

LEGAL COMMITTEE
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Agenda item 13(i)

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ANY OTHER BUSINESS

- (i) Analysis of liability and compensation issues connected with transboundary pollution damage from offshore exploration and exploitation activities, including a re-examination of the proposed revision of Strategic Direction 7.2**

**Information on the International Conference
on Liability and Compensation Regime for Transboundary Oil
Damage Resulting from Offshore Exploration and Exploitation Activities**

Submitted by Indonesia

SUMMARY

Executive summary: This document contains information on the International Conference on Liability and Compensation Regime for Transboundary Oil Damage Resulting From Offshore Exploration and Exploitation Activities

Strategic direction: 7.2

High-level action: 7.2.2

Planned output: No related provisions

Action to be taken: Paragraph 10

Related documents: LEG 98/13, LEG 98/13/1, LEG 98/14 and C106/D

Background

1 The Legal Committee at its ninety-eighth session, recommended that, pending the approval by the 106th session of the Council and the twenty-seventh session of the Assembly of the amendment to Strategic Direction 7.2, the informal consultative group of interested States and organizations should continue to work together intersessionally, coordinated by Indonesia, to analyse the issue further, also in light of the comments during the sessions. The group communicates by electronic correspondence through mailing list groups under: ind_offshorediscussion_imoleg@yahoo.com.

2 The Council, at its 106th session, requested the Legal Committee to re-examine, at its ninety-ninth session, the proposed revision of Strategic Direction 7.2, concerning liability and compensation issues connected with transboundary pollution damage resulting from offshore oil exploration and exploitation activities, under the "Any other business" item of its agenda; and to report to the Council accordingly.

Progress of the discussion

3 Recalling the importance of the liability and compensation issues connected with transboundary pollution damage resulting from offshore oil exploration and exploitation activities, the Government of Indonesia would like to draw the attention of the Committee to the IMO Secretary-General's emphasis that transboundary damage resulting from offshore oil exploration and exploitation activities creates an eminent risk to the global society.

4 The Government of Indonesia welcomed the active discussion in the informal consultative group. To deepen the discussion on the issue further, the Government of Indonesia held an International Conference on Liability and Compensation Regime for Transboundary Oil Damage Resulting from Offshore Exploration and Exploitation Activities in Bali, Indonesia from 21 to 23 September 2011. The Conference was attended by the relevant stakeholders from eight States, namely Australia, Egypt, Indonesia, Malaysia, Norway, Thailand, Singapore and the United States of America, as well as representatives from the United Nations Environment Programme (UNEP).

5 During the Conference, the participants agreed that the discussion on transboundary damage caused by oil pollution from offshore activities is timely and urgent, due to the potential risks of offshore accidents caused by the emerging technologies that enable offshore drilling activities to be undertaken in deeper water, while posing a threat to the marine environment. In this relation, two recent major incidents are regarded as the main examples.

6 The damage caused by the pollution from offshore activities has had socio-economic repercussions on the environment, among others. There is also a need to have a mechanism to assess and to give evaluation on the damage and the amount of compensable damage.

7 The participants acknowledged the following modalities:

- the obligation and commitment of all States to protect the marine environment. It was agreed that there is a compelling need to address the issue;
- utilization of existing rules applicable to liability and compensation for oil pollution damage from ships as a model to address the issue;
- the best practices of national and regional instruments as a basis to develop an international instrument to regulate the liability and compensation for transboundary pollution damage caused by oil pollution from offshore activities; and
- IMO is the only appropriate and reliable forum to address the issue due to its characteristics, experience and expertise as a specialized agency of the United Nations system.

8 The Conference concluded that:

- all States have an obligation and commitment to protect the marine environment. There is a compelling need to take measures to address the issue;
- some existing rules applicable to regulate liability and compensation for oil pollution from ships can be utilized as a model to address the issue;

- the best practices of national and regional instruments can be used as a reference to develop a workable and achievable international instrument to address the specific issue of transboundary damage caused by oil pollution from offshore activities;
- IMO is a reliable and appropriate forum to address the issue due to its characteristics, experience and expertise as a specialized agency of the UN system;
- relevant stakeholders from industry, associations and oil producers should be included in the discussion;
- in order to optimize the work, all similar and relevant activities in other international organizations including G20 and UNEP should be synergized;
- the discussion at the informal consultative group should continue;
- the discussion should focus on a simple and pragmatic instrument to address a specific issue, rather than to develop an instrument that has an overarching objective. In this regard, it is advisable to specifically address the issue of transboundary impact of pollution from offshore activities; and
- an international regime on liability and compensation for transboundary damage caused by pollution from offshore activities should be established, taking into consideration limits of liability, insurance, compensable damage, compensable mechanism and the relation between existing national, bilateral or regional instruments and the new proposed international instrument.

