Licence to Spill? Developing a Framework for International Liability and Compensation for Transboundary Pollution Arising from Offshore Drilling Activities

by

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Abstract

As new drilling technology enables exploitation of more and more previously inaccessible areas, there is renewed concern over the risk of catastrophic oil spills. Drilling in deeper waters increases the difficulties of remedying a blowout. Thus, there is a greater risk of extensive oil pollution damage. The Montara and Deepwater Horizon incidents illustrate the potential damage that catastrophic oil spills from offshore platforms may cause. Under the no-harm rule, states have an obligation of due diligence to ensure that offshore drilling activities within their jurisdiction do not cause harm to the environment of another state. However, even if a state has exercised its obligation of due diligence under the no-harm rule, a catastrophic oil spill may still occur. Under such circumstances, there is a gap in the law where liability and compensation is concerned. Hence, there is a need for an international civil liability convention for offshore drilling activities.
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Introduction

As new drilling technology enables exploitation of more and more previously inaccessible areas, there is renewed concern over the risk of catastrophic oil spills.\(^1\) Drilling in deeper waters increases the difficulties of remediating a blowout.\(^2\) As a result, there is a greater risk of extensive oil pollution damage. The Montara and Deepwater Horizon incidents illustrate the potential damage that catastrophic oil spills from offshore platforms may cause.

The Montara oil spill occurred in 2009 following a blowout from a wellhead platform. The incident, which released between 400 to 1500 barrels of oil per day into the Timor Sea for up to ten weeks,\(^3\) resulted in transboundary oil pollution in Indonesian and Timor Leste waters.\(^4\) Reports by Indonesian universities found that fishing and seaweed communities in the East Nusa Tenggara region of Indonesia have lost more than $1.5 billion every year since the spill.\(^5\) Following the spill, the Indonesian government approached PTTEP Australasia (PTTEP AA), the owner and operator of the Montara Development Project and subsidiary of PTT Exploration and Production (PTTEP), seeking US$2.4 billion in compensation on the basis that the fishing grounds in the Timor Sea were polluted, catches decreased significantly as a result of the spill, and the livelihoods of inshore seaweed fishermen were destroyed. This claim was rejected by PTTEP on the basis that there was “no verifiable scientific evidence” to support the claim for compensation.\(^6\) PTTEP agreed to sign a memorandum of understanding (MOU) to provide compensation that is estimated to reach US$3 million. However, the signing of the MOU has

\(^1\) Sylvain Serbutoviez, *Panorama 2012 - Offshore hydrocarbons*, online: IFP Energies nouvelles <http://www.ifpenergiesnouvelles.com/>
\(^2\) Julien Rochette et al., *Seeing Beyond The Horizon for Deepwater Oil and Gas: Strengthening the International Regulation of Offshore Exploration and Exploitation*, online: Institute for Sustainable Development and International Relations <http://www.iddri.org/>
\(^4\) *Ibid* at 26
\(^6\) De Smedt Kristel et al., *Civil Liability and Financial Security for Offshore Oil and Gas Activities*, online: European Commission Joint Research Centre <http://euoag.jrc.ec.europa.eu/node/79 > at 54
been postponed on several occasions.\(^7\) In the five years since the incident, no compensation for losses suffered by Indonesia as a result of the Montara oil spill has been made.\(^8\) The Montara incident demonstrates that, in the absence of an agreement relating to liability and compensation for transboundary damage, various hurdles including evidentiary difficulties frustrate legitimate efforts to claim compensation for damages.\(^9\)

The Deepwater Horizon incident, which occurred in 2010, involved the sinking of an exploration platform in the Gulf of Mexico following an explosion and fire caused by the malfunctioning of a blowout preventer safety system. Approximately five million barrels of oil were released into the Gulf of Mexico as a result of the disaster.\(^10\) In 2014, BP reportedly spent a total of US$26 billion on clean up, fines, and compensation for the Deepwater Horizon Spill.\(^11\) An investigation launched by the United States National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling identified four key observations. Firstly, the oil spill could be seen as an embodiment of a culture of complacency where, in the absence of accidents, investment to keep pace with the increased risks associated with the industry’s venture into more challenging environments was lacking.\(^12\) Secondly, there was a lack of consistent commitment to safety by the industry at all levels of the organization, beginning with the organizational culture set by the highest levels of management.\(^13\) Thirdly, there was insufficient federal regulation and oversight on the United States government’s part.\(^14\) Lastly, the preparedness to respond to an oil spill of the

\(^7\) *Ibid*


\(^9\) De Smedt Kristel, *supra* note 6 at 54


\(^11\) Jemma Kelly, “Compensation battle rages four years after BP’s U.S. oil spill”, Reuters (18 April 2014) online: Reuters <http://www.reuters.com>

\(^12\) De Smedt Kristel, *supra* note 6 at 62

\(^13\) *Ibid*

\(^14\) *Ibid*
magnitude in the Deepwater Horizon incident was gravely inadequate.\textsuperscript{15} The Deepwater Horizon was drilling 49 miles off the coast of Louisiana, a location where transboundary harm was unlikely to occur. Nonetheless, the Deepwater Horizon incident highlights the immense risk associated with deepwater drilling and the magnitude of damage that can be caused by an oil spill from offshore drilling activities.

Hence, offshore drilling activities that regularly take place within the national jurisdiction of a state can have the inadvertent effect of causing transboundary harm due to the potential magnitude of harm associated with an accidental oil spill.

The following are areas where there is a perceived risk of transboundary oil pollution. In Canada, there have been proposals from oil companies seeking to drill in the Arctic in the Beaufort Sea. If approved, a blowout accident in this area has a chance of causing transboundary harm in Alaska, United States and in Russia.\textsuperscript{16} In the Caspian Sea, where there is booming exploitation of oil and gas resources, transboundary pollution is already an issue by the region.\textsuperscript{17} In the South China Sea, risks of transboundary pollution are currently confined to boundaries between contiguous states.\textsuperscript{18} Due to the geographical characteristics of the respective borders, pollution from offshore platforms located close to maritime boundaries are likely to involve more than two states.\textsuperscript{19} Although the transboundary effects of offshore drilling activities within the national jurisdiction of a state are regional, it remains a problem that exists around the globe.

In the absence of any regime on liability and compensation for transboundary harm, difficulties may exist in obtaining compensation for such harm by victim states and its nationals. Given the magnitude of damage and potential losses that may result, it is important that a system of

\textsuperscript{15} Ibid
\textsuperscript{16} CBC, “Arctic oil spills likely to spread across borders: study”, \textit{CBC News} (25 July 2014) online: <http://www.cbc.ca>
\textsuperscript{17} UNEP, \textit{UNEP in the Caspian}, online: UNEP <http://www.unep.org>
\textsuperscript{18} Youna Lyons, “Transboundary Pollution from Offshore Oil and Gas Activities in the Seas of Southeast Asia” in Simon Marsden & Robin Varner, eds, \textit{Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives} (Farnham, England: Ashgate Publishing 2012) at 196
\textsuperscript{19} Ibid
compensation, which effectively allows victims of transboundary harm to obtain prompt and adequate compensation, be made available.

Under the United Nations Convention on the Law of the Sea (UNCLOS), states have a legal obligation to ensure prompt and adequate compensation. Article 235(2) of the UNCLOS provides that states have an obligation to ensure that recourse is available for prompt and adequate compensation in respect of damage caused by pollution of the marine environment by persons under their jurisdiction.\textsuperscript{20} In addition to Article 235(2), Article 235(3) calls on states to cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment and compensation of damage and the development of criteria and procedures for payment of adequate compensation.\textsuperscript{21}

Based on these observations, this paper seeks to argue for the development of an international civil liability and compensation regime. Given that offshore drilling activities are largely conducted by private actors, a civil liability approach is desirable for two reasons. First, it is able to hold private actors to higher standards of liability as opposed to the traditional standard of due diligence under the law of state responsibility. Second, this approach is consistent with the polluter-pays principle. While the polluter-pays principle may not be a legal rule, it is an approach that has been used to guide the development of existing international civil liability regimes. The polluter-pays principle is also evidenced in Principle 16 of the Rio Declaration.\textsuperscript{22} The role of the polluter-pays principle will be discussed further under Section I of this paper.

The scope of this paper is limited to damage caused to the marine environment of another state and excludes discussions relating to pollution damage caused to the global marine environment. This distinction is made on the basis of the status of the global marine environment as a common area. While the global marine environment is also subject to environmental protection under Article 194 of UNCLOS,\textsuperscript{23} there is no clear provision on enforcement for breach of the \textit{erga alia}.

\textsuperscript{20} United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, Article 235(2) [UNCLOS]
\textsuperscript{21} Ibid art 235(3)
\textsuperscript{23} UNCLOS, \textit{supra} note 20, Article 87
omnes obligation to protect the marine environment of the high seas. Moreover, there is no clear state practice or indication under international law in support of the view that states have standing to hold violators of erga omnes norms accountable for breach of those norms.24 Furthermore, none of the existing liability convention for marine pollution applies to damage caused to the high seas environment.25 This can be taken as an indication of the contentious nature of extending liability and compensation regimes to the global marine commons. Given the extensive and complex issues associated with pollution of the global marine environment, I have chosen to focus my discussion on transboundary pollution occurring within the territorial jurisdiction of states.

This paper is divided into three sections. The first section provides an overview of the law of state responsibility in an effort to reveal its limitations in addressing issues of liability and compensation for lawful, but hazardous activities. In light of these inherent limitations, I will then discuss the polluter-pays principle to show how it should be used as a conceptual framework for the development of an international civil liability regime and the desirability of such an approach. The second section will involve an examination of the existing civil liability regimes governing oil pollution arising from the carriage of oil in the shipping industry. I will provide an overview of the structure of the civil liability regimes in this area. I will also look at previous attempts and existing regimes governing oil pollution from offshore activities. In examining the existing regimes, I will examine the history of the negotiations so as to illustrate the rationale behind the structure of the regimes. Based on the analysis in the second section, the third section will provide an analysis of key features that should be included in a regime governing civil liability and compensation for oil pollution damage arising from offshore activities.

25 Ibid at 559
1 The Law of State Responsibility, The Polluter Pays Principle & Civil Liability Regimes

1.1 The Law of State Responsibility and The Duty to Prevent Transboundary Harm

The concept of state liability is distinct from that of state responsibility. The distinction between state liability and state responsibility is reflected in the International Law Commission’s (ILC) work on codifying the customary law of state responsibility. The ILC recognized the difficulty of conflating issues relating to state responsibility for internationally wrongful acts and the obligation to make good any injurious consequences arising from activities not prohibited by international law. In light of this, the ILC decided to limit state responsibility to the consequences of internationally wrongful acts alone and deal with the issue of liability for injurious consequences arising from activities not prohibited by international law separately.

The ILC draft articles on state responsibility envisages an obligation on the responsible state to make full reparation for the injury caused by an international wrongful act. This can come in the form of restitution or compensation, either independently or in combination. An international wrongful act is an act or omission that is attributable to the state under international law and constitutes a breach of a state’s international obligation. Therefore, breach of international environment law would, in principle, give rise to state responsibility.

