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OFFSHORE OIL POLLUTION DAMAGE: IN PURSUIT OF A UNIFORM INTERNATIONAL CIVIL LIABILITY REGIME

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ABSTRACT

A significant amount of marine oil pollution is vessel-source with another being non-vessel-source originating from offshore oil platform operations. The world has witnessed a number of oil spill disasters since the 1950s including the Deepwater Horizon incident in the United States, the Montara Wellhead Platform in Australia and the continuing oil spill incidents in the Niger Delta, Nigeria. Technological advances mean that offshore operators now venture further out from coastlines to explore for, and exploit hydrocarbon reserves, thus increasing the crude oil output, and also the possibility of oil pollution incidents from offshore platforms. The International Convention on Civil Liability for Oil Pollution 1969 and the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1971 were developed under the leadership of the International Maritime Organization in response to the increasing incidents of vessel-source oil pollution of the marine environment.

Since the entry into force of these Conventions the membership has increased and the incidents of vessel-source oil pollution reduced. Efforts made by the *Comité Maritime International* (CMI), as early as in 1977, to develop a uniform civil liability convention for claims arising from offshore operations did not come to fruition, and very little progress has been made in finding a solution. Currently, there is no uniform international civil liability regime in place for oil pollution compensation claims arising for damages caused by offshore operations.

This article explores the reasons behind the lack of a coherent legal framework to process civil liability claims arising from offshore oil spill incidents, especially when a comprehensive international regulation exists to govern vessel-source and other related forms of marine oil pollution. It argues that the lack of leadership to find a solution is proving to be highly damaging and that there is a strong case and an urgent need to establish a

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uniform international offshore oil spill liability regime. The article looks at existing regimes, both regional and national, as a way forward to develop an international regime for oil pollution compensation for damages arising from offshore activities.

KEYWORDS: Offshore Oil-Pollution; Marine Oil-Pollution; Deepwater-Horizon; Niger-Delta; Montara Wellhead; Civil-Liability; CLC; UNCLOS; OPOL; US Oil Pollution Act 2010.

PART I: INTRODUCTION: EXTRACTION, CARRIAGE AND THE RISK OF OIL SPILL

Crude oil is still the primary source of energy for the modern global economy. Over half of the crude oil that is extracted, both off the coast and inland, is transported by sea for refining and eventual consumption. Each year, over 2,000,000,000 metric tonnes of petroleum products are transported by sea, which accounts for a 29.8% share of annual seaborne trade.[1] About 63% of the world's oil production is moved using maritime routes[2] and, not unsurprisingly, has led to oil spills from tankers, drilling rigs and wells, and offshore platforms.[3] The pollution caused by crude oil is a major threat as it can escape into the marine environment at any point during its extraction and transportation, viz*.,* directly from the platforms, from the pipes, or from the oil tankers. Offshore activities play an important role in crude oil production, with offshore installations producing an estimated 15.4 million barrels of oil per day globally.[4] Needless to say, both offshore operations and the carriage of crude by sea

[1] In 2013 over 2,800,000,000 tonnes of oil and gas products were carried by sea. See UNCTAD, "Review of Maritime Transport" (2014) 4.

[2] According to the US Energy Information Administration (EIA) estimates, in 2013, world petroleum and other liquids production was about 90.1 million barrels per day, and about 63% (56.5 million barrels) travelled by seaborne trade. See US Energy Information Administration, 'World Oil Transit Chokepoints' (10 November 2014) <http://www.eia.gov/countries/regions-topics.cfm?fips=wotcandtrk=p3> (accessed 4 March 2016).

[3] Oil spills may also occur due to releases of refined petroleum products, such as petrol, diesel, or from bunkers used in large ships, or from the spill of any ballast oil or waste oil from ships.

[4] See M Faure, L Jing and W Hui, "A Multilayered Approach to Cover Damage Caused by Offshore Facilities" [2015] Virginia Environmental Law Journal 356-422. See also Quest Offshore, "The State of the Offshore US Oil and Gas Industry: An In-depth Study of the Outlook of the Industry Investment Flows Offshore" No 14 (2011).

carry with them the high risk of oil spills leading to damage to both the marine environment and to the livelihoods of individuals. This article, in particular, is concerned with the legal issues relating to civil liabilities arising from the operations relating to the former.

As it stands today, the fate of any civil liability claim arising from oil pollution damage appears to depend entirely on a) the source and the geographical location of the incident that gave rise to the claim—as there is a lack of uniform international regulation to govern such incidents, b) the domestic legal framework and oversight on corporate social responsibility, and c) in the case of developing nations involved in hydrocarbon extraction, the domestic legal and regulatory framework to oversee the work of offshore operations. Legal claims are further influenced by factors such as the spill being vessel-source or non-vessel-source oil pollution. The outcome of any claim for civil liability is also shaped by the availability of any domestic legislation and/or any regional agreements and international conventions to which a State may be a party.

Liability laws in general have the function to compensate for damages caused to individuals, and also to serve as a deterrent to the originator of the damage.[5] Whilst, vessel-source pollution has been addressed globally with the participation of oil producers, shipowners, etc., under the leadership for the International Maritime Organisation (IMO), the same cannot be said about the approach to compensation for pollution arising from offshore oil exploration and exploitation activities. This is a major loophole in international governance of the marine environment, especially as numerous offshore facilities have been developed in the littoral states since the creation of the CLC, all of which have experienced numerous oil spill incidents from their offshore facilities over the past four decades. The current study analyses the reasons for the lack of a coherent legal framework to process civil liability claims arising from offshore oil spill incidents, especially when a comprehensive international regulation exists (since the late 1960s) for vessel-source and other forms of marine oil pollution. It also presents the key argument for the urgent

[5] VJ Hartje, "Oil Pollution Caused by Tanker Accidents: Liability Versus Regulation" (1984) 24 Nat. Resources J. 41. The author also observes that since "…pollution causes damages to individuals, the use of liability law for pollution control would be a logical extension of existing instruments". See also RB Stewart, "Liability for Natural Resource Injury: Beyond Tort" in RL Revesz and RB Stewart (eds), *Analyzing Superfund: Economics, Science, and Law* (Resources For the Future, 1995) 219-249. The author explores the natural resource damage regime in the US which represents an extension of traditional tort liability to public natural resources and how it serves to protect the public commons in the event of any environmental damage.

establishment of a uniform international offshore oil spill liability regime. The article argues that, subject to certain caveats, an international regime template can be developed using the US Oil Pollution Act 1990 (OPA)[6] in conjunction with some of the existing regional agreements.

This article is divided into five parts, with the first part presenting the introduction to the discussion, the second part taking up for discussion a selection of vessel-source oil pollution incidents from around the globe, and the civil liability conventions and domestic legislations that emerged from the incidents. The third part covers some of the offshore oil pollution incidents and the measures taken by developed nations to create a domestic civil liability regime. The fourth part presents the state of play as regards civil liability claims arising from offshore oil pollution and analyses the reasons for the lack of a clear strategy to develop an international civil liability regime. In doing so, it identifies the efforts of the *Comité Maritime International* (CMI). This part will also consider the urgent need for an international liability regime for oil spill liability arising from offshore operations and identify the major difficulties faced in putting together a uniform system. The fifth part investigates the possibility of forging an international regime using existing national regimes and regional agreements to cover liabilities arising from offshore operations, and concludes with suggestions for the way forward in the effective governance of claims arising from offshore oil spills.

PART II: VESSEL-SOURCE OIL SPILL INCIDENTS AND THE INTERNATIONAL CIVIL LIABILITY REGIME

The international regulation on marine oil pollution that is currently in force is focused primarily on vessel-source marine pollution. Although there had been a number of vessel-source marine oil spill disasters since the 1950s, there was very little effort put in place internationally to prevent or mitigate marine pollution damage[7] and a regulatory framework for vessel-source marine oil pollution only emerged after 1967. One early

[6] The US, which is not a party to the CLC, has its own domestic law, viz., The Oil Pollution Act 1990 which covers civil liability claims arising from both vessel-source and non-vessel-source marine oil pollution liabilities.

[7] See AKJ Tan, *Vessel-Source Marine Pollution: Law and Politics of International Regulation* (Cambridge 2012) 107. A conference was convened in Washington DC in June 1926 for the purpose of creating a regime to regulate vessel-source pollution within ocean zones. The author notes that at the conference, the UK and the US were able to persuade other states to adopt pollution control zones of up to 50 nautical miles from shore—beyond the traditional three-mile territorial waters limit.

international measure was the International Convention for the Prevention of Pollution of the Sea by Oil 1954 (OILPOL 1954) which expressly prohibited the discharge of oil and or oil mixture within specific geographic zones. The two vessel-source oil pollution incidents worth mentioning here that brought about changes to the law are *The Torrey Canyon* and *The Exxon Valdez*, which are discussed below, albeit briefly. While the first incident was instrumental in encouraging the international community to take action to create an international civil liability regime for claims arising from vessel-source oil spill incidents, the second was a catalyst for the passing of domestic legislation designed to address civil liability claims arising from both vessel-source and offshore oil spill incidents.

Torrey Canyon: In March 1967 the oil tanker *Torrey Canyon* split into two in the English Channel spilling its cargo of 119,328 tonnes of crude oil along the Cornish coastline, contaminating the oyster beds and the fishing waters besides causing extensive damage to bird life.[8] This incident, which caused damage of an unprecedented level to both the English and French coastline, served as a trigger[9] for taking urgent measures to address the issue of civil liability claims arising from oil pollution damages. Following the *Torrey Canyon* disaster, efforts to formulate an international regime for oil spill damages gained momentum. As, at that time, there was no international regime to regulate liability for compensation for oil pollution damage (both vessel-source and vessel-source), compensation was worked out under the domestic laws of the affected states. Indeed it is not an exaggeration to say that the *Torrey Canyon* disaster, to a significant degree, forced the international community and the oil industry to re-examine the existing laws for assessing civil liability[10] arising from oil pollution. By 1967 the first and second United Nations (UN) Conferences on the Law of Sea had taken place and the issue of marine pollution had not featured on the agenda.[11] It

[8] For details of the case see VP Nanda, "The Torrey Canyon Disaster: Some Legal Aspects" (1967) 44 Denver Law Journal 400, 400-401.

[9] AKJ Tan (n 7) 288. See also M Tsimplis, "Marine Pollution From Shipping Activities" in Y Baatz (ed) *Maritime Law* (Informa Law, Routledge 2014) 369. The author notes that there was little public interest in developing pollution prevention and compensation regimes prior to the major pollution incidents. The author also notes that strong lobbying from the shipping industry to a certain extent delayed any development in this regard.

[10] See G Clausen, "Liability for High Seas Oil Pollution Cleanup Costs: Domestic and International Provisions" (1980) 3 Hastings Int'l and Comp L Rev 473-496, 474.

[11] See AKJ Tan (n 7) 115.

is to be noted that though there had been a few incidents of vessel-source oil pollution damage prior to the 1967, but none as severe as the *Torrey Canyon*.

Exxon Valdez: This oil spill incident occurred in 1989 when the oil tanker *Exxon Valdez* ran onto the Bligh Reef in Prince William Sound in Alaskan waters. The single-hulled oil tanker spilled approximately 11 million gallons of crude oil onto a varied marine ecosystem. At the time of the disaster the Clean Water Act 1970 was in force in the US and the cost of removing the oil greatly exceeded the liability limit under section 311 of the Act.[12] Due to the limited reach of the provisions of the Act, in seeking a remedy the claimants were constrained to rely on other legal avenues available under domestic law[13] The US, although a party to the International Convention Relating to Intervention on the High Seas in Cases of Oil Casualties, was not a party the International Convention on Civil Liability for Oil Pollution Damage which governs civil liability claims for vessel-source oil pollution. The US has, instead, sought to create its own domestic framework to find solutions to civil liability claims arising from oil spill incidents, both vessel-source and non-vessel-source. The Oil Pollution Act 1990 was enacted in response to the *Exxon Valdez* oil spill disaster[14] and soon proved to be a watershed event in the history of modern oil pollution law in the US.[15]

In sum, both the *Torrey Canyon*, and the *Exxon Valdez* disasters resulted in vessel-source oil pollution in different jurisdictions, affecting both the marine environment and livelihoods. The resulting laws that developed in response to the above incidents differ, and an analysis of both international and domestic laws on the subject is presented below.

