The Legal Environment of the British Oil Industry

William H. Millard
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I. INTRODUCTION

The recovery of resources from the North Sea Continental Shelf has given seven nations which traditionally have been oil and gas consumers the opportunity to become producers of energy sources. In the period following the unexpected discoveries during the late 1950's, the governments of these nations have been compelled to rapidly develop legal systems providing for immediate exploration and production in the region. Control over the shelf has been divided among the nations by asserted boundary lines and, internally, each nation has established its right to control the exploitation of resources by enacting national acts of ownership. Once armed with a right of control, the nations created legal relationships between their governments and the oil companies they hoped to attract to the area. Methods of allocating portions of the shelf to the oil companies for production purposes were devised, as were tax regimes to assure that some of the companies' success is shared with the nation. Over the years, the legal systems have matured, and as the North Sea oil industry has changed, the systems have been altered to accommodate the industry.

This Article explores the development of the legal system provided for North Sea oil and gas in the United Kingdom, focusing particularly on the laws and regulations that affect American oil companies operating in the British sector. Throughout the Article, attention is given to the policy issues that caused the British government to make certain decisions. Additionally, this Article demonstrates that political and

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economic policies are especially important in determining the United Kingdom’s method of licensing oil companies for production rights and in the decision to form the state-owned British National Oil Corporation (BNOC) to directly compete with the private oil industry. The last section of the Article considers the effect of changes in laws and legal relationships on the British oil industry, with analysis centering on the government’s decision requiring oil companies to renegotiate existing licenses to provide for increased state participation through BNOC. An understanding of the variables that cause the British to adopt certain policy, and consequently to enact certain law, will aid in predicting changes in the law and thus render the legal environment more secure.

II. SIGNIFICANCE OF NORTH SEA OIL AND GAS PRODUCTION

The discovery of hydrocarbons in the continental shelf below the North Sea has had a tremendous impact on many sectors of the world. For some of the seven European countries in the North Sea region, production has meant an unanticipated boost for their economies. For oil companies from around the world, the North Sea offers a much-needed new supply in a region that is politically stable. Finally, for neighboring European nations, the North Sea production presents at least the opportunity to have an energy source other than the OPEC countries.

Since 1964, when Britain took initial steps toward developing a legal environment for offshore exploration and development,1 industry growth has been impressive. With an early goal of rapid exploration, the British have effectively used a licensing scheme to attract oil companies from around the world to operate in their portion of the continental shelf.2 In only sixteen years, offshore production of oil in the United Kingdom had grown from nothing to a 1980 figure of 1.7 million barrels per day—an amount which exceeds British consumption.3 Proven reserves in the U.K. continental shelf are set at twelve billion barrels, while probable and possible reserves have been estimated to

2. Address by J.D.A. Evans, a Managing Director of British National Oil Corporation (BNOC), before the Society of Petroleum Engineers of A.I.M.E., 1981 S.P.E. Hydrocarbon Economics and Evaluation Symposium, S.P.E. No. 9543 (Feb. 26, 1981) [hereinafter referred to as Evans]. Presently, there are over 200 licensees holding rights to more than 200,000 square kilometers. Id.
3. Id.
equal roughly that amount. Twenty-six fields have been declared commercial and sixteen now are in production.

Britain's sagging economy also has heightened the importance of North Sea oil. In 1974, the cost of oil imports accounted for over a quarter of a record deficit in the nation's balance of payments. By 1980, however, British oil production was credited with saving about 6 billion pounds or 14 billion dollars, and creating a surplus account of 2.3 billion pounds or 5.3 billion dollars. Additionally, oil production comprised about seven and one-half percent of the total industrial investment in Britain from 1975 to 1979, and by 1981 accounted for about four percent of the nation's gross national product. Currently, for the first time, Britain has actually become a net exporter of petroleum. The oil industry also has provided a valuable new source of jobs in both the production area and in the industries servicing the oil companies.

The British were well aware that a policy of rapid exploration would require a large amount of participation by foreign oil firms. The two largest British companies, British Petroleum and the Royal Dutch-Shell group, quickly became active participants, but they alone were not able to develop the shelf. In 1981, about sixty percent of the North Sea activity was controlled by foreign oil companies, with Americans accounting for fifty percent of the total. Considering the advanced state of the American oil industry, the fact that British interests are responsible for more than forty percent of the activity is an impressive aspect of the government's licensing system. Initially, nearly all

5. Evans, *supra* note 2. The production figures are even more impressive upon noting that the first oil field was discovered in 1969 at the Montrose Field and that production was delayed until 1975. Production was first obtained at the Argyll Field. *Id.*
6. *Id.*
7. *Id.* The British export about one-half of the oil they produce. *Id.*
10. G. ARNOLD, *BRITAIN'S OIL* 42 (1978). The Shell group is comprised of 60% Dutch interests and 40% British interests. In 1973, 35% of the discoveries were in areas held by British Petroleum and Shell. *Id.*
12. See G. ARNOLD, *supra* note 10, at 47. Angus Beckett, civil servant in charge of oil policy from 1964-1972, defends the size of British participation in the North Sea, citing the country's lesser participation in other oil provinces. *Id.*
Participation in the British sector has been dominated by the seven major international oil companies, and more recently by the state-owned BNOC. Active foreign independents included the United Kingdom subsidiaries held by Phillips, Conoco, Amerada, and Texas Eastern. Small British independents have had a harder time establishing their presence as only about 500,000 acres out of a total 17 million licensed are held by such British firms. While nearly 10,000 independents operate in the United States, there were only about 30 operating in England in 1980. For independents, the only viable opportunity for participation is through the formation of an operating consortium. Although some potential members complain that they can never become the operator of the consortium, the arrangement provides an opportunity to share in the success of development and gives voting power in the operating committee proportionate to each member's share. Increasing the share of small British independents was one of the goals of the Conservative Government in the seventh licensing round in 1980-81, and the inclusion of small British independents in operating consortia should become more common if the majors plan to

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13. *Id.* at 39. British industry was able to contribute only about five percent of the work connected with opening the southern gas fields. *Id.* The Netherlands' share was the result of its controlling interest in Shell.

14. The major international oil companies generally are considered to include Exxon (including its British subsidiary, Esso), Shell, British Petroleum, Mobil, Standard Oil of Indiana (Amoco), Standard Oil of California, Gulf, Texaco, and Atlantic-Richfield (ARCO).

15. Ellis, *Oilmen in bowler hats*, FORBES, July 21, 1980, at 54-55. British independents control only about three percent of proven reserves and one percent of proven gas. *Id.* Certainly, the primary cause of the low levels of activity by British independents is the scarce number of such companies. Ellis attributes the poor achievement of the British independents in part to the former Labour Government's policies which promoted BNOC at the expense of the independents. *Id.*

16. *Id.* The number of British independents has been increasing, however, as shown by the results of the seventh round of licensing. Among the 119 companies receiving licenses were 72 British companies, many of which were independents. The Times (London), Mar. 13, 1981, at 21, col. 4.


18. See G. ARNOLD, supra note 10, at 91. Cluff Oil, one of the more active British independents, claims that it was excluded from the fifth round of licensing due to its insistence on being an operator. *Id.*

The consortium arrangement also is used by the major firms. Shell and Esso are joint licensees for four producing fields, including Brent, the largest development in the U.K. sector. *Id.* at 85.

receive new licenses.\textsuperscript{20}

As the magnitude of the success of British offshore development becomes more apparent, and its implications for improving the economy better understood, companies should continue to expect active regulation by the government, subject to changes that are perceived as best for the nation. An appreciation of the British regulatory system and an awareness of how and why it changes is extremely important.

\section*{III. North Sea Geography}

The North Sea encompasses 222,000 square miles (about 56,320 square kilometers) between the British Isles and the northwestern portion of the European continent. Its often violent seas are bordered by seven coastal states: the United Kingdom on the west, Norway in the northeast, and Denmark, West Germany, the Netherlands, Belgium, and France, on the east.\textsuperscript{21} Of the seven countries, Great Britain enjoys the largest coastal area along the sea. Commercially, the North Sea region also is considered to include recent exploratory efforts west of Great Britain, in the Celtic and Irish Seas, and the Western Approaches Basin between northwest France and southern England.

There are two large sedimentary basins found in the North Sea.\textsuperscript{22} In the southern portion, large natural gas fields have been found in the region between the Netherlands and mid-Great Britain. In the northern basin, located in the area between Norway, Scotland, and the Shetland Islands, some of the most significant oil field discoveries in recent years now are under development.

The entire seabed of the North Sea is the continental shelf of Europe. Generally, North Sea waters are shallow, with maximum depths rarely exceeding 650 feet (200 meters). However, a pronounced exception is found off the southern coast of Norway where a trench, known as the Norwegian Trough, reaches more than 1,000 feet deep. This formation separates the Norwegian coast from some of the successful oil fields within its jurisdiction.

\begin{itemize}
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Young, \textit{Offshore Claims and Problems in the North Sea}, 59 AM. J. INT'L L. 505, 505 (1965).
  \item \textsuperscript{22} D. Keto, \textit{Law and Offshore Oil Development: The North Sea Experience} 17 (1978).
\end{itemize}
IV. Establishing Jurisdiction over the North Sea Continental Shelf

There are two claims to jurisdiction and ownership of North Sea minerals relevant to companies seeking to explore and develop the region. The first is the claim establishing for each of the seven coastal states exclusive jurisdiction over a portion of the North Sea Continental Shelf. The second is the state’s right of ownership of those minerals found within the seabed of each jurisdiction. International law and treaties firmly established the former, while national acts of sovereignty are the basis of the latter.

A. Jurisdictional Division of the North Sea

No minerals in the North Sea Continental Shelf may be exploited without express consent by one of the seven coastal states. In the early 1960’s, when initial tests for hydrocarbons were giving positive results, the oil companies and politicians began encouraging the governments to formally assert control over portions of the continental shelf so that exploration could legally get underway.23

Seeking international legal justification for dividing the continental shelf into separate exclusive jurisdictions, the seven nations relied largely on principles set forth in the Geneva Convention on the Continental Shelf of 1958 (Convention).24 Although only Britain and Denmark officially ratified the Convention before formally laying claim to the seabed hydrocarbons,25 the Convention’s principles formed the basis of the various reciprocal agreements that established each country’s jurisdictional share.26 Rights set forth in the Geneva Convention and

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26. See Young, supra note 21, at 516.

The situation in the North Sea is thus largely governed at present by principles of general international law and such agreements as there may be among the littoral states. It does not seem, however, that major difficulties should arise because of the lack of direct acceptance of the Geneva texts. The North Sea states appear prepared in general to apply, on a basis of reciprocity, principles essentially the same as those framed at Geneva.

Id.
five separate agreements with North Sea states enabled the United Kingdom to claim approximately forty-six percent of the seabed.\(^{27}\) Norway, with twenty-five percent, took the second largest share, even though its population is nearly fifteen times less than Britain's.\(^{28}\)

The United Kingdom found the terms of the Geneva Convention very attractive. Britain easily qualified under either of the criteria set forth in article 1 for asserting exclusive jurisdiction over a country's continental shelf.\(^{29}\) Article 1 requires that a nation laying claim to a seabed either show that the waters do not exceed a depth of 200 meters or "beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources."\(^{30}\) Obviously, however, in an enclosed area such as the North Sea, no one nation could claim exclusive jurisdiction over a continental shelf that other nations also could claim. Here, the principle of "equidistance," set forth in article 6, became relevant. Article 6 provides that where conflicting jurisdictional claims are possible, the final boundaries are to be determined by agreement between the parties or, in absence of agreement, according to the point of equidistance from the coasts of the two states.\(^{31}\)

Although the United Kingdom was not adversely affected by the principle of equidistance, commentators have criticized the British government's willingness to allow Norway to apply the principle without assenting to the other terms of the Geneva Convention.\(^{32}\) Rather than ratifying the Convention and possibly having the area beyond the Norwegian Trough—but within the point of equidistance from the British coast—declared British continental shelf, Norway chose to establish its jurisdiction by separate agreements. On May 31, 1963, by royal decree, Norway declared that it had sovereign jurisdiction over the seabed and

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\(^{27}\) D. MacKay & G. MacKay, The Political Economy of North Sea Oil 21 (1975) (Table 2.1).

\(^{28}\) Id. Britain's population is approximately 56 million. Norway's population totals about four million. Id.

\(^{29}\) See Continental Shelf Convention, supra note 24, art. 1.

\(^{30}\) Id.

\(^{31}\) Id. art. 6; see Brenscheidt, supra note 25, at 283. The equidistance principle proved a source of legal conflict for states sharing one coastline. When West Germany was faced with settling for a share smaller than it thought fair, it successfully received a ruling against Denmark and the Netherlands from the International Court of Justice at The Hague. North Sea Continental Shelf Cases (Fed. Rep. of Germany v. Denmark; Fed. Rep. of Germany v. Netherlands), 1969 I.C.J. 3. The court held that since West Germany had not ratified the Convention on the Continental Shelf, it was not legally bound by the equidistance formula of art. 6. Id. at 46-47. Subsequently, in 1971, the three countries entered agreements establishing continental shelf jurisdiction. D. Keto, supra note 22, at 74.

