

Offshore oil exploitation a new frontier for international environmental law

Lucien Chabason (IDDRI)

ADDRESSING THE RISKS OF OFFSHORE OIL EXPLOITATION

Recent accidents on offshore oil platforms have drawn attention to the ecological and human risks inherent to this industrial activity. In the current context of the continued development of deep and ultra-deep offshore drilling, which affects the integrity of oceans and seas as a common property, it therefore appears essential that those risks be addressed and that progress be made towards the construction of an international legal framework.

DIFFERENT INITIATIVES, DISAPPOINTING OUTCOMES

At the intergovernmental level, two legal and political processes have been initiated to advance pollution prevention and control: the Indonesian and Russian proposals are both based on the observation that international law falls well short of covering the cross-border dimensions of offshore oil exploitation when considering the increasing risks involved. It is indeed with caution that international law addresses the obligations of states, as sovereignty and jurisdiction issues often limit its scope and impacts. As for regional initiatives and conventions, they are often chronically absent or of very limited effectiveness.

SUPPORTING A COMPREHENSIVE APPROACH

The deficiencies of a highly fragmented international law therefore call for support to a comprehensive approach that aims to: counterbalance the power of oil companies and their professional organisations with an international legal framework that creates obligations; and establish a common set of obligations for states (and operators) covering the entire process of approval, monitoring, intervention, sanctions and liability regime. International institutions such as UNEP and IMO could take on this responsibility and promote the creation of a comprehensive convention on offshore oil exploitation.

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For more information about this document,
please contact the author:
Lucien Chabason lucien.chabason@iddri.org

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INTRODUCTION: RAISING AWARENESS ON OFFSHORE OIL EXPLOITATION RISKS

In recent years, a series of accidents on offshore oil platforms has drawn attention to the inadequacy of international law in relation to the legal framework of the activity.

On 21st August 2009, a well on the Montara platform, located in the Australian Exclusive Economic Zone (EEZ), exploded during the drilling of a new well. According to the Australian Maritime Safety Authority (AMSA), by 30th August the oil slick had spread over 1,750 square miles of ocean, in an area rich in coral reefs and marine biodiversity, and which also provides an important migration corridor for whales and sea turtles. Within days, the oil slick had extended across 5,800 square miles, affecting waters under Indonesian jurisdiction. The presence of oil was discovered 38 miles from Indonesia's Rote Island in the Timor Sea¹.

Eight months later, on 20th April 2010, the Deepwater Horizon drilling rig—operated by Beyond Petroleum (BP) and situated in waters 1,500 meters deep in the Gulf of Mexico, within the jurisdiction of the United States—exploded, caught fire and sank. The resultant leak could not be stopped until 85 days later when the well was finally capped, during which time the equivalent of 4.9 million barrels of oil had dumped into the sea.

In June 2011, the Chinese and American-operated Penglai 19-3 platform leaked a substantial amount of oil that covered an area of 840 km² within a month. The Chinese authorities did not acknowledge the incident until one month after the leak began.

These occasions have served to raise public awareness on the extent to which offshore oil

exploitation is moving into increasingly deep waters². Offshore exploitation now represents 30% of global oil production and 20% of oil reserves. Deep offshore (over 500 meters below sea level) and ultra-deep (more than 1000 meters) exploitation accounts for 3% of total oil production, the prime areas being the Gulf of Mexico, the North Sea, West Africa and the South China Sea. Areas for future development include Brazil's Atlantic coast, Eastern Canada, the Barents Sea and the Arctic Ocean.

Recently, permits have been granted that extend the underwater depth reached by drilling operations to 3000 metres and beyond.

The aforementioned accidents and the potential future risks, particularly in relation to the Arctic and when the coastal states issue drilling permits here, serve to highlight the deficiency of international law when confronted with a development that affects the integrity of oceans and seas as a common property.