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[12] See KM Murchison, "Liability Under the Oil Pollution Act: Current Law and Needed Revision" (2011) 71 La. L. Rev. 917-956, 925.

[13] Ibid. The Federal Government, in this case, filed both civil and criminal charges against Exxon, which paid nearly $900 million towards the civil charges and another $100 million towards the criminal case. Besides, Exxon was asked to pay $303 million with some private parties. Later, Exxon was also required to pay a further $500 million towards punitive damages. See *Exxon Shipping Co v Baker*, (2008) 554 U.S. 471, 476-514. Exxon spent a total of $2.1 billion in cleanup efforts.

[14] See LI Kiern, "Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade" (2000) 24 Tulane Maritime Law Journal 481, 482. The author opines that there were other incidents such as the *American Trader* (1990), and the *Mega Borg* (1990), which persuaded the US Congress to pass the Oil Pollution Act 1990.

[15] Ibid.

1. Overview of Civil Liability Claims for Oil Pollution 1969

In the aftermath of the *Torrey Canyon* and other oil spill disasters, relevant international conventions, collectively known as the CLC-IOPC Fund regime, were developed under the auspices of the IMO. The conventions currently in force to regulate civil liability claims for oil pollution are the International Convention of Civil Liability for Oil Pollution 1969 (1969 CLC), and the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1971 (1971 Fund Convention). Both were negotiated in 1967. This move represented a clear response from the international community to vessel-source oil pollution incidents. The civil liability regime for vessel-source oil pollution established under the 1969 CLC enables victims of oil spill damage from member States to make financial claims against both domestic and non-domestic tanker owners and, in certain circumstances, against the global oil cargo industry.[16]

The 1969 CLC and 1971 Fund Convention have since been amended, leading to the adoption of the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol. Strict liability is the dominant liability rule for marine pollution under the Conventions. However, their scope is restricted to vessel-source oil spills and to such incidents of pollution damage in the territorial sea and Exclusive Economic Zone (EEZ) of the signatories to the Conventions. From available statistics it can be safely said that large vessel-source oil pollution incidents have reduced both in number and in size in recent times, but the potential threat of environmental damage and any consequential economic loss associated with the carriage of crude oil by sea still remains. It is worth noting that the CLC 1969 has attracted more ratifications than any other international liability convention.[17] Although the CLC enjoys a substantial membership, not all States are parties to the Convention with the US being the notable absentee. So far as the protection and preservation of the marine environment is concerned, the Member States which are parties to the UN Convention on the Law of the Sea (UNCLOS 1982) have certain responsibilities and liabilities under the convention. The following section provides an overview of the relevant provisions of the UNCLOS 1982, and highlights its importance to the current discussion.

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[16] M Mason, "Civil Liability for Oil Pollution Damage" (2002) 27 Marine Policy, 1.

[17] B Soyer, "Compensation for Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources" in B Soyer and A Tettenborn (eds) *Pollution at Sea: Law and Liability* (Informa, London 2012) 73.

2. UN Convention on the Law of the Sea 1982

The UN Convention on the Law of the Sea (UNCLOS) came into force on 16 November 1994. Although the US played a major part in shaping the final draft, in the end it did not ratify the Convention. Article 2(1) of UNCLOS provides that coastal states have sovereign powers over their territorial sea, being the adjacent belt of water to their land territory and internal waters.[18] Article 2(2) further clarifies the position by extending sovereignty to the territorial sea bed and subsoil and granting the coastal state the powers of exploration and exploitation of the natural resources of the territorial sea.[19] As regards the right of the coastal state over the exclusive economic zone (EEZ),[20] Article 56(1) of the Convention provides that the coastal state may exercise sovereign rights for the purpose of exploring and exploiting the natural resources of the EEZ, and through the establishment and the use of artificial islands, installations and structures. Importantly, Article 57 limits the EEZ to 200 nautical miles from the baseline whilst Article 235 outlines the responsibility and liability of littoral States/parties to the Convention. The relevant Article reads as follows:

Responsibility and Liability

> 1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the

[18] See also C Brown, "International Environmental Law in the Regulation of Offshore Installations and Seabed Activities: The Case for a South Pacific Regional Protocol" (1998) 17 Australian Mining and Petroleum Law Journal, 109-137, 115.

[19] Article 2(2) provides: "This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil".

[20] The EEZ is defined in Article 55 of UNCLOS as follows: "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention. The EEZ as a talking point in the law of the sea first emerged in the early 1970s, when a growing number of coastal states advanced claims to extend their authority over vast marine areas off their coasts. The EEZ as envisaged under the UNCLOS attempts to reconcile these claims with the interests of the international community, such as freedom of navigation and the right of innocent passage.

> marine environment. They shall be liable in accordance with international law.
> 2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
> 3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Although UNCLOS entered into force in 1994, no successful legal action was taken against any littoral State under the above provisions for some years nor had the Seabed Disputes Chamber constituted under UNCLOS been required to provide an advisory opinion. This position changed on 1 February 2011, when the Seabed Disputes Chamber unanimously adopted an historic Advisory Opinion (the Opinion) on the application of Nauru during the International Seabed Authority's 16th Session. Nauru had submitted an application for an advisory opinion from the Seabed Disputes Chamber of the ITLOS seeking clarification on the sponsoring State's responsibilities and liabilities.[21] This is the first time

[21] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion (ITLOS Seabed Disputes Chamber Feb. 1, 2011), 50 ILM 458 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf> (accessed 5 September 2016). See further H Zhang, "The Sponsorship State's 'Obligation to Ensure' in the Development of the International Seabed Area" (2013) 28(4) International Journal of Marine and Coastal Law 681-699. It is also to be borne in mind that the jurisdiction of the ITLOS comprises both contentious and advisory proceedings—both under Article 21 of the ITLOS Statute, and Article 138(1) of the Rules of the Tribunal—and normally only signatory States may be made a party to the proceedings before the ITLOS. Also, disputes arising under UNCLOS may also be settled before the ITLOS, besides the ICJ or an arbitral tribunal. See R Verheyen and C Zengerlin, "International Dispute Settlement" in C Carlarne, KR Gray and R Tarasofsky (eds) *The Oxford Handbook of Climate Change Law* (Oxford 2016) 431-32. See

that the advisory jurisdiction of the International Tribunal for the Law of the Sea (ITLOS) was invoked and also the first time that the Seabed Disputes Chamber was called upon.[22] In the advisory opinion handed down by the Tribunal, the significance of UNCLOS was emphasised. Amongst other things, the Chamber defined the responsibilities and obligations of states that sponsor activities in the seabed area beyond their national jurisdictions—the "Area"[23] and the extent of the sponsoring State's liability for the failure of any entity it has sponsored to comply with UNCLOS 1982.[24] Article 136 of UNCLOS designates the Area and its resources as the "common heritage of mankind". Article 138, which deals with the general conduct of States in relation to the "Area", requires that the general conduct of States Parties in relation to the Area be in accordance with Part XI of UNCLOS.

Interestingly, the exploration and exploitation of minerals in the Area are governed by the ISA and require all prospective exploration and

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also D Freestone, "Responsibility and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area" (2011) 105(4) American Journal of International Law 755.

[22] It was also the first time that the Tribunal had reached a completely unanimous ruling in a case referred to it. Until February 2011 the Tribunal's jurisprudence has been marked by a multiplicity of dissenting and separate opinions. Following the above Advisory Opinion from 2011, the Tribunal received a request for an advisory opinion on 28 March 2013 from the Sub-Regional Fisheries Commission. See the Advisory Opinion (2 April 2015) On the Request submitted to the Tribunal by the Sub-Regional Fisheries Commission (SRFC) (No. 21) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf > (accessed 5 September 2016). See also DD Baere and H Wouters, "The Contribution of International and Supranational Courts to the Rule of Law: A Framework for Analysis" in DD Baere and H Wouters (eds) *The Contribution of International and Supranational Courts to the Rule of law* (Edward Elgar, 2015) 73.

[23] Under Article 1(1) UNCLOS, the 'Area' means the seabed, ocean floor and its subsoil that are beyond the limits of national jurisdiction. Further, Part XI of UNCLOS deals with the exploration for and exploitation of its entire solid, liquid and gaseous resources. See Verheyen and Zengerlin (n 21).

[24] Freestone (n 21). For a more detailed analysis of the Advisory Opinion in relation to foundational issues of international environmental law see, D French, "From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor—the Seabed Disputes Chamber's 2011 Advisory Opinion" (2011) 26(4) International Journal of Marine and Coastal Law525-568.

exploitation activities to be sponsored by a State party to UNCLOS.[25] If a licence is granted for exploration or exploitation, the ISA determines the area to be allotted to the applicant; while the second area is reserved for activities by the ISA through the Enterprise or in association with developing States. However, the Enterprise (the international body that was originally designed to carry out such activities for the benefit of mankind), was effectively disbanded by the 1994 Agreement Relating to the Implementation of Part XI, which brought the Convention into force.[26] In Case 17,[27] the first of three questions posed by the ISA to the Chamber was as follows:

> "What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?"

In response, the Chamber expressed the opinion that the phrase "activities in the Area" included "drilling, dredging, coring, and excavation; disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents; and construction and operation or maintenance of installations, pipelines and other devices related to such activities".[28] In the key part of the Opinion, the Chamber expressed the opinion that activities in the Area for the purposes of the Convention (Article 139(1)) did not include transportation and processing (although these were covered by the regulations). Further that State Parties were

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[25] Freestone (n 21). See also S Rares, "An International Convention on Off-Shore Hydrocarbon Leaks?" [2011] Lloyds Maritime and Commercial Law Quarterly 361-371. Under Article 153, paragraph 3 the activities in the Area are to be carried out in accordance with a formal plan of work approved by the Authority in the form of a contract. That contract must also incorporate relevant rules, regulations and procedures in the "mining code" issued by the Authority. The "mining code" currently consists only of regulations relating to prospecting and exploration for polymetallic nodules and polymetallic sulphides. The Authority has not made any regulations for offshore exploration and exploitation of hydrocarbons.

[26] The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 UNTS 3. See also Freestone (n 21).

[27] Advisory Opinion (n 21).

[28] Advisory Opinion (n 2), para 87.

obliged to assist the Authority, and under Annex III, Article 4(4) of the Convention, the State Parties "pursuant to Article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract *and its obligations under this Convention*" (emphasis added).

The Chamber also observed that due diligence is a variable concept, as measures considered to be sufficiently diligent at a certain moment may not be so considered in light of new scientific or technological knowledge/advances. The Opinion of the Chamber makes it clear that the sponsoring State must take all measures necessary to ensure the contractor's compliance and those measures must be incorporated in that State's legal system.[29] The Opinion also suggests that a State sponsoring such activities in the "Area" *may* (emphasis added) be held liable to pay compensation if it fails to carry out its responsibilities under UNCLOS with due diligence and a third party were to suffer damage as a result.[30] However, the Opinion provides no clarity and certainty as to the amount or sufficiency of the compensation payable to the affected party, nor requires any insurance cover in the event the person primarily liable is unable to pay. The Chamber also expressed an interesting opinion that according to Annex III, Article 4, paragraph 4 of the UNCLOS, the

[29] Ibid, para 118. See also Freestone (n 21).

