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International regulation of offshore oil and gas activities: time to head over the parapet

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The last decades have been marked by a considerable development of offshore oil and gas activities. Because of an increasing energy demand and technological innovations, drilling activities extended and moved into deep and ultra-deep water areas. As of today, almost a third of the oil and a quarter of the natural gas consumed in the world come from underwater areas. This rush to offshore oil and gas exploration and exploitation is not about to end: forecasts show a continuing growth of production in traditional offshore regions and significant development in new areas. Drilling more and deeper means increasing the threats to the environment and natural resources, as well as the potential consequences for the human activities depending on those ecosystems. Recent accidents on offshore platforms have demonstrated that the environmental risks of offshore drilling activities concern all regions in the world and all types of companies. Because these accidents have had trans-boundary impacts, discussions were recently reopened on the suitability of the current international framework to regulate offshore oil and gas activities. In this regard, it clearly appears that there are regulatory gaps, both in terms of safety of offshore drilling activities and liability and compensation in case of accidents.

RECOMMENDATIONS

- The current framework regulating offshore drilling activities highlights regulatory gaps at the national, regional and international levels. Several risks can be pointed out if the legal status quo prevails, including inappropriate, fragmented or inexistent regulations on the safety of offshore activities and non-payment of damages because of the absence of clear rules regulating liability and compensation in case of accidents.
- Regional agreements on the environmental safety of offshore oil and activities should be developed and strengthened.
- The elaboration of an international convention regulating liability and compensation for pollution damage resulting from offshore drilling activities should be promoted. In the absence of such initiative and as a transitional option, provisions on liability and compensation could be integrated in existing and future regional agreements.
- Regulations cannot not deliver changes if States have no means—e.g. technical, financial, human, etc.—to implement them: building States' capacities in effectively controlling the offshore industry is therefore a crucial challenge.

SAFETY OF OFFSHORE DRILLING ACTIVITIES: AN UNCOMPLETE REGULATORY FRAMEWORK

Disparity of national laws regulating offshore oil and gas activities

National legislations regulating offshore oil and gas activities greatly vary from a country to another. Some national legislation address every stage of the platform's lifecycle—from the exploration phase to the dismantling of the facilities—while others are restricted to the production stage. Some aim at addressing the environmental impacts of offshore exploration and exploitation while others are entirely focused on facilitating the development of offshore activities. Moreover, the effective implementation of the national legislations also greatly varies from a country to another. In this regard, there is a lack of capacity in many developing States which prevents them from effectively controlling the development of offshore activities and enforcing the regulations, when they exist. For instance, data on vulnerable ecosystems often lacks, which makes it difficult to take into account the conservation and sustainable use of marine biodiversity when delivering drilling authorisations. More broadly, national administrations often have poor knowledge on offshore industry, this sector being very technical and opaque. This is a considerable obstacle to an effective control of offshore drilling activities.

Absence of an international convention

The analysis of the current legal framework regulating the safety of offshore drilling activities demonstrates that there currently is a regulatory gap at the international level. Despite the United Nations Convention on the Law of the Sea's (UNCLOS) relevant provisions, no international convention on the safety of offshore drilling activities has been adopted so far, and there is no on-going process intended to fill this gap. Two attempts failed in the past. The 1977 draft Convention on offshore mobile craft, prepared by the Comité maritime international (CMI) and aimed at applying to offshore activities various conventions already adopted in the field of navigation, has never been endorsed by the International Maritime Organisation (IMO). Furthermore, the most recent project to develop an international agreement, considered at some point within the G20 framework, was eventually dropped out.

Fragmented regional initiatives

Gaps in the global legal framework progressively led to the development of regional instruments, mainly

binding, within the framework of the regional seas programmes (Table 1). In the same manner, the European Union adopted in June 2013 a Directive on safety of offshore oil and gas operations. However, even if some are promising, these regional initiatives are highly fragmented and insufficient. Indeed:

(i) Regional agreements have contrasted levels of comprehensiveness, some being more comprehensive (in the Persian Gulf/Oman Sea Area, the Mediterranean or the North-East Atlantic) than others (in the Arctic for instance);

(ii) Regional agreements have heterogeneous legal scopes: protocols are binding by nature while guidelines (in the Western Indian Ocean) or recommendations (in the North-East Atlantic) are soft law instruments;

(iii) Regional agreements have varied levels of implementation: some have been adopted several years ago (in the Persian Gulf/Oman Sea Area or North-East Atlantic) but others just entered into force (in the Mediterranean) or still have to be elaborated (in Western, Central and Southern Africa and the Western Indian Ocean);

(iv) There is no coordination and/or sharing of experiences between the different regions involved in offshore drilling regulation.

