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**ON-GOING DISCUSSION AT IMO ON MATTERS CONCERNING LIABILITY AND
COMPENSATION FOR OIL POLLUTION DAMAGE RESULTING FROM OFFSHORE
EXPLORATION AND EXPLOITATION ACTIVITIES**

Submitted by the International Maritime Organization (IMO)

SUMMARY

<i>Executive Summary:</i>	This document presents matters concerning liability and compensation for oil pollution damage resulting from offshore exploration and exploitation, activities.
<i>Action to be taken:</i>	For information only.
<i>Related documents:</i>	None.

Distinguished experts and participants, ladies and gentlemen,

First of all, may I thank the organizers for the invitation to speak to you today, as part of this Workshop.

The issue of liability and compensation for oil pollution damage resulting from offshore oil exploration and exploitation was first brought to the attention of IMO in March 2010 at the 60th session of the Marine Environment Protection Committee (MEPC) by the Indonesian delegation who made a general statement regarding an accident at the MONTARA offshore oil platform located in Australian waters, resulting in a significant release of oil into the Timor Sea.

As liability and compensation issues are generally dealt with by the Legal Committee, the MEPC agreed that this matter, should in the first instance at least, be discussed within that Committee. Accordingly, the Indonesian delegation submitted a proposal in this regard to the 97th session of the Legal Committee, which met in September 2010.

At the time of the incident in question, the MONTARA platform, which was located in the Australian EEZ, blew out during the drilling of a new well. While there was no loss of life, the rig and platform were immediately evacuated as gaseous hydrocarbons and oil were released into the sea and air.

The rig and platform were owned and operated by PTTEP Australasia, a subsidiary of a Thai owned petroleum exploration and production company. According to the Indonesian delegation, the oil slick damaged the marine environment in Indonesia's waters in the Timor Sea and caused socio-economic damage to the coastal communities whose living depends on the sea and its living resources. While the company did carry relevant insurance, as far as I know, no pay-out has yet been effected due, in part, to a dispute as to the alleged extent of the damage.

The wider concern of the Indonesian delegation was that, while such companies generally do carry insurance, this is usually determined in accordance with the regulatory limits set by national bodies which regulate offshore drilling in the respective country and may be, in certain cases, present in regional arrangements/agreements. However, the amount of such insurance may be limited and may vary, according to national law. What was missing, in their view, was a uniform international standard which could apply to all incidents of this nature.

The Indonesian delegation accordingly invited the Legal Committee to include this item on its agenda and to consider the possibility of establishing an international regime for liability and compensation for oil pollution damage resulting from offshore oil exploration and exploitation activities.

To date, the Indonesian proposal has been considered at four successive sessions of the Legal Committee, as well as by an informal intersessional consultative group led by Indonesia. The debate has revolved around two main issues, one procedural and the other substantive, and each of these issues has proved to be rather controversial.

The procedural issue is a rather fundamental one. In years past, each Committee was able to determine for itself whether to include a new item on its agenda. All such proposals were of course carefully considered, particularly in relation to the criterion of need, and if the Committee thought fit, the item was included on its agenda.

These days, however, the IMO Council requires that all proposed new agenda items fit into the Strategic Plan developed by the Organization for any particular biennium. Unfortunately, the Indonesian proposal did not fit into the Strategic Plan, and any amendment of the Plan would require the Council's agreement.

The Committee's consideration of the substantive issue has, if anything, been even more difficult to resolve. Not all delegations have entered into the debate but it is quite clear that views are becoming polarised.

At the Committee's request, the Secretariat submitted a document providing information on international and regional instruments already in existence, which might deal with the problem of liability and compensation for oil pollution damage resulting from the operation of offshore oil rigs. The Secretariat reported that no suitable single instrument existed, although some of the instruments it cited might well provide some elements for an international instrument of this nature.

In summary, while the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) requires States to control pollution of the marine environment from seabed activities and to provide recourse for compensation for damage caused by such pollution, the Convention falls short of imposing a liability and compensation regime itself. The 1977 Convention on Civil Liability for Oil Pollution Damage from Offshore Activities (CLEE), which does provide the text for such a regime, has not entered into force. A 1974 regional Convention between Denmark, Finland, Norway and Sweden does provide for compensation for oil spills from offshore platforms, but is limited to these four States – though it could serve as a precedent for regional action, as could, perhaps, the 1974 voluntary Offshore Pollution Liability Agreement (OPOL), which makes major oil companies operating in and around the North Sea liable for compensation for damage caused by oil spills from offshore facilities.