[30] Ibid, para 139. See Zhang (n 21), where the author argues that the word "ensure" occurring in Article 139(1) of UNCLOS causes current and potential sponsoring States to worry about the assumption of any "obligation" as under the Advisory Opinion the sponsoring State will be deemed to be in breach of its obligations if its contractors do not comply strictly with the provisions of the UNCLOS. The author takes the position that the characterization of 'obligation to ensure' as a due diligence obligation on the sponsoring State clarifies the meaning of 'ensure,' and from a legal perspective the obligation of a sponsoring State to a reasonable extent is in conformity with 'historical and contemporary practice' in international law, but from that from a seabed mining perspective it is appropriate to charge the States with the due diligence obligation. See further M Gavouneli, "State Jurisdiction in Relation to the Protection and Preservation of the Marine Environment" in DJ Attard, M Fitzmaurice, NAM Gutiérrez and R Hamza (eds) *The IMLI Manual of International Maritime Law: Vol III: Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 13. The author takes the view that the Advisory Opinion of the Chamber and the ICJ in in 2011 judgment in the *Pulp Mills in the River Uruguay* case best defines 'due diligence' thereby confirming the position of the State as the final arbiter of all such activities and reinforcing the State-centred concept of international law. See however, Rares (n 25) where the author argues that the Advisory Opinion does not go into detail of the State's obligation to exercise due diligence.

"obligation to ensure" applies within the legal system of sponsoring States, and to implement and enforce it, necessary measures are required and must be adopted within the national legal system. In Zhang's view this observation may adversely affect the protection of marine environment as States that do not have a sound regulatory regime can reduce their obligation and responsibility and have the advantage to attract companies to set up base corporations to develop the Area.[31]

What the Chamber demonstrated in the Opinion is that there is a possible recourse for those affected by any activities carried out by an operator authorised by a Member State. The Opinion can also, to some degree, particularly help those affected in developing countries (e.g. Nigeria) who are not part of any regional agreement to seek redress for the damages caused in the course of offshore exploration and exploitation in their state's EEZ. However, the claimants may not succeed in getting any monetary compensation if the operator/tortfeasor were not to have any insurance to cover any damages directly arising from their offshore operations.

In February 2011, the IMO Secretariat prepared a note on the existing international instruments relevant to the subject of oil spills from offshore facilities.[32] Interestingly, the note refers to Articles 192, 208, 214 and 235 of UNCLOS but observes that these and other provisions *do not* create an international liability and compensation regime.[33] It also refers to a number of other international instruments including the Convention between European countries with oil and gas reserves in the North Sea.[34]

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[31] Zhang (n 27). See also R Pereira, 'Pollution from Seabed Activities,' in DJ Attard, M Fitzmaurice, NAM Gutiérrez and R Hamza (eds) *The IMLI Manual of International Maritime Law: Vol III: Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 95-138, 108.

[32] International Maritime Organisation Legal Committee, Note by the Secretariat – Information relating to Liability and Compensation for Oil Pollution Damage resulting from Offshore Oil Exploration and Exploitation, 18 February 2011. See also Rares (n 25).

[33] See Rares (n 25). For instance, the *International Convention for the Prevention of Pollution from Ships* (MARPOL 73/78) under Article 2(3)(b) clearly excludes from its ambit the release of harmful substances from exploration, exploitation and associated off-shore processing of seabed mineral resources.

[34] The Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources, adopted at London on 1 May 1977. The States Parties to this Convention are the United Kingdom, Germany, Ireland, the Netherlands, Norway and Sweden. See also Rares (n 25).

3 The US Response: The Oil Pollution Act 1990

As mentioned earlier, the *Exxon Valdez* incident was a catalyst for the passing of the OPA 1990. Following the incident it became apparent that the existing legal framework was insufficient to process claims arising from oil spill incidents (both vessel-source and non-vessel-source),[35] or to tackle some of the blowout incidents taking place in some of the offshore facilities. The Act was aimed primarily at creating comprehensive oil spill liability and compensation legislation. The legislation is comprehensive in that it provides for a liability regime for oil pollution damage arising from both vessel-source and non-vessel-source pollution incidents, including from offshore facilities. It also expands both the recoverable damages and liability for oil spillage. Importantly, the OPA also mandates funding on a per-barrel contribution on oil imported to or transported within the US. This measure covers coastal trade, as the crude oil extracted in the US offshore facilities will be transported through vessels along the coast, which again from an operational perspective makes it vulnerable and potentially giving raise to vessel-source oil pollution. The OPA is discussed in more detail here as it covers both vessel-source oil pollution and non-vessel-source oil pollution, and potentially serves as a template for work on an international liability regime. The provisions of the OPA had been invoked in a number of cases, including civil liability claims arising from the Deepwater Horizon incident in 2010. Also, there is good source of scholarly discussion available for scrutiny on both the positives and shortcomings of the legislation.

Section 1001(23) of the OPA broadens the definition of "oil" by providing that it is of any kind or in any form whilst in section 1001(22) an offshore facility is defined as a "facility of any kind, located in, on or under any of the navigable waters of the US' and subject to US jurisdiction. Under the definition of "vessels", the OPA provides that a mobile offshore drilling unit (MODU) is a vessel "capable of use as an offshore facility"[36] and thereby effectively extending the same liability limits for vessels and offshore facilities to be applicable to a MODU. Section 1002(a) of the OPA imposes strict liability on the responsible party (RP) of an offshore platform, stipulating liability for removal costs

[35] Murchison (n 12).

[36] Section 1001(18) reads as follows: "mobile offshore drilling unit" means a vessel (other than a self-elevating lift vessel) capable of use as an offshore facility. See the discussion in part 4.1 on the CMI Draft 1977 which proposed the extension of those legal concepts unique to maritime law which applied to ships to offshore mobile craft.

and damages that result from the spillage.[37] The "responsible party" (RP) of an offshore facility is defined in section 1001(32)(C)[38] as the "lessee or permittee" as opposed to the "owner or operator"[39] of an offshore platform. The focus of the OPA in this regard is only marine oil pollution, and the offending object could be a sea going vessel, a floating platform, etc. The Act has introduced tough provisions which enable the Government to prevent the prospect of continuous wilful or inadvertent pollution originating from offshore platforms.[40] The OPA places strict liability on the "responsible party" and the definition, notably, does not include the owner of the oil cargo aboard the vessel. Under section 2702(b)(2)(E), the OPA recognizes, as recoverable damages, loss of profits or impairment of earning capacity arising from injury of natural resources.[41] It is clear that the OPA has expanded the damages that can be claimed for oil spills beyond those previously available under US federal laws. As in earlier oil spill legislation, the OPA under section 2702(a),(b)(1) provides for the recovery of clean-up and removal costs.

The approach taken in the OPA to cover both vessel-source and non-vessel-source oil pollution claims eliminates the unnecessary problems as

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[37] Section 1001(32)(C) reads as follows: "Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident".

[38] Section 1002(a) reads as follows: "In the case of an offshore facility (other than a pipeline or a deep-water port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301–1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit".

[39] Section 1001(26) reads as follows: "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated.

[40] MD Morgan, "The Oil Pollution Act of 1990: A Look at Its Impact on the Oil Industry" (1994) 6(1) Fordham Environmental Law Journal 1.

[41] Ibid at 5. Hotel owners, pleasure craft lessors, and coast-side restauranteurs may recover under the statute.

to the definition of a "vessel" or "ship" that arise in the vessel-source international regimes under the CLC. The OPA requires oil storage facilities and vessels to submit to the Federal Government plans detailing how they will respond to large-scale oil discharges. Following the passing of the OPA, a trust fund financed by a tax on oil was made available to clean up spills when the offending party is incapable of, or unwilling to pay. The OPA to a large extent has streamlined and strengthened the US Environmental Protection Agency's ability to prevent and respond to catastrophic oil spills in US waters. Following the Deepwater Horizon catastrophe, serious questions were raised concerning the compensation regime in force for civil liability under the OPA. One such question was how a major offshore-related oil spill damage could be compensated in the future.[42] This concern comes from a leading modern State which views compensation as being an important component and key element of any civil liability regime, when a corporation (while acting under the authority of the State) is engaged in a highly profitable commercial venture, which also carries with it the major risk of causing environmental damage and loss to both property and livelihood, if not carried out properly. It is to be emphasised that compensation has an important role to play in such ventures, as it provides monetary relief to both victims and for restoration of the environment. Any compensation regime also guarantees cost internalization and incentivizes operators and stakeholders to prevent further oil spills.[43]

For both vessel-source and non-vessel-source (offshore-facility) oil pollution, the OPA imposes strict liability on the responsible party, who is required to establish and maintain evidence of financial responsibility up to certain amounts.[44] For claims arising from both vessel-source and non-vessel-source oil pollution, liability of the responsible party is limited and under US law, civil liability claims will be processed through a patchwork of legislation including the OPA. When damage costs are not covered by the limited liability of the responsible party, the pollution costs are covered by a federal fund.[45] For vessel-source oil pollution the financial

[42] Faure, Jing and Hui (n 4).
[43] Faure, Jing and Hui (n 4). From an economic perspective, the primary goal of tort law is to minimize the total social costs, or in the other words, to create deterrence. See generally G Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).
[44] H Wang and M Faure, "Civil Liability and Compensation for Marine Pollution - Lessons to be Learned for Offshore Oil Spills" (2010) 8(3) Oil, Gas and Energy Law Journal 1.
[45] Ibid.

responsibility is based on the limited liability of the responsible party, whereas for non-vessel-source offshore facility oil pollution, the amount of financial responsibility is unrelated to the liability limit.[46] Under the vessel-source regime, the responsible party will be, on most occasions, the shipping industry (the shipowner, operator and/or charterer). Nevertheless it is the oil industry that contributes to the fund based upon the barrels of crude oil shipped.[47] Under the offshore liability system, the responsible party is invariably an oil company licensed by the concerned State party to explore and exploit the area from which the spill originates although the oil industry still contributes to the fund.[48]

Wang and Faure's analysis of the system raises the question of whether the liability regime under OPA imposes too heavy a burden on the oil industry. It can be strongly argued here that all players are involved in the business to make profits—the operator through extraction, the oil industry through the sale of crude, and the state party through the levy of licence fees (and revenue), the creation of employment, and also the earning of foreign currency through the export of crude oil. This raises the question of whether the scheme envisaged under the OPA can be adapted for the purposes of developing an international civil liability regime for damages arising from offshore oils spills.

PART III: OFFSHORE OIL SPILL INCIDENTS AND THE ABSENCE OF AN INTERNATIONAL RESPONSE

Available statistics show that there are over 2,657 offshore installations in the US[49] and, according to US Bureau of Ocean Energy Management, these provide about 16 percent of US domestic oil production and another 5 percent of domestic natural gas production.[50] Likewise, in EU waters there are around 1,000 offshore installations in operation.[51] Over 90 percent of the oil and over 60 percent of the gas

[46] Claims arising and brought against BP petroleum under the Deepwater Horizon incident showcased some of the intricate workings of the legal regime for civil liability claims.

[47] Wang and Faure (n 44) observe that it is down to cost-sharing between the shipping and the oil industries.

[48] Ibid.

[49] Faure, Jing and Hui (n 4).

[50] US Bureau of Ocean Energy MGMT, 'Oil and Gas Energy Program' (April 2016) <http://www.boem.gov/Oil-and-Gas-Energy-Program/> (accessed 4 September 2016).

