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## Liability and compensation due to transboundary pollution caused by offshore exploration and exploitation: IMO competence and development of guidelines

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**WORLD MARITIME UNIVERSITY**

Malmö, Sweden

**LIABILITY AND COMPENSATION DUE  
TRANSBOUNDARY POLLUTION CAUSED BY  
OFFSHORE EXPLORATION AND EXPLOITATION**

IMO Competence and Development of Guidelines

By

**SEBASTIAN PIZARRO KLEIN**

Chile

A dissertation submitted to the World Maritime University in partial Fulfilment  
of the requirements for the award of the degree of

**MASTER OF SCIENCE**

In

**MARITIME AFFAIRS**

**MARITIME LAW AND POLICY**

2016

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## **DECLARATION**

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

(Signature): .....

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**Liability and Compensation Due  
Transboundary Pollution Caused by  
Offshore Exploration And Exploitation  
IMO Competence and Development of  
Guidelines**

Degree:

**MSc**

The dissertation is an **analysis** on the problem of the prevailing legal lacuna regarding responsibility and liability due transboundary offshore pollution. The **investigation** starts with the **examination** of the discussion at IMO and its competence to regulate the offshore industry. Afterwards the discussion at the Legal Committee of IMO is analyzed through the different doctrines developed by the authors and the International Court of Justice. Based on a possible competence of the IMO, we introduce the discussion on which international instrument is appropriate to regulate the legal lacuna. Finally, in the **concluding** chapters, different international instruments are **compared** highlighting the most relevant elements to take into consideration. Some elements are **discussed** at the end of the final chapter presenting the position of the authors regarding the feasibility of the implementation of certain regimes and the economic impacts of enforcing such regulation. As there are certain approaches that lead to socially optimum results, different desirable solutions are **evaluated**. The need for an economic analysis of the solution is emphasized.

KEYWORDS: Pollution, Transboundary, Liability, Responsibility, IMO, Offshore, Industry, Oil, Environmental, Damage,

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**List of Abbreviations:**

CLC, International Convention on Civil Liability for Oil Pollution Damage (1992)

CLEE, Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources

CMI, Comité Maritime International

CMLA, Canadian Maritime Law Association

EC Directive: 2004/35/EC

IGO, International Organizations

IMO, International Maritime Organization

IOGP, International Association of Oil and Gas Producers

IOPC Funds, International Oil Pollution Funds

ISA, International Seabed Authority

MARPOL, International Convention for the Prevention of Pollution from Ships

OPCR, International Convention on Oil Pollution Preparedness, Response and Co-operation

ROPME, Regional Organization of the Marine Environment

UN, United Nations

UNCLOS, United Nations Convention on the Law of the Sea

UNDOALOS, United Nations Division for Ocean Affairs and the Law of the Sea

UNEP MAP, United Nations Environment Programme Mediterranean Action Plan

UNEP, United Nations Environment Program



## Introduction: A Legal Gap Concerning Transboundary Offshore Pollution

The legal framework applicable to platforms is facing challenges as new technology allows more projects to be developed contributing to the growth of the blue economy. One of these challenges is liability and compensation in case of transboundary pollution, best represented by the Deep Water Horizon platform, Varanus and Montara incidents in Australian waters, which had serious consequences beyond its boundaries.

The Montara well incident in 21 April 2009 generated an oil spill not controlled until November 3, the incident, a follow up of the 2008 Varanus accident, triggered legal reforms within Australia to improve the safety of the platforms (Hunter, 2014). However, the consequences of the Montara accident were not restricted to Australian waters, but also reached the coasts of Indonesia, causing several losses to “*Seaweed farmers, fishermen, and residents of Nusa Tenggara Timur (NTT)*” (Indonesian Community Seeking Class Action Suit, 2015, p. 1). Indonesia reacted to these events, at the International Maritime Organization (IMO) in the Ninety-Seventh Session of the Legal Commission, proposing the drafting of an international convention addressing the liability coming from transboundary offshore pollution. **The problem framed by Indonesia and the motivation of this research is the legal lacuna regarding compensation and liability for transboundary offshore pollution.** Furthermore, the confusion is increased due Article 208 of UNCLOS that leaves open the question regarding which international organization is competent to regulate pollution coming from seabed activities. The focus on the discussion at IMO obeys to the excellent position of the organization, as the authors have recognized, already reuniting the relevant expertise and actors in the industry. Regretfully, the proposal for an international convention faced at IMO resistance from member states especially from delegation of Latin America. Thus, several discussions on the competency of IMO took place to extend or to limit the powers

of IMO to cover seabed activities. **Does IMO contemplate powers to regulate the offshore industry?**

Determination of the competency of an international organization is hard as international organizations evolve with practice, generating a common law of the organization. The discipline of international public law has developed several criteria to justify the limits of the powers of an international organization. The different doctrines have been proposed, however, the implied powers doctrine has been recognized by several advisory judgements of the International Court of Justice. Most of the progress in this area is related with the evolution of United Nations throughout the last century, but the conclusions of that progress have still needs to be applied to IMO. The most important decisions pertaining the implied powers doctrine will be reviewed, although the interpretation of the decisions, and the current stand of the tribunal regarding competency of international organizations is still developing. **Historic establishment of the IMO and ulterior development is dealt insofar the arguments of the parties are supported by historical reasons, however no full account is given. The reason behind this is that competence will always know as a limit the sovereignty of the member states and their willingness to sacrifice part of it in exchange for a wider IGOs competence; so, the focus is directed to the arguments of the parties.**

The idea to regulate the offshore industry started in the middle of the XX century and several attempts have been made to create an international instrument. Following the different drafts and conventions is useful to know what to expect from the new guidelines developed by working groups at IMO or UNEP. One milestone in this process is the 1977 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE). This convention did not reach enough ratifications to come into force, however it was the first attempt to regulate compensation and liability at a global scale for the offshore industry. Also, regional conventions, which require by definition fewer ratifications from the states, and private instruments that can developed by the offshore industry, can mitigate the need for an international convention. The industry represented at the IMO through the IOGP

favors these alternatives, as previous international instruments applicable to vessels could be inappropriate for the offshore activities.

The Comité Maritime International has also played an important role in the development of draft instruments; the first of them dates also from the 1977 with the Rio Draft, then in 1994 a revised version of the document took the name of the Sydney Draft. As IMO deemed that the instrument still had to mature, the draft was not revisited until 2004.

The authors have played a part in the debate leaning towards the development of a binding international instrument. However, upon the realization that political interests of the member states supersede a purely legal analysis of the situation, alternative solutions to the problem have emerged. Instead of trying to achieve a binding international convention, step by step approaches through non-binding instruments is gaining support especially through guidelines.

**Competency of the IMO and the elements of liability and compensation to be regulated are inextricably related. If member states acknowledge the competency of IMO to regulate seabed activities, the powers derived from that competency will extend to those elements. In other words, the implications of that recognition will become visible, showing in practice the real extension of those powers and sovereignty given in exchange.** At the same time the decision on the elements such as: standard of liability, causal links, scope of liability, limitation of liability, compulsory insurance or financial securities **will have repercussions on the level of activity of the industry and level of claims. This is the core to reach agreement between member states**, and the discipline of economic analysis of the law has much to say about these elements; how to adjust the levels of activities at its social optimum. Moreover, without the proper study of each element, impossible requirements to the industry can be imposed. In this particular area, compulsory insurance or financial security is a good example that will be explored. Insurance markets are very scarce or non-existent to cover certain risks; the scope of liability usually covers traditional damages and environmental damages; the latter is one of those risks that has been

introduced to the legal framework in Europe through EC Directives. Environmental damage became a protected value in its own right, so any valuation of the damages must be broad and encapsulate the traditional recognized damages plus the diminution of value related to the environment. The courts will have to face new challenges valuing this new kind of damages, trying at the same time to provide legal certainty to their judgements. To achieve this new instruments are being developed, such as diminution of value, reasonable costs of acquiring resources, rehabilitation of the area, replenishment of biological resources. In cases where the damage is irreparable, new ideas must be developed to determine the compensation as it is not possible to determine the damage. Definition in this area is paramount, the poor record of insurance markets for environmental damages is highly related to this uncertainty.

Other elements that can be less controversial today, need to be revisited for further analysis; strict liability is widespread throughout the conventions for risky activities but not in all cases is wise to implement it or qualify all activities as high risk. This is also true for the limitation of liability which can have serious consequences on the levels of preventive measures that the industry should implement. Therefore, separation between limitation of liability for the industry and the insurance or financial security will be explored. The problem of causation and to establish liability of the tortfeasor is and will be always present in tort law. Regretfully the subject is not developed as thoroughly as the subject deserves, but a practical point of view is presented to overcome the complexity of causation. Definition of incidents have come to a convergent meaning among different instruments; it is understood that incidents include: sudden occurrences, series of occurrences with a common causal link and continuous occurrences. However, incidents that cause pollution of diffuse character poses special problems in several areas, not only apportioning the liability and compensation but affecting insurance and financial security coverage.

Regional agreements regarding response and security of the offshore industry have come into force, achieving various degrees of success. Albeit, the great majority of these regional arrangements have not covered the area of compensation and liability. A great example of progress in compensation and liability is the working group in the Draft

Barcelona Guidelines at UNEP MAP. After several *pactum de contrahendo* in the Barcelona Convention and protocols to regulate the subject, UNEP MAP decided to take a step by step approach; first drafting a soft law instrument with the view of member states implementing the provisions in the national law and then a potential protocol or annex to add to the Barcelona legal framework. Their progress has served partly as a model for other organizations amongst them the Indonesian Denmark working group at IMO. Other regional agreements for example protocols under ROPME, are still in the phase of undertaking the obligation to legislate on compensation and liability.

Regarding bilateral agreements, the CMI sent a questionnaire to its members to inform about bilateral treaties that regulate compensation and liability, however the result is not encouraging. The number of agreements of this type is very low and the vast majority does not cover compensation and liability, but rather cooperation on exploration and exploitation and coordination between member states in case of an incident.

Finally, the progress of the working group lead by Denmark and Indonesia at IMO is analyzed. At the 103th session of the Legal Committee the delegations of Denmark and Indonesia presented a document with the draft guidance on “***liability and compensation issues connected with transboundary oil pollution damage resulting from offshore exploration and exploitation activities***”.

In the hypothetical case that IMO modifies its strategy and includes an offshore agenda, **what are the elements to be regulated and what regimes should be adopted?** The elements necessary for a compensation and liability regime are explored through a comparative analysis of different drafts and international instruments. The economic analysis of law assists in determining what options are more efficient for the society, **what principles can we apply to the compensation and liability regimes to improve the outcome?**

**The research methodology can be categorized as qualitative.** Regarding the analysis of the contents different views or lines of sight were considered, trying to achieve a process called “**triangulation**” (Berg , 2001, p. 4). Therefore, the answers to the questions were meant to follow a scientific method, **understanding science** “as a

*specific and systematic way of discovering and understanding how social realities arise, operate, and impact on individuals and organizations of individuals” (Berg , 2001, p. 10).*

The **First Chapter** will underline the discussion at IMO regarding competence to regulate seabed activities. Account of the discussion at IMO included as much of the actors as it was deemed practical and documented; the **descriptive methodology** requires this analysis (Berg , 2001, p. 184), however it also partially an historical account, which can shed light into the future of the organization (Berg , 2001, p. 212).

Based on the immersion in the documentation of the **First Chapter**, Competence of IMO is then analyzed in **Chapter Two** through different doctrines, following an inductive path (Berg , 2001, p. 245). **Chapter Three** explores the possible international instruments that IMO could support if it is deemed to be competent to regulate the offshore industry.

**Chapter Four**, as it was mentioned, will take a **comparative approach** of the elements of compensation and liability; the relevant elements to regulate compensation and liability will become apparent (coding) (Berg , 2001, pp. 255-256) and finally application of the authors’ opinion and economic analysis on those elements. **The unifying factor across the chapters is, how from the development of powers of an IGO can lead to effective regulation to solve the problem statement.**

## Chapter I: Discussion at IMO and its Competence to Regulate Offshore Activities

The delegation of Indonesia first brought back the issue of liability and compensation due transboundary pollution in the 60<sup>th</sup> session of the Marine Environment Protection Committee (MEPC). The Montara incident the 21 April 2009 was still fresh in the minds of the states and introduced a remark at MEPC 60/22 Paragraph 1.7: “As no

*international legal instrument addresses transborder oil pollution damage caused by offshore oil exploration, the delegation of Indonesia urged the Committee to keep this matter in mind for future consideration.”*

As the issue seemed to pertain to the Legal Committee, upon consultation with the Legal Affairs Division of the International Maritime Organization (IMO), it was recommended to submit the proposal of a new international convention at that committee. At the 97<sup>th</sup> session of the legal committee Indonesia proposed to draft a new international convention.