9 While the discussion to amend Strategic Direction 7.2. is in progress, the Government of Indonesia is planning to hold the second round of discussion to elaborate the principles and technical approach further. Meanwhile, the informal consultative group will simultaneously be utilized as a discussion forum.

Action requested of the Legal Committee

10 The Legal Committee is invited to consider and comment on the information contained in this document, and to express views on the future work of the informal consultative group.

ANNEX

REPORT OF THE INTERNATIONAL CONFERENCE ON LIABILITY AND COMPENSATION REGIME FOR TRANSBOUNDARY OIL DAMAGE RESULTING FROM OFFSHORE EXPLORATION AND EXPLOITATION ACTIVITIES

1 The Government of the Republic of Indonesia held the International Conference on Liability and Compensation Regime for Transboundary Oil Damage Resulting From Offshore Exploration and Exploitation from 21 to 23 September 2011 in Bali, Indonesia.

2 The aim of the Conference was to facilitate the discussion at IMO to analyse the liability and compensation regime for transboundary pollution damage, resulting from offshore oil exploration and exploitation activities.

3 The Conference was opened by the Minister for Transportation and formatted in three segments, attended by States, international organizations, academicians and industries.

The Conference discussed environmental and socio-economic aspects of marine pollution from offshore activities:¹

4 Transboundary pollution caused by oil pollution from offshore exploration and exploitation activities has a socio-economic impact on the environment and on the ecosystem and communities. Due to technological advances, the impact of oil spills to the sea can be predicted, and scientifically, the damages and the loss of the oil spill can be calculated.

5 Asia was indicated as an example that is quite vulnerable to the risk of transboundary pollution caused from offshore activities, due to the rising number of offshore platforms and the potential areas for exploration which are situated in areas near to the sea borders of countries. The potential risks of such spills are to coastal populations, commercial fisheries, marine and coastal tourism, coastal mangroves, migratory species and biodiversity. Therefore it is necessary to plan ahead, not only in order to prepare response measures to deal with such spills, but also to develop international law provisions to ensure fair and prompt compensation.

The Conference concentrated also on the legal aspects of marine pollution from offshore activities:

6 The evolution of the existing international legal instruments regulating marine pollution, including its transboundary impact, namely the International Convention on Civil Liability (CLC 1969 and 1992), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund 1971), 1992 Fund Protocols and 2003 Supplementary Fund. Those instruments regulate pollution from ships and do not cover offshore activities. The Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Seabed Mineral Resources (CLEE) was adopted in 1976, but never achieved the necessary ratifications for entry into force. Regional agreements regulating offshore oil platforms, such as Offshore Pollution Liability Agreement (OPOL) 1974, applies only to States Parties, all in Europe, and does not apply in

¹ Speakers: Ms. Masnellyarti Hilman, Ministry of Environment of Indonesia and Ms. Youna Lyons, Centre for International Law-National University of Singapore.

the Baltic or Mediterranean Seas. OPOL provides for compensation, up to US\$250 million, to be payable by the operator of the rig causing pollution damage with payment guaranteed by the other participating companies.

7 International law in the field of compensation for pollution damage caused by offshore drilling activity is relatively undeveloped, and the need for a coherent international regime governing offshore activity was becoming more apparent. There were precedents establishing State liability for compensation in such circumstances, but in most cases the question of liability was covered by the terms of the licensing agreement between the operator and the coastal State. This left open the position where pollution damage is caused in a neighbouring State to the State in whose territory or EEZ the drilling took place. The proposal for a new convention raised several complex questions that included the notion of "damage compensable" as extending to pure economic loss liberally interpreted and to pure environmental loss. The State was likely to be an insurer of the last resort in cases where the damages suffered exceeded the available insurance coverage of the operator, or indeed the legal limit of liability if applicable. UNEP Guidelines on Environmental Damage² was also referred, which include a duty on signatory States to develop methods of compensation for environmental damage, and urged that this should be part of a global regime.

