Liability and Compensation Regimes: Oil and HNS pollution of the High Seas

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Tropic Seamount: The mountain stands about 3,000m tall: NOC/NERC
Introduction

• **What are “gaps”**
  – Environmental harms uncompensated
  – Deficiencies in current legal instruments

• **Different harm – different remedy?**
  – Ship based activities
    – Maritime law and ‘accidents’ causing harm – tort remedies
    – IMO Maritime Liability Conventions
  – Seabed [and water column] activities
    – Harm as consequence of normal anticipated operations
    – Contract, and administrative, law mechanisms
      – LOSC 1982 Part XI – The Area and the International Seabed Authority (ISA)
      – BBNJ discussions and superadjacent waters
      – State liability

• **LOSC 1982 Part XII Art. 235**
  – State liability
  – Recourse mechanisms – compensation
  – Implement and develop liability rules, including
    – Compulsory insurance or compensation funds
    – Eg, CLC/Fund, HNS, BPC, WRC
  – **Nb difference between**
    – Liability and compensation rules
    – Trust Funds and administrative measures
Marine [Shipping] Pollution Law

International / National Approaches

Prevention Compensation
Public Law Private Law
Criminal Sanctions Civil Remedies

"Disaster Reaction" Syndrome
Torrey Canyon 1967
Compensation Problems and Solutions

• Legal problems
  – Prevention issues (regulation)
  – Compensation issues, eg
    • Who can be sued?
    • Basis of liability and defences
    • Damages recoverable
    • Limited or unlimited liability
    • Financial security (e.g. insurance)
    • Jurisdiction and recognition of judgments

• Legal solutions?
  – National law
  – Voluntary industry liability schemes
  – International Conventions
    • 1969-2010 IMO produced a suite of liability conventions
    • Many similar concepts and drafting
    • But different: State parties, rules, limits of liability
Non-Convention Liability Today?

- **Shen Neng 1 (2010)**
  - 36,575 gt Coal Carrier:
    - Aground on Douglas Shoal, Great Barrier Reef
    - 3-4t bunker spill
  - Remediation costs (Au$130m?)
    - 750-1500 kg scrapings of anti fouling TBT paint
    - Removing reef rubble, and
  - Traditional negligence/nuisance claim
  - 6 years of difficult surveys
  - Settlement in September 2016 (after a week’s trial)
    - Au$35m TBT removal
    - Au$4.3 response costs
    - [LLMC 1996 limit was about Au$35.9m]

- **Montara offshore well disaster (2009)**
  - 74 days - oil and gas flowed into the Timor Sea
  - 2016: [Au$200m?] claim in Australian Federal Court
  - 13,000 seaweed farmers
  - 2017: Indonesia State liability claim?

- **High Seas?**
  - In absence of liability convention
  - Environmental claims may face similar difficulties
    - Eg proof, limitation and time bars
Montara 2009

Areas of isolated patches of slick observed over periods August-November 2009
Pollution Liability Regimes

- **Oil tankers**
  - Civil Liability for Oil Pollution Damage Convention (CLC), 1969, 1992
  - Fund Convention for Compensation for Oil Pollution Damage (Fund), 1971, 1992
  - Supplementary Fund 2003

- **Chemical/dangerous goods carriers**
  - Hazardous and Noxious Substances Convention (HNS), 1996, 2010

- **Ordinary cargo/passage passenger ships [fuel]**
  - Bunker Oil Pollution Damage Convention (BPC) 2001

- **Removal of wreck and cargo**
  - Wreck Removal Convention (WRC) 2007

- **Spills from offshore platforms, FPSOs etc**
  - No existing international regime
  - Voluntary schemes, eg OPOL 1975-2017 (N. Europe)
Features of IMO Liability Conventions

- **Liability system (e.g. CLC 1992)**
  - Strict (no fault) liability of registered shipowner
    - Limited defences for owner
    - Financial limits of liability for owner, eg
      - **CLC**: shipowner maximum liability about US$126 million
      - **HNSC 2010**: shipowner maximum liability about US$140/161 million
  - “Channelling” of liability to registered shipowner only

- **Definition of “pollution damage” claimable**
  - Not an ‘open cheque’ – restricted
  - Clean up, economic loss and actual reinstatements costs