#### *Indonesia’s Proposal at Legal Committee Session 97<sup>th</sup> (Year 2010):*

The proposal contained in LEG 97/14/1 was supported by the arguments: 1) **No international convention regulates the liability and compensation**; 2) Adoption of a supplementary fund covering offshore oil exploration and exploitation would ensure compensation to the victims of pollution damage; 3) Existence of a compelling the need: The Montara and the Deep Water Horizon incidents; 4) A uniform international mechanism for compensation and liability would provide prompt and adequate compensation for the victims.

#### *Indonesian Argumentation for the IMO as the Competent Organization*

The next issue is perhaps the most important part of Indonesia’s proposal, and what finally brought the idea of drafting a new international convention under the auspices of IMO to a halt. In order to sustain that IMO was the competent international organization to regulate platforms, relied in previous IMO instruments that regulated offshore activities. The first argument of Indonesia in the 97<sup>th</sup> session was that IMO has regulated platforms in the past; in MARPOL 73/78 and in the Oil Pollution Preparedness, Response and Co-

operation 1990. In particular, “15 Chapter 7 of MARPOL 73/78, regulation 39”, also Annex I of MARPOL 73/78, and regulations 12. (IMO, 2010, p. 4) The above mentioned regulations are related to the nature of the instruments: pollution and emergency plans. The title of Regulation 39 MARPOL reads: “*Special requirements for fixed or floating platforms*” Nr. 1:

***This regulation applies to fixed or floating platforms including drilling rigs, floating production, storage and offloading facilities (FPSOs) used for the offshore production and storage of oil, and floating storage units (FSUs) used for the offshore storage of produced oil.***

It was recommended in the 97<sup>th</sup> session to organize an informal consultative group to develop the proposal and the feasibility of a new international instrument.

*Necessary Amendments to allow the Drafting of a new Convention (LEG 97/15)*

To add the drafting of a new international convention to the work program the main issue was the Strategic Direction 7.2 as established by resolution A. 1011 (IMO, 2010). The SD 7.2. reads: SD 7 IMO will focus on reducing and eliminating any adverse impact by shipping on the environment by:

identifying and addressing possible adverse impacts; developing effective measures for mitigating and responding to the impact on the environment caused by **shipping incidents and operational pollution from ships**; contributing to international efforts to reduce atmospheric pollution and address climate change and global warming; and increasing the emphasis on the role of the human element in **environmentally sound shipping**.

The proposed amendments to SD 7.2 IMO (2010):

***IMO will focus on reducing and eliminating any adverse impact by shipping or by offshore oil exploration and exploitation activities on the***



*environment by ... developing effective measures for mitigating and responding to the impact on the environment caused by shipping incidents and operational pollution from ships and **liability and compensation issues connected with transboundary pollution damage resulting from offshore oil exploration and exploitation activities.*** (p. 29)

#### *Potential Conflicts with other International Organizations*

Another concern was stepping into other international organizations' scope such as United Nations Environmental Program (UNEP), the International Seabed Authority (ISA), UNDOALOS. Other argued that the CLC/FUND convention model does not apply well into platforms. Other delegations considered that offshore platforms are fundamentally different from ships given that their activities are carried in the continental shelf of the states regulated by national law or bilateral agreements.

#### *Consolidation in the Positions of the Delegations at the 98<sup>th</sup> Session of the Legal Committee (Year 2011)*

The final report of the 98<sup>th</sup> session (LEG 98/14) recognized the main positions of the parties. The Indonesian Delegation main concerns were: First, lack of international instruments addressing the issue of compensation for damages arising from offshore exploration and exploitation. Second, there is a need to mitigate the incidents and to determine liability and compensation for the victims (IMO, 2011, p. 27). More importantly stressed the importance of modifying Strategic Direction 7.2 (SD 7.2), which remains the gravitating issue regarding the competence of IMO to regulate these matters. **Modification of the SD 7.2 would require approval of the Assembly and the Council** as mentioned by the Indonesian delegation in paragraph 13.1 of Leg 97/14: “*approval,*

*by the Council and the Assembly, of the proposal to revise Strategic Direction 7.2 would help the common interest of working for clean oceans;”*

In the Annex 7 of the above mentioned document LEG 98/14, Brazil made a statement sustaining that offshore exploration and exploitation are carried in the continental shelf of states in accordance with UNCLOS, **therefore those activities are under national law. The Brazilian delegation supports the position that transboundary oil pollution should be dealt regionally or bilaterally**, as geographical areas differ from one region to the other.

Review of the Proposal to Modify the Strategic Direction 7.2 (LEG 99/13/1):  
Delegations at the 99<sup>th</sup> Session of the Legal Committee (Year 2012):

Brazil submitted the document Leg 99/13/1 for the 99<sup>th</sup> session of the Legal Committee: The submission debates the modification to the Strategic Direction 7.2. The document C 106/ 10, proposing modification of the SD 7.2. was submitted to the 106<sup>th</sup> session of the Council. However, Brazil at the Council proposed to return the proposal back to the Legal Committee for a more thorough analysis. The proposal to review the matter again in the legal committee received the support of 18 delegations. So it was that the proposal went back to the legal committee for a full review. This new submission tries to support the position of Brazil concerning the incompetency of the IMO as a forum regulating the offshore industry. The **Brazilian Delegation arguments** can be summarized as follows: UNCLOS being the umbrella convention and The Intergovernmental Maritime Consulting Organization Convention (IMO Convention) cannot be in conflict. UNCLOS does not have any provisions delegating a role to IMO regulating platforms, limiting its role to shipping. Further, IMO conventions includes clauses precisely to avoid this conflict (LEG 99/13/1 Paragraphs 15-25). UNCLOS Annex VIII Article 2 mentions IMO as an expert related to navigation, but not in protection and preservation of the marine environment. Relying on Article 60 and 80 of UNCLOS Brazil

interprets UNCLOS as establishing a different legal regime for shipping from platforms. On the other hand, dismisses the previous roles of IMO in the regulation of platforms i.e. MARPOL, London Convention and the 1996 protocol as a “*residual competence*” (IMO, 2012, p. 3). Adding to the argument Article 194: “Measures to prevent, reduce and control pollution of the marine environment” and Articles 208: “*Pollution from seabed activities subject to national jurisdiction*” and 214: *Enforcement with respect to pollution from seabed activities*” on the other hand in Article 211 the title reads: “*Pollution from vessels*”.

The next argument is the IMO Convention Article 1:

*“The purposes of the Organization are:*

*(a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds **affecting shipping** engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the **maritime safety, efficiency of navigation and prevention and control of marine pollution from ships**; and to deal with administrative and legal matters related to the purposes set out in this Article;*

*(b) To encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; **assistance and encouragement given by a Government for the development of its national shipping** and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;*

*(c) To provide for the consideration by the Organization of matters concerning unfair restrictive practices by **shipping concerns** in accordance with Part II;*

(d) To provide for the consideration by the **Organization of any matters concerning shipping** and the effect of shipping on the marine environment that may be referred to it by any organ or specialized agency of the United Nations...;

Given that the mandate of IMO is restricted to shipping it would not be possible to address exploration and exploitation by changing only the working program.

Then the Brazilian delegation mentions Article 59 of the IMO Convention being the link between IMO and United Nations:

*The Organization shall be brought into relationship with the United Nations in accordance with Article 57 of the Charter of the United Nations<sup>1</sup> as the **specialized agency in the field of shipping and the effect of shipping on the marine environment.***

An additional argument presented by Brazil is that IMO instruments exclude the scope of application to sea bed activities mentioning: The Intervention Convention in Article 2, MARPOL, London Convention of 1972 and the 1996 protocol. Regarding the OPRC Convention it limited IMO's competence to ships in Article 3 (1).

The Brazilian delegation observed that the proposal includes objective liability and the creation of a fund, in case liability exceeds the limitation of liability, or insolvency. In conclusion, the proposal borrows institutions from the CLC 1992 and Fund Convention to an industry substantially different, where activities start and end in the exclusive economic zone of a country. Any incident will be restrained to one geographical area or comprising one region (IMO, 2012, p. 6), unlike vessels that cross several jurisdictions. Another issue raised by the delegation is that offshore exploration and prospecting (E&P) is regulated at the national level, therefore no international organism is providing technical definitions or certifications. An international insurance market for risk distribution across different legislations, would be impossible without an international institution competent to oversee those matters. *"The only international convention specifically addressing liability for offshore exploration and exploitation is the 1976 Convention On Civil Liability*

*For Oil Pollution Damage Resulting From Exploration And Exploitation Of Sea Bed Mineral Resources (CLEE Convention) which has never come into force. **One of the difficulties faced was the lack of a competent international organization to host the convention and act as secretariat.***" (Lyons, 2011, p. 14)

Another point is the moral hazard that may occur if the costs of pollution are shared throughout the fund. This increases incentives to do exploration and exploitation in sensitive areas where the danger of damaging the environment is even greater. In conclusion, Brazil favors a regional or bilateral scheme to address the issue.

*Indonesian Rebuttal to Brazil LEG 99/13/3 in the 99<sup>th</sup> Session (Year 2012)*

Indonesia considers the Brazilian position against the Rio 1992 Conference Declaration on Environment and Development and the 1972 Stockholm declaration. Regarding the point that IMO instruments do not regulate seabed activities, should not be considered an obstacle preventing to create a new convention. Prevention, Control, reduction of pollution of Seabed activities are part of the obligations of the states under **Articles 192 and 208 UNCLOS**, therefore the states have to implement international rules and standards through the competent international organizations according Article 214.

OPCR 1990 does not establish a liability system, and IMO would be the right forum to address the discussion. Albeit, the contingency plan according OPCR Art. 3(2) is determined by each state, it is the communicated to IMO to ensure coordination.

The IMO considered itself competent under Article 15 (J):

*(j) To recommend to Members for adoption regulations and guidelines concerning maritime safety, the prevention and control of marine pollution from ships and other matters concerning the effect of shipping on the marine environment assigned to the Organization by or under international instruments,*

*or amendments to such regulations and guidelines which have been referred to it;*

to adopt the 1989 Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the EEZ (A 672(16)):

*“RECALLING Article 15(j) of the Convention on the International Maritime Organization concerning the functions of the Assembly in relation to regulations and guidelines concerning maritime safety and the prevention and control of marine pollution” (IMO, 1989, p. 1)*

*Agreement on the Necessity of Modifying SD 7.2. and Compromise of the Delegation: The 99<sup>th</sup> Legal Session Summary LEG 99/14 (Year 2012)*

The submission of Brazil and Indonesia were analyzed and summarized. We can also add the participation in the session of the International Association of Drilling Contractors (IADC), who expressed concerns regarding the modification of SD 7.2. redirecting the IMO into “*design, construction and operation of offshore drilling units and support services*”, entering into areas outside liability and compensation. They were of the view that regulation should be kept at the regional or bilateral level (Paragraph 13.10 LEG 99/14).

The secretary general acknowledged the necessity to modify SD 7.2 at LEG 99/14 Paragraph 13.12

**strictly speaking, it was necessary** for a modification to be made to allow the Committee to work on a Planned Output on transboundary pollution damage from offshore activities; but the Committee might also inform the Council that **it wished to maintain a degree of flexibility and further analyse the issues with the aim of developing guidance to assist States in pursuing bilateral or regional arrangements, without revising SD 7.2 at this stage.**

In conclusion, the development of a non-binding guidance to assist countries interested in pursuing bilateral or regional arrangements, was allowed without modification of the SD 7.2.

Competence of the organization according to the Secretary General finally rests on the member states, disregarding the faculties of DOALOS in determining competence (LEG 99/14 Paragraph 13.13). This last comments obeys to the concern of some delegations at the 97<sup>th</sup> session to trespass the competence of IMO into the scope of other institution such as DOALOS.

As the proposal falls outside the Strategic Plan the committee agreed that a proposal to change SD 7.2., must follow the established procedures in particular paragraph 4.12.3 of LEG.1/Circ.6.

The attempts to include outputs not included in the Strategic Plan cannot be accepted by the Chairman, however it should be recommended to the member states to present the proposal to the council Paragraph 8.7.3 (*A 26/Res. 1013*)

Finally, it was agreed that bilateral and regional arrangements were the most appropriate way to deal with liability and compensation (Paragraph 13.17 LEG 99/14). Indonesia expressed that it would continue to coordinate the informal consultative group (Paragraph 13.18 LEG 99/14).