Other international and regional conventions and some IMO instruments and codes deal with combating pollution from offshore activities, but do not establish liability and compensation regimes. The 2010 UNEP Guidelines provide for the development of domestic legislation on liability and compensation for damage from activities dangerous to the environment, but do not extend to offshore platforms. Similarly, the 2004 European Union Environmental Liability Directive makes operators carrying out dangerous activities responsible for damage, regardless of fault, but applies only in a limited degree to oil rig accidents. It should be noted that, in reaction to the *Deepwater Horizon* incident, that Directive was amended by Directive 2013/30/EU, of 12 June 2013. However this Directive remains limited in scope and it confines itself to requesting Member States to “ensure that the licensee is financially liable for the prevention and remediation of environmental damage as defined in that Directive, caused by offshore oil and gas operations carried out by, or on behalf of, the licensee or the operator”.

The Committee was also informed of the work being done over the past 30 years by the Comité Maritime International (CMI) on a draft convention on offshore mobile craft. In fact, in 1998, the CMI

had submitted a comprehensive report to the Committee on such craft, which do not easily fall within the generally accepted definition of “ship” and the consequent difficulties in applying certain existing maritime law conventions to them. The submission addressed the need and prospects for a new international convention to address these problems and the possibility of enlarging the scope of such a convention to apply, in appropriate cases, not only to mobile offshore units but also to fixed structures. It also contained a possible framework for a future treaty instrument.

As might be expected in a meeting comprising approximately 60 different government delegations, a wide range of views was expressed, both for and against the Indonesian submission.

Among the arguments in favour of including the item on the Committee’s agenda were the following:

- it was appropriate at this time for the Organisation to discuss this issue in light of recent incidents;
- the Committee should not wait for another serious incident to occur before acting;
- if IMO did not take the initiative, it was doubtful whether any other international body was competent or had a better mandate to deal with this issue;
- incidents involving transboundary pollution damage from offshore platforms might occur in any part of the world and not every country was able to tackle the problem on its own – accordingly, international regulation was advisable; and
- oil pollution knows no borders and accordingly it was important to have in place a mechanism to compensate victims.

Among the arguments against, or expressing caution, were the following:

- oil spills from offshore rigs differ from those from ships, since offshore exploration and exploitation activities are normally carried out on the continental shelf of States and are regulated by national law and bilateral instruments, making the need for a uniform, global regime questionable;
- IMO’s mandate to deal with such issues was also questioned;
- under UNCLOS, States, rather than international organizations, have the right to establish limits of liability for this type of activity;
- the compelling need to develop liability and compensation provisions had not yet been established and further study was therefore needed, including a survey of national laws and regional solutions, to assess the existing legal structures and their effectiveness and to identify gaps, if any, relating to the availability of compensation; and
- while the proposal was theoretically attractive, many practical issues had first to be discussed.

Ultimately, since a clear majority of those delegations which spoke were in favour of including this item on the agenda of the Committee, and since, as stated earlier, IMO’s Strategic Plan, as currently worded, refers to “shipping” and therefore does not cover pollution caused by offshore oil exploration and exploitation activities, the Committee recommended that the Council, and through it, the Assembly, revise Strategic Direction 7.2 to include a focus on reducing or eliminating any adverse impact on the environment by offshore oil exploration and exploitation activities. It was further recommended that Strategic Direction 7.2 also include a reference to liability and compensation issues connected with transboundary pollution damage resulting from such activities.

In the meantime, and pending the Council’s decision, the Committee recommended that the informal consultative group of interested States and organisations should continue to work together interessionally, coordinated by Indonesia, to analyse the issue further, taking into account comments made in the Committee.

At the Council a number of States which had not been in favour or had expressed caution at the meetings of the Legal Committee which predated that of the Council, forcefully reiterated their views, while those States which had been in favour failed to do so.

As a result, instead of accepting the Committee's proposal for amendment of the Strategic Plan, the Council requested the Legal Committee, at its next session, to re-examine the proposed revision of Strategic Direction 7.2 and to report back to it accordingly.

The matter was further considered by the Legal Committee at its 99th session in April 2012, when the Committee was expected to either confirm, revise or revoke its recommendation. Both the delegations of Indonesia and Brazil submitted documents.

The Brazilian submission argued essentially that, in light of UNCLOS and IMO's mandate as contained in the IMO Convention, this work was outside of the scope of the Organization. Accordingly, it was not legally possible to vest the Organization with the authority to pursue the change to its Strategic Plan by means of a simple change in its work programme.

In Brazil's view, IMO's mandate was limited to shipping-related issues and could not be extended to cover pollution damage caused by offshore oil exploitation and exploration rigs. That is to say, the Organization's mandate was limited to pollution prevention activities from vessel sourced pollution.