On the other hand, ‘liability’ generally refers to the duty to compensate for damage under the concept of restitution in integram. In international law, liability is generally understood as the

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duty to compensate for harm arising out of activities not prohibited by international law.\textsuperscript{31} International liability may come in the form of state liability, where the duty to compensate for harm arising from such activities is imposed on states or in the form of civil liability, where the duty to compensate for harm is imposed on private actors.

In the context of offshore drilling activities, there is no international agreement that lays out the specific obligations of states. Instead, offshore drilling activities are governed by the no-harm rule under customary international law and the general rules provided by UNCLOS.

The no-harm rule essentially provides that a state has an obligation under international law to ensure that activities within its jurisdiction do not cause significant damage to the environment of other states or areas beyond its national jurisdiction.\textsuperscript{32} The no-harm rule has its origins in the \textit{Trail Smelter Arbitration} case, where the Tribunal held that,

\begin{quote}
Under the principles of international law…no State has the right to use or permit the use of its territory in such a manner as to cause injury …to the territory of another of another or the properties therein, where the case is of serious consequence and the injury is established by clear and convincing evidence.\textsuperscript{33}
\end{quote}

The no-harm rule was also subsequently employed in other cases beyond the context of international environmental law such as the \textit{Corfu Channel} case. The International Court of Justice (ICJ), in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, confirmed that the no-harm rule was a rule of customary international law. The \textit{Pulp Mills} case decided by the ICJ in 2010 reiterated its views in the \textit{Corfu Channel} case and the \textit{Nuclear Weapons Advisory Opinion}.\textsuperscript{34} Thus, within the context of offshore drilling, states have an obligation under customary international law to ensure that drilling activities do not cause significant transboundary harm to the environment of other states or areas beyond its national jurisdiction.


\textsuperscript{33} \textit{Trail Smelter Case (United States v Canada)} (1941) 3 RIAA 1905 at 1964

\textsuperscript{34} \textit{Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)} Order of 20 April 2010, [2010] ICJ Rep 14 at 45 – 47 [\textit{Pulp Mills case}]
Apart from customary international law, UNCLOS contains provisions that specifically address offshore drilling activities. Article 77 recognizes the sovereign right of coastal states to exploit natural resources in its continental shelf. However, this right is qualified by Article 193, which stipulates that states have a duty to protect and preserve the marine environment. Pollution from offshore platforms are specifically covered by Article 194(3), which binds states to “minimize to the fullest extent pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil.” In addition to the duty to minimize pollution, Article 194(2) addresses the concern of transboundary harm by providing that,

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

These provisions under UNCLOS could be viewed as a codification of the customary no-harm rule and its application in the context of the marine environment. With regard to offshore drilling, as the initial owners of the resource base, states are responsible for establishing policies in the development of its resources. In developing these policies, states must take into account the no-harm rule under customary international law and UNCLOS. Where transboundary oil pollution does arise from a failure of the state to take the necessary preventive measures and is found to be in breach of its international obligations, it could be held responsible to make the necessary reparations under international law.

Nonetheless, the requirement for a breach of international law as a basis for state responsibility poses a challenge in securing compensation for transboundary harm arising from offshore drilling activities. This is largely linked to the standard of due diligence that states have to

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35 UNCLOS, supra note 20, Article 77
36 Ibid, Article 193
37 Ibid, Article 194(3)(c)
38 Ibid, Article 194(2)
exercise in order to demonstrate compliance with the no-harm rule.\textsuperscript{40}

1.1.1 The Due Diligence Obligation

In the \textit{Pulp Mills case}, the ICJ pointed out that states have an obligation of due diligence under the customary no-harm rule.\textsuperscript{41} Consequently, the ICJ held that the obligation imposed on the Parties to adopt rules and measures to ‘protect and preserve the aquatic environment and, in particular, to prevent its pollution’ was an obligation to act with due diligence.\textsuperscript{42} The due diligence obligation entailed:

\textellipsis not only the “adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.” \textsuperscript{43}

In its advisory opinion on \textit{Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area},\textsuperscript{44} the International Tribunal on the Law of the Sea (ITLOS) discussed the obligation to prevent transboundary harm under the UNCLOS framework. ITLOS is an independent judicial body established by UNCLOS to adjudicate disputes related to the interpretation and application of the Convention.\textsuperscript{45} The Tribunal held that the obligation “to ensure” was an obligation to exercise due diligence, citing Article 194(2) as an example.\textsuperscript{46} It provided that:

The expression “to ensure” is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law.

\begin{flushright}
\footnotesize
\textsuperscript{40} Fitzmaurice, \textit{supra} note 28 at 1014
\textsuperscript{41} \textit{Supra} note 34 para 101
\textsuperscript{42} \textit{Ibid}, para 197
\textsuperscript{43} \textit{Ibid}
\textsuperscript{44} \textit{Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber) Advisory Opinion [2011] ITLOS Reports 2011 10}
\textsuperscript{45} \textit{The Tribunal}, online: International Tribunal for the Law Of The Sea <https://www.itlos.org>
\textsuperscript{46} \textit{Supra} note 44 at para 112 - 114
\end{flushright}
An example may be found in article 194, paragraph 2 of the Convention which reads: “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment.\textsuperscript{47}

The ICJ decision in \textit{Pulp Mills} and the ITLOS advisory opinion show that while there are clear obligations imposed on states under both customary international law and UNCLOS, the obligations are merely obligations to exercise due diligence. Where a state fails to exercise its obligations under UNCLOS or customary international law, it could be found liable under the law of state responsibility for damage that is attributable to private persons of entities within its jurisdiction.

On the surface, the conceptual framework under the law of state responsibility may seem straightforward. Where a state fails to exercise due diligence and the failure to do so results in transboundary harm, it would be responsible for that damage. Nevertheless, from a practical standpoint, the standard of due diligence creates a variety of evidentiary difficulties – causality being one of them.\textsuperscript{48} Moreover, the scarcity of international law practice, judicial or otherwise, on the definition of the standard of care required by states poses difficulties in developing the law of state responsibility into a satisfactory framework for environmental protection.\textsuperscript{49} This is true for the offshore industry where there is an absence of a global convention setting out internationally acceptable regulatory standards.

Currently, there is a disparity of national legislation regulating the offshore industry with some legislation addressing every stage of the platform’s lifecycle and others restricting regulations to the production stage.\textsuperscript{50} This may pose a challenge in establishing acceptable international standards which can be used to define the content of due diligence in the context of offshore drilling activities.\textsuperscript{51} As a result, there may be difficulties in determining whether a state has done enough to fulfil its obligation of due diligence.

\begin{itemize}
\item \textsuperscript{47} \textit{Ibid} at para 112-113
\item \textsuperscript{48} Fitzmaurice, supra note 28 at 1014
\item \textsuperscript{49} \textit{Ibid} at 1013
\item \textsuperscript{50} Rochette, supra note 2 at 27
\item \textsuperscript{51} AE Boyle, "Globalising Environmental Liability: The Interplay of National and International Law" (2005) 17: 1 J Envtl L 3 at 7
\end{itemize}
In fact, in its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS recognized that the content of due diligence is not easily identifiable. The Tribunal commented that:

The content of “due diligence” obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that “due diligence” is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough, in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.

Hence, proving that a state has not complied with its due diligence obligations may be a challenge in itself given the uncertain nature of the obligation.

Furthermore, the due diligence obligation can be criticized as setting a relatively low bar to escape responsibility for transboundary harm in light of the hazardous nature of offshore drilling activities where recovery for damages arising from events that are unforeseeable or unavoidable using reasonable diligence would otherwise be excluded. States only have to demonstrate that the due diligence obligation has been complied with to escape responsibility for transboundary harm. Given the subjective nature of the obligation and the lack of clear indicators of international standards, it is arguable that the due diligence obligation can be easily satisfied. As such, oil spills may occur notwithstanding compliance with the loosely defined due diligence obligation.

The gap in this area of international law was also recognized by the ILC in its work, *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities* in 2004. The ILC’s draft principles on the allocation of loss were developed in light of the recognition that transboundary harm could occur notwithstanding the fulfillment of a

52 *Supra* note 44

53 *Ibid* at para 117

54 *Boyle, supra* note 51

state’s duty to prevent such harm.\textsuperscript{56} This recognition is reflected in the third preambular paragraph of the draft principles, which states, “Aware that incidents involving hazardous activities may occur despite the relevant State with its obligations concerning prevention of transboundary harm from hazardous activities.”\textsuperscript{57}

The draft principles provide for international liability for harm caused even where a state has fulfilled its duties under international law.\textsuperscript{58} The draft principles were drawn up with the intention of providing appropriate guidance to states in respect of hazardous activities not covered by specific agreements.\textsuperscript{59} It envisages the allocation of loss arising from the hazardous activity among the different actors involved in the operations such as those authorizing or managing or benefiting from the hazardous activity.\textsuperscript{60}

The work of the ILC in this area lends support to the view that the law of state responsibility is unable to provide a satisfactory conceptual framework to ensure that victims of transboundary harm are promptly and adequately compensated. In light of the limited reach of state responsibility, the alternative option would be to allocate liability to the polluter in line with the polluter-pays principle.

1.2 The Polluter-Pays Principle: Origins and Rationale of the Principle and Its Status in International Law

The polluter-pays principle has its origins in the Organisation for Economic Cooperation and Development’s (OECD) 1972 “Guiding Principles Concerning International Economic Aspects of Environmental Policies”.\textsuperscript{61} In its conception, it was an economic principle that was fashioned


\textsuperscript{57} Draft principles on the allocation of loss, supra note 54 at 114

\textsuperscript{58} ILC report on the work of its fifty-fourth session, supra note 56 at para 445

\textsuperscript{59} Draft principles on the allocation of loss, supra note 54 at 111, para 5

\textsuperscript{60} ILC report on the work of its fifty-fourth session, supra note 56 at para 445

to allocate the costs of pollution prevention and control measures to promote rational use of scarce environmental resources and to avoid distortions in international trade and investment.\textsuperscript{62} The polluter-pays principle calls for polluters to bear the expenses of carrying out pollution prevention and control measures decided by public authorities to ensure that the environment is in an acceptable state.\textsuperscript{63} De Sadeleer explains the rationale behind the polluter-pays principle as an “economic rule of cost allocation whose source lies precisely in the theory of externalities.”\textsuperscript{64} The absence of this mechanism would leave the general community to bear the costs of environmental damage either through taxation to fund governmental clean-up or by reduced environmental quality.\textsuperscript{65} Prior to the development of this principle, the costs of environmental harm were not perceived as costs that needed to be internalized since the environment was deemed to be a free good.\textsuperscript{66}

The polluter-pays principle is neither a legal rule nor a legal principle that establishes liability for compensation for damage caused by pollution.\textsuperscript{67} While the polluter-pays principle can be regarded as having received widespread acceptance as an approach of allocating the costs of pollution, it has been given various meanings depending on the specific context.\textsuperscript{68} Thus, notwithstanding its appearance under Principle 16 of the Rio Declaration, which indicates a general acceptance of the principle, it is unlikely that the principle has formed customary international law.