Hydrocarbon transportation is governed by specific international regulations that have contributed to: a reduction of the volume of oil released at sea by tankers; improvements in the control of accident risks; a better organization of the response to maritime distress signals and international cooperation; and a compensation scheme and an international fund. Nothing of that kind, however, exists for offshore oil platforms. This industry develops under the sole responsibility of the states involved, without these states having to account for their actions. The reason why such a *status quo* persists is hard to comprehend given that hundreds of multilateral environmental agreements have been established in countless other fields. Could it be due to the political strength of the oil industry and of the states that benefit from its activities? Whatever the answer, in the current

1. Document OMI LEG 97/14/I from 10/09/2010

2. ISEMAR – Note n°125 from May 2010 – The offshore oil exploitation: maritime issues

context of the continued development of deep and ultra-deep offshore drilling, it appears essential that progress be made towards the construction of an international order.

1. INITIATIVES WITH INTERNATIONAL SCOPE

After the Deepwater explosion, President Obama set up a Commission of Inquiry which addressed the issues of regional cooperation with Mexico and Cuba in the prevention of platform accidents and in the control pollution resulting from such incidents.

At the intergovernmental level, two legal and political processes have been initiated:

- The first by Indonesia, which has waters under its jurisdiction that were polluted in 2009 after the spillage of oil and gas into the Timor Sea by a platform located in Australian seas. Indonesia introduced a proposal to the Legal Committee of the International Maritime Organization (IMO) to adopt a new work programme on liability and compensation relating to pollution caused by the offshore oil exploration and exploitation.
- The second was initiated by Dmitri Medvedev, the Russian President. In November 2010 at the G20 summit in Seoul, he announced that Russia would seek the approval of the 2011 G20 on the adoption of a convention on pollution resulting from offshore oil activity. Dmitri Medvedev had previously raised this issue on World Environment Day on 5th June 2010, when he focused on the deficiencies of international law in terms of both risk prevention and the clean-up of environmental damage. In its communiqué on 24th July 2010, the Russian government set out the reasons behind this initiative, highlighting similarities between the *modus operandi* of the oil and banking industries (processes that were exposed by the 2008 financial crisis). Shared characteristics such as high demand, massive risk, a lack of transparency and weaknesses in external regulation systems, all inevitably tend to lead to disaster. The Russian initiative, which was very ambitious in its potential scope, led to the establishment of a G20 working group entitled “Global Marine Environment Protection Initiative”. The working group met twice in 2011. At the time of writing, the results of this initiative seem quite hypothetical.

The Indonesian and Russian proposals are both based on the observation that international law falls well short of covering the cross-border dimensions of offshore oil exploitation when considering

the increasing risks involved. The offshore oil exploitation which according to the former IMO Secretary General, Mr. Efthymios Mitropoulos, is characterised by the four “Ds”: Deep, Distant, Dangerous and Difficult³.

2. INTERNATIONAL LAW AND ITS DEFICIENCIES

International law relating to offshore oil production is marked by the fact that the activity takes place in marine areas under sovereignty or jurisdiction. It is therefore with caution that international law addresses the obligations of states.

2.1. The UN Convention on the Law of the Sea (UNCLOS)

UNCLOS applies a strict application of the 1945 Truman Doctrine which states: “the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation [in this casen the United States] is reasonable and just”. Since then, the UNCLOS has extended this principle to the EEZ.

The Convention is implementing this principle, while adding to it certain, albeit very limited, obligations related to the protection of the marine environment, among which are:

- Article 60-4, which enables states to establish drilling installations with safety zones.
- Article 194-1, which calls on states to take “all measures (...) necessary to prevent, reduce and control pollution of the marine environment...”
- With regards to continental shelves, Article 194-3-c asserts that coastal states should limit the “pollution from installations and devices used for the exploitation or exploration of the natural resources of the seabed and its subsoil”. Coastal states must also adopt national legislation to control offshore drilling activity.

Under section 208, the parties are also invited to establish global and regional regimes to prevent pollution from offshore activities. They should establish compensation schemes and prescribe under certain conditions the removal of exploitation structures once operational lifetimes have ended (Article 235-3).