[Agreement on the Necessity to Coordinate with other International Groups and Progress in a Non-Binding Instrument: Delegations at the 100<sup>th</sup> Session of the Legal Committee \(Year 2013\)](#)

The Indonesian delegation submitted the document LEG 100/13 reiterating its interest in developing a convention; reaffirming that IMO is the adequate forum (Paragraph 6 LEG 100/13) and the need to coordinate with other groups such as the G20 and UNEP in developing the framework (Paragraph 7.5 LEG 100/13).

The document distinguishes between: (a) Principles to prevent pollution damage (Paragraph 4 LEG 100/13/2) and (b) Principles to facilitate the recovery of compensation for pollution damage from offshore exploration and exploitation activities (Paragraph 5 LEG 100/13/2).

In part (b), amongst the principles of compensation we can find:

- i) All types of oil pollution, preventive and remedial actions.
- ii) Actions against the owner
- iii) The concept of damage is extended to natural resource damage.
- iv) Strict Liability System
- v) Limitation of Liability
- vi) Licensee: *"The licensee of an offshore field should be strictly liable (on a joint and several basis if there are multiple licensees) for pollution damage caused by or arising from the discharge of pollutants from natural reservoirs or other geological formations."*
- vii) Exemptions of liability:
  - "(i) damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;*
  - (ii) the pollution damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person;*
  - (iii) the pollution damage was intentionally done by a third party; and*
  - (iv) the damage was caused by the negligence of any Government or resulted from compliance with conditions imposed on or instructions given by the Government."*
- viii) **Mandatory Insurance**

Require the owners of offshore facilities to maintain adequate levels of insurance.



The bilateral/regional agreement or arrangement should:

- (i) require compulsory insurance by owners of offshore facilities to the minimum value of the limitation amounts;
- (ii) require compulsory insurance by licensees up to an amount **not less than the cumulative amount of the limitation established by the bilateral/regional agreement or arrangement**, in respect of each offshore facility covered by the licensee;
- (iii) each facility to obtain a certificate from the State attesting that it has compliant insurance;
- (iv) make provisions as to the form of the certificate;
- (v) allow for claims for compensation to be made directly against the insurer; and
- (vi) provide that States (as owners) should be exempt from insurance requirements.

Commitment of Indonesia to Pursue a Non-Binding Instrument: Delegations at the 101<sup>th</sup> Session of the Legal Committee (Year 2014)

The Committee maintained its position to pursue a non-binding instrument without modifying SD 7.2., the Council took note of the decision at its 108<sup>th</sup> session. (LEG 101/12 Paragraph 11.1). Further cooperation from the states was encouraged asking to send examples of bilateral and regional agreements to the Secretariat. In the same line, the Secretariat commented on the benefits of exchange of information regarding best practices in the industry and consequences of transboundary pollution (LEG 101/12 Paragraph 11.6).

The Comité Maritime International mentioned that would be sending questionnaires to its members to report on any bilateral treaties that address the issue of liability and compensation for transboundary pollution (Paragraph 11.8).

The delegation noted the lack of collaboration from states sending information on bilateral or regional arrangements. Also it drew to attention the fact that from the 2009 Montara incident, compensation was still pending and the processes are at a standstill. The main issue in the view of the Indonesian delegation, was the undefined rights and duties of the parties. Indonesia acknowledged that the time is not yet ripe for an international convention and accepted to generate guidelines for developing bilateral and regional agreements without modification of SD 7.2.

*NGOs Defending Drafting a New International Convention: CMI and IIDM Delegations at the 102<sup>th</sup> Session of the Legal Committee (Year 2015)*

The document was presented by the IIDM and written by the member of the council of the CMI Mr. Jorge Radovich. IIDM defends the compelling need for an international convention; Exploration and Extraction operations are reaching deeper, increasing the risk of incidents, and without being comprehended by an international instrument. These activities do not only comprise fixed and mobile platforms but also an arrange of vessels and tugs supporting exploration and exploitation. (Paragraphs 3,4 and 5 LEG 102/11).

Evidence of the compelling need, are the failed attempts of the international community trying to regulate these activities, such as the Civil Liability for Oil Pollution Damage resulting from Exploration and Exploitation of Seabed Mineral Resources (CLEE 1976), the draft convention of the CMI prepared for conference in Rio in 1977 and then revised in 1994 at Sydney (LEG 102/11 Paragraph 13). The Canadian Maritime Law Association produced a draft in 2001 including “*ownership, registration, immunities,*

*mortgages, civil and criminal jurisdiction and aspects of assistance, pollution and liability for spills*” (LEG 102/11 Paragraph 14).

Views sustained by Argentina and Brazil among other States in Latino America, defending their exclusive sovereign right to regulate the continental shelf and EEZ are not acceptable; polluting the marine environment or third parties “*in no sense constitutes reasonable and socially acceptable behaviour.*” (LEG 102/11 Paragraph 10)

Despite these political influences IMO has already regulated platforms with the MODU Code and then the OPCR Convention. (LEG 102/11 Paragraph 12).

#### IIDM on the Competency of IMO:

Dr. Rosalie Balkin conclusion drawn from Article 1 of the IMO Convention. The focus of IMO is shipping.

The IIDM replies that the IMO when established, the offshore industry was at its infancy. The logo of IMO is safe shipping in clean oceans. This cannot happen when there is uncontrolled structures auxiliary and supply vessels.

For IIDM the reasons for not drafting a convention is better explained by Dr. Balkin:

***“this is not strictly a legal problem but also a political issue: States do not wish to relinquish sovereignty over their continental shelf or exclusive economic zone and are unwilling to endorse an international convention on offshore activities which they feel would restrict their legal authority in such areas.”*** (LEG 102/11 Paragraph 39).

#### *Excellent Position of the IMO to Organize and Promote a New Convention*

The IMO already has experience with oil tankers and could create a fund with contributions from the offshore extraction industry.

According to a report from Deloitte (LEG 102/11 Paragraph 47) there isn't a legal framework in the EU that regulates liability, rapid compensation or ensures solvency to pay compensation.

#### *Answer to the CMI and IIDM and the Option of Drafting a New Convention (LEG 102/12)*

As an answer to IIDM the committee reiterated that without modification of SD 7.2 no further actions can be taken by the Legal Committee. The position of the Committee can be summarized by paragraph 11.8 (LEG 102/12), which states that there is not a compelling need to develop and international convention.

Despite these considerations the chairman encouraged Indonesia and Denmark to continue their work in the terms that the committee had already agreed.

#### *Guidance for Bilateral/Regional Arrangements. Document Submitted by Denmark and Indonesia: Delegations at The 103<sup>th</sup> Session of the Legal Committee (Year 2016)*

A revised guideline for developing regional and bilateral treaties as a non-binding instrument was presented by the delegations of Denmark and Indonesia. The introduction of the guideline underlines the obligation of the States under UNCLOS article 194 (2) towards the prevention, reduction and control of pollution. Also their obligation to take measures to avoid polluting other states coming from activities under their jurisdiction.

Article 208 UNCLOS is mentioned on the coastal state's duty regulating seabed activities. Under the title "*Pollution from seabed activities subject to national jurisdiction*" is especially relevant to the debate:

**States, acting especially through competent international organizations or diplomatic conference, shall establish global and regional rules**, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment referred to in paragraph I. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

The Article is cited as the objective of the delegation of Denmark and Indonesia is precisely to establish the IMO as the competent international organization. **However, it is a long standing debate, where the strict interpretation of the article would lead to the exclusive national regulation.** Southeast Asia is an example of this, under their interpretation of Article 208 of UNCLOS they have refrained to ratify any IMO Convention that regulates the Seabed. (Warner & Marsden, 2012, p. 181). However, several international organizations might be competent i.e. IAEA, IHO, ILO, IMO, IOC, UNEP and UNIDO (Walker, 2012, p. 144).

The guideline further mentions the implementation of international standards under articles 214 and 215 and provide prompt and adequate compensation caused by pollution Article 235 UNCLOS. The objective of the guideline is **to assist "IMO Member States to formulate national legislation, bilateral, regional, or international instruments pertaining to liability and compensation issues connected with transboundary oil pollution damage resulting from offshore exploration and exploitation activities."** (LEG 103/13/1 Annex Paragraph 1.4).

## Chapter II: Analysis of the Discussion at IMO and Competency of International Organizations

In the discussion at the Legal Committee, summarized in the previous Chapter, we can see different approaches to determine the competency of IMO. In the following lines we will describe the nature of IMO as a UN specialized agency, and classify the arguments of the members according to the prevailing doctrines.

### Definition of International Organisations or IGOs

The definition of organization cannot be attained without difficulties, the diversity of organisations in existence make the attempts difficult, however at its fundamental level they are instruments of cooperation between its members. (Engström, 2012, p. 65)

International Organisations or IGOs are part of the International Public law and are deemed to have legal personality, therefore they are different from the members that compose them. This last characteristic had to be recognized differently in the continental law, in which legal personality requires a law to be established unlike the common law system. (Seyersted, 2008, pp. 67-68). As the members of these organisations are States, they act as subjects of international law, having international relations, and **providing the members with a forum to exchange their views** (Brölmann, 1999, p. 85). IGOs exercise their power through their organs, although the outputs derived from its performance will no bind the member states. (Engström, 2012, p. 68)

### IMO as a Specialized Agency

The IMO or International Maritime Organization “*is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine pollution by ships.*” (International Maritime Organisation, 2016). The nature of IMO can be found in Article 59 of the 1948 Convention on the International Maritime Organization. Specialized agencies of United Nations are contemplated under Article 57 of the Charter of United Nations.

#### Extent of the Powers of the International Organizations

The issue of determining the competence of IGOs is not new and certainly IMO as an International Organization is not a stranger in these discussions. Competence of the IMO, was the main dispute of the Indonesian proposal to draft a new convention regulating liability and compensation from incidents related to activities of the offshore industry. To determine whether the IMO has the power to regulate such matters, it is necessary to analyze the different criteria developed by the courts and doctrine to answer this question. Commonly, three different doctrines have been prevalent in the past: **Attributed Powers, Inherent Powers and Implied Powers**

#### *Arguments Related to Attributed Powers Doctrine*

The arguments of Indonesia in LEG 99/13/3, in particular, the mention of the OPCR Article 3 (2), in which IMO considered itself competent to regulate platforms under Article 15 (j) of the Convention; The same Article justified the competence of IMO issuing the 1989 Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the EEZ (A 672(16)). This type of argument is part of the attributed powers doctrine, having as a base the constitution of the IMO to extend its competence to regulate platforms. On the other hand, Brazil in LEG 99/13/1

paragraph 13, based on Article 1 and 59 of the IMO constitution reached a different conclusion limiting IMO's competence.

The basic idea behind the attributed powers, which in its original form was formulated by Hans Kelsen (Seyersted, 2008, p. 29), is that **the constitution of the International Organisations determines the powers of IGOs**. However, the powers established by the constitution can be performed at its fullest extent, unless the constitution has express dispositions limiting those powers. This criterion was used by the Permanent Court of Justice (1927) in their advisory opinion over the jurisdiction of the European Commission of the Danube.

“As the European Commission is not a State, but an international institution with a special purpose, **it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.**” (p. 64)

The International Organization, in this case the European Commission, is not a State, thus only has competence in those matters comprehended by their constituting act. Notwithstanding, competence can be fully exercised: “***The Court hereby formulated the doctrine of attributed (or conferred) powers.***” (Engström, 2012, p. 33)

Blokker and Schermers share this view; states have as only limitation international law, but International organisations have the powers that states have attributed to them and the constitution of the organization recognize them (Schermers & Blokker, 2003, p. 156).

On the other hand, the inexistence of a particular power, does not imply immediately that the IGO lacks competence if it is a “*necessary corollary*” to its obligations Permanent Court of Justice (1927):



*The absence, however, of findings of pertinent facts of record in respect to this specific point does not suffice to prove that such a right, **which is a necessary corollary to the duties** of, the European Commission, does not exist” (p. 67)*

This notion of necessary corollaries, developed by the Permanent Court of International Justice, is also called “effet utile”; the interpretation of the powers in the constitution must allow their fullest effect Engström (2012):

*“The idea that there are ‘necessary corollaries’ to the performance by an organization of its attributed powers expresses the idea that **powers should be interpreted so as to guarantee their fullest effect**, also known as the principle of effet utile” (p.34)*

Supporting the attributed powers, we can find another advisory opinion of the PCIJ in 1928, also called Greco-Turkish Agreement the Permanent Court of International justice (1928):

**But from the very silence of the article** on this point, **it is possible and natural to deduce that the power** to refer a matter to the arbitrator rests with the Mixed Commission when that body finds itself confronted with questions of the nature indicated. (p.20)

Although, other authors consider it an early sign of implied “powers” (Engström, 2012, p. 34).