As a matter of economic policy, it attributes the cost of preventing or making good such damage

\begin{itemize}
\item \textsuperscript{62} OECD, \textit{Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies}, C(72)128 (1972)
\item \textsuperscript{63} Ibid
\item \textsuperscript{64} Nicholas de Sadeleer, \textit{Environmental Principles: From Political Slogans to Legal Rules}, translated by Susan Leubusher (New York: Oxford University Press, 2002) at 21.
\item \textsuperscript{65} Boris N. Mamlyuk, “Analyzing the Polluter Pays Principle Through Law and Economics” (2009-2010) 18 SE Envtl LJ 39 at 42
\item \textsuperscript{66} Ibid
\item \textsuperscript{67} OECD, \textit{The Polluter-Pays Principle: Definition, Analysis, Implementation} (Paris: Organisation for Economic Co-operation and Development 1975) at 6
\item \textsuperscript{68} Mamlyuk, \textit{supra} note 65 at 41
\end{itemize}
to the polluter. As a result, compensation measures are not contrary to the polluter-pays principle. Nonetheless, it is arguable that, even so, compensation measures are not fully in line with the polluter-pays principle. Legal compensation in the context of transboundary harm is based on the notion of restitution. On the other hand, the polluter-pays principle is based on cost-internalization. While there is some force to the argument above, the polluter-pays principle provides an alternative means of achieving the same effect by ensuring that the cost of pollution is not borne by innocent states and their nationals. Hence, from a policy perspective, it provides an alternative justification for the imposition of liability and the duty to compensate on polluters. The polluter-pays principle could therefore be used as a conceptual framework to design a liability regime.

1.2.1 The Polluter-Pays Principle as a Conceptual Framework for a Liability Regime

A major point of contention with accidental pollution from offshore activities relates to the fact that accidental oil spills may occur notwithstanding compliance with safety standards. Thus, there is tension between the offshore operator’s reliance on the prescribed standards as the legal measure of its duty of care and the legitimate interest of the innocent party to live in an environment free of pollution damage caused by the operator’s activities. The choice to resolve the tension in favour of either side is essentially a matter of public policy. At this juncture, the polluter-pays principle provides an equitable solution based on economic reasoning.

The law of state responsibility is concerned with legal rights and duties under international law. The polluter-pays principle, as an economic principle, has the advantage of assigning responsibility, not based on moral or legal judgments, but on the basis of ensuring efficient cost-allocation. This ensures that market prices of a good reflect the true cost of the economic activity, thus eliminating the problem of environmental free riders. As such, from an economic perspective, it is less contentious that polluters should bear the cost of pollution damage

69 ibid at 67
70 OECD, The Polluter Pays Principle, supra note 67
notwithstanding their compliance with the prescribed standards as the goal of the polluter-pays principle is ultimately one of cost internalization. Hence, liability to pay for the cost of pollution damage caused by accidental oil spills from offshore drilling arises not as a matter of legal principle, but rather one of economic principle.

The role of the polluter-pays principle can be seen as an approach that enhances the balance between territorial sovereignty and territorial integrity, a balance that international law has arguably struggled to achieve under the law of state responsibility. Notwithstanding the canonical status of the no-harm rule in international environmental law, the value of the rule as a means of protecting territorial integrity is circumscribed by the operation of the law of state responsibility.

Firstly, as mentioned earlier, the law of state responsibility operates on the basis that there is a breach of international law. In the absence of such a breach, there would be no liability under the law of state responsibility. Secondly, even if there is potential liability under the law of state responsibility, Bodansky notes that the Trail Smelter case remains the only case where the failure to prevent transboundary pollution resulted in a state being found legally responsible. Other major transboundary pollution incidents such as the Chernobyl and Sandoz accidents did not lead to legal claims by victim states. Rather, the preferred approach of states has been to reach a mutually satisfactory outcome through inter-state negotiations or through other institutional arrangements.

The importance of a framework for international compensation and liability for transboundary harm was recognized by the ILC in its report on its work on international liability in the case of loss arising from transboundary harm arising from hazardous activities. The ILC took the view that:

73 ibid
74 ibid
75 ibid
It was generally recognized that States should be reasonably free to permit desired activities within their territory or under their jurisdiction or control despite the possibility that they may give rise to transboundary harm. However, it was equally recognized that they should ensure that some form of relief, for example compensation, be made available if actual harm occurs despite appropriate preventive measures. Otherwise, potentially affected States and the international community are likely to insist that the State of origin prevent all harm caused by the activity in question, which might result in the activities themselves having to be prohibited.\(^{76}\)

The view of the ILC can be taken as a restatement of one of the aims of international environmental law, namely the balance between territorial sovereignty and territorial integrity. The proposition that damage caused to another state’s territory be compensated or remedied is a recognition of the principle of territorial integrity, which provides that states have a right to be free of interference from others.\(^{77}\) In light of the inadequacy of the framework under the law of state responsibility, there is a need for an alternative framework that guarantees prompt and adequate compensation.

From a conceptual perspective, the polluter-pays principle reinforces the notion of territorial integrity. The imposition of environmental costs arising from activities in State A to State B can be seen as a violation of territorial integrity. The internalization of the cost of pollution incidentally upholds the principle of territorial integrity by preventing the costs of environmental pollution from falling on State B. Thus, while it does not operate as a legal principle, it is a principle that can be used to support the legal principle of territorial integrity by requiring the polluter to provide compensation for environmental harm as part of the cost-internalization requirement.

Furthermore, the polluter-pays principle is able to provide a unique response to the challenges posed by the notion of ultra-hazardous activities not prohibited under international law. As an economic principle, the polluter-pays principle is not burdened by considerations of whether an activity is environmentally harmful or not. Its principal concern is the allocation of the cost of pollution associated with the activity. Hence, in the context of hazardous activities that pose a risk of environmental pollution despite the exercise of sufficient precautionary measures, the polluter-pays principle allows for such activities to persist. The operation of this principle does

\(^{76}\) ILC Report on the work of its fifty-fourth session, supra note 56 at para 446

\(^{77}\) Bodansky, Brunnée & Hey, supra note 72 at 9
not require an examination of the risks associated the activity per se and whether such risks should be taken. Rather, it allows for such risks to be taken with the caveat that the cost of guarding against the risk and the cost associated with the risk materializing is borne by the polluter. Thus, in the context of ultra-hazardous activities such as offshore drilling, application of the polluter-pays principle would allow for offshore drilling activities to continue and expand without necessarily compromising the need for environmental protection.

1.3 International Civil Liability Regimes as an Alternative

One of the challenges faced in international law is the dichotomy between states and private actors within their jurisdiction. International law is primarily directed at the conduct of states. However, pollution often results from the activities of private actors. Given the difficulties of invoking state responsibility, an alternative solution would be to develop an international civil liability regime. International civil liability regimes can be viewed as a means of directly engaging private actors through international law.

It imposes an obligation on states to enact laws that impose liability on private actors under their jurisdiction. Hence, from a theoretical perspective, international civil liability treaties involve interaction between states. However, the practical effect of international civil liability treaties is that private actors can be held internationally liable for harm caused by their activities. These regimes operate by recognizing the competence of national courts, either in the victim state or in the state in which the polluter is a national, to decide cases on the liability of the polluter for causing damage outside the state in which the activities are based. Moreover, these decisions are enforceable in other states that are parties to the agreement.

In addition to providing access to the responsible parties, the international civil liability regimes harmonize liability standards in all contracting states. The combined effect of the harmonization of liability rules and access to redress through national courts overcomes the difficulties of obtaining compensation under the law of state responsibility.

78 Ibid at 6
79 Fitzmaurice, supra note 28 at 1024
80 Ibid
Furthermore, since it has the practical effect of directly imposing international liability for transboundary pollution on private actors, an international civil liability regime can be viewed as a vehicle to implement the polluter-pays principle in an international context. By channelling international liability to the responsible private actor, international civil liability regimes have the effect of ensuring that the cost of pollution internalized by a polluter in a state also applies equally beyond the state’s borders. In the context of offshore drilling, where there is potential for transboundary pollution, it is important that these costs are internalized by the polluter in a state, consistent with the polluter-pays principle.

Looking beyond the polluter-pays principle, the resolution of interstate dispute for damage caused by transboundary pollution may be lengthy and cumbersome in the absence of an international civil liability regime. Lyons, in a study of the Montara offshore oil spill, demonstrated that Montara incident serves as a “typical example of ‘paper’ cooperation that fails to meet its purpose.” In her examination of the Montara Incident, Lyons identifies several critical concerns that tend to support the need for an international instrument on civil liability.

She notes that PTTEP AA, the owner and operator of the Montara Offshore Development project, relied on the lack of scientific evidence on causality of damage to defend itself against the obligation to compensate the Indonesian government. However, none of the reports relied upon by PTTEP AA had, as its objective, the investigation of the extent of the spill in Indonesian waters or the impact of the spill on Indonesian resources. As such, Lyons argues that this is a weak justification. The Australian government approached the issue of compensation in a manner similar to PTTEP AA. In its discussions with Indonesia, the central issue was the

83 See page 1 above
84 Lyons, “Study of the Montara offshore oil spill”, supra note 82
85 Ibid at 185
determination of the causal link between the loss suffered and the oil spill.\textsuperscript{86} Again, the lack of scientific proof posed a hurdle in Indonesia’s efforts to obtain compensation. Under Australian law, the Indonesian victims would have the onus of proving their losses to justify any award of compensation.\textsuperscript{87}

While the need to prove causation is uncontroversial, Lyons’ study illustrates the potential challenges victims of transboundary harm may face in their attempt to claim compensation through the polluting state’s national legal system. For example, in the Montara oil spill incident, Lyons notes that one reason behind Indonesia’s failure to provide scientific proof stems from Indonesia’s lack of general resources to proceed with their own monitoring and assessment.\textsuperscript{88} An international civil liability regime may be able to overcome these challenges in various ways, such as creating a system of liability based on strict liability or by imposing liability on offshore operators for the cost of scientific assessments of transboundary pollution.

Overall, it is clear that there is a need for a mechanism through which compensation for transboundary pollution arising from offshore drilling activities can be obtained. The absence of an international treaty poses a significant number of problems for victims of an environmentally harmful activity in bringing claims for compensation before domestic courts for harm suffered especially for harm or damage of a transnational nature.\textsuperscript{89} Churchill identifies four problems associated with bringing a claim in the absence of an international regime: (1) the difficulties of proving causation between the harm suffered and the activity in question, (2) proving fault or negligence on the part of the person causing the harm especially where the harm involves a technically complex activity, (3) the domestic legal system may recognize limited grounds for compensation, and (4) the possibility that where compensation is successful, the amount claimed may be in excess of the defendant’s financial resources.\textsuperscript{90} In addition to the abovementioned

\begin{flushleft}
\textsuperscript{86} Ibid at 186  \\
\textsuperscript{87} Ibid  \\
\textsuperscript{88} Ibid  \\
\textsuperscript{90} Ibid at 5
\end{flushleft}
problems, a victim of transboundary pollution may encounter difficulties posed by the private international law rules preventing one state’s courts from assuming jurisdiction over transnational civil liability claims.\textsuperscript{91}

Moreover, the lack of an effective framework for compensation under the law of state responsibility emphasizes the need to develop an alternative. Thus, the need for an alternative framework is also related to achieving the goals of international environmental law. As discussed earlier, the law of state responsibility is limited in its ability to play an effective role of balancing between claims of territorial sovereignty and territorial integrity. An international civil liability regime guided by the polluter-pays principle is able to supplement the law of state responsibility, in further support of promoting the balance between territorial sovereignty and integrity.

