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EX POST REGULATION:

FIRM LIABILITY FOR ENVIRONMENTAL  
ACCIDENTS

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# ECONOMIC APPROACH TO REGULATION

- Liability concerns the legal field
- Economic approach: internalization of environmental damage due to third parties (ex post effect)
- A liability system is efficient if we have a perfect internalization of damage and moreover firms are incentivated to adopt the best technology with the best preventive measures (ex ante effects).

# EX POST REGULATION UNDER AN ECONOMIC POINT OF VIEW

- The instruments such as Command and Control and Market-Based ones are instruments of *ex ante* regulation
- Liability is analyzed as an instrument of *ex post regulation*.
- Through instruments of regulation *ex post* there are the possibility for the individuals in the market to sue a firm for her polluting behavior: on this point of view liability can be seen as an instrument of control after the event happens, but with *the* effects of deterrence.

# EX POST REGULATION RESULTS IN TERMS OF EFFICIENCY

- Liability can provide the internalization of externalities  
(damage compensation)
- Liability is against impunity because of the possibility for injured parties to sue an infringing firm  
(action possibility)
- Liability makes the firms behave in a diligent way  
(deterrence incentive)

# THE U.S. LIABILITY SYSTEM

- The experience of the US with environmental issues provides an excellent example in several respects.
- The issue of environmental liability in that country, in fact, fully emerged in the 1980's, when several environmental-pollution cases were recorded and, at the same time, an increased number of small enterprises entered risky sectors.
- In 1980 the Congress accordingly issued the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

- CERCLA and a whole range of amendments in the following years have the objective to cope with the decontamination of the sites subject to environmental risks by charging the reimbursement of the clean-up costs to the liable parties
- It was also created a public fund, the Superfund.
- All these parties are retroactively, objectively, and jointly liable, therefore each may be held responsible for the whole amount of the damage.

# THE BUILDING OF AN EUROPEAN ENVIRONMENTAL POLICY: Environmental Liability Directive (“ELD”)

- Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.
- The Directive establishes a framework for environmental liability based on the "polluter pays" principle, with a view to preventing and remedying environmental damage.
- The ELD was amended three times through Directive 2006/21/EC on the management of waste from extractive industries, through Directive 2009/31/EC on the geological storage of carbon dioxide and amending several directives, and through Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC.

- The ELD aims at ensuring that the financial consequences of certain types of harm caused to the environment will be borne by the economic operator who caused this harm. Insofar as the ELD provides for the financial responsibility of an operator, it lays down a framework, based on the “polluter-pays” principle,
- The ELD’s own specific approach is shown by the role given to competent authorities to be designated by Member States. These competent authorities will ensure the effective implementation and enforcement of the ELD.



# EX POST REGULATION SCHEME

- **FIRST:** INJURER – POLLUTER – FIRM
- **SECOND:** CAUSALITY
- **THIRD:** EVENT (probability and damage)
- **FOURTH:** DAMAGE EVALUATION
- **FIFTH:** DAMAGE EVALUATION EFFECTS AND TIMING
- **SIXTH:** VICTIMS (individuals, society)

## DEFINING POLLUTER AS A FIRM

Definition of OPERATOR by the US liability system is very comprehensive:

The liable parties were considered to include the owners and the operators of the affected sites, as well as the current owners and operators, the generators of dangerous polluting materials stored on those sites, and the carriers of such materials.

Definition of OPERATOR by the ELD is very detailed:

Operator means any natural or legal, private or public person who operates or controls the damaging occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying <sup>10</sup> such an activity.

# DEFINING AN environmental damage

There are three categories of environmental damage under the ELD:

(a) “damage to protected species and natural habitats”, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The habitats and species concerned are defined by reference to species and types of natural habitats identified in the relevant parts of the Birds Directive 79/409 and the Habitats Directive 92/43;

(b) “water damage”, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in the Water Framework Directive 2000/60, of the waters concerned;

(c) “land damage”, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.



