THE PRACTICAL CONSEQUENCES AND CHALLENGES OF OIL SPILLS -
LESSONS LEARNED FROM DEEPWATER HORIZON INCIDENT

You are justified in wondering whether I have wandered into the wrong room to make a presentation on a view from the Gulf of Mexico as part of this Arctic Shipping Day panel. My co-panelists have ably set out the legal civil liability regimes applying to shipping and oil exploration activities in the Arctic region. Bert Ray, in particular, has summarized the U.S. liability regime and vividly illustrated for you the daunting challenges which could be expected to arise after any significant oil spill off the Alaskan coast. My presentation will hopefully provide a U.S. Gulf of Mexico historical perspective based on the major offshore oil spill incidents in that area.

First, let me indulge in a bit of pre-Oil Pollution Act history. On June 3, 1979, a blowout and fire involving the Ixtoc 1 well and the drilling unit SEDCO 135 occurred. The location was approximately 38 miles offshore Mexico in the Bay of Campeche. See if this sounds familiar – the blowout preventer failed and it took approximately 9 months to cap the affected well resulting in a total spillage estimated at 3.1 million barrels of oil. Spilled oil migrated across the Gulf of Mexico and ultimately fouled the shoreline of the Texas coast. The SEDCO 135's owner filed a limitation of liability petition in a Texas federal court under The Limitation of Liability Act.[i] All claimants, including the U.S. government, were required to lodge their claims against the rig owner in that court. The claims arising from the incident reportedly exceeded $100 million (how inconsequential that figure sounds in the present day context!).

Somewhat remarkably, it took the orders of magnitude smaller 1989 oil spill from the tanker EXXON VALDEZ in Alaska's Prince William Sound to create the political environment leading to the passage of the Oil Pollution Act of 1990 "OPA".[ii] Undoubtedly, the fact that the EXXON VALDEZ spill occurred in a near pristine area of Alaska profoundly affecting Alaskan wildlife played a part. Does this history present a cautionary tale when evaluating future offshore drilling efforts in the Arctic?

The most far reaching and comprehensive application of the post-OPA 90 civil liability regime has been in the context of another well-known Gulf of Mexico oil spill incident. More than six years ago, on April 20, 2010, a blowout of the Macondo well being drilled by the drill ship DEEPWATER HORIZON occurred. The resulting explosion and fire initially caused 11 deaths and 17 personal injuries. As with the Ixtoc 1 casualty, the blowout preventer failed to shut off the Macondo well, and the oil flow continued for 87 days. For many of those days, a national audience could watch a live 24 hour television camera feed of the oil flow. There has been a judicial determination that 3.19 million barrels of oil spilled from the Macondo well into the Gulf of Mexico following the blowout.

Unlike the situation in Alaska, availability of resources to combat the DEEPWATER HORIZON spill was not an issue. Between 48,000 and 55,000 individuals were involved in some part of the response. It has been reported that on the single most demanding day of the response, 6,000 vessels, 82 helicopters, and 47,849 individuals were working the spill. An estimated 9,000 vessels, including 2 drilling ships, numerous oil containment vessels, and flotillas of support vessels and skimmers, were ultimately involved.[iii]

Environmental conditions were not an issue either and the responders used every available technique. There was in situ burning, application of approximately 1.8 million gallons of dispersant both above and below the ocean surface, surface skimming, and the deployment of 10.4 million feet of sorbent boom and containment boom for shoreline protection.

The U.S. federal civil liability regime as described by Bert Ray has been applied to the myriad claims arising out of the Macondo blowout. The federal Fifth Circuit Court of Appeals with appellate jurisdiction over Texas, Louisiana, and Mississippi has held that state oil pollution laws are preempted when an oil spill originates outside state territorial waters, even though the spill affects state waters[iv]. That Fifth Circuit ruling is not binding on Alaska which is covered by the federal Ninth Circuit Court of Appeals.

Many, many lawsuits arising out of the Macondo blowout were filed in various United States federal and state courts. Most of those lawsuits were consolidated for handling in a multi-district consolidated case "MDL" before Judge Barbier in the federal U.S. District Court for the Eastern District of Louisiana in New Orleans.

Now, more than six years after the event, the MDL litigation is winding down. The legal twists and turns to this point are too complex and lengthy to discuss in detail today. As an indicative factor of the sheer volume of claims and issues involved, one can cite to the MDL electronic docket (a list of the parties, their lawyers, and individual filings related to the litigation) which as of this writing exceeds 1,850 pages and includes more than 16,500 individual entries.

On April 4, 2016, Judge Barbier signed and entered a Consent Decree (a form of agreed judgment) between the United States of America, the individual U.S. Gulf states of Alabama, Florida, Louisiana, Mississippi and Texas on the one side and BP Exploration and Production "BP" and its financial guarantors on the other. The Consent Decree implements a settlement first proposed in July of last year. The April 4, 2016 Consent Decree resolves the United States and the individual Gulf states's Macondo blowout related claims against BP for civil penalties, resource damages, response costs and other damages.