\textsuperscript{91} Ibid at 6
2 International Civil Liability Regimes on Oil Pollution

Currently, the only liability regimes that have come into force are those relating to nuclear and oil pollution liability.\textsuperscript{92} Moreover, the oil pollution agreements are the only agreements which have seen pollution victims successfully obtain compensation.\textsuperscript{93} In light of the success of the oil pollution regime and the similarities between the maritime transport of oil and offshore drilling activities, an examination of the oil pollution liability regimes is warranted.\textsuperscript{94} The first part of this section will outline the general background leading up to the development of the civil liability regime in the marine transportation of oil. The second part of this section will then examine the key features of this regime. The third part of this section will then examine existing or previous attempts at establishing a liability and compensation regime in the offshore exploration and exploitation sector.

2.1 Background of the International Liability Regime for Oil Pollution in the Marine Transportation Industry

The 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC)\textsuperscript{95} and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention)\textsuperscript{96} were adopted under the auspices of the International Maritime Organization (IMO) to form the international regime for

\begin{itemize}
\item \textsuperscript{92} Brunnée, “Of Sense and Sensibility” supra note 31 at 365
\item \textsuperscript{93} Ibid
\end{itemize}
the compensation of pollution damage caused by oil spills from tankers. These two conventions replaced the earlier corresponding Conventions adopted in 1969 and 1971 respectively. This analysis of the regime is based on the 1992 regime as amended. The International Convention on Civil Liability for Oil Pollution Damage (1969 CLC) was adopted with the aim of ensuring adequate compensation for victims of oil pollution damage emanating from oil-carrying vessels.

The Torrey Canyon incident served as an impetus for the development of the CLC regime, prior to which liability remained a matter of national laws. On 18 March 1967, the Torrey Canyon vessel, which was carrying crude oil, ran aground in English waters, near the Isles of Scilly. Subsequently, 119,328 tonnes of crude oil was released into the Atlantic Ocean. Although the Torrey Canyon vessel ran aground in English waters, the oil released from the vessel spread significantly, polluting 100 kilometres of the English coastline and 80 kilometres of the French coastline. The ability of oil pollution to spread is illustrated by the fact that the Torrey Canyon incident occurred 180 kilometres from French shores. The total combined clean-up costs incurred by the British and French governments amounted to £16 million.

The severity of the Torrey Canyon was sufficient to gain momentum amongst States to develop

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97 Måns Jacobsson, “The International Oil Pollution Compensation Funds and the International Regime of Compensation for Oil Pollution Damage” in Jürgen Basedow and Ulrich Magnus (eds), Pollution of the Sea: Prevention and Compensation (2007 Springer: Berlin) at 137
98 ibid
100 International Maritime Organization, International Convention on Civil Liability for Oil Pollution Damage online: International Maritime Organization <http://www.imo.org>
103 Verheij, supra note 101
104 Tormod Raflård, “Tankers, Big Oil and Pollution Liability” online: Tankers, Big Oil and Pollution <http://www.oilpollutionliability.com/pollution-control/>
105 Ibid
an international convention in this area. Yet, the details of the *Torrey Canyon* incident can be regarded as mild when contrasted against the scale of more recent incidents such as the Deepwater Horizon incident. Moreover, *Torrey Canyon* incident can be used to show that notwithstanding the occurrence of an incident within the territorial jurisdiction of one state, the release of oil into the ocean may cause transboundary harm given the ability of oil to travel and spread.\(^{106}\) Some of the difficult legal issues in the *Torrey Canyon* incident include choice of law and forum, determination of the offender / responsible party, *locus standi*, and the availability of funds for clean-up purposes as well as compensation for affected individuals.\(^{107}\) The success of the regime is not only evidenced by the number of ratifications it has received to date,\(^{108}\) but also by its ability to address the abovementioned issues.

### 2.2 Features of the Existing Regime

#### 2.2.1 The 1992 International Convention on Civil Liability for Pollution Damage

The issues highlighted above are also present in claims for transboundary oil pollution arising from offshore drilling activities. The CLC regime has, through its features, managed to address these issues. As such, it would be useful to examine the features of the 1992 CLC regime.

The 1992 CLC defines pollution damage as “loss or damage caused outside the ship by contamination resulting from the discharge of oil from the ship.”\(^{109}\) This includes compensation for loss of revenue resulting from pollution as well as impairment of the environment, although compensation for this type of damage is limited to costs of reasonable measures of

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\(^{106}\) As soon as oil is spilled, spreading over the sea surface begins. The speed at which oil spreads is dependent on the type of oil. In addition, prevailing environmental conditions such as temperature, water currents, tidal streams and wind speeds may also affect the rate at which oil spreads. For more information, see: International Tanker Owners Pollution Federation, *Fate of Oil Spills*, online: International Tanker Owners Pollution Federation <http://www.itopf.com>

\(^{107}\) Tumaini S. Gurumo, “Civil Liability Issues Arising from Spills of Oil Cargo: Are International Agreements the Best Solution for Common Problem?” (2013) 3:1 International Journal of Social Science and Humanity 52


\(^{109}\) 1992 CLC, *supra note* 95, Article 1(6)(a)
reinstatement.\textsuperscript{110} The costs of preventive measures are also included under the definition of pollution damage. Preventive measures refer to reasonable measures taken after the occurrence of an incident to prevent or minimize pollution damage.\textsuperscript{111}

The Convention provides for strict liability against the shipowner with limited exceptions for acts of war, acts or omission done with intent to cause damage by a third party, and the negligence or wrongful act of any government or authority responsible for navigation.\textsuperscript{112} During the course of negotiations, it was argued the imposition of strict liability would guarantee optimal compensation. In addition, the imposition of liability on shipowners was based on the fact that the particular form of carriage, i.e. maritime transport with tankers, created the risk of oil pollution.\textsuperscript{113} Although the decision to impose strict liability ultimately materialized from the political element of the debate and negotiation process,\textsuperscript{114} the strict liability-based CLC regime has indeed succeeded in providing optimal compensation, thereby proving the merits of the arguments discussed above. Moreover, the ‘creator of the risk’ argument could be viewed as an early manifestation of the polluter-pays principle where the ‘creator of the risk’ is regarded as the polluter. In addition, attributing liability to shipowners ensured that the responsible party was easily identified for the purposes of obtaining compensation.\textsuperscript{115} This further reinforced the role of the regime in achieving the goal of ensuring prompt and adequate compensation as it reduced the additional burden of determining whom to sue,\textsuperscript{116} thereby simplifying the compensation process.

The rationale applied to the development of the CLC regime could also be imported into the development of an international civil liability regime for accidental oil pollution emanating from

\begin{itemize}
\item \textsuperscript{110} \textit{Ibid}
\item \textsuperscript{111} \textit{Ibid}, Article 1(7)
\item \textsuperscript{112} \textit{Ibid}, Article 3
\item \textsuperscript{113} Wang Hui, “Shifts in Governance in the International Regime of Marine Oil Pollution Compensation: A Legal History Perspective” in Michael Faure & Albert Verheij (eds), \textit{Shifts in Compensation for Environmental Damage} (New York: 2007 Springer) 197 at 215
\item \textsuperscript{114} \textit{Ibid} at 219
\item \textsuperscript{115} Verheij, \textit{supra} note 101 at 140
\item \textsuperscript{116} Wu Chao, \textit{Pollution from the Carriage of Oil By Sea: Liability and Compensation} (1996 Kluwer Law: London) at 54
\end{itemize}
offshore drilling activities. Similar to the shipping industry, the offshore industry also involves more than one party. As such, identifiability is also one of the challenges faced by victims of pollution in the offshore drilling context. Moreover, the ‘creator of the risk’ analysis can be used to support the idea of identifying the offshore operator of the drilling platform as the polluter under the polluter-pays principle.

In addition, the CLC regime has a mandatory insurance provision. Under Article 7, the shipowner is required to “maintain insurance or other financial security” for the amount of the shipowner’s liability under the Convention – i.e. the shipowner’s limit of liability.\(^{117}\) The inclusion of this provision was based on the fact that in the absence of any financial security or insurance, the essence of strict liability would be an empty shell, as there would be no guarantee that victims of pollution would be compensated.\(^{118}\) The shipowner’s limit of liability is calculated based on the vessel’s tonnage in accordance with the amounts set out under Article 5.\(^{119}\) Moreover, victims are guaranteed access to funds for compensation through Article 7(8), which provides that “any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner’s liability for pollution damage.”\(^{120}\) The right to limit liability was introduced to balance the interests of shipowners in exchange for accepting responsibility under a strict liability standard.\(^ {121}\) The right to limit liability however, is lost if the incident occurred as a result of the owner’s actual fault.\(^ {122}\) One criticism of the CLC regime is the fact that the limits of liability are too low to meet claims for compensation arising from large-scale oil pollution damage, thus defeating the purpose of the regime in ensuring prompt and adequate compensation.\(^{123}\) This feature is even more controversial when placed in the offshore drilling context, as oil spills from offshore drilling

\(^{117}\) 1992 CLC, supra note 95, Article 7(1).

\(^{118}\) Verheij, supra note 101 at 140

\(^{119}\) 1992 CLC, supra note 95, Article 5(1)

\(^{120}\) Ibid Article 7(8)

\(^{121}\) Verheij, supra note 101

\(^{122}\) Ibid, see also 1992 CLC, supra note 95, Article 5(2)

activities are significantly greater and more unpredictable.

It should be highlighted that the introduction of limits of liability was a necessary compromise for the acceptance of strict liability. To accommodate the critics of the limits of liability provisions, a supplementary fund was established under the 1971 Fund Convention. While the creation of a fund did not negate the effects of having limits of liability, as the Convention also included a limit of liability albeit at a higher amount, it significantly alleviated the problem of insufficient compensation in cases of large-scale pollution damage. The 1971 Fund Convention has also been replaced by the 1992 Fund Convention.

2.2.2 Features of the 1992 Fund Convention

Article 2(1) of the 1992 Fund Convention establishes an international fund for compensation named, “The International Oil Pollution Compensation Fund” with the purpose of providing compensation for pollution damage where compensation under the 1992 CLC is inadequate.

The International Oil Pollution Compensation Fund (hereinafter referred to as the Fund) is recognized as a legal person capable of assuming rights and obligations in each contracting State. The Fund also has a Director which acts as its legal representative.