Furthermore, Brazil contended that it would be impossible, as proposed by Indonesia, to duplicate for the offshore oil sector, existing liability and compensation rules applicable to oil pollution from ships contained in the 1992 Civil Liability and Fund Conventions. Any such attempt to do so would ignore fundamental differences that exist between the activities of ships and those of oil rigs attached to the continental shelf.

It contended that, since offshore oil exploration and exploitation activities start and end within the EEZ of a State, any damage would always have a restricted spatial reach. At most, in exceptional cases, these activities may cause losses to a common geographical region. By comparison, since the role of oil tankers is to transport oil from the producing regions to the consuming ones, this activity usually has international implications because ships need to sail through EEZs and territorial waters of different countries in order to accomplish the task.

The Indonesian delegation submitted a short paper attempting to counter the points raised by Brazil and another paper providing information on an International Conference on Liability and Compensation Regime for Transboundary Oil Damage Resulting from Offshore Exploration and Exploitation Activities, held in Bali, which recommended that an international regime on liability and compensation for transboundary damage caused by pollution from offshore activities should and could be established.

The Committee agreed that, in order to have a proper basis to organize discussion of the issues relating to transboundary damage from offshore activities, it was necessary to follow applicable procedures. In this regard, a delegation making a proposal which falls outside the scope of the Strategic Plan should be invited to submit it to the Council in accordance with paragraph 8.7.3 of the Guidelines on the application of the Strategic Plan and the High-level Action Plan (resolution A.1013(26)), and in accordance with paragraph 4.12.3 of the Committee's Guidelines on the organization and method of work (document LEG.1/Circ.6).

There was support for the Committee to develop guidance, or a model agreement, to assist States to enter into bilateral or regional agreements. In this regard, it was noted that the Committee had special expertise in the area of liability and compensation issues.

In view of the above, the Committee agreed to inform the Council that it wished to analyse further the liability and compensation issues connected with transboundary pollution damage resulting from offshore oil exploration and exploitation activities, with the aim of developing guidance to assist States interested in pursuing bilateral or regional arrangements, without revising SD 7.2.

The Committee recognized 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.

The delegation of Indonesia informed the Committee that it would continue coordinating an informal consultative group to discuss issues connected with transboundary pollution damage from offshore exploration and exploitation activities¹.

Delegations were invited to submit documents on this subject to the Committee's next session under the agenda item "Any other business".

The Legal Committee at its 100th session held last April, considered a submission by Indonesia (document LEG 100/13) providing information on the outcome of the second International Conference on Liability and Compensation Regime for Transboundary Oil Damage Resulting from Offshore Exploration and Exploitation Activities, held in Bali in November 2012. Among the outcomes, according to the document, was an acknowledgement that the issue of transboundary damage caused by offshore oil pollution is still timely and should be further discussed, due to the high possibility of such an incident occurring in the future. It was also highlighted that IMO is the most appropriate forum to deal with the issue, due to its extensive expertise in various maritime and marine environment issues, and that there was a possibility of adopting a regional approach, especially between ASEAN countries and/or East Asian countries.

The Committee further considered document LEG 100/13/2, also submitted by Indonesia, providing information on principles for guidance on model bilateral/regional agreements or arrangements on liability and compensation issues connected with transboundary pollution damage from offshore exploration and exploitation activities. The document referred to certain principles that need to be further elaborated when deliberating on offshore liability and compensation issues, making a distinction between principles to prevent pollution damage and principles to facilitate the recovery of compensation for pollution damage from offshore facilities. The first category represented public law issues, the second private law issues.

Following a debate, in which a variety of views were put forward, there was general support for increased cooperation between States on the subject, as well as for further work by the Committee.

The Legal Committee agreed that:

- the keyword in providing guidance was collaboration by States and assistance to those States which are in need of guidance for bilateral and multilateral agreements;
- Member States were invited to send examples of existing bilateral and regional agreements to the Secretariat; and
- at the same time, the delegation of Indonesia was encouraged to continue its work intersessionally to facilitate further progress within the Committee.

In conclusion, whilst the development of principles for bilateral and regional agreements appears to be in sight, a global legal framework at present is not. The only additional comment I would like to add is that the Legal Committee tackled this complex issue with sensitivity. The compromise decision not to develop a new international treaty regime, but, instead, to look into the possibility of developing guidance to assist States in entering into bilateral or regional arrangements, appears to be the best possible outcome.

Ladies and gentlemen, it remains only for me to once again thank the organizers of this event for inviting me to address this Workshop and to commend them for assembling such a distinguished panel of experts.

Thank you.

¹ The online address for participating in this group is as follows: ind_offshorediscussion_imoleg@yahoogroups.com.