CIVIL LIABILITY FOR DAMAGE CAUSED BY OIL POLLUTION FROM OFF-SHORE PLATFORMS - A COMPARATIVE ANALYSIS OF INTERNATIONAL AND DOMESTIC INSTRUMENTS

by

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ABSTRACT

This dissertation addresses the question of liability for oil spills emanating from offshore installations, beginning with an analysis of international law, specifically international customary law, global conventions and regional agreements. Following the analysis of the present international law, a number of proposals are considered in motivation of a global convention specifically addressing offshore platforms. Key areas addressed are the scope of the proposed convention, the standard of liability imposed, the quantum of liability suggested, financial security measures, dispute resolution proceedings and alternatives to a global convention. Legal instruments discussed in this portion include the United Nations Law of the Sea Convention, the International Convention on Civil Liability for Oil Pollution and a number of global and regional legal instruments. This discussion will also draw analogies with the nuclear compensation regime in motivation for strict liability between States.

The domestic legal framework of the United States of America and South Africa are discussed and contrasted. The primary federal marine pollution legislation of the USA, the Oil Pollution Act of 1990, is compared to South Africa's Marine Pollution (Control and Civil Liability) Act 6 of 1981 in order to determine which provisions are successful and which ought to be amended or supplemented. Other sources of South Africa law considered include the National Environmental Management Act 107 of 1998, the Maritime Zones Act 15 of 1994, the Admiralty Jurisdiction and Regulation Act 105 of 1983 as well principles of South African common law.

The objectives of this research are to identify all the international and domestic legal instruments that are applicable to offshore platforms, critically evaluate their provisions and propose realistic amendments and instruments that resolve any lacunae or weaknesses that are identified.

DECLARATION

I, Karl Andre Blom, declare that:

(i) The research reported in this dissertation, except where otherwise indicated, is my original work.

(ii) This dissertation has not been submitted for any degree or examination at any other university.

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K A BLOM

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LIST OF ABBREVIATIONS

AJRA	Admiralty Jurisdiction Regulation Act 105 of 1983
BP	British Petroleum
CIL	Customary International Law
CLC 69	International Convention on Civil Liability for Oil Pollution Damage, 1969
CLC 92	Protocol to the 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, 1977
CMI	Comite Maritime International
EEZ	Exclusive Economic Zone
EU	European Union
ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organisation
MARPOL	The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978
MPCCLA	Marine Pollution (Control and Civil Liability) Act 6 of 1981
NEMA	National Environmental Management Act 107 of 1998
NEMICMA	National Environmental Management: Integrated Costal Management Act 24 of 2008
OPA 90	Oil Pollution Act of 1990
OPOL	Offshore Pollution Liability Agreement
OPRC	International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992
UNCLOS	United Nations Convention on the Law of the Sea
SAMSA	South African Maritime Safety Authority
SDR	Special Drawing Rights
UKCS	United Kingdom Continental Shelf
UN	United Nations
UNEP	United Nations Environmental Programme
USA	United States of America

CHAPTER 1 - INTRODUCTION

Background:

On 20 April 2010 the *Deepwater Horizon*, a semisubmersible oil platform operated by British Petroleum ('BP'),[1] exploded in the Gulf of Mexico off the coast of Louisiana, United States of America ('USA').[2] Prior to the explosion, one of the leaders on the site (of which there were only two) left the installation to participate in a conference.[3] The US Coast Guard, after an investigation, concluded that his replacement was inexperienced.[4] BP had also been advised by Halliburton, the engineers hired to design the cement seal that prevents leaks from the well, that the mechanism used on the *Deepwater Horizon* was potentially defective.[5] Halliburton suggested that BP utilise 21 centralisers to centre the drill – BP were using only 6.[6] Reacting to the warnings from Halliburton, a BP engineer ordered the additional centralisers only to be overruled on 16 April by a BP manager who instructed the staff on the *Deepwater Horizon* to continue drilling operations.[7] On 18 April, after conducting additional tests, Halliburton engineers repeated their warnings to BP that the *Deepwater Horizon* was not equipped with the requisite number of centralisers.[8] BP once again ignored the warning, and on 20 April the well failed.

The well failure resulted in an explosion that killed eleven men and leaked between an estimated 56 000 to 68 000 barrels of oil per day for three months until the well was sealed.[9] It

[1] R Abeyratne 'The Deepwater Horizon Disaster - Some Liability Issues' (2010) 35 *Tul. Mar. L. J*. 125, 126. The Deepwater Horizon was valued at 350,000,000 US Dollars, carried 126 crewman and was 378 feet tall.
[2] M Fisk and L Calkins 'BP Gulf of Mexico Spill, From Disaster to Trial: Timeline' *Bloomberg* 25 February 2013. Available at *http://www.bloomberg.com/news/2013-02-25/bp-gulf-of-mexico-spill-from-disaster-to-trial-timeline.html*, accessed on 19 April 2013.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] S Gupta 'More than 4 million barrels of oil entered the Gulf' *NewScientist* 24 September 2010, available at *http://www.newscientist.com/article/dn19495-more-than-4-million-barrels-of-oil-entered-gulf.html#.Unnz0PlpnSo*, accessed on 4 November 2013.

has been estimated that the oil spill covered 68 000 square miles of ocean.[10] This is roughly equivalent in size to the state of Oklahoma,[11] which is slightly larger than the Eastern Cape province of South Africa.[12]

The scale of the environmental damage caused by the *Deepwater Horizon* has yet to be determined, as the quantity of oil spilled alone is not sufficient to determine the extent of environmental harm.[13] A similar oil platform spill occurred in 1979 when an exploratory well drilled by the *Ixtoc I* suffered a blowout (this too occurred in the Gulf of Mexico, although the platform was within the jurisdiction of Mexico). The *Ixtoc 1* spilled approximately 530 million litres of oil, nearly triple the quantity spilled by the *Deepwater Horizon*.[14] Despite the alarming quantity, the environmental damage was minimal as the oil spilled by the *Ixtoc 1* was of a light grade and did not reach environmentally sensitive areas.[15] This is in stark contrast to the *Exxon Valdez* spill, which, whilst significantly smaller than the *Ixtoc 1* at only 40 million litres, was environmentally disastrous due to the heavy grade oil and the sensitive environment where it spilled.[16]

Whilst the environmental damage resulting from the *Deepwater Horizon* spill may be difficult to quantify, one can begin to calculate the economic damage that resulted. The commercial fishing industry is estimated to have suffered a 40% loss of sales revenue in 2010, amounting to approximately $4.36 billion.[17] The tourism industry was also affected – albeit less than initially predicted – suffering an estimated loss of $3.8 billion.[18] The real estate industry was similarly impacted, with the value of coastal properties exposed to the oil spill decreasing by

[10] C Robertson and C Krauss 'Gulf Spill is the Largest of its Kind, Scientists Say' *N.Y. Times* 2 August 2010, available at *http://www.nytimes.com/2010/08/03/us/03spill.html?_r=1&fta=y*, accessed on 3 March 2013.
[11] J Gillis 'An Oil Slick to Rival Oklahoma' *New York Times* 28 July 2010, available at *http://green.blogs.nytimes.com/2010/07/28/an-oil-slick-to-rival-oklahoma/*, accessed on 19 May 2013.
[12] The size of the Eastern Cape Province is approximately 168 966 square kilometres. See *http://www.southafrica.info/about/geography/eastern-cape.htm#.UmTIoJS6TGA*, accessed on 21 October 2013.
[13] P Alhous, P McKenna and C Stier 'Gulf leak: biggest spill may not be biggest disaster' *NewScientist* 14 June 2010, available at *http://www.newscientist.com/article/dn19016-gulf-leak-biggest-spill-may-not-be-biggest-disaster.html#.Unn9hPlpnSp*, accessed on 4 November 2013.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] L Smith, M Smith and P Ashcroft 'Analysis of Environmental and Economic Damages from British Petroleum's Deepwater Horizon Oil Spill' (2010) Available at SSRN: *http://ssrn.com/abstract=1653078*, 11.
[18] Ibid, 12.

10%.[19] BP itself has estimated that the *Deepwater Horizon* spill, excluding sanctions, will cost the company approximately $32.2 billion.[20]

Oil spills from offshore platforms can also be transboundary in nature. The *Ixtoc 1* spill travelled across state boundaries and polluted the coasts of the USA. Despite calls that followed the *Ixtoc 1* incident to introduce legal instruments to allocate liability and regulate drilling from oil platforms, the situation remained largely unchanged until the *Deepwater Horizon* disaster. In 2009 the *Montara Wellhead Platform* suffered a well blowout off the coast of Australia and the resulting oil slick damaged the coast of Indonesia.[21] The Montara spill created an oil slick that covered approximately 90 thousand square kilometres, making it the largest oil spill in Australia's history.[22] In its wake there has been renewed scrutiny of international and domestic instruments governing liability for oil spills emanating from offshore oil platforms. The exploration and exploitation of offshore oil and gas is the largest marine industry.[23] It is readily apparent that the current international regime governing liability for such spills is vague at best, absent at worst. This lacuna has not escaped criticism from the media,[24] and there is an environmental and political need to effect a solution. Such a solution is urgently needed as offshore exploitation constitutes approximately 30% of the global oil production and 20% of oil reserves.[25] It is therefore necessary to study various international law principles and instruments, as well as the domestic legislation of states, in order to determine their applicability to offshore installations and the scope of claims permissible under their terms.

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[19] Ibid, 12.
[20] Ibid, 14.
[21] M White 'First Montara, then Deepwater Horizon - is Australia protected from catastrophic oil spills?' The Conversation, available at https://theconversation.com/first-montara-then-deepwater-horizon-is-australia-protected-from-catastrophic-oil-spills-996, accessed on 25 August 2013.
[22] Ibid.
[23] L Wrathall 'The Vulnerability of Subsea Infrastructure to Underwater Attack: Legal Shortcomings and the Way Forward' (2010-2011) 12 *San Diego Int'l L.J.* 223, 225.
[24] K Galbraith 'Gap in Rules on Oil Spills from Wells' *New York Times* 16 May 2010, *www.nytimes.com/2010/05/17/business/energy-environment/17green.html?_r=0*, accessed on 15 February 2013.
[25] L Chabason 'Offshore Oil Exploitation: A New Frontier for International Environmental Law' (2011) Working Papers No 11/2011 *IDDRI*, available at *http://www.iddri.org/Publications/Collections/Idees-pour-le-debat/WP%201111_chabason_offshore.pdf*, accessed on 23 May 2013.

Problem Statement:

Oil spills on the scale of the *Deepwater Horizon* may be infrequent, but they are economically and environmentally devastating. Liability in these instances needs to be clear, as in the absence of defined and enforceable liability, the likelihood that necessary precautions will be taken by the operators of offshore platforms is diminished. This dissertation is an endeavour 1) to investigate the current legal regimes (international and domestic) imposing liability on parties for oil spills emanating from offshore oil platforms; and 2) to scrutinise the suggestions of leading authors to remedy the lacunae that presently exist in the law, in an attempt to identify the most appropriate legislative steps to remedy those gaps. Issues such as the standard of liability imposed, the quantum of liability imposed, the financial security measures required, and the dispute resolution process will be canvassed. Emerging from this analysis, the best practices at both the domestic and international level will be incorporated into a series of proposals to remedy the situation within the context of civil liability.

Issues Addressed:

The starting point is an analysis of international law that is applicable to oil platform spills. This analysis of international law will commence with a consideration of the applicable customary international law principles arising from key decisions of the International Court of Justice and works of the International Law Commission. The Stockholm Declaration[26] and the Rio Declaration[27] will be discussed for the purposes of applying their principles in the specific context of offshore oil pollution. In addition, the Space Objects Convention,[28] a global convention imposing strict liability on states for transboundary harm, will be considered in support of imposing strict liability on states of transboundary oil pollution.

[26] The Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, U.N. Doc. A/Conf. 48/14 at 2-65 (1972) ('Stockholm Declaration').
[27] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 14 June 1992, U.N. Doc. A/Conf. 151/26 (Vol. I).
[28] Convention on International Liability for Damage Caused by Space Objects, 29 November 1971, 961 U.N.T.S. 187, 1 September 1972.

Following the commentary on customary international law, a study of key global conventions addressing marine pollution will be undertaken. This will comprise of an examination of the United Nations Law of the Sea Convention, the London Dumping Convention,[29] the Oil Pollution Preparedness and Response Convention,[30] MARPOL,[31] and the CLC 69[32] and Fund[33] Conventions (including their updated protocols).[34] This analysis will be conducted with the object of identifying whether these leading global conventions impose liability on states for pollution emanating from offshore installations, whether the flag or the coastal state bears the burden of regulating offshore activities, and what liability (if any) may be imposed by these conventions. This will be accompanied by a critique of these conventions and a commentary on their applicability to offshore installations. This will conclude with a study of CLEE,[35] an instrument addressing pollution from offshore installations but which failed to obtain the support of the international community.

The next aspect of international law addressed will be regional instruments. In the light of the identified failings of the global international regime, various regional frameworks will be identified and assessed to determine whether they are sufficient to address any lacunae that may exist. This consideration will begin with a study of OPOL,[36] followed by OSPAR,[37] the

[29] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 30 August 1975, 11 ILM 1294 ('London Convention').
[30] International Convention on Oil Pollution, Preparedness, Response and Co-operation 1990, 30 November 1990, 1891 UNTS 78.
[31] International Convention for the Prevention of Pollution from Ships, 1973, adopted 2 November 1973, 1340 UNTS 184, (entered into force 2 October 1983), amended by Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973, adopted 17 February 1978, 1340 UNTS 61 (entered into force 2 October 1983).
[32] International Convention on Civil Liability for Oil Pollution, 29 November 1969, 973 U.N.T.S 3.
[33] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 18 December 1971, 1110 U.N.T.S. 57.
[34] 1992 Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, 27 November 1992, 1956 *U.N.T.S.* 255, 30 May 1996 ('1992 CLC Protocol'). 1992 Protocol to amend the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 27 November 1992, 1953 *U.N.T.S.* 330, 30 May 1996 ('1992 Fund Protocol').
[35] Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 1 May 1977, 16 ILM 1451 ('CLEE').
[36] Offshore Pollution Liability Agreement, (1974) 13 I.L.M. 1409 and (1975) 14 I.L.M. 147, available at *http://www.opol.org.uk/downloads/opol-agreement-jul12.PDF*, accessed on 1 June 2013 ('OPOL').
[37] Convention for the Protection of the Marine Environment of the North-East Atlantic 1992, 22 September 1992, 2354 UNTS 67, 25 March 1998. ('OSPAR').

Barcelona Convention,[38] the Kuwait Convention,[39] as well as the Helsinki Convention.[40] In addition to these select conventions, brief mention will be made of other regional instruments, notably the marine pollution directive of the European Union.[41] These instruments will be critiqued in the context of their liability provisions and whether they create an effective regulatory regime.

Chapter 3 will address the domestic legislation of the United States of America and South Africa. This will be done in an attempt to identify best practices that may be used to propose amendments to South Africa's legal regime. This chapter will commence with an evaluation of American legislation and case law that is applicable to oil platforms spills, primarily focusing on the Oil Pollution Act of 1990.[42] This analysis will include commentary on the *Ixtoc I* spill, *Exxon Valdez* and *Deepwater Horizon* spills. As was done with international law, this commentary will be restricted to questions of civil liability. This evaluation will include a comparison between USA regime and the international law regime to determine whether America's unilateral approach is laudable or concerning.

South Africa's legislative readiness to deal with the consequences of an oil spill will be examined in light of the prevailing international, regional and American regimes. This examination will entail a comprehensive consideration of existing legislation, primarily the Constitution,[43] the MPCCLA (with its accompanying regulations),[44] and the Maritime Zones Act.[45] The MPCCLA specifically recognises discharges of harmful substances from 'offshore installations'[46] and contains detailed regulations for the inspection of such installations,[47] thus

[38] Convention for the Protection of the Mediterranean Sea against Pollution 1976, 16 February 1976, 1002 UNTS 27, 12 February 1978 ('Barcelona Convention').
[39] Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 24 April 1978, 17 *I.L.M.* 511, 1 July 1979 ('Kuwait Convention').
[40] 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 9 April 1992, 13 *I.L.M.* 546, 17 January 2000 ('Helsinki Convention').
[41] Directive 2004/35/CE of the European Parliament and of the Council, 21 April 2004, L143/56 *Official Journal of the European Union* 30.4.2004.
[42] Oil Pollution Act of 1990, 33 U.S.C. §2701 (ÓPA 90').
[43] The Constitution of the Republic of South Africa, 1996 ('The Constitution').
[44] Marine Pollution (Control and Civil Liability) Act 6 of 1981 ('MPCCLA').
[45] Act 15 of 1994.
[46] MPCCLA,s1.
[47] The Prevention and Combating of Pollution of the Sea by Oil Act Regulations in GN 1276 *GG* 9277 of 29 June 1984, Reg. 24 and 26.

rendering it directly applicable to offshore oil platforms and any spills emanating from them. Furthermore, this section will address questions of jurisdiction, considering whether (in addition to the MPCCLA) offshore installations are subject to the provisions of NEMA,[48] and the principles of admiralty law and customary law. This analysis will consider the scope of South Africa's liability in the event of an oil spill and whether it is sufficient to address the reality of a modern-day offshore platform spill. This chapter will conclude with a comparison between South African and American law in order to determine whether South Africa's law is truly sufficient to address a major oil spill off its coast.

Chapter 4 will consider a variety of proposals on how to remedy the legal framework which exists at the international level. In this regard, the creation of a global convention specifically addressing pollution from offshore installations will be motivated. Particular attention will be given to certain key areas: the scope of such a global convention, liability under the convention, financial security measures mandated by the proposed convention, and the settlement of disputes under the convention. This section will include reference to CLEE, proposals made by the Comité Maritime International and analogies will be drawn between transboundary marine pollution and transboundary nuclear pollution. The purpose of this chapter is to consider whether there is an achievable solution that addresses the major concerns raised in the analysis of the global and regional instruments.

Chapter 5 is the concluding chapter and will comprise of a précis of the conclusions drawn throughout the paper, and recommendations for future legislation in this area moving forward.

[48] National Environmental Management Act 107 of 1998 ('NEMA')

CHAPTER 2 - THE INTERNATIONAL LIABILITY REGIME

Due to the international nature of modern resource exploration and exploitation,[1] it is perhaps unsurprising that a number of international law authorities seek to regulate offshore platforms. These sources range from principles of customary international law, to global conventions, and to regional instruments. Whilst these sources are numerous, it is disconcerting to note that few are directly applicable to spills from oil platforms. Those that are applicable (directly or indirectly) are often incomplete in the context of liability as they fail to address large-scale oil pollution.

2.1. THE ROLE OF INTERNATIONAL CUSTOMARY LAW

Customary international law ('CIL') is a fairly difficult concept to define, as its precise nature is the subject of some debate amongst scholars. Resulting from this uncertainty, states differ in their interpretation of their obligations under CIL, which inevitably sows the seeds of dispute. CIL has traditionally been defined as arising 'from widespread state practice and *opinio juris* - a sense of legal obligation.'[2] This definition has been recognised as problematic due to differing opinions of what constitutes 'widespread' and what actions form 'state practice'.[3] Certain scholars recognise the development of a new, flexible view of CIL. These scholars suggest that contemporary CIL is derived 'in a loose way from treaties (ratified or not), U.N. General Assembly resolutions, international commissions, and academic commentary - but all [coloured] by a moralism reminiscent of the natural law view'.[4] This contemporary definition suggests that CIL and multi-lateral conventions/agreements are not necessarily mutually exclusive.[5]

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[1] It is quite plausible for a number of multinational corporations to have a financial interest in an offshore oil platform, operated in a country other those where they are registered. This results in a situation where a number of legal systems regulate different aspects of offshore drilling. Drilling may also occur in international waters, thus introducing international law instead of mere domestic regulation.

[2] A Guzman 'A Compliance-Based Theory of International Law' (2002) 90 *Cal. L. Rev.* 1823, 1874.

[3] Ibid.

[4] J Goldsmith and E Posner 'Understanding the Resemblance Between Modern and Traditional Customary International Law' (1999) 40 *Va. J. Int'l L.* 639, 640.

[5] Indeed, the United Nations Convention on the Law of the Sea (discussed in 2.2 below) is considered as customary international law.

For the sake of convenience, CIL will be discussed separately from the global and regional conventions. CIL will be considered in the marine pollution context and the applicability of certain general principles to the question of liability in the specific context of oil spills from offshore platforms will be discussed.

2.1.1. The Duty of States to Prevent Transboundary Environmental Harm under CIL:

The issues of transboundary pollution and the state liability were directly addressed in the *Trail Smelter Arbitration.*[6] The dispute was caused by fumes travelling from a smelter in Canada into the state of Washington in the USA. The two countries created the Trail Smelter Convention in order to convene a tribunal to resolve the issue.[7] The tribunal reached a decision that prohibited the smelter from causing further harm to Washington state's environment, declaring that 'no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence.'[8] Hancock and Stone note that commentators have accepted this principle as the basis of the duty of states to ensure that no acts within their jurisdiction cause harm to the water or air of other states.[9] The exact ambit of this principle remains unclear, and the position is perhaps best encapsulated by Douglas who writes 'the truth is that there is no accepted international law - which usually is based on custom, treaty or convention - stating the duty which one state owes its neighbour' respecting pollution'.[10] Hancock suggests that the result of the *Trail Smelter Arbitration* is a recognition of the CIL duty on states to prevent causing transboundary environmental harm to neighbouring states, with such a duty potentially including the payment of compensation on the part of the polluting state.[11] This same duty was recognised in the first case heard by the International Court of Justice ('ICJ'), the *Corfu Channel* case,[12] in

[6] 3 R. Int'l Arb. Awards 1938 (1941).
[7] Convention for Settlement of Difficulties Arising from Operation of Smelter Trail, B.C., 15 April 1935, United States-Canada, 49 Stat. 3245, T.S. No. 893, 3 R. Int'l Arb. Awards 1907 (1935) ('Trail Smelter Convention').
[8] Trail Smelter Arbitration, 3 *R. Int'l Arb. Awards* at 1938, 1965.
[9] W Hancock and R Stone 'Liability for Transactional Pollution Caused by Offshore Oil Rig Blowouts' (1981) 5 *Hastings Int'l & Comp. L. Rev.* 377, 379-380.
[10] W Douglas 'Environmental Problems of the Oceans: The Need for International Controls' (1971) 1 *Envtl. L.* 149, 155. At the time this article was written, Douglas was an Associate Justice of the United States Supreme Court.
[11] Hancock and Stone (note 9 above) 380.
[12] Corfu Channel case (U.K. v Alb.), Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4.

which the ICJ held that in accordance with 'certain general and well-recognised principles' every state has the 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.'[13] Whilst this case dealt with Albania's failure to disclose the presence of a minefield to the United Kingdom, the duty confirmed by the ICJ is general in nature and is therefore applicable to environmental matters. Commentators have also noted that the ICJ in its decision 'clearly rejects the idea that state liability presupposes "culpa" on the part of the individual whose conduct is imputed to the state.'[14] Sucharitkul states that as a result of the *Trail Smelter Arbitration* and the *Corfu Channel* case, amongst others, it is clear that 'a state must not only refrain from harming or hurting neighbouring states, it must also prevent harm in the territories of neighbouring states.'[15]

The obligation on states not to cause harm to a neighbouring state is echoed in the principle of *bon voisinage* (the good neighbour principle), which has been recognised as a 'fundamental rule of international law',[16] even being expressly recognised by the Charter of the United Nations.[17] Additionally, CIL requires states to consider the interests of other states in the exercise of their sovereignty in accordance with the *sic utere tuo ut alienum non laedas* (use your property in a manner that does not harm others) rule.[18] This principle was recognised by the ICJ in the *Corfu Channel* case.[19] It would therefore seem that the principle that states ought to prevent harm caused by transboundary pollution to their neighbouring states has been recognised by certain international arbitral bodies. It follows that one must next canvas specific environmental decisions and legal instruments to determine how this obligation ought to be interpreted in the context of marine pollution.

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[13] Ibid, 22.
[14] G Handl 'International Liability of States for Marine Pollution' (1983) 21 *Can. Y.B. Int'l L.* 85, 96.
[15] S Sucharitkul 'State Responsibility and International Liability under International Law' 18 *Loy. L. A. Int'l & Comp. L. Rev.* 821, 829.
[16] S Kirchner 'State Responsibility for Transboundary Ecological Damage: The Case of the Chinese Benzole Spill' (2005) *SSRN* 895847, 11, available at *http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID895847_code343201.pdf?abstractid=895847&mirid=1*, accessed 24 July 2013.
[17] Preamble of Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[18] Kirchner (note 16 above) 12. This principle was also recognised as a fundamental principle of South African property law in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106.
[19] Corfu Channel case (note 12 above) 22.

The duty on states to ensure that their activities do not cause environmental harm to their neighbours was recognised in Principle 21 of the Stockholm Declaration.[20] Principle 21 specifies that states have the 'sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states.'[21] Hancock and Stone state that Principle 21 is a clear endorsement of the *Trail Smelter Arbitration* decision.[22] Principle 21 has subsequently been preserved in Principle 2 of the Rio Declaration on Environment and Development ('Rio Declaration'),[23] given 20 years after the Stockholm Declaration. Principle 13 of the Rio Declaration, in a similar vein to Principle 22 of the Stockholm Declaration, encourages states to develop international law in an 'expeditious and more determined manner' to address liability for polluting activities. It is submitted that it is clear from the Rio Declaration, that the rule arising from the *Trail Smelter Arbitration* award is still accepted by the international community as CIL. This is significant as oil spills have the potential to be transboundary in nature, and states would therefore be able to avail themselves of this principle in the event of a dispute.

Principle 2 of the Rio Declaration has enjoyed support from a number of authoritative sources. The ICJ, in the *Pulp Mills* judgment,[24] stated that it is 'every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states'.[25] The ICJ further stated that 'a state is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another state'.[26] The ICJ noted that this obligation 'is now part of the corpus of international law relating to the environment.'[27] Boyle notes that the ICJ's decision

[20] The Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, U.N. Doc. A/Conf. 48/14 at 2-65 (1972) ('Stockholm Declaration').
[21] Principle 22 adds to this by requiring states to cooperate in developing the international law concerning liability for transboundary environmental harm.
[22] Hancock and Stone (note 9 above) 381.
[23] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 14 June 1992, U.N. Doc. A/Conf. 151/26 (Vol. I).
[24] International Court of Justice, *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment of 20 April 2010.
[25] Ibid, para 101 the ICJ quoted its decision in the *Corfu Channel* case.
[26] Ibid.
[27] See the ICJ's opinion in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29.

was congruent with existing precedents and the work of leading authors.[28] The ICJ's affirmation of Principle 2 of the Rio Declaration has been mirrored in the 2011 ITLOS Advisory Opinion.[29] In this opinion, the tribunal noted that 'while it is not considered reasonable to make a state liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the state under international law'.

Boyle posits that a combined reading of the *Trail Smelter* Arbitration, the *Pulp Mills* judgment and the ITLOS Advisory Opinion suggests that 'states will thus be responsible under international law for damage caused by their own failure to act with due diligence, but they are not guarantors of last resort for the defaults of industry or business. They will not be responsible for damage if they have acted with due diligence: there is no consensus in favour of international liability of states without fault.'[30] As noted above, this is a significant conclusion, as negligence may often not be present in the event of an oil spill from an offshore platform. When the *Ixtoc 1* spill occurred, the USA was unable to demonstrate that Mexico had been negligent. It is thus necessary to investigate the principles of CIL to determine whether a departure from the usual standard of fault (requiring negligence) is possible in the specific context of oil spills. It is also necessary to determine the maximum amount that may be claimed in the event of such a spill.

2.1.2. The Extent of Liability for Transboundary Harm under CIL:

As discussed previously, there are numerous treaties and other legal instruments that create liability regimes at the international level and these will be dealt with later. The present analysis will consider sources such as the reports of the ICL, amongst others, in an attempt to identify emerging trends in the context of liability and whether a case can be made for the imposition of strict liability (that is, liability without the requirement of negligence).

[28] A Boyle and G Handl 'International law and the Liability for Catastrophic Environmental Damage' (2011) 105 *Am. Soc'y Int'l L. Proc.* 423, 424.
[29] Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, ITLOS Seabed Disputes Chamber, 2011.
[30] Boyle and Handl (note 28 above) 424.

The International Law Commission ('ILC') published its 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities' in 2004 as part of an on-going effort by the international community to agree on principles of liability in the event of a damaging, but lawful act, with such damage being transboundary in nature.[31] The last version of these draft principles ('2006 Draft Principles') was adopted by the ILC at its 58th session in 2006, and was submitted to the General Assembly as part of the ILC's report.[32] These principles are not yet binding on the international community, but they represent the likely direction in which CIL is likely to evolve and as such, they merit consideration.

The 2006 Draft Principles define damage as meaning 'significant damage caused to person, property or the environment', including loss of life or personal injury, damage to property (including property that is considered part of the cultural heritage), loss or damage to the environment, costs incurred of rehabilitating the environment or reinstating property, and the cost of reasonable response measures.[33] The 2006 Draft Principles require states to adopt measures to ensure that prompt and adequate compensation is available to victims,[34] and that such measures shall include the imposition of liability on an operator or other person, without the requirement of proving fault.[35] The 2006 Draft Principles additionally recognise that operators should establish and maintain financial security,[36] and in appropriate cases this should include establishing 'industry-wide funds at the national level.'[37]

In its commentary attached to the draft principles, the ILC notes that the state itself is not required to pay compensation. The duty extends only to ensuring that such compensation is available.[38] The ILC further elaborated on what was meant by the term 'adequate compensation' noting that that 'adequacy is not intended to denote "sufficiency."'[39] This sets a fairly low

[31] 2004 draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities (ILC, 2004) available in *Report of the International Law Commission on its Fifty-Sixth Session* (UN Doc. A/CN.4/L.661, 8 July 2004).
[32] ILC Report A/61/10 in *Yearbook of the International Law Commission*, 2006, vol. II, Part Two.
[33] 2006 Draft Principles, principle 2(a)(i)-(v).
[34] Ibid. principle 4(1).
[35] Ibid, principle 4(2).
[36] Ibid, principle 4(3).
[37] Ibid principle 4(4).
[38] ILC Report (note 32 above) 152.
[39] Ibid, 154.

threshold, as the ILC seems to accept any compensation as adequate provided that the quantum of such compensation is not determined in an arbitrary fashion and is not 'grossly disproportionate' to the damage that has been suffered.[40] The commentary states that in the event of significant damage, liability is 'generally channelled to the operator of the installation.'[41] The ILC motivates this approach by arguing that primary operator liability is common in both international and domestic regimes, adding 'operator's liability has gained ground for several reasons and principally on the belief that one who created high risks seeking economic benefit must bear the burden of any adverse consequences of controlling the activity.'[42] Handl agrees with this approach by stating that it is 'unobjectionable, indeed eminently sensible from a deterrence and compensation point of view, given that it is private parties that most often are the primary actors in creating and controlling significant transboundary risks'.[43] However he remains critical overall due to his concern that the 2006 Draft Principles focus exclusively on these 'private actors'.[44]

The ILC justifies the imposition of the strict liability standard by recognising that ultra-hazardous activities (which would clearly include deep sea mineral exploration and exploitation) carry 'inherent risks of causing significant harm.' The ILC goes on to reason that 'it would be unjust and inappropriate to make the claimant shoulder a heavy burden of proof of fault or negligence in respect of highly complex technical activities whose risks and operation the concerned industry closely guards as a secret.'[45] This approach is commendable, as the highly technical nature of the evidence emerging from the *Deepwater Horizon* spill (as well as attempts by Halliburton to destroy such evidence) seems to corroborate the ILC's reasoning.[46] A significant difficulty - and one identified by the ILC - is the transposition of domestic concepts of strict liability to an international level. The ILC has thus created a simple definition, stating that strict liability means to 'make the person liability without any proof of fault for having created a

[40] Ibid.
[41] Ibid, 155.
[42] Ibid.
[43] G Handl 'International Accountability for Transboundary Environmental Harm Revisited: What Role for "State Liability"?' (2007) 37.2-3 *Environmental Policy and Law* 116 ('Handl 2007'), 116.
[44] Handl 2007 (note 43 above) 116.
[45] ILC Report (note 32 above) 156.
[46] T Fowler 'Halliburton to Plead Guilty to Destroying Deepwater Horizon Evidence' *The Wall Street Journal* 26 July 2013, available at *http://online.wsj.com/article/SB10001424127887324564704578628472663785926.html*, accessed on 12 August 2013.

risk by engaging in a dangerous or hazardous activity.'[47] The ILC rightly identifies this as a definition that should be palatable to the international community and yet still serves as an effective remedy.[48]

It is submitted that the 2006 Draft Principles demonstrate that there is a noticeable trend in the development of international law favouring the use of the strict liability standard in the case of transboundary pollution. However, it is necessary to note that the ILC was not attempting to 'proclaim or develop' international customary law, as the ILC was not able to 'reach consensus on what customary law is or should be in this area.'[49] Furthermore, Boyle writes that the greatest flaw of the 2006 Draft Principles is that they fail 'to require states as a matter of legal obligation to make provision for adequate redress in the event of transboundary damage'.[50] This is surely a damning critique, as in the absence of a clear obligation, it is unlikely that one can rely on a state to voluntarily provide compensation for environmental harm. In addition to the uncertainty of their application, the substance of the 2006 Draft Principles is also of some concern. As noted by Foster, the principles favour a 'privatised approach to risk' as they impose strict liability upon operators, but stop short at definitively imposing similar liability upon state actors.[51] Whilst the provisions do impose strict liability on another 'person or entity', it only does so 'where appropriate'.[52] This would seem to confirm the suspicion that the international community is reluctant to impose the standard of strict liability when claiming from states but the text of this provision does not necessarily exclude that possibility. Foster argues that the ILC has proposed a 'soft' set of principles in the hope of reaching international consensus, as the imposition of strict liability on states is controversial.[53] In fact, the topic is so controversial that it has taken the ILC more than three decades of work on the matter to produce the current draft principles. The sheer time it has taken the international community to reach this point makes it unlikely that a more

[47] ILC Report (note 32 above) 157.
[48] Ibid, 158.
[49] M Matheson 'The Fifty-Eighth Session of the International Law Commission' (2007) 101 *Am. J. Int'l L.* 407, 413
[50] A Boyle 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17 *Journal of Environmental Law* 3, 26.
[51] C Foster 'The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: Privatizing Risk?' 14 *Review of European Community & International Environmental Law* 265, 266.
[52] 2006 Draft Principles, principle 4(2).
[53] Foster (note 51 above) 272.

definitive and binding instrument will be produced in the near future. It is therefore necessary to consider other international instruments that support the strict liability standard.