The UNCLOS therefore has the legal basis to create international regulations relating to pollution from offshore oil activities. It has yet to give substance to these provisions. However, the conventions adopted within the International Maritime

3. Speech to the IMO Legal Committee – 15th November 2010

Organization (IMO) and regional seas agreements have thus far provided an insufficient solution.

2.2. The IMO conventions

Although the IMO sticks to its mandate to deal only with maritime shipping, and not to fixed installations, some of the conventions it has adopted set out rules that apply to, or could apply to, oil platforms. However, the issue is complicated by the fact that an increasing amount of oil platforms are made up of floating structures, which cannot navigate independently⁴.

Some convention provisions explicitly apply to oil platforms, regardless of the type. For example, Annex V of the MARPOL Convention 73/78 prohibits the discharge of household solid waste, including packaging, from offshore platforms as it does from ships. The London Convention (1972/1996) on marine pollution also applies to waste dumped from platforms. The 1990 IMO International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), on hydrocarbon pollution, applies to critical situations affecting the platforms. Similarly, the new IMO “Anti-Fouling” Convention (2009) and the Hong Kong Convention on end-of-life ship recycling (2009) apply to offshore floating units.

In contrast, in terms of liability and compensation, oil platforms, floating or not, are not covered by international agreements such as the Convention on Civil Liability for Oil Pollution Damage (1992) or the 1992 Convention that established the International Oil Pollution Compensation Fund (IOPC). These agreements refer only to pollution relating to the transport of oil or its use as fuel by ships.

It is therefore clear that there are two main gaps in global international law, the first is located upstream: the absence of an international framework for the conditions under which oil exploration/exploitation is authorised and monitored; while the second is downstream: the absence of a global instrument relating to damage liability and compensation, as highlighted by Indonesia, even though the UNCLOS Article 235 (3) and the Rio Declaration of 1992 encouraged movement in this direction.

It is worth remembering that a “Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources” (CLEE) was drafted in London in 1976. It set out the principles of financially limited objective liability, compulsory insurance and the possibility to take action against the insurer; it was not accompanied by the creation of a fund.

4. Note ISEMAR, *op. Cit.*

This convention, however, was never ratified.

2.3. Regional initiatives

In accordance with the encouragement of UNCLOS, certain maritime regions, or “regional seas” have taken the initiative to cooperate in the establishment of shared rules that go beyond the scope of the international framework as described above.

Examples of such initiatives include the OSPAR Convention, which has an advanced legal system⁵, the 1978 Kuwait Regional Convention and the 1992 Convention on the Baltic Sea Environment which all require participant states to fight against pollution resulting from offshore activities. Recently (2011), the Abidjan Convention on the protection of the West African marine environment has indicated concern for the risks associated with offshore operations on the African coast. Indeed, the risks related to current developments are particularly worrying since many of the countries involved have a very limited capacity to deal with pollution incidents or platform accidents. Consider for example that off the coast of Mauritania, where 30 years ago the Banc d’Arguin National Park was created, the entire EEZ has been divided into zones intended for oil exploitation. While the IUCN has set up an “Oil Panel” in this country, highlighting potential risks and regulatory deficiencies, one wonders what could constitute effective regulation for oil exploitations that could be authorized in waters as rich in biodiversity as those of the Western Sahara, a territory whose status remains uncertain in international law.

The Mediterranean is covered by the 1976 Barcelona Convention, which was revised in 1995 and is accompanied by seven protocols, including an “offshore” one that was signed in Madrid in 1994 and came into force in 2010 after ratification by six states. However, neighbouring European countries and the European Community have so far refrained from ratifying the Protocol because it is deemed too restrictive in certain provisions. The European Commission seems to want to break this negative attitude and to encourage the countries involved (France, Italy, Greece, Spain, Slovenia and Malta) to ratify the protocol.

This protocol may be regarded as very advanced and ambitious⁶.

