

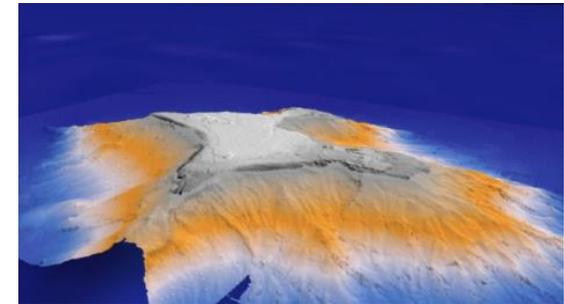
High Seas Governance: Gaps and Challenges

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

Public Law

Criminal Sanctions

Compensation

Private Law

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**
 - [Convention on **L**imitation of **L**iability for **M**aritime **C**laims 1976/1996]
 - **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

ANNEX A1 Montara Well Observed Oil Extent - Montara Well Head Incident

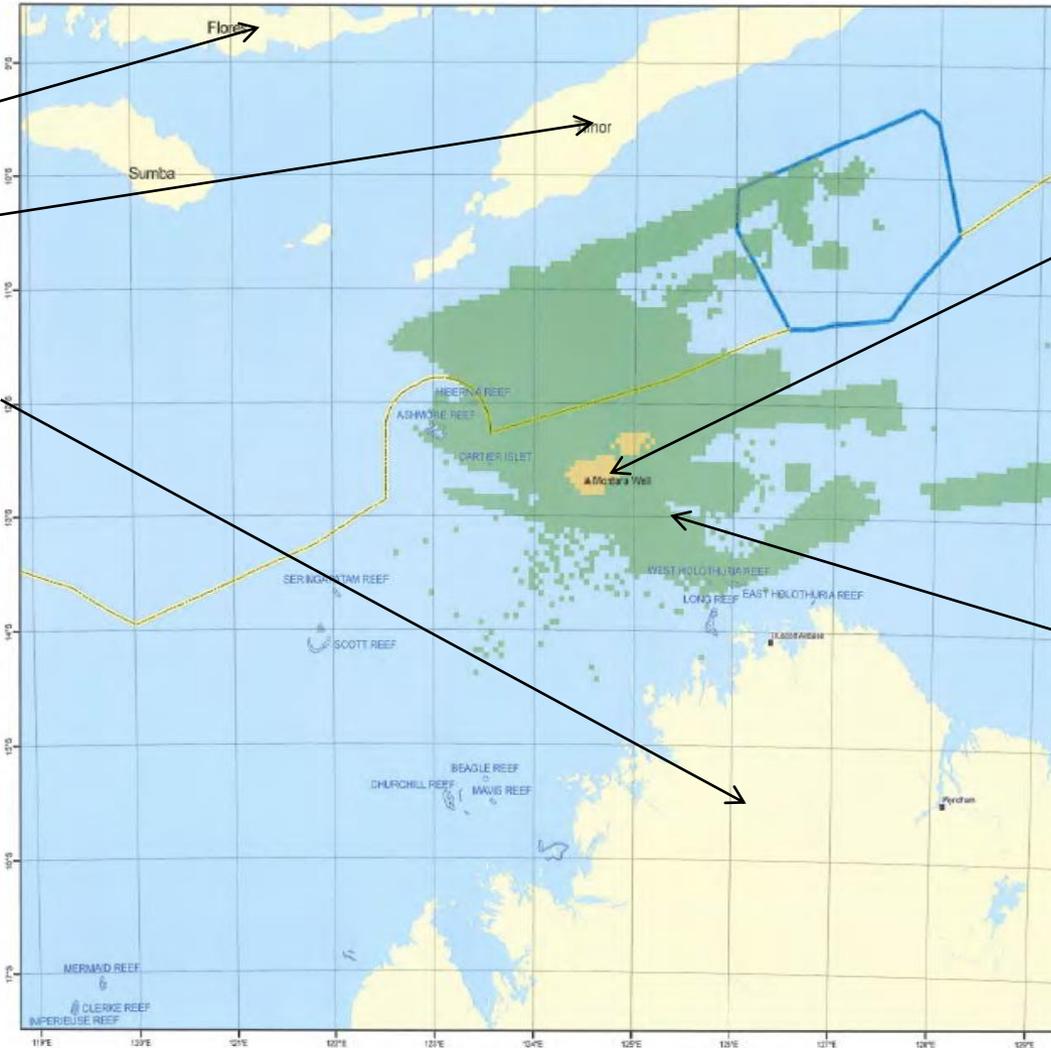
Flores

Timor

Australia

Montara Well

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**
 - **Hazardous waste cargoes: Basel Convention 1989/Protocol 1999**
- **Ordinary cargo/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
- Contribute
- After-even
- 150,000t p

- **HNS Fund** Limit
- **BPC 2001** and
 - LLMC limits

- Jurisdictional C
 - Pollution dama
 - No internationa
 - Recognition an
 - Shipowner's

- Time Bar - 3/6
- Practicality of I
 - Shipowners' in
 - States (claiman

Cameroon	1 748 429	0.12%
Ghana	1 283 141	0.09%
Papua New Guinea	1 235 233	0.08%
Mauritius	659 851	0.04%
Cyprus	646 153	0.04%