51 European Commission, "Commission Proposes New Rules on the Safety of Offshore Oil and Gas Activities" MEMO/11/740, (27 October 2011). An

produced in the EU comes from offshore operations.[52] The offshore facilities include fixed or floating platforms, offshore storage systems, wells, pipelines, drilling units and installations. Offshore oil installations are classified into two broad categories, *viz.,* mobile units (floating) and fixed platforms, where floating rigs include drill ships, semi-submersible and barges, and bottom-supported rigs which include submersibles and jack-up drills.[53] It is estimated that around 6000 oil and gas installations are presently operating in the marine environment, with a sizable majority of them located in the Gulf of Mexico and the North Sea.[54] In addition, offshore oil and gas operations are now being carried out much further away from the land and at record depths.[55] This expansion increases the

estimated 486 are located in UK waters, 181 in the Netherlands, 61 in Denmark, 2 in Germany, 2 in Ireland, 123 in Italy, 4 in Spain, 2 in Greece, 7 in Romania, 1 in Bulgaria and 3 in Poland. See also European Commission: Energy, 'Topics: Offshore Oil and Gas Safety' <https://ec.europa.eu/energy/en/topics/oil-gas-and-coal/offshore-oil-and-gas-safety> (accessed 4 September 2016).

52 European Commission, Impact Assessment accompanying the document, "Proposal for a Regulation on Safety of Offshore Oil and Gas Prospection, Exploration and Production Activities" SEC(2011) 1293 FINAL, Commission Staff Working Paper (27 October 2011) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:1293:FIN:EN:PDF> (accessed 4 September 2016). See also K Sales, S Mudgal and V Fogleman, "Civil Liability, Financial Security and Compensation Claims for Offshore Oil and Gas Activities in the European Economic Area" Final Report Prepared for European Union (BIO by Deloitte 2014) 18.

53 K Agyebeng, "Disappearing Acts - Toward a Global Civil Liability Regime for Pollution Damage Resulting from Offshore Oil and Gas Exploration" Cornell Law School Graduate Student Papers, Paper 11 (2006) <http://scholarship.law.cornell.edu/lps_papers/11> (accessed 5 September 2016). See also E Tarelli, "International Efforts to Establish Rules on Liability for Offshore Activities" in P Ehlers and R Lagoni (eds), *Responsibility and Liability in the Maritime Context* (LIT Verlag, Hamburg, 2009). Offshore installations for the purpose of exploration and exploitation of oil and gas usually encompass all types of fixed and mobile installations, as well as drilling, production and storage structures, whether self-propelled or not.

54 GESAMP (IMO/FAO/UNESCO-IOC/UNIDO/WMO/IAEA/UN/UNEP Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection). 2007. Estimates of Oil Entering the Marine Environment from Sea-Based Activities. Rep. Stud. GESAMP No. 75.

55 See Faure, Jing and Hui (n 4). Fixed platforms are used in shallow waters, not more than 400 meters deep. "Deepwater" refers to a depth between 400 and 1,800 meters, and "Ultra-deepwater" refers to a depth between 1,800 and 3,000 meters, or more. See "Uruguay: First Offshore Well in Years Breaks World Record" Offshore Energy Today (1 April 2016).

possibility of more crude extraction and profit, and also a higher risk of more oil spill incidents. It is well documented that there have been several instances of oil pollution incidents from offshore facilities, reportedly causing serious damage to the environment and in turn to livelihood. Studies show that the frequency of blowouts from oil wells is five times higher offshore than onshore,[56]

The databank maintained by *Det Norske Veritas* (DNV) recorded more than 6000 such incidents around the world between 1975 and 2012.[57] From a purely environmental point of view, offshore oil exploitation is a potentially destructive process from exploration to exploitation.[58] In the case of offshore oil exploration, pollution hazards arise out of seismic surveys, oil drilling, the use of oil-based drilling muds and explosives, and the accidental spillage or leakage of oil and gas from offshore installations.[59] Some of the recorded oil spill incidents from the past four decades are presented below to gain a better picture and understanding of the considerable damage that they have caused to individuals and the marine environment. In some such incidents the State authority has responded proactively by introducing legislation to address the issue of liabilities arising from such incidents and also to introduce further regulation on energy exploitation through offshore facilities.

Ekofisk Bravo: A major blowout occurred in 1977 on the Bravo platform in the Ekofisk field which led to the uncontrolled release of oil

<http://www.offshoreenergytoday.com/uruguay-first-offshore-well-in-years-breaks-world-record/> (accessed 5 September 2016). On 30 March 2016, a Maersk drillship broke the world record for the deepest water depth for an offshore oil rig in Uruguay waters at a depth of 3400 metres (11,156 feet).

[56] Brown (n 18) notes that offshore blowouts are also more likely to result in fire.

[57] As of 28 April 2014 DNV has recorded 6451 accidents in 3795 operating units. See CM Hickey 'New Update of World Offshore Accident Databank (WOAD),' (28 April 2014) <https://www.dnvgl.com/news/new-update-of-world-offshore-accident-databank-woad-available-8318> (accessed 5 September 2016). See also M Christou and M Konstantinidou, "Safety of Offshore Oil and Gas Operations: Lessons from Past Accident Analysis" Report EUR 25646 (2012) 14, <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC77767/offshore-accident-analysis-draft-final-report-dec-2012-rev6-online.pdf> (accessed 5 September 2016).

[58] Z Gao, "International Petroleum Exploration and Exploitation Agreements: A Comprehensive Environmental Appraisal" (1994) 12(2) Journal of Energy and Natural Resources Law, 240-56.

[59] Brown (n 18) notes that this does not include the escape of oil from ruptured pipelines on the seabed, and the disposal of sewage and garbage. A further problem is the disturbance of marine ecosystems by disused or abandoned platforms which are past their economic use.

and gas resulting in the North Sea's biggest oil spill. The official inquiry into the incident attributed human errors as the major cause for the blowout.

Piper Alpha: On 6 July 1988 a series of explosions rocked the Piper Alpha Oil and Gas production platform in the North Sea oil field which resulted in 167 fatalities. This is widely considered as the deadliest accident in the history of offshore oil and gas industry. The 106 recommendations from the Cullen Inquiry[60] published in November 1990 essentially re-shaped the offshore safety legislation and practices in the UK.[61] These were incorporated into the Offshore Safety Act 1992 together with other regulations aimed at augmenting safety on board offshore platforms operated within the territorial waters of the UK.

Montara Wellhead Platform: In August 2009, the Montara Wellhead Platform in Australia experienced an uncontrolled release of hydrocarbons. Australia's principal legislation covering the liabilities arising from the incident was the Offshore Petroleum and Greenhouse Gas Storage Act 2005 which applied from 3 nautical miles from the baseline out to the limits of the Exclusive Economic Zone (EEZ).[62] This accident reopened the debate on the suitability of an international framework regulating liability and compensation in case of accidents arising from drilling activities.[63] In the aftermath, Indonesia claimed that the oil slick from the well blowout damaged the marine environment in Indonesian waters causing socio-economic hardship to the coastal communities who depended on the sea in the surrounding areas, and also to the living resources of the region.[64] As of 2016, no pay-out has been made to the

[60] The Hon. Lord Cullen, *The Public Inquiry into the Piper Alpha Disaster*, Vols 1 and 2 (Report to Parliament by the Secretary of State for Energy by Command of Her Majesty, November 1990).

[61] Christou and Konstantinidou (n 57).

[62] Ibid.

[63] J Rochette and G Wright, "Strengthening the International Regulation of Offshore Oil and Gas Activities" Institut du Développement Durable et des Relations Internationales (IDDRI) Brief (2015) <https://sustainabledevelopment.un.org/content/documents/5779Brief%20offshore%20GSDR_rev.pd> (accessed 12 May 2016).

[64] Ibid. In 2010, Indonesia submitted a proposal to the Legal Committee of the IMO regarding the development of an international regime for liability and compensation for oil pollution damage arising from offshore oil exploration and exploitation activities. See IMO, *Report of the Legal Committee on its Ninety-Seventh Session*, LEG 97/15, 1 December 2010. This proposal was rejected by the IMO on the ground the same should be addressed at a regional level. See J Rochette, M Wemaëre, L Chabason and S Callet, "Seeing Beyond the Horizon

Indonesian claimants due to the fact that there was an inappropriate insurance cover for the operator, and an ongoing dispute as to the alleged extent of the damage sustained.[65] While operators do carry insurance, it is to be determined in accordance with the regulatory limits set out by the national bodies (Australia) that regulate offshore drilling in the country where they are headquartered.[66] The incident also captures a scenario of how oil spilled in a marine environment is potentially capable of giving rise to civil liability claims in more than one jurisdiction.

Deepwater Horizon: On 20 April 2010, an explosion occurred on the Deepwater Horizon, a mobile offshore drilling rig. The rig was owned and operated by Transocean[67] and leased out to British Petroleum (BP).[68] The explosion caused a blowout, killing eleven workers, leading to a fire that led to the sinking of the rig two days after the Macondo Well blowout. Although attempts were made to activate the blowout preventer (BOP), it failed, resulting in oil gushing into the Gulf of Mexico. The oil spill caused extensive harm to the marine environment, resulting in multibillion-dollar losses to the fishing, tourism and other industries. Nearly 170,000 claims were submitted to BP's claims offices and later to the Gulf Coast Claims Facility.[69] BP, being a major oil enterprise and the party responsible for the oil spill, instead of invoking the liability cap clause under the OPA to limit liability to $75 million plus removal costs,[70]

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for Deepwater Oil and Gas: Strengthening the International Regulation of Offshore Exploration and Exploitation" IDDRI Study No 1/14 (2014) 1-36.

[65] Ibid.

[66] Ibid. In Indonesia's view what is missing is an international framework which will apply for all incidents of this nature.

[67] Transocean is the world's largest offshore drilling contractor.

[68] British Petroleum (BP), one of the world's largest energy companies, was also the lessee and principal operator of the Macondo Prospect Field, where the rig in question was located. At the time of the Deepwater Horizon incident, BP was the world's fourth-largest corporation (based on revenue), producing over 4 million barrels of oil daily from 30 countries (including the US), with each barrel with a capacity of 42 gallons. See "Global 500," CNNMoney.com (26 July 26 2010) <http://money.cnn.com/magazines/fortune/global500/2010/full_list/index.html> (accessed 21 October 2015).

[69] The Gulf Coast Claims Facility (GCCF) was an independent "claims" facility established for submission and resolution of claims from individuals and businesses for costs and damages incurred as a direct result from Deepwater Horizon incident. BP agreed to contribute funds to an escrow account to be used to pay claims submitted to the GCCF.

[70] See 33 U.S.C. § 2704(a)(3) (2012).

opted to commit itself to compensate for total costs.[71] The Deepwater Horizon incident led to an intensive re-examination of existing regulatory and liability schemes for offshore oil and gas activities in the US.[72]The incident also prompted the EU to pass safety directives to establish minimum safety standards to prevent major accidents in the offshore and gas operations within the EU.[73]

Niger Delta: Nigeria is currently Africa's largest oil producer with a production capacity of 2.5 million barrels per day.[74] Unlike the earlier examples, the Niger Delta oil spills cover a period stretching to well over two decades with the region being subjected to grave oil pollution arising from unregulated offshore platform operations.[75] In 2010, the National Oil Spill Detection and Response Agency stated that since 2006, the Niger

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[71] Statement of BP Exploration and Production Inc. re Applicability of Limit of Liability under Oil Pollution Act of 1990, In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, MDL No. 2179, 2010 WL 4151003 (ED La. Oct. 18, 2010). See also Faure, Jing and Hui (n 4).

[72] Faure, Jing and Hui (n 4). See also I Stefankova, "International Regulation *v*. National Regulation on Offshore Oil Exploitation: The USA as an Example" (2013) ELSA Malta Law Review, Edition III 126-139; W Amos, "Development of Canadian Arctic Offshore Oil and Gas Drilling: Lessons from the Gulf of Mexico" (2011) 20(1) Review of European Community and International Environmental Law 39.