The Fund provides supplementary compensation to the CLC regime under three circumstances – (1) where no liability for damage arises under the 1992 CLC, (2) where the owner liable for damage under the 1992 CLC is financially incapable of meeting his obligations in full and the financial security provided under Article VII of the Convention does not cover or is insufficient to satisfy the claims for compensation, and (3) where the damage exceeds the owner’s liability under the 1992 CLC. Unlike the 1992 CLC, the circumstances where the Fund has no obligation to provide compensation for pollution damage is more restricted. Even if the pollution damage was caused by the negligent act of a State or the act of a third party, a victim of pollution damage


125 1992 Fund, supra note 96, Article 2(1)

126 Ibid, Article 2(2)

127 Ibid, Article 2(2)
can still recover compensation from the Fund. The only circumstances where the Fund has no obligation to provide compensation is if the pollution damage resulted from an act of war, or if the claimant is unable to prove that the damage resulted from an incident involving one or more ships.\(^\text{128}\) Therefore, the Fund acts as both a second tier of compensation as well as an alternative source of compensation. It acts as a second tier of compensation where claims for pollution damage exceed the shipowner’s liability. Where the shipowner is not liable or if the amount of financial security is insufficient or does not cover, the Fund steps in to form the first tier of compensation, thereby acting as an alternative source of compensation.

Hence, the Fund plays a pivotal role in the success of the CLC regime. The existence of an alternative and secondary tier of compensation effectively enlarges the scope of compensation thereby providing victims of pollution damage with a more realistic chance of obtaining compensation.

It should be noted that the wide scope of compensation available under the CLC and Fund regime is made possible as a result of the cooperation between the oil industry and shipping industry. Thus, the burden of loss is spread out between different parties. The Fund is exclusively financed by the oil industry.\(^\text{129}\) Oil importers that receive more than 150,000 tons of oil in a calendar year make annual contributions to the Fund. A body, comprised of all contracting states, known as the Assembly of the Fund, determines each year, the amount of annual contributions that is due based on general administrative expenditure of the Fund and the amount of compensation and claims-related expenditure.\(^\text{130}\) While the decision to obtain contributions in the context of the CLC regime was a result of political compromise, the distribution of the burden of providing compensation could be viewed as a broader application of the polluter-pays principle. The broad application of the polluter-pays principle in this context has not only promoted cost-internalization across the industry, but also increased the financial capacity of the regime. Thus, within the offshore drilling context, it may be worth considering expanding the scope of responsible parties through the creation of a similar supplementary Fund, where the costs of

\(^{128}\) 
\textit{Ibid}, Article 4(2)

\(^{129}\) Sarah Fiona Gahlen, \textit{Civil Liability for Accidents at Sea} (Berlin: Springer 2015) at 51

\(^{130}\) \textit{Supra} note 127, Article 12; For the functions of the Assembly, see Article 18
pollution damage can be equitably distributed in a manner consistent with the polluter-pays principle.

Notwithstanding the increased amount of compensation available under the 1992 Fund, subsequent major incidents revealed that the 1992 CLC and Fund regime was incapable of providing sufficient compensation, as the claims exceeded the limits of liability under the two conventions. In light of this, the limits of liability were raised in 2000. The current combined amount of compensation available under the 1992 CLC and Fund regime is 203 million SDR.

The revised limits were adopted through a simplified procedure known as the tacit amendment procedure. This provision is located under Article 15 and of the 1992 CLC and Article 33 of the Fund. Apart from setting out the amendment formula, Article 15(5) places an obligation on the Legal Committee, the body in charge of considering and adopting amendments, to “take into account the experience of incidents and in particular the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance” when acting on a proposal to amend the limits. This provision demonstrates the awareness that liability limits are not static and gives the 1992 CLC a degree of responsiveness to current and future situations in relation to adjusting the liability limits. Arguably, this provision can be seen as a lifeblood of the Convention, which prevents it from becoming irrelevant through ineffective liability limits thereby allowing it to fulfil its objective of providing adequate compensation to victims of pollution.

2.2.3 The 2003 Supplementary Fund Protocol

Notwithstanding the increased limits under the 1992 CLC and Fund regime, some States were concerned that the maximum compensation available under the 1992 CLC and Fund regime might be insufficient. As such, the 2003 Supplementary Fund Protocol was adopted.

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132 Churchill, *supra* note 89 at 18
133 1992 CLC, *supra* note 95, Article 15(5)
134 Gaetano Librando, “Influence of the Torrey Canyon incident on the liability and compensation regimes developed under the auspices of the IMO” in David Joseph Attard & Norman A. Martinez Gutierrez, eds, *Serving*
29

The 2003 Protocol is an optional scheme that is open to all Contracting Parties under the 1992 Fund Convention and has been in force since 3 March 2005. Under Article 5 of the 2003 Protocol, compensation under the Supplementary Fund is contingent on the 1992 Fund’s determination that the pro-rating payment is necessary in light of the circumstances where the total amount of established claims exceeds the aggregate amount of compensation available.

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the rule of international maritime law: essays in honour of Professor David Joseph Attard (New York: 2010 Routledge) 315 at 319


136 Verheij, supra note 101 at 149

137 Ibid

138 Ibid


140 Librando, supra note 134
under the 1992 Fund or where such a risk exists. As such, the 2003 Protocol works as an additional tier of compensation that applies only when the available compensation under the 1992 CLC and Fund Convention is inadequate or insufficient.

Similar to the 1992 Fund Convention, annual contributions to the Supplementary Fund are collected through a levy placed on companies located in Contracting States that received more than 150,000 tons of oil in any given year. One notable difference between the 1992 Fund and the 2003 Supplementary Fund is that the latter has a provision which states that, for the purpose of contribution, at least 1 million tonnes of oil will be deemed to have been received each year in each Member State. Article 14(2) provides that where the aggregate quantity is below the minimum of 1 million tons, the “…Contracting State shall assume the obligations that would be incumbent under this Protocol on any person who would be liable to contribute to the Supplementary Fund…” The inclusion of Article 14 was essentially a pragmatic approach of ensuring some form of financing is available given the optional nature of the Supplementary Fund.

At the time the Supplementary Fund Protocol was being drafted, a number of States indicated that there was no need for a supplementary scheme. As such, from the onset, it was envisaged that the Supplementary Fund would have limited participation. Limited participation was perceived to have the potential effect of oil industries in State Parties shouldering a heavy burden of financing compensation payments in respect of pollution damage in a state where no contribution is paid, since contribution is made only where the total quantities of oil received

141 2003 Supplementary Fund, supra note 135, Article 5,
142 Ibid, Article 10; see also Steamship Mutual, Oil Pollution Compensation – Supplementary Fund online: Steamship Mutual <http://www.steamshipmutual.com/publications/Articles/Articles/03_OilPollComp_SuppFund.asp>
144 2003 Supplementary Fund, supra note 135, Article 14(2)
exceeds 150,000 tons.\textsuperscript{146} Article 14 therefore, was proposed as a means of ensuring that all Contracting States that enjoy protection under the Supplementary Fund would also contribute to the system.\textsuperscript{147}

Article 14 introduces an element of state participation in terms of the obligation to contribute to the 2003 Supplementary Fund Protocol. While this provision can be seen as a deviation from the polluter-pays principle, the deviation is justified given the significantly higher limits available under the 2003 Supplementary Fund Protocol. Moreover, the right to claim under the 2003 Supplementary Fund Protocol is contingent on the assessment by the 1992 Fund that pro-rating is necessary. As such, the regime as a whole, is still by and large, compatible with the polluter-pays principle.

### 2.2.4 Evaluation of the CLC, Fund and Supplementary Fund as a model for the Offshore Drilling Context

The international regime under the 1992 CLC and Fund Convention has been described as “one of the most successful compensation schemes in existence.”\textsuperscript{148}

As of 15 May 2015, 114 States are parties to both the 1992 CLC and Fund Convention as amended.\textsuperscript{149} Since the establishment of the 1971 and 1992 Fund, the Fund has been involved in a total of 149 incidents of varying magnitude across the globe.\textsuperscript{150} Apart from the number of ratifications received by the regime, its success can also be seen in terms of its effectiveness in simplifying and expediting the process of recovering damages often without the need to resort to

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{146} Ibid
\item\textsuperscript{147} Ibid
\item\textsuperscript{148} Måns Jacobsson, “The International Oil Pollution Compensation Fund and the International Regime of Compensation for Oil Pollution Damage” in Jürgen Basedow and Magnus Ulrich (eds), \textit{Pollution of the Sea: Prevention and Compensation} (Berlin 2007: Springer) 137 at 148
\item\textsuperscript{149} IOPC Funds, \textit{The International Regime for Compensation for Oil Pollution Damage: Explanatory Note} (2015) online: IOPC Funds <http://www.iopcfunds.org/fileadmin/IOPC_Upload/Downloads/English/explanatorynote_JUN15E.pdf>
\end{itemize}
\end{footnotesize}
lengthy and costly litigation.\textsuperscript{151} In most cases involving the Fund, claims were settled out of court.\textsuperscript{152} Hence, given the overall success of the CLC regime, it could be used as a model for the development of a civil liability regime in the context of offshore drilling.

However, one major shortcoming of the CLC regime is that liability under the regime is limited. The multiple revisions to the liability limits demonstrate that the regime struggles to establish a limit that is able to eliminate the risk of claims exceeding the liability limits. In addition, the circumstances in which the limits of liability are broken are rare. Under the 1992 CLC, the right to limit liability is only lost in the event that “pollution damage resulted from [the shipowner’s] personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.”\textsuperscript{153} Even if the shipowner were personally negligent, the shipowner would be able to rely on the limitation provision under the 1992 CLC. Therefore, the right to limit liability under the 1992 CLC is virtually guaranteed. Based on this, it is questionable whether the CLC has succeeded in achieving its aim of providing prompt and adequate compensation. Nevertheless, the effect of the CLC’s shortcoming in this respect has been mitigated by the establishment of the Fund and the tacit amendment procedures.

At first sight, the civil liability regime comprised of the CLC, Fund, and Supplementary Fund can be regarded as a hodgepodge of provisions with seemingly contradictory aims. For example, strict liability was introduced as a means of guaranteeing compensation for victims of pollution damage. However, that effect of that guarantee is hampered by the limitation of liability. As a result, this necessitated the creation of an additional tier of compensation i.e. the Fund. The creation of the Fund results in a diversion of full responsibility for pollution damage away from shipowners. The CLC, Fund and Supplementary Fund regime therefore appears to be a concoction of conventions riddled with conceptual difficulties that amount to an inefficient solution.

\textsuperscript{151} Librando, supra note 134 at 319
\textsuperscript{152} IOPC Annual Report, supra note 150
\textsuperscript{153} 1992 CLC, supra note 95, Article 5(2)
However, if one takes into account the diverse interests at play, the CLC, Fund, and Supplementary regime can be regarded as a creative solution that has successfully achieved a balanced between the competing interests whilst continuing to adhere to its principal aim of ensuring that prompt and adequate compensation is available to victims of pollution damage.

Gaskell and Forrest state that the mantra of the IMO Legal Committee with regard to its function in drafting conventions is “the perfect is the enemy of the good.”154 In relation to the CLC regime, they note the conceptual problems associated with an incrementally developed system but recognize that there are advantages to a ‘try it and see’ approach as opposed to an approach geared towards perfect drafting and conceptual consistency.155 Through this ‘try it and see approach’, the CLC regime has created an effective framework for civil liability and compensation which is reflected in the number of claims that has been successfully paid out under the regime. As such, the hodgepodge appearance of the CLC provisions should not be a deterrent to develop similar instruments of international civil liability and compensation. If anything, the structure of the CLC, Fund and Supplementary regime provides a model for allocating loss in circumstances where there are multiple interests at play.