- **Financial security**
  - Compulsory insurance of registered shipowner
  - Direct action against insurer
    - E.g. for insolvent or single ship company
  - Insurance certificate for Port State Control
Features of Liability Conventions

- **One or Two level compensation system?**
  - **CLC** Shipowner liable for first level (up to limits of liability)
  - **IOPC Fund** liable for second level
    - Limit about US$285 million
    - Contributed by cargo importers generally (not States)
    - After-event collection system from all importers worldwide (tax?)
    - 150,000t per year threshold
  - **HNS Fund** Limit about US$1 billion
  - **BPC 2001 and WRC 2007** single level (only “shipowner” liable)
  - LLMC limits

- **Jurisdictional Co-Operation**
  - Pollution damage in State Party’s seas or EEZ
  - No international tribunal
  - National court jurisdiction
  - Recognition and enforcement of judgments

- **Shipowner’s Limitation Fund**

- **Time Bar** - 3/6 years

- **Practicality of IOPC Fund system in operation**
  - Shipowners’ insurers (P&I Clubs) cooperate with 1992 Fund
  - States (claimants and potential contributors)
    - Influence and develop practice
Scope of IMO Liability Conventions

• CLC
  – Art II (a) Convention shall apply exclusively to pollution damage caused … in the territory/territorial sea … or EEZ of Contracting state
  – Art II(b) continues that it applies to “preventive measures wherever taken, to prevent or minimise such damage.”

• Similar provisions in
  – Fund Convention Art 3
  – HNS Convention Art 3
    • [nb Art 3(c) possible wider scope for non-environmental damage, eg injury or property damage]

• Result = non application on high seas, eg
  – *ABT Summer* (1991)
    • 260,000 tonnes heavy crude
    • Sank 900 nm off Angola
    • “Little or no environmental impact”
Scope: What is Beyond the EEZ?

**Castillo de Belver (1983)**
- 252,000 tonnes light crude
- Sank 70 nm from Cape Town
- Most oil drifted to sea
- 1500 gannets oiled
- “Environmental effects were minimal”

**ABT Summer (1991)**
- 260,000 tonnes heavy crude
- Sank 900 nm off Angola
- “Little or no environmental impact”

**Atlantic Empress (1979)**
- 287,000 tonnes light crude
- Sank 300 nm off West Indies
- Largest ship-source spill ever recorded
- “No impact studies were carried out”

**The Kirki (1991)**
- Bow breaks off in heavy weather
Pollution from Offshore Platforms

• **Montara** spill 2009
• Indonesian proposals at IMO: 2010
  – Convention to create liabilities for spills
• Competency of IMO
  – IMO to focus beyond shipping?
    • To “liability and compensation issues connected with damage resulting from offshore oil exploration and exploitation activities”
  – 2011 objections to new multilateral convention
    • IMO Convention 1948 references to effects of “shipping on the marine environment”
  – 2012 impasse
    • To “directly establish States involved in an international convention”
    • Develop “guidance to assist States interested in pursuing bilateral or regional arrangements or agreements on liability and compensation issues”
    • “No compelling need to develop an international convention”
• 2015-17 Indonesia and Denmark
  • Draft guidance for bilateral/regional arrangements or agreements on liability and compensation issues
  • Still opposition – even to this modest move
• Regional voluntary schemes?
  – Offshore Pollution Liability Agreement (OPOL) [now 2016]
  • Members accept strict liability for
    • Pollution damage to US$125 million
    • Remedial measures to US$125 million (and sharing)
BBNJ and Liability and Compensation

- BBNJ discussions 2011-
  - Comprehensive global regime or close gaps?
- UNGA 2015
  - Develop an international legally binding instrument
  - Preparatory Committee 2016-
  - Chair’s 2017 “non-paper”: Elements of a draft text
    - Polluter pays principle
    - Part VI B Rehabilitation / Contingency Fund
    - Part X State Liability?
      - [cf ILC draft articles on State Responsibility, eg Art 36]
LOSC Part XI: Developments in the Area