The financial obligations assumed by BP in the Consent Decree are staggering. First, a Clean Water Act[v] civil penalty of $5.5 billion is assessed against BP. This amount is to be paid in annual installments during the years 2017 through 2031, at $379,310,445 per year, except for 2018, when a mere $189,655,117 is owed. The Consent Decree provides that the amounts to be paid are not to be tax deductible.

Natural Resource Damage Assessment "NRDA" claims are resolved for $7.1 billion payable by BP to United States and the U.S. Gulf states. Again, a payment schedule is set out under which BP is required to pay $489,655,172 annually from 2017 through 2031 except in 2018 when a mere $244,827,586 is owed. Additional provisions are made for the payment of interest. Another $232 million payment to the United States will come due on the 16th anniversary of the effective date triggering the payment plan. Another $350 million (less a $10 million credit for a past payment) is payable between 2016 and 2031 for past federal and state NRDA related costs.

There is a provision for an additional $250 million payment to the United States representing a $167.4 million reimbursement to the Oil Spill Liability Trust Fund and $82.6 million to resolve United States claims under the False Claims Act[vi] and the Federal Oil and Gas Royalty Management Act[vii] (representing BP's share of lost royalty payments on the oil spilled between April and July of 2010). The payment schedule calls for $40 million to be paid this year and then $30 million a year from 2017 through 2023.

The Consent Decree includes stipulated additional penalties which would come into play for acts of noncompliance with the agreed requirements, including the payment requirements. BP's total tab (amounts paid and obligated to pay in the future) related to the Macondo blowout is presently estimated to exceed $55 billion, not including all the legal and other transactional costs of reaching this result. Transocean, Haliburton, Anadarko and MOEX have also paid or agreed to pay large, but not comparable, amounts of money to resolve their parts of the litigation.

In some senses, the U.S. civil legal liability regime has for the most part worked as intended in the aftermath of the Macondo blowout. Legal responsibility has been settled or assessed, claims have been examined and concluded, and court opinions have resolved disputed or novel legal issues. However, many, many other outstanding issues will still have to be resolved before the Macondo blowout book is finally closed.

Certain foreign claimants might disagree with my assessment. In September 2010, the Mexican States of Veracruz, Tamaulipas, and Quintana Roo initially filed lawsuits in the Western District of Texas federal court in El Paso seeking to recover damages sustained or expected to be sustained as a result of the Macondo oil spill. The cases were consolidated in the Louisiana MDL action before Judge Barbier. The Mexican States initially ran afoul of a restriction included in OPA. Recovery under that statute for losses not otherwise compensated is available when the recovery is authorized by treaty or executive agreement between the United States and the claimant's country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials have certified that the claimant's country provides a comparable remedy for United States claimants.[viii] The Mexican States were unable to show a countervailing right in favor of United States' claimants so their claims under OPA were dismissed. The Mexican States' remaining claims were later also dismissed because, under the U.S. court's interpretation of Mexican law, the Mexican federal government owns the allegedly damaged resources so that the individual Mexican States did not hold a sufficient "proprietary interest" in those resources to assert claims for damage. On appeal, the Fifth Circuit upheld Judge Barbier's lack of standing ruling.[ix] A subsequent lawsuit filed on behalf of the United Mexican States making similar claims appears to still be pending but its status or disposition is unclear.

One central feature of the Arctic discussion is the fact that several nations have coast lines bordering the Arctic waters and their interests have to be harmonized to the extent possible. In the Gulf of Mexico context, this means the United States, the United Mexican States, and the Republic of Cuba. Following the Ixtoc 1 spill, the United Mexican States and the United States entered into an "Agreement of Cooperation between the United States of America and the United Mexican States regarding pollution of the marine environment by discharges of hydrocarbons and other hazardous substances" that entered into force in 1981. That agreement called for the establishment of a framework for joint Mexican/U.S. responses to marine pollution events.

Twenty years later, the MEXUS plan was agreed. The MEXUS plan established the framework for bilateral cooperation with respect to pollution incidents that could affect both countries or a pollution incident affecting one country sufficient to support a request for assistance from the other country. Non-binding annexes, (MEXUSGULF and MEXUSPAC) have since been put in place. Multiple bilateral oil spill drills have been held under the MEXUS plan.

In 2012, the United States and Mexico signed the U.S. Mexico Transboundary Hydrocarbons Agreement. The Agreement entered into force in 2014. This Agreement covers two areas of international waters in the Gulf of Mexico straddling the maritime boundary between Mexico and the United States. These two areas are known as the "Western Gap" and "Eastern Gap". The purpose of the 2012 agreement was to preserve the opportunity for a coordinated approach to drilling in waters beyond the 200 mile EEZs of the U.S. and Mexico within the Western Gap and Eastern Gap areas. A number of offshore blocks within the U.S. side of the Western Gap have been leased. How would an oil spill affecting these areas be handled? A complicating factor is that Cuba has also asserted a claim to the waters in the "Eastern Gap".