[73] The European Union adopted the Offshore Safety Directive (2013/30/EU) with a view to establishing minimum standards/requirements for preventing any major incidents in EU waters.

[74] K Kalejaye, "Nigeria Risks Losing Africa's Biggest Oil Producer Status" *Vanguard* (9 July 2013) <http://www.vanguardngr.com/2013/07/nigeria-risks-losing-africas-biggest-oil-producer-status/> (accessed 3 September 2016). See also JW Carpenter, "The Biggest Oil Producers in Africa" Investopedia (15 October 2015) <http://www.investopedia.com/articles/investing/101515/biggest-oil-producers-africa.asp> (accessed 4 September 2016). Interestingly Angola has been challenging the position of Nigeria as the largest producer of crude in Sub-Saharan Africa. In June 2015 it briefly overtook Nigeria in oil production, but has been dogged by government red tape and falling oil prices. See C Mendes, "Angola recently became Africa's Largest Producer, Now its Oil Industry Could Disappear" (Bloomberg 6 September 2015) <http://mgafrica.com/article/2015-09-06-angola-recently-became-africas-largest-producer-now-its-oil-industry-could-disappear> (accessed 4 September 2016).

[75] For example, the Funiwa 5 blowout in 1980 and the Shell Bonga oil spill, amongst others. See C Nwachukwu, O Ndiribe, E Ovuakporie and K Kalejaye, "Bonga Oil Field Spill: FG fines Shell $5bn" *Vanguard* (12 July 2012) <http://www.vanguardngr.com/2012/07/bonga-oil-field-spill-fg-fines-shell-5bn/> (accessed 5 September 2016).

Delta area had suffered over 2,400 oil spill incidents.[76] According to Amnesty International, hundreds of oil spills occur annually in the Niger Delta, causing severe harm to the environment, to local livelihoods, besides placing the local population's health at risk.[77] Oil corporations (primarily Shell) have maintained the position that the vast majority of the oil spills are down to sabotage and theft.[78] In Amnesty International's view the investigations into the oil spill incidents are not independent and lack transparency.[79] In most cases Shell has controlled the data that is recorded on Joint Investigation Team forms and these forms are treated in the field as the company's document[80] which does not allow access to affected parties (potential claimants) and law enforcement authorities. This malpractice has to a great extent disadvantaged the rights of any lawful claims being brought against the oil corporations operating in the Niger Delta. The worrying trend can only be classified under corporate social irresponsibility (CSI), suggesting that the country lacks any effective oil regulations.[81]

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[76] C Eboh, "Nigeria Cautions Exxon Mobil on Offshore Oil Spills" *Reuters News* (15 June 2010) <http://www.reuters.com/article/2010/06/15/nigeria-exxon-idUSLDE65E22C20100615> (accessed 5 September 2016).

[77] See Amnesty International, Bad Information: Oil Spill Investigations in the Niger Delta (Amnesty International Publications, 2013) 5. According to Amnesty International the spills were/are caused by corrosion, poor maintenance of oil infrastructure, equipment failure, sabotage and theft of oil. See also, Amnesty International, Petroleum, Pollution and Poverty in the Niger Delta (Index: AFR 44/017/2009) and Amnesty International and the Centre for Environment, Human Rights and Development (CEHRD), The True Tragedy: Delays and failures in tackling oil spills in the Niger Delta (Index: AFR 44/018/2011).

[78] In Amnesty International's view there is no basis for the above assertion by oil corporations.

[79] See Amnesty International, "Oil Spill Investigations in the Niger Delta: Amnesty International Memorandum" (2012) <https://www.amnesty.org/download/Documents/16000/afr440422012en.pdf> (accessed 5 September 2016).

[80] Ibid.

81 E Wrigley, "Oil Spills: Are Corporations Responsible for Protecting the Environment?" (2014) 3(3) African Journal of Economic and Sustainable Development 237, 243. See also G Eweje, "Environmental Costs and Responsibilities Resulting from Oil Exploitation in Developing Countries: The Case of the Niger Delta of Nigeria" (2006) 69 Journal of Business Ethics 27-56. The author argues that the central issue in both corporate social responsibility (CSR) and business ethics is that of a company's responsibility to the society and physical environment in which it operates. Applying this argument, and the

However, in reality the Federal Government of Nigeria adopted a regulatory framework as early as in the 1960s to monitor and control the activities of multinational oil corporations.[82] It also implemented the 1963 Oil Pipeline Act to monitor the extraction and production of petroleum products by all oil corporations in Nigeria.[83] At the time of its promulgation, the Act was not meant to address the environmental pollution and degradation of other natural resources in Nigeria, but was rather to establish the legality of the pipelines and their protection.[84] Nigeria was to later implement more extensive regulations in an effort to combat the problem of environmental damage arising from offshore oil spill incidents in addition to the Nigerian Oil and Gas Industry Content Development Act 2010 (the 2010 Content Development Act).

In 1990 the Oil Pipeline Act was passed which requires that oil corporations take responsibility for their actions and pay appropriate fees to the landowners affected in the oil-producing areas of the Niger Delta in the event any damage is incurred.[85] Section 5(1)(a)(b) the 1990 Act grants the oil licence holder the right to enter and survey the land without interference from any third parties, and also to provide adequate maintenance of those pipelines in the Niger Delta oil producing communities.[86] In fact the Petroleum Exploration Decree No 25 of 1969, required oil operators to take prompt action to control and, if possible, end any pollution.[87] However there is very little evidence to suggest that the oil operators acted to comply with the provisions of the Decree No 25. Section 20(2)(1)(a)(b) and (c) stipulates the compensation that the holder of a license must pay to the land owners or third parties for damages resulting from its operations. Unfortunately, none of the above provisions seem to have been used by claimants from the Niger Delta to bring a substantially successful claim for oil pollution damage before the judiciary in Nigeria. Evidence also shows that "… most oil companies

available evidence, one can boldly state that the oil corporations operating in the Niger Delta do not seem to follow the good practice principles of CSR.

[82] AOY Raji and TS Abejide, "Compliance with Oil and Gas Regulations in the Niger Delta Region, Nigeria C. 1960-2000: An Assessment" (2014) 3(8) Arabian Journal of Business and Management Review 35, 36.

[83] Ibid.

[84] Ibid.

[85] Ibid, at 37.

[86] C Mwalimu, The Nigeria Legal System: Volume 2, Private Law (Peter Lang 2009).

[87] Raji and Abejide (n 82).

deliberately contravene established regulations" in relation to the environment in Nigeria,[88] which is shocking to say the least.

The 2010 Content Development Act was aimed at facilitating the participation of Nigerians and Nigerian companies in the country's oil and gas industry. This Act signalled the Government's intention to increase indigenous participation in the overall functioning of the oil and gas industry in the country.[89] Even so, section 92 of the Act has come under severe criticism as it seems to facilitate institutionalised corrupt practices amongst public officials overseeing the implementation of the Act.[90]

Overall, the above discussion has emphasized that the Niger Delta region has suffered and continues to suffer from a combination of institutionalised corruption, unregulated exploitation of mineral resources whilst the offshore operations in the region are characterized by numerous oil spill incidents.[91] Some striking features of the problem include large scale CSI of the firms engaged in exploration and exploitation of off shore hydrocarbon resources in Niger Delta, a lack of clear state/legal oversight of such activities and an inept judiciary in dealing with civil liability claims arising from oil spill damage claims.[92]

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[88] Ibid at 42.

[89] See U Bellema, "Local Content Policy and SMEs Sector Promotion: The Nigerian Oil Industry Experience" (2010) 5(5) International Journal of Business and Management. The author observes that from the data gathered, in a number of cases the local content policy resulted in increased contract awards to existing companies without significantly enhancing the participation of new entrants. The author concludes that the local content policy had had very little positive implication in enhancing higher small and medium sized firms' participation in the oil and gas industry.

[90] See C Nwapi, "Corruption Vulnerability in Local Content Policies in the Extractive Sector: An Examination of the Nigerian Oil and Gas Industry Content Development Act 2010" (2015) 46 Resource Policy 92. The author notes the existence of corruption vulnerabilities in the Act and that section 92 does not have a place in law as it clearly paves the way for corrupt practices by stating that the "Board may accept gifts of land, money or other property on such terms and conditions, if any, as may be specified by the person or organisation making the gift". The author notes that if local content policies (LCPs) are not properly implemented, resource-rich developing countries can create opportunities for corruption which can see revenues stolen from the state continuously and damage the business reputation of the country.

[91] BR Konne, "Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland" (2014) 47 Cornell International Law Journal 181.

[92] Ibid.

PART IV: OFFSHORE FACILITIES AND OIL POLLUTION: THE STATE OF PLAY

The potential for large scale, widespread pollution damage exists with every offshore hydrocarbon drilling activity.[93] Under the "polluter pays" principle, the party responsible for polluting the marine environment is required to bear the costs of clean-ups and damages. However, as discussed above, liability for pollution damage originating from offshore platforms is yet to be resolved under international law. It would not be an exaggeration to state that the environmental concerns arising from offshore energy exploitation have largely been overlooked by the players involved in the oil industry.[94] Although there have been a few attempts to formalise a regulatory framework for civil liability claims arising from offshore oil spills, they have met with little success. The regulation of liability for pollution damage arising from offshore platforms and structures remain at the discretion of a State to prescribe such measures for compensation. One such measure adopted within the EU along with Norway is the Offshore Pollution Liability Agreement (OPOL).[95] The recent accidents arising from offshore operations, including the ones discussed earlier, demonstrate that the environmental risks of offshore drilling activities are prevalent in all regions of the world, and faced by all types of companies involved in the activities.[96] The cross-border nature of the impact from such incidents has only reinvigorated discussions regarding the suitability of the current international regulatory framework for offshore oil and gas activities[97] and highlighted the absence of a uniform civil liability regime to process claims for damages. It is also clear that there are regulatory gaps for both liability and compensation in case of accidents from, and for the safety of, offshore drilling activities.[98]

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[93] Ibid.

[94] Gao (n 58) writing in the 1990s, notes that environmental concerns have more or less been neglected by both the governments of oil producing countries and exploiting companies, with hardly anyone suggesting that environmental protection and resources conservation should also be part of the petroleum agreements.

[95] Offshore Pollution Liability Agreement 1974.

[96] Rochette and Wright (n 63)

[97] Rochette, Wemaëre, Chabason and Callet, (n 64).

[98] Rochette and Wright (n 63). See also L Chabason, "Offshore Oil Exploitation: A New Frontier for International Environmental Law" IDDRI Working Paper No 11 (2011), where the author notes that there is at present no ongoing process at the international level designed to fill the gap in the regulatory regime as regards the safety of offshore drilling activities.

The discussion in the following section will explore the earlier attempts by the CMI, the current state of play and also the way forward.

1 The CMI Draft 1977 and other Regional Agreements

In 1977 the CMI at its conference in Rio de Janeiro drafted a Convention on Offshore Mobile Craft (the Rio draft),[99] which proposed the extension of those legal concepts unique to maritime law and which applied to ships to offshore mobile craft. The original objective of the Rio draft was to clarify the application of certain recognised principles of maritime law to new types of craft developed in connection with the exploration and exploitation of offshore mineral resources, but which did not fall within the definition of a ship.[100] The reasoning was based on the fact that mobile craft, as in the case of sea going vessels, require ownership, registration and a flag, and the creation of maritime liens and rights of civil arrest.[101] The IMO had already adopted in 1979 and 1989 the MODU Code on the application of the Loadline and SOLAS Conventions to mobile offshore drilling units.[102] The Rio draft which was the brainchild of the CMI, was forwarded to the IMO for further discussions and in the hope of its eventual adoption at the international level. The draft was discussed at the CMI Conference in Sydney in 1994, where it was revised and adopted as the Sydney Draft, with the Conference unanimously resolving that the CMI would "establish a working group for further study and development, where appropriate, of an international convention on offshore units and related matters".[103]

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[99] R Shaw, "Offshore Craft and Structures: Report of the Legal Committee of the International Maritime Organisation from the International Subcommittee of the Comité Maritime International" CMI Yearbook 1998, 145. See also N Liu, "Protection of the Marine Environment from Offshore Oil and Gas Activities" in Rosemary Rayfuse (ed) *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing 2015) 190, 203.