However, the use of the CLC as a model should also be adapted to address the concerns of the specific industry in which it is employed. The success of the CLC regime has led to its use as a model for the development of an international liability convention for the marine transportation of hazardous and noxious substances. The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010 (2010 HNS Convention) was largely modelled after the CLC model.156 Currently, the potential success of the HNS Convention is unknown as the Convention is not yet


155 Ibid

in force due to a lack of ratification by states.\(^{157}\) While the HNS Workshop held in Rome on 10 October 2014 indicated that many states were advancing towards ratification,\(^{158}\) the progress of the HNS Convention demonstrates that notwithstanding the success of the CLC model, each industry faces specific issues and the development of an international civil liability convention needs to address the specific challenges faced by the targeted industry.

Hence, in applying the CLC model to the context of offshore drilling, some of the initial concerns include whether limits of liability should be introduced, and if so, what the possibilities of creating a supplementary fund are and which parties should provide contributions to finance the fund. These considerations will be addressed in the next chapter.

### 2.3 Previous Attempts at Developing an International Instrument for Liability and Compensation for Pollution Damage Arising From Offshore Drilling Activities

Before the abovementioned issues can be considered, it is worth mentioning that there have been calls supporting the development of an international instrument for liability and compensation for pollution damage arising from offshore drilling activities.\(^{159}\) Any future attempt at developing a civil liability regime in this area has to take into account previous challenges.

In 1973, the United Kingdom government came up with an initiative to devise a regional legal liability regime for offshore operators modelled after the 1969 CLC Convention.\(^{160}\) In 1976, the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources was adopted by a majority of nine participating

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157 Article 46 of the HNS Convention requires at least 12 states to ratify or accede to the Convention, including four States each with not less than 2 million units of gross-tonnage to bring the Convention into force.


States. However, the Convention, also known as the 1977 Convention on Civil Liability for Exploration and Exploitation (1977 CLEE) never achieved the number of ratifications necessary to enter into force. The CLEE requires four ratifications to come into force, yet it has not received a single ratification. The failure of the CLEE to enter into force is worth discussing as it provides an example of the challenges that are present in developing an international liability instrument for the offshore drilling industry. As the development of the 1992 CLC regime illustrates, much of the debate surrounding the structure and obligations under the regime was more political than legal in nature. However, when the 1977 CLEE was negotiated, there was a lack of political will on the part of a few States to come to a consensus on the key features of the convention such as the standard of liability and whether liability should be limited. Hence, although the 1977 CLEE was meant to take after the 1969 CLC model, the adopted text differed greatly from the CLC model. In addition to that, there were several provisions that were problematic, which arguably resulted in its failure to enter into force. Hence, in developing a new international framework, it is important to consider the discussions that took place during the negotiations of the CLEE to avoid repetition of the same mistakes.

2.3.1 1977 Convention on Liability for Exploration and Exploitation (CLEE)

An examination of the negotiating history of the CLEE reveals that the CLEE was positioned for failure from the onset of discussions. In fact, as Churchill rightly notes, it is virtually certain that the CLEE will never enter into force. Nevertheless, the failure of the CLEE to enter into force should not discourage efforts to develop a civil liability regime for pollution damage resulting from offshore activities. Instead, it should serve as an example of the potential issues that should be solved prior to or during the course of negotiations.

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161 Ibid at 63; the nine participating States were Belgium, Denmark, France, Germany, Ireland, Netherlands, Norway, Sweden and the United Kingdom; 1977 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, text available at <http://cil.nus.edu.sg/rp/il/pdf/1977%20Convention%20on%20Civil%20Liability%20for%20Oil%20Pollution%20Damage%20Resulting%20from%20Exploration%20for%20and%20Exploitation%20of%20Seabed%20Mineral%20Resources.pdf.pdf> [1977 CLEE]

162 Churchill, supra note 89 at 23

163 Ibid
The CLEE is restricted to states with coastlines on the North Sea, the Baltic Sea or northern parts of the Atlantic Ocean.\textsuperscript{164} It is based on the principle of strict but limited liability.\textsuperscript{165} It places liability for pollution damage (which is defined as “loss or damage outside the installation caused by contamination resulting from the escape or discharge of oil from the installation” and the cost of preventive measures) on the operator.\textsuperscript{166} The operator is exempted from liability only if he is able to prove that the damage resulted from either an armed conflict, an exceptional natural phenomenon, or from an abandoned well more than five years after it was abandoned.\textsuperscript{167}

Unlike the 1992 CLC, the CLEE does not establish a supplementary fund. Instead, Article 15 allows a State in which the offshore installation is located to prescribe higher limits or even unlimited liability for pollution damage caused in that State or another State Party.\textsuperscript{168} The Convention also imposes a mandatory insurance requirement under Article 8.\textsuperscript{169}

The first session of the Diplomatic Conference convened in London on 20-31 October 1975, prior to the adoption of the CLEE text. This session failed to reach an agreement due to a divergence among state delegations as to the potential magnitude of risk involved.\textsuperscript{170} The potential magnitude of risk involved was important in informing the discussions on the standard of liability and limitation of liability.

In addition to the differing views on the potential magnitude of risk, the delegations of the Diplomatic Conference had differing goals in mind. Dubais reveals that there were two broad categories of states at the conference: the moderate states which had the goal of ensuring uniformity of laws and the extreme states which preferred a stricter regime for offshore operators.

\begin{enumerate}
\item[\textsuperscript{164}]Philippe Sands, \textit{Principles of International Environmental Law} (Cambridge, United Kingdom: 2003 Cambridge University Press) at 923
\item[\textsuperscript{165}]Churchill, \textit{supra} note 89 at 23
\item[\textsuperscript{166}]\textit{Ibid}
\item[\textsuperscript{167}]\textit{Ibid}
\item[\textsuperscript{168}]\textit{Ibid}; see also 1977 CLEE, \textit{supra} note 161, Article 15(1)
\item[\textsuperscript{169}]1977 CLEE, \textit{supra} note 161, Article 8(1)
\item[\textsuperscript{170}]Dubais, \textit{supra} note 160 at 62
\end{enumerate}
in comparison to the regime applicable to tanker owners.\textsuperscript{171} Dubais notes that the compromises made, which ultimately favoured the latter category of states, resulted in more problems than solutions.\textsuperscript{172}

Although the CLEE was modelled after the 1969 CLC regime, it lacked an important provision, namely the provision establishing a separate fund to provide compensation for claims exceeding the liability limits of shipowners. As mentioned earlier, the existence of the supplementary fund is a result of the series of compromises revolving around the standard of liability – strict liability was acceptable as long as liability was limited. In turn, limits of liability were acceptable as long as a supplementary fund was established to provide compensation for claims that exceed those limits.

In contrast, the CLEE provided for strict but limited liability. To address the concern where pollution damage claims exceeded the limits of liability, Article 15 was introduced. At first glance, Article 15 seems uncontroversial in that it created a ‘minimum standard’ model of civil liability. However, where an international convention is concerned, there are several practical difficulties that arise as a result of this provision.

Firstly, Dubais states that this provision introduced the notion of non-uniformity.\textsuperscript{173} One of the aims stated in the preamble of the Convention is, “to adopt uniform rules and procedures for determining questions of liability and providing adequate compensation in such cases.”\textsuperscript{174} Thus, it can be said that Article 15 contradicts this aim. Article 15 creates an element of uncertainty, making it difficult to determine the scope of protection offered under the Convention since this may vary from state to state. In negating one aim of the Convention, it is easy to see why obtaining sufficient ratification was a challenge. The lack of uniformity under the Convention makes it difficult to see why such a convention is needed. It would be easier for states to simply

\textsuperscript{171} Ibid at 63
\textsuperscript{172} Ibid
\textsuperscript{173} Ibid
\textsuperscript{174} 1977 CLEE, supra note 161, third preambular paragraph
come to a political agreement on the minimum standards of liability since this is, in reality, the effect achieved by the CLEE.

Secondly, there were issues surrounding the compulsory insurance provision under the CLEE. Article 8 of the CLEE provides that an “operator is required to have and maintain insurance or other financial security” to cover his liability under the Convention.\textsuperscript{175} However, unlike the CLC regime where the amount of insurance was fixed according to the liability limit, the amount of insurance or financial security including the type and terms of such insurance is determined by the State having jurisdiction over the offshore operations under the CLEE.\textsuperscript{176} The Convention merely sets a minimum amount of 35 million SDR.\textsuperscript{177}

In the event a Contracting State decides to apply its own requirements, this creates the potential situation where offshore operators might be subjected to unreasonable and costly obligations.\textsuperscript{178} One example provided by Dubais is the common practice of multinational oil companies carrying global policies, which cover their operational risks wherever situated in amounts and conditions, as they deem proper.\textsuperscript{179} The ability of a Contracting State to stipulate the type and terms of compulsory insurance required may have an adverse effects on such companies in the event that a contracting state decides not to accept the validity of such global policies, even if the amounts were sufficient to cover the operator’s liability.\textsuperscript{180}

Furthermore, the minimum amount of insurance set by the Convention is lower than the 40 million SDR minimum limit of liability under the Convention.\textsuperscript{181} Hence, if a contracting state adheres to the minimum amount of 35 million SDR while the limitation of liability is capped at

\begin{itemize}
\item \textsuperscript{175} 1977 CLEE, \textit{supra} note 161, Article 8(1)
\item \textsuperscript{176} \textit{Ibid}
\item \textsuperscript{177} 1977 CLEE, \textit{supra} note 161 Article 8(1); Dubais, \textit{supra} note 160 at 67
\item \textsuperscript{178} Dubais, \textit{supra} note 160 at 67
\item \textsuperscript{179} \textit{Ibid} at 68
\item \textsuperscript{180} \textit{Ibid}
\item \textsuperscript{181} 1977 CLEE, \textit{supra} note 161, Article 6(1)
\end{itemize}
40 million SDR, there is a risk of non-compensation where the operator is financially incapable of providing compensation.

Thus, although the CLEE intended to simulate the 1969 CLC, it evidently failed to do so. I mentioned earlier that in using the CLC as a model, it must be adapted to meet the specific issues faced by an industry. However, in the case of the CLEE, the Convention was modified to the extent that it lost the key essence of the model provided by the CLC regime.

The strict but limited liability coupled with compulsory insurance, and the development of a fund as an additional tier of compensation model provided by the CLC strikes a delicate balance between commercial interests and the goal of providing prompt and adequate compensation for victims. In failing to capture the same essence of the CLC model, the CLEE failed to promote the same balance achieved by the CLC.

One of the effects of treaty negotiations is that the text that is ultimately adopted often reflects the lowest common denominator on a specific issue. The CLEE can be criticized as a convention that fails to achieve an agreement even on the lowest common denominator. Instead, it is a series of compromises and concessions that achieves nothing in terms of creating a uniform system of liability and compensation. The lack of uniformity in liability rules has a crucial effect in ensuring prompt and adequate compensation. The harmonisation of liability standards and limits across different states reduces the potential of forum shopping and provides certainty not only to victims, but also to the offshore industry.