The only international instrument that explicitly imposes strict liability on states for transnational harm is the Convention on International Liability for Damage Caused by Space Objects ('Space Objects Convention').[54] The Space Objects Convention has been recognised by a number of authors as a possible model for a treaty imposing liability for transboundary pollution. This is because the Space Objects treaty recognises that launching objects into space is an inherently dangerous activity, and thus it is possible for serious harm to occur even if a state has acted with reasonable care (and thus, not negligently). Cates notes the existence of a number of similarities between the launch of space objects and the exploration of the seabed, as they both require the use of advanced technology with the potential for failure even where the operator acts with due diligence.[55] She argues that in such cases 'a negligence theory of liability [is rendered] impotent because determining the exact malfunction causing injury is difficult'.[56] The quantum of compensation recoverable in terms of the Space Objects Convention is the amount required to 'restore the person, natural or juridical, state or international organisation on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred.'[57] A submission can therefore be made that precedent exists in international law for imposing strict liability on states to restore the condition of property to the condition it was in prior to the occurrence of transnational harm (in this context, transboundary pollution).[58] This precedent is arguably a reasonable continuation of the principle established in the *Trail Smelter* arbitration (and confirmed by the ICJ) that states have an obligation not to cause harm to another state and that they must take steps to prevent such a harm. This duty could now be expanded to include compensation for such harm without the requirement of proving negligence. Indeed, a growing

[54] Ibid, 273. Convention on International Liability for Damage Caused by Space Objects, 29 November 1971, 961 U.N.T.S. 187, 1 September 1972.
[55] M Cates 'Offshore Oil Platforms Which Pollute the Marine Environment: A Proposal for an International Treaty Imposing Strict Liability' (1983) 21 *San Diego L. Rev.* 691, 700.
[56] Ibid.
[57] Space Objects Convention, art. XII. The principle that the quantum of damages awarded must return the plaintiff to the position he would have been had the harm not occurred is a basic principle of South African law for pecuniary claims. See *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665.
[58] Foster (note 51 above) 273. Foster supports the notion that strict liability exists for transboundary pollution in general international law, and supports this argument by referencing a number of pollution conventions that impose

number of authors support the establishment of strict (or even absolute) liability in international law for harm caused to the environment.[59] Such a principle would prevent a repeat of the uncertainty following the *Ixtoc 1* spill in the event that the states concerned are not parties to a more comprehensive legal instrument specifically concerning such a situation.

2.1.3. Conclusion:

It is safe to conclude that CIL is applicable in the context of offshore oil platform spills but that it suffers from a lack of clarity and enforceability.[60] The draft principles published by the ILC are promising, as they recognise the need for implementing the strict liability standard in the context of transboundary harm. Whilst this is a positive step, it needs to be developed so that states themselves are liable to that same standard, not just 'operators'. The Space Objects Treaty is proof that such an approach is not unprecedented. Unfortunately the greatest problem with the reliance on CIL to regulate an industry stems from the nature of CIL itself. CIL, in the form of uncodified principles and ICJ judgments, is not sufficiently detailed to be of practical use in offshore drilling regulation. A rather cynical view of CIL is provided by Goldsmith and Posner, who wrote that 'with [CIL]… nations mouth their agreement to popular ideals as long as there is no cost in doing so, but abandon their commitments as soon as there is a pressing military, economic or domestic reason to do so.'[61] Whilst this view may be pessimistic, it is clear that one cannot hope to eliminate marine pollution by reliance on uncodified principles alone. The 2006 Draft Principles demonstrate that whilst there is some movement amongst states to address incidents of transboundary harm, their failure to agree on key principles after nearly three decades is disheartening. A strong political will is required to address this problem and unfortunately it does not appear to be present.

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strict liability on operators. Whilst not explicitly imposing strict liability on states per se, these conventions do support the idea that strict liability is an established feature in the context of transboundary harm.

[59] G Doeker and T Gehring 'Private or International Liability for Transnational Environmental Damage - The Precedent of Convention Liability Regimes' (1990) 2 *J. Envtl. L.* 1, 3.

[60] Doeker and Gehring (note 59 above) 2. The authors write that it is unclear 'in the absence of treaties, that states can be held absolutely or strictly liable for their damaging activities, even if they engage in ultra-hazardous enterprises, or those with a foreseeable risk of damage, such as operating nuclear or other power stations, using ships to transport oil and other hazardous or noxious cargoes, disposing of toxic wastes, exploiting seabed resources or outer spaces etc.' The authors further state that in event a state does actually pay, such payment 'is normally based not on customary international law but on regimes for certain specific areas of transnational pollution established by liability conventions or it is paid '*ex gratia*' i.e. without acceptance of the formal obligation to compensate.'

There is a need for clear and detailed agreements between states, at both the global and regional level, in order to begin to address the problem. Some such agreements do exist and their substance (as well as their applicability to offshore platforms spills) will be examined in order to determine whether they add sufficient clarity and enforceability to CIL principles.

[61] Goldsmith and Posner (note 4 above) 672.

2.2. THE APPLICABILITY OF LEADING GLOBAL MARINE OIL POLLUTION CONVENTIONS TO OFFSHORE PLATFORMS

A significant number of global conventions govern oil pollution of the marine environment, yet their applicability to offshore oil platforms is erratic. The majority of global conventions focus on tanker-source pollution, addressing only incidental aspects of oil pollution from offshore installations. This will analyse the provisions of these instruments; their applicability to offshore platforms, the liability framework created by the instruments, and will conclude with a critical evaluation of the effectiveness of these instruments.

2.2.1. The United Nations Convention on the Law of the Sea:

A discussion on legal instruments relating to the ocean cannot commence without first considering the United Nations Convention on the Law of the Sea ('UNCLOS').[62] UNCLOS was adopted in 1982 and signed by over 120 states,[63] quickly achieving the status of customary international law.[64] UNCLOS defines pollution of the marine environment as 'the introduction of substances into the marine environment which result or are likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.'[65] UNCLOS created fives zones — (1) the territorial sea; (2) the contiguous zone; (3) the exclusive economic zone ('EEZ'); (4) the continental shelf; and (5) the high seas,[66] specifying the extent to which states can exercise their jurisdiction in each zone. UNCLOS bestows upon each state the sovereign right to explore and exploit resources within its EEZ,[67] as well as limited rights to the establishment and use of artificial structures.[68]

[62] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3.
[63] As of 23 January 2013, 165 countries are signatories to UNCLOS. See the Chronological list of ratifications, accessions and succession available at *http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm*, accessed on 24 May 2013.
[64] Carroll B 'Drilling in the Deep: Jurisdiction over Oil Rigs Operating Outside of the Territorial Zone in Light of the Deepwater Horizon Spill' (2011) *18 Sw. J. Int'l L.* 667, 673. Since UNCLOS's provisions have achieved the status of customary international law, they are capable of being enforced against states who are not signatories to the convention - a notable example being the USA.
[65] UNCLOS, art. 1(4).
[66] Carroll (note 64 above) 674.
[67] UNCLOS, art. 56(1)(a).

UNCLOS grants states the jurisdiction to enact measures protecting and preserving the marine environment with the EEZ.[69] These rights are significant in the context of offshore oil platforms, as the EEZ extends up to 200 nautical miles from the edge of a state's territorial sea,[70] which means that the various EEZs of states cover approximately thirty percent of the ocean.[71] A state's continental shelf extends up to 350 nautical miles from the baseline of its territorial seas,[72] and UNCLOS similarly confers upon states the exclusive right to exploration and exploitation within this area.[73] Coastal states have the additional exclusive right to authorise and regulate drilling on the continental shelf 'for all purposes'.[74]

UNCLOS places a number of obligations on states, specifying that they are responsible for protecting and preserving the marine environment and are 'liable in accordance with international law'.[75] States are required to ensure that their legal systems provide for 'prompt and adequate compensation' in respect of damage caused by pollution to the marine environment (whether it is done by natural or juridical persons).[76] States are required to cooperate in the implementation of existing international law, as well as aid in the development of such laws in relation to responsibility and liability for environmental harm (the article mentions the introduction of measures such as compulsory insurance or compensation funds).[77] However, where a state takes all 'necessary and appropriate measures' to ensure that persons comply with the environmental provisions of UNCLOS, they escape any liability for such persons' failure to comply with those provisions.[78] UNCLOS states that contractors will be liable for any actual damage arising out of wrongful acts in the conduct of their operations,[79] although the exact

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[68] Ibid, art. 56(1)(b)(i).
[69] Ibid, art. 56(1)(b)(iii).
[70] Ibid, art. 57.
[71] Carroll (note 64 above) 675.
[72] UNCLOS, art. 76(5).
[73] Ibid, art. 77(1).
[74] Ibid, art. 81.
[75] Ibid, art. 235(1).
[76] Ibid, art. 235(2).
[77] Ibid, art. 235(3). This article has been seen as an affirmation of the concept of state responsibility in instances where marine pollution causes harm to the environment. See also E Duruigbo 'Reforming the International Law and Policy on Marine Oil Pollution' (2000) 31 *J. Mar. L. & Com.* 65, 78.
[78] Ibid, art. 139(2).
[79] Ibid, Annex III, art. 22.

extent of liability is woefully undefined.[80] A jaded spectator could hardly be blamed for assuming that the liability provisions are deliberately obtuse, as UNCLOS has been criticised for protecting maritime commercial interests.[81] This pessimism may well be warranted, as article 228(1) allows flag states to pre-empt litigation by coastal and port states against one of their vessels for pollution damage, provided the coastal state did not suffer major damage. This provision has been criticised, as it is clearly prone to abuse,[82] with critics calling it 'a mockery of port state and coastal state enforcement'.[83] As one author notes,[84] the 'lukewarm manner' with which UNCLOS addresses liability for pollution from offshore platforms has created 'the perfect recipe for dispute and disagreement'.

In addition to these 'general' rights and obligations conferred upon states by UNCLOS, there are articles that specifically pertain to offshore platforms within the zones created by the convention. Article 60 of UNCLOS confers upon coastal states the exclusive right to construct and operate installations and structures for the purposes of exploring and exploiting natural resources,[85] as well as granting these states exclusive jurisdiction over these structures, with such jurisdiction including the ability to enact laws and regulations.[86] This includes laws and regulations aimed at preventing, reducing or controlling pollution that is a result of seabed activities by structures within their jurisdiction,[87] provided that such laws are no less effective than international standards,[88] and congruent with any applicable regional policies.[89] States are obliged to take any other necessary measures to prevent, reduce and control pollution from these platforms.[90] It is clear from Article 60 that offshore platforms are 'ipso facto subject to coastal

[80] K Agyebeng 'Disappearing Acts - Toward a Global Civil Liability Regime for Pollution Damage Resulting from Offshore Oil and Gas Exploration' (2006) *Cornell Law School Graduate Student Papers*, Paper 11. Available at *http://scholarship.law.cornell.edu/lps_papers/11*.
[81] M Stephenson 'Vessel-Source Pollution under the Law of the Law of the Sea Convention - An Analysis of the Enforcement Standards' (1992) 17 *U. Queensl. L.J.* 267, 282-283.
[82] Duruigbo (note 77 above) 78.
[83] J Bernhardt 'A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference' (1980) 20 *Va. J. Int'l L.* 265, 307-08.
[84] Agyebeng (note 80 above) 11
[85] UNCLOS, art. 60(1)(b).
[86] Ibid, art. 60(2).
[87] Ibid, art. 208(1).
[88] Ibid, art. 208(5).
[89] Ibid, art. 208(4).
[90] Ibid, art. 208(2).

state control'.[91] Article 80 explicitly states that the provisions of Article 60 also apply to offshore installations and structures on the continental shelf. Article 214 of UNCLOS requires that states enforce these laws and regulations, and that they endeavour to implement applicable international rules and standards established through international organisations to prevent, reduce and control pollution of the marine environment from installations and structures under their jurisdiction, pursuant to Articles 60 and 80. Finally, Article 194 requires states to take measures to prevent, reduce and control pollution originating from any source, ensuring that their policies prevent damage by pollution to the environment.[92] Article 194 contains a list of potential sources of marine pollution and requires states to adopt measures to reduce pollution from these activities. This list of potential sources includes 'installations and devices used in exploration or exploitation of the natural resources' of the seabed,[93] which comfortably brings offshore platforms drilling for oil (such as the *Deepwater Horizon*) within its ambit. Article 194(3) has been criticised because, whilst it lists 'particular measures' to be adopted by states,[94] these measures do not actually result in reduced pollution.[95] This is because Article 194 merely requires states to adopt 'particular measures' to either prevent accidents or deal with emergencies resulting from certain activities, but it does not elaborate on what is meant by this term. Nor does the article seek to provide any specific practices that states ought to adopt that would satisfy its provisions. Thus Article 194 merely requires states to combat pollution for a specific list of activities, which would already fall within the broader obligation on states to protect and preserve the marine environment. It would clearly be preferable for this article to specify the practices that states must adopt to satisfy this requirement, but the article fails to do so.

Of further concern is the applicability of UNCLOS to offshore platforms as, despite their specific mention in the above provisions, ambiguity remains as to the extent to which many UNCLOS provisions apply to offshore platforms. Carroll notes that an obvious omission exists in Article 1 of UNCLOS, as it fails to define what is meant by 'a ship'.[96] Certain authors argue

[91] J Kindt 'The Law of the Sea: Offshore Installations and Marine Pollution' (1985) 12 *Pepp. L. Rev.* 381, 412
[92] UNCLOS, art. 194(1).
[93] Ibid, art. 194(3)(c).
[94] Ibid, art. 194(3)(c)(d).
[95] Kindt (note 91 above) 414.
[96] Carroll (note 64 above) 677.

that the term 'ship' ought to be read to include oil platforms,[97] however Carroll notes that this would be difficult as UNCLOS specifically refers to 'platform' and 'structure' in its provisions,[98] decreasing the likelihood that the latter terms are interchangeable with the former. Even the term 'oil platform' presents difficulties, as offshore installations designed to exploit minerals from the seabed are notoriously difficult to define.[99]

It is apparent that UNCLOS directly recognises the need to prevent environmental harm due to offshore platforms and therefore gives states the legal basis to implement laws and regulations to minimise such environmental risk.[100] UNCLOS provisions clearly designate the geographical areas in which states may exercise jurisdiction over such platforms, a measure which should remove any uncertainty as to who bears responsibility for the platform. Unfortunately, difficulties remain as the above measures require states to take additional steps to prevent environmental harm, but fail to allocate liability definitively in the event of a spill. It has been noted that 'the regime of enforcement by the UNCLOS continues to recognise the flag state as the principle repository of jurisdiction over its vessels'.[101] This is troublesome as the sovereignty of flag states remains 'jealously guarded',[102] with flag states often enjoying their protected status at the expense of coastal states' economic and environmental interests.[103] This problem is illustrated by the provisions of UNCLOS, which places the duty of preventing pollution on flag states whilst only conferring the right to do so to coastal states and not the corresponding duty.[104] It is submitted that the reliance of UNCLOS on flag states to regulate ships in the latter's ship registry is unwise, as flag states do not exercise sufficient control over such vessels in order for any regulation to be effective. It would perhaps be prudent to require the state that faces the

[97] G Walker and J Noyes 'Definitions for the Law of the Sea Convention - Part II' (2003) 33 *Cal. W. Int'l L.J.* 191, 318.
[98] Carroll (note 64 above) 677.
[99] C Brown 'International Environmental Law in the Regulation of Offshore Installations and Seabed Activities: The Case for a South Pacific Regional Protocol' (1998) 17 Australian Mining & Petroleum L.J. 109, 113
[100] L Chabason 'Offshore Oil Exploitation: A New Frontier for International Environmental Law' (2011) Working Paper No 11/2011 *IDDRI*, pg. 6 available at *http://www.iddri.org/Publications/Collections/Idees-pour-le-debat/WP%201111_chabason_offshore.pdf*, accessed on 23 May 2013.
[101] D Dzidzornu and B Tsamenyi 'Enhancing International Control of Vessel-Source Oil Pollution Under the Law of the Sea Convention, 1982: A Reassessment' (1991) 10 *U. Tasmania L. Rev.* 269, 281. The difficulties created by the frequent use of flag states to avoid strict regulation will be addressed in detail later in this dissertation.
[102] E Ellis 'International Law and Oil Waters: A Critical Analysis' (1995) 6 *Colo. J. Int'l Envtl. L. & Pol'y* 31, 42.
[103] Dzidzornu and Tsamenyi (note 101 above) 287.
[104] Duruigbo (note 77 above) 75.

greatest risk of damage from pollution, the coastal state, to prevent pollution from platforms within its territory, as they have means (and the incentive) to do so.

2.2.2. The 1972 London Dumping Convention and the 1996 Protocol:

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter ('the London Convention')[105] is an undertaking by contracting parties to protect the marine environment against pollution caused by hydrocarbons, including oil,[106] wastes generated in the course of operation of vessels, aircraft, platforms and other man-made structures at sea,[107] and wastes or other matter directly arising from the exploration, exploitation and associated off-shore processing of sea-bed mineral resources.[108] The London Convention is notable as it was the first international attempt to regulate deliberate dumping of wastes and material of any kind.[109] There are currently 87 states that have ratified or acceded to the London Convention, with 20 contracting parties also accepting the 1978 amendments concerning settlements of disputes.[110] The amendments are not yet in force.[111] As concerns civil liability, the London Convention imposes liability in 'accordance with the principles of international law regarding state responsibility' for causing harm to any area of the environment or the environment of another state by the 'dumping of wastes and other matter of all kinds'.[112] Additionally, the London Convention requires contracting parties to develop methods for assessing liability and settling disputes concerning dumping.[113]

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[105] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 30 August 1975, 11 ILM 1294 ('London Convention').
[106] London Convention, art. 12(a).
[107] Ibid, art. 12(c).
[108] Ibid, art. 12(f).
[109] E Molenaar 'London Convention' (1997) 12 *Int'l J. Marine & Coastal L.* 396, 396. Molenaar notes that the London Convention was not the first convention to cover situations where waste was incidental to the functioning of a vessel or structure, but rather the deliberate dumping of such waste.
[110] See the report on the status of the London Convention and Protocol published on 19 July 2012 by the International Maritime Organisation, available at *http://www.imo.org/blast/blastDataHelper.asp?data_id=31094&filename=2.pdf*, accessed on 31 May 2013.
[111] In terms of Art. 15(1) the amendments will come into force once two-thirds of the contracting parties accept them.
[112] London Convention, art. 10.
[113] Ibid.

In 1996, states, many of which are party to the London Convention, sought to increase the effectiveness of the London Convention in order to better address modern disposal practices. To this end the 1996 Protocol to the Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter ('1996 Protocol')[114] was drafted, entering into force on 24 March 2006 (superseding the London Convention)[115] with 42 states parties.[116] The 1996 Protocol essentially created a separate convention as it has altered or supplanted almost every provision of the original London Convention.[117] The 1996 Protocol has expanded on the London Convention's definition of 'dumping' so that it not only includes wastes and other matters from platforms and other man-made structures, but also the deliberate disposal of the platform or man-made structure itself.[118] The 1996 Protocol has adopted a 'reverse list' approach, meaning that all dumping is prohibited unless the wastes or matter are on the approved list of substances.[119] This novel approach gives the 1996 Protocol a significantly wider scope that its predecessor. Unfortunately, the 1996 Protocol fails to make any significant changes regarding the imposition of liability,[120] except that it now features a clear procedure for the settlement of disputes.[121] Thus the 1996 Protocol, as was the case with London Convention before it,[122] still restricts liability to the existing principles of international law and ultimately goes no further than UNCLOS in establishing a clear liability regime for oil spills. The 1996 Protocol merely imposes standard liability upon states for deliberate disposal from offshore platforms, which is unfortunate considering progressive instruments (such as the CLC and Fund Conventions) have begun to adopt strict liability. Whilst such a rudimentary framework is necessary and a good point of departure, it does not truly address the massive potential for harm that may be caused by an unintentional oil spill. Carroll agrees with this conclusion, stating that the London Convention is

[114] 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, 7 November 1996, 36 ILM 1.
[115] M Kashubsky 'Marine Pollution from the Offshore Oil and Gas Industry: Review of Major Conventions and Russian Law (Part 1)' (2006) 151 *Maritime Studies* 1, 3. Available at *http://worldlii.austlii.edu.au/au/journals/MarStudies/2006/31.html*, accessed on 11 May 2013.
[116] See the IMO Overview of Contracting States as of 28 May 2012, available at *http://www.imo.org/blast/blastData.asp?doc_id=7541&type=body*, accessed on 30 May 2013.
[117] Molenaar (note 109 above) 398.
[118] 1996 Protocol, art. 4(1) and (2).
[119] Ibid, art. 4(1).
[120] Ibid, art. 15.
[121] Ibid, art. 16.
[122] Molenaar (note 109 above) 402.

'no more effective than [UNCLOS], MARPOL and CLC in preventing environmental disasters stemming from oil rigs'.[123]

2.2.3. The Oil Pollution Preparedness and Response Convention:

The International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 ('OPRC')[124] entered into force on 31 May 1995 with 104 states party to the convention.[125] Numerous authors have recognised the OPRC as one of the most important,[126] and efficient,[127] global instruments relating to pollution from offshore platforms.[128] This is because the OPRC makes specific reference to 'offshore units' in its provisions, a rarity in IMO conventions,[129] defining them as 'any fixed or floating offshore installation or structure engaged in gas or oil exploration, exploitation or production activities, or loading or unloading of oil'.[130] The OPRC requires offshore units under the jurisdiction of a party state to have 'oil pollution emergency plans' that are co-ordinated under a national system and approved by the party state.[131] The operators of such offshore units are required to report, without delay, any event (whether relating to their own vessel or an observed vessel) involving a discharge, or possible discharge, of oil to the coastal state which exercises jurisdiction over the offshore unit.[132]

Whilst the main objective of the ORPC is the establishment of emergency procedures and increased cooperation between states in preventing or minimising oil spills, the convention does

[123] Carroll (note 64 above) 682.
[124] International Convention on Oil Pollution, Preparedness, Response and Co-operation 1990, 30 November 1990, 1891 UNTS 78.
[125] See ECOLEX list of State parties to the OPRC, available at *www.ecolex.org/ecolex/ledge/view/RecordDetails?id=TRE-001109&index=treaties*, accessed on 1 June 2013.
[126] Kashubsky (note 115 above) 151.
[127] Agyebeng (note 80 above) 14.
[128] H Esmaeili *The Legal Regime of Offshore Oil Rigs in International Law* (2001) 158.
[129] As noted by R Shaw in his paper 'Regulation of offshore activity - Pollution liability and other aspects", delivered to the CMI Beijing International Conference 2012, available at *http://www.cmi2012beijing.org/dct/attach/Y2xiOmNsYjpwZGY6Mjg5NDY=*, in June 2011 the IMO refused to consider a global treaty which sought to regulate offshore platforms (a topic that will be addressed in greater detail below) on the basis that its mandate was restricted to matters pertaining to merchant shipping. Shaw is critical of this objection as the IMO has repeatedly worked on instruments imposing safety regulations on offshore platforms, protecting such platforms from unlawful acts and a variety of other important issues. As stated by the Secretary General of the IMO, there is no UN body that has better authority for addressing these matters.
[130] OPRC, art. 2(4).
[131] Ibid, art. 3(2).
[132] Ibid, art. 4(1)(2).

have possible liability implications. In the preamble of the convention it states that the OPRC 'takes account of the 'polluter-pays' principle as a general principle of international law'.[133] This is a curious feature of the convention, as none of the articles in the OPRC directly address the issue of civil liability. The only portion of the OPRC that has liability implications is an annex concerning reimbursement for costs of assistance.[134] This annex provides that when, in the absence of any other agreement, a state requests the assistance of another state, the former should pay the costs of the latter.[135] Where a state acts on its own, it shall bear the costs.[136] It is therefore apparent that the primary consideration of the OPRC is not liability. Thus, whilst the convention may be an incredibly significant tool in the procedural regulation of offshore platforms and in promoting cooperation between states in the implementation of preventative and remedial measures,[137] it is unfortunately of little assistance in the context of allocating liability in the event of an oil spill.

2.2.4. MARPOL:

The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 ('MARPOL')[138] entered into force on 2 October 1983 and can be considered the primary international convention combatting oil pollution from ships, with over 150 states party to the convention.[139] The key objective of MARPOL is to eliminate intentional and accidental discharge of harmful substances into the marine environment.[140]

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[133] Ibid, preamble. The preamble also notes the significant role played by regional conventions and agreements. The importance of these agreements will be discussed in detail below, coupled with an analysis of the polluter-pays principle.
[134] Ibid, Annex 'Reimbursement of Costs of Assistance'.
[135] Ibid, Annex (1)(a)(i).
[136] Ibid, Annex (1)(a)(ii).
[137] Llewelyn Usher *Offshore Drilling in Ocean Waters and its Adverse Effect on the Potential of Blue Carbon of Coastal State: A Belize Perspective* (unpublished LLM dissertation, IMO, International Maritime Law Institute, 2012) available at *http://www.rempec.org/admin/store/wyswigImg/file/News/Forthcoming%20Meetings/Offshore%20Protocol%20WG%20(Malta,%2013-14%20June%202013/WG%20384-%20INF.5%20-%20IMLI%20Doc%20-%20Llewelyn%20Usher%20-%20E.pdf*, accessed on 11 September 2013, 29.
[138] International Convention for the Prevention of Pollution from Ships, 1973, adopted 2 November 1973, 1340 UNTS 184, (entered into force 2 October 1983), amended by Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973, adopted 17 February 1978, 1340 UNTS 61 (entered into force 2 October 1983).
[139] See the list of contracting states as of 27 September 2012, prepared by the Australian Maritime Safety Authority, available at *https://imo.amsa.gov.au/public/parties/marpol78.html*, accessed on 2 June 2013
[140] E Ellis 'International Law and Oil Waters: A Critical Analysis' (1995) 6 *Colo. J. Int'l Envtl. L. & Pol'y* 31, 41.

A preliminary concern arising from MARPOL is apparent from its title; the convention only addresses pollution from 'ships'. As mentioned above, the applicability of most oil pollution conventions to offshore platforms is partial and indirect at best. Whilst MARPOL defines a 'ship' as a vessel including 'fixed or floating platforms', it is only applicable when the platform is in a mobile configuration.[141] This means that MARPOL will apply to a platform whilst it is in transit to a drilling site, but it will not apply once the platform has been configured for drilling. This has the result of excluding the actual operation of the platform from the ambit of MARPOL, thus preventing any claims for environmental damage resulting from a well leak or a blowout. This is due to the definition of 'discharge' which specifically excludes the release of harmful substances directly arising from the exploration, exploitation and associated offshore processing of seabed mineral resources.[142] Annex 1 of MARPOL provides a list of 'unified interpretations' that must be adopted when considering MARPOL provisions. Regulation 21 sets out the application of MARPOL to offshore platforms engaged in the exploration and exploitation of oil, as addressed in Article 2(3)(b)(ii).[143] Regulation 21 identifies four categories of potential discharges that may result from offshore exploitation of minerals: (1) machinery space drainage, (2) offshore processing drainage; (3) production water discharge, and (4) displacement discharge; stating that only machinery space drainage is subject to the provisions of MARPOL.[144] Additionally, where a tanker is utilised as an offloading facility, it is to be treated as a platform for the purposes of regulation 21.[145] Annex V, 'Regulations for the Prevention of Pollution by Garbage from Ships',[146] is also applicable to offshore platforms[147]. Regulation 4 even prohibits the disposal of garbage from offshore platforms whereas ships are subject to far less-stringent measures.[148] Regrettably, the incorrect disposal of garbage, whilst clearly undesirable, pales in comparison to an oil spill, an area MARPOL expressly excludes from its ambit.

[141] Kashubsky (note 115 above) 4.
[142] MARPOL, art. 2(3)(b)(ii).
[143] Ibid, annex I, 10.1.1.
[144] Ibid, annex I, appendix 6 illustrates the various offshore platform discharges.
[145] Ibid, annex I, 10.1.2.
[146] Ibid, annex V.
[147] V Radovich 'International Legal Regime of Offshore Structures - Environmental Concerns' (2010) Paper submitted to 2010 CMI Buenos Aires Colloquium, available at *www.cmi2010buenosaires.com.ar/papers/Paper_2_Violeta_Radovich.pdf*, accessed 31 May 2013.
[148] MARPOL, annex V, Reg. 4(1).

A further concern is that MARPOL provisions must not conflict with UNCLOS provisions.[149] The result of this is that any provisions regulating the design or manufacture of oil rigs (or ships in general) are not enforceable against offshore oil platforms, as Articles 60 and 94 of UNCLOS directly prevent coastal states from mandating the design or construction standards of vessels within their EEZ.[150] Without the right to implement design standards in their EEZ, coastal states are left perilously exposed and must rely on the flag state to regulate the design of an installation.[151] As Richards writes, it is the coastal state that bears 'both the brunt of the harm and the majority of the clean-up responsibility'.[152] One could therefore suggest that as the coastal state bears the risk of pollution, it should have the right to mandate design standards for installations. However, as installations are often relocated to different states in the pursuit of oil, it would be incredibly difficult in practice for an installation to conform to the design specifications of different states.

MARPOL has been criticised as states frequently fail to comply with its provisions. Critics have stated that MARPOL fails to provide a mechanism that ensures compliance with its provisions,[153] with others noting that there are few economic or legal motivations to comply with the convention.[154] A reluctance by states to enforce MARPOL's provisions coupled with poor applicability to offshore platforms leads to the inevitable conclusion that MARPOL, in its present form, is of limited application to pollution emanating from oil platforms. Whilst it may cover incidental pollution resulting from, *inter alia*, incorrect garbage disposal, it will be of no use in the event of a catastrophic oil spill nor can it be utilised to force a design of offshore platforms that is less prone to pollution.

[149] Ibid, art. 9.
[150] Carroll (note 64 above) 681.
[151] UNCLOS, art. 94(3).
[152] R Richards 'Deepwater Mobile Oil Rigs in the Exclusive Economic Zone and the Uncertainty of Coastal State Jurisdiction' (2011) 10 *J. Int'l Bus. & L.* 387, 387.
[153] Duruigbo (note 77 above) 74.
[154] J Curtis 'Vessel-Source Oil Pollution and MARPOL 73/78: An International Success Story?' (1985) 15 *Envtl. L.* 679, 705.

2.2.5. The CLC and Fund Conventions:

The 1969 International Convention on Civil Liability for Oil Pollution Damage ('CLC 69')[155] was an instrument drafted to specifically to address the issue of liability for pollution emanating from oil tankers.[156] The CLC 69 was drafted in response to the *Torrey Canyon* oil spill, as the incident revealed the lacunae that existed in the liability regime.[157] The CLC 69 defines the term 'ship' as 'any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo',[158] and thus is not directly applicable to oil pollution from offshore platforms. This is because offshore platforms are designed for the exploration and exploitation of oil, and do not carry it in bulk as cargo.[159] However, whilst the CLC may not be directly applicable to offshore platform oil pollution, it is a vital instrument as it encapsulates the international law on oil spills from ships. It is not unreasonable to assume that a similar approach ought to be adopted by an offshore platform regulatory regime, as there are numerous similarities between a spill from a tanker and a spill from an offshore platform. Both activities are economically valuable to the international community, both have the potential to draw massive liability in the event of a spill and it is impossible to completely remove any risk from both simply by exercising due care.[160] It is for this reason that an understanding of the liability framework created by the CLC is vital.