[100] Shaw (n 99). See also sections 1001(18) and (22) US Oil Pollution Act 1990.

[101] R Shaw, "The FPSO – Is it a Ship? The Proposed CMI Offshore Mobile Craft Convention – An Update" *Year Book of Australian Mineral and Petroleum Law Association* (AMPLA Yearbook) (2000). In the author's view the CMI attempted to "apply established legal concepts specific to maritime law to the strange new craft generated by the offshore industry".

[102] Shaw (n 99). The author observes that this code is a good example of the adaptation of established maritime law principles to craft for which they were not originally conceived.

[103] Ibid. It is worth noting that the author acted as Chairman of the working group.

Although the need for an international regulation on matters relating to the application of legal principles with regard to subjects such as registration, mortgages and salvage is well recognised, some sections of the industry are not overly convinced on the need for a convention.[104] Writing in 1998, Shaw raised the bigger, and more pertinent question of whether the IMO should try to produce "a broader based convention dealing with all offshore activities", whilst attempting to develop a solution to the recognised legal uncertainties.[105] This point gains force as there are in force a number of regional agreements covering the North Sea, Mediterranean, and Arabian Gulf areas with regard to civil liability claims arising out of offshore activities. However, there are regions such as South East Asia, West Africa, and the South Atlantic which do not have a set of rules to govern any civil liability claims arising out from offshore activities and these would benefit from an international convention. Likewise, the Global Ocean Commission[106] in its 2016 report expressed its commitment to "support efforts to adopt and improve international safety and environmental standards for offshore drilling on the continental shelf, including regional protocols… In line with the polluter pay principles, the Commission also supports the development of an international liability convention to cover damage to the marine environment from offshore oil and gas installations".[107]

For Soyer the best international organization for handling a matter of this magnitude is the IMO.[108] Unfortunately, the State Parties that initiated the process for the creation of a new regime did not enjoy sufficient support from any of the international organizations. Although the IMO's

[104] Ibid. The author notes that the International Association of Drilling Contractors was not in favour of establishing an international convention.
[105] Shaw (n 99) 146.
[106] The Global Ocean Commission, an international initiative was launched in 2013. The Commission works to raise awareness and promote action to address the degradation of the ocean.
[107] The Global Ocean Commission, *The Future of Our Ocean: Next Steps and Priorities* (February 2016) <http://www.some.ox.ac.uk/wp-content/uploads/2016/03/GOC_2016_Report_FINAL_7_3.low_1.pdf> (accessed 6 September 2016). In the 2014 report published by the Commission similar commitments were expressed as regards the environmental standards of offshore carried out in the continental shelfs. See The Global Ocean Commission, *From Decline to Recovery: A Rescue Package for the Ocean* (24 June 2014) <http://www.some.ox.ac.uk/wp-content/uploads/2016/03/GOC_report_2015.July_2.pdf> (accessed 6 September 2016).
[108] Soyer (n 17).

current vision and strategic plan does not include pollution damage arising from offshore oil exploration and exploitation activities, it is worth pointing out that the Legal Committee of the IMO at its 97th Session in 2010 approved a proposal to recommend that the Assembly revised the Strategic Plan, Direction 7.2 to include the impact of offshore activities on the environment and related liability and compensation issues.[109] The IMO in its 99th session in 2012 was to reconsider its Strategic Plan, Direction 7.2, as Brazil had challenged the jurisdiction of the IMO to work towards the creation of a multilateral convention. The objections related to the competency of the IMO and also to the substantive issue of whether such a convention was needed.[110] The IMO's Legal Committee opined that there was no compelling need to develop an international convention on the subject.[111]

In this regard Gaskell takes a more pragmatic approach to institutional competence by noting that there are precedents for joint projects with other UN bodies, and that "there is scope for the UN to approve joint drafting work where the subject matter crosses jurisdictional boundaries". Gaskell presents the instance where two international organisations, the IMO and the UNCTAD coordinated as joint sponsors to work on the creation of the International Convention on Arrest of Ships 1999. Gaskell also opines that the IMO may not possess the special (technical) expertise on offshore platform operations (as opposed to ships), but there is no other UN organisation with comparable expertise to develop a liability and compensation regime.[112]

A more recent project to develop an international framework for civil liability arising from offshore activities was discussed within the G20

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[109] See N Gaskell, "Compensation for Offshore Pollution: Ships and Platforms" in M Clarke (ed) *Maritime Law Evolving* (Hart Publishing 2013) 63, 83.

[110] LEG 99/13/1, 10 February 2012. See also the report of the Legal Committee on the work of its 99th Session, LEG 99/14, 24 April 2012, 23-28. See also Gaskell (n 109) where the author notes that the issue of the IMO extending its competence to offshore activities had been raised when the Sydney draft was being discussed in the mid-1990s. Also of importance is the remit of the IMO outlined in Article 1 the IMO Convention 1948 on the purpose of the organisation which repeatedly refers to "shipping": thus giving rise to doubts as to whether it was competent even under its own Convention of 1948.

[111] LEG 99/14, 24 April 2012, para 13.7.

[112] Gaskell (n 109). The author also points out that work on any aspect of offshore activities will necessary include the United Nations Environment Programme (UNEP), the International Seabed Authority (ISA), the United Nations Office of Legal Affairs/Division for Ocean Affairs and the Law of the Sea (UN/DOALOS) and the International Law Commission.

framework but failed to progress beyond the preliminary stages of the discussion.[113] This was only the second attempt after the CMI draft of 1977 and the failure to make progress at the highest level only demonstrates the difficulty in agreeing on the development of a binding international convention regulating an economic activity that is considered vital for most States.[114] Nevertheless, the existing gaps in the international legal framework have only encouraged the development of regional agreements. What has emerged as a result is a patchwork of fragmented and uncoordinated regional agreements. While some regional agreements, like the Persian Gulf/Oman Sea Area, and the Mediterranean are more comprehensive, some others like the Arctic agreement are less so. Also, the scope of the regional agreements varies, with some being binding on the parties and others remaining as only soft law instruments with little enforceability. One of the major drawbacks that Rochette *et al*, highlight is the lack of coordination amongst States in the sharing of experience between different regions involved in offshore drilling regulation.

One of the earliest conventions to be adopted in Europe is the 1976 Barcelona Convention. Sixteen Mediterranean countries and the European Community adopted the Mediterranean Action Plan (MAP) in 1975, and in 1976 adopted the Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention).[115] Most importantly the Convention applies without distinction to all the maritime waters of the Mediterranean Sea[116] and calls for the development of an international liability regime "as soon as possible". These words originally contained in Article 12 of the Convention was later modified in 1995, and the amended provision now enshrined in Article 16 no longer carries the words "as soon as possible".[117]

The 1994 Offshore Protocol[118] was one of the measures aimed at creating a liability regime. The Protocol was finally ratified and adopted

[113] Rochette, Wemaëre, Chabason and Callet (n 88).
[114] Ibid.
[115] The Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona, 16 February 1976, entered into force on 12 February 1978).
[116] See Article 1, para 1 of Barcelona Convention, which states, "… the Mediterranean Sea Area shall mean the maritime waters of the Mediterranean Sea proper, including its gulfs and seas…". See also Pereira (n 31) 124.
[117] Pereira (n 31) 124.
[118] Protocol for Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, adopted 14 October 1994, and entered into force on 17 March 2011. UNEP *Register of International Treaties and Other Agreements in the Field of Environment* (UNEP 2005) 569.

in 2011. Its most interesting feature is that it covers a range of activities concerning the exploration and exploitation of seabed resources in the Mediterranean. Unlike its predecessor, the 1976 Barcelona Convention, the Offshore Protocol calls for the parties to establish under national laws the liability of the operator for damage and to pay prompt and adequate compensation.[119] More importantly, in January 2008 the Guidelines for Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area were adopted.[120] Although this is a step in the right direction, Pereira opines that the regime governing liability for offshore pollution remains underdeveloped under the Offshore Protocol.[121] Gaskell notes that regional conventions are drafted much more in the language of general public international law obligations rather than the more precise private law casting such as the CLC.[122]

As earlier stated, the EU in response to the Deepwater Horizon catastrophe, adopted the Offshore Safety Directive (2013/30/EU) with a view to establishing minimum standards/requirements for preventing any major incidents in EU waters. The EU also carried out a review of the regulations in relation to offshore oil and gas activities within the EU envisaging safety rules. This however, fell short of adopting a moratorium on drilling.[123] The EU also introduced a number of regulations on safety,[124] and on the prevention of environmental damage.[125] The EU

[119] Article 27(a), Offshore Protocol 1994.
[120] Guidelines for Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area (2008) (22 DOC UNEP(DEPI)/MED.IG.17/10) of 18 January 2008, adopted at the 15th ordinary meeting of the Parties. See also T Scovazzi, "Mediterranean Guidelines for Determination of Environmental Liability and Compensation: The Negotiation for the Instrument and the Question of the Damage that Can be Compensate" in A von Bogandy and R Wolfrum (eds) *Max Plank Yearbook of United Nations Law,* Vol 13 (2009) 183-212.
[121] Pereira (n 37) 125.
[122] Gaskell (n 109) 89.
[123] Pereira (n 31) 126.
[124] European Commission Proposal for a Regulation of the European Parliament and of the Council on Safety of Offshore Oil and Gas Prospection, Exploration and Production Activities, COM(2011) 688 final.
[125] Directive 2004/35/EC on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, 21 April 2004.

Directive[126] covers a number of aspects including prevention of pollution, the response and the financial liability in relation to granting permits, controls. Interestingly, the Directive also requires companies seeking permits to have clear response plans in case of an oil spill event, and to prove they have the means to pay for the clean-up costs and for compensation for environmental damage.[127] One criticism is that it pays more attention to accidental pollution from offshore oil and gas activities, rather than from operational pollution.[128]

As regards national legislation introduced by states with offshore activities, some are more detailed and address every stage of the platform's lifecycle, from the exploration phase to the dismantling of installations, while others are limited to the production stage.[129] The latter's restrictive approach neither takes into account the environmental impact of such exploration and exploitation nor the consequences that gives rise to civil liability claims arising from the damage caused to property and persons. This criticism apart, the effective implementation of any domestic legislation by developing States also prevents them from effectively controlling and monitoring the development of offshore activities and enforcing regulations.[130]

Returning to the international regimes, it is noticeable that the attempts to create an international regime are weak whilst the existing regional arrangements are limited in scope as they are restricted in their geographical coverage. This means it may not be possible to extend the same to a larger area. A classic example is the Offshore Pollution Liability Agreement 1975 (OPOL) which has limited geographical reach and where compensation for damages is capped at a rather low level.[131] The OPOL Agreement is a private agreement between the UK, Denmark, Germany, France, Republic of Ireland, Netherlands, Norway, Isle of Man, Faroe Islands and Greenland—all operators in the offshore sector. OPOL was

[126] Directive 2013/30/EU of the European Parliament and the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC Text with EEA relevance, in force on 18th July 2013.
[127] See Pereira (n 31) 126.
[128] Liu (n 99) 201. The author notes that the Directive is identified as EEA relevant, which raises the question as to its applicability in the European Economic Area. This view is now under challenge by Norway.
[129] Rochette, Wemaëre, Chabason and Callet (n 64).
[130] Panel Scientifique Indépendant sur les Activités Pétrolières et Gazières en République Islamique de Mauritanie, (2009) as cited by Rochette, Wemaëre, Chabason and Callet (n 64).
[131] Client Earth, "Note on the Limitations of OPOL in Response to Oil and Gas UK Additional Evidence" (2009).

introduced as an interim measure during the negotiation phase of the Convention of Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources.