Within the doctrine a defender of the attributed or delegated power approach is Finn Seyersted. As mentioned above, both member states Indonesia and Brazil argued using the IMO Convention as a starting point Seyersted (2008):

The basic point of departure for nearly all writers is that an IGO, in contrast to States and other self-governing communities which are subjects of international law, **can only do – internally and externally – what is provided in its**

**constitutional convention** (or in other treaty between the member States). (p. 29)

Agreeing with this point of view, considering the constitution as the starting point to determine the powers of the IGO Catherine Brölmann states: “*in principle **international organisations are competent only in as far as powers have been attributed to them by the member states**, 'within the framework of their internal legal order they assume a Kompetenz-Kompetenz of sorts.*” (Brölmann, 1999, p. 123)

A dissenting opinion made by judge Hackworth, mentioned by Seyersted (Seyersted, 2008, p. 29) in the International Court of Justice case regarding “Reparation for Injuries Suffered in the Service of the United Nations”, sheds light to the doctrine International Court of Justice in 1949: “**Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are “necessary” to the exercise of powers expressly granted**” (International Court of Justice, 1949, p. 198)

Three cases starting with the 1949 Advisory Judgement of the ICJ supported the doctrine of implied powers; Seyersted considers that the doctrine of attributed powers recovered its importance being adopted in the International Law Commission and the second Vienna Conference on the Law of Treaties and the ICJ stating: “*The International Court of Justice on the other hand, abandoned the fictitious application of “implied powers” already in 1962 when it stated that “the presumption is that the Organization has the power”* (Seyersted, 2008, p. 30).

#### *Doctrine of Inherent and Implied Powers*

The starting point of the inherent powers is the juridical person of the IGO; the legal consequences caused by the recognition of legal personality, is what the doctrine calls inherent power. Limitation of inherent powers under this doctrine is made by

negative provisions in the constituting document or any “*requirement of special basis to make binding decisions*”. (Engström, 2012, p. 70)

Advantages of these doctrine is to be able to review an IGO regardless of the provisions of the constitution through two criteria i) it must be geared towards the end of the organization ii) as already mentioned, the constitution must not have provisions to the contrary. This allows for great flexibility for the IGO saving resources as the evolution does not need to be supported through precedent, interpretation or justifying acts. (Engström, 2012, p. 70)

Under this doctrine it appears that there is an excessive extension of the powers of the IGO. Applying the implied powers doctrine to the Articles referenced by Brazil to defend a stringent competence of the IMO (Articles 1 and 59 of the IMO Convention), as there is no provision contrary to drafting a convention related to the offshore industry, it could be interpreted as competent. However, the debate would gravitate not in supporting the practice or in the constituting act but in the “*telos*” of the organization. Thus, the doctrine could be utilized to extend or limit the powers of an organization.

There are international organisations which in their constituting act will recognize the possibility of implied powers. Such is the case for the International Seabed Authority through UNCLOS III Part XI Article 157 Nr. 2: “...*The Authority shall have such incidental powers, consistent with this Convention, **as are implicit in and necessary** for the exercise of those powers and functions with respect to activities in the Area.*” (Engström, 2012, pp. 92-93)

Once the extension of powers complied with the requirements of necessity and being implicitly recognized by the constitution there is no limitation on the amplitude of the extension Engström (Engström, 2012, p. 95).

### *Extension of Powers of IMO due Necessity*

Regarding an extension of power due necessity of an IGO, as suggested by the IIDM in LEG 102/11 paragraphs 13 and 14, and also by the Indonesian arguments since the first submission before the Legal Committee in 97/14/1 by itself is not a good argument. It is not enough to have a compelling need without the agreement of the States of this expansion of powers and activities based on that power (Engström, 2012, p. 101)

### *Critics to the Idea of Implied powers:*

The implied powers theory lacks of definition; it is usually used only when the necessity arises, however regarding the boundaries or contents of the implied powers is difficult to determine according to Seyersted: “**the formula of “implied powers” has had to be applied whenever the need was felt – in such a wide, fictitious and undefined manner that it offers no guidance, merely an escape from the false point of departure.**” (Seyersted, 2008, p. 30). Moreover, adjusting the concept of implied powers to strictly necessary powers, would disregard most of the acts and even contest some of them that were never doubted before (Seyersted, 2008, pp. 31-32). Implying powers as a way to derive new competencies from an IGO, is in words of Seyersted “unnecessary, impossible and misleading.” (Seyersted, 2008, p. 32)

Interpretation of the constitution is undefined and contains several problems; it is then through customary law that the development of the powers of an IGO is made, avoiding undefined criteria (Seyersted, 2008, p. 33).

### The History of Implied Powers Rests in three Advisory Opinions of the ICJ

Under the International Court of Justice there are three cases between 1949 and 1962 that are mentioned by the doctrine as recognizing the implied powers doctrine.

The first of these cases commented by Bederman was the 1949 Case of International Court of Justice on Reparation for Injuries Suffered in the Service of the United Nations Bederman (1995-1996):

**It recognized not only the notion of implied powers for entities, unchaining the institution from the literal text of its constituent instrument. It also acknowledged that these organizations were evolving creations, capable of expanding their rights and duties and living their international life to the fullest... (p.369)**

The advisory opinion highlights the importance of implying those powers that an international organization must count and are essential to achieve its goals: “***Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication. as being essential to the performance of its duties***” (International Court of Justice, 1949, p. 12)

This expansive view of the competence of the international organisations went even further asserting that all subjects of law could expand or limit the competence depending on the need of a community: “*The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.*” (International Court of Justice, 1949, p. 178). As Engström appreciated the court’s interpretation of subjects in law is very functional, focusing on the effectiveness of the IGO. However, the judgement was not unanimous and dissenting opinions based on the UN Charter were given (Engström, 2012, p. 44).

*Second ICJ Case: Administrative Tribunals of the UN:*

In this second case the General Assembly of the UN consulted the ICJ whether it was competent to create an administrative tribunal with judgements binding for the organization. (Engström, 2012, p. 45). The ICJ based on the implied powers doctrine was of the opinion that the power may be implied, however the International Court of Justice (1954) provided:

**The Court must therefore begin by enquiring whether the provisions of the Charter concerning the relations between the staff members and the Organization imply for the Organization the power to establish a judicial tribunal to adjudicate upon disputes arising out of the contracts of service. (p.56)**

*Third Case: Certain Expenses Opinion of 1962*

The UN needed interpretation of the Article 17 paragraph 2 of the UN Charter: “*The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.*” In particular expenses needed to be interpreted as administrative or regular. Once again the court decided to apply the implied powers doctrine “***According to the Court this would be possible only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole.***” (International Court of Justice, 2016, p. 1)

## What Legal Regime Regulates the Internal Relations of IGOs?

Knowing the importance of the International Organization's internal law, the Indonesian delegation added to the work program, as stated in LEG 97/15, the modification of Strategic Directive 7.2 including the regulation of the offshore industry. Thus, there is a recognition of the legal committee of the importance and application of the procedural rules to the member states and other international organizations. Especially in Paragraph 13.1 of LEG 97/14, the procedures (paragraph 4.12.3 of LEG.1/Circ.6) to modify the SD 7.2 would require the approval of the Council and the Assembly (Paragraph 8.7.3 A 26/Res. 1013).

The law applicable to the organs of an international organization has been determined by the authors such as Seyested: *"As demonstrated above in chapter 5, these parties are, according to established customary law, under the inherent organic jurisdiction of the organization, **and relations with them are governed exclusively by the internal law of the organization.**"* (Seyersted, 2008, p. 580) the same view is found in Brölmann (Brölmann, 1999, p. 89).

## Previous Practice of IMO under the Light of the Different Doctrines

In the document LEG 97/14/1, already mentioned above, the Indonesian delegation argued relying in previous regulation of IMO of offshore activities. The instruments developed by IMO were 15 Chapter 7 of MARPOL Regulation 39 and Annex I of the same instrument.

Document LEG 99/13/1 Submitted by the Brazilian delegation attempts to determine the powers by practice in paragraphs 17-23 and the delegated powers of the constitution of IMO. The defense is focused to show that IMO considered necessary in the past to restrain the scope of the conventions to avoid trespassing areas not involved with its role in shipping.

Practice of the international organisations is relevant for all the doctrines. For the implied powers doctrine, it would mean that the states always intended to extend those powers to the IGO. For the author Bederman analyzing the Cape Spartel case practice can create an implied power: “*Even if the 1865 Convention did not represent an explicit derogation of Moroccan sovereignty (whether exercised on its own or through the French protectorate), **subsequent state practice created an "implied" servitude under customary international law.***” (Bederman, 1995-1996, p. 323). Also states that: “***The constituent instrument creates the institution, but the organization then lives its own life.***” (Bederman, 1995-1996, p. 358)

In conclusion under Bederman’s view the IGOs’ competence depends on the functions expressed or implied in the constituting act plus the added functions through practice. (Bederman, 1995-1996, p. 369). Therefore, interpretation of the constitution of an IGO under the Vienna Convention requires attention to the teleological element and subsequent practice (Brölmann, 1999, p. 123)

In LEG 99/14 Paragraph 13.12, the Legal Committee accepted to continue working on the guidelines despite the fact that was outside the scope of SD 7.2. **Does this constitute a new practice?** Acknowledges that certain subjects outside the Strategic Directions can be included in the agenda? The consequences of this practice can have implications of the internal law of the organization and its relationship with the member states.

#### IMOs Competence and Sovereignty

The Annex 7 of LEG 98/14 contains a statement of Brazil supporting under UNCLOS the sovereignty of the member states to regulate exploration and exploitation; therefore, IMO’s competence would not extend to the offshore industry. Brazil was of the opinion that each state separately can, in exercise of their sovereignty, agree on bilateral or regional agreements. The powers of the IMO, can be extended, whether justifying



implied powers, inherent powers or attributed powers through necessary corollaries. However, as other delegations considered that the extension was beyond the acceptable surrender of sovereignty, it could be considered ultra vires. Supporting this view, we can mention in the doctrine Engström: “**Membership in an international organization will therefore have an impact on member sovereignty regardless of whether the organization exercises any implied powers. Naturally, the more extensive the powers of an organization, the greater that impact will be.**” (Engström, 2012, p. 120)

#### Conclusion: Can the IMO Regulate Offshore Activities?

All arguments based in UNCLOS trying to establish a total sovereignty of the states over the seabed seemed to be devoid of real weight, insofar does not establish an express prohibition to IGOs to issue non-binding regulations on the subject. The discussion at the IMO largely will continue to follow argumentations based on the attributed powers doctrine or implied powers: “*In this debate differences concerning what an organization can or should do are commonly expressed by invoking two legal doctrines; the doctrine of attributed/conferred powers, and the doctrine of implied powers.*” (Engström, 2012, pp. 1-2)

All interpretations extending the powers of an International Organization will affect the sovereignty of a state, and the limit will be based on the member’s acceptance of that extension of power and lost sovereignty.

The conclusion should be in the following terms: Due IMO’s practice (common law of the IGO) and following the implied powers criteria of ICJ and the doctrine, the IMO does have the powers to regulate platforms. IMO already considered itself competent under Article 15 letters K and J of its constitution to justify the application of MARPOL and OPCR to platforms.

To conclude the discussion, we refer to the quote of Dr. Rosalie Balkin (LEG 102/11 Paragraph 39), is not only a legal issue but a political issue. Eighteen States have

taken the position together with Brazil that they do not wish to extend the IMO competence on matters of transboundary pollution.

A different issue is compliance of the internal law of IMO. The established procedures are part of the internal law, although the practice will give content to the framework and enrich the internal law. **Finally, the decision must count with the agreement of member states as a specialized agency, the forum it cannot supersede the sovereignty of the states.**

The IMO is not restricted in virtue of Article 1 of the treaty nor by the SD 7.2. but in the unwillingness of the committee and council to further regulate the offshore industry. Also already mentioned in the IIDM document submitted and above mentioned.

*“Any interpretation of the powers of an organization, whether expressed by a member or by an organ of an organization, has its source in (at least some) members of the organization. **A disagreement concerning the extent of powers will therefore, at heart, be a disagreement between members.**”* (Engström, 2012, p. 184)

Without a doubt the discussions regarding IMO's role in the offshore industry obeys to animadversion to its development Engström (2012)

*“**However, new institutions can come into existence, organizations can develop new ways of reacting to common problems, or members may turn hostile towards the institutional development of a particular organization.** In such instances, the doctrines of attributed/conferred powers and implied powers serve as tools by which to present claims concerning the proper role of an organization. In a disagreement over whether to restrict an organization or enhance its independence and capacity to act, both sides can rely on the doctrines in order to make their case.”* (p.184)

Regardless of the extend of powers in the legal sense, the influence of IMO in the offshore industry is great, having repercussions on in the activity of its members (Engström, 2012, p. 6).