In light of the lack of uniformity achieved by the CLEE, it is unsurprising that the CLEE failed to gain any ratification. The CLEE provided little incentive for states to ratify the Convention, as it failed to provide any apparent benefit beyond the status quo. It merely established minimum thresholds of liability and compulsory insurance, a standard that the negotiating states most probably would have in place even in the absence of an international convention given their interests in protecting their local marine environment.

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182 Gaskell, supra note 154 at 164
I agree that a minimum standard of liability and compulsory insurance in the very least provides a guaranteed amount of compensation. However, this does not facilitate access to prompt compensation. Article 11 of the CLEE provides that an action for compensation may be commenced in the courts of any State Party where pollution damage was suffered or in the courts of the Controlling State (i.e. the State where the offshore drilling activity is located). In the event liability standards are not uniform, it is likely that claimants will attempt to bring a claim in the state where liability limits are higher while offshore operators may contest jurisdiction by arguing for the jurisdiction of the other State with the lower limits of liability. Consequently, this may prolong the process of compensation.

The CLEE demonstrates that the standard of liability and any applicable limits are contentious issues for the offshore industry. It is therefore imperative that a consensus is reached on this issue. If states are unable to agree on the applicable limit of liability, the creation of a supplementary fund serves as a useful tool in providing the additional layer of protection desired by those states.

2.3.2 Offshore Pollution Liability Agreement (OPOL)

The scheme, known as the Oil Pollution Liability Agreement (OPOL), is an agreement between thirteen major oil companies designed to provide compensation to victims of oil pollution damage arising from an offshore oil well blowout.183

It is a regional private liability scheme aimed at providing compensation for damages or reimbursing remedial measures carried out by public authorities following an oil pollution incident arising from an offshore installation.184 It was originally devised as an interim measure to fill the legal lacuna in the United Kingdom pending ratification of the 1977 CLEE.185 However, the failure of the CLEE to enter into force made the Agreement the definitive regime governing liability offshore oil pollution compensation and liability in the North Sea.186 The

184 Rochette, supra note 2 at 22
185 Ibid
legal status of the agreement is a contractual obligation undertaken by operators of offshore facilities.\textsuperscript{187}

The OPOL agreement takes a strict but limited liability approach.\textsuperscript{188} Currently, the total liability of an operator under the agreement is capped at US$250 million per incident.\textsuperscript{189} OPOL also requires its members to “establish and maintain its financial responsibility to fulfil its obligations under Clause IV” of the agreement so as to ensure that claims are met.\textsuperscript{190} Thus, members have to provide “evidence of insurance or self insurance or other satisfactory means.”\textsuperscript{191}

In addition, OPOL employs a vague definition of pollution damage, which is defined as “direct loss or damage (other than loss of or damage to any Offshore Facility involved) by contamination which results from a Discharge of Oil.”\textsuperscript{192} Hence, whether damage caused to the environment per se is included is arguable.\textsuperscript{193}

Churchill notes that the failure of the CLEE to enter into force is of limited significance given the existence of a private compensation scheme established by offshore operators.\textsuperscript{194} In fact, the structure and function of OPOL seem to demonstrate the industry’s commitment to provide a mechanism for the payment of compensation for pollution damage up to the specified limit. However, in spite of the industry’s commendable efforts, OPOL must be taken for what it is, a

\textsuperscript{186} Ibid
\textsuperscript{187} Angelica Bonfanti and Francesca Romanin Jacur, “Energy from the Sea and the Protection of the Marine Environment: Treaty-Based Regimes and Ocean Corporate Social Responsibility” (2014) 29 The International Journal of Marine and Coastal Law 622 at 642
\textsuperscript{188} Offshore Pollution Liability Agreement (effective as of 1 April 2015), Clause 4(a), text available at: <http://www.opol.org.uk/downloads/OPOL-Agreement-From-1april2015.pdf>
\textsuperscript{189} Ibid
\textsuperscript{190} Rochette, supra note 2 at 23; ibid Clause 2(c)
\textsuperscript{191} Ibid
\textsuperscript{192} Rochette, supra note 2 at 23
\textsuperscript{193} Ibid
\textsuperscript{194} Ibid
private contractual arrangement. As such, it is limited in its ability to provide an effective liability and compensation regime.

Firstly, participation in the agreement is voluntary. Operators can withdraw from the agreement at any time. However, there is the argument that membership to OPOL can be made compulsory through licensing requirements, as what is currently being required by the United Kingdom’s Department of Energy and Climate Change.\footnote{Ibid at 24}

Although it could be made compulsory through a licensing requirement, as a private scheme, it is not possible for governments and regulators to define the terms of the agreement. In the event of a dispute, it is likely that the terms of the agreement would be adjudicated based on the law of contracts. Under such circumstances, it is questionable whether a private agreement is able to govern what is essentially, a matter of public law.

Another weakness of the agreement is the low limits of liability. Smith points out that in the Deepwater Horizon incident, the US$20 billion allocated to finance a relief fund to aid those affected by the disaster far exceeds the limits prescribed not only under OPOL, but also the Limitations under the 2003 Supplementary Protocol, the third and highest tier of compensation available.\footnote{Marissa Smith, “The Deepwater Horizon Disaster: An Examination of the Spill’s Impact on the Gap in International Regulation of Oil Pollution from Fixed Platforms” (2011) 25 Emory Int’l L Rev 1477 at 1496} While the issue of an appropriate limit of liability is not exclusive to OPOL and is in fact, also prevalent in an international treaty, it is dubious whether a private regime would set an appropriate liability limit without any regulatory pressure. The US$250 million limit was effected following the Deepwater Horizon incident.\footnote{Ibid} This amount is more or less equal to the amount of compensation available under the 1992 CLC and Fund regime, which guarantees compensation up to 203 million SDR. An oil spill from a blowout has the potential to cause far greater damage than that of a tanker oil spill. Yet, compensation levels are somewhat similar. Hence, although compensation limits under OPOL were raised, it is questionable whether the industry, on its own volition, is willing to raise limits to a point that guarantees adequate
compensation. It is evident that the US$250 million limit pales in comparison to the amount of damage caused not only in the Deepwater Horizon incident, but also the Montara incident.

Smith argues that the reactive nature of amending liability limits in light of new incidents results in protocols quickly becoming outdated and insufficient, thereby ineffective. While OPOL offers a more expeditious approach in amending limitation amounts, it is debatable as to whether such limitation amounts, if amended, would even be sufficient. Moreover, it is also uncertain if the offshore operators would be willing to increase their limits.

As such, notwithstanding the easier compensation mechanism provided by OPOL, it cannot be relied on as the sole means of ensuring the prompt and adequate compensation mechanism due to its weaknesses. Coupled with its private nature, OPOL does not have the ability to take on the same task of creating uniformity on a global scale, as individual states may legislate against applicability of the agreement by setting different standards of liability or higher limits.

Nevertheless, the role played by OPOL as the definitive regime governing liability and compensation in the North Sea demonstrates that there is potential for a liability and compensation framework that is acceptable to the industry. In fact, it should also be used as a reference in developing an international convention on civil liability and compensation, as it serves as an indication of the industry’s preference and the types of risk that the industry is willing to accept.

198 Ibid
199 Supra note 196 at 1501
3 Moving Forward: Developing a Workable Framework

Based on the foregoing analysis, there are several key features that should be implemented in a civil liability regime. However, before delving into the respective features, it should be made clear that, civil liability regimes are primarily concerned with the goal of providing prompt and adequate compensation to victims of pollution damage. On the other hand, the polluter-pays principle is primarily concerned with cost-internalization. Hence, in employing the polluter-pays principle in the development of a civil liability regime, it should be borne in mind that civil liability regimes will never be able to provide complete compensation to victims of pollution damage. In fact, the polluter-pays principle, as defined by the OECD, encompasses a definition that entrusts the decision of the level of pollution permitted in the environment to public authorities. Given that the negotiation of civil liability regimes typically entails a series of compromises between the right to carry out an economic activity and the right to compensation, the polluter-pays principle provides a suitable conceptual framework, which balances the two competing rights.

3.1 Proposed Features for an International Regime on Civil Liability and Compensation for Oil Pollution arising from Offshore Drilling Activities

3.1.1 Channelling of Liability

Channelling of liability has the effect of removing one of the hurdles faced by a victim seeking compensation for pollution damage. It enables the victim to easily identify the party responsible for providing compensation. In determining whom liability should be channelled to, the operator has been identified as the responsible party. The operator is the party holding the licence or lease that is responsible for petroleum operations. The justification for holding the operator liable stems from its primary role in offshore operations.

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201 Peter Cameron, “Liability for Catastrophic Risk in the Oil and Gas Industry” (2012) 6 IELR 207
Cameron explains that the private allocation of risk between operators and contractors within the offshore industry reflects the dominant role that operators play.\textsuperscript{202} An operator decides on the well design or programme and runs the operations at the well site. The well design or programme and its subsequent execution are of fundamental importance to safe drilling.\textsuperscript{203} Operators also have the authority for the selection and approval of various contractors and oversight for the control operations and results of the contractor’s work plans.\textsuperscript{204} Therefore, they have control over all information and decision-making related to the well and associated risks.\textsuperscript{205} Hence, in the same way primary liability was assigned to shipowners by virtue of their dominant role in the activity, liability should similarly be channelled to offshore operators.

In addition to that, operators are also the party that governments hold responsible for compliance with regulatory requirements.\textsuperscript{206} As such, the extension of civil liability to operators should be consistent with this to reflect the general responsibility held by operators.

To provide for joint and several liability between offshore operators and contractors or to channel liability to the contractor instead would greatly affect the risk-allocation structure. Currently, risk allocation in contracts between operators and contractors are structured to place the largest share of risk with the party in the best position to control and prevent that risk i.e. the operator.\textsuperscript{207} To impose joint and several liability on offshore operators and contractors, one has to account for the ability of contractors to absorb such liability, which necessarily involves considering the capacity of insurance for contractors. Currently, insurance carried by contractors exclude coverage for catastrophic risks from the well such as blowout and pollution, which are traditionally known as risks borne by the operator.\textsuperscript{208}

\textsuperscript{202} Ibid
\textsuperscript{203} Ibid
\textsuperscript{204} Ibid; A contractor is the party responsible for the provision of services such as, well services, facilities hire and operations and maintenance, to the operator in relation to field operation and production.
\textsuperscript{205} Ibid
\textsuperscript{206} Ibid
\textsuperscript{207} Ibid at 217
\textsuperscript{208} Ibid at 210
Thus, as a matter of policy and practicality, channelling liability to the operator would seem to be the best and most viable option. While this may not necessarily reflect the polluter-pays principle, the principle can be construed broadly so as to view the offshore operator as the dominant player and therefore the main polluter. Moreover, it is less controversial that liability is channelled to the operator since the operator is able to allocate risks contractually so as to refine the application of the polluter-pays principle.

3.1.2 Strict but Limited Liability

To facilitate the provision of prompt and adequate compensation, strict liability is desirable, especially within the context of offshore drilling activities. Strict liability ensures that victims of oil pollution damage are able to obtain compensation irrespective of the operator’s fault. Moreover, the notion of strict liability is in line with the polluter-pays principle’s aim of ensuring cost-internalization. With industries such as the offshore drilling industry where offshore operations are often technical and highly complex, a system based on fault-liability would create an evidentiary hurdle for potential claimants.