\(^{32}\) See, e.g., A. Sampson, Seven Sisters: The Great Oil Companies and the World They Made 177-84 (1975).
subsoil "to such extent as the depth of the sea permits the utilization of natural deposits, irrespective of any other territorial limits at sea, but not beyond the median line in relation to other states." In effect, Norway was asserting that it would not permit the criteria of article 1 to deny it any claim to the rich seabed lying beyond the Norwegian Trough but within the point of equidistance from the British coast. The United Kingdom assented to this boundary, the median line, by entering into a 1965 treaty with Norway. The British government's decision has been criticized as being one of its many "give-aways" of North Sea rights. Mason believes Britain's assent was due primarily to the fact that, at the time, the extent and value of the hydrocarbons in the continental shelf were unknown. A dispute apparently would have been far more likely if negotiations had concerned the allocation of known resources. In addition, the British would have had little chance for success had the suit gone before the International Court of Justice where precedent indicated that nonsigners, such as Norway, would not be bound by the Geneva Convention. Britain's position would have been enhanced by international acceptance of the continental shelf doctrine and, at the time, Norway could not have shown that the Norwegian Trough was technologically exploitable, thus terminating its continental shelf where the Trough began. However, the Norwegians had carefully refrained from laying claim to the continental shelf, choosing instead the "seabed." Finally, it is highly unlikely that oil companies would have been willing to operate in the disputed area and Britain naturally was anxious to promote development of the area.

Thus, Britain's share of the continental shelf was determined by the points of equidistance from an adjacent nation's coast. The map above shows the median lines that divide the continental shelf into seven jurisdictions.


35. See A. Sampson, supra note 32, at 182.


37. Id at 19. It has been observed that the negotiations between the nations related to the assignment of jurisdiction, rather than the allocation of resources, a fact which allowed an agreement to be reached relatively rapidly. Id.

38. Id at 33.
B. The Continental Shelf Act of 1964

The United Kingdom's Continental Shelf Act of 1964 implements the rights made available by the Convention on the Continental Shelf to control designated portions of the North Sea. The Act specifies that "[a]ny rights exercisable by the United Kingdom outside territorial waters with respect to the sea bed and subsoil and their natural resources, . . . are hereby vested in Her Majesty." The Act does not purport to vest in the British government actual ownership of the sea-bed resources. The British only claim the right to control, through exclusive jurisdiction, the exploration and extraction of those resources. This is a basic principle of the Geneva Convention. The Act continues to respect the free character of the high seas, concerning itself solely with jurisdiction over the shelf seabed.

For private companies doing business in the United Kingdom continental shelf, it is significant that the Act has not attempted to nationalize the resources. Any company given permission to explore and develop in the U.K. continental shelf will be recognized as having full, legal ownership of the resources it extracts, despite the confusion that the concept of nationalization causes some British politicians. However, legal ownership of extracted resources may be subject to numerous governmental controls on the use of the extracted resources.

The government's power to decide who shall have permission to explore and develop in the U.K. continental shelf applies also to the government itself which, as developer of a certain region, can consequently enjoy full ownership of any resources it extracts. Although in

40. Id. § 1(1).
41. Dam, Oil and Gas Licensing and the North Sea, 8 J.L. & ECON. 51, 53 (1965). The Continental Shelf Convention gives coastal states sovereign rights over their portions of the shelf to explore and exploit the resources. These rights are "exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State." Continental Shelf Convention, supra note 24, art. 2(1)-(2).
42. Article 3 of the Continental Shelf Convention provides: "The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters." Continental Shelf Convention, supra note 24, art. 3. See generally Woodliffe, North Sea Oil and Gas—The European Community Connection, 12 COMMON MkT. L. Rev. 7, 12-24 (1976) (discussing Continental Shelf Act in conjunction with Britain's relationship with other North Sea countries).
43. An example of this confusion is found in the Labour Government's "White Paper," UNITED KINGDOM OFFSHORE OIL AND GAS POLICY, CMD. 5696 (1974), reprinted in 14 INT'L LEGAL MATERIALS 460-63 (1975), where the statement is made: "Britain's oil is of course already publicly owned." Id. at 460.
44. See infra notes 200-08 and accompanying text.
1964 only private oil companies had the capacity to begin immediate exploration, in 1975 the Labour Government created the BNOC, with an express purpose of exploring for and recovering petroleum on behalf of the nation. In 1980, BNOC was the principal operating partner in a consortium exploring in the Rockwall Trough off west Scotland. In the future, the British can be expected to continue to take advantage of this direct national ownership of a share of the petroleum recovered by an operating consortium, as long as it remains possible to finance the BNOC's participation. It is significant, however, that the government's basic rights to ownership are no different than any private company's.

Three previous actions seemingly provide legal precedent for the control Britain established over the continental shelf through its 1964 Act. The first and most explicit precedent is the resolution of the Geneva Convention on the Continental Shelf of 1958. The second action, the Truman Proclamation on the Continental Shelf, was actually precedent for both the Geneva Convention and the British Act. President Truman's proclamation gave the United States "jurisdiction and control" over all natural resources and subsoil of the continental shelf appurtenant to the United States. The Truman Proclamation was the first such action, by any nation, declaring its control over the continental shelf region lying outside its traditional territorial waters. Like the 1964 British Act, the Truman Proclamation resulted from active encouragement by oil companies to establish some legal basis for developing offshore petroleum resources. The Truman Proclamation cited no specific legal precedent, stating only that the action was reasonable for developing offshore resources. National jurisdiction over the appurtenant continental shelf was necessary, the proclamation declared, "in the interest of [resource] conservation and prudent utilization."

The Truman Proclamation soon became legal precedent as other na-
tions quickly made similar pronouncements.\textsuperscript{52}

The third legal precedent, the Petroleum (Production) Act of 1934,\textsuperscript{53} is the British law vesting in the Crown all property rights in subsurface minerals on land or in territorial waters.\textsuperscript{54} Private companies, when licensed, could explore for and develop petroleum under the terms of the Act.\textsuperscript{55} Commentators Daintith and Gault claim that uncertainty under prior British law regarding who held the property rights to subsurface minerals necessitated the passing of the Act.\textsuperscript{56} Establishing a governmental licensing regime was viewed as a way to "organise and control exploration and production so as to avoid the disorder and waste of the competitive drilling by which the U.S. oil scene had been disfigured in the early part of this century."\textsuperscript{57} In addition to the acceptance of the principle of national rights of control from the 1934 Act by the 1964 Act, some of the specific licensing provisions were also adopted.\textsuperscript{58}

\section*{C. Jurisdictional Issues: Choice of Law}

Section 3 of the Continental Shelf Act establishes that the civil law of the United Kingdom applies to acts or omissions that take place on or within 500 meters of an "installation in a designated area."\textsuperscript{59} The "designated area" is Britain's continental shelf region, outside of territorial waters, that was officially specified in the Continental Shelf (Designation of Areas) Order 1964(a).\textsuperscript{60} Anyone doing business in the British sector should be aware of which regional law applies within the United Kingdom. Through a Continental Shelf (Jurisdiction) Order, the British sector is divided, along fifty-five degrees fifty minutes north latitude, into Scottish and English sections.\textsuperscript{61} The respective laws of

\begin{itemize}
\item \textsuperscript{52} D. KETO, \textit{supra} note 22, at 65. Mexico made a similar proclamation within a month. \textit{Id.}
\item \textsuperscript{53} Petroleum (Production) Act, 1934, 24 & 25 Geo. 5, ch. 36. The Act states, "The property in petroleum existing in its natural condition . . . in Great Britain is hereby vested in His Majesty." \textit{Id.} § 1(1).
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.} § 2(1).
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{See} Continental Shelf Act, 1964, ch. 29, § 1(3), specifically adopting Petroleum (Production) Act, 1934, 24 & 25 Geo. 5, ch. 36, §§ 2-3, 5-6.
\item \textsuperscript{59} Continental Shelf Act, 1964, ch. 29, § 3(1); \textit{see also} Morris, \textit{The North Sea Continental Shelf: Oil and Gas Legal Problems}, 2 INT'L LAW. 191, 204 (1967) (applying to criminal law as well). \textit{But see id. at} 205 n.72.
\item \textsuperscript{60} Continental Shelf (Designation of Areas) Order, 1964(a), No. 697.
\item \textsuperscript{61} Continental Shelf (Jurisdiction) Order, 1964, No. 930.
\end{itemize}
Scotland and England apply in the two sections. The area designated as "Scottish" waters covers 62,500 square miles, nearly twice the size of the 32,800 miles assigned as "English" waters.

D. Framework for Resolving International Boundary Disputes

The rule of capture, a general principle of oil and gas law, states that where mineral deposits lie in a pool covering more than one tract of land, either party is permitted to exploit as much of the resources as possible. There are indications that the rule of capture applies to drilling in the British shelf. However, where a mineral deposit stretches into two separate continental shelf jurisdictions, the rule of capture alone will be an insufficient basis for resolving conflicts. Such a situation becomes a border dispute, requiring reconciliation via international agreement.

Pursuant to the Geneva Convention principle that a country owns the right to exploit the natural resources of its continental shelf, governments have acted quickly to license the shelf regions bordering median lines. In the United Kingdom, most of the blocks in the northern region along the boundary with Norway were licensed in the second, third, and fourth rounds. Norway followed a similar practice, leading Daintith and Gault to conclude that "[t]here was, clearly, some concern that should a licensee on either side of the boundary line discover a joint field, the other country should have a licensee in a position to play some part in exploitation." When the massive Brent field

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62. Id. § 3(1).
64. See Morris, supra note 59, at 206. "One who has the right to drill for and produce oil and gas from a particular tract of land may so produce such hydrocarbons even though the oil or gas so produced is drained from beneath the land of another." Id. The rule was recognized in every state in the United States and by the Supreme Court in Brown v. Spilman, 155 U.S. 665, 670 (1895).
66. Morris says in the event of drainage, then the rule of capture controls. Morris, supra note 59, at 210. However, this contradicts the notion of the Geneva Convention that each state has control over its resources. See Continental Shelf Convention, supra note 24, art. 2, § 2.
67. Continental Shelf Convention, supra note 24, art. 2.
68. See, e.g., Daintith & Gault, Oil and Gas: National Regimes, in THE EFFECTIVE MANAGEMENT OF RESOURCES 53, 63 (C. Mason ed. 1979) (noting that blocks along the Norwegian-British border tended to be allocated first and blocks along the coast allocated later).
69. Id.
70. Id.
was discovered by Shell and Esso on the United Kingdom side of the median, Norway immediately announced that a Statoil/Mobil group had been licensed to handle production in the Norwegian sector of the field.\footnote{Onorato, Apportionment of an International Common Petroleum Deposit, 26 INT'L & Comp. L.Q. 324, 324-25 (1977).} Resolving this potential conflict over who is to obtain the resources is important to both the nations involved and, of course, to the companies holding licenses on each side of the boundary. The best method of resolution would be through an agreement between the two sides.

Onorato identifies two ways to resolve the potential conflict between nations finding one pool of reserves straddling an international boundary.\footnote{Id. at 325.} The first, which has generally been rejected from consideration, is the "unity of deposit" concept.\footnote{See Continetal Shelf Convention, supra note 24, art. 6.} According to this theory, it is most important to maximize production by leaving the entire deposit under the authority of the nation that discovered it. Rather than permitting the median line to bisect the field and divide its ownership, it is argued that, the "special circumstance" clause of article 6 of the Geneva Convention\footnote{Id. at 325.} would permit an agreement between nations to redraw the boundary lines.\footnote{Id. at 325.} Others, however, reject this interpretation of article 6, arguing that the Geneva Convention is silent on this issue.\footnote{See Birnie & Mason, supra note 23, at 41.} In the North Sea case involving West Germany, Denmark, and the Netherlands, Judge Ammoun held that "if the preservation of the unity of deposit is a matter of concern to the Parties, they must provide for this by voluntary agreement."\footnote{North Sea Continental Shelf Cases, 1969 I.C.J. 3.} One can imagine the difficulty that Norway and Britain would have in deciding who was to receive the successful oil fields along their northern boundary, especially when the magnitude of the discoveries became fully understood. Onorato also agrees that "[t]ime and practice . . . has now proved conclusively that [unity of deposit] is not an approach that has been accepted or will be

\footnote{Onorato, supra note 72, at 325.}
followed.  

The second method suggested to resolve the possible conflict is also by agreement. It calls for recognizing that the field straddling an international boundary is the "joint property" of both countries. International agreements generally have followed this approach.

The British have entered into a series of bilateral treaties on the issue, establishing their rights with Norway, the Netherlands, Denmark, and West Germany. In most cases, the treaties are little more than an agreement to agree—whenever the problem should arise—on some way of dividing the field such that competition is reduced, and exploration and exploitation are maximized. In the agreement between the United Kingdom and the Netherlands, the language of article 1 shows this goal of maximizing the recovery from the field.

If any single geological mineral, oil or natural gas structure or field extends across the dividing line and the part of such structure or field which is situated wholly on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties will seek to reach agreement as to the manner in which the structure or field shall most effectively be exploited and the manner in which the costs and proceeds relating thereto shall be apportioned, after having invited the licensees concerned, if any, to submit agreed proposals to this effect.

A significant aspect of this language is that, while an agreement is formalized between two governments, the terms of the agreement would most likely be those worked out between the real parties in interest—the companies holding the licenses.

78. Onorato, supra note 72, at 325.
79. Id
80. Id
82. Birnie & Mason, supra note 23, at 42.
The British agreements with Norway and Denmark are delimitation agreements and each contains an article addressing this problem. The agreements differ somewhat in that the Danes only wanted to agree on a manner of exploiting, leaving the other terms to subsequent, detailed agreement, while the British and Norwegians provided for a format for reaching agreement, including consultation with licensees. Neither agreement discusses arbitration. Birnie and Mason note, however, that its absence does not mean that arbitration is rejected.