### Chapter III: What Instrument Should the IMO Support, an International, Regional, Bilateral Convention or Private Arrangements?

Although the doctrine is mostly for drafting an International Convention governing the issue of liability due transboundary offshore pollution, there are dissenting opinions. Moreover, there isn't uniformity regarding the liability itself whether it should be fault based or objective, as to whether the liability should be limited, the extend of the damages, incorporate environmental damage, mandatory insurance amongst other subjects.

#### Authors in favor of a Convention

Nicholas Gaskell, seems to adhere to the idea of an international convention providing several arguments in favor of such instrument: worldwide uniformity of rules, override the industry resistance embracing legislation, distribution of the risks associated with the activity, and reciprocal recognition of judgements (Gaskell, 2013, pp. 85-86). Jacqueline Allen believes that an international convention regulating oil rigs could benefit

not only the environment and the resources, but also the industry in the long run; harmonization of the legislation and legal certainty will help achieve these goals. As the development and adoption of an international convention is slow, there is compelling need for the international community to thrive towards the goal. (Allen, 2011, p. 107)

Shame Bosna concludes that the liability regime in place is insufficient and inadequate. Attributes the lack of accountability and chances of recovery from claims arising from transboundary offshore pollution to the coastal states Shame Bosna (2012):

The current and continuing lack of a cohesive international framework governing the regulation and liability for marine pollution from offshore facilities inevitably raises the spectre of international State responsibility and emphasizes the crucial need for the adoption of an international legal regime to discourage and avert marine pollution from offshore facilities and to properly address affected environmental interests should such pollution occur. (p.117)

Peter Cameron favors an international convention, although it acknowledges that it will require several states to support such a convention to influence others to follow Peter Cameron (2012):

Such an approach would probably be an ideal one, leading to a level playing field for operators and contractors globally. However, it would probably take years to negotiate, leading to a long period of uncertainty for operators and contractors, and in the meantime diverse and unpredictable reactions from some regulatory bodies... (p.218)

The main issue according to the author with a regional approach is the limited results that such schemes may achieve. This holds true specially regarding the harmonization of the applicable regime and transference of best practices in the industry. (Cameron, 2012, p. 218)

### Authors favoring Regional Arrangements

Supporting the draft of a guideline is Van Hende and Wciwryk, coming to a conclusion closer to IMO's position. Notwithstanding, they do recognize the advantages related to establish a single regime through a convention *"While it may be desirable to achieve uniformity across the globe, one of the chief advantages of the **bilateral/regional approach is that the agreement can be tailored to meet the specificities of each region, making agreement more likely.**"* (Wciwryk & Van Hende, Civil liability for spills from oil rigs: the development of bilateral and regional principles, 2015, p. 245)

### Alternative Solutions Suggested by the Authors

An alternative solution from bilateral treaties or an international convention is to address the liability and compensation regimes through autoregulation. Amy Sheau (Ye, 2013), and also Peter Cameron (Cameron, 2012), suggest a private arrangement of compensations. One example of private arrangements is the second tier compensation fund created for Oil tankers, namely the International Oil Pollution Compensation Fund. The IOPC and other industry created funds i.e. STOPIA 2006 and TOPIA 2006, have the objective of compensating privates against pollution incidents that the industry may experience. One of the advantages is the possibility of redistributing the risks along other actors, the IOPC fund for example operates with the contribution of oil importer States. (Gaskell, 2013, p. 67). In the offshore industry a fund called OPOL operating initially in United Kingdom and Northern Ireland and extended to other parts of Europe was created (The Offshore Pollution Liability Association Ltd, 2016). A limitation of liability is kept by the industry that establishes rules and procedures to obtain compensation from the fund (IOPC Funds, 2016). The industry is trying to prevent that, in case of an incident, draconian measures by national or international initiatives will come into fruition if no compensation at all is offered to compensate privates for their potential loses. (Gaskell, 2013, p. 91)

## Chapter IV: Comparative Analysis of International Instruments and Potential Liability and Compensation Elements for an IMO Guideline

Omitting obvious differences between the nature of different instruments such as international, regional and bilateral conventions, their target region, and different stages of progress or enforcement, all of them are regulating elements of compensation and liability.

The elements that are ought to regulate are a) subject of the obligation, scope of the activities and damage b) fault based or strict liability c) limitation of liability d) insurance or financial security and exemptions e) direct actions against the Insurer f) time bars. This communality makes the study and comparison valid, notwithstanding it has to be recognized that these instruments were drafted in different periods of time under premises that could no longer be true. At the end of the Chapter there is an analysis from different authors on the relevant elements of liability.

1977 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE)

The CLEE was an attempt to regulate exploration and exploitation in the sea bed, however the convention never entered into force and probably never will. For the application of the convention Article 1 Nr. 2 defined the concept of installation maintaining the scope of the concept of vessels: **“Like the Draft Convention on Offshore Mobile Craft discussed below, the CLEE 1977 does not broaden the definition of "ship" to include nontraditional ships, but is applicable to other structures used in sea-based exploration and exploitation activities.”** (Severance, 2014-2015, p. 19)

#### Strict Liability and Liability of Several Operators under CLEE

Regarding provision on liability Article 3 of the convention establishes that the operator at the time of the incident is liable for **any damages**: *“Except as provided in paragraphs 3, 4 and 5 of this Article, the operator of the installation at the time of an incident shall be liable for any pollution damage resulting from the incident.”* As consequence the CLEE opted for a system of strict liability. According to Art. 3 Paragraph 2 Several operators will be **several and jointly liable** for the pollution damage; the same is true if there is a change of operators during the incident. (Scicluna, 2013, p. 49)

#### Limitation of Liability under CLEE

Article 6 allows operators to limit their liability to 40 million SDR. The right to rely on the limitation of liability will not apply to acts or omissions of the operator *“done deliberately with actual knowledge that pollution would result”* (Article 6 Paragraph 4 CLEE).

### Mandatory Insurance or Financial Security

Under Article 8 of the convention the operator has the obligation to maintain insurance or financial security covering not less than 35 million SDR (Special Drawing Rights). Special considerations were taken regarding the first five years in which the convention was opened for signature setting the lower limit to 22 million SDR.

### Exemptions to Insurance

Countries had the option to exempt wholly or partly incidents such as acts of sabotage or terrorism (Article 8 Paragraph 1). State members that are operators are exempted from providing financial security (Article 8 Paragraph 5). An important point which can be considered by the committee for amendment is the lack of reliable insurance cover (Article 9 Paragraph 2 Letter C);

### Direct Action Against the Insurer

Article 8 Paragraph 3 provides for direct action against the insurer or any other person providing a financial security. Defenses that the insurer or person providing a financial security can invoke are the same as the operator and “*willful misconduct of the operator himself*”.

### Time Bar of Compensatory Actions

Similar to the CLC and Fund Conventions there is two time bars counting from the knowledge of the damages and a second cap considering the time passed from the



incident. The first one is twelve months starting when the person who suffered the damage “*knew or ought reasonably to have known of the damage*” (Article 10). The second time bar is four years counting from the date of the incident.

### Regional Arrangements;

Regional Seas Conventions have not been able to regulate liability and compensation, however many of them contain provisions with the intention to regulate the issue. These provisions are called *pactum in contrahendo* incorporating the obligation of the parties in cooperating towards a liability regime<sup>1</sup>. Therefore, the obligation to regulate liability is still pending and some authors call them “dead letters in the sea”. The complexity of the task and lack of uniformity among the legislations prevents a quick solution resulting in this “*poor record*” (Scovazzi, 2009, pp. 184-185)

#### *ROPME Agreements: The Kuwait Convention*

At the 103th session of the Legal Committee (LEG 103/Inf 2) Saudi Arabia presented as an example of regional agreement two protocols of the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution. The Kuwait Convention integrates a clause stating the willingness of the contracting states to regulate liability coming from transboundary offshore pollution (United Nations Environment Programme, 2016). In this case Article 13 under the title Liability and compensation provides (Scovazzi, 2009, p. 184):

The Contracting states undertake to co-operate in the formulation and adoption of appropriate rules and procedures for the determination of:

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<sup>1</sup> T. Scovazzi (2009) page 184-185 provides an extensive list of regional agreements with such provisions.

- a) Civil liability and compensation for damage resulting from pollution of the marine environment, bearing in mind applicable international rules and procedures relating to those matters; and
- b) Liability and compensation for damage resulting from violation of obligations under the present Convention and its protocols. (ROPME, 2016, p. 6)

These two protocols are result of a ***pactum de contrahendo*** provision: The Protocol concerning Marine Pollution resulting from Exploration and Exploitation of the Continental Shelf, and Protocol for the Protection of the Marine Environment against Pollution from Land-Based Sources. Albeit, the provisions of the agreements regarding compensation are identical to the terms already adopted by UNCLOS in Article 235:

Protocol for the Protection of the Marine Environment against Pollution from Land-Based Sources

Article XIII: Responsibility and Liability for Damage

- 1. Contracting 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 cause by pollution of the Marine Environment by natural or juridical persons under their jurisdiction.
- 2. Contracting States shall formulate and adopt appropriate procedures for the determination of liability for damage resulting from pollution from land based sources.

*Barcelona Agreement and Protocols;*

The original Barcelona Convention of 1976 contained a pactum de contrahendo provision in Article 12:

The Contracting Parties undertake to co-operate **as soon as possible** in the formulation and adoption of appropriate procedures for the **determination of liability and compensation for damage resulting from the pollution of the marine environment** deriving from violations of the provisions of this Convention and applicable protocols (UNEP MAP, 2016)

As it can be seen, the original goal was not accomplished and further modifications to the conventions, deleting the words as soon as possible from Article 13, and adding the urgency of adopting regulation in the successive protocols delineate the real state of progress in achieving a liability regime. (Scovazzi, 2009, pp. 186-187)

#### [Feasibility Study Regarding a Liability and Compensation Framework for the Mediterranean:](#)

UNEP MAP in 1978 started studying the possibility to have a legal framework regulating liability and compensation. However not until 1997 in Brijuni Croatia, the states party to the Barcelona Convention arranged a meeting with UNEP to draft a text addressing the issue (Scovazzi, 2009, p. 188). In the case of the guidelines being developed by UNEP MAP, the working group took first the approach of sending a questionnaire to the parties of the Barcelona Convention. The results of the questionnaire sent to the state came to the following conclusions: First, all the states deemed that there should be a regime regulating liability and this new regime should avoid overlapping with other legislation. This translates that the regime should take into account the directive 2004/35/EC (Council of 21 April 2004)

#### [European Union Directive 2004/35/EC](#)

The European Union Directive 2004/35/EC. The directive does not establish compensation for persons or property, but covers certain environmental damages: water

damage, land damage and damage to protected species and habitats. A special emphasis on the responsibilities of the authorities preventing and remedying was given instead of court actions. Certain risky economic activities were listed where strict liability would apply. Notwithstanding Liability under this directive can be attenuated in the case of a pollution event authorized by the local legislation. Also, those economic activities will be liable only for damage to protected natural habitat and species.

Liability depends on the restoration or remedial measures. When restoration is impossible or difficult restoration by equivalence can be accepted. The EC Directive allows for certain exemptions of liability to be established by the member state. Compulsory insurance was not established.

Regarding NGOs they are not allowed to initiate actions directly, but they can request the authority to take action and ask for a judicial review. (United Nations Environment Programme, 2006, pp. 6-7).

The directive will not apply in those cases that overlaps with other international conventions such as those listed in its Annex IV.

One of the biggest challenges is to avoid overlapping with national law. In some jurisdictions, for example the case of Israel, they deal with environmental damage through criminal, civil and administrative. The problem with Civil Liabilities is the complexity and time consuming endeavour to determine if the duty of case was those of a reasonable and prudent person. (United Nations Environment Programme, 2006, p. 8)

Italy modified the national law to comply with the EC Directive. Before the reform, liability for environmental damage was fault based, additionally any action depended exclusively on the authorities as opposed to the EC directive which grants to NGO certain rights to trigger action of the authorities. (United Nations Environment Programme, 2006, p. 8) Greece already counted with a strict liability system allowing even more rights to NGOs to initiate actions within their scope of competence before the courts.

#### Relevant Issues Developing a Liability and Compensation Regime:

A liability and compensation scheme should integrate to the Barcelona legal framework and other relevant international and regional instruments. Considering the procedure for adopting a new protocol (which requires ratification from the member states) and the past failures in ratifying new protocols a different approach was necessary. Thus, the development of a soft law instrument was preferred among the member states as a prelude for a future binding instrument. (United Nations Environment Programme, 2006, pp. 10-11)

#### Elements Considered Paramount to be Covered by the Guideline are:

##### *Nature of the Instrument:*

As mentioned above, the instrument is in a first instance a guideline.