The CLC 69 imposed strict liability on the owner of an oil vessel for any oil spill,[161] unless a specified exception applied.[162] The reason for implementing strict (no fault) liability was due to

[155] International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, 9 ILM 45.
[156] Brown 'The Conventional Law of the Environment' (1973) 13 *Nat. Resources J.* 203, 224.
[157] See the IMO description of their work on liability and compensation, available at http://www.imo.org/OurWork/Legal/Pages/LiabilityAndCompensation.aspx, accessed on 24 July 2013.
[158] CLC 69, art. 1(1).
[159] The International Oil Pollution Compensation (IOPC) Funds authorised an analysis of the CLC to determine what the term 'ship' encapsulates. The report concluded that the vessel must be carrying oil as cargo. It is not sufficient for the vessel to hold the oil in storage alone, the vessel must be (1) carrying oil and (2) undertaking a voyage, in order for the CLC to be applicable. The report document has the reference IOPC/OCT/11/4/4 and is available at *http://documentservices.iopcfunds.org/meeting-documents/download/docs/3535/lang/en/*, accessed on 25 July 2013.
[160] W Hancock and R Stone (note 9 above) 384-385.
[161] CLC 69, art. 3(1).
[162] Ibid, art. 3(2). The exceptions include pollution damage resulting from an act of war, where the damage is wholly caused by a third party or wholly caused by an act of another government.

the difficulty in recovering damages on the basis of negligence.[163] In order to soften the blow of strict liability, the CLC 69 placed a ceiling on a potential liability in accordance with the tonnage of the vessel, with a maximum liability amount of 210 million 'francs'.[164] In order to avail themselves of this limitation, the CLC 69 required ship owners to contribute to a fund equal to the maximum applicable liability.[165] The convention outlined the procedure for distributing the fund with the court of the state in which the fund was deposited having exclusive jurisdiction to resolve any issues that may arise in relation to the distribution procedure.[166] The CLC 69 went even further and required a state to directly compensate another for any harm caused by the pollution from one of its own ships.[167]

The CLC 69 was thus a very effective liability regime but the absolute cap on liability was perceived to be insufficient in the event of a major spill.[168] To resolve this shortcoming, the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution ('71 Fund Convention')[169] was drafted. The 71 Fund Convention was premised on the idea that the shipping industry alone should not bear the burden of supporting the liability regime created by the CLC 69, but rather that it 'should in part be borne by the oil cargo interests'.[170] This objective would be achieved, as Hancock and Stone explain it, by the 71 Fund Convention implementing three main concepts: 1) increasing the possible compensation provided by the CLC 69; 2) relieving ship owners of any extra financial burden; and 3) spreading the expenses of

[163] C Ingram 'Oil Pollution - Rylands v. Fletcher' (1971) 121 *New L.J.* 183, 183.
[164] CLC 69, art. 5(1). A 'franc' in respect of the CLC 69 is not a reference to the French currency, but it is rather a unit created by art. 5(9) of the CLC 69 and is equal to 'sixty-five and a half milligrams of gold of millesimal fineness nine hundred'. See Hancock and Stone (note 9 above) 386.
[165] Ibid, art. 5(3).
[166] Ibid, art. 9(3).
[167] Ibid, art. 11(2). Hancock and Stone (note 9 above) 387 observe whilst article 11(2) respects the sovereign immunity of states, this immunity does not extend to its commercial activities.
[168] A difficulty that seems ever present in international agreements pertaining to pollution featuring a 'liability cap' is that they are frequently conservative. Only after a catastrophic spill are they adjusted to a more appropriate level. The (well-documented) danger of this approach is that the liability limits are always out-dated at the time of the 'next big spill' and thus the international community seems to be involved in a perpetual 'catch-up' with the increasing economic costs of environmental disasters. See John Hunt *A comparative analysis of the Civil Liability and Fund Conventions, TOVALOP and CRISTAL, the U.S. Federal Oil Pollution Act and U.S. State Legislation, as legal mechanisms regulating compensation for tanker-source oil pollution damage as of February, 1994* (unpublished LLM these, University of Natal, 1995) 125 who notes that it was originally the Belgium delegation at the 1969 Brussels Convention who suggested a secondary fund financed by the oil industry. Whilst initially unpopular, this suggestion slowly gained support amongst the other nations.
[169] Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 18 December 1971, 11 ILM 284.

the liability regime amongst all the major players in the oil industry.[171] The 71 Fund Convention exists as a complementary structure to the CLC 69, increasing the liability limit to 450 million francs,[172] and providing compensation in certain circumstances where it would not be possible under the CLC 69.[173] A major departure from the CLC 69 is the 71 Fund Convention's requirement of contributing to the fund if a party transports more than 150 000 tonnes of crude oil by sea per annum.[174] The reasoning behind this requirement is to shift the financial burden away from the ship-owner and towards the parties who benefit from the offshore oil trade (and ultimately the consumer).[175]

Whilst the combination of the CLC 69 and the 71 Fund Convention created an effective liability regime, both underwent revisions in 1992 and were significantly altered by new protocols. The Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1992 ('CLC 92')[176] has maintained the underlying structure of the CLC 69 albeit with revised upper limits and insurance requirements. Commentators have noted that the CLC 92 was drafted in the aftermath of the *Exxon Valdez* disaster, and contained relaxed 'entry into force requirements' in order to avoid the need for accession by the USA.[177] As with the CLC 69, the CLC 92 does not apply to offshore oil platforms, instead catering specifically to 'ships' with a ship being defined as a vessel 'actually carrying oil in bulk as cargo'.[178] The CLC 92 retained the key feature of the CLC 69 by implementing strict liability for damage caused by pollution,[179] the result being that a claimant need only identify the polluting ship without the requirement of

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[170] Ibid, Preamble.
[171] Hancock and Stone (note 9 above) 388.
[172] 71 Fund Convention, art. 4(4).
[173] Ibid, art. 4(1)(4).
[174] Ibid, art. 10(1).
[175] Hancock and Stone (note 9 above) 389.
[176] Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 27 November 1992, 1956 UNTS 255, 30 May 1996.
[177] M Mason 'Transnational Compensation for Oil Pollution Damage: Examining Changing Spatialities of Environmental Liability', pg. 6, available at *http://www.lse.ac.uk/geographyandenvironment/research/researchpapers/rp69.pdf*, accessed on 24 July 2013. Mason notes that the USA adopted far stricter liability provisions in its domestic legislation than those found in the CLC and Fund Conventions, specifically the lack of a liability limit. The approach adopted by the USA will be analysed later in this thesis.
[178] CLC 92, art. 1.
[179] Ibid, art. 4. CLC 92 leaves unchanged the provisions of CLC 69 that allowed a ship owner to escape liability in certain circumstances, including situations where the incident was wholly caused by a third party. These limitations on liability do not however alter the strict liability standard maintained by art. 4 of CLC 92.

establishing negligence.[180] The CLC 92 defines 'pollution' damage to include loss or damage caused by the discharge of oil from the ship,[181] but this does not extend to a loss of profits. A claimant may also recover any costs of preventive measures that they implemented, or any loss or damage caused by those measures.[182] As with the CLC 69, a limit on the amount that may be claimed from the ship-owner does exist but this limitation does not apply in certain instances, such as incidents where the ship owner deliberately caused the damage or acted recklessly with the knowledge that oil pollution would be likely.[183]

The International Maritime Organisation Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage ('92 Fund Convention')[184] retains its predecessor's complementary role with the CLC conventions. The 92 Fund Convention allows a claimant to recover their losses in the event that the CLC 92 does not adequately cover the claim.[185] This includes situations where the liable ship-owner is insolvent or cannot be identified.[186] The 92 Fund Convention has subsequently been amended by the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 ('2003 Protocol')[187]. The 2003 Protocol created a supplementary fund to compensate for pollution damage where the claimant was unable to 'obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention'.[188] The supplementary fund created by the 2003 Protocol will usually compensate a claimant only after they have first claimed from the 1992 Fund[189]. The increased amount available to a claimant from the supplementary fund is significantly greater than the 1992 Fund, as the 2003 Protocol permits compensation up to 1155 Special Drawing Rights (SDR) per ton, whereas the 1992 Fund Convention permits 312.6 SDR

[180] J Allen 'A Global Oil Stain - Cleaning Up International Conventions for Liability and Compensation for Oil Exploration/Production' (2011) 25 *Austl. & N.Z. Mar. L.J.* 90, 93.
[181] CLC 92, art. 2(3).
[182] Ibid, art. 2(3).
[183] Ibid, art. 4(2).
[184] International Maritime Organisation Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 18 December, 973 UNTS 3.
[185] 92 Fund Convention, art. 3.
[186] Allen (note 180 above) 93.
[187] Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, 16 May 2003, IMO Doc. LEG/CONF. 14/20, 5 March 2005 ('2003 Protocol').
[188] Ibid, art. 4(1).
[189] Ibid, art. 5 and art. 6(1).

per ton and the CLC 92 provides up to 137.9 per ton if the tanker's gross tonnage exceeds 140 000.[190]

Whilst the CLC and Fund Conventions clearly seek to address large-scale oil pollution emanating from tankers, and they have has been extremely effective in doing so,[191] there are two clear concerns for our purposes. First, as mentioned above, the two conventions are not applicable to spills from oil platforms. Second, the manner in which the conventions' liability limits are increased is concerning.[192] There is a noticeable trend of the international community setting a limit and only increasing it following a disaster (such as the *Exxon Valdez*) that exceeds that limit. This approach is reactive and does not anticipate any future crises — an approach that is, with respect, short sighted.

2.2.6. Critical analysis of the present global regime:

It is evident from the above analysis that the global treaty regime in regard to pollution emanating from offshore installations is rather sparse and inadequate. Whilst a number of conventions, in addition to those listed above,[193] may apply to certain aspects of the offshore oil industry there is nothing on the scale of the CLC and Fund Conventions. There are a number of possible reasons for the lack of any unified convention on the topic. The most likely explanation for the lack of motivation on the part of the international community is the infrequency of large oil spills from offshore platforms. Whilst tanker spills occur fairly frequently, large-scale platform related disasters are a rarity and this infrequency has resulted in the seeming

[190] See maximum amounts of compensation available as of October 2012, published by The International Tanker Owners Pollution Federation Limited, available at *http://www.itopf.com/spill-compensation/clc-fund-convention/*, accessed on 5 June 2013. As of October 2012, 1155 SDR was equivalent to $1 778 700 000.

[191] R Shaw 'Trans-boundary Oil Pollution Damage Arising from Exploration and Exploitation of Offshore Oil. Do We Need An International Compensation Convention?' (2011), available at *http://www.comitemaritime.org/Uploads/Newsletters/CMI%20News%202011-3.pdf*, page 18, notes that the effectiveness of the CLC and Fund regime is even more astonishing when one considers that only 35 people manage the regime from an office in London. He argues that this is evidence that small-scale funds can clearly be effective in addressing pollution claims arising from offshore platform operations.

[192] An interactive timeline of the CLC and Fund liability increases is available at *http://www.imo.org/MediaCentre/HotTopics/Scripts/Timeline.html*, accessed on 24 July 2013.

[193] Conventions such as the International Convention for Safety of Life at Sea ('SOLAS'), 1 November 1974, 1184 UNTS 18961, have dedicated provisions pertaining to offshore installations, but these matters do not pertain to liability for environmental damage. Whilst conventions such as SOLAS are certainly necessary, there is a strong

indifference of the international community. A further reason could be that many the major oil companies are registered in countries such as the USA or the United Kingdom whereas the oil fields are based elsewhere, thus creating competing interests between these two groups of states. However, as many commentators have noted,[194] there is an increased danger of large-scale oil spills from platforms due to increased offshore exploration and exploitation. Furthermore, the scale of these disasters is set to increase as wells are drilled at significantly deeper depths every year. The *Deepwater Horizon* was drilling at a depth of 1500 m but platforms off the coast of Australia, such as the *Maersk Discoverer*, are drilling at a depth of 3000 m.[195] One can only imagine the difficulty in capping a well twice as deep as that drilled by *Deepwater Horizon*, a well that took many months to permanently seal.

Hancock and Stone also suggest that the international community is reluctant to introduce further regulation to the offshore oil industry,[196] as it may be unwilling to place any additional obstacles in the path of petroleum exploration and development.[197] Their hypothesis would appear to be correct when one considers the fate of the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources ('CLEE').[198] CLEE was a convention specifically designed to regulate the international offshore drilling industry. In its preamble CLEE stated, as an objective, the desire to 'adopt uniform rules and procedures for determining questions of liability and providing adequate compensation in such cases.'[199] CLEE was directly applicable to any 'installation' fixed or mobile, utilised for the purposes of exploring for, producing, treating, storing, transmitting or regaining control of crude

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argument for a consolidated legal instrument to govern all aspects of offshore drilling and an argument will be advanced for such a convention later in this dissertation.

[194] Hancock and Stone (note 9 above) 390.

[195] See the breakdown of Maersk's Fleet, Maersk Discoverer, available at *http://www.maerskdrilling.com/drillingrigs/semi-submersibles/pages/maersk-discoverer.aspx*, accessed on 6 June 2013.

[196] Hancock and Stone (note 9 above) 391.

[197] Shaw (note 191 above) explains that the IMO have repeatedly refused to consider regulations pertaining to oil platforms, stating that their mandate restricts them to shipping matters. This is despite numerous submissions to the IMO suggesting that there is no more appropriate UN agency to address the matter. Their failure to implement a liability regime is even more baffling when one considers that the IMO publishes 'Code for the Construction and Equipment of Mobile Offshore Drilling Units, 2009' (2009 MODU Code) comprehensively governing construction standards of offshore platforms. This would seem to further reduce the legitimacy of the argument that offshore platforms do not fall within the mandate of the IMO.

[198] Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 1 May 1977, 16 ILM 1451 ('CLEE').

[199] Ibid, Preamble.

oil'.[200] CLEE applied to wells drilled for the same purposes.[201] CLEE therefore cast a very wide net when defining what activities fell within its ambit, essentially seeking to regulate any vessel or structure designed to drill for oil (or any vessel that was involved with such drilling). CLEE applied exclusively to pollution damage resulting from an incident occurring in waters under the jurisdiction of a controlling state, with such damage being suffered in the territory of a party state or an area of where it had sovereign rights in terms of international law.[202] The operator would be liable for all damages recovered under CLEE unless it is able to demonstrate that the damage occurred due to certain events such as an exceptional natural disaster, civil war or other hostilities.[203] CLEE was clearly modelled on the CLC and Fund Conventions, incorporating concepts such as strict liability with a limit on the amount that could be claimed from an operator, unless that operator could be shown to have intentionally caused the pollution or that he acted with gross negligence.[204] The drafters of CLEE presumably observed the success of the tanker conventions and sought to extend similar coverage to offshore platforms. They failed, as CLEE was not enthusiastically received by states, with only six becoming signatories to the convention and no accessions.[205] The result - CLEE remains unenforceable.[206] An additional concern pertaining to enforcement is that even where a 'global' international instrument contains provisions stipulating liability, there is no international court a claimant may approach to adjudicate their claim,[207] nor is it likely that a national court would have jurisdiction.[208] This means that for any instrument to be effective, there must be a will on the part of states to enforce its provisions, something that seems unlikely considering CLEE's stillbirth.

In conclusion, it is clear that whilst a number of conventions exist to address issues of oil pollution in the marine environment, they were clearly not drafted with the intention of specifically addressing the problem of oil pollution caused by or emanating from offshore

[200] Ibid, art. 1(2).
[201] Ibid, art. 1(2).
[202] Ibid, art. 2.
[203] Ibid, art. 3(3).
[204] Ibid, art. 6(4).
[205] List of states party to CLEE available at *http://www.ecolex.org/ecolex/ledge/view/RecordDetails?id=TRE-000434&index=treaties*, accessed on 5 June 2013.
[206] CLEE, art. 20 requires no less than four states to ratify the convention in order to come into force and not a single state has done so.
[207] L Bergkamp *Liability and Environment* (2001) 3.
[208] Ibid, 3, fn. 17.

platforms. As offshore oil production is increasing rapidly, the international community finds itself in a disconcerting situation because there is an increasing risk of oil pollution being caused by the activities of offshore platforms but there is not international regime to deal with that eventuality. All that is available is the existing system of regional agreements, the existence of which may provide some explanation for the failure to create an overall international solution to this problem. These agreements are, as the name suggests, strictly regional in their application with some agreements even being considered as private international law. Since they form the bulk of the effective oil platform regulation on the international level (albeit not global) they merit detailed consideration.

2.3. THE REGIONAL OFFSHORE PLATFORM LIABILITY REGIME

The global regulatory framework of offshore oil platforms is a patchwork of incomplete instruments that fail to directly address the issue of liability in respect of oil spills. Fortunately a number of smaller regional initiatives have been developed and seem to be the approach currently preferred by the international community to this issue. Indeed, the IMO has recognised the success of regional agreements and has encouraged states to conclude multilateral agreements.[209] In order to understand the merits of this approach, the texts of the various regional instruments will be considered as well as whether they have proven successful. After all the leading instruments have been considered, the current system will be critiqued and suggestions will be made to 'fill in the gaps'.

2.3.1. The Offshore Pollution Liability Agreement:

To full the lacuna that exists in global international law, a number of offshore platform operators developed the Offshore Pollution Liability Agreement ('OPOL').[210] This voluntary agreement applies to operators' party to the agreement operating in 'designated states',[211] including operators drilling within the European Economic Community jurisdiction and Norway.[212] Unlike the global conventions, and most regional instruments, the parties to OPOL are not states but rather all the offshore operators that are involved in mineral exploration and exploitation on the United Kingdom's Continental Shelf ('UKCS').[213] It is the operators themselves who are required to satisfy any claims, not a state.[214] OPOL gives a very wide definition to 'offshore platform', which includes any fixed or mobile installation or pipeline or portion thereof of any kind that is used for 'exploring, producing, treating, storing or transporting

[209] International Maritime Organisation, Resolution A.448(XI), 15 November 1979.
[210] Offshore Pollution Liability Agreement, (1974) 13 I.L.M. 1409 and (1975) 14 I.L.M. 147, available at *http://www.opol.org.uk/downloads/opol-agreement-jul12.PDF*, accessed on 1 June 2013 ('OPOL').
[211] Ibid, clause 1(4). The designated states are the United Kingdom of Great Britain and Northern Ireland, Denmark, the Federal Republic of Germany, France, Greenland, the Republic of Ireland, the Netherlands, Norway, the Isle of Man and the Faroe Islands. A notable absence from this list is Russia.
[212] Hunt (note 168 above) 563.
[213] A Budiman 'On Liability for Offshore Oil Spillage: Strictly Settled', International Bar Association - Oil and Gas Law Publications, available at *http://www.ibanet.org/Document/Default.aspx?DocumentUid=FCEBAB31-12B0-4F19-B5F6-1259FD824FBC*, accessed on 7 June 2013, page 3.
[214] OPOL, clause 2(c)(1).

oil from the seabed or its subsoil', even where such an installation has temporarily been removed from its operational site.[215] The definition extends to wells that are being drilled or worked upon (except for normal work-over operations).[216] Remaining within the definitions clause, OPOL defines 'pollution damage' in quite a restrictive sense, stating that it 'means direct loss or damage (other than loss of or damage to any offshore facility involved) by contamination which results from a discharge of oil'.[217] A discharge of oil is simply defined as 'any escape or discharge of oil into the sea' from an offshore facility.[218]

The parties to OPOL formed a company called the Offshore Pollution Liability Association Limited ('OPOL Association'),[219] which is governed by the laws of England.[220] It is this company that administers any claims brought against operators, but the OPOL Association does not itself pay the claims.[221] The operator 'responsible' is the only party liable to the claimant however, if the responsible operator should default, the remaining operators will cover the claim.[222] Due to this structure it would be incorrect to refer to OPOL as a convention in the traditional sense. It is rather a contract, concluded in England, between the various operators to ensure the payment of any claim brought against an operator for damages resulting from an oil spill. For an operator to become a member of the OPOL Association, the Rules of the OPOL Association ('OPOL Rules') require that the operator provide evidence of financial responsibility.[223] An operator will be deemed to be financially responsible where it can demonstrate that it is capable of fulfilling its obligations under clause 4 of OPOL.[224] Evidence of financial responsibility may be provided by one (or a combination of) insurance, guarantee or

[215] Ibid, clause 1(8).
[216] Ibid, clause 1(8). 'Work-over operations' is an industry term meaning 'well servicing operations'. See *http://www.rigzone.com/data/rig_statusdescriptions.asp* for a list of offshore rig status terminology.
[217] Ibid, clause 1(13).
[218] Ibid, clause 1(5).
[219] Ibid, clause 2(a).
[220] Ibid, clause 12.
[221] Hunt (note 168 above) 564.
[222] OPOL, clause 3(2). OPOL members will not cover an operator's claim in the event that the operator failed to establish or maintain financial responsibility as required by OPOL or they had ceased to be a member of OPOL prior to the incident. See Articles of Association of The Offshore Pollution Liability Association Limited, art. 7, available at *http://www.opol.org.uk/downloads/opol-articles-jul12.pdf*, accessed on 1 June 2013.
[223] Rules of The Offshore Pollution Liability Association Limited (as at 1 January 2012), available at http://www.opol.org.uk/downloads/OPOL-Rules-Jan2012.pdf, accessed on 1 June 2013 ('OPOL Rules') Part II, 2.2.
[224] Ibid.

self-insurance.[225] Evidence of financial responsibility may be required of operators throughout their membership in order to ensure their continued ability to meet future claims.[226] Membership of OPOL is a condition for obtaining a licence to drill on the continental shelf in English Law, specifically in terms of the Petroleum (Production) (Seaward Areas) Regulations 1988,[227] and it has become a standard clause in all Joint Operating Agreements.[228]

OPOL was heavily influenced by the terms of the ill-fated CLEE[229] and thus incorporated the concept of strict liability into its provisions.[230] As with the CLC and Fund Conventions, a limit exists on the amount that may be claimed via the OPOL Association. OPOL sets the maximum reimbursement at US $250 million per incident, with $125 million comprising compensation for remedial measures,[231] taken by a 'public authority',[232] and $125 million maximum compensation for pollution damage.[233] A party may escape liability in restricted circumstances such as the incident resulting from an act of war,[234] or the damage being wholly caused by the conduct of a third party.[235] For a claimant to recover any amount via the OPOL Association, they are required to proceed by arbitration in London.[236] This approach has been praised, as certain authors fear that courts lack the required expertise to deal with the highly technical aspects of offshore oil exploitation.[237] In addition to the expertise of the arbitrator, arbitration proceedings are private and the claim is likely to be resolved sooner than it would by means of traditional litigation.[238]

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[225] Ibid, Form B.
[226] Ibid, Part II, 2.2.
[227] See cl. 23(9) Petroleum (Production) (Seaward Areas) Regulations 1988, 1988 No. 1213, made in terms of section 6 of the Petroleum (Production) Act 1934, available at *www.legislation.gov.uk/uksi/1988/1213/made*.
[228] Budiman (note 213 above) 3. See also S Bosma 'The Regulation of Marine Pollution Arising from Offshore Oil and Gas Facilities - An evaluation of the Adequacy of Current Regulatory Regimes and the Responsibility of States to Implement a New Liability Regime' (2012) 26 A. & N. Z. Mar. L.J. 89, 96.
[229] See http://www.opol.org.uk/index.htm, accessed on 11 June 2013, where the relationship between CLEE and OPOL is discussed. This page also contains the annual reports and financial statements of the OPOL Association.
[230] Bergkamp (note 207 above) 5, notes that strict liability is preferred where the activities being regulated are inherently high risk. It is clear that offshore oil drilling comfortably falls within this category.
[231] OPOL, clause 1(15) defines remedial measures as 'reasonable measures' taken by a party or public authority to 'prevent, mitigate or eliminate' pollution damage following the discharge of oil, including control measures and measures taken to protect, repair or replace the offshore facility concerned.
[232] Ibid, clause 4(a)(1).
[233] Ibid, clause 4(a)(2).
[234] Ibid, clause 4(b)(1).
[235] Ibid, clause 4(b)(2). See clause 4(b) for the entire list of exceptions.
[236] Ibid, clause 9.
[237] Budiman (note 213 above) 5.

OPOL has thus far been effective, with some commentators suggesting that its success may be the cause of Europe's reluctance to implement a comprehensive treaty pertaining to oil pollution from offshore platforms, preferring simply to require the operators of such platforms to become parties to OPOL.[239] Whilst the inclusion of strict liability is in keeping with international practice, it is submitted that the maximum amount that can be claimed is still too low. The OPOL liability cap was raised from $125 million to the present $250 million in response to the *Deepwater Horizon* incident,[240] however, since BP has set aside approximately $20 billion to compensate victims (with further claims against the company still pending) and finance clean-up operations, the amounts envisaged by OPOL are still inadequate. Indeed, this same conclusion was reached by the UK House of Commons, Energy and Climate Committee ('the committee') assigned to investigate the *Deepwater Horizon* spill and advise whether the UK had a satisfactory regulatory regime in place.[241] The committee concluded that the $250 million compensation provided by OPOL was too low,[242] a conclusion supported by witnesses presenting to the committee.[243] The committee raised further concerns over the definition of 'direct damage' suggesting that this definition was vague and unclear, noting that polluters could argue that damage to 'biodiversity and ecosystems' is indirect and thus not eligible for compensation.[244] The committee stressed that 'any lack of clarity on liability will inhibit the payment of compensation to those affected by an offshore accident',[245] and it is submitted that this conclusion is accurate. A final concern of the committee was the voluntary nature of OPOL, as the MPs felt that its 'voluntary nature' weakened OPOL's 'legality and the control and deployment of its funds'.[246] This particular concern is questionable, as membership of OPOL (as discussed above) is a requirement to obtain a licence to operate an offshore oil platform. A

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[238] Ibid.
[239] Shaw (note 191 above) 1.
[240] Sylvia Pfeifer 'UK Liability limits to double after BP spill' Financial Times 15 August 2010, available at *http://www.ft.com/cms/s/0/1ed8eace-a898-11df-86dd-00144feabdc0.html#axzz2WCKpM9qI*, accessed on 11 June 2013. As noted above, most international bodies are reactionary, only raising liability limits following a catastrophe. Such an approach is clearly short-sighted.
[241] A full list of all the reports conducted (and their response from government) is available at *http://www.parliament.uk/business/committees/committees-a-z/commons-select/energy-and-climate-change-committee/inquiries/uk-deepwater-drilling/*, accessed on 19 June 2013.
[242] UK House of Commons, Energy and Climate Change Committee, *UK Deepwater Drilling: Implications of the Gulf of Mexico Oil Spill* (2011) (Second Report of Session 2010-2011) Volume 1, 26 ('Committee Report') para. 90.
[243] Ibid, para. 86.
[244] Ibid, para. 90.
[245] Ibid, para 91.
[246] Ibid, para 90.

legislative body may be preferable, it is certainly not the most pressing concern. Whilst claimants may bypass OPOL and claim directly through the courts,[247] they would do so without the benefit of strict liability, resulting in complex and technical litigation that would be drawn out for years.[248]

2.3.2. Convention for the Protection of the Marine Environment of the North-East Atlantic:

The Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 ('OSPAR')[249] was created with the explicit view that stringent measures at the regional level were the preferable means of addressing marine pollution.[250] There are sixteen states party to OSPAR,[251] whose jurisdiction allows the convention to effectively cover not only the Atlantic and the North Sea, but also the Rhine River.[252] OSPAR comprehensively addresses pollution from a variety of sources, including offshore installations, which it addresses in detail. A notable aspect of OSPAR is that it addresses the practice of abandoning offshore platforms by implementing strict procedures that must be followed.[253] These include obtaining a permit and keeping records of all disused offshore installations and pipelines.[254] OSPAR specifically incorporates the precautionary principle.[255] The precautionary principle, as enunciated in Principle 15 of the 1992 Rio Declaration on Environment and Development ('Rio

[247] P Cameron 'Liability for Catastrophic Risk in the Oil and Gas Industry' (2012) *International Energy Law Review* 207, 211.
[248] Budiman (note 213 above) 6, where the author notes that the amounts claimed in the English courts for marine pollution have never exceeded the limits of OPOL. He argues that due to the court's seeming reluctance to grant large awards, proceeding in terms of OPOL is clearly preferable.
[249] Convention for the Protection of the Marine Environment of the North-East Atlantic 1992, 22 September 1992, 2354 UNTS 67, 25 March 1998. ('OSPAR').
[250] Ibid, Preamble.
[251] OSPAR current status via the UN Treaty Collection, available at *http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280069bb5*, accessed on 12 June 2013. These states are Belgium, Denmark, the European Community, Finland, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom of Great Britain and Northern Ireland.
[252] See the OSPAR Commission information on the contracting parties, available at *http://www.ospar.org/content/content.asp?menu=00380108110000_000000_000000,* accessed on 12 June 2013. Many of these sixteen states require operators in their jurisdiction to join OPOL.
[253] It is notable because, as of 2009, there were 1212 offshore platforms within OSPAR's jurisdiction and 129 of those platforms have been decommissioned to date. There is therefore a clear need to ensure that the decommissioning of platforms is well regulated, as it is hardly a rare occurrence. See D Jorgensen 'OSPAR's exclusion of rigs-to-reef in the North Sea' (2012) 58 *Ocean & Coastal Management* 57.
[254] OSPAR, annex III, art. 5.
[255] Ibid, art. 2(2)(a).

Declaration'),[256] requires that where there are 'threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'[257] The need for the principle is summarised well by Cho,[258] who states that 'effective implementation of environmental law needs to proceed in spite of scientific uncertainties in order to prevent irreversible damage.' The precautionary principle is not without limits - there must be an identifiable and clear threat to the environment, capable of causing serious or irreversible damage.[259] Despite espousing preventative measures, OSPAR fails to provide for emergency planning procedures nor does it allocate clean-up responsibilities.[260] OSPAR also lacks any provision for insurance or financial guarantees in the event of an accident, something present in OPOL. The failure of OSPAR to cover emergency response situations or to make provision for financial guarantees has been strongly criticised by environmental groups.[261]

OSPAR has implemented the polluter-pays principle, requiring the polluter to cover the costs relating to 'pollution prevention, control and reduction measures'.[262] OSPAR additionally requires contracting parties to implement measures and programmes to 'prevent and eliminate pollution fully' with such initiatives adopting the best available techniques and the best environmental practices.[263] In the context of offshore oil platforms, OSPAR states that the dumping of wastes or any other matter is prohibited,[264] however, this prohibition does not extend to 'discharges or emissions from offshore sources'.[265] Such discharges or emissions capable of reaching and affecting the maritime area, whilst not entirely prohibited, are strictly subject to the

[256] 1992 Rio Declaration on Environment and Development, 14 June 1992, 31 ILM 974 ('Rio Declaration').
[257] Ibid, Principle 15.
[258] Y Cho 'Precautionary Principle in the international Tribunal for the Law of the Sea' (2009) 10 *Sustainable Dev. L. & Pol'y.* 64.
[259] Ibid, 64.
[260] S Luk & R Ryrie 'Legal background paper: Environmental Regulation of Oil Rigs in EU Waters and Potential Accidents' *ClientEarth* available at *http://www.clientearth.org/biodiversity/biodiversity-publications/regulation-oil-rigs-833*, accessed on 2 June 2013.
[261] See Committee Report (note 242 above) EV 94, in which a witness to the committee, ClientEarth, lampooned the inadequate liability measures present in OSPAR.
[262] OSPAR, art. 2(2)(b).
[263] Ibid, art. 3(a) and (b)(i). This requirement is repeated in the context of offshore sources in OSPAR, Annex III, art. 2(1).
[264] Ibid, Annex III, art. 3(1).
[265] Ibid, Annex III, art. 3(2).

authorisation or regulation by competent authorities of the contracting parties.[266] The significance of this provision is that it permits individual states to impose additional regulations and liability criteria upon operators who are located within their jurisdiction. The clear drawback to such an approach is that it is reliant on states to actually implement such measures. OSPAR requires contracting parties to settle disputes relating to either its interpretation or application by means of arbitration.[267] The parties to the dispute are free to elect their own procedure,[268] but OSPAR does prescribe a procedure should parties fail to decide otherwise.[269]

As mentioned earlier, OSPAR, for the purposes of liability, is based on the polluter-pays principle. It is submitted that the reliance of OSPAR on the polluter-pays principle alone is insufficient to deter polluters or to provide adequate redress to bona fide claimants. The polluter-pays principle was encapsulated in the Rio Declaration, which states that '… the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.'[270] Ellis defines the principle as 'an economic theory that "internalizes" environmental pollution and degradation costs caused by a company or a producer. The [costs of pollution] are included as a cost to the producer rather than being paid by the general community through reduced environmental quality or increased taxes…'[271] Whilst this is clearly an aspirational principle, it is not legally binding on states and must be implemented in more precise terms in order to be effective,[272] hence its incorporation into OSPAR. Note that only a handful of conventions have adopted the polluter-pays principle since the Rio Declaration.[273] Offshore oil exploration and exploitation is both technically complex and dangerous. Whilst colossal spills may be infrequent, they have the potential to cause great harm. Due to these technical aspects of offshore drilling, there is an intimidating evidentiary burden on a claimant seeking damages for a spill. As a result of the unusually hazardous conditions surrounding offshore oil exploitation, it is quite probable that a spill could occur without a party

[266] Ibid, Annex II, art. 4(1). Such authority shall include monitoring and inspection by the competent authorities of contracting parties.
[267] Ibid, art. 32(1).
[268] Ibid, art. 32(2).
[269] Ibid, art. 32(3)-(10).
[270] Rio Declaration, Principle 16.
[271] E Ellis 'International Law and Oily Waters: A Critical Analysis' (1995) 6 *Colo. J. Int'l Envtl. L. & Pol'y.* 31, 57.
[272] Khachaturova Regina *The international obligations of the Russian Federation relating to offshore oil and gas exploration and production in the Arctic* (unpublished LLM thesis, University of Tromsø, 2012) 27.
[273] Ibid, 26.

being negligent. Indeed, this was the case with the *Ixtoc I* spill in 1979. It is precisely for this reason that instruments such as OPOL have gone beyond merely incorporating the polluter-pays principle, instead specifically adopting an approach of strict liability, thus alleviating the burden on the claimant of proving fault and instead merely quantifying the damages. There has been a noted trend in international environmental instruments favouring strict liability over traditional fault-based liability, a trend even continued in the domestic legislation of states such as the USA and the UK.[274] This decision to only utilise the polluter-pays principle in OSPAR without specifying a stringent liability standard would thus seem to be at odds with some of the convention's other founding principles, specially its mandate to adopt the best environmental practices. The polluter-pays principle ought to be enacted in conjunction with the implementation of strict liability as the two concepts complement each other well.[275] However, there is a presumption in international law that, unless stated otherwise, negligence is required in order to establish fault.[276] Thus merely stating that the polluter-pays principle has been incorporated into a convention will result in a standard of fault requiring negligence.

It is perhaps unwise to apply more modern environmental standards solely to precautionary techniques and not to the liability aspects of the convention, as despite all the measures adopted by offshore operators to be compliant with OSPAR, there were still 467 accidental oil spills totalling 137 tonnes of oil, from only 7 contracting parties, in 2010 alone.[277] This is particularly alarming as OSPAR only specifically apportions liability for pollution control, reduction and prevention.[278] OSPAR therefore fails to address liability in the event of an accident, remaining silent on liability for damages suffered as a result of economic loss or any other form of loss. Clearly, it is not ideal to have such a vague liability clause, as this will force claimants to resort to costly litigation and rely on customary international law (which is itself a difficult beast to

[274] D Ong 'The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives' (2001) 12 *Eur. J. Int. Law* 685, 692.
[275] United Nations 'Report of the International Law Commission' 58th session (1 May-9 June and 3 July-11 August 2006) General Assembly, Official Records, 61st session, supplement no. 10 (A/61/10),146. In this report, the International Law Commission notes that the effectiveness of the polluter-pays principle is largely dependent on a conventions definition of environmental damage, in addition to the standard of liability elected by that convention.
[276] Boyle (note 50 above) 424.
[277] These figures may be found in OSPAR Commission 'Discharges, spills and emissions from offshore oil and gas installations in 2010' (2012) 18, available at *http://www.ospar.org/documents/dbase/publications/p00567_2010%20offshore%20report.pdf*, accessed on 18 June 2013.

master). It is clearly not sufficient for a legal instrument to restrict itself to precautionary measures - it is fair to conclude that OSPAR lacks metaphorical teeth.

2.3.3. Convention for the Protection of the Mediterranean Sea against Pollution:

The 1976 Convention for the Protection of the Mediterranean Sea against Pollution ('Barcelona Convention')[279] is a regional agreement established with the goal of preventing marine pollution in the Mediterranean. As of June 2012 there are 22 state parties,[280] with 20 having accepted the 1995 amendments. The Barcelona Convention was drafted in response to United Nations Environmental Programme ('UNEP') Mediterranean Action Plan,[281] which recognised the need for regional conventions that addressed pollution and selected the Mediterranean as its first priority.[282] The Barcelona Convention directly addresses the issue of offshore pollution by requiring states to take 'all appropriate measures to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area resulting from exploration of the continental shelf and the seabed and its subsoil.'[283] As with OSPAR, the Barcelona Convention recognises the precautionary principle,[284] and requires that parties implement the 'best available techniques and the best environmental practices.'[285] The implementation of these principles has been considered to be consistent with internationally accepted standards.[286] In the context of liability the Barcelona Convention merely contains a *pactum de contrahendo* provision obliging states to 'cooperate in the formulation and adoption

[278] OSPAR, art. 2(2)(b).
[279] Convention for the Protection of the Mediterranean Sea against Pollution 1976, 16 February 1976, 1002 UNTS 27, 12 February 1978 ('Barcelona Convention').
[280] List and status of contracting states available at *http://195.97.36.231/dbases/webdocs/BCP/StatusOfSignaturesAndRatifications.doc*, accessed 19 June 2013. These states are Albania, Algeria, Bosnia and Herzegovina, Croatia, Cyprus, the European Union, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Slovenia, Spain, Syria, Tunisia and Turkey.
[281] The Mediterranean Action Plan's main objectives were, amongst others, to control marine pollution and to formulate national environmental policies. The 1975 action plan is available at *http://195.97.36.231/dbases/webdocs/BCP/MAPPhaseI_eng.pdf* and Phase II of the action plan, which is a response to the shortcomings of the 1975 plan, is available at *http://195.97.36.231/dbases/webdocs/BCP/MAPPhaseII_eng.pdf*.
[282] L Mee 'The Role of UNEP and UNDP in Multilateral Environmental Agreements' (2005) 5 *International Environmental Agreements* 227, 240.
[283] Barcelona Convention, art. 7.
[284] Ibid, art. 3(a).
[285] Ibid, art. 4(b).
[286] Kashubsky (note 115 above) 7.

of appropriate rules and procedures for the determination of liability and compensation for damage resulting from pollution.'[287] The only other mention of compensation in the convention can be found in article 4, which mandates that states apply the polluter-pays principle, thereby requiring states to bear the 'costs of pollution prevention, control and reduction measures' with 'due regard to public interest'.[288] The Barcelona Convention implores parties to engage in 'negotiation' or any other 'peaceful means' to settle disputes that may arise in the interpretation or the application of the convention.[289] Should the parties fail to resolve the dispute through such means, the parties will follow an arbitration procedure set out in annex A of the convention.[290] The approach adopted by the Barcelona Convention is similar to that adopted by the Space Objects Convention, as it encourages diplomacy over the use of legal arbitration.