Risks related to a legal status quo

Against this background, several risks can be highlighted if the legal *status quo* prevails:

(i) A risk of inappropriate, fragmented or inexistent regulations, leading to a protection of the environment at different speeds, including the risk of environmental dumping due to the lack of level playing field;

(ii) A risk of non-implementation of national and/or regional agreements if States capacities are not strengthened;

(iii) A risk of regulation by private norms only: beyond the major companies which have sometimes developed environmental standards, through the International Association of Oil and Gas Producers (OGP) in particular, the offshore sector is also composed of small companies which do not pay the same attention to the protection of the environment.

LACK OF SPECIFIC INTERNATIONAL RULES ON LIABILITY AND COMPENSATION

Stalling discussions at the international level

There are currently no global rules regulating liability and compensation for pollution damage resulting from offshore drilling activities. No international

Table 1. Rapid assessment of the regional seas programmes' agreements on the safety of offshore drilling activities

Region	Instrument	Nature / Status	Assessment
Arctic	Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic	Binding/In force	Focused on emergency responses only Very light obligations on cooperation
Baltic Sea	Convention on the Protection of the Marine Environment of the Baltic Sea Area, Annex VI on Prevention of Pollution from Offshore Activities	Binding/In force	Important provisions on environmental impact assessment (EIA), regulation of discharge of various substances, and contingency plans
Mediterranean	Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental shelf and the seabed and its Subsoil	Binding/In force	Considered as the most comprehensive regional instrument Recently entered into force (2011)
North-East Atlantic	Convention for the Protection of the Marine Environment of the North-East Atlantic, Annex III of the Convention specifically deals with the prevention and elimination of pollution from offshore sources Various decisions and recommendations	Binding, except the recommendations/ In force	Many provisions regulating the discharges of chemicals and oil, the use of chemicals offshore, the decommissioning of offshore platforms and environmental management systems
Persian Gulf / Oman Sea	Protocol concerning Marine Pollution resulting from Exploration and Exploitation of the Continental Shelf	Binding/In force	First specific instrument elaborated within a regional sea, in 1989 Very technical agreement, providing rules on the different phases of offshore exploration and exploitation
Western, Central and Southern Africa Region	Protocol on regional environmental standards for offshore drilling activities	Binding/In preparation	Roadmap for the elaboration of the Protocol to be submitted to the next COP, in March 2014
Western Indian Ocean	Regional guidelines addressing transboundary environmental impacts of oil and gas exploration and production	Non-binding/In preparation	Regional Guidelines to be presented to the next COP, in 2015

agreement has been adopted and the rare regional agreements addressing this issue are very limited (in the Mediterranean and the European Union, for instance). Last, the offshore pollution liability agreement (OPOL), a private regime, is also limited in its geographical coverage and capped at a rather low level with regard to the compensation of damages. The 2009 Montara accident opportunely reopened the debate on the suitability of the international framework regulating liability and compensation in case of accidents arising from drilling activities. The Indonesian proposal to elaborate a specific international convention was considered by the IMO Legal Committee from 2010. However, there is no political will shared by States to adopt such a framework at multilateral level: the Indonesian delegation appears isolated in its endeavor. Reluctant States, Brazil at the helm, reject the idea of a global regulation and put the ball into the court of regional organisations. It therefore seems very unlikely that the international community can quickly reach an agreement and negotiate an international treaty on this issue. As a result, “it is left to national laws to deal with this matter. Such laws vary enormously both in the way that the law itself deals with it and with the way contractual indemnities are interpreted and enforced, or not as the case may be”.¹

1. Cameron, P. (2012). “Liability for catastrophic risk in the oil and gas industry”, *International Energy Law Review*, Volume 6, pp.207-219.