In fact, this was recognized by the ILC in its work on the draft principles for the allocation of loss.\(^\text{209}\) The merits of establishing a system based on strict liability has also been recognized by the ILC in their work on allocation of loss. Moreover, it has been noted that strict liability is a well-recognized standard prescribed to high-risk and ultra hazardous activities in many jurisdictions.\(^\text{210}\) From the industry’s perspective, the strict liability regime under OPOL arguably indicates that the strict liability approach is acceptable to the industry.

The imposition of strict liability should, however, be balanced by a limitation of liability. It could be argued that the possibility of unlimited liability permitted by the 1977 CLEE contributed to its failure to gain ratification. While the notion of limited liability could be seen as defeating the purpose of providing adequate compensation to victims, as a matter of negotiation, the introduction of some form of limit of liability serves as a compromise for the imposition of strict liability.

\(^{209}\) ILC Draft principles on allocation of loss, supra note 55 at para 13

\(^{210}\) Ibid
However, there is one practical problem associated with limited liability, namely, determining the level at which liability should be capped. As evidenced by the CLC regime, where limits of liability had to be constantly revised in light of new incidents, the rationale of maintaining such limits has been called into question.  

It is nevertheless arguable that limits of liability play an essential role as a quid pro quo for the acceptance of strict liability. Hence, the absence of limited liability may result in a reluctance to accept liability on a strict liability basis. An interesting feature that could be incorporated with the introduction of limited liability is a simplified amendment procedure similar to that found within the CLC regime. Moreover, the structure of the CLC regime demonstrates that through the establishment of additional tiers of compensation, the problem of providing adequate compensation associated with limited liability could be mitigated.

### 3.1.3 Compulsory Insurance & Limitation of Liability

In addition to that, limitation of liability also has an effect on the insurance market. To ensure the availability of compensation, the civil liability regime should also include a compulsory insurance or proof of financial capabilities provision. This provision is absolutely necessary as civil liability laws are only as good as the liable party’s ability to pay. As Shaw notes, in any project to develop an international convention on offshore activity, the active participation by insurers involved in the energy sector would be a pre-requisite. Limitation of liability coupled with strict liability provides legal certainty to the insurance market. In determining the insurability of any given risk, an insurer requires information concerning the probability of a certain event occurring and the possible magnitude of damage. Provision of limits of liability should also reflect the capacity of the insurance market to insure such risks.

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211 Wang Hui, *supra* note 113 at 224


3.1.4 Additional Tier of Compensation

The Deepwater Horizon incident illustrates the potential catastrophe that may arise from drilling in deeper waters. Although the amount of compensation paid out in the Deepwater Horizon incident exceeded the highest tier of compensation afforded under the 2003 Supplementary Protocol, the development of an additional tier of compensation is desirable, as it increases the amount of available compensation and allows for the risk and burden of loss to be shared amongst stakeholders in the industry. The structure of the CLC regime demonstrates a method of sharing the burden of compensation between two key players: shipowners (as the party carrying out and profiting from the activity) and major oil importers (as the owner of the cargo).

With regard to the offshore industry, it would be desirable for states to contribute to a fund for the purposes of compensation given the magnitude of damage that may arise and as a matter of policy. While it could be argued that requiring states to contribute deviates from the polluter-pays principle, the state is ultimately the largest stakeholder in terms of the development of a country’s oil and gas assets. Such contributions could be collected, for example, through the taxation of offshore activities. The amount of contribution could be calculated based on the amount of oil produced by the state or the number of wells being drilled in the state. Furthermore, given the lack of international regulation over offshore activities, it is perhaps arguable that establishing such a fund would incentivize states to pursue a global convention or to enforce stricter regulations over offshore activities carried out in their jurisdiction.

3.2 Status Quo of the Development of an International Convention on Civil Liability and Compensation for Pollution Damage from Offshore Activities

Following the Montara incident and the difficulties faced by Indonesia in obtaining compensation, the Indonesian government, at the 97th session of the IMO Legal Committee’s meeting, submitted a proposal to include a new program on the Legal Committee’s work agenda to address the issue of liability and compensation for oil pollution damage resulting from offshore oil exploration and exploitation and to consider the possibility of establishing an international regime in this area.\footnote{Rochette, supra note 2 at 25}
The Indonesian proposal elicited a variety of views from different state delegations present at the meeting where some were in favour of reconsidering the matter further under its agenda in light of the Deepwater Horizon and Montara incidents and the apparent gap under international law, while others were opposed to it, questioning the IMO’s mandate and the need for a uniform, global regime.\textsuperscript{215}

Unfortunately, the IMO Legal Committee finally decided at its 99\textsuperscript{th} Session held in April 2012 that “bilateral and regional arrangements were the most appropriate way to address this matter; and that there was no compelling need to develop an international convention on this subject.”\textsuperscript{216} Although the Committee agreed to further analyse issues of liability and compensation, it aimed to develop guidance to assist states interested in pursuing bilateral or regional arrangements.\textsuperscript{217}

At its 100\textsuperscript{th} session, the Legal Committee invited Member States to send in examples of existing bilateral and regional agreements to the Secretariat. However, at the 101\textsuperscript{st} session of the Legal Committee, the Indonesian delegate reported that there was no progress or follow up in the provision of examples of bilateral and regional agreements to the Secretariat by Member States.

Indonesia further expressed its disappointment in the lack of support from the international community in sharing its views on the need for an international legally binding instrument.\textsuperscript{218} Consequently, Indonesia retracted its insistence on an international regime, noting that the “time is not yet ripe” for such an undertaking.\textsuperscript{219}

The course of the discussion on liability and compensation for pollution from offshore exploration and exploitation activities at the IMO reflect the general reluctance of states towards

\begin{itemize}
\item \textsuperscript{215} IMO Legal Committee, “Report of the Legal Committee on its Ninety-Seventh Session” (2010) LEG 97/15
\item \textsuperscript{216} Rochette, \textit{supra} note 2 at 26
\item \textsuperscript{217} IMO Legal Committee, “Report of the Legal Committee on its Ninety-Seventh Session” (2012) LEG 99/14 at para 13.16
\item \textsuperscript{218} Indonesia, “Agenda Item 11” in IMO Legal Committee, “Report of the Legal Committee on its One Hundred and First Session” (2014) LEG 101/12
\item \textsuperscript{219} \textit{Ibid}
\end{itemize}
the development of an international instrument on civil liability in this area. On the other hand, there seems to be a favourable response towards the development of a regional approach.

However, as the negotiations of the 1977 CLEE illustrate, a regional approach may not necessarily result in the development of a successful liability and compensation treaty and negotiations would not necessarily be any easier. Furthermore, a regional approach is inferior in its ability to promote uniformity, whereas a global approach has the advantage of creating legal certainty for states and the industry, and in ensuring uniform levels of compensation globally.

One difference that could arguably be viewed as the reason influencing states’ reluctance to develop an international regime is due to the nature of the risk of oil pollution from offshore activities. Unlike the carriage of oil by tankers at sea, which has a high probability of causing pollution damage, albeit of a lower magnitude, the probability of pollution damage from offshore drilling activities is much lower. However, the need for a civil liability convention in this area arises directly from the fact that if, and when, an accidental oil spill does occur as a result of a blow-out, the potential damage may be catastrophic.

Much of the development of the CLC regime stemmed from a single incident i.e. the Torrey Canyon incident and its transboundary effects. Notwithstanding the scale of damage caused by the Deepwater Horizon incident, it is arguable that the same impetus is lacking, as the extent of transboundary harm suffered in that case is less apparent.

Nevertheless, the Deepwater Horizon and Montara incidents did have some influence in this area. It reminded the international community at large of the dangers associated with offshore drilling and exposed the existing gap under international law. The preference for a regional or bilateral approach based on a model treaty can be seen as a platform for future development of a global regime.

220 Rochette, supra note 2
221 Ibid at 30
Conclusion

It is evident by now that an oil spill following a blowout incident can have catastrophic consequences. Notwithstanding the risks, it is unlikely that offshore drilling activities will stop. On the contrary, offshore drilling activities are continuing to move into deeper waters. In the introduction, I provided examples of some areas that are at risk of transboundary pollution. As the search for oil continues, drilling may take place in locations where transboundary pollution is a serious risk.

The current framework which relies on the law of state responsibility lacks the ability to ensure the availability of compensation for transboundary harm. The availability of compensation is important, as it reflects the polluter-pays principle. Although the polluter-pays principle does not have legal status under international law, it is a principle that provides a suitable conceptual framework for the development of a civil liability regime.

One of the struggles of international environmental law lies in its ability to directly affect private actors given its state-centric paradigm. An international civil liability regime can be seen as a unique creature of international law, which provides a direct link for states to address private actors located in another state’s territory. While civil liability conventions differ from multilateral environmental agreements (MEAs), there is an interesting similarity that can be drawn between MEAs and the CLC regime – the creation of an administrative body implementing the treaty provisions. The Fund adopted as a Protocol to the 1992 CLC can be likened to the creation of an administrative body which implements the treaty provision. While the Fund does not implement the provisions of the CLC per se, through its decision-making and claims experience, it has provided clarification of the interpretation of the treaty provisions so as to ensure uniform interpretation of the treaty. Thus, not only has the Fund acted as a buffer for compensation, it has also played an influential role in the continuous development of the CLC regime. The success of the CLC regime justifies its use as a model against which an international civil liability regime for offshore drilling activities can be developed.

The current challenge with developing an international liability regime for offshore exploration and exploitation activities is the lack of political will among states. This is reflected by the outcome of the discussions of this topic at the IMO. Arguably, the lack of political will is
connected to the industry’s resistance to an international convention in this area. One way of addressing this is to use existing agreements such as the OPOL and CLC regime to develop an international convention in this area.

Notwithstanding the outcome of the discussions at the IMO, the development of an international regime on the regulation and liability of offshore drilling activities is still a current issue. It is an ongoing project at the Comité Maritime International (CMI).\textsuperscript{222} The CMI is a non-profit international organization that was established with the purpose of contributing to the unification of maritime law. It has been working closely with the IMO since 1967, where it took on the task of studying the liability issues arising from the Torrey Canyon incident, which ultimately led to the establishment CLC regime.\textsuperscript{223} In addition, the ILC’s draft principles on loss allocation indicate the preference for an international civil liability convention to address the issue of liability and compensation for transboundary damage caused by hazardous but lawful activities under international law.

More importantly, it should be noted that the success of the CLC regime was achieved over the course of three decades. This demonstrates that negotiating an international liability convention does indeed have its challenges. Nevertheless, the CLC has greatly improved the ability of victims of pollution damage to obtain compensation. The foundation for an international liability regime has already been laid out through the development of private schemes such as OPOL. As such, there is room for an international treaty to be negotiated. The role of an international civil liability regime in the context of international environmental law is not only limited to the provision of prompt and adequate compensation. It is able to play a significant role in improving the protection of environmental rights beyond the no-harm rule by ensuring that a breach of territorial integrity is remedied.

\textsuperscript{222} Comité Maritime International, \textit{Work in Progress}, online: <http://www.comitemaritime.org/>  
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