In addition to being addressed in the Barcelona Convention, the state parties agreed to a more specific protocol pertaining to offshore mineral exploitation, which was probably in response to the growing number of offshore platforms in the region (231 as of 2010).[291] The 1994 Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from the Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil ('Madrid Protocol')[292] has been signed by 12 states, and as of April 2013 has 6 state parties.[293] The Madrid Protocol is a comprehensive instrument, specifying obligations for operators who may include private persons, be they natural or juristic in nature. Furthermore, the protocol extends the definition of operator beyond those who have authorisation to those who lack authorisation, but exercise de facto control over operations.[294] As with the Barcelona Convention itself, the Madrid Protocol

[287] Barcelona Convention, art. 16. The Barcelona Convention is unfortunately not unique in this regard, see T Scovazzi 'The Mediterranean Guidelines for the Determination of Environmental Liability and Compensation: The Negotiations for the Instrument and the Question of Damage that Can Be Compensated' (2009) 13 *Max Planck U.N.Y.B.* 183, 184 ('Scovazzi 2009') for a comprehensive list of conventions with similar provisions.
[288] Barcelona Convention, art. 4(3)(b).
[289] Ibid, art. 28(1).
[290] Ibid, art. 28(2).
[291] Chabason (note 100 above) 8.
[292] 1994 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, 14 October 1994, 24 March 2011. This protocol is also referred to as the 'Offshore Protocol'.
[293] Status of Protocol and list of state parties available at *http://195.97.36.231/dbases/webdocs/BCP/StatusOfSignaturesAndRatifications.doc*, accessed on 19 June 2013. The current states party to the protocol are Albania, Cyprus, Libya, Morocco, Syria and Tunisia.
[294] T Scovazzi 'Maritime Accidents with Particular Emphasis on Liability and Compensation for Damage from the Exploitation of Mineral Resources of the Seabed' in A de Guttry et al. (eds) *International Disaster Response Law* (2012) 287 ('Scovazzi 2012'), 298.

imposes a duty on states to 'cooperate as soon as possible' to formulate rules to determine liability and compensation for damage caused by pollution.[295] Scovazzi notes that this obligation is not entirely devoid of legal meaning,[296] as the International Court of Justice has interpreted such a provision to mean that the parties are under an obligation to reach an agreement, not merely to negotiate.[297] Thus this provision requires parties to engage in meaningful negotiations, with the *bona fide* intention of reaching an agreement. Until such rules are determined, the Madrid Protocol states that operators are liable for any damage caused by their activities, and that such operators shall be required to pay 'prompt and adequate compensation'.[298] Significantly, the Madrid Protocol requires states to ensure that operators have sufficient 'insurance cover or other financial security' that the state deems appropriate to cover any damage that may occur as a result of the activities covered by the protocol.[299] It is submitted that this approach is wise, as it anticipates the usual delay that occurs when states negotiate liability provisions and thus creates a temporary measure that goes beyond liability found in other conventions. The robust liability provisions imposed by the Madrid Protocol have been suggested as a reason for the long wait for the protocol to enter into force as well as the low number of state signatories to the protocol.[300]

Despite the Barcelona Convention (and Madrid Protocol) requiring party states to pay compensation in the event of pollution, there are still numerous difficulties - the most apparent of which is uncertainty. Whilst the Madrid Protocol undoubtedly sought to place the actual cost of compensation on the operators of the platforms, the protocol ultimately fails to define what is meant by the term 'damages'. If one is to apply the 'polluter-pays' principle, presumably the intended standard considering its incorporation by article 4 of the Barcelona Convention, the operators might well be able to limit compensation to clean up costs. It is submitted that loss of tourism, economic damages suffered by those in the fishing industry and costs to rehabilitate the environment post-spill would be difficult to include within the ambit of the polluter-pays

[295] Madrid Protocol, art. 27(1).
[296] Scovazzi 2012 (note 294 above) 299.
[297] North Sea Continental Shelf cases, ICJ Rep. 1969, para. 85.
[298] Madrid Protocol, art. 27(2)(a).
[299] Ibid, art. 27(2)(b).
[300] Scovazzi 2012 (note 294 above) 300. The author notes that the European Union and France have both entered reservations concerning Article 27(2) in particular, although this position has been changed in the wake of the *Deepwater Horizon* spill.

principle, as the principle itself is of minimal practical use in the absence of a detailed liability provision. Whilst the polluter-pays principle indicates an intention to hold the polluter accountable, it is not effective in isolation. The difficulty to quantify a damages claim has an adverse effect on another key feature of the Madrid Protocol - the provision of security. Whilst operators are required to furnish a guarantee or some other form of financial insurance to the amount required to cover a damages claim, operators could conceivably argue in favour of a narrow interpretation of the 'polluter-pays' principle. This would potentially allow an operator to furnish security that would be practically insufficient. As was the case with OSPAR, it is unfortunate that a strict liability approach was not adopted, as this would have been congruent with agreements such as OPOL and conventions addressing tanker pollution (namely the CLC and Fund Conventions), which have proven to be effective. Indeed, these same concerns were addressed in a proposed 1997 amendment to the Barcelona Convention.[301] The 1997 draft contemplated strict liability without any limitations, the establishment of a supplementary fund (to assist in the event that an operator was unable to meet the costs) and held the state with jurisdiction over the activity liable in the event that the operator and fund were unable to satisfy the claim.[302] The 1997 draft also defined 'damage' to include damage to persons (as well as the state) and their property, the cost of 'reasonable preventative measures' and any additional loss caused by such measures, and damage resulting from any impairment created by harm to the marine and coastal Mediterranean environment.[303] Despite the need for such amendments, the proposal was considered too extensive to be accepted by the majority of Mediterranean states,[304] and thus it is submitted that the Barcelona Convention and the Madrid Protocol have yet to reach their full potential.

[301] United Nations Environment Programme 'Appropriate Procedure for the Determination of Liability and Compensation for Damage Resulting from Pollution of the Marine Environment in the Mediterranean Sea Area' (1997) Doc. UNEP(OCA)/MED WG. 117/3 of 1 July 1997 ('The 1997 draft')
[302] Scovazzi 2009 (note 287 above) 189.
[303] Ibid, 190-191.
[304] Ibid, 191.

2.3.4. Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution 1989:

The Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution 1989 ('Kuwait Convention'),[305] is, as the name suggests, a multilateral regional agreement among states based in the sea area adjacent to Kuwait.[306] The party states are Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates – therefore all the Persian Gulf countries are party to the convention. As the Persian Gulf is a major producer of oil, the participation of all eight countries is certainly positive. The Kuwait Convention applies to the marine area shared by the party states and seeks to eliminate pollution in the area by the implementation of laws comparable to, and that conform to, international law.[307] In addition to the general obligation to eliminate pollution, the Kuwait Convention also requires contracting states to take 'all appropriate measures to prevent abate and combat pollution' that results from the exploration and exploitation of the seabed, its subsoil and the continental shelf.[308] The Kuwait Convention requires states to cooperate in the event of a pollution emergency,[309] it mandates scientific and technological co-operation,[310] and requires the use of environmental assessments to minimise the risk of pollution.[311] As concerns liability, the Kuwait Convention merely envisages the future formulation and adoption of procedures to determine civil liability in the event of damage caused by marine pollution,[312] as well as liability for violating obligations under the convention and its protocols.[313] The only clarification provided by the liability provision can be found in its reference to 'applicable international rules

[305] Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 24 April 1978, 17 *I.L.M.* 511, 1 July 1979 ('Kuwait Convention').
[306] Ibid, art. 2 defines the applicable area. It essentially covers the region between Ras Dharbat Ali and Ras Al-Fasteh, excluding internal waters.
[307] Ibid, art. 3(a)-(d). This clause is unsurprising, as the Kuwait Convention was drafted by UNEP who oversee a number of conventions, including the Barcelona Convention discussed above. For a full breakdown of conventions that feature UNEP involvement, see Mee (note 282 above) 260.
[308] Ibid, art. 7.
[309] Ibid, art. 9.
[310] Ibid, art. 10.
[311] Ibid, art. 11.
[312] Ibid, art. 13(a).
[313] Ibid, art. 13(b).

and procedures relating to those matters'.[314] This provision merely indicates the convention's intention to conform to international law and is of no additional assistance.

A number of protocols exist that supplement the Kuwait Convention, including the Protocol Concerning Marine Pollution Resulting From Exploration and Exploitation of the Continental Shelf ('Kuwait Protocol').[315] The Kuwait Protocol is directly applicable to offshore oil platforms,[316] and enjoys ratification from all eight states party to the Kuwait Convention.[317] As with the convention itself, the Kuwait Protocol places an obligation on the contracting states to ensure that 'all appropriate measures' are taken to restrict and eliminate pollution 'taking into account the best available and economically feasible technology'.[318] In the context of offshore operations, the protocol goes further than the convention as it requires that such operations are conducted under a licence,[319] and the protocol implements a number of requirements that states must satisfy prior to the granting of a licence.[320] The Kuwait Protocol contains a number of safety measures in order to minimise the risk of an oil spill, but unfortunately, it does not contain a liability provision. In the absence of such a provision, liability under the protocol will be assigned under article 7 of the Kuwait Convention - an article that contains nothing more than a *pactum de contrahendo*.

The Kuwait Convention and Protocol are vague at best when it comes to the issue of liability, perhaps even mute if one is particularly critical. Whilst these instruments contain a number of measures to prevent oil pollution from occurring, it is submitted that by sparing the rod, they are perhaps spoiling the child, as the absence of any clear liability provision allows a polluter operator (or state) to hide behind the uncertainty of customary international law. Without requiring any financial guarantees from operators in the region, there is no assurance that an operator would be able to cover the costs associated with an oil spill even if they felt obliged to

[314] Ibid, art. 13(a).
[315] 1989 Protocol Concerning Marine Pollution Resulting from Exploration and Exploitation of the Continental Shelf, 29 March 1989, 17 February 1990 ('Kuwait Protocol').
[316] Ibid, art. 1(12) provides a comprehensive definition of an 'offshore installation', stating that it means 'any structure, plant or vessel, whether floating or fixed'.
[317] Status of Kuwait Convention and its Protocols available at *http://www.unep.org/regionalseas/programmes/nonunep/ropme/instruments/default.asp*, accessed on 22 June 2013.
[318] Ibid, art. 2.
[319] Ibid, art. 3.
[320] Ibid, art. 4(1).

do so. When one considers that the Persian Gulf is a major producer of the world's oil, it is frankly alarming that no liability provisions have been effected. Whilst this might not be particularly alarming if other legal instruments could cure this deficit, the existence of the Kuwait Convention and Protocols have been cited in the past as reasons mitigating against the creation of a global convention to address this issue.[321] The inescapable conclusion is that the Kuwait Convention, in the context of liability at least, is completely insufficient yet its very existence prevents the formulation of an effective liability regime. Thus, as concerns liability, the Kuwait Convention can be considered to represent the very worst stereotypes of international law.

2.3.5. Convention on the Protection of the Marine Environment of the Baltic Sea Area:

The Baltic Sea also enjoys the environmental protection of a regional convention, specifically the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area ('Helsinki Convention')[322], which presently has ten state parties,[323] replacing the 1974 Convention of the same name.[324] The Helsinki Convention differs from most conventions as it expands the definition of 'ship' to include 'fixed or floating platforms'.[325] This is significant as the definition of ship is not a settled matter in international law and, as mentioned above, most interpretations of UNCLOS would suggest that the offshore platforms are not included in the general definition of ship or vessel.[326] The Helsinki Convention applies the precautionary principle, requiring states to take preventative measures when 'substances or energy' introduced to the marine environment may cause harm, even if there is no conclusive evidence of a causal connection between the introduction of such substances and environmental harm.[327] The convention also requires parties to utilise the best environmental practices and best available

[321] Brown (note 99 above) 125 where the existence of instruments such as the Kuwait Convention have caused regulatory bodies to conclude that there 'is no pressing need' for a global convention on the issue of offshore platform spills.
[322] 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 9 April 1992, 13 *I.L.M.* 546, 17 January 2000 ('Helsinki Convention').
[323] The ten contracting parties are Denmark, Estonia, the European Union, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden. This list of contracting parties is available at *http://www.helcom.fi/about-us/contracting-parties/*, accessed on 27 June 2013.
[324] Agyebeng (note 80 above) 20.
[325] Helsinki Convention, art. 2(3).
[326] See 2.2.1 of this dissertation for a more detailed discussion of UNCLOS and its provisions.

technologies,[328] and fortunately includes an annex detailing what is meant by these principles.[329] This provision further mandates that parties shall adopt additional measures in the event that satisfactory results are not obtained.[330]

The Helsinki Convention, continuing the trend of the Barcelona and Kuwait Conventions, contains a liability clause that merely requires parties jointly to develop rules and principles concerning the allocation of liability, limits on liability and available remedies.[331] Guidance can be found in the founding principles of the convention, in which it states that the parties will apply the polluter-pays principle.[332] Whilst there is an annex focusing on the regulation of offshore platforms,[333] it is unfortunately silent on liability. The Helsinki Convention does however make explicit reference to assistance and the recovery of costs incurred in providing such assistance. Parties to the convention are entitled to call for assistance,[334] with the requested party being required to 'use their best endeavours' to provide the necessary assistance.[335] When such assistance is rendered, the requesting party is required by the convention to reimburse the assisting party.[336] Where the assistance is taken at the initiative of the assisting party, it shall bear its own costs unless otherwise agreed.[337] This same regulation recognises that contracting parties shall continue to enjoy the right to claim from third parties for pollution damage, unfettered by the terms of the Helsinki Convention.[338] This would perhaps allow a party to bypass the limitation of the polluter-pays principle, provided they are not claiming from a party to a convention - as would be the case where the claim lies against an offshore operator. States are also entitled to utilise national or supra-national regulations in such an event.[339]

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[327] Helsinki Convention, art. 3(2).
[328] Ibid, art. 3(3).
[329] Ibid, annex 2.
[330] Ibid, art. 3(3).
[331] Ibid, art. 25.
[332] Ibid, art. 3(4).
[333] Ibid, annex 6. This annex repeats the obligation on states to utilise the best available technologies and environmental practices, as well as regulating aspects such as incident reporting. Whilst clearly focusing on preventative measures, it is unfortunate that his annex did not recognise the difference of scale that exists between an oil spill from an ordinary ship and that from an offshore platform. In this respect, there is a clear need to distinguish between the two,
[334] Ibid, annex 7, reg. 8(1)(a).
[335] Ibid, annex 7, reg. 8(1)(b).
[336] Ibid, annex 7, reg. 9(2)(a).
[337] Ibid, annex 7, reg. 9(2)(b)(c).
[338] Ibid, annex 7, reg. 9(4).
[339] Ibid, annex 7, reg. 9(4).

The absence of clear liability provisions in the Helsinki Convention has been attributed to uncertainty amongst member states concerning the substance of and necessity for such liability regulations.[340] The Helsinki Commission has made certain recommendations that are of interest.[341] In response to the obligation on contracting states to agree to rules on liability, the commission has noted the success of IMO liability regimes in the context of vessel-based pollution.[342] To cure the current liability deficit of the Helsinki Convention the commission recommended that contracting parties accede to IMO conventions, notably the CLC 69, Fund 71 and their 1984 protocols,[343] as well as recommending that contracting states cooperate with the IMO in creating further liability regimes for pollution damage.[344] A second set of recommendations from the Helsinki Commission with liability considerations are those pertaining to a harmonised system of fines in the event of a ship violating anti-pollution regulations.[345] The commission recommended that contracting states impose harmonised minimum penalties in the event that a ship (a term that is defined in the Helsinki Convention to include offshore platforms) commits an illegal discharge, including a discharge of oil in contravention of MARPOL.[346] The recommendations also suggest imposing greater fines on legal persons than on natural persons, with the quantum of such fines being determined in accordance with Special Drawing Rights ('SDR'). The minimum suggested administrative fine for the illegal discharge of oil, in terms of annex I of MARPOL, is 1500 SDR.[347] It is worth noting that whilst this is truly a paltry amount, it represents the absolute minimum that could be charged and the recommended fine is to take into account the quantity of the discharge and the environmental damage caused by the discharge.[348]

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[340] P Ehlers 'The Helsinki Convention, 1992: Improving the Baltic Sea Environment' (1993) 8 *Int'l J. Marine & Coastal L.* 191, 210.
[341] The commission is established by art. 19 of the Helsinki Convention.
[342] Helsinki Commission Recommendation 10/11, adopted 15 February 1989, available at *http://www.helcom.fi/Recommendations/en_GB/rec10_11/*, accessed on 28 June 2013.
[343] Ibid, recommendation (a).
[344] Ibid, recommendation (b).
[345] Helsinki Commission Recommendation 19/14, adopted 26 March 1998, available at *http://www.helcom.fi/Recommendations/en_GB/rec19_14/*, accessed on 28 June 2013.
[346] Ibid, recommendation 1(1) provides a complete list of violations.
[347] Ibid, recommendation 2(1)(a). The International Monetary Fund (IMF) has set the value of 1 SDR to equal 1.49888 US Dollars, effective from 1 January 2011. IMF statement on SDR value available at *http://www.imf.org/external/np/tre/sdr/sdrbasket.htm*, accessed on 28 June 2013.
[348] Ibid, recommendation 2(1)(a).

In conclusion, the Helsinki Convention has implemented measures to improve the transfer of information between the parties and promotes state cooperation in the fight against marine pollution, emanating from a wide variety of sources. Whilst the imposition of a fine system and a mechanism for recovery of the costs incurred in assistance operations is a tangible step in the right direction, it is unfortunate that the drafters of the convention failed to decide upon clear liability provisions. It may not be particularly rare to include a *pactum de contrahendo* in a convention, but it would have been preferable if the Helsinki Convention had implemented interim measures pending final agreement between the parties. Such temporary measures have the desirable effect of granting recourse against polluters whilst negotiations on permanent provisions continue. The need for such measures is clear, as the Helsinki Convention has been in force for 13 years and the parties have failed to reach a clear agreement on a liability clause. The convention also fails to require insurance or financial guarantees from offshore operators, a much-needed feature when one considers the potentially catastrophic clean-up costs that can result from an offshore spill. The Helsinki Convention thus requires immediate amendment if it is to provide adequate financial protection against modern pollution threats.

2.3.6. Other notable conventions and regional agreements:

The Cartagena Protocol,[349] to the United Nations Convention on Biological Diversity,[350] tackles transboundary pollution caused by any living modified organism. It is therefore not applicable to oil pollution, but the manner in which it addresses liability for biological pollution is worth some study in the hope that these methods may be exported to address oil spills in future or existing conventions. As with the Helsinki and Barcelona Conventions, the Cartagena Protocol's liability clause merely requires parties to agree to liability provisions at a future date.[351] However, unlike the Barcelona and Helsinki Conventions, the parties to the Cartagena Protocol met and drafted the Kuala-Lumpur Supplementary Protocol on Liability and Redress

[349] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 27 April 2000, 2226 *U.N.T.S.* 208, 11 September 2003. ('Cartagena Protocol')
[350] United Nations Convention on Biological Diversity, 5 June 1992, 1760 *U.N.T.S.* 79, 29 December 1993. ('Biodiversity Convention')
[351] Cartagena Protocol, art. 27.

('Supplementary Protocol'),[352] which has yet to come into force.[353] The Supplementary Protocol has a broad scope, as it is applicable to both unintentional and illegal transboundary pollution.[354] The Supplementary Protocol confers jurisdiction upon states to implement national legislation to apportion liability, encouraging states to claim costs relating to response measures directly from the 'guilty' operators in accordance with their national law.[355] States are further required to apply their existing domestic law, or develop such laws, in proceeding against operators for civil damages resulting from the pollution.[356] States are granted a discretion to determine the standard of liability, including the right to impose strict liability.[357] States are also permitted to define the elements of damages,[358] standing,[359] and channelling of liability.[360] It is submitted that this Protocol could serve as a model for the Kuwait, Barcelona and similar conventions that have elected to include a *pactum de contrahendo* concerning liability. The Supplementary Protocol has created a clear framework for imposing liability whilst still permitting states the discretion of selecting the exact standard of liability (a palatable clause for states that are otherwise reluctant to accede to such agreements). The Supplementary Protocol also envisages the provision of financial security, with such security being regulated by the domestic laws of states. Furthermore, the protocol has tasked states with undertaking a comprehensive study of financial security arrangements, with the hopes of implementing such arrangements in the foreseeable future.[361] Clauses mandating the provision of security and clearly regulating liability are vital to an efficient pollution treaty and it is hoped that the Cartagena Protocol represents a shift in treaty drafting to include such provisions.[362]

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[352] Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, 15 October 2010, 50 *I.L.M.* 105 (2011) ('Supplementary Protocol').

[353] The status of the Supplementary Protocol with a list of state signatures is available at *http://bch.cbd.int/protocol/parties/#tab=1*, accessed on 1 July 2013. At present 56 states have signed or ratified the Supplementary Protocol.

[354] Supplementary Protocol, art. 3(3).

[355] Ibid, art. 5(5).

[356] Ibid, art. 12(1).

[357] Ibid, art. 12(3)(b).

[358] Ibid, art. 12(3)(a).

[359] Ibid, art. 12(3)(d)

[360] Ibid, art. 12(3)(c).

[361] Ibid, art. 10.

[362] Naturally the effectiveness of financial instruments is dependent on a number of factors. This includes issues such as which state (coastal or flag) determines the form of security, the quantum of the security, whether a fund is created to cater for extraordinarily large claims and so on. A more detailed discussion of financial security measures can be found in 4.4. of this dissertation.

Another convention applicable to spills from offshore oil platforms is the Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific ('Lima Convention').[363] The Lima Convention contains the all-too-common provision envisaging future agreement on a liability framework,[364] but also contains a provision binding states to ensure that civil claims (for compensation or other relief) against natural or juristic persons who caused pollution are available within their domestic legal system.[365] Whilst the main text of the Lima Convention is silent on the costs incurred by assisting states, an accompanying protocol, the Supplementary Co-operation Protocol,[366] allows assisting states to recover the actual costs incurred when performing clean-up operations.[367] The liability framework created by the Lima Convention is thus fairly intriguing, as it clearly foresees the creation of a comprehensive liability framework but contains certain temporary measures - notably the requirement of states to ensure that civil claims against marine polluters is possible in terms of their domestic framework. Whilst not quite as detailed as the Cartagena Protocol, these provisions are a welcome addition to the convention and the approach adopted by the Lima Convention ought to be considered by the drafters of future conventions.

A number of UNEP Conventions have continued the unfortunate trend of deferring the creation of liability frameworks until later negotiations. Near identical *pactum de contrahendo* liability clauses can be found in conventions such as the Nairobi Convention,[368] the Noumea Convention,[369] the Bucharest Convention,[370] and the Abidjan Convention.[371] Whilst this may not

[363] Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific, 12 November 1981, 1648 *U.N.T.S.* 3, 19 May 1986 ('Lima Convention'). The states party to the Lima Convention are Chile, Colombia, Ecuador, Panama and Peru. See *http://www.unep.ch/regionalseas/main/hstatus.html*, accessed on 8 November 2013.
[364] Ibid, art. 11(1).
[365] Ibid, art. 11(2).
[366] Supplementary Protocol to the Agreement on Regional Co-operation in Combating Pollution of the South-East Pacific by Hydrocarbons or Other Harmful Substances, 22 July 1983, 20 May 1987 ('Supplementary Co-operation Protocol'). The five states who have ratified this protocol are Chile, Colombia, Ecuador, Panama and Peru. See *http://www.unep.ch/regionalseas/main/hstatus.html*, accessed on 8 November 2013.
[367] Ibid, art. 1(c).
[368] Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, *Official Journal of the European Community* 1986, C253/10-58 ('Nairobi Convention') art. 15. The states party to the Nairobi Convention are Comoros, France, Kenya, Madagascar, Mauritius, Mozambique, Seychelles, Somalia, Tanzania and the Republic of South Africa. See *http://www.unep.org/nairobiconvention/*, accessed on 11 November 2013.
[369] Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 24 November 1986, 26 *I.L.M.* 38, 22 August 1990 ('Noumea Convention') art. 20. There are 26 states party to the

necessarily be a problem, such controversial provisions are unlikely to be negotiated immediately and thus render the conventions impotent. A simple solution to this would be to include a temporary liability provision, as was done with the Madrid Protocol, until more comprehensive negotiations have taken place.

Whilst not a convention, Directive 2004/35/CE of the European Parliament is a significant regional policy concerning 'environmental liability with regard to the prevention and remedying of environmental damage' ('EU Directive').[372] The EU Directive seeks to unify the legal framework of EU states and thus mandates certain features that must be present in the latter's domestic laws. The EU Directive begins by recognising the polluter-pays principle, stating that the fundamental principle of the directive is that operators should be financially liable for any activity that causes environmental damage, as this will 'induce' operators to alter their practices so as to decrease the potential for environmental damage.[373] The threat of liability alone might not induce operators to alter their drilling practices, but it is submitted that it is a potent weapon in a legislator's arsenal. Coupled with stricter regulations, the threat of liability is a powerful motivator.

Environmental damage is given a wide definition, including adverse water damage, land damage (land contamination posing a risk to human health), and damage that has an adverse effect on natural habitats or protected species.[374] A broad definition is also given to the term 'damage', encompassing any 'measurable adverse change' or 'measurable impairment' of a natural resource, with such resources being specified by the EU Directive or a member state.[375] Occupational activities that have the potential to harm either human health or the environment

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Noumea Convention, see *http://www.unep.org/regionalseas/programmes/nonunep/pacific/instruments/default.asp*, accessed on 8 November 2013.

[370] Convention on the Protection of the Black Sea Against Pollution, 21 April 1992, 32 *I.L.M.* 1110, 15 January 1994 ('Bucharest Convention') art. 16. The Bucharest Convention has been ratified by six states; namely Bulgaria, Georgia, Romania, the Russian Federation, Turkey and Ukraine. See *http://www.blacksea-commission.org/_convention.asp*, accessed on 8 November 2013.

[371] Convention for Co-Operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, 23 March 1981, 20 *I.L.M.* 729, 5 August 1984 ('Abidjan Convention') art. 15.

[372] Directive 2004/35/CE of the European Parliament and of the Council, 21 April 2004, L143/56 *Official Journal of the European Union* 30.4.2004 ('EU Directive').

[373] Ibid, art. 1. See also para. 2.

[374] Ibid, art. 2(1).

[375] Ibid, art. 2(2).

fall within the ambit of the EU Directive,[376] however claims for damage to private property or economic loss are excluded.[377] This restriction is problematic in the context of a major offshore platform spill, as property damage and claims for economic loss would certainly form a large portion of the claim. Finally, where the claim is for environmental damage, the EU Directive recognises that individuals may lack the necessary standing to pursue a claim against operators, so non-governmental organisations that promote environmental protection are permitted to ensure that the directive is directly implemented.[378]

The EU Directive defines 'operators' as natural or legal, private or public persons, who control (or have had control delegated to them) an occupational activity,[379] with such activity falling within the ambit of the directive regardless of whether it is private or public, profit or non-profit in nature.[380] Article 3(1)(a) states that the directive applies to any occupation activity listed in Annex III. Annex III lists a number of activities related to the offshore petroleum industry, including management operations (the collection, transport, recovery and disposal of waste); the transport by road, rail, inland waters, sea or air of dangerous or polluting goods; and transboundary shipment of wastes. Therefore any company that conducts activities listed in annex 3 can be held liable in terms of the EU Directive, including charterers, independent contractors and others.

Operators are required to bear the costs of both remedial and preventative measures,[381] and are liable for costs incurred by a competent authority who acts to assess or prevent a harm from occurring,[382] although states may elect to bear the remedial costs themselves in the event that the operator was not negligent.[383] The assets of the operator act as security in the event that a state takes remedial steps on the operator's behalf.[384] Operators may escape liability if the damage was caused by a third party or resulted from compliance with a compulsory order.[385] The EU

[376] Ibid, para. 8.
[377] Ibid, para. 14.
[378] Ibid, para. 25.
[379] Ibid, art. 2(6).
[380] Ibid, art. 2(7).
[381] Ibid, art. 8(1).
[382] Ibid, para 18 and art. 5(4).
[383] Ibid, art. 8(4).
[384] Ibid, art. 8(2).
[385] Ibid, art. 8(3).

Directive recognises the need for operators to have financial security in order to adequately cover any potential costs, and thus encourages states to develop financial security instruments to cover any possible liability an operator may incur.[386]

For the purposes of liability, the EU Directive does not require fault; merely that the damage is quantifiable, the polluter is identifiable and that causation is present.[387] States may also choose to adopt more stringent provisions,[388] and pass legislation that prevents the double recovery of costs.[389] Claims are excluded where liability or compensation is subject to an existing international convention listed in annex IV, to which the member state concerned is a party.[390] Of these conventions, none are applicable to spills emanating from offshore oil platforms.[391] Thus there is no provision in the EU Directive that would narrow its scope to exclude an offshore platform spill.

It is evident that the EU has adopted an aggressive approach to tackling marine pollution whilst being cognisant of existing international conventions. The EU Directive thus sets a commendable minimum threshold and imposes liability directly upon operators. By applying the polluter-pays principle and removing the requirement of fault (unless otherwise specified), the EU Directive has created a clear incentive for operators to avoid polluting. The recognition of the need for financial security instruments coupled with the right of states to hold an operator's assets as security ensures that there should be assets available to address remedial costs as they arise. Despite these positive measures, the EU Directive has been criticised. Environmental NGOs have noted that whilst the EU Directive is applicable to offshore platform pollution, the provision of financial security is not yet compulsory.[392] This is problematic as spill-related costs could easily exceed the value of the installation itself. Thus in the absence of additional financial security measures, it is uncertain whether the operator would be capable of financing clean-up operations. Furthermore, the EU Directive only becomes operable once very high damage

[386] Ibid, art 14(1) and para. 27.
[387] Ibid, para 13.
[388] Ibid, art. 16(1).
[389] Ibid, art. 16(2).
[390] Ibid, art. 4(2).
[391] The list of conventions includes the CLC and Fund Conventions and, as discussed in 2.1 above, these conventions only apply to vessels that carry oil in bulk as cargo.
[392] Luk & Ryrie (note 260 above) 12.

thresholds have been met, and there have been calls for a lowering of those thresholds.[393] A final critique is that the EU Directive is not applicable to marine pollution that does not occur within inland and territorial waters, thus excluding offshore platforms as they operate beyond such these bodies of water.[394] This would need to be amended to address oil pollution occurring in the EEZ or resulting from activities on the continental shelf. The conclusion is that whilst the EU Directive incorporates many welcome features, it alone is not sufficient as an instrument for combating offshore oil pollution. A specialised instrument is needed, and such an agreement is presently being drafted by the EU in response to the *Deepwater Horizon* spill.[395]

2.3.7. Conclusion:

It is clear that the lacunae that exist in the global regulation of offshore platform pollution have been addressed by regional agreements, either between states or even between private operators. The success of these instruments is varied, especially as concerns liability. Certain instruments have adopted strict liability, albeit with a maximum claim limit, and this approach is congruent with instruments relating to tanker pollution (specifically the CLC and Fund Conventions). However, as with the tanker instruments, a strong argument could be made that the liability ceilings are too low. OPOL has set the maximum claim amount at 250 million US dollars, with that figure being divided into 125 million for 'clean-up' costs incurred by a public authority and 125 million for environmental damage. Whilst this ceiling may cover potential claims for fairly routine and small spills, it would be woefully inadequate in the event of a disaster akin to the *Deepwater Horizon* or *Ixtoc I*. It would perhaps be wise for the OPOL Association to recognise the potential for massive liability in the event of a well blowout, and raise the liability limit accordingly.

In addition to the implementation of the strict liability standard, certain instruments have recognised the need for the provision of financial security. The EU Directive, whilst not

[393] Ibid, 11.
[394] Ibid, 10. EU Directive, art. 2(5). Article 2(5) states that the EU Directive is only applicable to waters falling within the ambit of Directive 2000/60/EC, which is restricted to the territorial waters of a state.
[395] P Dittrick 'EU reaches preliminary agreement on offshore oil, gas safety directive' *Oil & Gas Journal* 3 April 2013, available at *http://www.ogj.com/articles/print/volume-111/issue-3/general-interest/eu-reaches-preliminary-agreement-on-offshore.html*, accessed on 4 July 2013.

specifying that financial security is currently compulsory, does permit states to seize the assets of operators as security for costs incurred in the event of a spill. Other instruments such as the Supplementary Protocol to the Cartagena Convention envision the provision of security by operators, to be governed by the domestic laws of states. Similarly, the Barcelona Convention requires that states ensure that operators within their jurisdiction furnish security that would be sufficient to cover environmental damage caused by pollution. The recognition of the need for financial security by regional of instruments is notable departure from the global regulatory regime, and it is sorely needed. Given the potential costs that may result from a catastrophic oil spill, requiring operators to furnish security is prudent. The EU Directive's approach is particularly novel, as by granting states security over the equipment of operators, it should prevent any state hesitation in clean-up activities motivated by financial constraints. It is submitted that provisions requiring the furnishing of financial security should be present in all regional instruments pertaining to offshore oil pollution, as there are great costs associated with environmental rehabilitation. Compulsory security coupled with a strict liability framework represents a strong weapon in the fight against pollution.

Despite recognition at the regional level, the majority of instruments have not implemented the strict liability standard. A number of conventions have maintained the usual fault based liability standard, informed by the polluter-pays principle. The polluter-pays principle is featured in a number of regional instruments, including OSPAR, the Barcelona Convention and the Helsinki Convention. Whilst the presence of this principle in environmental instruments is beneficial, it is insufficient if not accompanied by detailed liability provisions. The lack of such detailed provisions is possibly the strongest critique of the current regional regulatory regime, as uncertainty is the enemy of accountability. Many conventions seek to address this concern with the inclusion of a *pactum de contrahendo*, but this approach is reliant on proactive negotiations between states in order to be effective. It is perhaps unsurprising that parties to the majority of conventions including such a clause have failed to agree on a clear framework of liability. It is submitted that the failure by a majority of the above-mentioned conventions to include detailed liability provisions renders them near useless as deterrents to large-scale offshore platform oil pollution. Their shortcomings, coupled with the lacunae present in the global regulatory regime, shift the burden of imposing liability to domestic legislation.