5. See Luisa Rodriguez Lucas, 2008, “la Prevención de la contaminación por la explotación de hidrocarburos en el mar” - Tirant lo blanch Ed

6. See Evangelos Raftopoulos, 2010, “Sustainable Governance of Offshore Oil and Gas Development in the Mediterranean: Revitalizing the Dormant Mediterranean Offshore Protocol” - www.mepielan-ebulletin.gr

The offshore protocol does not only cover activities in, geographically speaking, the entire Mediterranean subsoil, but encompasses all exploration and exploitation activities and all installation types. It imposes specific obligations on parties in terms of permits, monitoring and a requirement to use the best available technology. States must also check on the technical and financial capacity of operators. The protocol is relatively advanced on the issue of liability, stating that parties shall make sure that operators are insured against risks and that they remain responsible for any environmental damage that their activities may cause.

We can only hope that all Mediterranean countries eventually ratify this protocol, which is much needed given the development of oil platforms in the region (numbering 231 in 2010).

3. TOWARDS A GLOBAL CONVENTION ON OFFSHORE OIL EXPLOITATION

3.1. The deficiencies of regional laws

Highly fragmented regional laws have many deficiencies: they are often chronically absent, particularly in Asia, or, where they do exist, they may be of very limited effectiveness (Abidjan and Nairobi Convention). Such circumstances can only encourage support for a comprehensive approach that aims to:

- Firstly establish a common set of obligations for states (and operators) covering the entire process of approval, monitoring, intervention, sanctions and liability regime.
- Second, to counterbalance the power of oil companies and their professional organizations with an international legal framework that creates obligations, including reporting, and allows the creation of an international convention secretariat. Such a framework based on an open and multi-stakeholder governance approach, would allow the participation of civil society and, in particular, NGOs involved in the protection of the marine environment. The fundamental intention is to introduce greater transparency and accountability into a subject that presently has many grey areas and which functions as a battlefield for the clash between the Horatti (oil companies) and Curiatti (states).

While there have been many attempts to instigate such an approach, history shows a chaotic picture of convention drafts that have not, to date, produced the desired outcome.

3.2. The –challenged– role of the Comité Maritime International (CMI)

In 1977, the Comité Maritime International (CMI), an NGO for maritime law unification, proposed a draft convention on offshore mobile craft (“the Rio Draft”) which was not approved by the IMO. The CMI, however, has continued to work on the issue.

The CMI considered a new project at its 1994 conference in Sydney (“the Sydney Draft”), establishing a working group for the “further study and development, where appropriate, of an international convention on Offshore Units”. Noting that global oil and gas production had increased by 144% between 1980 and 1993, and taking the 1992 Rio Declaration into account, its Article 2 of the convention stipulating that states must ensure that activities under their jurisdiction or control do not cause damage to the environment, to other states or to areas beyond national jurisdiction. In addition, following on from the 1972 Stockholm Declaration, the Rio Declaration stressed the need for states to develop international regimes dealing with trans-boundary pollution and liability and compensation for environmental damage caused in or outside of areas under state jurisdiction.

Despite the political and moral force of the Rio Declaration, two years later in 1994 the IMO’s Committee of the Marine Environment considered that there was no need to adopt a legal instrument for offshore installations.

In 1995 however, the IMO’s Legal Committee encouraged the CMI to pursue an entirely new approach that would no longer distinguish between fixed and mobile platforms, thus answering the recurring question of the competence of the IMO through the choice of a comprehensive and positive approach. The CMI entrusted this exercise to the Canadian Maritime Law Association (CMLA), which raised the question of the appropriateness of such a convention, given:

- The international provisions already in place, as mentioned above.
- The current development of national legislation.
- The reluctance of the oil industry, whose cooperation is desirable and probably indispensable.

Finally, in March 1996 the CMLA issued a “Discussion Paper” pronouncing in favour of the preparation by the CMI of a global instrument for subsequent negotiation within the IMO framework. However, the International Association of Drilling Contractors and the Maritime Law

Association of the United States quickly opposed the CMI's work on this process⁷.

