

Dispute settlement options for environmental disputes in the context of energy projects: determining liability and dealing with claims						
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# What types of claims arise?

Weil

## **Tortious / compensatory claims**

These claims are aimed at compensating injured parties for losses or injuries incurred as a result of the incident

### **Who brings these claims?**

Individuals, businesses and public bodies

### **What types of claims?**



```
graph TD; A[Tortious / compensatory claims] --> B[Personal Injury Claims]; A --> C[Economic Loss Claims]; A --> D[Securities Loss Claims];
```

Personal  
Injury  
Claims

Economic  
Loss  
Claims

Securities  
Loss  
Claims

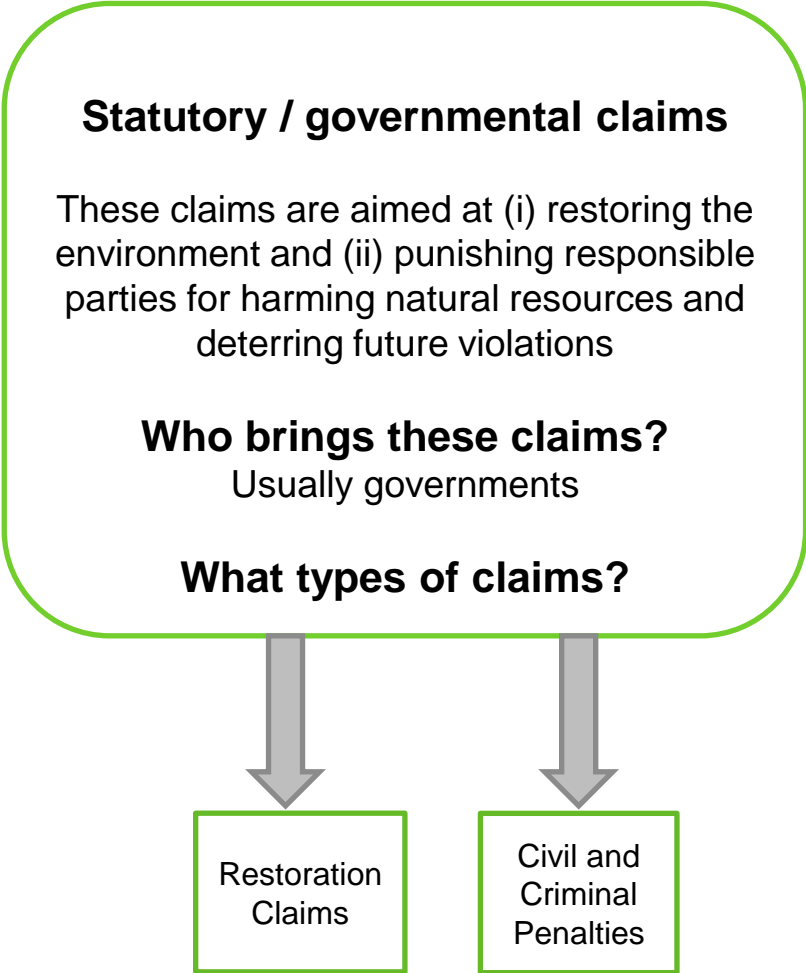
## **Statutory / governmental claims**

These claims are aimed at (i) restoring the environment and (ii) punishing responsible parties for harming natural resources and deterring future violations

### **Who brings these claims?**

Usually governments

### **What types of claims?**



```
graph TD; A[Statutory / governmental claims] --> B[Restoration Claims]; A --> C[Civil and Criminal Penalties];
```

Restoration  
Claims

Civil and  
Criminal  
Penalties

- Jurisdiction
  - Will be the single most important factor in any case
- Legal basis for claims
  - Related to issue of jurisdiction
  - Statutory/contractual/tortious?
  - Most Investor/State and State/State agreements have no, or at best inadequate, provisions expressly dealing with how liability for environmental damage should be ascertained and apportioned
- Political issues

## Who is liable? US example – *Deepwater Horizon*

Naturally, a large number of companies were involved in running the *Deepwater Horizon* rig. The determination of which of these could be liable for losses and damage caused by the *Deepwater Horizon* incident depended primarily on the nature of the different claims available.

The principal companies involved include:

- **BP**: majority owner and operator of the Macondo well; BP hired Transocean to provide the *Deepwater Horizon* drilling rig and a drilling crew
- **Transocean entities**: owner of the *Deepwater Horizon* drilling rig
- **Anadarko entities**: minority owner of the Macondo well
- **MOEX**: minority owner of the Macondo well
- **Halliburton**: performed cementing work on the Macondo well
- **Cameron**: manufactured the blowout preventer
- **Weatherford**: manufactured the float collar
- Risk allocation between the operator and contractors – “*knock for knock*” indemnities

## How have claims been dealt with? *Deepwater Horizon (cont'd)*

### TORTIOUS / COMPENSATORY CLAIMS

- Economic Loss Claims
  - The Economic and Property Damages Settlement
  - Post-settlement issues
- Personal Injury Claims
  - The Medical Benefits Settlement
- Securities Claims
  - Shareholders claims against BP and key officers
  - Shareholders claim against Anadarko and key officers
  - SEC Settlement with BP
  - Multidistrict litigation

## How have claims been dealt with? *Deepwater Horizon (cont'd)*

### STATUTORY CLAIMS

- Restoration and Oil Removal Claims
  - Under the Oil Pollution Act
    - Natural Resource Damages
    - Oil Removal
- Civil fines and criminal penalties
  - Clean Water Act
  - Settlements with the DOJ

## Who is liable? European example – *The Erika*

- Tiered international regime of compensation for oil spills from oil tankers:
  - First Tier: Civil Liability Conventions (CLC 1992)
  - Second Tier: International Oil Pollution Funds (1972 and 1992)
  - Third Tier: Supplementary Fund Protocol (2003)
  - BUT no international regime for oil pollution from blowout
  
- Issues arisen from the Erika proceedings:
  - Do the French courts have jurisdiction?
  - Interaction between the international conventions and French legislation
  - Which entities are liable?

## Other issues/possible routes for determining liability

- ECT model agreements
  - Model IGA
    - Provides for states to: (i) establish appropriate environmental standards and ensure compliance; and (ii) assist an Affected State in the event of spillage
    - No specific provision for resolving disputes in relation to liability
  - Model HGA
    - Obligation to take action rests with the Project Investors
    - Project Investors jointly and severally liable (could include environmental damage)
    - No specific procedure for resolving disputes in relation to environmental damage
- Other treaty provisions – e.g. BITs/MITs
- PCA



## Recent developments and future challenges

- EU directive in respect of safety of offshore oil and gas operations
- Lack of consistent national legislation and jurisdictional issues
- Clarification of the liability regime between operators and contractors
- Adopting appropriate liability caps