In conclusion, whilst a number of regional instruments have implemented novel and effective provisions pertaining to liability and the provision of financial security, the majority of instruments have failed to implement sufficiently clear liability provisions. Without recourse available at the global regulatory level, it is necessary to consider the domestic laws of select states to determine whether they hold the solution. Considering that large-scale oil spills are often transboundary in nature, reliance on domestic legislation is clearly ill advised.

2.4. INTERNATIONAL LAW CONCLUSION:

The analysis conducted in this chapter indicates that there is a clear lacuna in the international regulation of offshore platforms. This analysis began with a consideration of customary international law. CIL has developed to the point where there is a recognised state obligation to prevent an activity conducted in its territory from harming the territory of another state. This obligation has been recognised by the ILC in their 2006 Draft Principles as well as decisions of the ICJ and famously the *Trail Smelter* arbitration. However, as noted in that discussion, the standard of liability applicable to transboundary pollution remains uncertain. Whilst there has been some progress to recognising the strict liability standard in this context, the standard remains contentious amongst states and is unlikely to find acceptance from the international community. Thus, whilst a clear duty exists in CIL for holding states accountable for their polluting activities when the pollution harms another state, uncertainty remains concerning both the extent and standard of liability.

Conventions presently form the bulk of international regulation of marine pollution. The 'global' regulatory regime created conventions that regulate marine pollution and are presently effective at addressing tanker-source pollution, but these conventions are either not directly applicable to offshore platforms or they specifically exclude offshore platforms from their application. Whilst UNCLOS does create a rudimentary system concerning offshore platforms, it is largely silent on liability. MARPOL, the London Convention and the OPRC are variably applicable to offshore platforms, but are not directly applicable to oil spills and instead regulate ancillary aspects. The leading tanker-source pollution conventions, the CLC and Fund Conventions, specifically exclude offshore platform spills from their scope. The result of this regime is an incomplete and ineffective liability framework at the global international level.

The absence of a global framework has been partially addressed by regional agreements. The majority of these agreements do not contain detailed liability provisions and merely require the parties to agree on liability at a later stage. A notable exception to this trend is OPOL, which creates a detailed liability regime specifically catering to offshore platforms, but this agreement is private (between operators, not states) and has a limited geographical coverage (it only extends

to platforms located on the UK continental shelf). Therefore, whilst a few regional agreements do improve on the liability regime created by UNCLOS, they remain largely insufficient in the context of liability. Most of the regional instruments canvassed above make reference to the polluter-pays principle, but this is largely meaningless in the absence of concrete liability provisions. In addition to these vague liability frameworks, the instruments rarely address pollution from offshore platforms, usually focusing on ship-source pollution. A positive step enjoying limited application by regional instruments is the need for financial security arrangements, but so far such recognition is limited as only the EU Directive and Barcelona Convention (of the conventions that were examined) contain any reference to financial security arrangements. Unfortunately, the conclusion that must be reached concerning regional instruments is that they are presently not sufficient for addressing an oil spill from an offshore platform, going only slightly further than the global framework. It is clear from this analysis that something must be done to improve international regulation of offshore platforms.[396]

[396] See the proposal for a global convention addressing offshore installations in chapter 4.

CHAPTER 3: THE DOMESTIC LIABILITY REGIMES OF THE USA AND SOUTH AFRICA

The international liability regime does not exist in isolation. States implement their own laws to give effect to international conventions and agreements, as well as to regulate the offshore oil industry in greater detail. Whilst it is desirable for the domestic law of a state to be congruent with international law, this has not been the case. UNCLOS confers coastal states the right to regulate offshore drilling where such drilling occurs in its EEZ or on its continental shelf, thus the coastal state has a significant regulatory role in the context of offshore platforms.

3.1. THE DOMESTIC LIABILITY REGIME OF THE USA

There are numerous differences between the legal systems of the USA and South Africa. South Africa addresses marine oil pollution and liability with all-encompassing national legislation. By contrast the USA deals with these matters through both federal and state legislation, but the present analysis is confined to the former.[1] The USA passed aggressive marine pollution legislation in the wake of the Exxon Valdez spill, but some authors are concerned that these laws go beyond international law thresholds and are thus ultra vires.[2]

3.1.1. The Outer Continental Shelf Lands Act:

The OCSLA states that the US Constitution, laws, and civil and political jurisdiction of the USA is extended to the seabed and subsoil of the US continental shelf, and to installations and other devices that are permanently or temporarily attached to the seabed for the purposes of exploring for or developing resources therefrom.[3] The OCSLA therefore confers upon the USA the right to regulate installations exploring for and exploiting minerals on its continental shelf, thus bringing the USA into conformity with international law, specifically article 77(1) of

[1] As each coastal US state may pass its own marine pollution legislation, it would not be feasible to consider each instrument here.
[2] D Dzidzornu and M Tsamenyi 'Enhancing International Control of Vessel-Source Pollution Under the Law of the Sea Convention, 1982: A Reassessment' (1990) 10 *U. Tas. L. Rev.* 269, 287.

UNCLOS.[4] In addition to placing installations within the federal jurisdiction of the USA, the OCSLA provides that the criminal and civil laws of the adjacent state are applicable to installations, to the extent that these are not inconsistent with the provisions of the OCSLA or any other federal laws.[5] This provision is only applicable to fixed installations,[6] and thus excludes the application of state law to mobile installations such as the *Deepwater Horizon*.[7] On the plain wording of the OCSLA, the only applicable law in the event of a spill from an offshore installation that was not permanently affixed to the seabed is general maritime law,[8] and Acts of Congress.[9]

Despite the seemingly clear wording of the OCSLA, controversy has arisen. In *Union Texas Petroleum Corp. v PLT Engineering Inc.* the court held that provided the cause of action arose upon an installation permanently or temporarily attached to the seabed, and that federal law does not apply of its own force, the law of the adjacent state will be applicable provided that it is not inconsistent with federal law.[10] Despite this dictum being upheld by the Court of Appeals for the Fifth Circuit, it has been the subject of intense academic scrutiny,[11] as the plain wording of the OCSLA refers only to fixed structures when conferring jurisdiction upon adjacent states. Nevertheless, the Supreme Court has not yet addressed the question, so the Fifth Circuit's decision remains binding in Louisiana.

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[3] Outer Continental Shelf Lands Act, 43 U.S.C. §1331 ('OCSLA'), §1333(a)(1).
[4] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3. ('UNCLOS'). For further discussion on UNCLOS, see 2.2.1. of this dissertation.
[5] OCSLA, 43 U.S.C. §1333(a)(2)(A).
[6] Ibid.
[7] M Davies 'Liability Issues Raised by the Deepwater Horizon Blowout' (2011) 25 *Austl. & N.Z. Mar. L.J.* 35, 35. Davies notes that whilst §1333(a)(1) was amended in 1978 to include semisubmersible drilling rigs and other devices, §1333(a)(2)(A) was left untouched, thus demonstrating that state law was excluded from applying to non-fixed installations.
[8] Article III, section 2 of the US Constitution grants federal courts the jurisdiction to hear maritime claims. See also Davies (ibid) 35.
[9] Davies (note 7 above) 36.
[10] *Union Texas Petroleum v PLT Engineering*, 895 F.2d 1043 (5th Cir. 1990), 1047. For a discussion of the three pronged test created by the *Union Texas* case, see also Chandler, Myers and Domingo 'Choice of Law on the Outer Continental Shelf: Is There Any Choice At All?' available at *http://www.jonesday.com/files/Publication/8167bb66-0756-49c0-a5e5-25c0572a73e1/Presentation/PublicationAttachment/c8eb003c-cef4-4bb1-a408-a5283217988d/choiceoflaw.pdf*, accessed on 28 September 2013.
[11] Davies (note 7 above) 36. Whilst Davies emphatically states that 'to put it bluntly, this just wrong', Schilling is a bit more restrained, commenting that this aspect of the judgment is 'particularly controversial'. See E Schilling

In the specific context of the *Deepwater Horizon* spill, Davies comments that BP's liability is largely unaffected by the Fifth Circuit's interpretation of the OCSLA, as federal and state law impose the same limits on liability.[12] Difficulties emerge when considering the potential liability of BP's contractors, as there is a possibility for a claim of product liability against the party responsible for the faulty blowout protector.[13] Whilst federal law permits punitive damages for product liability claims, provided that the quantum of punitive damages may not exceed that of compensatory damages,[14] Louisiana state law (the law that would be applicable to the *Deepwater Horizon*) does not.[15] Thus determining which law is applicable to the incident is of vital importance and the controversy surrounding the interpretation of the OCSLA by the Fifth Circuit is concerning.

In the context of liability for damage caused by pollution resulting from an oil spill, the OCSLA is silent (barring an action for the compensation of workers). The most important consequence of the OCSLA in the context of liability for an oil spill from an offshore installation is that it places installations operating on the US continental shelf (but beyond the territorial waters) within federal jurisdiction - and therefore within the ambit of federal oil pollution legislation.

3.1.2. The Oil Pollution Act:

The primary federal legislation addressing pollution is the Oil Pollution Act of 1990 ('OPA 90').[16] The OPA 90 was the US's legislative response to the *Exxon Valdez* spill.[17] Prior to the OPA 90 the USA was woefully exposed to marine oil pollution as it is not party to the CLC and Fund Conventions.[18] Although the USA has not incorporated the CLC and Fund Conventions

'Demette v Falcon Drilling Co.: The Sinking Ship of Fifth Circuit Precedent Construing the Outer Continental Shelf Lands Act and Maritime Law' (2001-2002) 76 *Tul. L. Rev.* 1785, 1788.

[12] Ibid

[13] Ibid.

[14] *Exxon Shipping Co. v Baker* 128 S Ct 2605 (2008). See also Schoenbaum (note 18 above) 403.

[15] Davies (note 7 above) 36.

[16] Oil Pollution Act of 1990, 33 U.S.C. §2701 ('OPA 90')

[17] R Perry 'The Deepwater Horizon Oil Spill and the Limits of Civil Liability' (2011) 86 *Wash. L. Rev.* 1, 49.

[18] International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, 9 ILM 45 ('CLC'). Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 18 December 1971, 11 ILM 284 ('Fund Convention'). T Schoenbaum 'Liability for Damages in Oil Spill Accidents:

into law, it has created a liability system that is similar in many respects and that - crucially - is applicable to spills emanating from offshore installations.

The OPA 90 defines an offshore facility as a 'facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or public vessel'.[19] The OPA 90 defines a 'mobile offshore drilling unit' as a vessel that can be utilised as an offshore facility,[20] and defines an 'outer continental shelf facility' as an offshore facility operating (in whole or in part) on the outer continental shelf.[21] The 'responsible party' for an offshore facility is defined as the 'lessee or permitee of the area in which the facility is located or the holder of a right of use and easement granted under applicable state law or the OCSLA for the area in which the facility is located (if the holder is a different person than the lessee or permitee)'.[22] The OPA 90, in contrast to the CLC 69,[23] covers all kinds of oil pollution,[24] and it is the 'responsible party' for a facility from which the oil is discharged (or is likely to be discharged) into either the navigable waters, the adjoining shorelines or the exclusive economic zone ('EEZ')[25] that is liable for removal costs and damages.[26]

The OPA 90 imposes strict liability upon the responsible party for an oil discharge.[27] OPA 90 provides that removal costs include all removal costs incurred by the US, a state or an Indian tribe and any removal costs incurred by a person for acts taken by that person which are

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Evaluating the USA and International Law Regimes in the Light of the Deepwater Horizon' (2012) 24:3 *Journal of Environmental Law* 395, 397.

[19] OPA 90, §2701(22).

[20] OPA 90, §2701(18).

[21] OPA 90, §2701(25).

[22] OPA 90, §2701(32)(B).

[23] Schoenbaum (note 18 above) 398 notes that whilst the international regime excludes claims for 'non-persistent oils', the OPA 90 has a far greater scope and includes every kind and form of oil.

[24] OPA 90, §2701(23) defines oil to mean any kind or form of oil other than those specifically listed or designated a hazardous substance.

[25] OPA 90, §2701(8) defines the EEZ as the zone established by Presidential Proclamation 5050, dated 10 March 1983. In this proclamation, President Reagan declared that the EEZ extended 200 nautical miles from the baseline of the territorial sea and that the USA would have all rights permitted by international law in this zone. For a further discussion of these rights, see 2.2.1. of this dissertation.

[26] OPA 90, §2702(a).

[27] J Goldberg 'Liability for Economic Loss in Connection with the Deepwater Horizon' (2011-2012) 30 *Miss. C. L. Rev.* 335, 342.

consistent with the US National Contingency Plan.[28] The OPA 90 distinguishes between removal costs and other damages claims (addressed below) for the purposes of limiting liability. As a general rule, the responsible party for an offshore installation will be able to cap liability at $75 million, excluding removal costs.[29] The limitation on liability (and the instances where a responsible party may not avail himself of this limit) will be discussed below.

In addition to removal costs, OPA 90 recognises six distinct forms of damages claims. They are as follows: (a) damages for injury, destruction, loss or loss of use of natural resources including reasonable costs of assessing the damage, recoverable by a trustee of the USA, state, Indian tribe or foreign entity;[30] (b) damages for injury to or economic loss arising from destruction of real or personal property, claimable by the owner or lessee of that property;[31] (c) damages for loss of subsistence use of natural resources, recoverable by the person who has lost use of such resources without regard to ownership or management of them;[32] (d) damages equal to loss of revenues as a result of injury, damage, destruction or loss of property or natural resources, recoverable by the USA, state or political subdivision thereof;[33] (e) damages for loss of profits or impairment of earning capacity due to injury, destruction or loss of property or natural resources by any claimant;[34] and finally (f) damages for the net costs of providing public services during removal activities caused by the oil discharge, recoverable by a state or a political subdivision thereof.[35] Whilst the OPA 90 allows for a very wide range of damages claims, it does not include claims for compensation for attorneys,[36] nor does it permit personal injury[37] or death claims.[38] The OPA 90 has been interpreted to exclude punitive damages.[39] The

[28] OPA 90, §2702(b)(1)(A)(B).
[29] OPA 90, §2704(a)(3). Interestingly, offshore facilities are the only source of pollution that OPA 90 prevents from including removal costs within the liability cap. See further Perry (note 17 above) 52. See also R Force, M Davies & J Force 'Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases' (2011) 85 *Tul. L. Rev.* 889 ('Force 2011'), 944.
[30] OPA 90, §2702(b)(2)(A).
[31] OPA 90, §2702(b)(2)(B).
[32] OPA 90, §2702(b)(2)(C).
[33] OPA 90, §2702(b)(2)(D).
[34] OPA 90, §2702(b)(2)(E).
[35] OPA 90, §2702(b)(2)(F).
[36] Schoenbaum (note 18 above) 403.
[37] Perry (note 17 above) 52.
[38] D Robertson 'Criteria for Recovery of Economic Loss under the Oil Pollution Act of 1990' (2011-2012) 7 *Tex. J. Oil Gas & Energy L.* 241, 242.

range of permissible claims under the OPA 90 is so wide, the judge hearing the *Deepwater Horizon* matter has ordered that the cases be divided and heard in 'bundles', with each bundle concerning a different form of damages.[40]

Certain authors comment that the OPA 90 appears to allow claims for pure economic loss, although there has yet to be a decisive ruling on this issue.[41] Prior to the OPA 90, the US courts had been reluctant to recognise claims for pure economic loss. In the Supreme Court case of *Robins Dry Dock & Repair Co v Flint* it was held that a time charterer could not sue a party for loss of profits resulting from damage to the chartered vessel, as the damaged property did not belong to the time charterer.[42] The court held that the time charterer only had a contractual interest, and as the negligent party was not party to the time charter, it was not liable for the time charterer's pure economic loss.[43] Davies writes that in the *Robins Dry Dock* case, the Supreme Court created the 'bright line' rule, stating that 'only those suffering personal injury or property damage may recover economic losses consequential on that injury or damage'.[44] The OPA 90 states that a claimant may recover damages 'equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources'.[45] This provision clearly indicates that OPA 90 provides for claims of pure economic

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[39] Perry (note 17 above) 56. Perry cautions that it would be premature to consider the interpretation excluding punitive damages as decided law as the OPA 90 states that it does not affect maritime and admiralty law 'except as otherwise provided in this Act'.

[40] Schoenbaum (note 18 above) 407/408.

[41] Schoenbaum (note 18 above) 411.

[42] *Robins Dry Dock & Repair Co v Flint* 275 US 303, 48 S Ct. 134 (1927). See Schoenbaum (note 18 above) 408/409. South African law permits claims for loss of profit provided that the claims are not 'too speculative or remote', see in this regard John Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2nd Ed. (2009) ('Hare 2009'), 368. In *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490A the Appellate Division, per Van Den Heever JA, held that damages in respect of the Aquilian action can only be awarded if the defendant 'made an invasion of rights recognised by the law as pertaining to the plaintiff; apart from that, loss lies where it falls'. The dictum from *Herschel* was repeated by the Appellate Division in *Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd and others* 1982 (4) SA 890 (A) at 900H, per Wessels JA, who held that 'in the absence of a legal duty there can be no unlawfulness'. The United Kingdom has a similar view to the USA, with Hewson J in *Konstantinidas v World Tankers Corp Inc, The World Harmony* [1965] 2 All ER 139 at 155 stating 'There is no reported case, so far as I am aware, in the long history of chartering where a time charterer has recovered damages for pecuniary loss because of a damage by a third party to the chartered vessel.' This dictum was subsequently endorsed by the House of Lords in *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd and another, The Mineral Transporter, The Ibaraki Maru* [1985] 2 All ER 935 at 940.

[43] Schoenbaum (note 18 above) 409.

[44] Davies (note 7 above) 38.

[45] OPA 90, §2702(b)(2)(E).

loss,[46] and this is consistent with the intention of Congress when promulgating this Act.[47] There is some academic concern that where the responsible party limits its liability in terms of OPA 90, permitting claims for pure economic loss will 'dilute the pool for compensating claimants'.[48] This would result in no single claimant adequately recovering their losses.[49]

As noted earlier, OPA 90 does allow a responsible party to limit its liability. The responsible party may escape all liability if it can establish on a balance of probabilities that the actual or threatened discharge of oil and its resulting damages or removal costs were solely caused by an act of God,[50] an act of war,[51] an act or omission of a third party,[52] or any combination thereof.[53] Where the discharge or damage resulted from an act or omission of a third party, the responsible party will not escape liability if the third party was its employee or agent, or if the act or omission of the third party occurred in connection with a contractual relationship between it and the responsible party.[54] Finally, where the damage occurred as the result of an act or omission of a third party, the responsible party must establish that it exercised due care with respect to the oil concerned,[55] and that it took reasonable steps against foreseeable acts or omissions by the third party, in order to escape liability.[56] It is worth noting that a party may not utilise these defences in the event that it failed to report the incident or if it failed to provide reasonable cooperation and assistance to a responsible official in connection with removing the pollution.[57]

In addition to the above 'complete defences' to liability, the OPA 90 allows the responsible party to limit its liability to the extent that the claimant caused the incident due to their own gross negligence or wilful misconduct.[58] The OPA 90 also contains general liability limitations

[46] Schoenbaum (note 18 above) 412.
[47] Congressional Record - 101st Congress (1989-1990), Conference Report on H.R. 1465, Oil Pollution Act of 1990 (House of Representatives - August 03, 1990) at page H6939.
[48] Davies (note 7 above) 53.
[49] A comprehensive analysis detailing claims for economic loss in terms of the OPA 90 can be found in Robertson (note 38 above).
[50] OPA 90, §2703(a)(1).
[51] OPA 90, §2703(a)(2).
[52] OPA 90, §2703(a)(3).
[53] OPA 90, §2703(a)(4).
[54] OPA 90, §2703(a)(3).
[55] OPA 90, §2703(a)(3)(A).
[56] OPA 90, §2703(a)(3)(B).
[57] OPA 90, §2703(c).
[58] OPA 90, §2703(b).

available to the responsible party, with the limits dependant on the nature of the vessel. Where the vessel is an offshore installation, the liability limit is the total of all removal costs plus $75 million.[59] This liability limit will not be available if the incident was proximately caused by the gross negligence or wilful misconduct of the responsible party,[60] or if a federal regulation was violated by the party, its agents, employees or a party in a contractual relationship with the responsible party.[61] The figure of $75 million has been criticised as insufficient in the wake of the *Deepwater Horizon* spill,[62] and the White House is presently considering increasing the liability limits (with some law makers calling for an increase to $10 billion).[63] Perry comments that the liability caps in the OPA 90 appear to be arbitrary, as they are 'insensitive to factors that seem relevant in determining the proper scope of liability, such as the fact that many relational losses are not true social costs'.[64] However, where the responsible party fails to report the incident or cooperate with the responsible authorities, it will not be entitled to limit its liability.[65] Perry comments that the OPA 90 removes liability limits in events that would usually result in punitive damages under general maritime law.[66] Notwithstanding any of these limitations, the owner or operator of an offshore facility operating on the continental shelf must bear all the removal costs incurred by the USA authorities.[67]

It is readily apparent that the USA has created a liability regime for spills emanating from offshore platforms. It has created a similar framework to that found in international law addressing tanker spills.[68] The key features of both regimes are strict liability with few exceptions, coupled with a liability limitations. A further similarity between the two regimes is the method by which money is made available to compensate claimants.[69] The OPA 90 allows claimants to proceed against the Oil Spill Liability Trust Fund ('Fund'), established by Article

[59] OPA 90, §2704(a)(3).
[60] OPA 90, §2704(c)(1)(A).
[61] OPA 90, §2704(c)(1)(B).
[62] Force 2011 (note 29 above) 945 writes that the limit of $75 million is insufficient for modern drilling activities.
[63] M Soraghan 'White House Proposes Bill to Lift Caps on Offshore Oil Spill Liability' *The New York Times* 12 May 2010, available at *www.nytimes.com/gwire/2010/05/12/12greenwire-white-house-proposes-bill-to-lift-caps-on-offs-45047.html*, accessed on 28 September 2013.
[64] Perry (note 17 above) 68.
[65] OPA 90, §2704(c)(2)(A-B).
[66] Perry (note 17 above) 54.
[67] OPA 90, §2704(c)(3).
[68] Schoenbaum (note 18 above) 400. See also Chapter 2 of this dissertation for a detailed analysis of the international law regime and its applicability to offshore platforms.

26, section 9509(a). The fund may only provide compensation for certain expenditure, including claims for payment of removal costs, expenses, claims and damages referred to in section 1012 of the OPA 90.[70] The amount of compensation provided in such instances is limited, with no payment exceeding $1 billion permitted for a single incident.[71] Where the costs relate to natural resource damage assessments and claims, compensation shall not exceed $500 million per incident.[72] Perry comments that these limitations demonstrate that the fund does not guarantee full compensation, even where all prerequisites for payment have been satisfied.[73] Furthermore, Perry strongly argues that the amount provided by the fund is clearly inadequate in instances such as the *Deepwater Horizon* spill.[74] This is because there will be insufficient funds for individual victims after the fund has paid for harm to natural resources and removal costs - as Perry writes, this leaves 'individual victims with only a forlorn hope of recovery'.[75]

The claimant must first seek compensation from the responsible party, before he may approach the fund.[76] A party may proceed directly against the fund in limited circumstances: (1) the President has advertised or advised claimants that they may do so; (2) the claimant is the responsible party and is recovering costs it paid in excess of its liability limitation;[77] (3) the claimant is a state which is recovering removal costs; or (4) the oil was discharged by a foreign offshore unit for which the fund is liable.[78] Of particular interest is the provision permitting the responsible party to claim from the fund. A responsible party may not claim from the fund where the incident was caused by its own gross negligence or wilful misconduct.[79] Perry summarises the position of a responsible party who acted with gross negligence or wilful misconduct as follows: (1) there will be no available liability cap; (2) the responsible party will be barred from claiming compensation from the fund; (3) no punitive damages claims are allowed against the

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[69] Schoenbaum (note 18 above) 400.
[70] U.S.C. 26, §9509(c)(1)(A).
[71] U.S.C. 26, §9509(c)(2)(A)(i).
[72] U.S.C. 26, §9509(c)(2)(A)(ii).
[73] Perry (note 17 above) 57.
[74] Perry (note 17 above) 57/58.
[75] Perry (note 17 above) 58. These individuals include affected tourism, fishing and real estate businesses. In this regard see chapter 1, page 2 of this dissertation.
[76] OPA 90, §2713(a). Force 2011 (note 29 above) 949/950.
[77] See OPA 90, §2708.
[78] OPA 90, §2713(b)(1)(A-D).
[79] OPA 90, §2712(b).

responsible party.[80] Perry is critical of this position, suggesting that the OPA 90 does not consider the relative gravity of the responsible party's negligence.[81] Provided the responsible party is more than merely negligent, he argues, the OPA 90 will summarily impose unlimited liability.[82] He further states that 'while general maritime law responds to severe misconduct by allowing a very exclusive group of successful claimants to obtain extra-compensatory payments, the OPA removes the statutory limit of the defendant's liability to a much more inclusive group of recognized [sic] claimants'.[83]

To properly assess Perry's critique that the OPA 90 fails to consider the relative gravity of the responsible party's negligence, one must briefly consider how the courts distinguish between ordinary and gross negligence. The US Supreme Court in *Exxon Shipping Co. v Baker*, in defining what is meant by recklessness (gross negligence) held that 'recklessness may consist of either of two types of conduct. In one the actor knows, or has reason to know… of facts which create a high degree of risk of… harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.'[84] Perry's contention is therefore that the OPA 90 does not distinguish between instances where the responsible party 'consciously disregards the risk' and instances where it intentionally causes the harm. It is submitted that whilst these two concepts are notionally different, they are difficult to distinguish in practice. Conventions such as the CLC 92 also remove all limits on liability if the claimant can

[80] Perry (note 17 above) 58. It is appropriate to reiterate that the matter of punitive damages under OPA 90 has yet to be definitively resolved, see Perry ibid, 59.
[81] Perry (ibid) 68.
[82] Ibid.
[83] Perry (ibid) 58.
[84] *Exxon Shipping Co. v Baker* (note 14 above) at 20. South African law also distinguishes between ordinary and gross negligence. In *MV Stella Tingas; Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and another* 2003 (2) SA 473 (SCA) Scott JA considered whether Transnet could avail themselves of a liability exemption contained in paragraph 10(7) of Schedule 1 to the Legal Succession to the South African Transport Services Act 9 of 1989. This exemption would allow Transnet to escape liability if the loss or damage resulted from a negligent act or omission on the part of the pilot. This liability exemption would not be available if the pilot acted with gross negligence. At page 481A-C, the court held that 'to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be a conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose validity.'

establish gross negligence,[85] presumably for this same reason. Thus the OPA 90's failure to consider the relative gravity of the operator's conduct beyond mere negligence is not anomalous and is in fact congruent with international law.

The final aspect of OPA 90 to be considered is its financial security provisions. The responsible party for an offshore installation is required to furnish evidence of financial responsibility amounting to $35 million if the installation is located seaward of the seaward boundary of a state, or $10 million if located inland thereof.[86] The President may determine that a higher amount, not exceeding $150 million, is appropriate based on factors such as operation, environmental and human health risks.[87] The President may also consider the quantity and quality of the oil being drilled or explored for in determining the final amount.[88] Where the same responsible party owns or operates more than one offshore installation, they need only furnish security equal to the amount applicable to the facility with the greatest financial responsibility requirement in terms of the OPA 90.[89] The OPA 90 confers upon the claimant the right to proceed directly against the guarantor, the latter being entitled to invoke any defences that would have been available to the responsible party.[90] The guarantor is thus precluded from raising any defence that might have been utilised in proceedings brought by the responsible party.[91] However, the claimant may only proceed against the insurer if the responsible party has denied or failed to pay the claim, is insolvent, has petitioned for bankruptcy or the claim is being filed by the USA for removal costs, damages or compensation provided for by OPA 90.[92]

3.1.3. Conclusion:

The OPA 90 creates an effective liability regime that is directly applicable to offshore installations. Whilst concerns remain over the scope of claims for pure economic loss and natural

[85] CLC 92, art. 4(2).
[86] OPA 90, §2716(c)(1)(B).
[87] OPA 90, §2716(c)(1)(C).
[88] Ibid.
[89] OPA 90, §2716(c)(1)(D).
[90] OPA 90, §2716(f)(1)(A).
[91] Force 2011 (note 29 above) 955.
[92] OPA 90, §2716(f)(2)(A-C).

resource damage,[93] as well as the arbitrary nature of the liability caps applicable to offshore installations,[94] it is submitted that the OPA 90 is a far more effective regulatory instrument for offshore installations than those that exist at the international law level. The OPA 90 imposes strict liability, with limited exceptions, it provides clear caps on liability, creates a fund to compensate claimants and mandates financial security measures. It is clear that many finer criticisms of the OPA 90, which have yet to be resolved by the courts, will likely be addressed in the litigation resulting from the *Deepwater Horizon* spill.

The USA's legislative regime is interesting as it is not party to the CLC and Fund Conventions. Following the *Exxon Valdez* spill, it was clear that the USA had to implement some form of pollution control legislation and the end result - the OPA 90 - appears to be very similar to that created by the CLC convention. Furthermore, instruments imposing criminal sanctions such as the Clear Water Act have purposely been excluded from the scope of this analysis, but will be used to fine BP significant sums of money.[95] Congress has allowed individual states the discretion to impose additional liability for oil pollution occurring within their territory, leading to the impression that 'state and general (federal) maritime law should be cumulative'.[96]

The effectiveness the civil liability provisions of the OPA 90 will ultimately be determined in the on-going litigation concerning the *Deepwater Horizon* spill.

[93] Schoenbaum (note 18 above) 416.
[94] Perry (note 17 above) 68.
[95] Federal Water Pollution Control Act, 33 U.S.C. §1251.
[96] Davies (note 7 above) 42.

3.2 THE DOMESTIC LIABILITY REGIME OF SOUTH AFRICA

The final liability regime to be considered is that of South Africa. Offshore oil exploitation is not currently a major industry in South Africa and therefore the potential for disaster is minimal. This potential is further reduced when one considers that established offshore platforms currently operate in shallow waters, a factor that would significantly reduce the time taken to seal a well blowout. Whilst present offshore oil operations in South Africa may therefore present minimal risk, there has been increased interest in exploring for oil in deeper waters along South Africa's coast,[97] as well as the coasts of neighbouring states.[98] As exploration increases, so too does the likelihood of an oil spill occurring in South Africa's waters. There is also a risk that a spill may occur in the waters of a neighbouring state and that such a spill could be carried onto South African shores by ocean currents.

3.2.1. THE LEGISLATIVE FRAMEWORK OF SOUTH AFRICA

There are many different pieces of legislation that address marine pollution in South Africa.[99] A number of these statutes attempt to incorporate international conventions into South Africa law whilst others merely codify principles found in South Africa's domestic law. In order to

[97] C Assis 'Exxon signs deal to look for oil in South Africa' *MarketWatch, The Wall Street* Journal 17 December 2012, available at *http://www.marketwatch.com/story/exxon-signs-deal-to-look-for-oil-in-south-africa-2012-12-17*, accessed on 10 November 2013. Exxon Mobil Corp. has obtained a partial interest in the Tugela South Exploration Right, granting it exploration rights to an 18 million acre area off the coast of Durban. Off South Africa's western coast, Shell has been granted the right to explore the Orange Basin Deep Water are (an area of approximately 37 000 square kilometres) for oil and natural gas. See *http://www.shell.com/zaf/aboutshell/shell-businesses/e-and-p/orange-basin-old.html*, accessed on 10 November 2013. Other operators include BHP Billiton, which is investigating an area of South Africa's south coast believed to be rich in oil. See J Roux, D van der Spuy and V Singh 'Deepwater drilling on the way of South Africa' 2 February 2004 *Offshore Magazine*, available at *http://www.offshore-mag.com/articles/print/volume-64/issue-2/features/deepwater-drilling-on-the-way-off-south-africa.html*, accessed on 10 November 2013. See also Appendix 4 for a map of South African petroleum resources, available at *http://www.petroleumagencysa.com/images/pdfs/Hubmap10a13.pdf*, accessed on 12 November 2013.

[98] Recently there has been increased exploration for oil and gas of Mozambique's coast and there is a strong likelihood that Mozambique could become a major player in the offshore energy industry. See E Gismatullin 'Oil Hunted in Mozambique after World's Largest Gas Discoveries' *Bloomberg* 14 June 2013, available at *http://www.bloomberg.com/news/2013-06-14/oil-hunted-in-mozambique-after-world-s-largest-gas-discoveries.html*, accessed on 9 November 2013. See also World Oil News Centre 'Eni discovers gas offshore Mozambique' *World Oil Online* 9 April 2013, available at *http://www.worldoil.com/Eni_discovers_gas_offshore_Mozambique.html*, accessed on 9 November 2013.

[99] H Staniland 'Should Foreign Maritime Liens Be Recognised?' (1991) 108 *S. African L.J.* 293, 300. Staniland somewhat cynically writes that 'there is an unconnected mass of South African statutes that variously regulate marine pollution.'

unpack this convoluted state of affairs, the various pieces of legislation applicable to offshore platforms spills will be separately addressed.

3.2.1.1. The Constitution of the Republic of South Africa:

The Constitution of the Republic of South Africa ('the Constitution') is the supreme law of South Africa.[100] Chapter 2 of the Constitution contains the Bill of Rights and the state has a duty to 'respect, protect, promote and fulfil' these rights.[101] Amongst these rights is the right for everyone to 'an environment which is not harmful to their health or well-being'.[102] Additionally, the section provides that everyone has the right to an environment protected for present and future generations through legislative or other measures that 'prevent pollution and ecological degradation'.[103] Couzens comments that this section is 'less a fundamental right than a policy principle' as a claimant is required to utilise statutory remedies prior to resorting to constitutional provisions due to the principle of constitutional avoidance.[104] Couzens's comment seems to be supported by the judgment given in the *HTF Developers* case,[105] in which Murphy J held that section 24 of the Constitution has an 'aspirational form' and identifies key areas that must be considered by legislators.[106] Kuschke writes that section 24 creates a 'third generation right', meaning that it is a 'right for the public at large' instead of a right of an individual.[107] It would therefore appear that section 24 of the Constitution was envisioned as a policy template, not primarily as an actionable provision (although general constitutional remedies will be available to a litigant).[108]

[100] The Constitution of the Republic of South Africa, 1996 ('The Constitution'), s2.
[101] The Constitution, s7(2).
[102] The Constitution, s24(a).
[103] The Constitution, s24(b)(ii).
[104] E Couzens 'The incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law' (2005) 30 *SAYIL* 128, 138.
[105] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T).
[106] Ibid 518.
[107] Birgit Kuschke *Insurance Against Damage Caused By Pollution* (unpublished LLD thesis, University of South Africa, 2009) 61.
[108] Kuschke (ibid) 67 and 72. See also *Minister of Health and Welfare v Woodcarb (Pty) Ltd and another* 1996 (3) SA 155 (N) at 164 where the court held that the Minister of Health and Welfare had *locus standi* to obtain an interdict to protect the respondent's neighbour's right to an environment which is not detrimental to their health or well-being. See further *Sibiya & Others v DPP: Johannesburg High Court & Others* 2005 (5) SA 315 (CC) at para.