##### *Incident and Operator*

The word incident is meant to be broad, encompassing one or several occurrences as long as there is a causal link to the environmental damages. Operator is defined as the natural or juridical person who has the power or take the decision over the activity.

### *Activities*

Following the EC Directive model, a list with the riskier activities have to be developed. Once again, one of the problems that are difficult to solve are those activities that are land based.. Related to biodiversity the EC Directive, the Basel Convention and the Antarctic Treaty Systems are models to follow. This area is especially important for the identification of risks of the industry and development of insurance markets. (United Nations Environment Programme, 2006, p. 14)

### *Scope*

The focus of the guideline must avoid overlapping with other legislation such as the EC directive, otherwise it will not add any value to the current legal system. (United Nations Environment Programme, 2006, p. 12)

### *Geographical scope of application*

Inclusion of the high seas and coastal areas.

### *Damage*

A guideline should define environmental damage and what activities will be covered; similar to the economic activities defined in the EC Directive. A broad definition given by the working group is “any measurable adverse change that affects natural

resources, habitats, human life, property or human activities” (United Nations Environment Programme, 2006, p. 13). Additionally, this subject poses other challenges i.e. land based pollution from diffuse sources.

#### *Standard of Liability: Dual liability system*

A dual model of strict liability for risky economic activities, and a fault based system for the rest (United Nations Environment Programme, 2006, p. 14). A fault based liability system is relevant for those countries that have not adopted strict liability internally. Regarding the exemptions of liability, it was agreed to maintain them as narrow as possible, mentioning: force majeure, actions beyond the control of the operator (United Nations Environment Programme, 2006, p. 15). There are exemptions that must exist to secure the existence of insurance, such as incidents in war zones that are uninsurable.

Finally, in those cases where illegal activities are involved absolute liability will prevail.

#### *Limitation of Liability*

It was suggested limit liability through a two or three-tiered system. The objective is to limit the liability of the provider of insurance or financial security, to incentivize the market. However, environmental damage is still a field where insurance coverage has to be developed. The option of developing of a fund for the Mediterranean was explored, although the circumstances in which the fund would operate are still vague. Among those triggering events it was mentioned: compensation beyond the limitation of liability of the operator, insolvent operator, operator not liable for the damages (United Nations Environment Programme, 2006, p. 17). Financing of such fund is also a pending matter, should the states finance it? The different industries?

A third tier was discussed in the form of a state residual liability. This would be equivalent to the supplementary fund; however, states seem reluctant to accept this responsibility. (United Nations Environment Programme, 2006, p. 17)

#### *Time Bars*

The limits depend on whether the activity is high risk or low risk. For high risks the time bar is ten years counted from the incident and low risk activities three years. (United Nations Environment Programme, 2006, p. 16)

#### *Bilateral Treaties Regulating Transboundary Offshore Pollution*

#### *CMI Questionnaire*

The existence of bilateral treaties regulating liability from transboundary offshore pollution between countries is very scarce. The Comité Maritime International (CMI) conducted a survey among its members consulting about the existence of these kinds of agreements; however, the results are very limited (Comité Maritime International, 2016). From all the answers received by the organization only countries like Canada, Denmark, EEUU, Finland, Iceland, Norway, Russia have arrangements touching issues related to liability. However, those agreements are very limited to mutual reimbursements between states, therefore compensation for damages suffered by nationals of other states is still pending. At the regional level in Europe, the Barcelona Agreement of 1976 through the *“Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil”* regulates in its Article 26 Transboundary Pollution and in Article 27 Liability and Compensation. The main objective is to establish the obligation of the states to allow for



the nationals of the affected state to initiate proceedings in the polluter state. (UNEP, 2016)

### CMI Work on Offshore Regulation

The CMI is one of the oldest international organization in the maritime field (Wiswall, 2016), and they have been looking at the issue of compensation and liability during the second part of the last century. This has been represented by the several drafts produced by the institution. The result of this work is summarized below:

#### Rio Conference on Mobile Offshore Units (1977): Rio Draft

CMI presented a draft convention to regulate Offshore Mobile Craft at the Rio Conference of 1977. Not until 1990 IMO at the legal committee added the issue into the agenda and soliciting CMI to advise whether there was a need to revise the draft. (White, 1999, p. 21)

#### CMI Sydney Draft (1994) and the Canadian Maritime Law Association (CMLA) Vancouver Draft 2001

The Sydney draft, is a revised version of the Rio Draft which was presented before the legal committee in 1995. IMO considered that the document needed further development and had to be more comprehensive. In 1997 the National Maritime Law Associations through a questionnaire sent by CMI, widely supported the idea of an international convention regulating offshore units. However, since the Rio Draft in 1977, the objectives have evolved with the invention of new types of offshore units such as

Floating Production Storage and Off Loading (FPSO). Thus, the applicability of recognized principles of maritime law became harder to implement. IMO, through the development of the 1979 and 1989 MODU code, applied the SOLAS and Load Lines Convention to the mobile offshore drilling units. (White, 1999, pp. 22-23)

Vancouver Draft: Draft Convention on Offshore Units, Artificial Islands and Related Structures Used in the Exploration for and the Exploitation of Petroleum and Seabed Mineral Resources 2001

The CMLA generated a draft in 2001 and a working group was reactivated at the CMI in 2004. This draft was more comprehensive than the Sydney Draft covering different topics such as registration, removal of offshore units and liability due pollution damage. (Bosna, 2012, p. 94). However, the U.S. Maritime Law Association continues to oppose the idea of drafting an international convention regulating oil rigs. (Severance, 2014-2015, p. 23)

#### *The Scope of the Draft Convention:*

The Vancouver Draft applies the convention to offshore units and artificial islands. Article 2 of the draft states:

This Convention applies to all **Offshore Units, Artificial Islands and Related Appurtenances** used or intended for use in the Exclusive Economic Zone and adjacent seaward Continental Shelf to the extent a State Party may exercise functional jurisdiction over such Continental Shelf consistently with UNCLOS.

The meaning of Offshore Unit in the Vancouver Draft according Severance is (2014-2015):

defined as any structure of whatever nature when not permanently fixed to the seabed which: (i) is capable of moving or being moved while floating in or on water, whether or not attached to the seabed during operations, and (ii) is used or intended for use in Economic Activities, and (iii) includes units used or intended for use in the accommodation of personnel and equipment related to the activities described in this paragraph. (p.24)

#### Definition of Pollution Damage (Article XI)

Pollution damage is defined by Article 11.1 as:

In this Article, “Pollution Damage” means loss or damage caused outside an Offshore Unit, Artificial Island and Related Appurtenances or outside a natural reservoir or other geologic formation, by the discharge of a pollutant and includes the **costs of preventive measures and further loss or damage caused by preventive measures.**

#### Liability and Compensation under the Vancouver Draft Convention

##### Strict Liability

Article 11.1 establishes that the liability pertains the owner of the artificial island, offshore unit or related appurtenances.

Strict Liability is recognized in Article 11.5 “*The Licensee **Shall be Liable** for pollution...*” Following a similar formulation as the CLEE 1977 Convention, in case of several owners all of them will be several and jointly liable Art. 11.6: “*Where an Offshore Unit, Artificial Island or Related Appurtenances has more than one Owner, **they shall be jointly and severally liable.***”

## Exemptions of Liability

**Exemptions of liability are wider than the CLEE** recognizing in Art. 11.7 “...act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character.”

**Time bar for the actions due pollution damage are longer than in CLEE and the formulation different;** within two years since the damages occurred (as opposed to CLEE which depends on the knowledge or reasonable knowledge of the damages), and six years from the incident (Article 11.8). Consecutive events will not interrupt the time bar of six years; it starts running from the first occurrence.

## Limitation of Liability

Limitation of liability is regulated under Article 13, which follows the LLMC 1976 Convention (Comite Maritime International, 2016, pág. 16). The draft is flexible in the terms of those legislations where the limitation of liability is prohibited by law (Article 13.1 letter b): “*claims by Offshore Occupants or their heirs or dependants, where the law of domicile of the Offshore Occupant or their heirs or dependants do not permit employers or owners or occupiers to limit their liability;*” The right to limit liability is not available when “committed with intent to cause such loss, or recklessly and with the knowledge that such loss would probably result.” (Article 13.4).

The amount of the limitation is calculated by “*units of Account per mass ton or deadweight ton*” and depends on the damages related to pollution damage and non-pollution damage. Unlike the CLEE convention, the Vancouver Draft leaves open the question regarding the total SDR (Article 13.5).

#### Mandatory Insurance or Financial Security (Article 14)

The amount of financial security is left to the flag state; however, the level of financial security has to comply with the biggest amount calculated according to Article 13.5. Other provisions are similar to the CLEE, recognizing direct action to the claimants against the insurance or person who provided the financial security (Article 14.5), and exempting from this requirement the owner or licensee which is a state party (Article 14.6).

#### Offshore Units in transit

The draft convention took the view that the offshore units in transit are ought to be regulated by ship's legal regime. Severance is of the view that off shore units should be subject of international maritime law whether in transit or not. One of the theory of Severance as to why the draft assimilated the legal regime to offshore units only in transit, is its focus on pollution liability. (Severance, 2014-2015, p. 25)

Progress on the Guidelines up to 8 of June 2007 (UNEP(DEPI)/MED WG.319/3): Draft Guidelines on Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area

#### *Introduction and Scope of the Guidelines*

The introduction of the draft mentions the final decision to take a step by step approach, generating a non-binding instrument.

Guideline A under the title "Purpose of the Guidelines" sets the objective of the guideline which is "*These Guidelines also aim to the furtherance of the polluter pays*

*principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter, with due regard to the public interest”* (Guideline A Paragraph 2).

Paragraph 3 repeats the strategy, this view obeys at the current state of several international conventions that are still pending ratification by the member states (Scovazzi, 2009, p. 198). Despite of the non-binding character Guidelines D and E indicates to the states which provisions should be incorporated to the national legislation.

Guideline B under the title “*Scope of the Guidelines and Relationship with Other Regimes*” Establishes that the guidelines are meant to be applied to the Barcelona Convention and its protocols. Also establishes that the guideline does not supersede other conventions, and will be subjected to them. Guideline C establishes the geographical scope of application.

#### *Traditional and Environmental Damage*

Guideline D creates two categories of damages, **the traditional damages** and **environmental damage**. The traditional damage will include personal injury or loss of life and property, including partial or total loss of income. On the other hand, environmental damage is defined as “*a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.*” (Guideline D Paragraph 10)

Guideline D Paragraph 11 establishes the compensation:

11. Compensation for environmental damage should include, as the case may be:

- (a) costs of activities and studies to assess the damage;
- (b) costs of preventive measures including measures to prevent a threat of damage or an aggravation of damage;

- (c) costs of measures undertaken or to be undertaken to clean up, restore and reinstate the impaired environment;
- (d) diminution in value of natural resources pending restoration;
- (e) compensation by equivalent if the impaired environment cannot return to its previous condition.

Paragraph 13 qualifies the costs described in letters “b” and “c” “as **appropriate, practicable, proportionate and based on the availability of objective criteria and information**”. The operator is called to perform the preventive or remedial measures, however if the operator fails to perform its duty, the member state has to undertake them at the operator’s expense (Guideline E).

The last two letters of the paragraph are different from the others, as they will require interpretation and cannot be calculated “*in precise monetary terms*” (Scovazzi, 2009, p. 205). Following the EC Directive 2004/35/EC the criteria is leaving the environment in the same state before the incident. As reinstatement can be impossible to achieve, letter E allows for compensation by equivalency. Environmental damage at this point is very difficult to calculate and encompasses serious uncertainties (Scovazzi, 2009, p. 207).

#### *Channeling Liability and Apportionment of Diffuse Damages*

Liability for traditional or environmental damage covered by the Guidelines is allocated on the operator, hence channeling the liability (Scovazzi, 2009, p. 208) Guideline F Paragraph 17 states:

For the purpose of these Guidelines, “operator” means any natural or legal, whether private or public, person, who exercises the control over an activity covered by these Guidelines. “Operator” includes any person who does not hold an authorization, but is in *de facto* control of an activity covered by these Guidelines.

In other words, an operator is a person performing the activities described by the guidelines regardless whether he has been authorized to carry them or not. The guideline

covers the situation where pollution is linked to a number of operators, thus they will be held liable in proportion to their contribution to the damage Guideline G Paragraph 18:

These Guidelines apply to damage caused by pollution of a diffuse character provided that it is possible to establish a causal link between the damage and the activities of individual operators. In such a case, **liability should be apportioned between these operators on the basis of an equitable assessment of their contribution to the damage.**

Regarding stressing the requirement of establishing a causal link in Guideline G Paragraph 18 and Guideline H Paragraph 20, it is not clear the purpose of the wording. Liability without a causal link would establish liability, thus compensation for just carrying an activity. As the establishment of causal link to determine liability is the general rule, it seems superfluous.

