

Brief for GSDR 2015

Strengthening the international regulation of offshore oil and gas activities

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Introduction: Too much of a good thing

Recent decades have seen a marked increase in the development of offshore oil and gas activities. Due to increasing energy demand and technological innovations, drilling activities extended and moved into deep and ultra-deep water areas (Dragani and Kotonev, 2013). 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 (e.g. Western Africa, Gulf of Mexico) (PCF Energy, 2011) and significant development in new areas (Pike, 2013), such as Eastern Africa and the Eastern Mediterranean.

Drilling more and deeper means increased threats to the environment, depletion of natural resources, and potential negative consequences for the human activities dependent upon these ecosystems. Recent accidents on offshore platforms have demonstrated that the environmental risks of offshore drilling activities concern all regions of the world and all types of companies. These transboundary nature of the impacts from these accidents have reinvigorated discussions regarding the suitability of the current international regulatory framework for offshore oil and gas activities (Rochette et al., 2014). In this regard, it is clear that there are regulatory gaps, both in terms of safety of offshore drilling activities and liability and compensation in case of accidents.

Gaps in the regulatory framework for the environmental safety of offshore drilling activities

National legislation regulating offshore oil and gas activities varies greatly. Some national legislation addresses every stage of the platform's lifecycle—from the exploration phase to the dismantling of offshore installations—while others are limited to the production stage. Some legislation aims at addressing the environmental impacts of offshore exploration and exploitation while others focus entirely on facilitating the development of offshore activities. Moreover, the effective implementation of national legislation also varies. In this regard, a lack of capacity in many developing States prevents them from effectively controlling and monitoring the development of offshore activities and enforcing regulations, when they exist (Panel scientifique indépendant sur les activités pétrolières et gazières en République islamique de Mauritanie, 2009).

Furthermore, there is also a regulatory gap at the international level. Despite the United Nations Convention on the Law of the Sea's (UNCLOS) relevant provisions, to date no international convention on the safety of offshore drilling activities has been adopted, and there is at present no ongoing process intended to fill this gap (Chabason, 2011). Two attempts have previously failed. The 1977 draft Convention on offshore mobile craft, prepared by the Comité Maritime International (CMI), aims to apply various existing conventions on navigation to offshore activities, but it has not been endorsed by the International Maritime Organisation (IMO).

The most recent project to develop an international agreement, discussed within the G20 framework, did not ultimately progress beyond the early discussions (Rochette et al., 2014). These failures reflect the difficulty for the international community to agree on the development of a binding instrument regulating an economic activity that is considered vital for many States.

Gaps in the global legal framework progressively led to the development of regional instruments, though these are highly fragmented and insufficient (Rochette et al., 2014): (i) Regional agreements differ in their comprehensiveness, some being more thorough (the Persian Gulf/Oman Sea Area, the Mediterranean, and the North-East Atlantic) than others (the Arctic for instance). Oil and gas exploration and exploitation are totally banned in Antarctica; (ii) Regional agreements have heterogeneous legal scopes: some are binding while others are only soft law instruments; (iii) There are different levels of implementation for regional agreements: some were adopted several years ago (the Persian Gulf/Oman Sea Area and North-East Atlantic) but others have only just entered into force (the Mediterranean) or still remain to be elaborated (Western, Central and Southern Africa and the Western Indian Ocean); (iv) There is no coordination and/or sharing of experience between the different regions involved in offshore drilling regulation.

Lack of specific international rules on liability and compensation

There are currently no global rules regulating liability and compensation for pollution damage resulting from offshore drilling activities. No specific international agreement has been adopted so far (Scovazzi, 2012) and the Brussels civil liability convention for oil pollution damage does not cover pollution risks and environmental damages caused by offshore oil and gas

operations. Finally, the offshore pollution liability agreement (OPOL), a private regime, is limited in its geographical coverage and compensation for damages is capped at a rather low level (Client Earth, 2011).

The 2009 Montara accident in Australia reopened the debate on the suitability of an international framework regulating liability and compensation in case of accidents arising from drilling activities. The Montara platform, located about 250 km off the north-west coast of Australia, blew out during the drilling of a new well. According to Indonesia, the oil slick damaged the marine environment in Indonesian waters and caused socio-economic hardship to coastal communities whose livelihoods depend on the sea and its living resources. In the absence of appropriate insurance coverage for the operator, no payout has yet been made, due in particular to a dispute as to the alleged extent of the damage. Indonesia's wider concern was that, while such operators generally do carry insurance, it is usually determined in accordance with the regulatory limits set by national bodies which regulate offshore drilling in the country where the company is headquartered. The amount of such insurance may be limited and may vary according to national law. What is missing, according to Indonesia, is a uniform international standard which could apply to all incidents of this nature. Since 2010, discussions at the IMO on the Indonesian proposal to develop an international treaty on liability and compensation are at a standstill.

Risks of the status quo

In terms of environmental safety of offshore drilling activities, several risks should be highlighted: (i) A risk of inappropriate, fragmented or nonexistent regulations, leading to uneven environmental protection and the risk of environmental dumping; (ii) A risk of non-implementation of national and/or regional

agreements if States capacities are not strengthened; (iii) A risk of self-regulation by voluntary 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 made up of small companies which are less accountable and do not pay the same attention to the protection of the environment.

In the same manner, several risks can be highlighted if no liability and compensation rules are adopted: (i) A risk of legal uncertainty leading to political disputes between States; (ii) A risk of partial or non-payment of damages in the absence of clear rules; (iii) A risk of insolvency given the lack of financial capacity of many small operators to pay for large claims (Cameron, 2012).

Issues for further consideration

The above analysis leads to the conclusion that:

- 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.
- Regulations cannot not deliver changes if States have no means – e.g. technical, financial, and human – to implement them. Building States' capacities in effectively controlling the offshore industry is therefore a crucial challenge.

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