Section 39 of the Constitution states that when a court, tribunal or forum interprets a provision of the Bill of Rights, it must consider international law.[109] It is therefore submitted that since section 24 mandates the creation of legislation to protect the environment, it will be necessary to consider international law to determine whether such legislation is adequate in terms of section 24.[110] The system established by the Constitution for incorporating international law into South African domestic law has been defined as a 'combined monist and dualist approach'.[111] International agreements are incorporated into South African law by an Act of Parliament.[112] Where such an instrument has attained the status of international customary law (an example of this would be UNCLOS)[113] such law is binding in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.[114]

The Constitution clearly recognises the need for environmental protection. It delegates the protection of this right to legislative and other measures, and crucially, the Constitution requires that international law must be considered in effecting environmental protection.

3.2.1.2. Maritime Zones Act:

The Maritime Zones Act[115] was promulgated by Parliament to give effect to the various maritime zones created by UNCLOS.[116] The Maritime Zones Act does not deviate from the provisions of UNCLOS. South Africa has rights and powers over minerals in its internal waters, territorial waters, exclusive economic zone and continental shelf.[117] As per UNCLOS, this includes the right to 'adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their

22 where the court further noted that it could grant a supervisory or structural interdict to enforce environmental obligations.
[109] The Constitution, s1(b).
[110] Couzens (note 104 above) 138 fn. 34.
[111] Couzens (note 104 above) 128.
[112] The Constitution, s231(4).
[113] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3. ('UNCLOS').
[114] The Constitution, s232.
[115] Act 15 of 1994.
[116] Couzens (note 104 above) 135. See also E Couzens 'Sea and Seashore' in: (2010) 24 *LAWSA* ('Couzens 2010') para. 132.
[117] Maritime Zones Act, s7.

jurisdiction from artificial islands, installations and structures under their jurisdiction…'[118] As noted earlier, installations operating in the EEZ, or in the waters above the continental shelf,[119] are subject to the exclusive jurisdiction of the coastal state.[120] It is submitted that the imposition of criminal or civil liability by the South African legislature for polluting activities by an owner or operator falls comfortably within the provisions of UNCLOS.

The Maritime Zones Act contains provisions detailing the application of laws in respect of installations. The term 'installation' is widely defined by the Act to mean 'any of the following situated within internal waters, territorial waters or the exclusive economic zone or on or above the continental shelf… (b) any exploration or production platform used in prospecting for or the mining of any substance'.[121] The Act states that any law in force in South Africa, including the common law, applies on and in respect of an installation,[122] and that installations are deemed to be within the jurisdiction of the magistrates' court nearest to the installation (unless the Minister of Justice designates otherwise).[123]

Whilst this Act is silent on issues of pollution and liability, it is noteworthy as it allows a potential litigant to rely on common law principles in addition to statutory remedies in a matter involving an installation, where such claim would usually be excluded due to the claim arising outside of the court's traditional territorial jurisdiction.[124] It is submitted that the effect of the Maritime Zones Act is that statutes, which ordinarily would not apply beyond South Africa's territorial waters, will apply to installations operating in the EEZ or on or above the continental shelf.

[118] UNCLOS, art. 208(1).
[119] UNCLOS, art. 81.
[120] UNCLOS, art. 60(2). See 2.2.1 for a detailed discussion of UNCLOS provisions applicable to offshore installations operating within the EEZ or the waters above the continental shelf.
[121] Maritime Zones Act, s1(b).
[122] Maritime Zones Act, s9(1).
[123] Maritime Zones Act, s9(2)(3).
[124] See for example *Schlumberger Logelco Inc v Coflexip SA* 2000 (3) SA 861 (SCA) in which the Supreme Court of Appeal ('SCA') held that the Patents Act applied to installations within the exclusive economic zone.

3.2.1.3. Marine Pollution (Control and Civil Liability) Act:

South Africa became party to CLC 69[125] in 1976, although it later denounced the convention in 2004.[126] The Marine Pollution (Control and Civil Liability) Act ('MPCCLA')[127] sought to incorporate a number of CLC 69's provisions into South African law but did not include the original text of the convention as a schedule.[128] The Act was not an attempt to mirror CLC 69 and as a result its scope was expanded to include offshore installations. 'Offshore installation' is defined by the Act to include 'any exploration or production platform situated within the prohibited area and used in prospecting for or the mining of natural oil'.[129] In the context of offshore installations, the term 'prohibited area' includes the internal waters, territorial waters, the exclusive economic zone ('EEZ') and the sea within the limits of the continental shelf.[130] The MPCCLA imposes both criminal and civil liability upon polluters, but the following discussion is primarily concerned with civil liability.[131]

Civil liability for an oil spill emanating from an offshore platform is governed by section 9 of the MPCCLA, stating that the owner of an offshore platform will be liable for 'any loss or damage caused, elsewhere than on such … offshore installation, in the area of the Republic by pollution resulting from the discharge of oil from such … offshore installation'.[132] The MPCCLA defines 'area of the Republic' to include 'the internal waters and the territorial waters'.[133] The owner will also be liable for any measures taken by the South African authorities for the purposes of reducing or preventing loss or damage caused by the discharge of any oil

[125] International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, 9 ILM 45.
[126] Status of CLC 69 published by the Australian Maritime Safety Authority, available at *https://imo.amsa.gov.au/public/parties/clc69.html*, accessed 16 September 2013.
[127] Act 6 of 1981.
[128] Couzens 2010 (note 116 above) para. 236.
[129] MPCCLA, s1.
[130] MPCCLA, s1.
[131] Sections 2 of the MPCCLA states that it is an offence to discharge oil from an offshore installation. The section contains provisions allowing an accused to escape criminal liability, but the onus of proving such an exemption rests on the accused.
[132] MPCCLA, s9(1)(a).
[133] MPCCLA, s1.

from the installation.[134] Finally, the owner will be liable for any loss or damage caused by measures taken or caused to be taken after a discharge from the installation.[135]

Section 9 also imposes liability for measures taken by the South African authorities.[136] The owner of the installation will be liable for expenses reasonably incurred in connection with the taking of such measures,[137] in addition to any expenses incurred in rescuing, treating, rehabilitating, feeding or cleaning coastal birds that have been polluted by the oil discharged from the installation.[138]

The MPCCLA has therefore adopted the same strict liability standard implemented by CLC 69.[139] The Act stopped short of imposing absolute liability as there are limited situations where the owner of the offshore installation may escape liability. The owner will not be liable for any loss resulting from a discharge if it is able to prove that the discharge 'resulted from an act of war, hostilities, civil war, insurrection or an exceptional, inevitable and irresistible natural phenomenon'.[140] The owner may also escape liability if the discharge was 'wholly caused by an act or omission on the part of any person, not being the owner or a servant or agent of the owner, with intent to do damage'.[141] Finally, the owner will not be liable in the event that the discharge 'was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids, in the exercise of that function'.[142]

Where an owner is not able to escape liability in terms of the MPCCLA, it may be possible for it to limit its liability. In the event the owner of the installation incurs liability in terms of section 9 but the incident was not caused by the owner's actual fault or privity, its liability will be limited to an amount not exceeding fourteen million units of account (or a sum determined by

[134] MPCCLA, s9(1)(b).
[135] MPCCLA, s9(1)(c).
[136] MPCCLA, s1 defines the 'authority' as the South African Maritime Safety Authority ('SAMSA').
[137] MPCCLA, s9(2)(b)(i)
[138] MPCCLA, s9(2)(b)(ii).
[139] See 2.2.5. of this dissertation. For a commentary on the strict liability standard, see 4.3.
[140] MPCCLA, s9(3)(a).
[141] MPCCLA, s9(3)(b).
[142] MPCCLA, s9(3)(c).

the Minister of Transport).[143] Therefore the owner of an installation, provided it was not at fault for the spill, would be liable for a maximum amount of approximately R200 million.[144] Furthermore, the owner of an installation will not be liable for any costs, loss or damages defined in section 9 of the MPCCLA otherwise than under the provisions of the Act,[145] and agents as well as servants of the owner of excluded from liability for such claims.[146]

It is readily apparent that the MPCCLA has adopted the framework of the CLC 69 i.e. strict liability with limit exceptions and a cap on liability. However, MPCCLA has deviated from the terms of the CLC 69 by including installations in its ambit - a category of vessels that the original text of the convention specifically excluded.[147] Whilst the MPCCLA may directly cater for oil spills from offshore installations, it is submitted that the Act is out of date and alarmingly insufficient. The first area of concern is the limitation of liability available to an owner, specifically fourteen million Special Drawing Rights ('SDR'). Hare states that this amount is 'paltry'.[148] Hare's dismay is well-warranted, especially when one considers that British Petroleum ('BP') has already agreed to pay 30 billion US Dollars in the wake of the *Deepwater Horizon* spill (with the civil suit still pending).[149] A claimant may only act against the polluter in terms of the MPCCLA, therefore the South African state would have to bear its own costs beyond fourteen million SDR.[150] This low limitation likely exists for two reasons. First, as the MPCCLA was created to correspond with the CLC 69, it is plausible that the drafters of the Act merely included installations within the scope of the Act without determining that the liability limitation (created to address pollution from tankers) would be insufficient for a spill from an installation. Second, the MPCCLA was drafted to conform to the CLC 69 but not any of its later

[143] MPCCLA, s9(5)(b)(ii). A 'unit of account' is defined by s5(8)(b) as being a Special Drawing Right as defined by the International Monetary Fund ('IMF').
[144] The current value of the Special Drawing Right is available from the IMF at http://www.imf.org/external/np/fin/data/rms_sdrv.aspx. On 18 September 2013, 14 million Special Drawing Rights was equivalent to R209 759 825.00.
[145] MPCCLA. s10(1).
[146] MPCCLA, s10(2)(3).
[147] CLC 69, art. 1(1).
[148] Hare 2009 (note 42 above) 566.
[149] Tom Fowler 'Settlement Offer to BP Takes Shape' *The Wall Street Journal* 24 February 2013, available at *http://online.wsj.com/article/SB10001424127887323549204578320362599078672.html*, accessed on 29 July 2013.
[150] See letter from UCT Professor John Hare to the Minister of Transport, in which he raises his concerns on this issue, available at *www.mlasa.co.za/wp-content/uploads/2012/06/Prof-John-Hare-Letter2.pdf*, accessed on 20 March 2013 ('Hare Letter') page 2.

protocols.[151] This has resulted in the South Africa's liability limitations, in the words of Hare, 'falling far behind international norms'.[152] The lack of political will to update South Africa's marine pollution legislation has been the subject of frequent criticism, with Hare (in an open letter to the Minister of Transport) exclaiming 'it would seem that polluted coastlines are too far from Pretoria for there to be any real appreciation of the enormity of our exposure'.[153]

A second concern is the geographical scope of the MPCCLA in the context of civil liability. Section 9(1)(a) of the Act states that the owner is liable for loss or damage caused by pollution 'in the area of the Republic'. 'Area of the Republic' is defined by the MPCCLA to include the internal waters and the territorial waters.[154] This is in stark contrast to criminal liability, which is extended to pollution occurring within the prohibited area,[155] an area that includes the EEZ and the sea within the limits of the continental shelf.[156] This is disconcerting as offshore oil platforms may well be located in the EEZ or in the waters above the continental shelf.[157] Section 9(1) of the Maritime Zones Act could possibly be utilised by a litigant to address this lacuna. The litigant could potentially argue that installations, as a result of the Maritime Zones Act, fall within the definition of 'area of the Republic', but to date this remains untested. It is unlikely that this line of reasoning would find favour with the courts, as the defendant owner of the offshore platform would vehemently argue that civil claims concerning installations in the EEZ and continental shelf have been specifically excluded by the MPCCLA. Therefore it is submitted that an amendment is needed to remedy this uncertainty.

A third concern is the lack of compulsory insurance for offshore platforms operating in South Africa's territory. The MPCCLA, following the provisions of CLC 69,[158] requires every tanker

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[151] Hare 2009 (note 42 above) 565. See also M Verwey *Liability for Oil Pollution Damage: An Anglo-South African Comparison in Light of the International Dispensation* (unpublished LLM thesis, Northwest University, 2005) 26.
[152] Hare 2009 (note 42 above) 565. Hare's letter was concerned with South Africa's failure to incorporate the 1992 CLC and Fund Protocols into law. Subsequent to the letter, Parliament is indeed deliberating on bills (attached as appendixes to this dissertation) that will hopefully be tabled before the National Assembly shortly.
[153] Hare Letter (note 150 above) 2.
[154] MPCCLA, s1(1).
[155] MPCCLA, s2 and 3.
[156] MPCCLA, s1(1).
[157] D Devine 'Legal Protection of Offshore Installations Outside South African Territorial Waters' (1993) 11 *J. Energy & Nat. Resources L.* 281 ('Devine 1993'), 281/282. See also D Devine 'South African Civil Law and Offshore Installations' (1994) 111 S. African L.J. 736 ('Devine 1994'), 736.
[158] CLC 69, art. VII.

carrying more than 2000 tons of oil in bulk as cargo to demonstrate proof of financial security that is sufficient to cover any potential claim brought against the owner in terms of section 9(1).[159] Hare notes that pollution cover is provided by Protection and Indemnity Clubs ('P&I Clubs'), who issue a 'green card' as proof of such cover.[160] Significantly, P&I Clubs do not cover offshore platforms.[161] This creates the undesirable situation where, in the event of a spill, there is no assurance that the owner of an offshore installation will be able to cover the associated costs. The MPCCLA attempts to remedy this by requiring the owner of an installation to furnish a written guarantee for costs incurred (or likely to be incurred) by SAMSA when taking measures to reduce damage resulting from the oil pollution.[162] In the event that the owner fails to furnish a guarantee or fails to pay the costs specified by section 9(1)(b), SAMSA may detain the installation (or any other ships of the installation owner) until payment is made or the guarantee is furnished.[163] If the owner fails to pay or furnish the required guarantee, the installation may be sold to cover SAMSA's costs.[164] It is submitted that these financial security measures are utterly inadequate, as they do not contemplate claims exceeding the value of the installation itself. If South African law requires financial security for oil tankers (vessels carrying oil in bulk as cargo) entering its waters, why not installations? Installations are easily capable of causing pollution equivalent to (or in excess of) that caused by oil tankers, and there is no compelling reason to exempt them from furnishing some measure of security. The USA requires the owners and operators of installations to furnish financial security up to $150 million.[165] It is submitted that an amendment to the MPCCLA is necessary to address this situation.

The MPCCLA is the primary Act in South Africa addressing civil liability in the event of an oil spill from an offshore platform. This is because the Act states that 'when an incident has occurred in respect of a … offshore installation the owner of such … offshore installation shall

[159] MPCCLA, s13(1). Note that the Merchant Shipping (Civil Liability Convention) Bill, No. 20B of 2013 is repealing sections 13, 14 and 15 and substituting them with new financial security provisions. Bill available at *http://www.parliament.gov.za/live/commonrepository/Processed/20130722/524991_1.pdf*, accessed 10 August 2013, s8. Attached to this dissertation as appendix one.
[160] Hare 2009 (note 42 above) 566/567.
[161] S Rares 'An International Convention on Off-Shore Hydrocarbon Leaks?' (2012) 26 *Austl. & N.Z. Mar. L.J.* 10, 17. See also 4.4. of this dissertation.
[162] MPCCLA. s16.
[163] MPCCLA, s19(1)(a)(i).
[164] MPCCLA, s19(1)(a)(ii). See also s19(3) which provides that SAMSA's claim for the costs it incurred take preference over any lien or mortgage associated with the installation or ship.

not be liable otherwise than under the provisions of this Act to any person for any – (a) loss or damaged referred to in section 9(1)(a) or (c); or (b) costs referred to in section 9(1)(b), suffered or incurred as a result of that accident.[166] Whilst this provision does not present difficulty if the claim arises in the internal waters or territorial waters of South Africa, it is extremely problematic if the installation is located in the EEZ or on or above the waters of the continental shelf. This is because the section 9(1) provisions are only applicable to claims arising in the internal and territorial waters. The result is that section 10 appears to exclude claims in terms of another statute or the common law against the owner. Fortunately, this exclusion would not be applicable to an operator of an installation, so the possibility for damages outside of section 9 remains open in that situation. Whether section 9 of the Maritime Zones Act could remedy this defect will be discussed below, but the current wording of the MCCPLA creates the possibility that claims against owners of installations operating in the EEZ or continental shelf are not possible, and thus this section is in dire need of amendment.

Whilst the MPCCLA may implement strict liability, the quantum limitation on claims is presently far too low. As Hare writes, this limitation is paltry and leaves South Africa 'dangerously and… shamefully inadequately covered.'[167] Whilst draft legislation intended to give the CLC 92 and the 1992 Fund Convention the force of law in South Africa would raise this limitation in respect of claims against oil tanker owners, it will be of no application to installations.[168] Similarly, the problem of civil claims arising in the EEZ is resolved by draft legislation that extends the court's jurisdiction to hear claims arising in the EEZ, but again only in the context of oil tanker spills.[169] Whilst marine pollution laws in South Africa are evolving to grant courts the jurisdiction to hear tanker pollution claims arising in the EEZ, they are leaving offshore installations in their wake.

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[165] OPA 90, §2716(c)(1)(C).
[166] MPCCLA, s10(1).
[167] Hare Letter (note 150 above) 3.
[168] See draft bills attached as annexures 1 and 2 to this dissertation.

3.2.1.4. The National Environmental Management Act:

The National Environmental Management Act ('NEMA') contains a general duty to prevent pollution or degradation to the environment.[170] Pollution is defined as 'any change in the environment caused by … substances … emitted from any activity … where that change has an adverse effect on human-health or well-being or on the composition, resilience and productivity of natural or managed ecosystems …'[171] Where a person causes, has caused or may cause significant pollution, he must take measures to prevent such pollution from occurring, continuing or recurring, or to minimise or rectify the pollution.[172] The liability implications resulting from section 28(1) are immense. In *Bareki v Gencor*,[173] the provincial division of the Transvaal High Court held that section 28(1) creates a standard of strict liability.[174] Furthermore, the court held that in the absence of statutory exemptions in favour of the polluter, section 28(1) may be said to create a standard of absolute liability.[175] Liability may exist even where the pollution is authorised by law or cannot reasonably be avoided or stopped.[176] Unlike the MPCCLA, NEMA does not contain any liability limitations, with the court stating that '[it] is important to note that there is no monetary limit to such liability. The liability can potentially be a very heavy one.'[177]

NEMA envisages the intervention by a relevant authority in certain instances.[178] NEMA sets out a framework for the control of emergency incidents, defining an incident as 'an unexpected sudden occurrence, including a major emission, fire or explosion leading to serious danger to the public or potentially serious pollution of or detriment to the environment, whether immediate or delayed.'[179] NEMA requires the responsible person (defined as the person responsible for the incident, owning the substance involved in the incident or in control of the substance at the time

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[169] Ibid, s4.
[170] Act 107 of 1998 ('NEMA'), s28.
[171] NEMA, s1.
[172] NEMA, s28(1).
[173] *Bareki NO and Another v Gencor Ltd and Others* 2006 (1) SA 432 (T).
[174] Ibid, 440H.
[175] Ibid, 440I - 441B.
[176] Ibid.
[177] Ibid, 440H.
[178] NEMA, s30.
[179] NEMA, s30(1)(a).

of the incident)[180] to take all reasonable measures to contain and minimise the effects of the incident, undertake clean-up procedures, remedy the effects of the incident and assess the effects of the incident on the environment and public health.[181] Where the relevant authority has incurred costs in controlling the incident,[182] it may claim reimbursement from every responsible person jointly and severally.[183]

NEMA creates an interesting, and as yet unresolved, dilemma as there is a possibility that NEMA could be applicable to marine pollution claims arising in the EEZ or on or above the continental shelf. NEMA does not expressly restrict its territorial application, and would therefore be enforceable in internal and territorial waters. It is therefore arguable that as a result of section 9(1) of the Maritime Zones Act, it is applicable to offshore installations operating within the EEZ and continental shelf. As Devine states, unless a statute indicates that it is not applicable to offshore installations, it will apply.[184] However, NEMA's provisions appear to conflict with the MPCCLA as the latter states that the owner of an offshore installation will not be liable for any loss, damage or costs contemplated in section 9(1) of the Act otherwise than under the provisions of the MPCCLA.[185] Where the harm falls outside the scope of section 9(1), NEMA would surely be applicable, but the wording of MPCCLA excludes liability for claims against the owner for oil pollution damage that fall within the section 9(1).[186] As the MPCCLA only excludes claims against the owner, it is submitted that one could proceed against the

[180] NEMA, s30(1)(b).
[181] NEMA, s30(4). Failure to adhere to this section constitutes an offence, with the responsible person facing a potential fine of R1 million or 1 year imprison or both in terms of s30(11). In *Truck and General Insurance Co Ltd v Verulam Fuel Distributors CC and Another* 2007 (2) SA 26 (SCA) at para. 20, the court held that s30(4) requires that the responsible person act immediately upon knowledge of the incident, and that such person need not wait for direction from the relevant authority nor wait for such authority to act.
[182] NEMA, s30(8).
[183] S30(9)
[184] D Devine 'The Application of South African Law to Offshore Installations' (1994) J. S. Afr. L. 229 ('Devine 1994(2)'), 230.
[185] MPCCLA, s10(1).
[186] In *Government of the Republic of South Africa and another v Government of KwaZulu and Another* 1983 (1) SA 164 (A) at 200E, the Appellate Division, per Rabie CJ, stated that a repeal of an earlier statute by implication 'is neither presumed nor favoured. It is only when the language used in the subsequent measure is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and contradiction, so that the one conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been repealed by the later one.' It will therefore fall to the courts to determine whether there is a conflict of laws situation between the provisions of NEMA and the MPCCLA, but it is submitted that on the plain wording of the MPCCLA, NEMA ought to apply to installations located in the EEZ and above the continental shelf, as these territories are specifically excluded from the ambit of the MPCCLA.

operator of the installation in terms of NEMA, provided that operator was not the owner of the installation. It could also be argued that, as section 9(1) of the MPCCLA is silent on pollution occurring in the EEZ or on or above the continental shelf, there is no direct conflict between its provisions and the provisions of NEMA in such instances. Thus the only time the MPCCLA would expressly prohibit marine pollution claims to be heard in terms of NEMA would be where the pollution occurs within the internal waters or territorial waters.

One possible way to resolve any difficulties relating to section 10 of the MPCCLA would be to amend the section to allow claims against installations under NEMA or the common law. A potential drawback however is that the potential for absolute, unlimited liability could deter platform operators from operating within South Africa's jurisdiction. Section 28(2) of NEMA which states that, without limiting the general nature of section 28(1), the persons on whom s28(1) 'imposes an obligation to take reasonable measures include the owner of the premises, a person in control of the premises, or a person who has a right to use the premises in which (a) any activity or process is or was performed or undertaken or (b) any other situation exists, which causes or is likely to cause significant pollution or degradation of the environment.'[187] Section 28 is therefore well suited to addressing offshore installation pollution as, unlike the MPCCLA, it recognises the role of the operator (the owner of an installation will likely be a foreign entity with no presence in South Africa). Extending the obligation to take reasonable measures to minimise or prevent pollution to the operator of an installation is certainly desirable. Furthermore, allowing offshore installation claims to be heard in terms of NEMA would bypass the 'paltry' liability limitation of R200 million.

In conclusion, extending NEMA to apply to offshore installations would certainly warm the hearts of environmentalists due to the possibility of unlimited and absolute liability. However, such an approach presents more difficulties than it ultimately solves. Unlimited liability is a rarity in maritime law, and ought only to apply in instances where the pollution was caused by wilful misconduct or gross negligence. To impose unlimited liability upon an owner or operator who was not negligent is not congruent with current international law, or with the practice of states such as the USA. As such, it is submitted that the more desirable short-term solution would

[187] NEMA, s28(2).

be to amend the MPCCLA to recognise civil claims arising in the EEZ and continental shelf, coupled with an increased limitation amount. In the absence of a regional convention applicable to offshore installations operating off South Africa's coast, the desirable long term solution would be the creation of a global convention applicable to offshore installations, with South Africa becoming a party to such a convention. Merely extending the provisions of NEMA is not the answer.

3.2.1.5. Other relevant legislation:

Beyond the statutes already discussed there is additional legislation that is relevant in the context of liability for an offshore platform oil spill, albeit in a limited manner. The Marine Pollution (Prevention of Pollution from Ships) Act gives effect to the MARPOL convention in South African law.[188] The provisions of this Act make it an offence to dump in or otherwise pollute the ocean in the course of operating a vessel.[189] In the specific context of offshore platforms, MARPOL (and thus the Act) prohibit discharges from the installation whilst it is in a mobile configuration but the release of harmful substances directly arising from the exploration, exploitation and associated offshore processing of sea-bed mineral resources is specifically excluded from its ambit.[190] MARPOL, and the Prevention of Pollution Act, are therefore of limited application in the context of offshore platforms.

The Dumping at Sea Control Act prohibits the unauthorised dumping of any substance (or the loading of any substance onto a vessel or installation for the purposes of dumping) into the sea.[191] The Dumping Act defines the 'sea' to include the internal waters, the territorial waters and the waters within the EEZ.[192] The onus is on the accused to demonstrate that the dumping was necessary to save human life, secure the safety of the installation or to prevent damage to the

[188] Act 2 of 1986 ('Prevention of Pollution Act'). International Convention for the Prevention of Pollution from Ships, 1973, 2 November 1973, 1340 UNTS 184, 2 October 1983, amended by Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973, 17 February 1978, 1340 UNTS 61, 2 October 1983 ('MARPOL'). For a discussion of the applicability of MARPOL to offshore platforms, see 2.2.4.
[189] Prevention of Pollution Act, s3A.
[190] MARPOL, art. 2(3)(b)(ii).
[191] Act 73 of 1980 ('Dumping Act'), s2(1)(c).
[192] Ibid, s1.

installation.[193] The Dumping Act, pending Presidential proclamation, has been wholly repealed by the National Environmental Management: Integrated Coastal Management Act.[194] NEMICMA prohibits the dumping of any waste or other material within the coastal waters or EEZ of South Africa, or on the high seas, from a platform or other man-made structure.[195] Dumping is defined as the 'deliberate disposal' of any waste or other material at sea.[196] It is doubtful that these provisions would cover a serious spill emanating from an offshore platform, as such a spill is unlikely to be deliberate. Such a spill would fall within the ambit of the MPCCLA.[197]

The Marine Pollution (Intervention) Act[198] incorporates the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties ('Intervention Convention')[199] into South African law. The Intervention Convention sought to empower states to intervene in the event of a maritime casualty in order to protect its coast. However, the convention (and thus the Act) defines a ship to include a floating craft 'with the exception of an installation … engaged in the exploration and exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof'.[200] Therefore the Intervention Act, whilst possibly applicable to a collision involving an offshore platform in a mobile configuration, would not be applicable in the event that a spill occurred whilst the platform was engaged in drilling.

[193] Ibid, s2.
[194] Act 24 of 2008 ('NEMICMA'), s98.
[195] NENICMA, s70(1)(e).
[196] NEMICA, s1.
[197] MPPCLA, s10(1).
[198] Act 64 of 1987 ('Intervention Act').
[199] 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 29 November 1969, 970 *U.N.T.S.* 211, 6 May 1975 ('Intervention Convention').
[200] Intervention Act, schedule 1, art. II.

3.2.2. ISSUES PERTAINING TO THE ENFORCEMENT OF CLAIMS

The nature of the claims that might arise under the common law, and whether they would be based in contract, delict or some other grounds, is beyond the scope of this dissertation. Suffice to say that there may be instances where a claimant can formulate a common law claim and may wish to pursue such a claim. In this case, as well as in the case of claims arising under statute, the procedure by which such a claim might be enforced must be considered.

3.2.2.1. Admiralty Law:

South Africa's admiralty law has been codified into a single piece of legislation - the Admiralty Jurisdiction Regulation Act ('AJRA').[201] In terms of AJRA, a litigant may commence an admiralty action in order to enforce a maritime claim. The definition of 'maritime claim' includes 'pollution of the sea or sea-shore by oil or any other substance emanating from a ship'.[202] The term ship is defined to mean 'any vessel used or capable of being used on the sea or internal waters, and includes any… oil or other floating right, floating mooring installation or similar floating installations, whether self-propelled or not'.[203] AJRA's definition of ship may exclude fixed installations,[204] but would include semi-submersible installations such as the *Deepwater Horizon*.[205] It is therefore apparent from section 1 of AJRA that an oil spill from an offshore platform (albeit a floating platform) would fall within the definition of maritime claim.

AJRA contemplates two forms of proceedings, an action *in rem* against the installation itself or an action *in personam* against the person causing the harm.[206] An action *in rem* is commenced by the arrest of the installation,[207] or an associated ship,[208] and may only be used to enforce a

[201] 105 of 1983.
[202] AJRA, s1(1)(z). AJRA also contains a 'catch-all' provision in s1(1)(ee), stating that a maritime claim will 'include any other matter which by virtue of its nature of subject matter is a marine or maritime matter, the meaning of the expression marine or maritime matter not being limited by reason of the matters set forth in the preceding paragraphs'. It seems any pollution related claim arising from an offshore installation would fall with s1(1)(ee).
[203] AJRA, s1.
[204] Devine 1993 (note 157 above) 283.
[205] R Abeyratne 'The Deepwater Horizon Disaster - Some Liability Issues' (2010) 35 *Tul. Mar. L. J.* 125, 126.
[206] Devine 1993 (note 157 above) 283.
[207] AJRA, s3(5).
[208] AJRA, s3(6).

maritime claim in two instances: the claimant has a maritime lien over the property to be arrested,[209] or the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause concerned.[210] An action *in personam* can only be instituted against a person who is resident or conducts business in South Africa,[211] whose property within the court's area of jurisdiction has been attached to found or confirm jurisdiction,[212] who has consented to the jurisdiction of the court,[213] in respect of whom the court has jurisdiction in terms of the Insurance Act, 1943,[214] or in the case of a company, the company has a registered office in South Africa.[215] In the specific context of offshore installations, it is quite likely that the party operating the installation will be a foreign company. For an action *in personam* to be instituted in such a case, the claimant would have to attach the property belonging to the party who is liable in respect of the claim to found or confirm jurisdiction.

Whilst these two actions differ in both practical and theoretical respects, they both share a common limitation - the arrest or attachment must be effected within the territorial waters of South Africa.[216] This presents a clear difficulty as offshore installations are likely to operate in the EEZ or in the waters above the continental shelf,[217] beyond the reach of AJRA's provisions. This problem could be solved by the Maritime Zones Act, as it states that any law applicable in South Africa is applicable to offshore installations,[218] and that an installation falls under the jurisdiction of the closest magisterial court district.[219] This approach seems congruent with international law, as UNCLOS confers upon coastal states the exclusive right to construct, operate and regulate structures that are exploring for and exploiting minerals within both the

[209] AJRA, s3(4)(a). Whether oil pollution damage creates a maritime lien is subject to debate. Staniland (note 96 above) 300-302 argues that in additional to the traditional categories of maritime lines, there exist additional maritime liens including for 'consequential pollution damage done by ship'. Staniland argues that such a lien is merely an extension of the traditional lien for damage done by a ship. Staniland does concede however that his argument is 'contrary to the orthodox view'.
[210] AJRA, s3(4)(b).
[211] AJRA, s3(2)(a).
[212] AJRA, s3(2)(b).
[213] AJRA, s3(2)(c).
[214] AJRA, s3(2)(d).
[215] AJRA, s3(2)(e).
[216] AJRA, s2(2).
[217] Devine 1993 (note 157 above) 281/282. See also Devine 1994 (note 157 above) 736.
[218] Maritime Zones Act, s9(1).
[219] Maritime Zones Act, s9(2)(3).

EEZ and continental shelf.[220] Devine argues that extending jurisdiction over installations operating in the EEZ and continental shelf is fundamentally different from extending jurisdiction to cover tankers and other such vessels, as the latter would infringe upon the vessels' right to navigation.[221] It is submitted that the clearest solution to this dilemma would be to amend AJRA to clearly permit the arrest or attachment of an installation in the EEZ or continental shelf.[222]

3.2.2.2. Common Law:

Incidents where a litigant may proceed against the owner or operator of an offshore installation under the common law are limited. In the event that the pollution damage falls within the scope of section 9 of the MPCCLA, the claimant is barred from proceeding in terms of the common law. Where the claim falls outside of this section 9 definition, a claimant would rather resort to NEMA, as it relieves them of establishing fault. Finally, where the installation is not affixed to the sea bed, any pollution claim from an installation would more than likely constitute a maritime claim, which will decided in accordance with the principles of admiralty law.[223] Therefore, there are extremely limited circumstances when a claimant may resort to South Africa's common law.

As Devine notes, there are situations where a claim would not arise under admiralty law and it would be possible for a claimant to rather rely on the law of delict if the claim involves pollution from a platform affixed to the sea bed.[224] Such claims are perfectly permissible as AJRA states that where a claim is not recognised under English maritime law, it will be determined according to principles of Roman-Dutch law.[225] The immediate concern, which has been raised repeatedly in this chapter, is that of jurisdiction. The South African courts may only exercise their common law jurisdiction for delicts that occurred within the territorial waters and

[220] UNCLOS, art. 60 and 80. See 2.2.1. for a discussion of UNCLOS and the rights of coastal states.
[221] Devine 1993 (note 157 above) 285.
[222] Devine 1993 (note 157 above) 291.
[223] Devine 1994 (note 157 above) 744. See also s7(2) of AJRA provides that if the question of whether a matter constitutes a maritime claim arise before a court, that court must immediately decide whether if the claim should be heard in a competent court exercising its admiralty jurisdiction. In terms of s7(4), once this decision has been made, it cannot be appealed.
[224] Devine 1993 (note 157 above) 286/287.
[225] AJRA, s6(1).

internal waters.[226] However, the Maritime Zones Act explicitly states that common law shall apply on an in respect of an installation.[227] Therefore, it is clear that the common law will be applicable to an offshore platform that is located in the EEZ or on or above the continental shelf.