As an outgrowth of these treaties, there are two agreements, between the British and the Norwegians, which carry out the principles of their treaty: the Norwegian-British Pipeline Agreement of 1973 and the Frigg Gas Field Agreement of 1976. The Frigg Field Agreement is a likely model for use in other similar situations. Its guiding principle was that the gas field, despite lying in both Norway and British sectors, was to be exploited as one unit. The apportionment of the gas reserves was settled on a pro rata basis according to the amount of the field on each side of the boundary, as determined by surveys. The terms of the agreement also provide for periodic reviews of the determinations.

An interesting aspect of the delimitation agreements is the effect they have internally on the signees. In Britain, the agreement "cannot, in and of itself, bind private parties such as the licensees." The British, however, found a way to make the terms binding by providing in their petroleum production regulations that the government shall be able to instruct licensees when fields cross an international median line. The Norwegians did not need the indirect approach; the Norwegian Royal Decrees of 1965 and 1972 provide that the Ministry of Industry may issue such rules as may be required “in regard to the

84. Onorato, supra note 72, at 325 n.6 (British treaties with Norway and Denmark).
85. See Birnie & Mason, supra note 23, at 43.
86. Id.
88. Agreement between the United Kingdom and Norway relating to the Exploitation of the Frigg Field Reservoir and the transmission of gas therefrom to the United Kingdom [hereinafter cited as Frigg Field Agreement]; see Onorato, supra note 72, at 326 n.9.
90. See Frigg Field Agreement, supra note 88, art. 1.
91. See Birnie & Mason, supra note 23, at 45.
92. Id.
93. Daintith & Gault, supra note 56, at 64.
94. Id. Daintith and Gault state that this was accomplished in the Petroleum (Production) Regulations of 1966 and 1976. Id.
manner in which . . . exploitation of petroleum shall . . . be carried out.””

V. ALLOCATION OF BRITISH OFFSHORE RESOURCES

A. Method of Allocation—Licensing of Operators

In addition to establishing the British government's jurisdiction over seabed resources, the Continental Shelf Act of 1964 provides for the mechanics of allocation. In section 1(3) of the Act, specific applications of sections of the Petroleum (Production) Act of 1934, pertaining to the granting of licenses "to search and bore for, and get, petroleum," are adopted for the North Sea shelf. The 1964 Act does not provide for the details of licensing, but rather made the 1934 Act applicable because it provides for the issuance of regulations by the Ministry of Power (subsequently changed to the Department of Energy). The regulations contain model clauses dictating the terms, rights, and duties of parties granted a license. A company wishing to do business in the British continental shelf must turn to these frequently changing clauses for guidance.

Licensing of private companies is common whenever the government owns the resources but not the means to recover them. In most situations, a government will have no choice but to rely on the expertise of the private petroleum companies for development of its resources. However, the granting of a license is intended to be beneficial to both parties. For the company, there is the opportunity to own the petroleum it extracts; for the government, the chance to take advantage of what Dam calls "economic rent." Recovery of economic rent may be in the form of a large monetary payment that bolsters the Treasury, or compliance by the companies with certain conditions, or even the requirement of immediate development that benefits many sectors of the economy. In Britain, licensing was apparently the only system

95. Id. (citing Norwegian Royal Decrees of 1965 and 1972, §§ 37-38).
96. Petroleum (Production) Act, 1934, 24 & 25 Geo. 5, ch. 36, § 2(1).
97. See Continental Shelf Act, 1964, ch. 29, § 1(3).
98. See id. §§ 1(6).
99. See generally Morris, supra note 59, at 199-202 (discussing specific regulations promulgated by the Minister of Power).
101. Id. at 3-4.
102. See id. at 4. "[W]here the value of the resources exceeds all relevant costs, including the costs of management and an appropriate risk premium for capital, then one may refer to the difference as the economic rent enjoyed by the licensee." Id.
given serious consideration for exploring and developing the North Sea shelf.\textsuperscript{103} The British chose a form of licensing termed by Dam as the "discretionary allocation system."\textsuperscript{104} Under the discretionary system, the government licenses private companies, or, where possible, a state-owned energy firm, based on the company's ability to satisfy the government that it can most effectively meet the set of criteria regarded as important by the government.\textsuperscript{105} This is the most prevalent form of licensing in the world,\textsuperscript{106} which is not surprising since it features the strongest elements of governmental control. The other form of licensing, the "auction" or "competitive bidding" system, is primarily found only in the United States.\textsuperscript{107} This system is not based on the ability of the company to meet government criteria, but simply on its ability to offer the highest monetary bid to purchase the lease rights.

B. \textit{Why the British Chose the Discretionary System}

In the early 1960's, the British government had no idea how successful North Sea oil and gas development would become. The Continental Shelf Act was passed at a time when optimism was high over the 1959 discovery of a natural gas field in the Groningen Province of the Netherlands. However, at the time, there was no indication that successful oil discoveries would occur in the north in a few years. Thus, despite the optimism, in 1964 the choppy North Sea remained very much an uncertainty. The oil companies were anxious to have a legal basis for operations, but continued to make low estimates of possible reserves, while emphasizing the high costs, dangers, and risks involved

\textsuperscript{103} Dam, \textit{supra} note 41, at 54.
\textsuperscript{104} The main outlines of the United Kingdom system for exploitation were undoubtedly determined as much by tradition as by logic. Exploration for and production of petroleum on public lands in most countries has traditionally been carried out by private companies under license from government. And some form of charge based upon the value of production, whether or not denominated a royalty, has traditionally been an element of the consideration derived by the licensing body. Thus, while some Labour Party voices were heard in favor of the exploitation of the North Sea resources by the government itself or by one of its nationalized industries, the Conservative government presumably gave little consideration to such an alternative and it adopted the usual arrangement of licensing private companies. Even the Labour government, which came to power in 1964 shortly after the system had been instituted, did not seek to change it.

\textsuperscript{105} Id. at 54-55.
\textsuperscript{106} See K. Dam, \textit{supra} note 100, at 7.
\textsuperscript{107} Id.
in North Sea searches.\textsuperscript{108} Against this background, the United Kingdom, then under Conservative control, wanted to achieve full exploration of the British sector as quickly as possible.

In a 1977 report to a United States Senate subcommittee, Edward Krapels identified the problem facing the British government as two-fold.\textsuperscript{109} First, there was a feeling that, relative to other areas of the world and because of the unproven state of the area, the North Sea would not be attractive enough to entice private oil companies to tie up the large amounts of capital needed for such risky and expensive ventures.\textsuperscript{110} Secondly, the government, perhaps itself doubting the North Sea potential, did not want to jeopardize the foreign interests of British companies with “onerous financial terms” that might incite “OPEC countries to follow suit, to the detriment of our . . . overseas oil interest and balance of payments.”\textsuperscript{111}

Although the Petroleum (Production) Act of 1934 had provided for a system of licensing, the insignificance of the onshore oil industry had never caused it much public scrutiny. This permitted the Conservative Government not to feel bound by the previous regulations in designing terms for the North Sea. The government obviously felt more confident in meeting its objectives by utilizing the discretionary system instead of the competitive bidding approach.\textsuperscript{112} The discretionary system was selected because:

\begin{quote}
[I]t was judged in 1964 that, in the unproven North Sea, competitive bidding would be unlikely to lead to full and thorough exploration, and it was thought that bids might well have been small, and confined to strictly limited areas, and that British participation might well have been less than was possible to achieve under a discretionary system. . . . Under a discretionary system, the Department felt that they would
\end{quote}

\textsuperscript{108} See G. Arnold, supra note 10, at 36. Even though Slochteran was destined to become the second largest gas field, its development was not an easy task. The twenty-mile area field “was only discovered after a program lasting thirteen years in which 200 wells were drilled.” \textit{Id.}


\textsuperscript{110} \textit{Id.} at 7.

\textsuperscript{111} See \textit{id.} at 7-8. Lord Balogh, a critic of the government’s initial energy policy, responds that British efforts to appease the Arabs are unnecessary. Labeling the fact that Arabs are influenced by British behavior “the imperial syndrome,” he says, “in fact, of course, the Arabs have experts who have forgotten more than the Foreign Office ever knew and who could, and should be employed to advise the Petroleum Department on how to obtain maximum benefit for the country.” Balogh, \textit{The North Sea Blunder}, BANKER, Mar. 1974, at 286.

\textsuperscript{112} See E. Krapels, supra note 109, at 8. Krapels notes that the British government experimented with another allocation method in 1971, but retains the discretionary method. \textit{Id.}
be able to insist, as a condition of a production license, that
the licensee carry out an effective work programme and also
to persuade him to buy British goods and services where they
were readily available.\textsuperscript{113}

In effect, the government chose to sell its economic rent, taking instead
the power for the Department of Energy to be able to select licensees
that best exemplify whatever characteristics it found to be important.

The Department of Energy has never been specific in how the various
factors are weighed when it selects a licensee.\textsuperscript{114} Charges of "un-
fairness," which is one of the criticisms of a discretionary system,\textsuperscript{115}
would seem hard to establish before an administrative review as long as
the standards remain tenuous. J.D.A. Evans, one of the managing di-
rectors of BNOC, cites typical factors as including a company's overall
competence, its financial strength, its technological ability, its willing-
ness to accept British unions, whether the firm is incorporated in Brit-
ain, whether it is small in size, and whether it has an overall desire to
contribute to the British economy.\textsuperscript{116} Certainly, one of the most impor-
tant factors to the government is the degree of effectiveness and coopera-
tion a company exhibited during a previous licensing term. This
process enables the government to most effectively enforce its condi-
tions and decrees.\textsuperscript{117}

C. \textit{The Specifics of Licensing—Types and Terms}

Section 6 of the Petroleum (Production) Act of 1934 was specifi-
cally adopted in the Continental Shelf Act of 1964 and gives the gov-
ernment the power to make regulations prescribing the terms and
conditions that an applicant will be expected to meet.\textsuperscript{118} Originally,
sections 2 and 6 of the 1934 Act provided for the Board of Trade to
handle licensing and the necessary regulations,\textsuperscript{119} but governmental re-
organization has subsequently granted that power to the Secretary of

\begin{itemize}
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id. at 9.
  \item \textsuperscript{115} Id. at 8.
  \item \textsuperscript{116} Interview with J.D.A. Evans, Managing Director, British National Oil Corporation, in
    Dallas, Texas (Feb. 26, 1981); see E. KRAPELS, supra note 109, at 8-9.
  \item \textsuperscript{117} See G. ARNOLD, supra note 10, at 143 (discussing Amoco's exclusion from the fifth li-
    censing round for refusing to comply with the government's insistence that all licensees negotiate a
    participation agreement with the BNOC).
  \item \textsuperscript{118} See Continental Shelf Act, 1964, ch. 29, § 1(3). Section 1(3) specifically adopts §§ 2 & 6
    of the 1934 Act. Id.
  \item \textsuperscript{119} Petroleum (Production) Act, 1934, 24 & 25 Geo. 5, ch. 36, §§ 2, 6.
\end{itemize}
State for Energy.\textsuperscript{120} Section 6 requires that regulations prescribe:

(a) the manner in which and the persons by whom applications for licenses under this Act may be made;
(b) the fees to be paid on any such application;
(c) the conditions as to the size and shape of areas in respect of which licenses may be granted;
(d) model clauses which shall, unless the Board thinks fit to modify or exclude them in any particular case, be incorporated in any such license; and different regulations may be made for different kinds of licenses.\textsuperscript{121}

One of the first actions taken by the Ministry of Power was to divide the United Kingdom portion of the continental shelf into blocks of 250 square kilometers (approximately 100 square miles), which could then be licensed, in differing allotments, to oil companies for development.\textsuperscript{122} A certain number of blocks would be offered in each specially announced licensing "round," depending on the perceived need for stimulating or limiting the amount of production. Certain blocks, selected at the Department of Energy's discretion, would be made available in specially announced licensing "rounds." Companies were encouraged to join together in operating groups in applying to develop a block.\textsuperscript{123} In later rounds, operating consortia were required to provide for state participation by including the BNOC or the British Gas Company.\textsuperscript{124} Favorable treatment was also given to applicants that included small British energy firms.\textsuperscript{125}

Presently, the Department of Energy is engaged in its seventh round of offshore licensing. Over 200,000 square kilometers have been licensed to approximately 200 licensees.\textsuperscript{126} Rounds have been held in 1964, 1965, 1970, 1971-72, 1977-78, 1979-80, 1980-81, and 1982-83.\textsuperscript{127}

The British find the block system attractive because it preserves the maximum amount of governmental control over production and the private companies. By offering many small blocks instead of a

\textsuperscript{120} See Brenschedt, \textit{supra} note 25, at 297.
\textsuperscript{121} Petroleum (Production) Act, 1934, 24 & 25 Geo. 5, ch. 36, § 6.
\textsuperscript{122} Petroleum (Production) (Continental Shelf and Territorial Sea) Regulations, 1964 STAT. INST. No. 708.
\textsuperscript{123} Forming operating consortia is certainly the trend; however, British Petroleum was given a license to develop the entire Forties Field without other companies.
\textsuperscript{124} The fifth, sixth and seventh rounds have required state participation as a condition to receiving a license.
\textsuperscript{125} \textit{Oilmen in bowler hats}, FORBES, July 21, 1980, at 54.
\textsuperscript{126} See Evans, \textit{supra} note 2.
\textsuperscript{127} \textit{Id.} (information on total amount of area licensed and number of licenses awarded in first seven rounds).
large concession to a few companies, the British wanted to evoke the widest possible interest in the North Sea by assuring that there would be numerous prize winners of varying size. The greater the number of companies involved, the greater the effect North Sea shelf production was expected to have on the various sectors of the British economy. Of course, the government also found it appealing that it could control the rate of production by varying the amount of blocks it made available when it decided that a round was necessary.