The UK government considered the OPOL Agreement to be a satisfactory means of providing for a strict liability regime in case an operator should default on providing the clean-up costs associated with an incident.[132] Under the scheme every operator of an offshore facility in UK waters used in connection with the exploration for, or production of oil, gas or natural gas liquids is required to be a party to the OPOL Agreement.[133] Additionally, any signatory to the agreement is required to demonstrate financial responsibility for costs resulting from the remediation of an oil spill and third party compensation for pollution damage.[134] This is one of the key features that make the scheme work. The OPOL Agreement has not yet attracted ratification or acceptance by any of the nine parties that took part in the intergovernmental conference which adopted the Convention.

The Offshore Pollution Liability Association Ltd, the body that is responsible for the supervision and administrative operation of the OPOL Agreement, accepts only operators as members of the association as they are more directly involved and hence in a better position than non-operators to assume obligations imposed under the Agreement.[135] In essence, the OPOL Agreement is a voluntary oil pollution compensation scheme that provides guarantees of payment for claims up to a liability limit of US$250 million per incident.[136] The Preamble to the OPOL

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[132] C Feikert-Ahalt, "Oil Spill Liability and Regulatory Regime: United Kingdom" Library of Congress (June 2010) <https://www.loc.gov/law/help/oil-spill-liability/uk.php > (accessed 14 May 2016). See also, Offshore Pollution Liability Association Limited, Home <http://www.opol.org.uk> (accessed 14 May 2016).

[133] See "Oil Spill Cost Study – OPOL Financial Limits" Joint Study Commissioned by OPOL and Oil and Gas UK (2012) <http://oilandgasuk.co.uk/wp-content/uploads/2015/04/Oil-spill-cost-study-120531.pdf> (accessed 14 May 2016).

[134] Ibid.

[135] Interestingly, the Agreement initially applied only to offshore facilities within the jurisdiction of the UK, but was later on extended to offshore facilities within the jurisdiction of the coastal States of the European Community, of Norway, of the Isle of Man and the Faroe Islands (denominated as "Designated States").

[136] Joint Study of OPOL and Oil and Gas UK (n 145). The financial limit in the OPOL Agreement is reviewed regularly. In October 2010 the limit was increased to US$250 million per incident, which was the industry's response to the Deepwater Horizon incident in the Gulf of Mexico.

Agreement outlines the scheme by stating that it seeks to "provide an orderly means for compensating and reimbursing any person who sustains Pollution Damage and any Public Authority which incurs costs for taking Remedial Measures as a result of a Discharge of Oil from any Offshore Facility". The scheme envisaged under the Agreement is that in the event of any oil discharge from an offshore facility, the operator of such facility must meet the cost of remedial measures and pay compensation for pollution damage up to an overall maximum of US$250 million per incident on a strict liability basis, subject to a limited number of usual exceptions (e.g. war and negligence of the claimant).[137]

It is indeed frustrating for those who are in favour of an international regime for oil pollution damage from offshore exploration when informed that the offshore oil industry is opposed to the idea of a global liability convention.[138] Currently, the oil industry's specific obligations are geared more towards regulating oil tankers, as opposed to offshore drilling activities,[139] which helps explain the attitude of the industry towards a global liability regime for offshore operations. Sachs points out that the offshore industry does put pressure on the governments—both in developing and developed countries.[140] Developing countries are vulnerable as they need to attract international partners that have the financial and other resources to engage in energy exploration and exploitation but which may be keen to avoid discouraging any potential investors with measures such as offshore oil pollution damage regimes. Interestingly, Sachs also points out that developed countries have also opposed a civil liability regime fearing that removing obstacles to cross-border litigation through international agreements could potentially expose them and other corporate bodies in their jurisdiction to additional liability.[141]

As mentioned earlier, the OPOL regime which is in force in some countries with offshore facilities (like the UK) does not provide any

[137] Joint Study of OPOL and Oil and Gas UK (n 145).
[138] Soyer (n 17) 75.
[139] See K Galbraith, "Gap in Rules on Oil Spills From Wells" *New York Times* (16 May 2010) <http://www.nytimes.com/2010/05/17/business/energy-environment/17green.html> (accessed 16 March 2016). The author argues that the regulatory discrepancy due to the fact that tankers move across international boundaries whereas platforms remain fixed. See also D Fowler, "Offshore Oil: A Frontier for International Law Making" (2012) 12 Chicago-Kent Journal of International and Comparative Law153.
[140] N Sachs, "Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law" (2008) 55 UCLA Law Review 837.
[141] Ibid.

certainty to the sector as such. The only option that law provides for any oil pollution damage is a tort action against operators and other tortfeasors. This remedy again is more a Common Law remedy, with the analogous position under Civil Law being based on delictual and quasi-delictual civil liabilities.[142] It should be noted that the position on limitation of liability under maritime law on the matter is unclear. Again, when the pollution is from a pipeline (connected to the well-head), it is more likely that the liability will be unlimited. One can say that if an international regime were to be in place the offshore industry will benefit from a clear limitation of liability.[143]

2 The CMI Draft, CLC and other Possible Frameworks

It can be argued that it is technically possible to extend the scope of the CLC to cover liability for pollution arising from offshore installations, including pipelines attached to them, and craft.[144] Shaw and other authors point out that this was in fact the envisaged solution suggested by the CMI in 1977 when it proposed a comprehensive compensation regime for oil pollution damage arising from offshore operations.[145] As discussed earlier, the scheme is found in the Rio Draft. As far as the scheme of the 1977 CMI Draft Convention is concerned, it seeks to apply the regulations of existing maritime/admiralty law practices to matters relating to arrest of ships, collisions, mortgages and salvage with regard to any maritime structure, as long as it is not attached permanently to the seabed. Here, the reference is clearly to include offshore oil platforms.

With regard to pollution liability arising from offshore installations and craft, the draft Convention simply extends the earlier version of the CLC 1969 to the superstructures. As mentioned earlier, the draft Convention was forwarded by the CMI to the IMO's Legal Committee. The IMO respond to it only in 1990 by requesting the CMI to undertake a further study, make a report and produce a modified draft Convention. The CMI in 2004 met in Sydney and carried out changes to the Draft. This

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[142] L Zhu and MZ Zhang, "Insuring Against Marine Pollution Liability: An International Perspective" (2015) 46(3) Journal of Maritime Law and Commerce 373. See also MPG Rubio, "The Prestige Case, International and Spanish Legal Regime for Compensating Damage" in M Faure and J Hu (eds), *Prevention and Compensation of Marine Pollution Damage, Recent Development in Europe, China and the US* (Kluwer Law, 2006).
[143] Soyer (n 17) 75.
[144] Shaw (n 99); Soyer (n 17).
[145] Ibid.

Draft, known as the Sydney Draft has a similar approach as the earlier Draft from 1977 as regards the scheme of liability for pollution is concerned. Soyer and Tettenborn are of the view that it may be difficult to apply the CLC and the Fund regime to the offshore sector, as it may be difficult to get the sector to satisfy the compulsory insurance requirement.[146]

It is hard to determine how contributions to the Fund from the offshore sector will be calculated, and also who will bear the financial responsibility for such contributions. Under the CLC, the Fund receives contributions from the receivers (oil importers) of the oil in member states, which is relatively easy to determine. This may not be the case with the offshore industry, as the same principles as applicable to the CLC may not be applicable. If the CLC and the Fund were only to be extended to cover the offshore industry, then it is only logical to require the offshore installations to contribute to the Fund. The offshore industry is a complex sector, as in addition to the operators a number of other interested parties come into the frame such as the licence holders, the landowners, the contractors and the coastal state. In other words, it is a multiple-party operation with various individuals holding stakes at various points of the operation, with interests of their own. Hence the operator may not be willing or be convinced to readily accept the additional financial burden. Being a multiple-party operation, it will be extremely difficult to determine who will be responsible for making contributions. In the words of Soyer, it "…has the potential of turning into a political mine-field".

Strict liability, which is the backbone of the CLC, will be of no use if there are no avenues to recover liability. The CLC, which enables action to be brought directly against the insurer, also requires that compulsory insurance be taken out by registered owners up to the limit of their liability under the Convention. The existence of a cover is the cornerstone of the CLC and contributes hugely to its success, as it guarantees adequate compensation through its various insurance provisions.[147] The CLC not only imposes compulsory insurance on ship-owners but also requires them to carry a certificate of insurance as proof, ensuring oil pollution victims access to insurance proceeds by allowing them to bring direct action against the insurers.[148] Usually it is the P&I Club which issues a certificate (known as blue card) confirming the existence of the required insurance.

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[146] Soyer (n 17).
[147] MM Billah, "The Role of Insurance in Providing Adequate Compensation and in Reducing Pollution Incidents: The Case of the International Oil Pollution Liability Regime" (2011) 29 Pace Environmental Law Review 42.
[148] Ibid.

This in turn is presented to the state/ship registry where the ship is registered. The concerned state authorities then in turn issue a certificate in recognition of the insurance.[149] Such an arrangement may not work in the case of offshore industry, as the P&I clubs do not offer liability insurance for pollution damage arising from such offshore operations.[150]

Liability insurance in the case of offshore operators come from the commercial market and as the nature of the risk involved is different and complicated it may not be an attractive proposition for P&I clubs to be involved. Will the States concerned be in a position to recognize the blue certificates from the commercial insurers for the offshore operators, especially when the limits of liability under the CLC are to be high? In Soyer's view the stability and uniformity of the CLC and Fund regime could be seriously jeopardized if it were to be extended to the offshore industry, as it has the potential to change the balance considerably.[151] They also opine that States with no offshore operations may view that the CLC and Fund Conventions as subsidising a fund that only benefits States with offshore operations and may decide to leave the CLC and the Fund Conventions altogether. In effect, extending the CLC and Fund Convention to offshore operations could see the demise of the CLC and the Fund Convention. For instance, under the European Union Directive 2004/35, referred to as Environmental Liability Directive (ELD), the operator of activities causing significant environmental damage to protected species, natural habitats, or water is strictly liable to prevent and remedy the damage, and also to bear the full costs of such remedial action.[152]

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[149] Soyer (n 17).

[150] Such liabilities arising out from wells drilled, blow-outs from subsequent equipment connected to offshore installations, as well as clean-up costs.

[151] Soyer (n 17) 74.

[152] Under the ELD, operators who carry out certain dangerous activities (as listed in Annex III) are strictly liable for environmental damage. In contrast, operators carrying out other occupational activities are liable for any fault-based damage. Operators may benefit directly from certain exceptions and defences, for example *force majeure*, armed conflict, third party intervention, as well as defences introduced via transposition (e.g. permit defence and state of the art defence). Operators must take preventive action if there is an imminent threat of environmental damage. They are also under an obligation to remedy environmental damage once it has occurred and to bear such costs under the polluter-pays principle. In specific cases where the operators fail to do so, or are not identifiable, or have invoked defences, the competent authority may carry out the necessary preventive or remedial measures. See T Scovazzi, "Maritime accidents with particular emphasis on liability and compensation for damage from

The position of strict liability for pollution damages greatly varies from one state to the other and is strongly based on the legal system that is followed. If liability is limited, it is very common to establish a compensation fund for cases where the amount of compensation payable exceeds the limitation, or where the responsible person for the damage caused is not identifiable.[153] One example is the US practice established under the OPA 1990, where liability for damages from offshore spills is capped at US$75,000,000 and claims up to US$1,000,000,000 above the cap are paid out of the Oil Spill Liability Trust Fund.[154] To pay out any damages, national legislation can also make it compulsory that the operator of any offshore facility is to be insured, or furnish adequate financial guarantees to cover the damages arising out of any accidents. Hence the grant of any licence by a State to an operator for exploration and exploitation of seabed resources will be strongly predicated on the availability of financial security from the prospective operator or on the availability of an adequate insurance cover for the risks involved in the operation.