# BP OIL SPILL

# THE ACTORS

## Deepwater Horizon



**Builder:**  
**Hyundai-**  
**2001**



**Owner:**  
**Transocean**



**Leasee:**  
**British Petroleum**



# LOCATION

- GULF OF MEXICO

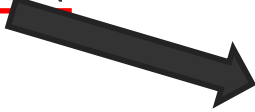



80Km from Louisiana

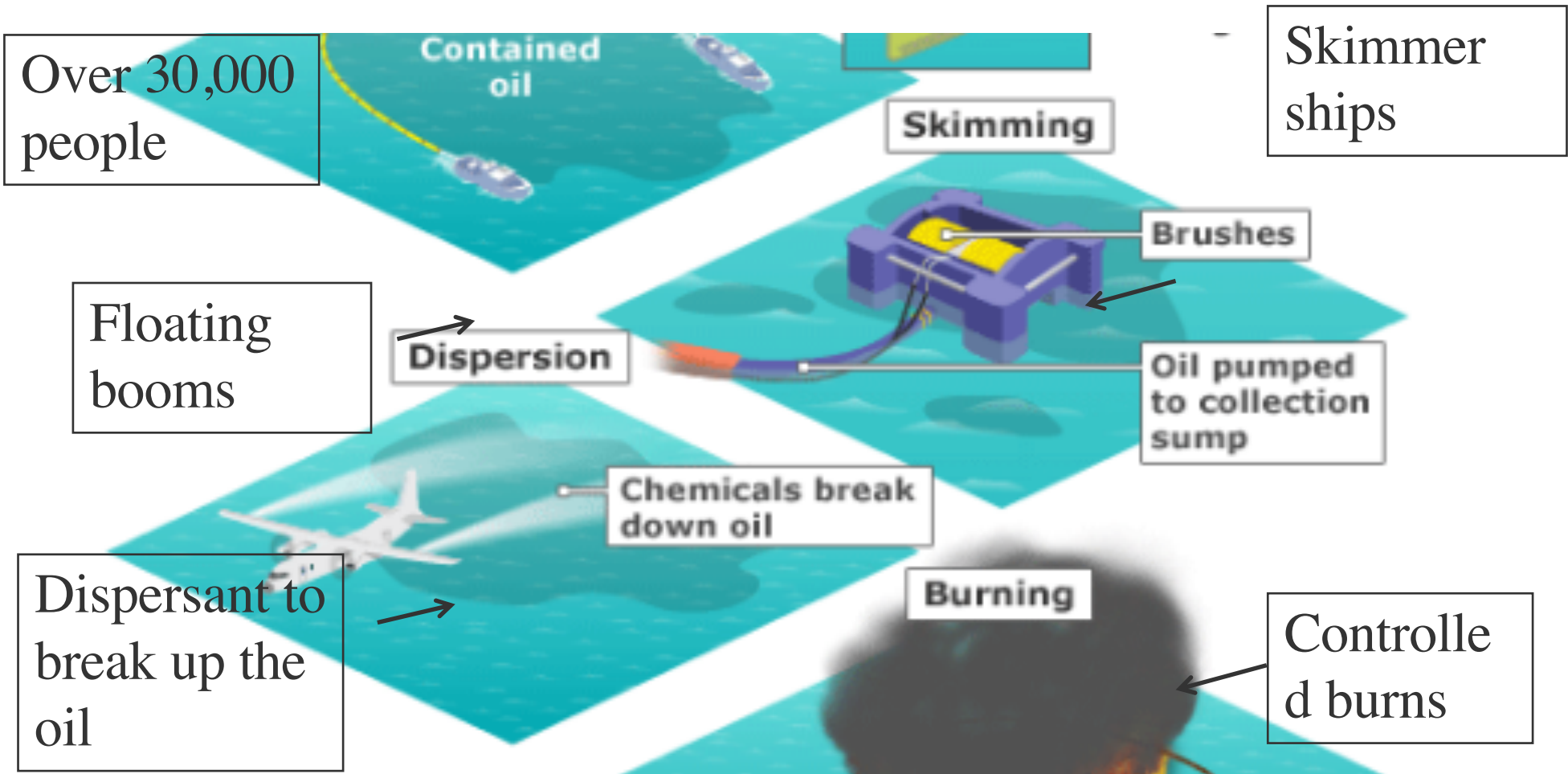
- One of the biggest drill:  
around 9000 barrels of oil  
per day



# THE FACTS

- 20 April, 2010 - EXPLOSION
  - 11 **Casualties**
  - 17 **injured**
- 22 April, 2010 - deposited on the seabed
  - OIL SPILL