Initially, licenses were available only to British citizens or companies incorporated in the United Kingdom. American companies were thus expected to have foreign subsidiaries incorporated in Great Britain before they could expect to operate in the British sector of the shelf. By 1976, however, the European Economic Community had forced Britain to make a "modest retreat" from the strictly British requirement. According to 1976 regulations, licensing is available to "any person." The British still require foreign companies to maintain a subsidiary in Great Britain and, as recently as 1976, continued to include as grounds for revocation of a license the removal by a company of its central management and control from the country. Keto notes that the government requires a local subsidiary in order to facilitate the assessment of taxes and the enforcement of regulations.

There are two kinds of licenses for which a company may apply: exploration licenses and production licenses. The exploration license is granted for a three-year period of nonexclusive exploration in designated areas. The license is renewable and usually applies to areas greater than the blocks assigned for production licenses. Exploration licenses do not permit operations to be conducted in the areas reserved under the exclusive production license. It is important to note that, despite its name, the exploration license is really only applicable to passive forms of exploration, as drilling is not permitted to go beyond a depth of 350 meters and only physical and chemical surveys of the seismographic, geochemical, or magnetic nature are allowed.

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130. D. Keto, supra note 22, at 85.
132. Id
133. D. Keto, supra note 22, at 85.
135. D. Keto, supra note 22, at 85.
government finds the license particularly useful for its own gathering of geological information, acquired through the Department of Energy's power to demand that the license holder provide any information it collects regarding the explored area.\textsuperscript{136}

The production license is the most significant of the two forms offered by the government. For the Department of Energy, it is the principal legal means for asserting control over the activities of the private companies and for recovering a share of the proceeds from successful private efforts.\textsuperscript{137} For the operating consortia, it is the only legal means by which it can operate in the British continental shelf. A production license provides, "Exclusive License and Liberty . . . to search and bore for, and get petroleum in the seabed and subsoil" of a designated 100-mile block in the continental shelf.\textsuperscript{138} The successful applicant is given six years of exclusive right to recover as much petroleum as it can, before it must return at least one-half, chosen at its discretion, of the block to the government for relicensing.\textsuperscript{139} The remaining one-half area may be renewed by the licensee for forty years of production or, if it so desires, may be surrendered back to the Department.\textsuperscript{140} The initial six-year period is actually very short by oil and gas production standards, because it requires an immediate capital investment by the companies in exploration and development facilities. Of course, this is exactly what the government intended when it decided that immediate production in the shelf was necessary. One of the fears that the British had of the competitive bidding system of the United States was that oil companies tend to plan their exploration budgets so that production is delayed until just before the primary term of the lease is scheduled to end.\textsuperscript{141} The British desperately wanted to avoid what they considered to be needless delays and thus chose provisions ordering the short-term, mandatory forfeiture of one-half of the block. The goal was to attract companies that would make North Sea shelf production an immediate priority.

Undoubtedly, the most effective means that the British have for

\begin{footnotes}
\footnotetext[136]{Petroleum (Production) Regulations, 1976, § 4, sched. 7, cl. 12(3).}
\footnotetext[137]{D. KETO, \textit{supra} note 22, at 85.}
\footnotetext[138]{Petroleum (Production) Regulations, 1966, Reg. 4, sched. 4, cl. 2.}
\footnotetext[139]{Petroleum (Production) Regulations, 1980, \textit{reprinted in} Barrow's Petroleum Legislation, Supp. 56.}
\footnotetext[140]{\textit{Id.} cls. 4, 6.}
\footnotetext[141]{E. Krapels, \textit{supra} note 109, at 8 (quoting a Department of Trade & Industry official, May 1972: "I believe it to be the case that in auction systems people quite often bid and hold territory."). The delay rental clause contained in most oil and gas leases in America permits the lessee to delay development until just before the primary term ends.}
\end{footnotes}
forcing immediate production is through the requirement that each applicant must submit a detailed “work program.” According to Dam, the work program is the most competitive aspect of the discretionary licensing system; the bigger and better the system, the greater the chances of success.\textsuperscript{142} Before granting a production license, the company, or as the case may be, the operating consortium, is expected to meet with Department of Energy officials so that they may “ascertain what working obligations the various applicants may be willing to assume.”\textsuperscript{143} Thus, a company can expect the Department to be very active in planning its work program, including the assuming of final authority over such decisions as how many wells will be drilled in a given block\textsuperscript{144} and how exploratory drilling is to be carried out.\textsuperscript{145}

The fees assessed for a production license have also varied as different licensing rounds have been announced, but they are consistently very low relative to what the government would receive under a competitive bidding system. The regulations provide for a uniform application fee of 1,000 pounds for all applicants and all blocks.\textsuperscript{146} All other fees are not statutorily based, but are determined by the Department of Energy. Generally, an area fee has been assessed which increases steadily over the number of years the licensee continues production. For instance, in the fourth round, during 1971 and 1972, all licensees were required to pay an initial area fee of forty-five pounds per square kilometer.\textsuperscript{147} In the seventh year, the fee increases to fifty pounds and each year thereafter it increases by thirty pounds to a maximum of 350 pounds per square kilometer.\textsuperscript{148} The 350-pound figure is reached in year seventeen. In the seventh round, in 1980, the Conservative Government assessed a five million pound per block fee for recipients of the “own choice” blocks, a fee that is markedly higher than previous rounds, but still considerably below the amount often brought in the United States.\textsuperscript{149} It is not infrequent in competitive bidding to have bids of over one hundred million dollars, with nearly half of that “left

\begin{small}
\begin{enumerate}
\item \textsuperscript{142} See K. DAM, supra note 100, at 28.
\item \textsuperscript{143} See Morris, supra note 59, at 202; Petroleum (Production) Regulations, 1966, sched. 4, cl. 12; Petroleum (Production) Regulations, 1976, sched. 4, cl. 14(1).
\item \textsuperscript{144} See E. KRAPELS, supra note 109, at 10.
\item \textsuperscript{145} Petroleum (Production) Regulations, 1976, sched. 4, cl. 14(1).
\item \textsuperscript{146} Id.
\item \textsuperscript{147} This is about 11,250 pounds per block which, at an exchange rate of $2.40 per pound, is only $27,000 for a 100-square mile block. See D. KETO, supra note 22, at 86.
\item \textsuperscript{148} 87,500 pounds per block.
\item \textsuperscript{149} UK seventh round larger than expected, 47 PETROLEUM ECONOMIST 238, 238 (1980).
\end{enumerate}
\end{small}
on the table"—an amount higher than the second highest bid.\textsuperscript{150}

The British government's intent is not to raise revenues through the low fee structure, but, again, to speed up production.\textsuperscript{151} Companies will have incentive to avoid the high annual fees that are incurred at an increasing rate in the seventh year. Keto's assessment of the British choice: "Britain has paid for this flexibility [control over licensing terms] in foregone auction revenues, but continues to consider the exchange worthwhile."\textsuperscript{152}

D. \textit{Highlights of the Eight Licensing Rounds}

1. The First Licensing Round—1964

In April of 1964, Britain's first round of licensing was announced in the House of Commons by the Conservative Minister of Power, F.J. Erroll.\textsuperscript{153} The round lasted from May 20 to July 20 of 1964, and involved application requests for 960 blocks located chiefly in the southern region of the British shelf, near the successful Slochteren field in the Netherlands. The government placed no limit on the number of blocks that could be included in a single license nor on the number of licenses for which an applicant could apply.\textsuperscript{154} The application was a simple, two-page form that sought basic information on which the Ministry would follow up later.\textsuperscript{155} The first round of licensing resulted in applications for 394 blocks; fifty-three licenses were issued to twenty-three different licensees, covering 348 blocks.\textsuperscript{156}

The licensing criteria for the first round resembled policy statements and set the tone for subsequent rounds by being very broad and imprecise. However, the criteria did reflect the Conservative Government's concern about foreign oil companies reaping too much of the profits from Britain's continental shelf resources. The five criteria were

\textsuperscript{150} Interview with Harold Champagne, Atlantic Richfield Company, in Dallas, Texas (Mar. 4, 1981).

\textsuperscript{151} British revenues are earned primarily through a corporate tax, a petroleum revenue tax, and a 12.5\% royalty on all oil and gas sold. See D. Keto, supra note 22, at 86, 93-95.

\textsuperscript{152} Id. at 88.

\textsuperscript{153} Rounds are officially announced by publication in the \textit{London Gazette}. All important dates and financial terms and a schedule of the blocks being offered in the first round were published in the May 15, 1964 edition of the \textit{London Gazette}.

\textsuperscript{154} See K. Dam, supra note 100, at 24. "The licenses [which were issued] ranged from one to ten blocks in size. Many of the licensees were groups of companies ... and ... some 53 different corporations or other legal persons were named in the licenses." Id.

\textsuperscript{155} Samples of applications for each round are reprinted in Petroleum Legislation supplements.

\textsuperscript{156} See D. MacKay & G. Mackay, supra note 27, at 27; K. Dam, supra note 100, at 24.
stated as follows: "First, the need to encourage the most rapid and thorough exploration and economical exploration of petroleum resources on the Continental Shelf. Second, the requirement that the applicant for a license shall be incorporated in the United Kingdom and the profits of the operation shall be taxable here. Thirdly, in cases where the applicant is a foreign-owned concern, how far British oil companies receive equitable treatment in that country. Fourthly, we shall look at the programme of work of the applicant and also at the ability and resources to implement it. Fifthly, we shall look at the contribution the applicant has already made and is making towards the development of resources for our Continental Shelf and the development of our fuel economy generally."

The British knew that the first criterion would, by necessity, require an active foreign participation if rapid exploration was to be possible. Krapels speculated that the British oil companies "probably were given all they could handle."

Thus, the third and fifth criteria were especially included to give British companies favorable treatment in the selection of blocks. The goal was apparently reached, as MacKay and Mackay reported that the British firms "appear to have obtained a relatively higher proportion of the more promising areas." The fifth criterion made it easy to justify giving one of the British firms a choice region. British Petroleum is reported to have been especially fortunate in this regard.

Recognizing the importance of foreign participation in achieving the goal of rapid development, the Ministry was very concerned about making the terms equitable to all. At the time, international oil licenses typically attempted an even division of profits between the host government and the licensee. Thus, production licenses in the first round required a royalty payment of twelve and one-half percent, in addition to the standard corporate tax rate that would apply to North Sea earnings. The government expected this fifty percent range to be comparable to that taken in the Netherlands and the United States, although it represented less than the amounts taken in Norway, Nigeria, and the Middle East. However, the government's efforts at fairness have since been labeled a "give-away."

The problem, as reported by the Public Ac-

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158. E. Krapels, supra note 109, at 10.

159. North Sea Gas: At the First Try, 216 Economist 1237 (1965).


161. See G. Arnold, supra note 10, at 44; see also A. Sampson, supra note 32, at 180 ("The first huge areas of the sea, of a hundred square miles each, were leased to the companies as gener-
counts Committee of the House of Commons, was that the Exchequer would receive a far smaller share of oil revenues than expected because of the law permitting companies to offset income at home with losses incurred overseas. The provision was originally enacted because of the vast operations of British oil companies in the Middle East, which were subject to large Arab taxation. Subsequent changes in the tax laws, applying specifically to off-shore petroleum production income, and stiffer licensing terms in later rounds did attempt to retain a larger share of the profits for Britain.

2. The Second Licensing Round—1965

The second licensing round was conducted by the new Labour Government in August 1965 and was somewhat smaller than the round held one year before. Most of the blocks offered were along a narrow strip between the previously licensed areas outside the North Sea and some blocks that were offered the previous year. Although 1,102 blocks were offered, the interest shown by the private companies was not good. Only about eleven percent of the offered blocks were applied for, resulting in thirty-seven production licenses being granted. The area licensed in the second round was only about one-third as much as that in the first round.

Despite the change in governments, the method of allocation and financial terms for second round licenses were essentially the same as in the first. The discretionary system was again used, but this time the decisions were made by a new Minister of Power. There was a significant change, however, in the presentation of the applicant's proposed work program. No longer would applicants include the work program as part of their application, but now were granted conditional approval of a license, if they satisfied the basic criteria, subject to later submission, and Ministry approval, of a program.

Certainly, one of the reasons that the Labour Government did not attempt to make the licensing terms any less favorable to private companies was due to the increased activity in the North Sea by other gov-

162. See E. KRAPELs, supra note 109, at 14-15.
163. See D. MACkAy & G. MACKAy, supra note 27, at 24 (Table 2.3).
164. K. DAM, supra note 100, at 29.
165. See E. KRAPELs, supra note 109, at 13.
166. See K. DAM, supra note 100, at 29.
ernments. At this time, both Norway and the Dutch were introducing licensing and the feeling was that companies would begin shopping for the most favorable deal.\textsuperscript{167} A report by the Norwegian Petroleum Committee reflects this attitude.