The ongoing discussion in IMO concerning liability and compensation for oil pollution damage resulting from offshore oil exploration and exploitation was also presented:³

8 Following Indonesia's submission, the Legal Committee, at its ninety-seventh and ninety-eighth sessions, recommended further discussion of the related issues, through an informal consultative group coordinated by Indonesia; it further recommended the addition of a new agenda item to the IMO work programme to discuss the issue of a liability and compensation regime for oil pollution damage resulting from offshore exploration and exploitation activities. The reasons for bringing these issues to the attention of IMO, as well as suggestions on how to follow up on this matter in IMO, were also described.

9 There is an urgency to develop an international instrument regulating the transboundary pollution from offshore activities in the wake of some catastrophic oil spill incidents. The appropriate target people for liability were identified. Limitation of liability was essential in order to obtain the support of the insurance community to the proposed instrument. In most cases involving merchant ships this would be the International Group of P & I Associations (P&I Clubs), but in the case of offshore craft the markets are different. States have a duty to exercise regulatory control over offshore operators and should be prepared to accept legal liability for breach of that duty. The instrument should also contain clear provisions relating to jurisdiction governing the assessment and enforcement of claims, with a requirement for the liability insurers to submit to the same jurisdiction. The States' rights and obligations should be governed by and limited by, the regime.

² Guidelines for the Development of National Legislation on Environmental Liability, Response Action and Compensation for Damage caused by Activities Dangerous to the Environment.

³ Speakers: Mr Bebeb AKN Djundjuran, Ministry of Foreign Affairs of Indonesia and The. Hon. Justice Steven David Rares, Federal Court of Australia.

10 Furthermore the Conference discussed the following:

- (a) identification of the issues
- (i) the discussion on transboundary damage caused by oil pollution from offshore activities is timely and urgent, due to the potential offshore accidents as a risk caused by the emerging technologies which enable offshore drilling activities to be undertaken in deeper water and challenging marine environments;
 - (ii) damage caused by accidents
 - environmental, socio-economic impacts and others;
 - how to assess and to give valuation on the damages; and
 - compensable damages;
 - (iii) whether the transboundary effect of the oil spill is a national, regional or international problem. It is worth considering the relevant existing regime that has encapsulated international instruments, as well as national regulations;
 - (iv) how to analyse and identify compensable damages and a mechanism to ensure prompt, adequate and effective compensation for victims;
 - (v) liability issue of transboundary damage caused by pollution from offshore activities (strict, limited, or unlimited);
 - (vi) the legal obligation of States to cooperate on the establishment of an international liability and compensation regime for damage caused by pollution; and
 - (vii) the specific legal gap on transboundary damage caused by pollution from offshore activities.
- (b) Modalities
- (i) all States have an obligation and commitment to protect the marine environment. There is a compelling need to take measures to address the issue;
 - (ii) some existing rules applicable to regulate oil spill from ships can be utilized as a model to address the issue;
 - (iii) best practices of national and regional instruments can be used as a reference to develop a workable and achievable international instrument to address the specific issue of transboundary damage caused by oil pollution from offshore activities; and
 - (iv) IMO is the reliable and appropriate forum to address the issue due to its characteristics, experience and expertise as a specialized agency of the UN system.

- 11 The way forward was discussed at the Conference, inter alia:
- (i) it is essential to find a workable solution that suits all in addressing the issues of concern;
 - (ii) learning from experience, it is advisable to try to develop a focused, simple and pragmatic instrument in order to address a specific issue, rather than try to develop an instrument that has overarching objectives. In this regard, it is advisable to specifically address the issue of transboundary impact of pollution from offshore activities; and
 - (iii) it is essential to gain maximum support from IMO Member States for this process:
 - to include relevant stakeholders in the discussion, including from industry, association and oil producers;
 - to synergize work in other international fora and organizations including at G20 and UNEP to optimize the work;
 - to continue discussion at the informal consultative group;
 - to continue working at the IMO and provide them with feasible roadmaps and work plans to complete the work; and
 - an international regime on liability and compensation for transboundary damage caused by pollution from offshore activities should be established, taking into the consideration limits of liability, insurance, compensable damage, compensable mechanism and the relation between existing national, bilateral or regional instruments and the new proposed international instrument.
- 12 The Conference agreed to present its results to IMO.
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