#### *Standard of Liability, Limitation of Liability and Exemptions of Liability*

In the same lines as with the EC Directive (2004/35/EC) there are two regimes, one of strict liability and another under a fault based system. Those activities recognized by the guidelines to pose a higher risk to the environment will be under strict liability. Activities not included in the guideline, therefore that poses a lower risk to the environment will be under a fault based standard Guideline H Paragraph 19: *“The basic standard of liability should be strict liability; however, in cases of damage resulting from activities not covered by any of the Protocols to the Convention, the Contracting Parties could apply fault-based liability.”*

Guideline H Paragraph 21 defines incident in a broad sense, similar to the EC Directive including various kinds of occurrences: *“For the purpose of these Guidelines, “incident” means any sudden occurrence or continuous occurrence or any series of*



*occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage.”*

Guideline J Paragraphs 23 and 24 regulates limitation of liability. The guideline leaves open to the members or future international conventions the option of setting a limitation of liability. Although, prescribes that such limits should be reviewed in regular basis. This issue as we have seen is important as limitations of liability will affect the level of preventive measures in the economic activities. Regarding arguments that unlimited liability would affect insurance coverage; as discussed above and stressed by Tulio Scovazzi in reference to the draft of the Guidelines (Scovazzi, 2009, p. 190), if insurance coverage is set independently from liability should not affect the market.

Guideline I Paragraph 22 establishes narrow exceptions as in the EC Directive, limited to a) *“acts or events which are totally beyond its control”* and b) *“natural phenomenon of an exceptional and irresistible character.”*

#### *Financial Security, Potential Establishment of a Fund and State Residual Responsibility*

Guideline F Paragraph 26 provides that member states should incentive the development of a market for insurance or other financial instruments in order to require operators to guarantee their potential liability: *“Contracting Parties should take **measures to encourage the development of insurance or other financial security instruments and markets**, with the aim of enabling and requiring operators to use financial guarantees to cover their liability under these Guidelines.”* Existence and experience of insurance markets covering environmental damage is dismal, hence mandatory insurance or financial security is still unenforceable.

Regarding the establishment of a fund, the Guideline M Paragraph 27 encourages to study the option:

The Contracting Parties should explore the possibility of establishing a Mediterranean Compensation Fund to ensure compensation where the damage exceeds the **operator's liability, where the operator is unknown, where the operator is incapable of meeting the cost of damage and is not covered by a financial security or where the State takes preventive measures in emergency situations and is not reimbursed for the cost thereof.**

Cases that would trigger the fund are similar of those of the Article 4 Paragraph 1 of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (1992 Fund Convention), i.e. insolvency of the operator, non-liability of the operator, damages beyond the limitation of liability. Paragraph 28 allows to exclude compensation from the fund cases of diffuse pollution.

Contributions to the fund are also similar however additional besides the operators, contributions from the state members is also mentioned. As T. Scovazzi points out, the matter of which actors will contribute to the fund exceed the legal aspect. Lastly, the state residual responsibility was not included in the guideline, and within the member states did not find support. (Scovazzi, 2009, p. 209)

#### *Time Limits:*

The two-time limit scheme from the EC Directive is maintained, one limit counting from the incident and a second since knowledge of the damage. Albeit, the first time bar is considerably longer passing from ten years to thirty years. (Guideline K Paragraph 25)

IMO Guideline Proposal: Guidance for Bilateral/Regional Arrangements or Agreements on Liability and Compensation Issues Connected with Transboundary Oil Pollution Damage Resulting from Offshore Exploration and Exploitation Activities (LEG 103/13/1 Annex, page 1)

The proposal of this guideline is the result of the discussions at IMO that were extensively described in Chapter I, however we reiterate the obligations of the member states under Article 194 and Article 208 of UNCLOS. The discussions on the doubts shed by the articles is dealt in the First Chapter.

**The compelling need to develop a guideline is explained as no international instrument regulates liability and compensation arising from exploration and exploitation activities.** According to the working group lead by Indonesia and Denmark a guideline would help member states to establish a national regime or an international instrument addressing the issue. Paragraph 1.5 states:

**The Guidance provides a non-exclusive list of elements which could be discussed, and elaborated upon when considering and negotiating a bilateral/regional arrangement or international agreement.** The Guidance could also be used as an inspiration when considering revisions of domestic law.

The main critics during the 103th session of the legal committee were related to the inclusion of the development of the guideline in the working program, doubting of IMO's competency to address the issue, and the reference of the guideline as an IMO instrument. It was also suggested that all references in the guideline to finally achieve an international instrument should be deleted as it falls outside the strategic planning of IMO (and some member states believe it is outside IMO's competence). On the other hand, the chairman of the legal committee urged the member states to be flexible and allow the guidelines to be kept under the "Any other Business" item in the agenda; also to maintain the correspondence group lead by Indonesia and Denmark to further develop guideline.

The approach was accepted by the member states not pronouncing any objections. (LEG 103/13/1)

As the guidelines are still in a very preliminary stage at the moment there are only bullet points to cover, but the discussion on each point is meant to be similar or equal of that of the Barcelona Convention Guideline or the EC Directive (EC/2004/35)

#### Scope of the Guideline:

Paragraph 2.1 (LEG 103/13/1): **The facilities intended to be covered (e.g. all offshore facilities, including artificial islands and ancillary units that are engaged in exploration or exploitation activities).**

The scope of the guideline points at the facilities to be covered, and not the activities to be regulated. This is a difference from the Barcelona Guidelines and the EC Directive as they target activities. This approach might be justified to avoid overlapping with other regulation or to separate the ship from what are offshore facilities.

#### Covered Damages or Geographical Scope?

Paragraph 2.1 (LEG 103/13/1): **Damage that is wanted to be covered (e.g. damage to coastline or related interests of one or more States, which requires emergency action or other immediate response).**

Apparently in this point refers to the geographical scope of the guideline. The title itself seems confusing types of damages to what areas should be protected. If our interpretation is right and the model of the Draft of the Barcelona Guidelines is followed according to Guideline C Paragraph 7 it should apply to the coastal area and “hydrologic basin insofar as they are covered by the relevant protocols to the convention”

## Definition of Incidents

Paragraph 2.1 (LEG 103/13/1): **Incidents defined.**

The EC Directive 2004/35/EC and the Draft Barcelona Guidelines choose a broad definition of incident which extends a sudden occurrence, a continuous occurrence and several occurrences with the same causal link. We should expect following the same line.

## Traditional and Environmental Damage

Paragraph 2.1 (LEG 103/13/1): **Types of claims (e.g. damage to living or non-living natural resources in the public domain by public authorities; damage to individuals or legal persons).**

Considering that Indonesia presented the initiative to regulate offshore pollution at IMO, it seems that they will regulate the traditional damages: loss of property, loss of life or personal injury. The question would be whether environmental damages will be covered, and if it is the case will be similar to the Draft Barcelona Guidelines approach or will try to specify even further the valuation of the damages and broaden the concepts of restitution and restitution by equivalency.

## Claim Proceedings

Paragraph 2.1 (LEG 103/13/1): **Whether settlement of claims may take place through court proceedings or through an alternative dispute resolution system.**

The Barcelona Draft Guideline in Guideline O Paragraph 31 states: “Contracting Parties should identify the public authorities, which are entitled **to bring action in court** for the compensation of environmental damage under these Guidelines.” By that wording

the court would be the forum to initiate actions for compensation. Potential utilization of alternative dispute resolution such as arbitration for tort cases, would have to study whether the national legislation allows that option.

#### Active Role of the State Facilitating Claims

Paragraph 2.1 (LEG 103/13/1): **Whether the licensing State should facilitate the settlement of claims by providing data.**

The question is in line with the state's obligation under Guideline N Paragraph 10 of the Barcelona Draft Guideline:

Contracting Parties should ensure that their competent authorities **give to the public the widest possible access to information as regards environmental damage or the threat** thereof, as well measures taken to receive compensation for it. Replies to requests for information should be given within specific time limits.

The obligation is drafted in such a way that a state has an active transparency on such matters.

#### Doctrinal Analysis of the Elements of Liability

Regarding the literature on these different elements we will address the following: fault based and strict liability systems, problems with causality, scope of liability, unlimited or limited liability, mandatory Insurance, and channeling of actions.

## Fault based and Strict Liability Standards

In the discussion, whether a fault based or strict liability system should be considered, most of the doctrine is inclined towards strict liability as already noticed Francisco Vicuña for environmental torts in general (Vicuna, 1997-1998, p. 281). In the maritime field, we can mention other conventions governing liability for other situations, such as the convention regulating liability of oil tankers CLC 1992 (Gaskell, 2013, p. 66), and in the HNS Code of 2010. Both conventions establish strict liability to relieve the claimant from the burden of proving intention.

Andrew Partain explains that strict liability increases the incentives of the tortfeasor to increase costs to prevent the incident, reducing the future costs of the damages. Therefore, in an industry with lower than optimal preventive measures, strict liability will help to increase them to optimal levels. Additionally, will allow the authority to determine what is the industry standard. (Partain, 2015, p. 97)

Jacqueline Allen describes the requirements that a global regime for the offshore industry should cover. Among those features mentions strict liability under the polluter pays principle Jacqueline Allen (2011)

- Provides adequate liability for clean-up and compensation damages. The CLC 92 and Fund Convention allow for compensation for loss of income as a direct consequence of an oil spill (compensates fishing and tourism industries);200
- Ensures sufficient liability amounts to cover potential damages including a mechanism to increase liability (through 'tacit acceptance?');
- Ensures appropriate mandatory financial security requirements for oil rigs before drilling permits granted;
- Follows principles of **strict liability** and **'polluter pays'** meaning less fuss for claimant, as in CLC 92; (p.106)

Alexandra Wawryk leaves the liability to third parties open for fault based or strict liability (Wciwryk, Recent Changes to the Commonwealth Offshore Petroleum Legislation: Strengthening Environmental Liability, Compliance and Enforcement Provisions, 2013).

Shane Bosna considers that strict liability lowers the cost of enforcement compared to fault based systems. Investigation as to the cause of a spill demands additional resources. Another factor to consider are the incentives of the operator under a fault based system. The possibility to be exonerated of responsibility in accidental cases lowers the expected penalty. (Bosna, 2012, p. 114)

#### Problems with Causality

According to Luke Maier the requirements to establish liability in an environmental tort suit requires complying with five points: a legal duty, breach of the duty or negligence, **a cause in fact, a proximate cause** and finally existence of damages (Meier, 2011-2012, pp. 1246-1247). In the case of strict liability, the duty or negligence element is discarded, liability is established regardless of this element.

Causality is a difficult issue in law, but a necessary requirement when dealing with liability. An accurate description of causality has eluded several authors and the task is described by Roscoe Pound as: "Very likely, one who essays a systematic exposition of causation as an element in legal liability is undertaking what has been described as **unscrewing the inscrutable**." (Pound, 1957, p. 1)

We are focusing in the causation, on how an act or omission produced the alleged damages. The burden of proof for such cause will lie on the claimant. Thus, several problems arise due the difficulties to link an action or omission with the alleged damages. In the particular field of toxic torts, to link both elements in Environmental cases it is relied



upon research and statistical models based on observed correlations (Causation in Environmental Law: Lessons from Toxic Torts, 2014-2015, p. 2269) and other fields such as meteorology, hydrography among others. The similarities exhibited between toxic torts and environmental cases allows us to do a similar analysis. (Causation in Environmental Law: Lessons from Toxic Torts, 2014-2015, pp. 2256-2260)

In the past, the doctrine utilized concepts created for toxic torts applying them to environmental law to distinguish the different elements in factual causation, namely general and specific causation. General causation refers to whether the breach of the duty can produce the alleged consequences. In the other hand, specific causality refers to the likelihood that the breach of the duty or negligence produced the damages. (Causation in Environmental Law: Lessons from Toxic Torts, 2014-2015, p. 2258). The doctrine is divided regarding whether the causality test is too hard, producing fewer claims than optimum: *“Some argue that it is currently too difficult to show causation, preventing worthy victims from being compensated for their injuries.”* (Causation in Environmental Law: Lessons from Toxic Torts, 2014-2015, p. 2259)

Also on the verge of several incidents from an offshore or vessel source, a private claimant could have difficulties identifying the specific source of offshore pollution that caused the damages; given that the burden will rest on them, limited resources to identify the causes will prevent them from obtaining compensation. (Textor, 1979, p. 196).