In the North Sea area it is particularly natural and simple for the international oil companies to make comparisons between the compensation systems of the various North Sea States. At present one must count on the possibility of reserves being found in all the North Sea States' continental shelves. The compensation system may thus cause the companies to concentrate their exploration in the areas where the financial considerations are most favourable.\textsuperscript{168} It would not be until later rounds, when most of the reserves in the British shelf were assumed to have been found, that British governments would feel less pressure to attract oil companies.

The criteria that the Labour Party Minister required in judging applications was essentially the same as in the first round, except for one significant addition providing for state participation. Taken into account were any proposals made "for facilitating participation by public enterprise in the development and exploitation of resources of the continental shelf."\textsuperscript{169} Increasing British participation was very important to the Labour Government, for, like the Conservatives in the first round, they recognized that a goal of rapid exploration and development would by necessity require much foreign involvement, due to the advanced state of the American industry. In the first round, while British participation stood at thirty percent of the total, state participation was only three percent. In the second round, the government favored applicants who were willing to include the British Gas Council or the National Coal Board, and state participation was able to increase to about ten percent, while total British participation rose to forty-one percent.\textsuperscript{170} According to Dam, the preference for state participation affected the licenses in two ways.

First, the Gas Council, which in the first round had had a 31 percent share in a group made up of Amoco (Standard of Indiana), Amerada, and Texas Eastern interests, increased its participation in that group to a 50 percent share of the sec-

\begin{footnotesize}
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\item See G. Arnold, \textit{ supra} note 10, at 355.
\item See Daintith & Gault, \textit{ supra} note 68, at 56 (citing Odelsting Proposition No. 47 (1964-65), Recommendation No. 3).
\item See G. Arnold, \textit{ supra} note 10, at 355 (citing 716 Parl. Deb. H.C. (5th Ser.) 1579 (1965)).
\item See K. Dam, \textit{ supra} note 100, at 38.
\end{enumerate}
\end{footnotesize}
ond-round licenses. Second, the National Coal Board was brought into the oil and gas business insofar as Gulf and Allied Chemical gave the board "options to participate in any licenses granted to them, subject to the necessary powers being conferred on the Board by Parliament." 171

The holdings of the National Coal Board would in later years become the assets of BNOC.

3. The Third Round of Licensing—1969

The third round, conducted by the Labour Government in late 1969, does not stand out as one of the more significant. The government offered 157 blocks and received thirty-four applications covering 117 of those blocks. 172 In all, thirty-seven production licenses were granted covering about 8,000 square miles of U.K. shelf. 173

Once again, the Labour Government instituted a policy review of the licensing system and terms before conducting the new round. 174 And once again it determined that the discretionary method of allocation and the surrender and financial terms of the production license had no good cause for being changed. 175 The review considered adopting the auction system but rejected the idea, noting that the prospect of major finds to attract oil firms was too uncertain, and that Britain needed to retain its interest in smaller, higher-cost gas fields. 176

The announced criteria for the third round remained similar to that required in 1965, 177 but Minister of Power Mason stated that there would be "some added preference for groups involving the Gas Council and the NCB [National Coal Board] and other British interests." 178

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171. Id. at 29 (quoting Minister of Power, 721 Parl. Deb. H.C. (5th Ser.) 518 (1965)).
172. See E. KRAPELS, supra note 109, at 13.
173. See D. MACKAY & G. MACKAY, supra note 27, at 27. Thirty-two thousand square miles were licensed in round one, while 10,000 and 24,000 were licensed in round two and round four, respectively. Id. Although round three involved the smallest licensed area of the first four rounds, private company response was regarded as good, especially considering that only 11% of land offered in the prior round was applied for.
174. See K. DAM, supra note 100, at 29.
175. See E. KRAPELS, supra note 109, at 12.
176. See K. DAM, supra note 100, at 30.
177. See G. ARNOLD, supra note 10, at 355-56.
178. See E. KRAPELS, supra note 109, at 12.
The Ministry devised a plan that was destined to ensure the government's involvement in oil with BNOC. The advantage for the state participants was that their choices did not have to be made until the consortium in fact proved to be successful. This differed from the second round system where the state agencies were made part of consortium at the time of licensing, and thus faced the same risks that the private companies faced as to whether the assigned area would prove successful. The British Gas Council was also given several blocks to operate on its own in the Irish Sea. By increasing Gas Council participation, the government intended to enhance its own knowledge in negotiating with private companies and to further its understanding of purchasing gas and incurring costs. In many ways, taking an active role in the North Sea was not a natural function for the Gas Council and National Coal Board. However, the Labour Party, unsuccessful in satisfying some party members' efforts to create a national hydrocarbons corporation, apparently saw these two agencies as a suitable method of achieving the desired North Sea participation level.

4. The Fourth Round of Licensing—1971-72

The fourth round joins the first as the most significant of all rounds held to date. The fourth was one of the largest held, was the first to open up the northern basin, and served as Britain's only experiment with the auction system of license allocation.

When the Conservatives returned to power, they were determined to reverse the trend of increasing state participation in offshore drilling and to provide more territory for development, learning from the third round that the territory offered should be sufficient to meet the demand. Recent discoveries of oil by Amoco at Montrose and British Petroleum at the Forties Field indicated that the potential for oil would make the northern basin attractive to applicants. When the fourth round began in 1972, the government offered 435 blocks, of which 286 were applied for. The large round concluded with 118 production licenses being granted, covering an area of 24,000 square

179. See Woodliffe, supra note 17, at 253. The BGC was represented by a subsidiary set up for this purpose. Id.
181. See K. Dam, supra note 100, at 31.
182. See E. Krapels, supra note 109, at 13.
183. See id. at 7.
184. D. Mackay & G. Mackay, supra note 27, at 27 (Table 2.3).
Most of the licenses were allocated under the discretionary system. The Conservatives stayed with the familiar system because of the importance of the territory being offered, the need to develop marginal fields, and because most in the government believed that the system had served Britain well. However, due to the persistence of some party members, it was decided that fifteen blocks would be offered on an experimental basis under a competitive bidding system similar to that used in the United States. Although certain minimum criteria would be required, it was still anticipated that many of the choice blocks would bring high bidding prices. Of the fifteen blocks offered, some were considered very attractive while others were deemed marginal. For auction-system proponents, the results were very encouraging. For the fifteen blocks, the government received thirty-seven million pounds, an amount easily surpassing the three million pounds received from total fees assessed on the 271 blocks offered in the fourth round under the discretionary system. Many agree that the results show that continued use of the discretionary system in the round was a mistake. MacKay and Mackay concluded that "the government took a conservative, even a pessimistic view of the future, while the oil companies were evidently more optimistic. Subsequent events have proved the assessment of the oil companies to have been correct." The Public Accounts Committee of the House of Commons went even further, calling the use of the discretionary system in that round "a major commercial misjudgment." Further, MacKay and Mackay argue that the government was in effect paying far too much in foregone tender premiums, the bid-amount offered under the auction system, for the amount of control it received. By insisting upon a good system of minimum work program criteria for all bidders, the government could gain both control and large financial recovery. The government's

185. *Id.*
186. E. KRAPELS, supra note 109, at 14.
187. *Id.*
188. *Id.*
189. D. MACKay & G. MACKAY, supra note 27, at 29. Some argue that these results would not be indicative of the true outcome because too many choice blocks were included in the competitive offering.
190. *Id.*
191. *Id.*
192. *Id.* at 29-30.
193. The government did in fact reserve the right to reject any tender bids, including the highest, if the offeror was considered inadequate. *Id.*
response was to cite changing economic conditions as reasons to continue to court the private oil companies.\textsuperscript{194} Despite the governmental control involved in the discretionary system, private industry frequently supports discretionary systems they believe to be fair. Undoubtedly, the real reason private industry approved of such a system is that the inexpensive licensing fees assessed are far preferable to the expensive bids occurring in the competitive system.\textsuperscript{195}

5. The Fifth Round of Licensing—1976

In the fall of 1976, the government conducted the fifth round of licensing, offering only seventy-one blocks or part-blocks, but implementing new terms providing for participation by the newly-formed state oil company, BNOC.\textsuperscript{196} The relatively small number of block offerings reflected a new governmental strategy of offering less territory each round, but holding rounds more frequently.\textsuperscript{197} In March of 1977, the Department of Energy conditionally granted production licenses to sixty-five companies, covering forty-four of the blocks or part-blocks offered.\textsuperscript{198} Despite the tougher terms required by the Labour Government, much of the success of the round is attributable to the reputation of the blocks offered as having “good hydrocarbon prospects in known sedimentary basins.”\textsuperscript{199}

Once again, the discretionary allocation system was used for awarding licenses, but this time the rationale for its use was that it offered the only reasonable way to require oil companies to agree to state participation. The most important criteria for the fifth round included the second and fifth conditions listed in the fourth round, above, and made it mandatory that licensees provide for a fifty-one percent participation option for BNOC.\textsuperscript{200} Before a license was officially granted, the applicant had to provide a satisfactory work program for the Department of Energy and to reach terms with BNOC on a form of operating

\textsuperscript{194} See id. at 28. Examples include raising the dry hole ratio and increasing OPEC-posted prices. Id.

\textsuperscript{195} Champagne, supra note 150. Sometimes the highest bidder will triple the amount offered by the second highest, leaving millions of dollars “on the table.” Id.

\textsuperscript{196} New offshore blocks on offer, 43 PETROLEUM ECONOMIST 343, 343-44 (1976).

\textsuperscript{197} Id.

\textsuperscript{198} United Kingdom: New Offshore Awards, 44 PETROLEUM ECONOMIST 107, 108 (1977) (list of blocks granted and companies receiving them).

\textsuperscript{199} New offshore blocks on offer, supra note 196, at 343.

\textsuperscript{200} D. Keto, supra note 22, at 87. The fourth round criteria are discussed at supra notes 177-78 and accompanying text.
agreement. BNO C (or British Gas Corporation, where applicable) planned to participate on a "carried interest" basis similar to a program which had been working successfully in Norway. BNOC was given the option of deciding whether to take its fifty percent participation, but it would have to pay its share of future and past development costs, including exploration appraisal work and costs.

One reason that the terms were stiffer under the fifth round is that new Petroleum (Production) Regulations were passed in 1976. New license surrender terms were more onerous than those of previous rounds, while financially, the fifth round was the most expensive to date for the oil companies. The 1976 Regulations required that a licensee surrender one-third of its licensed area to the government after only four years, with another one-third being relinquished three years later. The forty-year term for the remaining portion was reduced to thirty years. The oil companies were able to convince the Department of Energy to eliminate the four-year rule, requiring instead that a full two-thirds be returned at the end of year seven.

Financially, the government increased its intake by instituting a new way to calculate the twelve and one-half percent royalty, and by increasing fees and annual rentals.

One of the attributes of the discretionary allocation system from the government's point of view, is that it is effective at keeping control over licensees. In the fifth round, Amoco was reminded of this power when the "old faithful" in British offshore exploration was purposely excluded from the new list of licensees because of Amoco's obstinacy in being the only operator to refuse to renegotiate previous licensing terms to include BNOC participation. Although Amoco subsequently consented, it was too late for it to be included among the fifth round recipients.

By mid-1977, the first seven fields discovered had gone into production, providing about one-half of Britain's needs. Over fifty dis-

201. UK's fifth round, 43 PETROLEUM ECONOMIST 258, 258 (1976).
203. See supra note 139 and accompanying text. Regulations are frequently changed.
204. Petroleum (Production) Regulations, 1976, sched. 5, cls. 3(1) & 3(2).
205. Id
206. See New offshore blocks on offer, supra note 196, at 342-43.
207. The 12.5% royalty was calculated on a tax value basis rather than on the lower wellhead price.
208. See UK's fifth round, supra note 201, at 258.
209. See G. ARNOLD, supra note 10, at 147.
210. Id. at 144.
coveries and fourteen fields had been proved commercial and were under development. British politicians anticipated that in 1979 enough oil would be coming from the British shelf to entirely satisfy Britain's needs.

6. The Sixth Round of Licensing—1978

The British government continued its strategy of offering small rounds on a more frequent basis. Renewing an avowed intent to "strengthen British control over our offshore resources," Secretary of State for Energy Benn announced that the sixth round would be conducted in the summer of 1978. The round proved satisfactory, despite stiffer terms concerning state participation and the small size of the offering. Of the forty-six blocks offered, forty-two were conditionally granted to sixty-five companies. All blocks were applied for, but four were denied allocation, because of applicant's demands that sought-after areas be included along with the unattractive blocks.

There was concern over the sixth round's likelihood of success because of stringent new requirements that successful applicants be prepared to offer BNOC more than the fifty-one percent participation that was a condition of the last round. On any licenses on which BNOC exercised its option to participate, companies would not be expected to stop the practice of assessing BNOC for past exploration and appraisal costs. In addition, some companies would be expected to offer BNOC the right to purchase part of their equity share of oil and natural gas. Despite the relative success of the round, it has been considered significant that Exxon, the industry giant, chose to sit out the sixth round. Exxon insinuated that the government's conditions greatly influenced the decision. Geological prospects for the blocks offered were not attractive "in view of the economic and investment environment."

211. Id. at 54.
212. Id.
214. UK North Sea: Results of Sixth Licensing Round, 43 PETROLEUM ECONOMIST 170, 170 (1976).
215. Id.
216. See UK North Sea: Increased Participation in Sixth Round, supra note 213, at 261.
217. Id.
218. Id.
Certainly, the sixth round reflected the Labour Party's view that companies operating in the British shelf would increasingly be expected to show a spirit of partnership in "obtaining the fullest possible benefits for Britain."  

