Australia’s Lack of Compliance with International Legal Principles of Transboundary Harm

A case study of the Montara incident

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A Case Study of the Montara Incident

1. Brief background

2. Relevant domestic legislation and regulation

3. Applicable international environmental legal principles of transboundary harm
   a) Did Australia comply with these obligations in the Montara incident?

4. Conclusion
The Montara Oil Spill

- PTTEPAA operated the Montara wellhead
- located 140 nautical miles offshore from the northwest Australian coast

The Montara Oil Spill

- 21 August 2009 uncontrolled release of hydrocarbons at the Montara wellhead platform
- Direct causes now established:
  - PTTEPAA did not observe sensible oilfield practices at the Montara oilfield
  - The NT Department of Resources was not a sufficiently diligent regulator
- 400 to 1500 barrels of crude oil every day leaked into the environment until the leak was stopped on 3 November 2009
- The oil reached Indonesian and Timor Leste waters
Commission of Inquiry

- 5 November 2009 Commission of Inquiry announced
- Commissioner Mr David Borthwick AM PSO handed the Report to the Minister for Resources and Energy on 17 June 2010
- Report released to the public on 24 November 2010
- 105 recommendations
  - National offshore petroleum regulator
  - ‘Polluter pays’
Domestic Environmental Legislation and Regulation


Regulation of offshore petroleum exploration is shared between the Commonwealth and the relevant state/territory.
Domestic Environmental Legislation and Regulation

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (‘EPBC Act’)

Actions that are likely to have a significant impact on a place of National Environmental Significance (‘NES’) require approval from the Federal Minister for Environment
- Commonwealth marine environment
- Ramsar Wetland
Australia’s Obligations Under International Environmental Law

1. Customary Law
   a) the duty to prevent transboundary harm
   b) the duty to cooperate

2. Convention on the Law of the Sea

3. State Practice
Customary Law

1) The duty to prevent, reduce and control transboundary pollution and environmental harm resulting from activities within their jurisdiction or control

- *Stockholm Declaration on the Human Environment* principle 21

- *Rio Declaration on Environment and Development* principle 2

- *Trail Smelter Arbitration*
Did Australia Comply?

- An oil spill reaches the threshold of ‘significant’ transboundary harm

- Assessment of the Montara project under the EPBC Act s 75 should have taken a wide approach and considered all adverse impacts, including those reaching beyond Australia’s borders

- Stronger regulations could have required transboundary impacts to be considered at all stages of the Montara operations
Customary Law

2) The duty to cooperate in mitigating transboundary environmental risks and emergencies

- States must assess, notify and consult with any state whose interests may be affected prior to engaging in conduct carrying a significant risk

- *Lac Lanoux Arbitration*

- *Danube Dam Case*

- *MOX Plant Case*

- *Pulp Mills on the River Uruguay Case*

- *Southern Bluefin Tuna Case*
Did Australia Comply?

- Lack of information suggests that Indonesia and other neighbouring states were not notified prior to Australia approving the Montara project
- After the oil spill cooperation with Indonesia was limited
- Australian and Indonesian Governments are cooperating in seeking compensation from PTTEPAA
- This appears to be the extent of Australia’s cooperation with neighbouring states
Law of the Sea

*United Nations Convention on the Law of the Sea*

- **Article 197**: States shall cooperate on a global and regional basis for the protection and preservation of the marine environment.

- **Article 198**: States shall immediately notify likely affected states upon realisation that the marine environment is in imminent danger of damage by pollution.

- **Article 206**: When states believe that activities within their control could harm the marine environment they shall assess the potential affects and communicate the results.

- **Article 208**: States shall adopt laws and regulations to prevent, reduce and control pollution.
Did Australia Comply?

• Approval under the EPBC Act was assessed on preliminary documentation. The results of the EAR were not widely communicated.

• PTTEPAA’s preliminary documents claimed that there would be minimal risk to the marine environment in the event of an oil spill.

• PTTEPAA commenced drilling operations before gaining approval of its revised OSCP; a condition of its EPBC Act approval.

• Unclear whether there are any measures in place for transboundary situations such as an oil spill from Australia crossing into neighbouring waters.
State Practice: EIA

EIA is a way of complying with the international legal duty to prevent transboundary environmental harm

- *Nuclear Tests Case*
- *Pulp Mills on the River Uruguay*
- *Rio Declaration* principle 17
Did Australia Comply?

- Assessment of the Montara project under the EPBC Act was by preliminary documentation.

- A comprehensive EIA would have identified the real risks to the marine environment and promoted informed decision making.

- Accordingly, more effective conditions and regulation could have been devised, to prevent transboundary environmental harm from occurring.
Australia’s Domestic Legislation as it Currently Stands

Applications for offshore petroleum exploration and drilling must be accompanied by an:
- Environmental plan; and
- Oil Spill Contingency Plan

This is in addition to an Environmental Assessment Report (EAR) required for approval under the EPBC Act.

Transboundary considerations are often neglected from the EAR process, there is minimal dialogue and cooperation between Australia and its neighbours, and regulation is too great a burden on resource restricted authorities.
Conclusion

- Australia’s current legislative scheme arguably does not effectively implement international law requirements regarding environmental harm in a transboundary context, exemplified by the Montara incident.

- There needs to be greater emphasis on transboundary environmental harm in the planning stage of a project, namely through EIA, in addition to greater dialogue and cooperation between Australia and its neighbours.