- State liability issues: Art 139 and control
  - ITLOS, Advisory Opinion Case No. 17 2011
    - Due diligence rather than strict liability
- ISA to adopt rules to protect the marine environment from activities in Area: Art 145
  - ISA refers to the whole body as the “Mining Code”
- 2016 discussion paper on “enforcement and liability issues in the Area” [mostly about EIAs?]
- Working draft of exploitation regulations: July 2016
  - Part V “Financial terms of an Exploitation Contract”
    - “Performance Guarantee” “or Security in respect of the performance of [contractor] obligations, undertakings or conditions”
      - “Trust fund contributions etc. as these concepts and the payment mechanism itself are developed further
LOSC Part XI: Developments in the Area

• Discussion Paper on Development of "Environmental Regulations": January 2017
  – “Tentative Working Draft” to fulfil obligations under Art 145
  – Difficulty of defining “serious harm”
    • 2015 framework: restorative/rehabilitative obligation on contractors?
    • “Response measures may not always be technically feasible or economically reasonable”
    • Restoration was not considered technically feasible
  – Part XIII: Compensatory measures
    • Through “Funds” (and perhaps offsets – undefined)
    • “Environmental Liability Trust Fund”
      – Financed from percentage of fees and penalties?
      – Cf “Seabed Mining Sustainability Fund” (LTC 2015 proposal)
New “High Seas Protocols” for IMO Regimes?

• Extend existing IMO Conventions to High Seas?
  – Politics and drafting
  – Would there be fundamental LOSC objections?
    • Eg compulsory insurance for high seas navigation?

• Key Issues?
  – Who can claim?
  – Who is liable?
  – Damage definition?
  – Financial security?
  – Jurisdiction?

• Evaluation?
  – Not holistic: replicates existing piecemeal approach
  – Would there be widespread ratifications?
    • Fears about remediation costs?
    • Need for 2nd tier Funds to operate
    • Particular risks with an HNSC High Seas Protocol
  – At best an interim stop gap?
New Maritime Environmental High Seas Liability Convention?

• Create new universal maritime environmental liability convention for high seas?
  – Attempt to unify all separate IMO regimes [for high seas?]
  – Politics and drafting again

• Key Issues?
  – Scope?
  – Who can claim?
  – Who is liable?
  – Damage definition?
  – Method of financing
    • Financial security, or
    • Environmental Trust Fund?
  – Jurisdiction?

• Evaluation?
  – Industry concerns, eg different insurers and funders
  – Who would ratify – HNS difficulties again
  – Overlap with ISA could exclude Platforms etc
Conclusions

• Compensation solutions depend on wider discussions
  – What is the liability and compensation gap?
    • State liability and remedies in domestic law
  – Form of binding instrument
    • Conventions or
    • Implementing Agreement under LOSC
  – Un body taking lead
    • IMO/UNEP/FAO?
    • BBNJ: UNGA approved Preparatory Committee has the floor!
  – 2016-17 ISA developments very significant
    • Administrative control over seabed/column operations preferable to compensation regime
      – Environmental [Liability] Trust Fund is most flexible idea
      – Can it be financed, eg with advance contributions not post incident?
      – Can IOPC Funds provide any guidance? NB note fundamentally different, eg admissibility
    • Need to expand ISA’s role to cover environmental protection of water column
      – Trust fund to go beyond seabed mineral extraction, eg BBNJ issues in column
      – Build in safeguards eg for costs
      – Make ITLOS default for seabed and water column

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Conclusions

• If ISA develops administrative regime
  – It will be difficult for regime to apply to shipping
  – No contractual or consensual basis
• So will retain pragmatic difference between
  – Shipping transportation activities [accidents], and
  – Seabed/column operations [operational events]
• What of shipping environmental gaps?
  – Is oil really a major problem: number of incidents and effects?
  – HNS and wreck [cargo] removal is really the major threat from shipping
  – Environmental consequences of HNS cargo?
• Wreck Removal Convention 2007
  – Restricted to EEZ
  – LOS disputes about power to raise wrecks under high seas?
  – What of cargo raising?
  – Costs limited by insurance cover
    • Unlimited liability of single ship company shipowner is meaningless
• Give ISA WRC powers?
  – Protect the common heritage of mankind
  – Some shipowner liability, but with safeguards?
  – Excess recoverable from Environmental [Liability] Trust Fund?
  – Form of Instrument?
    • Presumably align with any increase of ISA competence over water column