EXISTING INTERNATIONAL LEGAL AND REGULATORY FRAMEWORKS FOR OIL SPILL COMPENSATION

SUMMARY ADVICE

16 JULY, 2014
1. We have been instructed by Stakeholder Democracy Network (SDN) to provide advice regarding international best practice in the design of oil spill response and compensation legislation. Specifically, SDN has requested advice regarding standardised compensation rates for oil spill-related loss and damage.

2. SDN is concerned that the current regime for oil spill compensation in Nigeria is unpredictable, inequitable and mired in delay. It believes that oil companies’ reliance on outdated industry-determined compensation rates in response to community and individual claims for damages is the main factor deterring settlement and fuelling litigation. As a proposed solution, SDN wishes to facilitate the introduction of statutory compensation system.

3. SDN has requested advice on the following:
   (a) An overview of the legal process for determining the rates of compensation in existing international legal frameworks;
   (b) Regulation mechanisms for the enforcement of those frameworks; and
   (c) Details of actual compensation rates.

4. For each of the schemes listed below, we provide a summary of (a) the administrative or legal process through which damages are claimed and enforced and (b) the principles and methods used to calculate damages:

   a. International Convention on Civil Liability for Oil Pollution Damage (CLC);
   b. International Oil Pollution Fund;
   c. United States Oil Pollution Act and Oil Spill Liability Trust Fund;
   d. Gulf Coast Claims Facility (BP Deepwater Horizon Compensation Scheme);
   e. Offshore Pollution Liability Agreement (OPOL);
   f. Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Sea-bed Mineral Resources, 1977 (CLEE);
   g. Petroleum Activities Act (Norway);
   h. EC Directive 2005/35 EC; and
   i. Canadian legislation

5. In addition to the summaries, we provide a reading list to assist SDN in researching further any particular legal provisions. On the basis of our research, we set out what we believe international best practice to be regarding compensation for loss and damage caused by oil spills.
We conclude from our research that standardised compensation rates for oil spill-related loss and damage do not exist internationally. However, the major compensation schemes share several common features, listed below:

**Heads of loss**

i) Damage to property tends to be calculated by reference to the actual cost of repairing or replacing the property, or the difference between the value before and after the spill;

ii) Compensation for damage to natural resources (where this is provided for) tends to be calculated by reference to the cost of remediating or replacing the lost or damaged natural resources. The compensation schemes do not generally provide for additional, independent compensation for damage to natural resources;

iii) Damages for loss of subsistence use of natural resources can be included;

iv) Compensation for consequential losses and pure economic losses (such as loss of income) are generally provided;

v) The cost of bringing a claim, including the use of advisers where appropriate;

vi) The heads of loss identified in the compensation schemes are generally not exhaustive or exclusive: for example, the French court awarded damages for nonpecuniary losses in addition to those provided for by the International Convention on Civil Liability for Oil Pollution Damage 1992; similarly, the American OPA does not contain damages for personal injury but these can be claimed under state or admiralty law;

vii) Non-pecuniary losses (save to the extent that these might be recoverable as damage to natural resources of loss of subsistence use) and punitive damages are generally not expressly recoverable under the compensation schemes;

It might be considered that non-pecuniary losses should be compensable in Nigeria, in recognition of the fact that indigenous communities in Nigeria tend to rely on nearby communal water sources for sanitary, washing and other purposes that go beyond the usual use in other parts of the world where oil spill compensation legislation have been developed.
Similarly, it could be appropriate to consider departing from international norms when it comes to the compensation for damage to communally owned land (which can include mangrove swamps and other natural resources) which forms a central part of Nigerian community life. Such natural resources are not generally communally owned or relied upon as heavily (and not solely for economic benefits) in the developed world. Some method of calculating compensation for communities in accordance with the area of land affected may be appropriate in the Nigerian context.

Many of the compensation schemes provide for interim payments, which would also be appropriate in the Nigerian context.

The international compensation schemes tend to require the responsible party (or the related fund, where appropriate) to reimburse persons for their reasonable efforts in cleaning up or remediating an oil spill.

The responsibility and enforcement mechanisms for clean-up and remediation vary from scheme to scheme.

There is not a single, consistent response to damage caused by third parties across the different international schemes. However, a responsible party will escape liability for such damage where it has acted with due care and taken reasonable precautions against foreseeable acts of third parties.

Responsible parties tend to be liable if their employees, agents or contractors have acted negligently and/or wilfully in causing an oil spill.

Many of the compensation schemes are twinned with funds, which provide for compensation where a responsible party is unable to meet its financial liabilities, where no responsible party is identified (such as where there has been third party damage), or where the damage exceeds the responsible party’s limited liability.