# CLEAN-UP ATTEMPTS





# STEM ATTEMPTS

- ☛ Remote controlled machines
- ☛ Containment “Dome” (a capping device)
- ☛ “Top Kill” approach (pumping heavy fluids in the blowout preventer)
- ☛ 15 July – temporary cap
- ☛ 3<sup>rd</sup> August – “Static Kill” operation (mud and cement injected)
- ☛ 19 September, 2010 – well officially “dead”

# OIL SPILLED

- ☛ 106 days long leak
- ☛ More than 4.9 million barrels
- ☛ 11,300 miles – distance covered  
by milk jugs lined up side by  
side - farther than New York  
to Buenos Aires and back
  - 102: school gymnasiums  
filled floor-to-ceiling

# DAMAGE EVALUATION

How did  
the oil spill  
affect the Gulf?



**Ecology**

**Fisheries**

**Tourism**

**Health**

**Economy**

# AN UPDATE OF THE SITUATION

## **Administration:**

- fast to reorganize the criticized Minerals Management Service; two agencies established, BOEMRE and BSEE
- asked for more funds to help the authorities to carry out their job

## **Offshore drilling industry:**

- introduced tools to contain a high-pressure blowout in deep water
- Not yet the creation of an independent safety institute that will focus on safety

## **US Congress:**

- It has introduced just the RESTORE Act (80 percent of the fines used for environmental and economic restoration projects)
- should increase the financial responsibility and the liability cap requirements for offshore facilities; raise the Oil Spill Liability Trust Fund's limitation

# EX-ANTE IMPROVEMENTS

☞ In order to increase the effectiveness of **ex-ante** regulation in the oil industry, we propose the introduction of some new regulations:

- BUILDING PROCEDURES
- DRILLING OPERATIONS
- SAFETY REVISIONS

# EX-POST REGULATION

## ***EX POST REGULATION SCHEME***

***1.FIRM, INJURER, POLLUTER: BP***

***2.CAUSALITY: environmental pollution, oil spread in waters and on lands***

***3.EVENT: oil spill, an accident***

***4.DAMAGE EVALUATION***

***5.DAMAGE EVALUATION EFFECTS AND TIMING***

***6.VICTIMS: individuals, society, animals, environment***

# EX-POST REGULATION

The **Oil Pollution Act** of 1990 (OPA 90) should be considered.

3 different principles at the heart of the law :

1. **Strict liability:** parties responsible for oil spills are considered strictly liable for damages caused even if they have not acted in a negligent way  
→ BP
2. **Channels liability:** companies should exactly specify who is to be considered as the responsible party for the liability purposes → the holder of the drilling permit, meaning Bp, is the sole responsible party
3. **Liability limits:** there is the imposition of some caps on the liability of parties responsible for spills → damages are capped at \$ 75 million (luckily, BP is a *deep pocket firm*, it ignored the cap and beared the full costs of responding to the spill)

# EX-POST REGULATION

**CERCLA** charges the reimbursement of the clean-up costs to the liable parties.

**Who should pay for the damages?**

Three major firms involved: BP, Halliburton, and Transocean.

US report of September 2011: BP can be considered ultimately the responsible of the spill, but the other two companies have to share some of the blame.

**Class actions** after BP publicly took its responsibility:

- individuals and businesses that considered themselves victims of the oil spill
- typical plaintiff represented by the fisherman



# TRIAL



- **Start:** February 25
- **Where:** federal court in New Orleans
- **Parties involved:** a team of private plaintiffs' attorneys, the federal government, the British company BP, the rig owner Transocean Ltd., the cement contractor Halliburton, dozens of company executives, rig workers and expert witnesses.
- **US District Judge appointed:** Carl Barbier, expert of maritime law
- **Main focus:** did BP's actions constitute gross negligence or wilful misconduct?
- **First phase:** identify the causes that lead to the blowout of BP's Macondo well and allocate faults to the companies involved.
- **Second phase:** (scheduled to begin in September) quantify how much crude spilled into the Gulf, explore BP's tentative to stop the flow of oil.