7. The Seventh Round of Licensing—1980-81

The seventh round began in 1980 and continued into 1981. With the Conservatives back in power, ninety blocks were made available, making this the largest offering since the fourth round. Interest was especially strong during this round, partially because of the government's adoption of the suggestion by the U.K. Offshore Operator's Association that oil companies be given the option of selecting their own blocks for exploration. When the first phase of allocations were announced in December of 1980, forty-two licenses were awarded by this auction system, collecting an estimated 210 million pounds for the Exchequer under this "own choice method." The method used by the Department of Energy defined an area in the eastern part of the British shelf out of which the oil companies requested specific areas to develop. A Department of Energy spokesman labeled the plan "extremely successful," as 125 applicants were submitted by 200 companies, the largest number of applicants since the first British offshore licensing round. Among those companies receiving licenses were the major multi-nationals, such as British Petroleum and Shell, and also a number of consortiums with small operators. BNOC was named operator in three of the licenses. When the second phase of licenses were awarded in March of 1981, thirty-seven more licenses were awarded, bringing the total number of companies to 119.

Despite the considerably higher fee, 5 million pounds per block, assessed for "own choice" blocks, the high demand shows that smaller fields were still attractive. Since it has been estimated that over two-thirds of the recoverable resources of the British shelf were licensed out

220. See UK North Sea: Increased Participation in Sixth Round, supra note 213, at 261-62.
221. See UK seventh round larger than expected, supra note 149, at 238.
222. The Times (London), Feb. 23, 1981, at 18, col. 5.
223. The area selected was between the 56th and 62d parallels. Id.
224. Another reason for the success is the attractiveness of some of the blocks offered, as a new region was opened northwest of the Shetland Islands. Id.
225. Id.
226. Id.
in the first four rounds, much of Britain’s future in developing the shelf will depend on companies being willing to try for the more limited venture. Among the apparent factors contributing to the demand in the seventh round were the rising prices for oil and gas and the proximity of the offered blocks to the government’s planned gas-gathering pipeline. There had been concern that the Conservative Government’s new petroleum taxes—a twenty percent Supplementary Petroleum Duty based on gross revenues, in addition to the Petroleum Revenue Tax—would make many smaller to medium-sized fields economically infeasible. However, Minister of Energy Gray declared the round a success and minimized the importance of the tax changes. Gray said, “[C]ompanies are used to working in hostile waters with hostile tax regimes. Despite the changes the North Sea remains one of the most attractive and encouraging environments in the world.”

8. The Eighth Round of Licensing—1982-83

The Conservative Government opened the eighth licensing round in September of 1982 and offered 184 blocks, nearly three-quarters of which were in previously unexplored areas. While some of the territory being offered was in deepwater blocks in the far north and off southwest Wales, the oil companies expressed the most interest in the large tracts found near producing fields in the north and central North Sea. Stiff competition was expected for those areas which were once again being offered on an auction basis. However, only fifteen of the eighty-five blocks expected to be licensed at the conclusion of the round in the spring of 1983 were scheduled to be awarded on the auction basis.

The blocks being offered in the more speculative, new exploration areas were expected to serve as a good indication of the effect of the Conservative Government’s changes in its tax regime. In March of 1982, the Chancellor of the Exchequer introduced proposals to take effect in January 1983, which included abolishing the Supplementary Petroleum Duty which was in effect during the seventh round, raising the

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228. Evans, supra note 2. Two-thirds of the total resources are believed to have been licensed in the first four rounds. Id.
229. UK North Sea: Depletion Control by Delay, 47 PETROLEUM ECONOMIST 400, 400 (1980).
231. Id.
232. UK opens eighth round, 49 PETROLEUM ECONOMIST 413, 413 (1982).
233. Id.
234. Id.
rate of the Petroleum Revenue Tax (PRT) from seventy to seventy-five percent, and introducing a system for advance payments of the PRT.\textsuperscript{235} Although the overall effect of the new tax regime is to narrowly reduce the marginal rate of tax and slightly improve the profitability of existing fields, it was still criticized for not offering relief for the small fields which were increasingly being declared economically infeasible by the oil companies.\textsuperscript{236} The problem in developing smaller fields was caused by the combination of falling oil prices, inflation, and the high taxes. Indeed, none of the twelve discoveries made during 1981 were certain of being commercially feasible. This led some critics to charge that the government's new tax regime would cause a drop in Britain's oil production in the late 1980's and early 1990's.\textsuperscript{237}

VI. STATE PARTICIPATION IN THE BRITISH SECTOR

For years, the British have been willing to provide for government involvement in private industry where national economic interests were perceived as being at stake. The government has frequently taken steps to place controls on the private sector to influence its behavior and enjoy a greater share of the financial returns.\textsuperscript{238} In North Sea offshore development activity, the government has been defining and redefining its role ever since it first established jurisdiction over the seabed resources.\textsuperscript{239}

Control over the offshore oil industry in the United Kingdom has been attempted in three ways.\textsuperscript{240} First, a review of the previous section of this Article shows an active and on-going regulation of offshore exploration and development, through the discretionary licensing system. Secondly, oil companies are subject to various forms of taxation: a corporate tax on earnings, a petroleum revenue tax, and a twelve and one-half percent royalty.\textsuperscript{241} Thirdly, the government has provided participation rights in offshore activities to its energy-related public corpora-

\textsuperscript{235} Kemp & Rose, North Sea economics revised, 49 PETROLEUM ECONOMIST 133, 133 (1982).
\textsuperscript{236} Id. A British Petroleum spokesman claimed that fields with reserves of less than 80 million barrels would no longer be feasible under this tax regime. Id.
\textsuperscript{237} Davis, Why the North Sea bubble burst, The Times (London), Apr. 30, 1982, at 17, col. 2.
\textsuperscript{238} Nationalized coal and airline industries are examples.
\textsuperscript{239} Some would argue that it is more accurate to say that the government tries to be able to forecast the private sector's next move.
\textsuperscript{240} Cranston & Puri, Government as Entrepreneur and Planner: Aspects of Recent Industrial Strategy in Britain, 9 CAT. W. INT'L L.J. 78, 94 (1979).
\textsuperscript{241} Oil Taxation Act, 1975, ch. 22.
tions—the British Gas Council (BGC), the National Coal Board (NCB), and the BNOC.

The next section of this Article examines the involvement and effect BNOC has on the North Sea oil environment. Since its inception in 1976, BNOC has established an increasingly formidable presence in carrying out its own functions and the policies of the British government.\textsuperscript{242} It is an actor in the British oil scene with which American oil companies may have to deal and certainly should understand.

Since as early as 1965, during the second licensing round, increasing state participation in offshore activities has been a goal of British governments.\textsuperscript{243} Even in the first round, when the purpose was attracting private oil companies to begin immediate development, the BGC still received three percent of the licensed area.\textsuperscript{244} Within a year, the NCB was given specific authorization to join in offshore oil activity and soon after, in the second round, state participation doubled.\textsuperscript{245} As subsequent rounds progressed, participation has reached the point today where BNOC, successor to the interests of the NCB and the BGC, through its exploration subsidiary, is now an active competitor with private companies operating in the British continental shelf. The state participants function both as individual recipients of licenses and, more frequently, as members of an operating consortium.

A. The Public Corporation and Offshore Drilling

State participation in British oil and gas has been accomplished through a vehicle known as the public corporation. The BGC, NCB and BNOC are all, in various forms, public corporations.\textsuperscript{246} The public corporation in Britain is by no means unique to the oil industry. One

\begin{footnotesize}
\begin{enumerate}
\item See G. ARNOLD, supra note 10, at 161, quoting Lord Kearton, former chairman of BNOC.

\begin{footnotesmall}
What we have done is come through a year when the betting of the oil companies was that we wouldn't survive that year. It seems to me that the next six months will see BNOC become an increasing influence, and by the 1980s it will be a very powerful influence on the European oil scene.
\end{footnotesmall}

\end{footnotesize}

\item See G. ARNOLD, supra note 10, at 11.

\item Id. Three percent was considered very small for a nationalized monopolistic industry. At the time, the National Coal Board was not authorized to participate in the offshore program.

\item See E. KRAPELS, supra note 109, at 11.

\item Id. Participation increased to 6%. E. KRAPELS, supra note 109, at 11.

\item See generally G. Arnold, supra note 10, at 113 (contains the beginning of an extensive discussion of the role of the BGC in the British gas industry). Neither the BGC nor the National Coal Board is discussed in depth in this Article.
\end{enumerate}
\end{footnotesize}
A commentator has written: "Public corporations as an institution are of quite respectable antiquity. Certain public bodies with specific functions are well known in England in the nineteenth century."247 The three state energy companies discussed herein are what Professor Rob-son has called "new public corporations concerned with the operation of great socialized industries or services."248 Examples of the so-called "new public corporation" in Britain include the original, the Port of London Authority, and the British Broadcasting Corporation, the London Passenger Transport Board, and the British Overseas Airways Corporation (now British Airways).249

There is not a precise definition of the British public corporation.250 Rather, Friedmann says there is only a general concept that has emerged from a "number of specialized public bodies . . . created for specific purposes."251 He argues that the most accurate way to consider the public corporation is not as "a multi-purpose authority but a functional organization, created for a specific purpose."252

B. Formation of BNOC

The BNOC operates from a unique position in the British oil industry. In a paper presented by one of BNOC's managing directors, J.D.A. Evans, its function is described.

First, B.N.O.C. is not—and never has been—a regulatory or supervisory agency, as are quite a number of national oil companies. B.N.O.C. is not simply an extension of a Government Department and its employees are not Civil Servants. B.N.O.C. is not there to raise revenues from the private sectors for the Exchequer—that is done through the tax system. B.N.O.C. is a public (i.e., Government-owned) Corporation in the business of petroleum exploration and production, alongside the private sector of the industry.253

One element which makes BNOC unique from many public corpora-

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247. Friedmann, The Public Corporation in Great Britain, in THE PUBLIC CORPORATION 162 (W. Friedmann ed. 1954). Friedmann cites these as the Public Trustee, the Prison Commissioners, the Public Record Office, or the Board of Control (for mental diseases). Id.
248. Id. Robson says that these are a result of "the need for a high degree of freedom, boldness, and enterprise in the management of undertakings of an industrial or commercial character and the desire to escape from the caution and circumspection which is considered typical of government departments." Id.
249. Id.
250. Id. at 163.
251. Id.
252. Id.
253. Evans, supra note 2.
tions, and certainly the BGC with its monopoly position, is BNOC's direct relationship with the private sector. In every sense, the British government looks upon BNOC as its only true representative possessing any clout in an industry controlled by multi-nationals.

Lord Kearton, BNOC's first chairman, said at the time of its formation in 1976: "This is a policy geared to the real world."

Friedmann in 1954, twenty-one years before BNOC was formed, compiled a list of what he called "certain universal legal characteristics of the [British] public corporation, applicable to all types." These characteristics are still very useful for illustrating BNOC's characteristics, and are presented and discussed here.

1. The public corporation is normally created by special statute or (exceptionally) by charter. It does not, like a commercial company, come into existence automatically, on fulfillment of certain conditions.

The BNOC is a statutory creation. Part I, Section I, of the Petroleum and Submarine Pipelines Act of 1975 established a body corporate called the British National Oil Corporation. Section 2(1) defines BNOC's general powers and includes a broad function provision: "(a) to search for and get petroleum existing in its natural condition in strata in any part of the world." The BNOC's right to participate with private oil companies in offshore activities, as given by the government through licensing provisions, is authorized in section 2(l)(e). Section 2(l)(f) provides for BNOC to gather and disseminate petroleum information to any person—which most certainly includes its primary benefactor, the Department of Energy. BNOC's information function becomes relevant to oil companies and operating consortia that must provide information about their operations to BNOC.

254. See Cranston & Puri, supra note 240, at 95. Monopoly is granted in supplying gas.

255. Cf. FORBES, Aug. 1, 1976, at 50 (British Petroleum, although 48% government-owned, has interests all over the world and is truly an international oil company. This independence led many politicians to consider it unsuitable to be further connected with the government.).

256. Id.

257. See Friedmann, supra note 247, at 164. Seven of Friedmann's "characteristics" are used in the following pages to illustrate the nature of BNOC.

258. Id.


260. (e). . . . to do anything required for the purposes of giving effect to agreements entered into by the Secretary of State [for Energy] with a view to securing participation by the Government of the United Kingdom, or by the Corporation or any other body on behalf of the Government, in activities connected with petroleum beneath controlled waters.

Id. § 2(1)(e).