Nevertheless, the CMLA continued its work and in 2000 produced a comprehensive draft convention of 14 articles that was responsive to technological, legal and environmental developments. At the CMI Vancouver conference in June 2004, the offshore convention's working group noted the IMO's lack of interest in the initiative and the opposition of the Maritime Law Association of the United States. Due to this, the activities of the working group have been shelved. Ultimately, the project stalled as a consequence of opposition from industry and certain states, and a level of indifference or inability from the IMO. In this case, the IMO is chronically concerned about the question of the scope of its mandate which, in principle, only covers the issues of maritime navigation, and therefore transport, but not oil extraction.

3.3. New institutional perspectives

However, the issue now seems to have been resurrected.

Following Indonesia's abovementioned request for work on liability and compensation, in 2010 the IMO's Legal Committee established an informal advisory group that included 14 states, four professional organizations and the CMI. Environmental NGOs, however, were not included.

Similarly, the working group established by the G20 in response to Russia's initiative involves states only, and its work is not freely accessible. There is a risk that the work of the G20 (which makes decisions by consensus) will not produce a significant outcome. There is also a concern about the way a multi-stakeholder issue such as marine pollution is being addressed, without civil societies being party to the process. At this point, questions may be raised on what would be the most appropriate framework in which to revive the draft convention. Clearly, frameworks that are closed to civil societies, such as that of the G20, or heavily influenced by industry, such as that of the IMO, may not be optimal for the consideration of environmental issues. The IMO has only acted

in response to major accidents (Torrey Canyon, Amoco Cadiz, Erika) in reaction to public turmoil, even though on a day-by-day basis it provides a valuable and essential contribution.

The UNEP can also play an important role, providing that it strengthens its expertise in the highly technical field of offshore oil.

We can also note that environmental NGOs, often the driving forces of international protection of the environment, have, with rare exceptions, showed little interest in this matter and that the CMI, which had made considerable progress, is now paralyzed.

The Rio +20 process may provide an opportunity to revive this project, which could be developed jointly by the IMO and UNEP, with a secretariat formed from both of these organizations.

It is hoped that the High Level Expert Meeting on the Sustainable Use of Oceans, to be held in Monaco from 28th to 30th November 2011, will provide an essential stimulus for the 2012 Rio conference.

CONCLUSION

In conclusion, what reasons exist today to justify the adoption of a comprehensive convention on offshore oil exploitation? The main grounds for doing so, as described above in greater detail, are:

- The scale of the environmental risks associated with oil exploitation in deep and ultra-deep waters.
- The major deficiencies in the international legal system (control of permits, monitoring and accountability), global or regional.
- The fact that there are major governance problems in many regions, such as West Africa, and that only a few countries are capable of exerting control in the appropriate locations, verifying the impacts, responding to incidents or conducting inspections.

A convention system will enable the creation of a secretariat and structures for cooperation, as well as the launch of projects and mobilization of financial resources, thus forming a body with a sufficient technical ability to rival that of the oil industry. Under a convention, countries and companies would be obliged to provide details of measures taken to reduce the huge ecological risks that offshore oil operations pose to the marine environment. ■

7. Documents IMO LEG 79/6/2

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Lucien Chabason (IDDRI)



IDDRI'S PUBLICATIONS

- E. Druel (2011), "Marine protected areas in areas beyond national jurisdiction: The state of play", IDDRI, *Working Papers*, n°07/11.
- J. Rochette, E. Druel (2011), « Les zones marines protégées en haute mer dans le cadre de la Convention OSPAR : état des lieux et perspectives d'avenir », IDDRI, *Working Papers-Idees pour le debat*, n°03/11.
- S. Beslier (2010), « Pêche et biodiversité marine : complémentarité ou concurrence au sein de l'ordre juridique international ? Le cas du thon rouge », IDDRI, *Working Papers-Idees pour le debat*, n°09/10.

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