# TRIAL

BP:

- **guilty of the death of 11 workers** and other criminal charges
- **paid \$ 4 billion in criminal penalties**
- reached an agreement for a **fine of \$ 1.3 billion**
- new claims: the damages to natural resources
- reached more than \$ 24 billion utilized for the spill-related expenses (compensation for both individuals and businesses and cleanup costs)

Costs may rise → **Clean Water Act**: a polluter has to pay an amount that goes from a minimum of \$1,100 per barrel of spilled oil to a maximum of \$ 4,300 if it is found grossly negligent [\$ 18 billion for BP]

# TRIAL

## Has BP acted in a grossly negligent way?

- Plaintiffs' attorneys: to complete the drilling project in the fastest way possible, BP gave up safety
- BP: strongly rejects the idea that it acted in a negligent way; Halliburton and Transocean liable
- Patrick O'Bryan, BP's vice president of completions and drilling: BP never decided to decrease the level of safety

**BP has sued Transocean** for damages, requesting a refund of \$ 20 billion.  
**U.S. government has sued Transocean** (on 3 January 2013, declared guilty of the violation of the Clean Water Act; it paid \$ 1.4 billion in criminal and civil fines and penalties) **and the Halliburton Group** (it reported that the contract relieved them of any responsibility).

# DEFINING THE VICTIMS: CLASS ACTIONS

- Class Action is a lawsuit that allows a large number of people with a common interest in a matter, to sue or be sued as a group.
- The first effect of class action is to permit the adjudication of meritorious claims that would otherwise not be litigated due to imperfections in the legal systems

# CLASS ACTION AND THE TODAY NORMATIVE FRAMEWORK

- A class action is a form of lawsuit in which a large group of people collectively bring a claim to court and/or in which a class of defendants is being sued.
- In the US system class action exists and, though sometime criticized, it is still defined a versatile and useful legal device permitting the enforcement of ex-post regulation.
- In EU the Directive 98/27/EC seems to push towards the adoption of class actions in national law, but until now it did not happen.
- Since January 2010, introduction in Italy, particularly for consumers' protection.

# HOW TO FILE A CLASS ACTION in US

- 1) Define complaint
- 2) Define the proposed class
- 3) Get a legal review
- 4) Name representatives
- 5) Define settlement type
- 6) File your suit

# THE IMPORTANCE OF CLASS ACTION

<b>In USA</b>	<b>In Italy</b>
<p>The class action tool represents one of the most important legal device. (More than 200 class actions every year)</p>	<p>Unlike in the United States in which class action is spread out and widely used, the trend in Italy is more slowly. (not even one in the last years)</p>

# MAIN CLASS ACTION ECONOMIC FEATURES

Class action is a legal device able to bind individuals with related claims represented by the class counsel after a certification procedure by judges.

- It favors the emergence of efficiency in judicial market, ‘judicial economy’, by means of economies of scale both on plaintiff and courts.
- It solves the failure in judicial market (suboptimal demand of lawsuits) by increasing the affordability of legal protection and enforcement for the possibility of indirect representation.
- A judicial system with class action permits less impunity because of the incentive for injured parties to sue an infringing firm.



<b>Advantages of a Class Action</b>	<b>Disadvantages of a Class Action</b>
<ul style="list-style-type: none"><li>• Lower cost of the process of litigation</li><li>• Participants have a stronger position</li><li>• Chance for all victims to ask for damages</li><li>• More uniformity in payouts</li><li>• Judicial efficiency</li></ul>	<ul style="list-style-type: none"><li>• Lack of control</li><li>• Class actions require usually long time</li><li>• Class actions consider only limited forms of compensation</li><li>• No possibility is given to make further private claim</li></ul>

# ERIN BRONKOVICH: JULIA ROBERTS' MOVIE

Erin Brockovich-Ellis is an unemployed single mother, desperate to find a job, but is having no luck. With no alternative, she successfully browbeats her. While no one takes her seriously, with her trashy clothes and earthy manners, that soon changes when she begins to investigate a suspicious real estate case involving the Pacific Gas & Electric Company. What she discovers is that the company is trying quietly to buy land that was contaminated by hexavalent chromium, a deadly toxic waste that the company is improperly and illegally dumping and, in turn, poisoning the residents in the area. As she digs deeper, Erin finds herself leading point in a series of events that would involve her law firm in one of the biggest class action lawsuits in American history against a multi-billion dollar corporation