A further challenge as there is no general duty in the South African common law not to pollute. When claiming for pecuniary loss, the plaintiff would have to establish that they are entitled to compensation because the defendant '[unreasonably], or contrary to the *boni mores* or legal conventions of the community, failed to prevent harm to the plaintiff.'[228] Negligence alone is not sufficient to attract liability. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[229] the Supreme Court of Appeal, per Harms JA, stated that 'the fact that an act is negligent does not make it wrongful, although the foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. To elevate negligence to the determining factor confuses wrongfulness with negligence …'[230] The courts, in imposing liability for an omission, will consider whether there is a legal duty to prevent the harm by bearing in mind the risk of the potential harm and the cost to prevent the harm from occurring.[231]

After a potential claimant has overcome the hurdles of jurisdiction and establishing a legal duty, another difficulty awaits him - establishing the element of fault.[232] Fault may take the form of either intention (*dolus*) or negligence (*culpa*).[233] It is perhaps safe to assume that instances where an owner or operator intentionally caused oil pollution are a rarity, and that pollution is far

[226] *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 686 (C), 696D-G.
[227] Maritime Zones Act, s9(1).
[228] M Loubser & R Midgley et al. 'The Law of Delict in South Africa' (2010) 143.
[229] 2006 (1) SA 461 (SCA).
[230] Ibid, para 12.
[231] Loubser and Midgley (note 228 above) 149. See also *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 361H-362B where the Appellate Division, per Olivier AJA, held that a defendant can only be held liable where the circumstances indicate that he could reasonably have been expected to act and take precautionary measures to prevent the harm from occurring. At 363C, the court further held that one must consider the affordability and proportionality between the possible harm and the possible costs of prevention in order to determine whether a duty was owed by the defendant to the plaintiff.
[232] R Midgley 'Fault under the *actio iniuriarum*: Custer's last stand?' in Trynie Boezaart and Piet de Kock *Vita perit, labor non moritur: Liber memorialis: PJ Visser* (2009) 187. Midgley reiterates that the elements of a common law delict are 'harm sustained by the plaintiff; conduct on the part of the defendant which is wrongful; a causal connection between the conduct and the plaintiff's harm; and the fault or blameworthiness on the part of the defendant'.
[233] Devine 1993 (note 157 above) 287.

more likely to result as a product of negligence. As was noted in chapter 2, offshore oil exploration and exploitation is considered an ultra-hazardous activity.[234] It is an activity that stretches the limits of human ingenuity and technical capability. This results in a situation where disaster may strike even where the operator of the platform has exercised reasonable care.[235] It is precisely for this reason that international law (and the law of foreign states)[236] has embraced the standard of strict liability for ultra-hazardous activities. South Africa, through NEMA, has embraced strict liability in its statutes, but the common law principles of delict have been slow to implement the standard.[237] Therefore, if an owner or operator is able to demonstrate that they acted with reasonable care, the plaintiff's claim will be defeated.

3.2.3. CONCLUSION

Whilst an owner or operator of an offshore platform could be held liable for an oil spill in terms of South African law, a confused legislative patchwork renders the situation complex. The state has certainly attempted to satisfy the constitutional requirement to enact laws to protect the environment, but these laws lack the cohesion of their USA equivalents. The MPCCLA is based on a dated convention, the CLC 69, a convention that was never designed to cater for offshore installations. The result is that installation owners are not required to furnish any financial security, and owners are able to limit their liability to paltry amount. A further concern is that civil claims involving installations drilling in the EEZ or continental shelf are not possible in terms of the MPCCLA. In these two areas, claims in terms of other legislation (notably NEMA) or under the common law might also be excluded due to the wording of section 10 of the MPCCLA. It is submitted that Parliament must amend the MPCCLA to recognise claims involving installations arising in the EEZ or the continental shelf. Further amendments that ought to be enacted include raising the amount of the owner's liability limitation, allowing for the

[234] 4.3. of this dissertation contains a focused discussion on liability for ultra-hazardous activities in international law.
[235] See 2.1.1. for a commentary on the *Ixtoc 1* spill, a spill that occurred despite the operators taking reasonable steps to prevent and minimise the harm.
[236] *Rylands v Fletcher* (1868) L.R. 3 H.L. 300. *Green v General Petroleum Corporation* 205 Cal. 328, 270 P. 952 (1928) Both these cases recognised that oil drilling constituted such an abnormally dangerous activity, that demonstrating reasonable care was insufficient for escaping liability.
[237] Loubser and Midgley (note 228 above) 22/23. The authors note that there are instances where the common law recognises strict liability, but these relate to vicarious liability or some other form of control or agency (such as owners being held liable for the failure to control their animals).

imposition of liability against the operator instead of merely the owner, and introducing compulsory financial security measures. Only through such steps can South Africa truly give effect to the Constitution's mandate for protecting and preserving the environment.

3.3. COMPARISON AND CONCLUSION

The domestic legislation of the USA and South Africa appear, at least superficially, to be quite similar in their approach of imposing liability for offshore pollution. Both the OPA 90 and the MPCCLA impose strict liability upon polluters with limited defences available to the polluter.[238] Both statutes include 'liability caps' that are available to a defendant in limited circumstances,[239] with the limits of both caps being the subject of considerable academic criticism.[240] However, despite both systems sharing this same general framework, they differ significantly in a number of respects.

Where the pollution emanates from an offshore installation, OPA 90 does not limit claims relating to removal costs. In addition to these costs, a claimant may seek six detailed forms of damages including pure economic loss.[241] As noted above, the OPA 90 does not include claims for personal injury or death.[242] Claims under South African law are not as clear as under its American counterpart. The MPCCLA allows claims for measures taken to reduce or prevent damage resulting from the pollution as well as claims for any loss or damage resulting from the pollution.[243] The MPCCLA is based on the CLC 69, and the liability provisions of the CLC 69[244] have been interpreted to include clean-up and preventative measures, property damage (and loss consequential to that damage), pure economic loss, environmental damages and attorney costs.[245] The CLC 69 does not allow claims for lost government income or for an increase in the price of government services, something the OPA 90 does permit.[246] However, since the CLC 69 was not

[238] OPA 90, §2702; MPCCLA, s9.
[239] OPA 90, §2703; MPCCLA, s5(b)(ii).
[240] Force 2011 (note 29 above) 945. See also Hare (note 42 above) 141.
[241] OPA 90, §2702(b)(2).
[242] Robertson (note 38 above) 242.
[243] MPCCLA, s9(1).
[244] CLC 69, art. III.
[245] Schoenbaum (note 18 above) 402.
[246] Ibid.

included as a schedule to the MPCCLA,[247] it is submitted that it remains unclear whether South African courts would interpret the liability provisions in the same manner. Differences between the OPA 90 and the MPCCLA are compounded by varying liability caps. The OPA 90 does not limit claims relating to recovery costs where the source of an oil spill is an offshore facility,[248] whereas the MPCCLA does not differentiate between the various forms of damages for limitation purposes.[249]

A crucial difference between OPA 90 and the MPCCLA is the party that may be held accountable. OPA 90 allows claims against the responsible party in the event of an oil spill,[250] but the MPCCLA only permits claims against the owner of an installation.[251] It is submitted that the use of the term 'owner' is a fundamental error on the part of South African legislators. Whereas the entirety of the USA's federal marine pollution law is captured in the OPA 90, South Africa does not enjoy the same all-encompassing approach. Due to the unfortunate wording of section 9 of the MPCCLA, in that it only mentions 'owners', it is quite probable that claims against offshore oil operators may be entertained in terms of other legislation, specifically NEMA,[252] by virtue of the Maritime Zones Act.[253] Unlike the OPA 90 and the MPCCLA, NEMA does not include a cap on liability,[254] nor does it provide the operator with defences exempting or limiting liability.[255] Therefore it is submitted that under South African law the operator of an offshore installation may potentially face unlimited, absolute liability. Whilst this will surely lift the spirits of a plaintiff, unlimited liability renders a risk uninsurable and this lacuna should be addressed by the legislature.

Another difference between the USA and South Africa are provisions relating to financial security. The OPA 90 requires offshore operators to furnish security, with the amount being

[247] Couzens 2010 (note 116 above), para. 236.
[248] OPA 90, §2704(a)(3).
[249] MPCCLA, s5(b)(ii).
[250] OPA 90, §2701(25).
[251] MPCLLA, s9.
[252] MPCCLA, s10(1) states that the owner of the installation is not liable otherwise than under the provisions of the act. Crucially, the definition of 'owner' does not include operators (unless the owner is the state) and this leaves the operator open to a variety of other claims.
[253] Maritime Zones Act, s9.
[254] *Bareki* (note 173 above) 440H.

determined in the light of numerous factors indicating the level of risk.[256] The offshore operator may be required to furnish up to $150 million in security.[257] South Africa unfortunately has no equivalent provision, requiring security only for vessels carrying oil in bulk as cargo.[258] This is a direct consequence of South African legislators copying provisions of the CLC 69 into a statute, but failing to adequately alter its provisions to cater for offshore installations. The mimicking of the CLC 69's provisions has a second consequence. A claimant will not be able to claim from the International Oil Pollution Fund (or supplementary fund) as such claims are excluded.[259] Furthermore, the MPCCLA does not require the creation of a similar fund for offshore installations. This is in stark contrast to the USA, which has created the Oil Spill Liability Trust Fund,[260] a fund that can pay a claimant up to $1 billion in the event of a spill from an offshore installation.[261] South Africa is currently readying legislation that would update its laws to conform to CLC 92, but this has no effect on offshore installations as the amendment bill does not repeal the existing law, nor does it amend any provision relating to offshore installations. South Africa is therefore woefully unprotected in comparison to the USA, for whilst it may be able to impose liability on the owners and operators of offshore installations, there is no guarantee that the polluter would be able to satisfy the claim.

In conclusion, whilst the USA and South Africa both have legislation addressing spills from offshore platforms, the USA enjoys far greater protection in the event of a spill. This is perhaps unsurprising as the Gulf of Mexico is an oil rich area that hosts numerous offshore platforms whilst South Africa is still developing its offshore petroleum industry. The OPA 90 was passed in the wake of the *Exxon Valdez* spills, an event that forced US legislators to address the threat posed by marine pollution. The *Deepwater Horizon* will be the first true test of the OPA 90's provisions and it is likely that the litigation will be drawn out for many years. South Africa, it seems, has yet to truly awaken to the potential harm posed by the offshore oil industry.

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[255] This led the Transvaal High Court in *Bareki* (ibid) at 440I-441B to comment that NEMA may actually impose absolute liability due to the absence of any statutory exemptions.
[256] OPA 90, §2716(c)(1)(C).
[257] Ibid.
[258] MPCCLA, s13(1).
[259] CLC 69, art. 1 defines a ship as a sea-going vessel actually carrying oil in bulk as cargo. For this reason, claims involving offshore installations do not fall within the ambit of the CLC 69.
[260] U.S.C. 26, §9509(c)(1)(A).
[261] U.S.C. 26, §9509(c)(1)(A)(i).

CHAPTER 4: A PROPOSAL FOR A GLOBAL CONVENTION REGULATING OFFSHORE OIL PLATFORMS

It is clear that international law, be it in the form of customary international law principles, global and regional instruments, or even a private voluntary agreement, is presently insufficient to properly address an oil spill emanating from an offshore platform. International law applicable to offshore platforms is piecemeal, and this is illustrated by the varying domestic legislation of the two states considered in chapter 3. Nowhere is this 'piecemeal' approach more evident than in the specific context of liability. It is submitted that states have been reluctant to address this regulatory dilemma for two primary reasons: 1) large-scale spills from offshore installations are infrequent, and 2) the offshore petroleum industry generates a significant amount of tax revenue and states are loathe to disrupt the industry. Due to recent spills that have garnered international media attention, it is hoped that states re-examine the laws applicable to the offshore petroleum industry. It is therefore necessary to consider a number of proposed solutions to this problem. There are many aspects of the offshore oil industry that could benefit from global regulation such as safety standards, licensing aspects, wreck disposal and salvage but for present purposes discussion will be limited to those pertaining to civil liability arising from oil pollution. An argument will be made for the adoption of a global convention dedicated to offshore platforms and the various strengths (and accompanying weaknesses) of this proposal will be canvassed. In proposing a 'global' convention, various aspects will be explored including the standard of liability, financial security, definitions of pollution, operator vs. state liability and dispute resolution. It is hoped that this analysis will reveal a viable solution to resolve the identified lacuna that presently exists in international law, which will hopefully result in more uniform domestic legislation.

4.1. CURING DEFICENCIES IN INTERNATIONAL LAW WITH A GLOBAL CONVENTION:

A global convention dedicated to the regulation of offshore platforms and similar installations is not a novel concept, and there have been a number of proposals and draft conventions to this effect. In 1977 the Convention on Civil Liability for Oil Pollution Damage

Resulting from Exploration for and Exploitation of Seabed Mineral Resources ('CLEE')[1] was signed and although regional in its application, it seemed to be a model for future conventions. Unfortunately CLEE failed to garner the requisite number of signatures in order to come into force, although it did serve as a forerunner to the OPOL agreement.[2] Attempts at drafting a convention dedicated to offshore platforms did not cease with CLEE's failure. In 1977, the Comite Maritime International ('CMI') drafted a Convention on Offshore Mobile Craft in its conference at Rio de Janeiro ('the Rio Draft').[3] Attention was diverted from the Rio Draft due to other international maritime law concerns.[4] In 1994 the CMI accepted an amended version of the Rio Draft, now referred to as the 'Sydney Draft'.[5]

Before considering the substance of a global convention as proposed by the CMI, the question that must be addressed is whether a global convention is truly the most appropriate tool for regulating offshore platforms. The approach of relying on regional instruments appears to be favoured at present,[6] so it is necessary to consider the merits of a 'global' approach. A number of authors suggest that reliance on regional regimes is flawed due to the international nature of deep-sea mineral exploration and exploitation. Justice Rares notes that 'ingenuity and economic imperatives are likely to make it feasible at some future time for hydrocarbons to be discoverable and recoverable in international waters.'[7] Troianiello supports Rares' call for global regulation, writing that 'global regulation is indispensable because an oil spill caused by an offshore

[1] Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 1 May 1977, 16 ILM 1451 ('CLEE').
[2] Offshore Pollution Liability Agreement, (1974) 13 I.L.M. 1409 and (1975) 14 I.L.M. 147, available at *http://www.opol.org.uk/downloads/opol-agreement-jul12.PDF*, accessed on 1 June 2013 ('OPOL'). See discussion at 2.3.1. of this dissertation.
[3] R Shaw 'Regulation of Offshore Activity - Pollution liability and other aspects' Paper presented at the CMI Conference 2012, Beijing, 14 − 19 October 2012, available at *http://www.cmi2012beijing.org/dct/attach/Y2xiOmNsYjpwZGY6Mjg5NDY=*, accessed 10 June 2013.
[4] Canadian Maritime Law Association 'The Draft Convention on Offshore Units, Artificial Islands and Related Structures' Comite Maritime International Newsletter No. 1 (2004), available at *http://www.comitemaritime.org/Uploads/Newsletters/2004/Binder1.pdf*, page 2.
[5] Convention on Offshore Units, Artificial Islands and Related Structures Used in the Exploration for and Exploitation of Petroleum and Seabed Mineral Resources, 200 (OUC 200) May 2001 Draft, available at *http://www.comitemaritime.org/Uploads/Newsletters/2004/Binder1.pdf*, page 3 (annexure 3).
[6] See International Maritime Organisation, Resolution A.448(XI), 15 November 1979.
[7] S Rares 'An International Convention on Off-Shore Hydrocarbon Leaks?' (2012) 26 *Austl. & N.Z. Mar. L.J.* 10, 12.

exploration or exploitation accident meets no boundaries and might occur anywhere.'[8] Agyebeng comments that 'the high seas and other areas beyond the limits of national jurisdiction become even more vulnerable to the deleterious effects of pollution in the absence of a global instrument on civil liability'.[9] The concern of these authors is well warranted, as it would be naive to rely on the benevolence of platform operators to clean up any oil pollution in international waters without the economic or political pressure of a state encouraging them to do so. An additional concern with the reliance on regional regulatory regimes is fragmentation. It is clear from the earlier analysis of regional instruments that they differ significantly in a number of respects, especially the allocation and extent of liability (which is arguably the most contentious issue). A global convention, unlike its regional counterparts, has the potential to obtain the status of customary international law thus potentially allowing its provisions to bind states that are not signatories.[10] Such an approach would not fall foul of UNCLOS provisions, provided that the powers of coastal states are not diminished.[11] Uniformity also leads to commercial convenience, as a uniform set of regulations creates certainty, which in turn facilitates trade and avoids disputes and conflict of laws.[12] Offshore oil leaks could potentially affect international trade by sea as large leaks could disturb shipping lanes and lead to navigation difficulties.[13] A final, albeit philosophical, point in favour of a global convention is found in UNCLOS's recognition that the ocean and its resources are 'the common heritage of mankind.'[14] As Tharpes explains, there is 'need for a collective effort, comprised of all countries, to prevent and control transnational pollution. In short, an international regime is necessary.'[15] It follows that a patchwork of regional conventions does not truly protect 'mankind's' rights, as not all states will be party to such

[8] A Troianiello 'Deep Sea Mining: A New Frontier for International Environmental Law' (2012) available at *http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=antonino_troianiello,* accessed 7 June 2013, page 8.

[9] K Agyebeng 'Disappearing Acts - Toward a Global Civil Liability Regime for Pollution Damage Resulting from Offshore Oil and Gas Exploration' (2006) *Cornell Law School Graduate Student Papers*, Paper 11. Available at *http://scholarship.law.cornell.edu/lps_papers/11*, page 6. The author stresses that despite legal boundaries, the world's oceans comprise of a single body of water and thus large-scale pollution will inevitably be transboundary.

[10] Carroll B 'Drilling in the Deep: Jurisdiction over Oil Rigs Operating Outside of the Territorial Zone in Light of the Deepwater Horizon Spill' (2011) *18 Sw. J. Int'l L.* 667, 684.

[11] Ibid, 685.

[12] The need for commercial convenience was recognised in the Preamble of the Sydney Draft.

[13] Rares (note 7 above) 15.

[14] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3 ('UNCLOS'), art. 136.

[15] Y Tharpes 'International Environmental Law: Turning the Tide on Marine Pollution' (1989) 20 *U. Miami Inter-Am. L. Rev.* 579, 598.

agreements. Only a global instrument, attaining the status of customary international law, could truly meet this (perhaps lofty) ambition.

If one accepts the need for a global convention focusing on offshore platforms, it is necessary to consider the scope of such an instrument. Should such an instrument seek to set minimum thresholds and rely on states to elaborate, or should the instrument contain detailed provisions and remove some discretion from state lawmakers? Would granting states a wide discretion defeat the very uniformity a global convention seeks to create?[16] In order to truly appreciate the possible merits of a global convention, it is appropriate to explore current (and past) attempts at drafting such a convention. In addition to this examination, consideration will be given to other notable global conventions relating to offshore platforms (as well as transboundary harm in general) in an attempt to create a contemporary framework addressing pollution from offshore platforms and similar structures.

4.2. SCOPE OF THE PROPOSED CONVENTION:

A starting point for any convention is its scope. The convention should be global in nature and focus specifically on offshore installations conducting deep sea drilling. Whilst the focus of the present discussion is oil pollution, it should be noted at this juncture that offshore platforms are used for a variety of purposes, including gas exploitation. It is presumably for this reason that CLEE had a very wide ambit, defining an 'installation' as 'any well or other facility, whether fixed or mobile, which is used for the purpose of exploring for, producing, treating, storing, transmitting or regaining control of the flow of crude oil from the seabed or its subsoil'.[17] CLEE further included 'any well which is used for the purpose of exploring for, producing or regaining control of the flow of gas or natural gas liquids from the seabed or its subsoil during the period that any such well is being drilled…'[18] CLEE's definition of installation also included wells that are used for exploring for any minerals other than crude oil, gas or natural gas liquids' provided

[16] B Dubais 'The 1976 London Convention on Civil Liability for Oil Pollution Damage from Offshore Operations' (1977-1978) 9 *J. Mar. L. & Com.* 61, 76.
[17] CLEE, art. 1(2).
[18] Ibid, art. 1(2).

that such exploration involves 'the deep penetration of the subsoil of the seabed.'[19] The definition also made provision for facilities used solely for storing crude oil that has been removed from the seabed or subsoil.[20] Finally, the definition specifically excludes any vessel that is defined as a ship by CLC 69.[21] It is clear from this very wide definition that CLEE was drafted with the intention of complementing the liability regime created by the CLC and Fund Conventions.

CLEE, drafted in 1977, was one of the earliest attempts at creating a convention dedicated to addressing pollution emanating from offshore platforms. The CMI has subsequently prepared a number of draft conventions addressing offshore platforms, the most recent of which being the Sydney Draft. The Sydney Draft distinguishes between artificial islands and offshore units. An artificial island is defined as a 'permanent installation or structure rigidly affixed to the sea bed and used or intended for use for economic activities…'[22] The term offshore unit is defined as any structure that is not permanently affixed to the sea bed and is capable of being moved while on water, is 'used for economic activities' and includes accommodation for personnel and equipment.[23] A definition is also provided for 'related appurtenances' which are defined as 'structures or installations associated with artificial islands or offshore units' and are used in relation to 'economic activities'.[24]

The most apparent difference between the Sydney Draft and CLEE definitions is that the latter gives the term 'installation' a broad, all-encompassing meaning whereas the Sydney Draft instead follows a more nuanced approach, recognising a variety of platforms and affording them separate definitions. Considering the scale of a global convention covering offshore platforms, it is wise to distinguish between various forms of installations and structures in the definitions in order to enable the convention to regulate the different structures more effectively. Whilst this differentiation may not be vital in the context of liability, it would allow for more detailed

[19] Ibid, art. 1(2).
[20] Ibid, art. 1(2).
[21] Ibid, art. 1(2).
[22] Sydney Draft, art. 1(1)(a). This definition expressly excludes pipelines.
[23] Ibid, art. 1(1)(h).
[24] Ibid, art. 1(1)(n).

provisions relating to safety standards and other aspects.[25] As a global convention relating to offshore platforms would certainly extend beyond mere liability provisions, a targeted approach to regulation is clearly desirable.[26]

A second difference between CLEE and the Sydney Draft is their varying definitions of pollution. CLEE defines 'pollution damage' as 'loss or damage outside the installation caused by contamination resulting from the escape or discharge of oil from the installation and includes the cost of preventive measures and further loss or damage outside the installation caused by preventative measures.'[27] Thus CLEE's definition of pollution actually indicates the extent of potential liability, but limits pollution to 'oil pollution'. Although CLEE's definition of pollution initially appears to have a wide ambit, Dubais notes that 'damage' must be given a narrow interpretation, excluding damage resulting from 'fire, explosion, consequential and ecological impairment', the same interpretation given the 69 CLC Convention.[28] The Sydney Draft contains a slightly more precise definition, defining a 'pollutant' as the 'escape of any substance or the application of any energy process which is deleterious to the marine environment.'[29] It is suggested that the approach of the Sydney Draft is preferable, as it allows for a more nuanced liability provision i.e. it would allow the drafters of a global convention to avoid restrictive interpretations of 'damage' and rather define the exact ambit of an operator's liability. This suggestion may be countered by arguments favouring an ambiguous definition of pollution, for as Hunt notes, the definition of pollution damage in the CLC and Fund Conventions (and thus

[25] Increasing safety measures and strictly regulating other operational practices could potentially reduce the frequency of large oil spills. Indeed, the OPRC (see 2.2.3. of this dissertation) does contain some measures applicable to offshore platforms. Llewelyn Usher *Offshore Drilling in Ocean Waters and its Adverse Effect on the Potential of Blue Carbon of Coastal State: A Belize Perspective* (unpublished LLM dissertation, IMO, International Maritime Law Institute, 2012) available at *http://www.rempec.org/admin/store/wyswigImg/file/News/Forthcoming%20Meetings/Offshore%20Protocol%20WG%20(Malta,%2013-14%20June%202013/WG%20384-%20INF.5%20-%20IMLI%20Doc%20-%20Llewelyn%20Usher%20-%20E.pdf*, accessed on 11 September 2013, 29 concludes that whilst the OPRC is presently the 'most competent' convention addressing safety and operational measures to minimise pollution from platforms, it is not sufficient. Unfortunately a detailed study of such measures is beyond the scope of this dissertation.

[26] R Richards 'Deepwater Mobile Oil Rigs in the Exclusive Economic Zone and the Uncertainty of Coastal State Jurisdiction' (2011) 10 *J. Int'l Bus. & L.* 387, 388. Richards writes that 'complete regulatory jurisdiction is required to prevent and ensure against an environmental disaster.'

[27] CLEE, art. 1(6). The term preventive measure is defined in article 1(7).

[28] Dubais (note 16 above) 64.

[29] Sydney Draft, art. 1(1)(m).

also CLEE) grants local courts interpreting the convention some discretion in applying their own domestic law principles when giving effect to these two conventions.[30]

The definitions of pollution found in the Sydney Draft and CLEE (and the CLC conventions) may be further contrasted with the definition of 'pollution damage' contained in the Bunker Oil Convention,[31] which Rares considers a possible template for a global convention addressing spills from offshore platforms.[32] The Bunker Oil Convention defines pollution damage to mean '(a) loss or damage caused… by contamination resulting from the escape or discharge of bunker oil… provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement… and (b) the costs of preventative measures and further loss or damage caused by preventive measures.'[33] This definition is normally interpreted in a strict manner, prohibiting claims such as general environmental damage. Claims for loss of profit are recoverable and national courts interpreting the convention are given discretion when considering claims for personal injury.[34] Whilst the Bunker Oil Convention caters to a different scale of oil spill (thus excluding claims for death and pure environmental damage), it continues the pattern established by the CLC (and therefore CLEE) of recognising claims for pure economic loss arising from pollution as well as the practice of granting national courts a measure of discretion in interpreting its liability provisions.

It is clear that an examination of existing definitions of pollution and pollution damage reveals diverging definitions. Considering that a global convention regulating offshore platforms ought to cover a variety of platforms and industries, CLEE's definition of 'pollution damage' (which exclusively applies to oil pollution) is not sufficient. As offshore platforms are not

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[30] John Hunt *A comparative analysis of the Civil Liability and Fund Conventions, TOVALOP and CRISTAL, the U.S. Federal Oil Pollution Act and U.S. State Legislation, as legal mechanisms regulating compensation for tanker-source oil pollution damage as of February, 1994* (unpublished LLM these, University of Natal, 1995) 66. Hunt suggests that a 'uniform meaning of "pollution damage" may in truth be unobtainable.'

[31] International Convention on Civil Liability for Bunker Oil Pollution Damage, 23 March 2001, ILM 40, 1493, 21 November 2008 ('Bunker Oil Convention').

[32] Rares (note 7 above) 17.

[33] Bunker Oil Convention, art. 1(9).

[34] K Bachxevanis 'The Bunker Pollution Convention' (2009) Reed Smith LLP, litigation department publication, available at *http://www.reedsmith.com/files/Publication/3e41481a-9716-47ed-98bd-ca5a84194932/Presentation/PublicationAttachment/c04f9b80-455d-432f-85f8-cb7ea97347b1/The%20Bunker%20Pollution%20Convention%202001%20-%20K.%20Bachxevanis.pdf*, accessed 9 September 2013.

isolated to oil exploitation alone, the inclusion of gas extraction facilities (and other facilities located offshore) seems prudent.[35] The definition of pollution contained in the Sydney Draft ought to be favoured as it recognises different forms of pollution, allowing for a more specific provision allocating liability (it would allow the possibility of differing liability provisions depending on the nature of the platform). Continuing the trend established by CLC 69 and the Bunker Oil Convention, national courts ought to be granted discretion when interpreting the liability provision to ensure that it is congruent with their domestic law principles, but not too great a discretion that could undermine the uniform application of the convention.[36]

4.3. LIABILITY UNDER THE PROPOSED CONVENTION:

Liability is likely to be the most contentious issue in any proposed global convention. The reluctance of states to accept liability has been demonstrated by CLEE's failure to gain ratification, the Sydney's Drafts failure to progress into anything more than a draft, and the on-going debate concerning the ILC's Draft Principles on transboundary harm[37] - a debate that has continued for three decades without reaching a workable resolution.[38] This creates the unnerving impression that states are unlikely to agree on far-reaching liability provisions. It is hoped that recent large-scale spills from offshore installations will motivate states to create a liability framework applicable to installations, in the same way that tanker pollution prompted the creation of the CLC and Fund conventions. Nevertheless, it is vital that this impasse is resolved as the success of any global convention regulating offshore platforms is largely dependent on the effectiveness of its liability provisions. There must be a clear allocation of liability; clear criterion for incurring such liability and the exact quantum of any potential liability must be clear

[35] Whilst the subject of regulating gas extraction facilities definitely merits a thorough discussion, it is beyond the scope of this dissertation.

[36] Dubais (note 16 above) 76 writes that a global convention regulating offshore platforms ought to promote uniformity. Dubais bemoans CLEE's apparent departure from promoting uniformity as creating a 'dangerous precedent'.

[37] 2004 draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities (ILC, 2004) available in *Report of the International Law Commission on its Fifty-Sixth Session* (UN Doc. A/CN.4/L.661, 8 July 2004) ('2006 Draft Principles') See 2.1.2 for further commentary on the 2006 Draft Principles.

[38] C Foster 'The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: Privatizing Risk?' 14 *Review of European Community & International Environmental Law* 265 provides a detailed discussion on the development history and substance of the draft articles.

from the outset - a necessity for insurers.[39] Furthermore, no matter the nature of the liability regime created by a global convention, it is necessary that states be compelled to respect that regime. If states are able to disregard the convention and impose their own standard of liability, it would result in uncertainty and render the convention useless.[40] The standard of liability imposed by a convention is therefore of paramount importance.

CLEE imposed strict liability upon operators of installations in the event of a spill,[41] except in limited circumstances.[42] These limited circumstances allow an operator to escape liability for pollution damage if 'he proves that the damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character.'[43] CLEE also states that an operator will not be liable for damage occurring more than five years after the well was abandoned,[44] nor will it be liable if 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.'[45] The liability framework created by CLEE is nearly identical to that of CLC 69 but there is one significant difference. As Dubais notes, CLC 69 exonerated the owner of tanker where the damage was 'wholly caused by an act or omission done with intent to cause damage to a third party', allowing the operator to escape liability in the case of sabotage.[46] This exception is not found in CLEE.[47] Dubais suggests that the drafters of CLEE may have been 'unduly influenced by the potentiality of a well blow-out' thus causing them to remove sabotage as an exemption to liability.[48] Instead, in the context of liability for sabotage, CLEE appears to have been modelled after conventions regulating liability for pollution from nuclear installations,[49] specifically the Paris Convention on Nuclear Third

[39] Rares (note 7 above) 21, in which he argues that 'if liability of a rig controller is unlimited, it will be uninsurable.'
[40] Ibid.
[41] CLEE, art. 3(1).
[42] Ibid, art. 3(3)(4)(5).
[43] Ibid, art. 3(3).
[44] Ibid, art. 3(4).
[45] Ibid, art. 3(5). The wording of this exemption is very similar to that found in the Convention on Limitation of Liability for Maritime Claims, 18 November 1976, 1456 *U.N.T.S.* 221, 1 December 1986 ('Limitation Convention'), art. 4; the Oil Pollution Act of 1990 ('OPA 90') §2703(a)(3), and the Marine Pollution (Control and Civil Liability) Act 6 of 1981 ('MPCCLA'), s9(3)(b).
[46] Dubais (note 16 above) 64. International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, 9 ILM 45 ('CLC 69'), art. 2(b).
[47] Ibid, 65.
[48] Ibid.
[49] Ibid.

Party Liability ('1960 Paris Convention').[50] Dubais argues that comparing offshore installations to nuclear installations for the purposes of 'sabotage liability' is flawed, as 'nuclear plants are closely guarded and protected by sophisticated means that an offshore operator cannot afford or is not entitled to.'[51] Whilst conventions allocating liability for nuclear pollution may be useful when drafting provisions addressing transboundary harm, it is submitted that CLEE's deviation from the CLC 69 in this instance was unwise. As Dubais concludes, 'there is simply no justification for such transfer of a political risk onto private industry.'[52]

CLEE envisaged a similar liability framework to CLC 69, save the sabotage exclusion discussed above. Operators of installations are strictly liable for pollution damage (save for limited circumstances) but such liability is capped. CLEE capped liability at 30 million Special Drawing Rights (SDR) for five years, with the amount increasing to 40 million SDR thereafter.[53] CLEE states that 'the operator shall not be entitled to limit his liability if it is proved that the pollution damage occurred as a result of an act or omission by the operator himself, done deliberately with actual knowledge that pollution damage would result.'[54] In order to benefit from this limitation, the operator must have contributed to a fund representing the limit of his liability.[55] Once this fund has been constituted, the claimant will only be able to proceed against that fund (and not against other assets held by the operator). Although Article 6 of CLEE created the liability limitation, it is possible for states to deviate from its terms. Article 15 of CLEE allows states to provide for 'unlimited liability or a higher limit of liability than that currently applicable under Article 6 for pollution damage caused by installations for which it is the controlling state and suffered in that state or in another state party; provided however that in so doing it shall not discriminate on the basis of nationality.'[56] Dubais is critical of this provision as

[50] Convention on Third Party Liability in the Field of Nuclear Energy, 29 July 1960, 956 *U.N.T.S.* 251, 1 April 1968.
[51] Dubais (note 16 above) 65.
[52] Dubais (note 16 above) 65. See also Dubais, page 77, where the author concludes rather cynically that the liability regime created by CLEE proves 'that common sense cannot be expected to prevail when responsible governments are faced with domestic political and social pressures.'
[53] CLEE, art. 6(1). Article 9 of CLEE established a committee comprising of representatives from each state. This committee would review the liability limitation, and increase the amount provided the state parties accept the new limit.
[54] Ibid, art. 6(4).
[55] Ibid, art. 6(5).
[56] Ibid, art. 15(1).

the drafters of CLEE originally sought to create a harmonised system of rules,[57] which he argues is of paramount importance, but the drafters appear to have ultimately favoured a system that encourages diversity.[58] Dubais is very critical of CLEE's provisions allowing states to increase the liability limitation (potentially removing it) whilst reducing the defences available to the operator to escape liability (in comparison to CLC 69).[59] One may be tempted to conclude that Dubois's criticism has been weakened in the wake of the *Deepwater Horizon* incident (as that spill demonstrated the potential for catastrophic economic and environmental harm), but it would be unwise to do so. The entire purpose of a global convention is the implementation of a uniform liability standard, and if states disregarded this standard the convention would be rendered useless.[60] The need for clear liability limits is necessary for purposes of insurance, whilst states currently enjoy the right to implement stricter liability regimes for pollution occurring within their own territory.[61] It is submitted that a uniform system with a high liability limitation is preferable.

