CROSS-BORDER POLLUTION FROM OFFSHORE ACTIVITIES

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The recent catastrophic oil pollution incidents of the *Montara* and the *Deepwater Horizon/Macondo* blowouts have caused some members of the international community great concern as to the adequacy of existing legal regimes to respond to both clean-up obligations and compensation for 'victims' of pollution from oil and gas exploration and exploitation.

The *Deepwater Horizon/Macondo* spill in the US Gulf of Mexico took 84 days to cap, with an estimated 50,000 to 100,000 barrels of oil spilt per day. BP's obligations for clean-up and compensation are governed by the US Oil Pollution Act 1990 (OPA 90), with unlimited liability for clean-up and limited liability for pollution damage of $75m under the act. BP waived its right to limit its liability for pollution damage and said it will pay all proven pollution damage claims in the first instance. BP's drilling contractor, Transocean, also has obligations under OPA 90, albeit to a lesser extent.

Unfortunately, the same cannot be said of the *Montara* spill, which originated within the Australian Exclusive Economic Zone (EZZ) in the Sea of Timor, taking 74 days to cap after an estimated 400 to 1,500 barrels of oil were spilt per day. The Indonesian government claims the pollution spread into its waters and impacted its coastline. A claim of $2.4bn has been made against the field operator, Thai state-owned company PTTEP Australasia rejected the claim on the basis that it is not supported by scientific evidence.

The *Montara* spill highlighted a further issue – that of cross-border pollution. As technology advances, the search for oil and gas will extend into international waters, possibly into more challenging environments and at greater depths and posing greater risks. There are calls for an international convention to regulate the risks and consequences of offshore oil and gas exploration and exploitation.

The Indonesian government is leading the initiative at the IMO for serious and immediate consideration to be given to developing a liability and compensation regime in respect of pollution from offshore units. We understand that the EU may be putting forward a legislative proposal this autumn. It is presently unclear what approach will be taken by the IMO and EU; but there is recognition for the need for some form of liability and compensation regime.

The purpose of this article is to identify if existing international legal regimes can respond to *Deepwater Horizon/Macondo* pollution situations, in particular to liability and compensation, and in its absence the type(s) of international regimes that are being considered.

EXISTING CONVENTIONS AND SCHEMES

The United Nations Convention on the Law of the Sea (UNCLOS) sets out the obligations for states to protect their marine environment from pollution as well as to reduce, prevent or control it. It does not include any compliance or enforcement mechanism, nor does it deal with liability or compensation. It does however promote under article 235, the development under international law, the concept of liability and adequate compensation via either compulsory insurance or compensation funds. Neighbouring countries may have either bilateral treaties or Memorandum of Understandings (MOUs) between them, requiring notification of any pollution event originating from their waters (including the EEZ) that has encroached into that adjacent state's water, as happened in the *Montara* field incident pursuant to the 1996 MOU between Indonesia and Australia. Some countries have entered into regional agreements such as the OSPAR Convention 1992 serving the North Atlantic countries, the Helsinki Convention 1992 serving the Baltic region and the Kuwait Convention 1989 serving the Persian Gulf. These conventions deal with marine environment protection, but not liability and compensation.

The two IMO conventions that specifically address oil pollution are the Civil Liability for Oil Pollution Damage 1992 (CLC 92) and the complementary International Convention on the Establishment of an International Fund for Oil Pollution Damage 1992 (Fund Convention). They do not apply to oil rigs and arguably they do not apply to FPSOs as they essentially apply to ships carrying oil as cargo that are on a voyage. There has however been a Greek Supreme Court decision in the Slops case (case number 23/2006) where a permanently anchored storage unit whose propeller had been removed and engine deactivated, was found to fall within the definition of ship under CLC 92. The IOPC Fund is due to review the definition of 'ship'.

CLC 92 and the Fund Convention work successfully together to provide a civil liability and compensation regime for pollution from the transportation of oil. It is a two-tier or interactive system developed in response to pollution-related claims caused by spills of persistent oil from tankers. The first tier is the CLC 92, which channels all claims against the owner of the ship and imposes strict liability on the shipowner with very limited defences. It currently limits liability to a maximum of 89.77m SDRs, depending on the ship's tonnage. It also provides for compulsory insurance on the part of the tanker and allows claimants direct access to the tanker owner's insurer. Where the claims exceed the amount available under the CLC 92, or if there is no valid recovery under the CLC 92, the Fund Convention steps in, but its liability is capped at 203m SDRs inclusive of limits under CLC 92. The Fund Convention is financed through levies on oil companies and other entities in states receiving oil. CLC 92 applies in 124 member states, while the Fund Convention applies in 103 states.

The Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE 1977) was intended to provide adequate compensation to victims of pollution damage from offshore activities, limited to 30m SDRs. Unfortunately, the CLEE 1977 was not ratified and did not come into force. However, in May 1975 a voluntary industry compensation scheme, the Offshore Pollution Liability Agreement (OPOL), came into effect as an interim measure to CLEE 1977, providing compensation up to $250m. The scheme is funded by specific oil companies who are parties to OPOL. Cover extends to any 'direct loss or damage by contamination which results from a discharge of oil' from an offshore facility (including the well) within the jurisdiction of any state specified in the agreement. These states presently include the UK, Denmark, Germany, France, Netherlands, Norway, the Isle of Man and the Faroe Islands. Companies in these designated countries cannot obtain a licence to operate in the offshore sector without signing up to OPOL. The scope of OPOL is similar to CLEE 1977 – it is a single-tier system funded by the oil industry.

THE CRITERIA FOR THE NEW INTERNATIONAL LIABILITY AND COMPENSATION CONVENTION FOR POLLUTION FOR OFFSHORE ACTIVITIES

The IMO and the EU have not indicated their intention in relation to the direction they intend to take with a new liability and compensation regime. Due to some reluctance from the shipping community, it is unlikely that the existing CLC 92 and Fund Conventions will be extended to include drilling rigs, production or storage units. There may be a case for FPSOs to be included as they, like tankers, store oil. Matters become more complicated however in the unlikely event of a spill from the well-side due to a catastrophic series of failures. Rather a new regime is likely to use CLC 92, the Fund Convention and /or OPOL as templates.

There are four considerations that are likely to be taken into account in any new regime, namely, the basis of liability, the parties to be held liable, the claims coverage, and the limitation of liability and financial security. We will look at each in turn.

BASIS OF LIABILITY

There are many ways for liability to be determined. The simplest would be a strict liability regime which would avoid arguments as to whether a party was negligent and to provide legal certainty as adopted by the CLC 92 and Fund Convention.

PARTIES HELD LIABLE

A two or three-tier system with primarily the oil industry responding but extending to contractors and including governmental participation, may be more attractive than a single-tier system, such as OPOL. A new regime should reflect the contractual allocation of responsibility as well as the availability of insurance. Under the International Association of Drilling Contractors pro forma drilling contract, there is a contractual allocation of liability for pollution, between the drilling operator and the field operator/oil company. Although the drilling contractor is 'responsible' for the operation of the drilling unit, pollution claims are limited to pollution originating from above the surface of the sea and the field operator/oil company is responsible for all other pollution-related claims, including pollution from a blowout or uncontrolled flow. Should the limit of liability under a new regime reflect the contractual allocation of responsibility as well as the available insurance for the drilling operator? The risks associated with drilling are different from production, the former being riskier. Often the operator of the FPSO and field operator are the same. Should there be a separate regime for drilling only and should the CLC 92 and Fund Convention expand the definition of the ship to take into account FPSOs and other production and storage units? The latter has not been well received by the shipping community. Certainly there are many issues to be taken into account in considering the parties to be held liable and the extent of that liability.

CLAIMS COVERAGE

It is important to establish the types of losses which a new regime may apply to. This could include clean-up costs, property damage, pure economic loss, environmental damage and death or personal injury. There should be a forum and rules for dispute resolution to ensure speedy resolution of claims. OPOL applies London arbitration and ICC Rules. CLC 92 and IOPC allow for the contracting state where the pollution damage occurred, to have jurisdiction in the event of the IOPC fund's rejection of any claim.

LIMITATION OF LIABILITY AND FINANCIAL SECURITY

Unlimited liability is uninsurable and not all operators have the financial resources of BP. There is a clear argument for high limits, but limits are ultimately what the oil and gas industry and/or its insurer can reasonably afford. Claimants need financial security either via direct access to compulsory insurance, or other means of financial security like a bank guarantee or an established fund. For a new regime to therefore be of practical use, financial security must be considered prior to operations starting. It is important that both insurers and the oil industry are engaged in discussions with the IMO and EU to find a solution to providing a reasonable limitation regime.

There is support for an international legal regime to respond to pollution-related matters from oil and gas exploration and exploitation. The difficulty is in getting a consensus on a workable international regime. The arguments in support of a new regime are compelling.

^ *Montara* blowout