Tanzania	512 113	0.03%
Algeria	489 525	0.03%
Colombia	274 917	0.02%
Barbados	226 048	0.02%

Total	1 477 428 499	100.00%
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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”



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Scope: What is Beyond the EEZ?



***Castillo de Biver* (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”

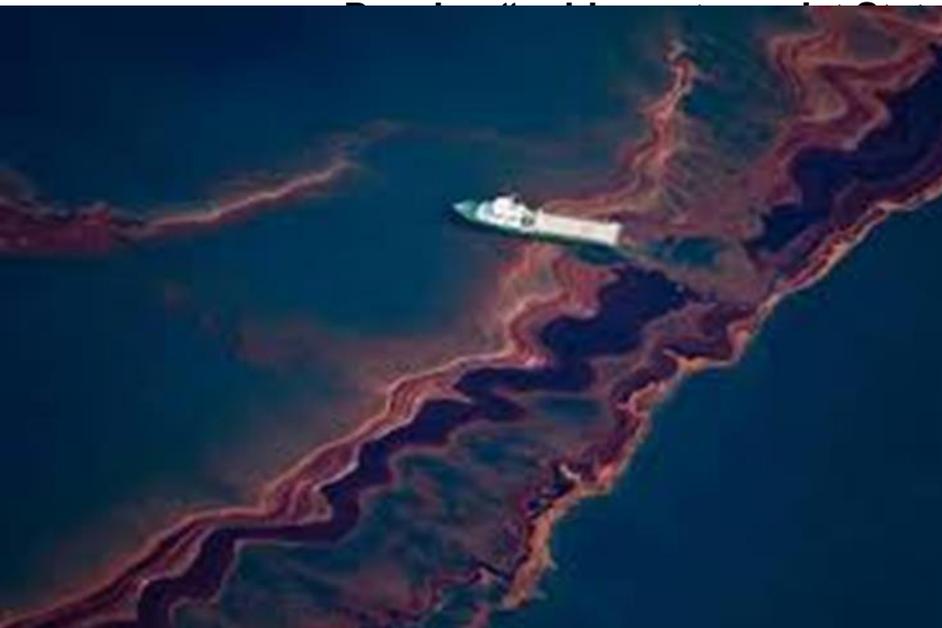


***The Kirki* (1991)**

- Bow breaks off in heavy weather

Pollution from Offshore Platforms

- **Montara spill 2009**
- **Indonesian proposals at IMO: 2011**
 - Convention to create liabilities for spill
- **Competency of IMO**
 - IMO to focus beyond shipping?
 - To “liability and compensation issue for damage resulting from offshore oil and gas operations”
 - 2011 objections to new multilateral convention
 - IMO Convention 1948 references to shipping
 - 2012 impasse



s i

an international convention”

al arrangements or agreements on liability and

est move

ment (OPOL) [now 2016]

on

lion (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

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