An example of the causation conundrum is the Deep Water Horizon incident. Claims for compensation faced problems related to causation. The spill itself produced great damage in the coast, but also the efforts to counteract the spill (Janasie, 2013-2014, p. 30). For example, great discharges of fresh water to disperse the oil affected cultivations of oysters. Catherine Janasie (2013-2014):

Unfortunately, the Spill occurred when oysters were spawning, so the oyster population was likely very damaged by the Spill. However, much of the oyster mortality is being attributed to the decision to flush freshwater into the Gulf as part of the response effort, and not due to oil from the Spill. (p.30)

The first element for any environmental tort claim in EEUU under the Oil Pollution Act (OPA) is proving that actual damage occurred, with an actual property interest including the loss of property or profits when proven. Then the claimant must prove actual causation: *“the test would be: but- for the Responsible Party's actions, would the plaintiff have been injured?”* (Talley, 2014-2015, p. 165) Foreseeing that the causation problem may pose a serious barrier for privates seeking compensation, **the states can establish presumptions for certain activities deemed to pose a high risk.** (Vicuna, 1997-1998, p. 288). This approach will balance the number of claims if a lower than optimal number of claims exists for pollution incidents (Vicuna, 1997-1998, p. 288).

There are authors such as Henry Foster that will try to avoid the classic discussion of causality; causality has entertained several philosophers and judges alike. Hence, the solution would be straight forward: the word “cause” is used in the ordinary and natural meaning, appealing to the common sense: *“It seems to me that, giving the word 'cause' its ordinary and natural meaning, anyone may cause something to happen intentionally or negligently or inadvertently without negligence and without intention...”* (Foster, 1995, p. 61)”

### Scope of Liability

The scope of the liability traditionally extends **to loss of property, life, personal injury or economic value.** So the traditional liability system looks at the human being and the property, but the environment is considered only as a medium or object of damage de la Fayette (2005):

This is because traditional regimes on liability for damage are based upon traditional tort law concepts of damage to persons and property, **with the concept of the environment, both as a medium for damage and as an object of damage, being grafted on afterwards, often not very successfully.** (p.172)

However, the environment became a protected value in its own right, so any valuation of the damages must be broad and encapsulate the traditional recognized damages plus the diminution of value related to the environment (Vicuna, 1997-1998, pp. 300-301). Louise de la Fayette defines environmental damage as “*In general, the concept of damage to, or impairment of, the environment refers to an adverse change in the components of an ecosystem, their functioning or their interaction, caused by an external factor of anthropogenic origin*” (de La Fayette, 2005, p. 172)

In the case of environmental damage, the courts must resort to different standards of compensation such as diminution of value, reasonable costs of acquiring resources, rehabilitation of the area, replenishment of biological resources. In cases where the damage is irreparable, a criteria must be developed to determine the compensation as it is not possible to determine the damage. Irreparable damages produce the impossibility of distinguishing the response or restoration costs from the liability undefined due an absent commercial value. Albeit, punitive damages should not be imposed as international law do not always recognize them (Vicuna, 1997-1998, pp. 300-301).

In the case of the 2004 EC Environmental Liability Directive, the preferred standard of compensation is restoration. In this context restoration is the state of the natural resources before being damaged. Notwithstanding other costs recognized by the directive “*the responsible party can be held liable for **the costs of assessing damages as well as the administrative, legal and enforcement costs, the costs of data collection and monitoring and supervision costs.***” (Brans, 2005, p. 100). As the 2004 EC Environmental Liability Directive was inspired on the US Oil Pollution Act of 1990, there are similarities on the assessment of the damages. Thus, is expected to contain provisions on the restoration of the environment Brans (2005):

(a) the **cost of restoring the injured natural resources** and services to baseline condition; (b) the **cost of restoration** that compensates for the interim loss of resources and services that occurs from the time of the incident until recovery of such resources and services to baseline condition; and (c) the reasonable cost of assessing damages. (p.100)

## Unlimited or Limited Liability

Looking at the extent of the damages a relevant discussion is whether a limitation of liability is justified for unusually expensive incidents. The main issue lies in the levels of care of the industry, can the measures, to prevent a large scale accident, be maintained to adequate levels even though they would not be liable for all the damages? The doctrine, especially those involved in the economic analysis of the law i.e. Steven Shavell considers that the offshore industry, under a limited liability system, **necessarily will have insufficient measures to prevent accidents** (Shavell, 2004, p. 238). On the other hand, there is a qualification to this statement; if there is an accident which was overlooked, as it is not possible to foresee every future event, a limitation of liability would not affect the incentives to prevent the incident. The operator of an offshore facility, would not increase costs to prevent an accident which could not anticipate. Regretfully, this position may create other issues, such as operators trying to convince courts that an incident and its consequences were unforeseeable. Ultimately this behavior leads to an increase in the cost of adjudication. (Shavell, 2004, p. 239)

From an economic standpoint the question is whether there is a necessity to subsidize the offshore industry? However, this argument can be hardly sustained in the offshore industry or even in the maritime industry as Gauci Gotthard observes: “*While such an incentive may have been necessary in the early days of shipping, it is no longer so today. Investment in shipping may be considered as widespread enough not to require any discriminatory stimulant.*” (Gauci, 1995, p. 66). An argument in favor of the limitation of liability is the availability of insurance. There is a recognition of this issue, although there can be a dissociation between a limited insurance coverage, while maintaining unlimited liability for insuree (Gauci, 1995, p. 67).

## Mandatory Insurance

Mandatory insurance has the benefit of transferring to the operator-licensee all the social cost of an activity. Therefore, the level of activity will lower to socially optimal levels; the reason of excessive levels of activity lies in the judgement-proof problem.<sup>2</sup> In the case of liability due damages coming from offshore pollution, insurance poses a guarantee to the victims ensuring the tortfeasor's solvency. Another benefit consists in facilitating contracting between trading parties and other third parties. (Skogh, 2000, p. 529)

A potential insolvent tortfeasor will transfer wholly or partly the costs to the public; the final result is the same as with limitation of liability, the tortfeasor will have inefficient levels of care.

The beneficial effect will be observed specially in a strict liability system, but in a fault based system limited to the probabilities of being found negligent. An additional requirement to achieve this effect is the ability of the insurers to observe the level of care (Shavell, 2004, pp. 277-278).

A different solution to solve this issue is through a mandatory public insurance<sup>3</sup>. Insurance markets can have serious information issues, rendering insurance companies unable to distinguish among good and bad risks (Siegelman, 2004). The information issues and highly uncertain events, can derive in a total inability to provide coverage for certain risks. Mandatory public insurance can solve the adverse selection problem by forcing the actors to be insured, regardless whether their risks are good or bad. Additional benefits to this approach is the creation of large pools to cover the high level of claim amounts required in the offshore industry in case of an incident. (Skogh, 2000, pp. 529-530)

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<sup>2</sup> The judgement-proof problem is associated with those tortfeasors that are unable to pay for the damages. Thus, the objective of tort law, to deter these acts and ensure compensation, is affected. (Logue, 1993-1994, p. 1375)

<sup>3</sup> The premium usually is paid through a tax

## Channeling of Actions

Channeling of actions is useful to encourage claims against the tortfeasor. Concepts of operator or licensee are created to achieve this goal. This issue is connected to the obligation of the states to provide information and transparency helping the victims of pollution to bring actions against court or other instances.

## Conclusion

The **problem formulated** at the beginning of this work was the **existing legal lacuna in the international legal framework to regulate compensation and liability**, in case of a transboundary offshore pollution incident. **UNCLOS in its Article 208 does not define which international organization is competent to serve as a forum to develop international and regional conventions.** From this problem we derived questions to be answered, the first of which was **whether the IMO could be competent to regulate such matters?** To answer that question, **a descriptive account of the discussion at IMO** starting at the 97<sup>th</sup> session of the Legal Committee was given.

Once the discussion at IMO was presented from the different points of view of the member states, **an international law analysis was applied to induce conclusions.** It was important to define the nature of IGOs and then the specific status of IMO as a specialized agency of the UN. Regarding autonomy of the IGOs, is already well established, thus IGOs have a will of their own will and execute valid acts as a juridical person. The authors have elaborated different theories to define the nature and competence of international organizations. Extension or restriction of powers can be justified through different doctrines, sometimes resulting in undesirable outcomes.

Therefore, the authors introduced correcting factors to the theories to further precise the concepts (i.e. the necessary corollaries). The ICJ has adopted the implied powers to justify a number of advisory decisions: the extension of competence of United Nations, through the recognition of an administrative tribunal dictating binding decisions for its members, justification of certain expenses, and creation of organs such as peace operations, not included in the United Nations Charter. Practice of the IGOs is relevant to understand how the member states interpret the constitution and how the IGO executes its mandate. **The practice of the IGOs generates a common law of the international organization that assists in the determination of powers within the organization.** Although, we concluded that an extension of powers is possible under different theories, **it is the member states who have the final decision determining the limits of the extension of powers.** The more autonomy and powers is given to an IGO the more sovereignty is sacrificed by the states. Thus, powers of an IGO and sovereignty of the state are related, and that relationship is inversely proportional.

Regardless of the points made above, we expressed our view that **IMO has an exceptional good position to sponsor an international convention**, hosting under its roof a forum with the relevant expertise to accomplish the task (as the doctrine in general has already observed). **An undesirable effect of the extension of powers could be potential overlapping with the competence of other international organizations.** However, it can be solved by collaboration between the organs of both IGOs. An IGO is fundamental to the success of an international instrument in order to act as a secretariat; as it was mentioned failure of previous international conventions was partly caused by the lack of an IGO to act as a secretariat for the convention; the support of an international organization with the proper expertise will be a sine qua non prerequisite.

**As to what instrument is optimal to regulate liability and compensation?** **most of the authors are inclined to draft an international convention.** Authors such as Nicholas Gaskell (Gaskell, 2013, pp. 85-86), Jacqueline Allen (Allen, 2011, p. 107), Shame Bosna (Bosna, 2012, p. 218), Peter Cameron (Cameron, 2012, p. 218) have stated their preference for a single regime. However, most of them realize the difficulties to achieve the purpose and accept regional or bilateral alternatives, even if this generates

duplication of efforts and fragmentation of the international legal framework. Regional and bilateral treaties and guidelines are easier to achieve and implement, facilitating the regulation of liability and compensation. Additionally, other solutions can be implemented as private arrangements, albeit their full analysis exceeds the purpose of this work.

**To determine to what extent the sovereignty of the states will be affected, through the extension of the competence of an IGO, it is paramount to analyze the elements of compensation and liability to be regulated.** Thus, Chapter Four in connection with the First, Second and Third Chapter, focuses in a comparative analysis between different international instruments, answering the question: **what are the elements to be regulated and what regimes should be adopted?** The chosen instruments that we compared were several attempts to regulate compensation and liability. Starting from the CLEE 1977, passing through the Rio, Sydney, and Vancouver draft and now the drafting of guidelines by regional organizations as the UNEP MAP or international organizations as IMO. These instruments have accrued useful information on the relevant elements that must be regulated and the obligations of the states to develop that regulation (pacto de contrahendo).

Regarding the guideline presented by Denmark and Indonesia at IMO, using as a base the outcome of the comparative analysis; we interpreted the meaning of the current list of examples of elements that are relevant for bilateral and regional agreements.

At the end of Chapter Four, a doctrinal analysis of the elements was presented on: fault based and strict liability, causality issues, the scope of liability, limitation of liability, mandatory insurance and channeling of actions. **Some principles of economic analysis of law were utilize to answer: how can liability and compensation regimes improve?**

The conclusions pertaining limitation of liability and mandatory insurance, are key elements for the protection of the marine environment and the future availability of funds to compensate the victims of transboundary pollution. **Limitation of liability increases the likelihood of incidents**; operators will decrease preventive measures if the total



costs of the damages are not internalized. The negative externalities will be paid by the society as a whole and affect small fisheries. Limitation of liability must be separated from the limitation of the insurance or financial security to help in the development of an insurance market and financial security, spreading the risk amongst more operators decreasing the probability of insolvency. A related issue is the definition of environmental damage and diffuse pollution; both subjects must be defined in a way that the consequences are predictable, providing legal certainty to the operators and insurers. The lack of insurance for environmental damage is troubling and harmful for the pretension worldwide recognition of this type of damage, but it is a consequence of the uncertainty of the current regulation. On the other hand, if the development of an insurance market becomes impossible, the state has to intervene creating a state insurance by the way of imposing taxes (without excluding the possibility of imposing a hybrid system).

Regretfully, the challenges faced by the international community cause delays implementing regulation much needed in pollution incidents. It is worth reiterating that to the coasts affect vulnerable populations; in the Montara incident Indonesian artisanal fisheries were affected the most; and the prospect of achieving compensation at a foreign court are very slim.

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