261. Id. § 2(1)(f).
tially, BNOC was not given authority to receive production licenses from the Department of Energy; however, subsequent amendments to the Petroleum (Production) Regulations changed that. 262 The BNOC is also permitted to provide and operate pipelines, tanker-ships, and refineries, and to carry out research in connection with petroleum. 263

2. The public corporation has no shares and no shareholders, either private or public. Its shareholder, in a symbolic sense, is the nation represented through Government and Parliament. 264

The BNOC is fully government-owned. It has no shareholder's equity in the traditional sense of stock being held by either the private sector or the government. Rather, BNOC was given an initial debt to cover operations of 600 million pounds, subject to the power of the Secretary of State for Energy to increase the amount to 900 pounds. 265 Clearly, at the time of formation, the Labour Government considered BNOC as the nation's oil company: "Perhaps most important of all, we shall gain for this country an independent capability in oil and gas production which will reduce our dependence upon international and other oil companies." 266

3. The responsibility of the public corporation is to the Government, represented by the competent Minister, and through the Minister to Parliament. 267

The BNOC operates subject to the approval of the Secretary of State for Energy. Section 3 of the Act defines the Corporation's general duties which, in each subsection, are either to be performed for the Secretary of State, actually the Department of Energy, or, if for the Corporation itself, with the Secretary's consent. 268 Section 4 specifically establishes the Secretary of State's authority over BNOC and his power to give it directions. 269 Throughout the 1975 Act are requirements that BNOC keep the Secretary fully informed of its activities. 270 Krapels believes that such provisions indicate that, under the 1975 Act,

262. See E. KRAPELS, supra note 109, at 26.
263. Petroleum and Submarine Pipe-lines Act, 1975, ch. 74, § 2(2).
264. Friedmann, supra note 247, at 164.
265. See E. KRAPELS, supra note 109, at 25.
266. Id. at 19 (citing statement by Parliamentary Under-Secretary of State for Energy John Smith in the House of Commons in April 1975).
267. Friedmann, supra note 247, at 164.
268. Petroleum and Submarine Pipe-lines Act, 1975, ch. 74, § 3(3).
269. Id. § 4. "(1) The Secretary of State may, after consultation with the Corporation, give to the Corporation such general or specific directions as the Secretary of State thinks fit." Id.
270. See E. KRAPELS, supra note 109, at 24.
BNOC actually has less autonomy than most public corporations in Britain.\footnote{271} He cites as an example of such restrictions section 2(4), which details activities that BNOC shall not engage in without receiving permission of the Secretary, such as refining and exploration outside Great Britain.\footnote{272}

Additionally, BNOC is the only national industry that cannot retain its own profits; they are paid into the National Oil Account.\footnote{273} Whatever the importance of the extent of the Department of Energy’s involvement, there is little room to question that BNOC is in fact responsible to the government, first and foremost. It is interesting, however, that section 1(5) declares that the Corporation is not to be regarded as a “servant or as an agent of the Crown . . . and its property is not to be regarded as property of or held on behalf of the Crown.” This section, however, addresses legal implications of BNOC and should not be interpreted as declaring that it is in practice separate of the government. Other examples of BNOC’s close relationship with the government include its advisory capacity to the government and its agency role in performing specified functions on the Department of Energy’s behalf.\footnote{274} However, since the Conservatives returned to power in 1979, there has been an effort to curtail some of BNOC’s close ties with the Energy Department. BNOC was relieved of its advisory role, although not by statute, and its privilege of sitting in on operating committees of fields in which it was not participating.\footnote{275}

4. The administration of the public corporation is entirely in the hands of a Board which is appointed by the competent Minister, sometimes after and mostly without consul-

\footnote{271}{Id. The Secretary of State for Energy during House of Commons debate over the BNOC declared that it would “have a specially close and intimate contact with the Government.” \textit{Id. But see} Evans, \textit{supra} note 2. Legislation has been proposed that would reduce BNOC’s role as advisor to the Department of Energy.}

\footnote{272}{Petroleum and Submarine Pipe-lines Act, 1975, ch. 74, § 2(4).}

\footnote{273}{\textit{Id.} § 40.}

\footnote{274}{\textit{Id.} ch. 1, §§ 2(1)a, 3(3) & 3(5). Financing is particularly closely controlled. \textit{See} Woodliffe, \textit{supra} note 17, at 264. The strength of the financial control exercised by the government derives first, from the duties imposed upon B.N.O.C. to settle with the Secretary of State and keep under review, both its immediate and longer-term corporate plans and its annual investment programmes and budgets. The advantage claimed for this form of review is that since all monies going into and out of N.O.A. are directly managed by the government, the latter will thereby at all times be informed of the corporation’s plans, and can exercise its supervision more effectively in respect of all but “trivial day to day matters.” \textit{Id.}}

\footnote{275}{Forster & Zillman, \textit{The British National Oil Corporation}, 3 J. ENERGY L. & POL’Y 57, 80 (1982).}
tation of special interests. Neither the Board members nor any employees of a Board are civil servants.\textsuperscript{276}

The Secretary of State is given authority in section 1(2) to appoint the Members of the Corporation “from among persons appearing to him to have had wide experience of, and shown capacity in, activities connected with petroleum, other industrial, commercial or financial matters, administration or the organization of workers.”\textsuperscript{277} There are indications that section 1(2) is similar to appointment provisions usually found in constitutions of public corporations.\textsuperscript{278} However the provision of section 1(3)(c) requiring that the Secretary of State appoint two members of the civil service to the Members of the Corporation is not typical under Friedmann’s list and is unique to BNOC, among all British statutory public corporations.\textsuperscript{279} This is one area where the British apparently followed the lead of other national oil companies and opted for using BNOC as a source of information for the Department of Energy.\textsuperscript{280} Charges by opponents of the provision that it creates a conflict of interest for the Department of Energy officials, who may have access to confidential information about the private sector from the department and yet have to advise BNOC on how to compete, were outweighed by the importance placed on oil for the national interest.\textsuperscript{281}

5. Where a public corporation needs capital . . . it is provided in the case of public corporations managing nationalized industries, through assets taken over from private ownership and capitalized through the issue of interest-bearing stock. Such stock is either Government stock or, in most cases, stock issued by the public corporation with a Treasury guarantee. . . . The industrial public corporations have furthermore the power to borrow money, with the consent of their supervising Minister and the Treasury, within limits fixed by the Acts.\textsuperscript{282}

The financial structure of BNOC differs considerably from that found in most public corporations. The unique importance that BNOC has in Britain’s energy future and the vast amount of finances expected

\textsuperscript{276} Friedmann, \textit{supra} note 247, at 164.
\textsuperscript{277} Petroleum and Submarine Pipe-lines Act, 1975, ch. 75, § 1(2). Presently, there are 14 members of the corporation.
\textsuperscript{278} Woodliffe, \textit{supra} note 17, at 262.
\textsuperscript{279} \textit{Id}. at 263.
\textsuperscript{280} \textit{Id}.
\textsuperscript{281} \textit{Id}.
\textsuperscript{282} Friedmann, \textit{supra} note 247, at 164-65.
to come its way caused the government to impose more controls on it than are usually necessary for a public corporation. 283

The three fundamental differences between BNOC and the model described above by Friedmann are that BNOC was not created by nationalization of private industry, it was not initially financed by issuance of stock, and it is the only public corporation that cannot retain its own profits.

Many national oil companies are the direct result of government nationalization of the private industry. 284 The new corporation's assets are the sequestered properties of the private companies operating within its borders. 285 However, plans for BNOC were different. "The Government does not see a case for total nationalization of the oil industry," said one high Labour Government official. 286 Thus, BNOC and its fifty-one percent participation was well-suited for state participation.

BNOC's initial assets were the interests held by the subsidiary of the NCB in the North Sea, which the Corporation acquired at a cost of about one hundred million dollars. 287 The transfer of these state-owned assets was especially significant because BNOC then had an immediate stake in production from the Viking gas field and equity interests in six oil fields. 288 Additionally, in that first year of existence, 1976, BNOC acquired, at the government's request, the U.K. shelf interests of Burmah Oil Company. 289 This transaction gave BNOC shares in two more oil fields and, for the first time, operating responsibility for a field under development. 290

As previously mentioned, BNOC was not issued stock but received an initial debt of six hundred million pounds with which it was to conduct operations. 291 Additional money could be borrowed from a spe-

283. Woodliffe, supra note 17, at 262.
284. Evans, supra note 2.
285. Id.
286. See G. Arnold, supra note 10, at 155 (quoting Dr. Jesseck Dickson Mabon, Minister of State, 1976).
287. Evans, supra note 2; see also Petroleum and Submarine Pipe-lines Act, 1975, § 13 (providing for transfer of these assets at a "sum equal to the face value of those shares").
289. Id.
290. Id. The Thistle field was under development. In the same transaction, BNOC acquired Burmah's North Sea subsidiary which added significantly to the corporation's experienced operating personnel. Id.
291. See E. Krapels, supra note 109, at 25.
cially created government source, the National Oil Account. The account is under the Secretary of State's control, and receives funds from the revenues of BNOC and the royalties the Department of Energy receives from the petroleum production licenses. Release of funds to BNOC is subject to the Secretary of State's approval, which further enhances the government's control over BNOC operations and plans. However, this source of funds for BNOC ceased when the new Secretary of Energy, David Howell, came into power with the Conservatives in 1979.

BNOC's borrowing of funds was by no means limited to the National Oil Account. Indeed, BNOC's credibility as an oil company was never more enhanced than when it successfully concluded substantial loan arrangements with leading banks from the United States and the United Kingdom. The June 1977 loan package led the chairman of BNOC, Lord Kearton, to declare, "Some of the most influential and forward-looking banks in the world have decided that BNOC is worth backing." One of the most impressive aspects of the loan arrangement was that BNOC did not have to call on the Treasury as guarantee. Section 8(1) of the 1975 Act provides for full Treasury guarantee of "repayment of the principal of and the payment of interest on any sums which the Corporation borrows from a person other than the Secretary of State."

Another significant aspect of BNOC financing was that the Corporation, under section 9(1) of the 1975 Act, was exempt from paying the Petroleum Revenue Tax assessed all oil companies operating in the United Kingdom shelf. This privilege ended, however, in 1979, with

293. The Account will be composed principally of royalty and participation revenue, together with rents and license fees. Participation revenues here refer to the revenues accruing from the sale of B.N.O.C.'s share of petroleum. Because B.N.O.C. is exempt from paying Petroleum Revenue Tax, no taxation as such goes into the account.

Id.

294. See Woodliffe, supra note 17, at 264.
295. See Forster & Ziliman, supra note 275, at 81.
296. In June of 1977, BNOC received a loan of $825 million from a group of banks which included Citibank as manager, six other American banks, and four from England and one from Scotland. The American banks accounted for $675 million of the total. G. ARNOLD, supra note 9, at 160.
297. Id.
298. Arnold thinks that the loans show that BNOC will not be as dependent on the government as the Department of Energy might wish. Id.
299. Petroleum and Submarine Pipe-lines Act, 1975, ch. 74, § 8(1). Treasury funds are drawn from the government's Consolidated Fund. Id. § 8(3).
300. Id. § 9(1).
the passage of The Finance Act (No. 2) by the new Conservative majority in Parliament.\textsuperscript{301}

6. The public corporation has the legal status of a corporate body with independent legal personality.\textsuperscript{302}

The status of BNOC for purpose of legal liability is not specifically addressed in the Petroleum and Submarine Pipe-lines Act. However, this is not uncommon in legislation creating British public corporations.\textsuperscript{303} Friedmann writes, "The Acts do not state specifically that the public corporation is to be on the same footing as any private legal person in respect of legal duties, liabilities, charges, etc."\textsuperscript{304} There are, however, typical provisions that are found within Acts creating public corporations that infer a position or role for the corporation. The Court must then decide whether the corporation is through this position so closely tied to the Crown as to impose a privilege and immunity, or rather is in fact an entity in itself, liable for its own conduct.\textsuperscript{305} As in all public corporation acts, BNOC is declared a "body corporate."\textsuperscript{306} However, this is not determinative of liability until the corporation's relationship with the Crown is established. Section 1(5) of the 1975 Act is the provision that becomes crucial in this regard.

It is hereby declared that the Corporation is not to be regarded as a servant or (except in pursuance of an express provision in that behalf made by or under this Act) as an agent of the Crown or as enjoying any status, privilege or immunity of the Crown or (subject to section 9 of this Act) as exempt from any tax, duty, rate, levy or other charge whatsoever, whether general or local, and that its property is not to be regarded as property of or held on behalf of the Crown; but nothing in this Act shall be construed as derogating from any privilege, immunity or exemption of the Crown in relation to any matter as respects which the Corporation acts as agent of the Crown by virtue of such an express provision as aforesaid.\textsuperscript{307}

Section 1(5) separates the activities of BNOC into two positions.

\textsuperscript{301} Finance (No. 2) Act, 1979, ch. 47, § 22.

\textsuperscript{302} Friedmann, \textit{supra} note 247, at 165.

\textsuperscript{303} \textit{Id} at 171.

\textsuperscript{304} \textit{Id}.

\textsuperscript{305} \textit{Id} at 172.

\textsuperscript{306} Petroleum and Submarine Pipe-lines Act, 1975, ch. 74, § 1(1).

\textsuperscript{307} \textit{Id} § 1(5).
First, it establishes as a rule that BNOC is not a servant or agent of the Crown and thus infers acceptance of full liability as a "person." Liability is further established in section 1(5) by language expressly disclaiming all privileges and immunities vested in the Crown. This conclusion is consistent with the holding in the landmark Tamlin v. Hannaford decision, where a commercial corporation, the British Transport Commission, was held not to be able to enjoy the Crown privilege of immunity from the Rent Restriction Acts. Despite the corporation's public functions and purposes, it was not to be regarded as part of the Crown. Language in Tamlin by Lord Denning explains the legal significance of the corporation's public purpose in a way that further enhances BNOC's independence from the Crown.

In the eye of the law the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.

There are, however, some differences between BNOC and other public corporations, the most significant of which is the element of government control. The last clause of section 1(5) reserves the right of BNOC to claim the Crown's privileges and immunities where the enacting Act expressly requires the corporation to act as an agent of the government.