Mexico, the U.S., and Cuba are also participants in the "Wider Caribbean Region Multilateral Technical Operating Procedures for Offshore Oil Pollution Response dated March 2014". This document establishes non-legally binding guidance on response procedures and provides details of each participating country's key organizational contacts. That agreement was entered into under the aegis of the Cartagena Convention[x] and the "Protocol Concerning Cooperation in combating oil spills in the wider Caribbean Region". Again, U.S., Cuba and Mexico are all parties to the Cartagena Convention and these protocols. There is not however, any binding bilateral agreement between the U.S. and Cuba regarding oil spill response or legal liability.

Although there does not appear to be an active drilling program in Cuba at this time, prior drilling efforts raised alarm in the United States, particularly in Florida, regarding the potential effects of an oil spill originating in Cuban waters. One of the issues of concern was that an oil spill emanating from Cuban waters would not be covered by OPA 90 remedies. It is worth remembering that BP, although a non-U.S. company, was subjected to OPA 90 liability for the Macondo blowout spill because its business operations were conducted within U.S. waters. Without the applicability of OPA 90 remedies, the Oil Spill Liability Trust Fund would have to address claims resulting from a spill emanating from Cuban waters. The amount available from the U.S. Oil Spill Liability Trust Fund would clearly be inadequate to address claims resulting from a major offshore oil spill.

A Florida senator last August introduced a bill in the United States Senate, the "Caribbean Oil Spill Intervention, Prevention and Preparedness Act".[xi] The primary purpose of this bill would be to authorize the U.S. Coast Guard to act in waters beyond the U.S. jurisdiction in case of a grave and imminent threat of crude oil pollution by sea from a ship or a drilling rig. Among other provisions, the proposed law would require the U.S. Coast Guard to refrain from unnecessary interference with any foreign state in whose waters an action must be taken. Sec. 204 of the bill would require U.S. Coast Guard to take steps to plan for oil spill response plans to deal with oil spills in the Gulf of Mexico or Florida straits originating outside U.S. territorial

jurisdiction. Presumably, this bill is still before the Senate Committee on Commerce, Science and Transportation and it is unclear whether it will be enacted.

More recently, on November 24, 2015, the United States and the Republic of Cuba issued a joint statement on cooperation on environmental protection.[xii] These parties listed the following as one of the actions they are committed to pursuing:

> 2.D- Prevention of oil spills and hazardous substances pollution through strengthened environmental regulation and control of offshore energy and oil and hazardous substance pollution, as well as through cooperation on oil spill preparedness and recovery and response capacity.

This statement of good intentions has not so far resulted in concrete action and it is unclear whether the recent improvements in U.S. relations with Cuba will survive after our elections this November. The absence of a bilateral agreement with Cuba regarding oil pollution spill response and civil liability is something which should be addressed and resolved.

How does the Gulf of Mexico experience inform what may come in Arctic waters offshore Alaska? We are always best prepared to fight the last war. No one knows how oil exploration and drilling in the Arctic will develop in the future. The harsh environment and relative scarcity of resources are likely to remain with us for the foreseeable future. It would behoove the nations with a stake in the Arctic to maintain close cooperation and coordination of all available asserts and resources to be as ready as possible to respond to a common peril. The U.S. civil liability regime has been tried and tested after DEEPWATER HORIZON and, for the most part, has worked. However, the time, effort, and expense required to sort out civil liability issues in the U.S. legal system under the OPA civil liability regime following a major oil spill have proven to be enormous. Unfortunately, a similar process is likely be repeated - should a major Arctic oil spill affecting Alaskan Arctic waters ever occur.

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[i] 46 U.S.C.A. § § 30501 – 30512.

[ii] 33 U.S.C.A. § 2701-62.

[iii] "On Scene Coordinator Report Deepwater Horizon Oil Spill September 2011".

[iv] *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014), cert. denied, 135 S.Ct. 401 (2014).

[v] Federal Water Pollution Control Act of 1972, 33 U.S.C.A. § § 1251-1387, as amended by the Water Quality Act of 1987, 33 U.S.C.A. § § 1281-1285, 1311-1387.

[vi] 31 U.S.C.A. § 3770(b)(1).

[vii] 30 U.S.C.A. § 1756.

[viii] 33 U.S.C. § 2707(a)(1).

[ix] 784 F.3d 1019 (5th Cir. 2015), cert. denied, 136 S.Ct. 536 (2015).

[x] Convention for the Development and Protection of the Marine Environment of the Wider Caribbean Region (Cartagena Convention 1983).

[xi] 2015 CONG US S 1999 (August 5, 2015).

[xii] "Joint Statement between the Republic of Cuba and the United States of America on Cooperation on Environmental Protection" http://www.state.gov/e/oes/rls/pr/249946.htm.