The European Union Directive 2004/35 follows a gradual approach on the question of financial security. The relevant provision, Article 14 of the Directive reads as follows:

> 1. Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive.
> 2. The Commission, before 30 April 2010 shall present a report on the effectiveness of the Directive in terms of actual remediation of environmental damages, on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III. The report shall also consider in relation to financial security the following aspects: a gradual approach, a ceiling for the financial guarantee and the exclusion of low-risk activities. In the light of that report, and of an extended impact assessment, including a cost-benefit analysis, the

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the exploitation of mineral resources of the seabed" in *International Disaster Response Law*, (TMC Asser Press, Springer 2012) 287.
[153] Scovazzi (n 152).
[154] Ibid.

Commission shall, if appropriate, submit proposals for a system of harmonized mandatory financial security.

In 2010 the EU Commission presented a report following from the above regulation.[155] The report was tabled after extensive consultation with government experts and other stakeholders, such as insurers, brokers, banks and financial institutions and non-governmental organisations.[156] With regard to the development of financial security, it was reported that eight Member States, namely, Bulgaria, Portugal, Spain, Greece, Hungary, Slovakia, Czech Republic and Romania were to introduce mandatory financial security, which measures were to come into effect at different dates up to 2014. Later, it was reported that the Member States Portugal, Spain and Greece had put back the dates of entry of the above arrangement for mandatory financial security.[157] On the question of insurance the operators were required to have adequate cover for general third party liability (GTPL), environmental impairment liability (EIL), and for other risks. But, in the view of the European Commission, the introduction of a uniform mandatory financial security is currently not justified[158] but could be justified in specific cases of oil spills arising from offshore activities.[159]

To guarantee adequate compensation, the CLC creates various compensation funds, primarily funded by the oil industry.[160] Two such funds are the International Oil Pollution Compensation Fund (IOPC) and the Supplementary Fund. Additional funds that currently exist are the Canadian Ship-Source Oil Pollution Fund (SOPF), which covers oil pollution damage not recoverable under the international regime; and the US Oil Spill Liability Trust Fund (OSLTF), which provides compensation above and beyond ship-owners' liability under the Oil Pollution Act 1990.[161] These funds function as an additional tier of insurance against oil pollution damage. In Billah's view, although intended primarily to provide adequate compensation, the insurance provisions contained in international agreements also incidentally lead to improved deterrence.

[155] Doc. COM (2010) 581 final of 12 October 2010.
[156] Scovazzi (n 152).
[157] Doc. COM (2010) 581 final of 12 October 2010.
[158] Scovazzi (n 152). Interestingly, the insurance industry welcomed the ELD, and had responded positively by developing products for ELD, either specific 'stand-alone' solutions, or top-ups to existing liability products.
[159] Scovazzi (n 152).
[160] Billah (n 147).
[161] Ibid.

The reason being that insurance premiums needed for the above insurance arrangements will roughly reflect the compensation paid to oil pollution victims—and higher compensation means higher premiums—which in turn induce insured ship-owners and the oil industry towards a heightened standard of care so that they pay less in premiums.[162]

Billah is also of the firm opinion that the success of vessel-source oil pollution liability regimes in providing adequate compensation is attributable to the various insurance arrangements which are part of the scheme, and as well as the higher limit on shipowners' liability.[163] Also to note here is the Advisory Opinion of the Seabed Disputes Chamber (under UNCLOS) dated 1 February 2011, which does not give any clear picture on the amount of compensation payable to the affected party from such oil spill incidents, and which does not also require insurance cover in the event the person primarily liable is unable to pay.[164] As mentioned earlier, the failure of the Seabed Disputes Chamber to require operators to have an insurance cover denies any compensation claims to be processed under the provisions of UNCLOS. Also parties to any reference to the Seabed Disputes Chamber can only be State parties, who are the licensors, or the license issuing authority for exploration and exploitation of the seabed resource. Hence any action to enforce a private right (e.g., claim for compensation suffered as a direct result of oil pollution) before the

[162] Ibid. In the author's view the incidental effect of insurance arrangements explains to some degree the decline in vessel-source oil pollution incidents. See also ITOPF, "Oil Tanker Spill Statistics 2015" (The International Tanker Owners Pollution Federation Limited, February 2016) <http://www.itopf.com/fileadmin/data/Documents/Company_Lit/Oil_Spill_Stats_2016.pdf> (accessed 27 May 2016). Two large spills (over 700 tonnes) were recorded in the year 2015, with both incidents arising from collision incidents. Also reported in 2015 were six medium spills (between 7 and 700 tonnes) of various oils including cargoes of asphalt, naphtha and slurry oil, as well as bunker fuels. In the last three and a half decades the average number of incidents involving large oil spills from oil-tankers has reduced progressively, and since 2010 it stands at an average of 1.8 large oil spills per year.

[163] The author uses the word "insurance" in its wider context to include any guaranteed source of compensation for victims of oil pollution damage, namely, the compensation from the IOPC Fund, the Supplementary Fund, the SOPF, and the OSLTF. They are to be included under the term "insurance" as the common goal of these funds is to provide for adequate compensation against oil pollution damage.

[164] See Advisory Opinion (n 27). See also Rares (n 25), where the author comments that the Advisory Opinion of the Seabed Disputes Chamber does not go into detail as to a State's obligation to exercise 'due diligence.'

Authority will not be sustainable and can only be processed before the domestic courts.

The above discussion only demonstrates that any proposal to extend the CLC and the Fund regime to cover offshore operations largely depends on the existence of insurance cover and a fully supported fund from the industry concerned. The proposal while being ambitious can run out of steam if it is not backed by the operators and the offshore industry at large. Likewise, both under the OPOL Agreement (aimed at claims arising from offshore operations in the UK waters), and the OPA 1990 (aimed at claims arising from both vessel-source marine pollution and offshore operations in US waters), it is absolutely essential that operators have a comprehensive, compulsory insurance cover for their operations. In short, all the existing regimes for claims arising from both vessel-source and offshore marine pollution, envisage the full cooperation and participation of the operators (shipowners, charterers, offshore operators, licensees, etc.) to fund any schemes for civil liability, and an adequate insurance cover for their operations which acts as the backbone.[165]

PART V: THE WAY FORWARD

Rochette and Wright highlight the possibility of several risks if no liability and compensation rules are adopted for damages caused by offshore incidents. In their opinion the risk of legal uncertainty surrounding the subject could potentially lead to political disputes between States.[166] Further, the absence of a legal framework in this area runs the risk of partial or total non-payment of damages by operators to the claimants who had suffered as a direct consequence of the oil spills arising from offshore operations. They call for the promotion of an international convention to regulate liability and compensation for pollution damage resulting from offshore drilling activities. There is also the risk of the operator going insolvent before the settlement of any claims, given the lack of financial capacity of many small operators (especially from developing countries) to pay for large claims,[167] and in the absence of a clear cut civil liability regime the claimants may not have anyone to proceed against. However, the task of finding a solution through the creation of a new international regime for offshore oil

[165] Billah (n 147).
[166] Rochette and Wright (n 63).
[167] P Cameron, "Liability for catastrophic risk in the oil and gas industry" (2012) 6 International Energy Law Review 207.

pollution damages may be a difficult task as there is very little political will amongst the international community to engage.[168]

In Gaskell's view there are many advantages in developing a multilateral convention-based regime to claimant States, as it can primarily bring uniformity of rules for an industry that operates worldwide.[169] He argues that it would be more difficult for the industry to resist international action than national legislation, that the risk could be spread internationally (rather being targeted on one State), and most importantly a compulsory insurance would work where there is an inbuilt ability to seek reciprocal enforcement of judgments.[170] Gaskell also advocates, as a minimum, a "strict liability regime with its boilerplate defences, coupled with compulsory insurance and direct action". Apart from the lack of a political will, one of the major obstacles is also the lack of leadership to take up the task of forging an international convention, as the IMO appears to be more concerned with safety at sea issues and is content to oversee the CLC and the Fund Conventions. The CMI, which was instrumental in producing the 1977 Draft, does not enjoy the same authority it seemed to possess in the twentieth century. Also, a number of developing countries and emerging economies that are engaged in offshore oil exploration may not be keen to be parties to an international regime which will require them, or the operators authorised by them, to be in a position to foot the bill for any damages arising from such offshore oil spills. One further hurdle faced along the way is also the lack of involvement from the key players responsible for causing any offshore oil spill[171] in finding a solution.

The conclusions that one draws from the above discussion are that

> i) there is an urgent need for an international civil liability regime for oil pollution damages arising from offshore activities—especially with more developing countries engaging in oil exploration and with lax regulatory mechanism in place;

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[168] Soyer (n 17) at 74.
[169] Gaskell (n 109) 85.
[170] Ibid, 86.
[171] There was little public interest in developing pollution prevention and compensation regimes for vessel-source oil pollution damage prior to the major pollution incidents. The author also notes that strong lobbying from the shipping industry to a certain extent delayed any development in this regard. See Tsimplis (n 9). Likewise, it can be said that there is very little interest in developing a civil liability regime arising from offshore oil pollution damage, as there is very little interest to engage from the industry.

ii) the existing international regimes on marine oil pollution may not provide the answers/solutions to the problem at hand, as they are primarily designed for vessel-source marine oil pollution and not for oil pollution arising from offshore facilities (floating and fixed platforms);
iii) the CLC, although strongly premised on compulsory insurance, may not be fit for the purpose as it is more geared towards vessel-source oil pollution and a mere extension of the terms to include offshore oil pollution may not be workable;
iv) the Law of the Sea Convention, although containing provisions on State responsibility, cannot be modified to create a regime for offshore oil spill damages; and
v) that solutions, if any, are to be found in the existing legal framework, i.e., the domestic legislation of the US, namely the Oil Pollution Act 1990.

Regional agreements designed to address the issue of oil pollution damage arising from offshore operations do not have the characteristics to be extended beyond their geographical remit, although some features from the Barcelona Convention and OPOL may provide useful/credible inputs into any working draft. It is true that there had been a number of criticisms about the OPA 1990 being inadequate[172] to meet all the requirements while dealing with the civil liability claims arising from the Deepwater Horizon incident. But nevertheless claims were processed in record time under the OPA and other domestic legislation in comparison to the suffering that has to be endured by thousands of innocent citizens from the Ogoniland oil spill disasters in Nigeria. One is encouraged to say that the way forward could still lie with the OPA 1990, which presents a template at the domestic level to process civil liability claims for both vessel-source and non-vessel-source oil pollution damages. This can be used as a model to develop a uniform international regime to work alongside other civil liability regimes like the CLC, any regional agreements, and the OPOL Agreement.

[172] See Murchison (n 12), where the author raises questions about the adequacy of existing federal law provisions including the OPA 1990 that govern liability for oil spills in the US waters. See also Faure, Jing and Hui (n 4), where the authors opine that the Deepwater Horizon catastrophe triggered an intensive re-examination of the then existing regulatory and liability schemes for offshore oil and gas activities in the US, implying that there were gaps in the civil liability regime.