How does one really know whether an activity of BNOC is an act of independence or agency of the Crown? There are two ways. First, consider the language of Tamlin which excludes the public corporation's public purposes and authority as being within the province of the

308. See Friedmann, supra note 247, at 171. Friedmann identifies a similar clause to this first portion of § 1(5) as inferring that the public corporation is expected to take on full liability. Friedmann's typical clause: "Nothing in this Act shall be deemed to exempt the corporation from liability for any tax, duty, rate, levy or other charge whatsoever, whether general or local." This clause makes it clear that the public corporation does not participate in any privileges or immunities of the Crown.


311. 1 K.B. at 24 (per Denning, L.J.).
government. Second, and most clear, section 3(5) of the 1975 Act specifically declares certain activities of BNOC as being undertaken "on behalf of the Crown." Often, this exception takes place when the Secretary of State orders BNOC to handle and store petroleum owned by the government—usually for disposing of royalty oil taken in kind. Clearly, the general powers of section 2, which give BNOC the opportunity to function as a fully integrated oil company, are not within the privileges and immunity exception of the last clause of section 1(5).

7. All public corporations are supervised by independent accounting and auditing as well as some form of public control. But the type of accounting and public control varies according to the type of public corporation.

Section 10 of the 1975 Act provides for the duties of BNOC concerning the preparation of public accounts and records. The requirements reflect the high level of government control placed on the BNOC. Subsections (1), (2), and (3) all expressly give the Secretary of State and the Treasury authority to request certain financial reports.

C. BNOC as Part of a Stable Legal Environment

During the period of 1965 to 1975, the United Kingdom's policy towards the oil companies operating in the North Sea changed from one of "non-intervention" to a system of active governmental involvement. The government's increased involvement has occurred in

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312. Id.
313. Petroleum and Submarine Pipe-lines Act, 1975, ch. 74, § 3(5).
314. See Evans, supra note 2.
316. Friedmann, supra note 247, at 165.
317. Secretary of State's power to demand financial records and details of operations represents the highest form of control—total information.
318. Petroleum and Submarine Pipe-lines Act, 1975, ch. 74, § 10(1)-(3). Section 10(4) gives the Secretary of State the power to appoint auditors for BNOC accounts and specifies certain qualifications for them. Id. § 10(4).
319. See Woodliffe, supra note 17, at 249. "Until the discovery of oil in 1969 . . . license holders allowed virtually a free rein to pursue their own producing, refining and marketing policies." Id.
three areas. First, as was shown in the preceding sections on licensing, the terms forced upon licensees have become progressively more demanding. Secondly, the tax regime has been modified from the original system in 1965 to now include a tax on petroleum revenues, in addition to the corporate earnings tax originally imposed. Thirdly, in an area this section will explore, extensive state participation was introduced through formation of the BNOC. Due to each of these changes, the legal environment that the oil companies entered in 1965 is now significantly different. This section of the Article explores the impact the BNOC has had on the stability of the legal environment of British offshore oil.

Certainly, among the most important criteria that a company considers in making an investment in a foreign country is the political, economic, and legal stability that the host country offers. Understandably, a company is concerned that the rights it has when an investment is made will in fact continue to be enjoyed in the years following the commitment of the investment. Relative to many of the other oil producing nations, especially those classified as third world countries, the United Kingdom and the other North Sea states can be considered politically and economically stable. While North Sea countries may have political debate and rising inflation, they are not countries on the verge of revolution or creating new economic orders. They are, however, like most countries, subject to political pressures and changing economic conditions in the world, which can affect the legal environment of a particular industry. For companies, undoubtedly the most feared change in its legal relationship with a country is the nationalization of foreign assets. Nationalization in the traditional sense of seizure of property is not the only concern. While a foreign company may be permitted to continue ownership, restrictions on the use of the asset or the disposal of its product can be just as significant.

In Britain, nothing so drastic as nationalization, in the traditional sense of the meaning, has occurred. However, there is no question that the introduction of BNOC, and its option to participate on a fifty-one percent carried interest basis, represents a change in the legal relationship between the government and oil companies. While participation was made a condition for all licenses granted beginning in the

320. See supra notes 200-08 and accompanying text.
321. Oil Taxation Act, 1975, ch. 22.
322. Evans, supra note 2.
323. "Carried interest" means that BNOC will pay its share, usually 51%, of the costs.
fifth round, thus still giving companies a choice as to whether they wanted to invest under such terms, those companies holding licenses from the first four rounds, when participation was not demanded, were particularly upset by the government's order that BNOC be negotiated a participation right in each.\(^3\) In essence, it could be argued that the government was ripping up a contract—after the investment was committed—and ordering new terms.

Was this action unconscionable? Does it indicate a lack of legal security and a loss of credibility for Britain? Some argue that it does not. It is the position of Daintith and Gault that an understanding of British constitutional law would put oil companies on notice that future actions of Parliament cannot be restricted by contract.\(^3\) Thus, all licenses or other forms of contract issued by the government are always subject to change should the government consider it necessary. One should note, however, that this does not mean that the government will force a private oil company to renegotiate an existing license; such power was never tested. Rather, the government made it clear that it wanted all operating consortia to renegotiate to give BNOC participation.\(^3\) The government did not threaten on legal grounds those companies which refused to go along, but instead promised that those who complied would have that fact working to their favor in future discretionary licensing rounds.\(^3\) Evans has suggested that the critical state of the British economy and the government’s negotiations with the International Monetary Fund made it critical that,

nothing should be done that would disrupt the progress of the oil developments [in the North Sea] and it was for that reason . . . the most controversial part of [the corporation’s] role—participation in commercial fields discovered under existing licenses—was put into place by negotiation with the companies concerned and not through the force of law.\(^3\)

Although many of the larger companies complained and made negotiations move slowly, overall, the government actually had little trouble getting companies to agree in principle to participation. Krapels reported,

\(^{324}\) See supra note 117 and accompanying text.

\(^{325}\) See Daintith & Gault, supra note 56, at 41. "[U.K. law] not only admits no explicit constitutional fetters on Parliament, but also greatly restricts the capacity of Government to fetter by contract its future executive action." \(\text{Id}\)

\(^{326}\) See E. Krapels, supra note 109, at 28.

\(^{327}\) Id. at 29.

\(^{328}\) Evans, supra note 2.
All the companies except Amoco had agreed to participation in principle by the time invitations to the [fifth] Round were issued in late 1976, but it is likely that most of the companies had resigned themselves to the participation principle once the Government made clear its intention to respect their interest in secure access to oil.329

The companies agreed to one of three different forms of participation, depending on their needs and position in the British oil scene.330

If one is willing to concede that the British could change the conditions under which oil companies operate, the next step of inquiry, in an analysis of legal stability, is whether there is a degree of predictability and justification for the country’s actions. Here again, changes in the international petroleum arena gave the emergence of state participation in the United Kingdom an “air of inevitability.”331

There are several factors that indicate that the creation of BNOC was an event that oil companies could have anticipated. First, Daintith and Gault describe state participation as fitting a pattern found around the world.

The general tenor of the developments in domestic policy here described is a familiar one in the context of oil company-Government relations the world over. Government policy is at first directed to attracting the interest of the companies and persuading them to commit their resources to the task of extracting oil within its territory. Once that commitment is obtained, and fortified by success, the terms on which the companies are required to operate are progressively made

329. E. Krapels, supra note 109, at 29.

330. Id at 29-30. Negotiation between BNOC and companies began in 1975 and agreements were entered in principle with all, including the recalcitrant Amoco, by spring of 1977. There were primarily three types of agreements:

1. Varying amounts of equity shares are held by BNOC in consortia whose membership include Conoco, Arco, Total, Shell, Marathon, Elf, and Chevron. This is the highest form of ownership for BNOC.

2. BNOC is given an unrestricted option to purchase 51% of the oil produced from licenses that include Stratfjord, Heather, Thistle, Claymore and Piper fields. This was particularly popular to the government because it permitted BNOC to choose which operations it wanted to invest in, giving the government more control over supply.

3. BNOC holds a restricted option to purchase 51% of the oil produced in fields being developed by major U.K. refining companies (including British Petroleum, Shell, Esso, Texaco, Mobil, Amoco and Chevron). Id; see United Kingdom: Full Buy-Back Rights for Shell and Esso, 44 Petroleum Economist 69, 69 (1977). Shell and Esso negotiated a deal with BNOC whereby they would sell the corporation its 51%, but subject to a right for Shell and Esso to buy that entire amount back at the same price “as long as they can show that the oil is needed to support their UK refining and marketing commitments.” Id.

331. Woodlifte, supra note 17, at 269.
more onerous and State control of operations is progressively tightened.\textsuperscript{332}

In Britain, the report by the Committee on Public Accounts concluded that the oil companies had in fact been given too good a deal, and this helped to stimulate the government to seek controls over the oil industry.\textsuperscript{333} Second, the OPEC oil embargo of 1973-74 created an awareness in Britain that the nation really had no security of supply. Despite the government’s owning forty-eight percent of British Petroleum, Conservative Prime Minister Edward Heath was quite upset to learn from British Petroleum management that it would not favor any particular buyer, in this case, Britain, in allocating its supply, but instead would honor its contracts on an international basis.\textsuperscript{334} In other words, the government would not be able to order the company to give Britain a greater share of its oil.\textsuperscript{335} Although most Conservatives were not to endorse the BNOC plan, they too recognized that British Petroleum would not be the supply solution if Britain were to enter another oil crisis.\textsuperscript{336} The incident further increased the calls for a truly British representative in the international oil scene. Finally, it should have been recognized that unlike the situation in the United States, public corporations had long been considered to play viable roles in the British economy. Given the right circumstances, a national oil company could be as attractive as a national gas company or airline.

As soon as controlling oil became a major issue in Britain, it did not take long to bring BNOC into effect. In the 1974 election, which returned the Labour Party to power under Harold Wilson, securing for the British a greater share of the North Sea wealth was an important issue. Soon after taking control, the Labour Government issued its “White Paper” policy statement on the British oil industry.\textsuperscript{337} In the Paper, the main problems facing the United Kingdom were identified as the nation’s not getting enough of the North Sea successes and the

\textsuperscript{332} Daintith & Gault, supra note 56, at 38.
\textsuperscript{333} See supra note 162 and accompanying text.
\textsuperscript{334} We’ve got ours, FORBES, Aug. 1, 1976, at 55.
\textsuperscript{335} See E. KRAPELS, supra note 109, at 17.
\textsuperscript{336} See We’ve got ours, supra note 334, at 55. According to BNOC Chairman Lord Kearton, “Heath found that British Petroleum [though 48% government-owned] was not a national company but an international one. No government could live if in another oil crisis it had to say, ‘What happens to the oil is beyond our control.’” Id.
\textsuperscript{337} See E. KRAPELS, supra note 109, at 18 (citing the “White Paper,” UNITED KINGDOM OFFSHORE OIL AND GAS POLICY, CMD. 5696 (1974), reprinted in 14 INT’L LEGAL MATERIALS 460 (1975)).
effect of rising oil prices. The result, it said, "is that North Sea licenses would reap enormous and uncovenanted profits on their investment." In rectifying this situation to attain a "more equitable arrangement . . . for the benefit of the nation," the Paper set out five ways to secure more profits and assert greater control:

1. Enact a new taxation bill to close the loopholes that oil companies had discovered;
2. Require future licenses to provide for state participation on a carried interest basis;
3. Renegotiate existing licenses to include participation;
4. Establish a British National Oil Corporation;
5. Permit the Government to control the rate of production in the U.K. sector.

Within a year, legislation was passed. Debate over establishing the BNOC drew much attention. Conservatives opposed it for many of the traditional reasons that face public corporations; that it furthered socialism, that it would be inefficient, that it would not be able to pay well enough to attract quality personnel, and that it would displace private capital. However, when many of these same Conservatives came to power in 1979, their opposition to BNOC had softened. In its three and one-half years of existence, BNOC had developed a strong position in the British oil scene. Through its combination of equity, participation, and crude oil royalty payments, BNOC had become the largest seller of crude oil in the North Sea. Thus, rather than trying to abolish BNOC, the Conservatives began modifying its powers, putting it in much the same position as companies in the private sector. The result has been that this form of state participation has not had the radical effect that many oil companies initially feared.

Supporters of BNOC today remain convinced that the British form of state participation in the oil industry offers oil companies the best deal in the world. Undoubtedly the flagship of British partici-
pation was the promise by Labour’s Secretary of State for Energy, Eric Varley, that financially oil companies shall be “no better and no worse off,” and that a “profitable role” will continue for the private oil industry in Britain.348

In the final analysis regarding the question of whether Britain offers a stable legal environment, commentators have argued that, relative to other producing nations, there is stability and security in the British system. Daintith and Gault compare Britain to Norway, which provides constitutional protection for private individuals prohibiting the government to give retroactive effect to changes in legislation, and they conclude that, despite the lack of such safeguards in the United Kingdom, the British offer just as much legal security.349 Unlike Norwegian legislation, which tends to be vaguely drawn and susceptible to broad interpretation, the British legislation is tediously specific and leaves little room for unexpected interpretations. Thus, even if British legislation may be unilateral and overturn previous contracts, it is always subject to legislative action.350 Since the United Kingdom guarantees an open democratic process, the companies always have an opportunity to be represented. Compared to the process found in most producing nations, the British offer a stable, though not absolute, system of legal security.

348. See E. KRAPELS, supra note 109, at 21.
350. See id. at 41.