Risks related to a legal status quo

Like for the safety issue, several risks can be highlighted should the legal *status quo* prevail:

- (i) A risk of legal uncertainty and therefore a risk of political dispute between States;
- (ii) A risk of partial or non-payment of damages because of the absence of clear rules;
- (iii) A risk of insolvency: “the international oil industry is now populated with a combination of big oil companies such as BP and ExxonMobil, medium to large oil companies such as Anadarko and many National Oil Companies, and numerous ‘new entrant’ companies, including service companies, which certainly do not have the access to capital to pay the kind of large claims which BP faced following the Macondo oil spill”.²

BETWEEN STRATEGY AND REALISM: BUILDING ON THE REGIONAL LEVEL TO STRENGTHEN THE REGULATION OF OFFSHORE DRILLING ACTIVITIES

For two main reasons, strengthening the regulation of offshore drilling activities could mainly come from the regional level. First, as demonstrated by the

2. *Ibid.*

recent developments within the G20 and IMO, the adoption of global conventions dealing with safety on the one hand, on liability and compensation on the other hand, seems very unlikely. As of today, the strong opposition from certain States, as well as the absence of a “champion” institution/State, does not leave much hope in the short term at least. Second, there are regional organisations on which States can rely to better regulate offshore drilling activities: that is unquestioningly the case of the regional seas programmes but progress could also be made through other regional intergovernmental organisations—the Association of Southeast Asian Nations (ASEAN) for example—or through alliances of States sharing similar interests—the Small Islands Developing States (SIDS) for instance. In terms of safety, steps have already been taken at the regional level. However fragmented in many ways, several regional initiatives have been developed and others are on-going. In the same manner, the regional level seems today the most appropriate leverage to deal with liability and compensation. Although it would match a real need, the elaboration of a global agreement seems very unlikely in the short term. Provisions on liability and compensation could therefore be integrated in current and future regional agreements. At the same time, efforts to mobilise champions and convince States to adopt an international convention must be redoubled.

But let’s not be naïve: the regulation of offshore drilling activities is a complex issue and developing agreements, even at the regional level, will face challenges and encounter barriers. In particular, it will certainly be difficult to develop at the same time legal provisions both on safety and liability and compensation. That is a lesson learnt from the Mediterranean and EU experiences. Moreover, the difficulty to negotiate provisions on liability and compensation—which is highly sensitive because financially impacting—could paralyze the entire process. In regions where the conditions to simultaneously regulate the two issues are not met, a two-step approach could be taken. First, it is crucial to fill the gaps and strengthen the safety of offshore drilling activities by developing regional binding agreements. This is the most urgent need in many regions, e.g. in Western, Central and Southern Africa, the Western Indian Ocean, Asia. The task is not that complex: there are principles and rules that are currently considered as best capable of controlling the offshore drilling activities and minimising the risks on the environment.³ More difficult will be the development of

the necessary accompanying measures—the first of which being strengthening national capacities—to ensure an effective implementation of the regional agreements. In most countries, the resolution of environmental problems related to offshore oil and gas exploration and exploitation will not come from the sole adoption of agreements. That is the reason why a strategic framework is needed in order to create the conditions for success of current and future regional binding agreements (Table 2). As a second step, rules dealing with liability and compensation could be developed; to that purpose, the Mediterranean Guidelines can provide some inspiration⁴.

As of today, the offshore sector is certainly the least internationally regulated marine-related industry. By comparison, the shipping sector is subject to dozens of international and regional agreements embracing both the safety and liability and compensation issues. Given the current growth of offshore activities and the recent accidents which highlighted their risks for the environment, it is time to move out of this aberrant situation. ■

Table 2. Conditions for success of regional binding agreements on safety of offshore oil and gas activities

	Conditions	
	Building national capacity	Bringing back UNEP to centre stage
Main function	Providing States with assistance in elaborating and implementing national and regional regulations	Support to and coordination of regional initiatives
Possible actions	Expanding the mandate of the IMO/IPIECA Global initiative, currently focused on preparedness and response only to the prevention of pollution from offshore activities Developing cooperation, between States and organisations which have developed expertise in terms of offshore drilling regulations and those in need Developing capacity programmes funded by multilateral and bilateral donors	Providing coordination among regional initiatives Promoting common set of rules to be integrated in regional agreements Enhancing the development of twinning agreements between North and South regional seas Supporting the development of capacity building programmes

3. Rochette, J., Wemaère, M., Chabason, L., Callet, S. (2014). “Seeing beyond the horizon for deepwater oil and gas: strengthening the international regulation of offshore exploration and exploitation”, *IDDR Study N°01/14*.

4. Scovazzi, T. (2009). “The Mediterranean Guidelines for the determination of environmental liability and compensation: the negotiations for the instrument and the question of damage that can be compensated”, *Max Planck Yearbook of United Nations Law*, Volume 13, pp.183-212.