The liability regime created by CLEE thus shares many similar attributes to that created by the CLC, save for a few aspects identified above, and therefore it is possible that a similar regime would be accepted by the international community in a convention addressing offshore platforms. Whilst CLEE did not receive the requisite signatures, it is submitted that a global convention may spared the same fate as the international community is now more alive to the risk of oil pollution from installations, and unlike in the case of CLEE, there are no comparable global instruments that address oil pollution from offshore platforms. The CLEE regime creates a clear liability limit that ought to satisfy insurers and the adoption of the strict liability standard is welcome as it relieves the evidentiary burden on the claimant. This form of liability framework has thus far proven very successful with oil spills from tankers, and it is hoped that its success can be carried over to an offshore platform convention.[62]

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[57] The Preamble of CLEE states that the parties were 'desiring to adopt uniform rules and procedures for determining questions of liability and providing adequate compensation in such cases.'
[58] Dubais (note 16 above) 76.
[59] Ibid, 77.
[60] Rares (note 7 above) 21.
[61] Indeed, UNCLOS confers this right exclusively upon coastal states. See 2.2.1. for a detailed discussion of UNCLOS.
[62] Shaw (note 3 above) 7 notes the success of the CLC and Fund Conventions.

The Sydney Draft proposes a liability regime that shares a number of similarities with CLEE as it creates a system of strict liability coupled with a cap on liability. In the event that an offshore platform causes pollution, a claimant may proceed against the owner of that platform.[63] Where the pollution damage is caused by pollutants from 'natural reservoirs or other geologic formations' the claimant must proceed against the licensee of the platform.[64] Pollution damage is defined as 'loss or damage caused outside an offshore unit, artificial island or related appurtenance 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.'[65] As with CLEE, a licensee or owner can avoid liability under the Sydney Draft in limited circumstances, specifically stating that 'no liability for pollution damage shall attach to an Owner or Licensee if it proves that the damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character.'[66] Additionally, the Sydney Draft states that 'if the Owner or Licensee proves that 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, the Owner or Licensee may be exonerated wholly or partly from his liability to such person.'[67] The Sydney Draft does not allow an operator to escape liability for pollution damage resulting from the intentional act of a third party who did not himself suffer the harm. Provision is however made for cases where the loss is caused by two or more persons and the individual party's liability is proportionate to the degree to which they are respectively at fault or negligent.[68] The two or more parties are jointly and severally liable, but they are liable to each other for their proportionate share of the damage.[69] This might allow an operator or licensee to have some recourse against a third party who intentionally caused (but did not suffer) the harm, but it would be preferable to include sabotage as an exemption to liability.[70]

[63] Sydney Draft, art. 11(4).
[64] Ibid, art. 11(5). A licensee is defined by article 1(f) and (g) as any person or corporation who holds a licence, concession, permit or other authorisation issued by a coastal state for economic activities.
[65] Ibid, art. 11(1).
[66] Ibid, art. 11(7)
[67] Ibid, art. 11(9).
[68] Ibid, art. 12(2).
[69] Ibid, art. 12(3).
[70] Dubais (note 16 above) 65.

The terms of the Sydney Draft allow owners and licensees to limit liability for 'claims in respect of loss of life, personal injury or loss of damage to property in direct connection to the operation of the offshore unit'; claims for loss resulting from infringement of non-contractual rights; and claims in 'respect of removing, raising or rendering harmless' the offshore structure.[71] The Sydney Draft did not include detailed liability limits, but indicated that such limits would differentiate between pollution and non-pollution damage and would be based on 'units of account per mass ton or deadweight ton'.[72] In a similar vein to CLEE, owners and operators are required to create a fund in order to limit their liability.[73] A party will not be able to limit their liability where 'the loss resulted from [a] personal act or omission, committed with intent to cause such loss, or recklessly and with the knowledge that such loss would probably result.'[74] This provision prevents limitation in instances where the operator either intentionally causes the harm or the harm results from his gross negligence (recklessness). It therefore differs from CLEE, which only prevents a limitation of liability in instances of intentional conduct where the operator knew pollution damage would result.[75] It is submitted that if one considers that the purpose of a global convention is to hold the polluter accountable for the harm resulting from their activities, it would not be conscionable to permit such a polluter to limit their liability where they have acted recklessly. It is strongly suggested that a global instrument must prevent a reckless polluter from benefiting from a liability limitation.

It is clear that CLEE and the Sydney Draft both impose the strict liability standard. This form of liability originated in the English case of *Rylands v. Fletcher*,[76] and has subsequently been recognised in a number of international instruments. The case concerned the improper construction of a subterranean reservoir that caused damage to a neighbouring mine. In what has become a famous decision, the House of Lords, quoting the judgment of the court below, stated that 'the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and if he does not do so, is prima facie answerable for all the damages which is the natural consequence of its escape. He

[71] Sydney Draft, art. 13(3).
[72] Ibid, art. 13(5).
[73] Ibid, art. 13(8)(9)(10).
[74] Ibid, art. 13(4).
[75] CLEE, art. 6(4).
[76] (1868) L.R. 3 H.L. 300.

can excuse himself by shewing [sic] that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God.'[77] The principle confirmed by the House of Lords is still followed and it is submitted that the reasoning of the court remains sound. Thus in the context of offshore platforms, this principle would hold the operator or owner of a platform liable for a spill, irrespective of fault. The appeal of the strict liability standard is that it holds polluters accountable, minimising their ability to avoid liability. As Agyebeng notes, whilst it may seem harsh to impose liability on an operator or owner without establishing fault, it is even more unreasonable and unfair to the sufferer of the harm if they are made to bear the loss if the responsible party is able to show due care.[78] This approach has been successful in the context of tanker pollution conventions and it is prudent that the Sydney Draft (or any such convention) incorporates such an approach.

The similarity of the Sydney Draft to tanker pollution conventions is no coincidence. The CMI (specifically the delegation from the Canadian Maritime Law Association) proposed a set of principles that should be incorporated in any global convention dedicated to offshore platforms, one of which states 'offshore regime provisions should be consistent with other generally accepted international maritime conventions except where the liability and operating environments of the offshore industry are distinct or markedly different from the operation of mobile seagoing commercial vessels as to require distinct international rules.'[79] Interestingly, a notable difference between oil tanker pollution liability and that of offshore platforms is that the latter is explicitly excluded from limiting liability in terms of the 1976 Convention on Limitation of Liability for Maritime Claims ('Limitation Convention').[80] White notes that this is because the Limitation Convention determines liability limitations based on a vessel's tonnage, a metric that is inappropriate in the context of offshore platforms since the spill size bears little correlation to

[77] Rylands v. Fletcher, 339-340.
[78] Agyebeng (note 9 above) 35.
[79] CMI Newsletter, available at *http://www.comitemaritime.org/Uploads/Newsletters/CMI%20News%202011-3.pdf*, at page 3.
[80] Convention on Limitation of Liability for Maritime Claims, 18 November 1976, 1456 *U.N.T.S.* 221, 1 December 1986.

the platform's mass.[81] The idea of emulating tanker conventions may be wise considering their success,[82] but there is one significant caveat - the absence of state liability.

As noted earlier,[83] states have been reluctant to accept liability in cases of transboundary pollution. Whilst the Sydney Draft and CLEE could conceivably be used to hold states liable, this would only be the case where the state was the owner, operator or licensee of the offshore platform.[84] There are a number of reasons favouring state liability for spills occurring within their jurisdiction - that is, within their EEZ, territorial waters or on their continental shelf. Hancock and Stone suggest three such reasons in their argument that states should be primarily liable in the event of the spill.[85] They contend that: 1) direct state liability would encourage states to ensure that operators are financially capable of meeting any claims under a convention; 2) the state that benefited the most from the offshore operation would bear the ultimate burden of recovery of damages from the owner or operator who caused the pollution; and 3) such a duty would be consistent with the principle confirmed by the *Trail Smelter* arbitration[86] and Principle 21 of the Stockholm Convention[87] that states must ensure that activities within their territory do not cause harm to the territory of another state.[88] The duty on states to prevent harm in neighbouring states has been recognised in a number of international instruments and ICJ decisions.[89] By channelling claims through the coastal state it would remove any concerns of insolvency on the part of the private owner or operator, and thus ensure compensation for the claimant. Further reasons favouring state liability are noted by Caron who suggests that a system imposing such liability encourages reciprocal protection, prevents extra-legal consequences and supports the notion of an international community favouring a regime of law over one of self-

[81] M White 'Offshore Craft and Structures: A Proposed International Convention' (1999) 18 Australian Mining & Petroleum L.J. 21, 25.
[82] A Boyle and G Handl 'International law and the Liability for Catastrophic Environmental Damage' (2011) 105 *Am. Soc'y Int'l L. Proc.* 423, 428 favour an offshore convention emulating tanker conventions.
[83] See 2.1. of this dissertation.
[84] It is interesting to note that article 14(7) of the Sydney Draft states that where the owner or licensee of a platform is a state party, there is no need for it to furnish financial security to cover its liability.
[85] W Hancock and R Stone 'Liability for Transactional Pollution Caused by Offshore Oil Rig Blowouts' (1981) 5 *Hastings Int'l & Comp. L. Rev.* 377, 394.
[86] 3 R. Int'l Arb. Awards 1938 (1941).
[87] The Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, U.N. Doc. A/Conf. 48/14 at 2-65 (1972) ('Stockholm Declaration').
[88] Hancock and Stone (note 85 above) 394/395.
[89] See 2.1. in this dissertation for a detailed examination of the relevant customary international law duties between states.

help.[90] States would obviously be reluctant to accept liability for polluting the coasts of their neighbours, but they would be able to recover their costs from the responsible operator.

In discussing instances of state liability, it is helpful to consider other instruments regulating transboundary pollution, as oil is not the only pollutant subjected to regulation by international law. Similarities exist between the international regime governing marine oil pollution and that governing damage resulting from nuclear activities.[91] One of the greatest similarities between these industries is that both are considered ultra-hazardous activities.[92] Since both are ultra-hazardous activities with the potential to cause transboundary pollution, it is clear that the liability regime created by nuclear conventions ought to be considered when drafting an instrument concerning offshore platforms. Doeker and Gehring note that 'nuclear conventions' channel liability onto the party operating the nuclear facility and hold that party solely accountable.[93] The nuclear compensation regime resembles CLEE and the Sydney Draft in that it imposes strict liability upon operators whilst limiting the liability of responsible parties.[94] As discussed above, even international acts of sabotage (or terrorism) by a third party against the nuclear installation will not be sufficient for the operator to limit his liability.[95] Commentators have suggested that strict liability was favoured in the context of nuclear pollution due to the enormity of the possible damage, the challenges in proving responsibility for the harm suffered

[90] D Caron 'Liability for Transnational Pollution Arising from Offshore Oil Development: A Methodological Approach' (1982-1983) 10 *Ecology L.Q.* 641, 654-656. Caron is arguing for a clear liability regime promoting accountability of nations, national companies and private industries. Thus, whilst he is not arguing solely for state liability, the reasons he provides clearly encompass such a notion.

[91] G Doeker and T Gehring 'Private or International Liability for Transnational Environmental Damage - The Precedent of Convention Liability Regimes' (1990) 2 *J. Envtl. L.* 1, 8 fn 50. The authors analyse five conventions addressing transboundary nuclear pollution. Where one of these conventions is addressed in this dissertation, their full citation will be given. For a comprehensive analysis of all five conventions the reader is directed to the Doeker and Gehring article, as such an analysis is unfortunately beyond the scope of this dissertation.

[92] L Malone 'The Chernobyl Accident: A Case Study in International law Regulating State Responsibility for Transboundary Nuclear Pollution' (1987) 12 Colum, J. Envtl. L. 203, 212. See also Doeker and Gehring (note above) 2.

[93] Doeker and Gehring (note 91 above) 8-9.

[94] Ibid, 9. See for example the 1960 Paris Convention, art. 3(1) which states that 'the operator of a nuclear installation shall be liable… for (1) damage to or loss of life of any person; and (2) damage to or loss of any property… upon proof that such damage or loss was caused by a nuclear incident in such installation or involving nuclear substances coming from such installation...'

[95] Dubais (note 16 above) 65. See also M Faure and T Borre 'Compensating Nuclear Damage: A Comparative Economic Analysis of the U.S. and International Liability Schemes' (2008) 33 *Em. & Mary Envtl. L. & Pol'y Rev.* 219, 234.

and the possible multiplicity of claims against the responsible party.[96] It is submitted that these three factors are all present in instances of oil spills from offshore platforms.

The nuclear compensation regime shares similar characteristics to the regime created by the CLC and Fund Conventions as it creates two additional levels of compensation in the event that the amount payable by the operator is insufficient.[97] These two additional tiers are created by 1963 Brussels Supplementary Convention.[98] The first fund is made available by the state in whose territory the nuclear installation is located,[99] with the second fund being financed jointly by all states party to the 1963 Brussels Supplementary Convention.[100] Whilst the intricacies of the nuclear compensation regime are well beyond the scope of this dissertation,[101] the nuclear regime demonstrates that the creation of additional funds by individual states and the international community can work well for activities that have the potential for colossal economic and environmental fallout. It is fair to comment that the nuclear liability regime, although placing primary liability on operators, has created a framework that places the eventual cost upon the shoulders of the state. The amount actually borne by the operator is so low, that Doeker and Gehring conclude that the state faces a disproportionate amount of liability in the event of a nuclear accident.[102] Therefore this system results in state liability for transboundary harm.[103] It is submitted that this framework represents a growing willingness on the part of the international community to accept state liability for transboundary harm. There are certainly significant economic and political differences between the nuclear and petroleum industries, and it would not be reasonable to expect states to bear the brunt of the costs resulting from the actions of a private entity.[104] However, the model of channelling liability through states onto operators is appealing as it ensures that compensation for pollution damage is available. Doeker

[96] A Lester 'River Pollution in International Law' (1963) 57 *Am. J. Int'l L.* 828, 850.
[97] Faure and Borre (note 95 above) 236.
[98] Nuclear Energy Agency, Convention of 31st January 1963 Supplementary to the Paris Convention of 29th July 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982, available at *http://www.nea.fr/html/law/nlbrussels.html*, accessed 8 September 2013 ('1963 Brussels Supplementary Convention').
[99] Ibid, art. 3(2)(2).
[100] Ibid, art. 3(2)(3). See also Faure and Borre (note 490 above) 236.
[101] For a more detailed consideration of the nuclear compensatory regime, see Faure and Borre (note 95 above), Doeker and Gehring (note 91 above) and also Malone (note 92 above).
[102] Doeker and Gehring (note 91 above) 10.
[103] Ibid, 12, fn. 77.

and Gehring's concerns can be allayed by simply increasing the amount of liability borne by the operators so that it does not place a disproportionate burden upon the state.

The practice of imposing the strict liability standard in claims against private operators has become commonplace in international environmental law. Strict liability is utilised in the CLC and Fund Convention, the European Environmental Liability Directive ('EU Directive'),[105] the Kuala-Lumpur Supplementary Protocol on Liability and Redress to the United Nations Convention on Biological Diversity ('the Supplementary Protocol'),[106] and the voluntary OPOL agreement amongst others.[107] Cates notes that ILC reports and comments from the UN General Assembly demonstrate that there is increasing support for the imposition of strict liability in international law.[108] The imposition of strict liability against states may be an emerging trend, but is by no means an established practice. An example of this emerging trend is the Space Objects Convention, which directly implements the strict standard against states due to the hazardous nature of launching objects into orbit.[109]

The Space Objects Convention contains several provisions that would be well suited to a convention addressing offshore platform oil pollution.[110] The convention allows the state that paid compensation to claim compensation from other states involved in the failed launch, as they are jointly and severally liable.[111] Cates notes that a similar provision in an offshore oil platform

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[104] Ibid, 13. Doeker and Gehring warn that the political background to the nuclear conventions is significantly different to that of the oil pollution conventions, and thus one must take care when comparing the two regimes.
[105] Directive 2004/35/CE of the European Parliament and of the Council, 21 April 2004, L143/56 *Official Journal of the European Union* 30.4.2004 ('EU Directive').
[106] Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, 15 October 2010, 50 *I.L.M.* 105 (2011) ('Supplementary Protocol').
[107] Note 2 above.
[108] M Cates 'Offshore Oil Platforms Which Pollute the Marine Environment: A Proposal for an International Treaty Imposing Strict Liability' (1983) 21 *San Diego L. Rev.* 691,708.
[109] In the United States case of *Green v General Petroleum Corporation* 205 Cal. 328, 270 P. 952 (1928) the court held that despite the defendant exercising care when drilling for oil, he was liable for the harm caused to his neighbour's land as the activity was 'abnormally dangerous'. Cates (note 108 above) 702, provides a list of US cases following the precedent set by *Green*. Furthermore, Cates, at 703, writes the following as a justification for strict (no-fault) liability: 'the creator of an abnormally great risk is strictly liable because, between the creator and the innocent victim, the one who engages in the dangerous profit-making activity is best able to predict and allocate the risk of loss. The enterprise can spread the loss through slightly higher prices to consumers whereas an innocent victim cannot.'
[110] Cates (note 108 above) 700.
[111] Convention on International Liability for Damage Caused by Space Objects, 29 November 1971, 961 U.N.T.S. 187, 1 September 1972 ('Space Objects Convention'), art. V(1)(2).

convention would be appropriate, as it would allow states to compensate victims of pollution and then recoup their expenses from the responsible platform owner or operator.[112] The Space Objects Convention states that compensation 'shall be determined in accordance with international law and the principles of justice and equity' and must be sufficient to repair any damage to the state it was in prior to the harm occurring.[113] Cates mirrors Hancock and Stone by arguing that state liability would encourage better regulation of offshore activities, as well as their contention that the Space Objects Convention could serve as a model for an oil platform convention.[114]

The final aspect of liability to be discussed is the nature of claims for which compensation is made available. As discussed above, both CLEE and the Sydney Draft make provision for pollution damage. These instruments state that compensation must be made available in the event that pollution from a platform causes any loss or damage, and such compensation must also cover any preventative measures.[115] Handl writes that the convention should 'cover property damage, pure economic loss, impairment of the environment, and the costs of preventative measures.'[116] Handl notes that whilst such claims are catered for by oil tanker conventions (specifically the CLC and Fund Conventions), this should be expanded for offshore platforms to include certain claims not covered by tanker conventions notably claims for personal injury, loss of life, and claims for environmental loss.[117] Ultimately the extent of claims covered by a global convention would be decided by the will of the states negotiating it. The wider the scope of claims actionable in terms of a convention, the greater the potential liability of states and thus the greater the reluctance on the part of states to ratify such a convention. At a minimum, it is submitted that for a convention to be of any real significance, it must allow claims for property damage, economic loss, loss of life, personal injury claims and the costs of preventative

[112] Cates (note 108 above) 700.
[113] Space Objects convention, art. XII.
[114] Cates (note 108 above) 700, fn. 52. Cates notes that state liability is endorsed by the *Corfu Channel* case as well as the *Trail Smelter* arbitration, but this argument is flawed. Neither of these two decisions endorsed the strict liability standard, they only recognised that states should be held accountable for any harm they cause to another state.
[115] CLEE, art. 1(6). Sydney Draft, art.11(1).
[116] Boyle and Handl (note 82 above) 428.
[117] Ibid. A useful reference is USA law, which permits a wide range of claims including claims for pure economic loss. See OPA 90, §2702(b)(2).

measures.[118] Claims for environment rehabilitation are obviously desirable, but permitting such claims may result in significant reluctance on the part of states and could result in a convention that never enters into force.[119]

It is therefore submitted that the liability provision in a global convention should have the following key features: 1) strict (no fault) liability with limited exceptions; (2) a clear liability limitation; (3) primary state liability and (4) a fairly broad scope of actionable claims. Such a provision would encourage states to better regulate offshore drilling occurring within their jurisdiction,[120] ensuring that the victims of pollution are able to obtain redress. The states could then seek indemnification from the responsible owner or operator, thereby placing the final financial burden on the owner or operator. A clear liability limit would allow owners and operators to obtain insurance, and would create a similar liability framework to that which exists for oil tanker pollution. As with CLEE, the Sydney Draft and the CLC and Fund Conventions, exceptions should be available to operators that would allow them to escape liability completely. Such exceptions would encompass scenarios where the harm occurred without a sufficient causal link to the operator or owner (an example of this being an act of war). Complementing these exceptions, provisions must exist whereby an operator would be unable to avail itself of the liability limitation in the event that they were grossly negligent or intentionally caused the harm. If this liability regime could attain the status of customary international law, it would largely resolve any lacunae that presently exist in international law relating to offshore platforms.

4.4. FINANCIAL SECURITY UNDER THE PROPOSED CONVENTION:

If a strict liability regime is implemented that renders a state or an owner liable for the costs of a large offshore platform-source oil spill, it is clear that the total compensation payable could reach very large figures. In the aftermath of the *Deepwater Horizon* spill, British Petroleum

[118] Rares (note 7 above) 19 suggests that a minimum threshold should be the definition of pollution damage found in the CLC and Bunker Oil Convention. As Rares notes, these definitions themselves have been challenged by environmental groups as being too conservative.
[119] Doeker and Gehring (note 91 above) 3, warn that reliance on ICJ judgments and ICL proposals supporting strict liability is unwise. They stress that 'international conventions reflect the intention and the view of political decision-makers in a much more realistic way than do isolated court decisions.'
[120] Ibid.

('BP') agreed to pay $30 billion in clean-up costs, penalties and fines,[121] with the civil suit still pending. Whilst BP may be willing and able to provide such a substantial amount of compensation, it is quite likely that a number of offshore operators are not. Certain jurisdiction issues pertaining to security exacerbate the difficult scenario caused by operators' reluctance to furnish security. White comments that it would presently not be feasible for a coastal state to exercise a right of security over an offshore platform,[122] as UNCLOS provides that such platforms would not be considered part of a state's territory unless located in the state's territorial sea.[123] It is for this reason that a comprehensive offshore platform convention must make provision for the furnishing of financial security, be it in the form of insurance or a guarantee, and that the convention allows coastal states to exercise rights of security over platforms in its EEZ and continental shelf. A further possibility is the creation of a fund - similar to that created by the Fund Convention and the nuclear compensation regime[124] - that requires the contribution of owners, operators and states, from which victims would be able to claim in the event that the platform owner/operator is incapable of satisfying the claim.

It is clear from the outset that obtaining insurance to cover an oil spill from an offshore platform will be considerably different to obtaining similar cover for a spill originating from a tanker.[125] The proposed convention would require the participation of insurers in order to be of any practical use.[126] Shaw points to the CLC and Fund regime, as well as that of OPOL,[127] in arguing that an insurance scheme for oil platforms is possible.[128] In terms of the OPOL Rules (which are based on CLEE) an operator must demonstrate that it is financially responsible in

[121] Tom Fowler 'Settlement Offer to BP Takes Shape' *The Wall Street Journal* 24 February 2013, available at *http://online.wsj.com/article/SB10001424127887323549204578320362599078672.html*, accessed on 29 July 2013.
[122] White (note 81 above) 23.
[123] UNCLOS, art. 60(8) states 'artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.'
[124] See International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 18 December 1971, 1110 U.N.T.S. 57 ('Fund Convention'), art. 4(4) and 1963 Brussels Supplementary Convention, art. 3(2)(2).
[125] Dubais (note 16 above) 67.
[126] Shaw (note 3 above) 7.
[127] A detailed analysis of OPOL is available in 2.3 of this dissertation.
[128] Ibid.

order to join the OPOL Association.[129] Financial responsibility is defined by OPOL as the capability of fulfilling its obligations under clause 4 of OPOL,[130] and the OPOL Association requires operators to furnish proof of insurance, guarantee or self-insurance in order to obtain membership.[131] It will be necessary for a global convention to specify forms of financial security, such as was done with OPOL, as Protection and Indemnity Clubs ('P&I Clubs') generally refuse to cover offshore platforms used in the exploration for and exploitation of oil.[132]

The Sydney Draft contains similar provisions to OPOL in the context of financial responsibility, requiring the owners of offshore units to have and maintain insurance (or any comparable type of financial security required by the flag state), with such funds being no less than the largest liability limitation amount.[133] The draft further requires all licensees to have and maintain insurance or other security on terms specified by the authority that granted the licence, with such amount being no less than the largest liability limitation amount.[134] Any financial security that could cease before more than two months' notice is given to the flag state or the authority that granted the license will not satisfy the requirements of the Sydney Draft.[135] Once the financial security has been given, a claimant proceeding against the owner or the operator for pollution damage may instead elect to proceed first against the insurer, irrespective of whether the owner or operator acted with gross negligence.[136] In the event that the owner or the operator of the platform is a state party, they shall not be required to furnish or maintain financial security.[137]

[129] Rules of the Offshore Pollution Liability Association Limited (as at 1 January 2012), available at http://www.opol.org.uk/downloads/OPOL-Rules-Jan2012.pdf, accessed on 1 June 2013 ('OPOL Rules'), Part II, 2.2.
[130] Ibid.
[131] Ibid, Form B.
[132] Rares (note 7 above) 17.
[133] Sydney Draft, art. 14(1). See also article 14(2) which requires the operator of an artificial island or related appurtenance to maintain insurance or other financial security as required by the license grantor, provided such security is no less than the liability limitation amount.
[134] Ibid, art. 14(3).
[135] Ibid, art. 14(4).
[136] Ibid, art. 14(5).
[137] Ibid, art. 14(7).

The Sydney Draft thus adopts a system very similar to CLEE (and therefore OPOL). The system created by OPOL has thus far proven to be successful,[138] so it would rational to incorporate many of its provisions into a global framework. The Sydney Draft differs from OPOL in a significant respect as it states that the flag state has the right to specify a form of insurance that must be provided by the owner of a platform.[139] This is problematic, as a flag state has little to lose in the event of a spill, as the pollution is unlikely to reach its shores whilst the coastal state will be burdened with the clean-up costs.[140] A cynical observer would be entitled to question whether such a system is prone to abuse. This situation could potentially be remedied by the operator of the rig maintaining insurance to the standard and form specified by the coastal state (who presumably would require comprehensive insurance as they are likely be the victims of any major spill).[141] It is submitted that it would be more appropriate to require that the owner obtain insurance or some other financial security that satisfies the licensing state, as such a system is less prone to abuse. An interesting provision included in the EU Directive, and a possible supplement to compulsory insurance, is a right of security granted to states over a platform in the event of a spill.[142] This would certainly be insufficient in the event of a catastrophic spill and would therefore be better suited for common, minor spills where the total clean-up cost of the spill is less than the value of the platform itself.

A relevant framework that ought to be considered is that created by the CLC and Fund Conventions. As noted earlier,[143] these two conventions create a system whereby ship owners contribute to a fund. Where a contributing ship owner causes pollution damage, a claimant may claim from the CLC fund. A claimant may claim from the fund created by the Fund Convention in the event that the damage exceeds the amount available under the CLC Convention; the ship-

[138] See 2.3.1. of this dissertation.
[139] Sydney Draft, art. 14(1).
[140] Richards (note 26 above) 387.
[141] Dubais (note 16 above) 67 is concerned that 'offshore operators might well be subjected, as regards these financial guarantees, to unreasonable and costly obligations.' Dubais concern can be contrasted with a point raised by Richards (note 26 above) 395 who argues that large oil spills threaten to cause long-term environmental damage to the coastal state as well has having a definite impact on that state's economy. Whilst Dubais concern may be well founded, it would seem unlikely that coastal states would waive a right to comprehensive security from operators in the name of international uniformity. Indeed, the USA requires offshore operators to furnish security to an amount not exceeding $150 million. See OPA 90, §2716(c)(1)(C). The UK also requires operators drilling on its continental shelf to join the OPOL Association, see 2.3.1 of this dissertation. South Africa, unfortunately, requires no security from operators drilling in its jurisdiction.
[142] EU Directive, art. 8(2).

owner is not liable under the CLC Convention or the ship-owner is unable to meet their financial obligations under the CLC Convention and sufficient insurance was not available to cover the entire claim.[144] The application of this model to the offshore petroleum industry is attractive. An oil spill from an offshore platform may be sufficiently large that the operator or owner would not be able to cover the resulting costs, thus necessitating the creation of a fund. The CLC and Fund Conventions require contributions from a party who receives a certain quantity oil, thus placing the financial burden on those who are utilising or reselling the product.[145] As noted earlier,[146] the nuclear compensation regime could also serve as a model for creating a fund. The nuclear compensation regime differs from that created by the CLC and Fund conventions, as it requires the state in whose territory the installation is located to contribute to the first tier of the fund,[147] and all states party to the convention to contribute to the second tier of the fund.[148] The creation of an industry-wide fund is also encouraged by the ILC's 2006 Draft Principles,[149] which recognises the need for operators to establish and maintain financial security in order to cover the costs associated with transnational pollution.[150] It is submitted that there is no reason why such a system ought not to be introduced for the offshore petroleum industry.[151]

From an analysis of a number of marine pollution instruments (whether addressing tanker-source pollution, general pollution or specifically concerned with offshore platform pollution) it is clear that there is recognition of the need for some measure of financial security to be furnished by the owners or operators of offshore installations.[152] The establishment and

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[143] See 2.2.5. of this dissertation for a detailed analysis of the CLC and Fund Conventions.
[144] Rares (note 7 above) 22.
[145] Ibid. See Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, 16 May 2003, IMO Doc. LEG/CONF. 14/20, 5 March 2005 ('2003 Protocol'), art. 10. See also Boyle and Handl (note 82 above) 428/429 where Handl writes that the contribution of states to a third tier fund for pollution claims is an example of states providing compensation even where they themselves have not acted wrongfully.
[146] See 4.3. of this dissertation.
[147] 1963 Brussels Supplementary Convention, art. 3(2)(2).
[148] Ibid, art. 3(2)(3).
[149] 2006 Draft Principles, principle 4(4).
[150] Ibid, principle 4(3).
[151] Indeed, similar systems exist outside of the context of marine pollution. See Boyle and Handl (note 82 above) 429, where the authors note that the Convention on Supplementary Compensation for Nuclear Damage, 29 September 1997, 36 *ILM* 1473, art. 3(1), 4, requires the contribution of installation states to help cover the costs of a significant nuclear incident.
[152] This has been recognised by the international community as there are provisions addressing compulsory financial security in a number of instruments addressing transboundary pollution, such as the ILC Draft Principles, the 1963 Brussels Supplementary Convention and the various iterations of the CLC and Fund conventions,

maintenance of financial security must be compulsory if any global convention is to be successful. This is due to the potential for catastrophic spills that may well result in claims exceeding the value of the owner's or operator's assets. The financial security provisions of the Sydney Draft are well suited to the task, as both the operator and the owner of a platform are required to furnish security. However, unlike the Sydney Draft, it would perhaps be wise if both these parties were required to furnish security to the satisfaction of the coastal state.[153] To require the owner to furnish security to the satisfaction of the flag state would leave the system open to abuse, and there seems no clear reason why the flag state should be able to dictate the terms of the security.[154] The flag state is not likely to be the victim of a spill from the platform. The party that dictates the terms of the financial security ought to be the state that is most at risk in the event of a spill - the coastal state.[155] As required by both CLEE and the Sydney Draft, the amount of financial security required must be sufficient to meet the largest possible claim in terms of the convention's limitation provisions. This approach would result in an international system where the amount of financial security is set according to international standards, yet the precise form of the financial security would be dictated by the coastal state. This system of financial security should be supplemented by the creation of a tiered fund system, similar to that of the CLC and Fund Conventions (and possibly the nuclear compensation regime).[156] It is submitted that such a system in conjunction with the liability regime proposed would result in an offshore oil industry that is required to and capable of covering any claims for pollution from deep sea drilling. The only aspect of this system that has yet to be addressed is the manner in which claims are to be adjudicated upon and resolved.

[153] Dubais (note 16 above) 67/68 warns that allowing coastal (or flag) states discretion to require their own standards of financial security could place unreasonable burdens on operators. He is also concerned that such an approach would undermine the uniformity of a global convention. See also note 141 above.
[154] Richards (note 26 above) 388 comments that this state of affairs has likely emerged from offshore platforms being treated as vessels. Richards argues that this is not desirable as there are significant differences between oil spills from vessels and offshore platforms, as the latter has the potential to spill for an 'open-ended' period of time and may affect a very large area.
[155] Ibid, 395.
[156] Rares (note 7 above) 22.

4.5. DISPUTE RESOLUTION UNDER THE PROPOSED CONVENTION:

The method by which a claim is resolved is significant, as there are major cost and time implications involved. It is necessary to consider some possible systems that may be implemented by a global convention.[157] The resolution of claims that have a transboundary character has been particularly difficult, with Handl noting that 'settling claims through litigation may prove exceedingly time-consuming, expensive, and ultimately inequitable. Some private lawsuits are too big for courts to handle.'[158] The proposed state, operator and owner aspects of the global convention further complicate the issue, as does the choice of financial security arrangement.

Where a claim lies between an operator or owner, and the coastal state, it would certainly be possible to resolve the claim through the courts of that state. An alternative is to make use of arbitration, as there is often a large amount of technical evidence that would best be weighed by arbitrators who are familiar with the offshore oil industry.[159] The issue grows more complicated where the claim lies between two states, as domestic courts would usually lack jurisdiction to hear the matter.[160] A proposed solution to this difficulty is the establishment of a permanent arbitral tribunal.[161] Such a tribunal could utilise technical experts and scientific data, and would thus serve as an ideal forum for disputes arising from transboundary pollution caused by offshore oil spills. Given the very technical nature of deep sea drilling, a specialised arbitral body is

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[157] Whilst the issue of dispute resolution is perhaps inseparable from that of liability, a detailed discussion of dispute resolution methods is beyond the scope of this dissertation.

[158] Boyle and Handl (note 82 above) 430.

[159] R Graving 'The International Commercial Arbitration Institutions: How Good a Job Are They Doing?' (1989) 4 *Am. U.J. Int'l L. & Pol'y.* 319, 324. Graving lists a number of factors favouring the use of arbitration in general. These include assurances of neutrality, expert arbitrators, flexible procedure, privacy, potential for reduced costs, and international enforcement amongst others. See also A Budiman 'On Liability for Offshore Oil Spillage: Strictly Settled', International Bar Association - Oil and Gas Law Publications, available at *http://www.ibanet.org/Document/Default.aspx?DocumentUid=FCEBAB31-12B0-4F19-B5F6-1259FD824FBC*, accessed on 7 June 2013, page 5.

[160] Caron (note 90 above) 657. It is perhaps trite law that domestic courts lack the jurisdiction to adjudicate on claims between sovereign states. Caron notes that it may be possible to act against a foreign state where they have assets within the jurisdiction of a domestic court, but that such a scenario is 'a fortuitous and slender reed upon which nations should not rely when designing compensation schemes for their citizens.' Caron further reiterates this by stating that 'it must be borne in mind that international accountability is fundamentally different from domestic accountability'.

[161] L Cahalan 'Compensating Private Parties for Transnational Pollution Injury' (1984) 58.3 *St. John's Law Review* 528, 554. Naturally, such an arbitral body would require the participation of party states in order for its orders to be effective.

ideal.[162] International instruments addressing pollution often mandate arbitration between parties,[163] but such arbitration is mostly *ad hoc* and not conducted by a permanent tribunal. An example of an *ad hoc* arbitral body is that created by the Space Objects Convention. The Space Objects Convention is relevant in the context of dispute resolution, as it contains provisions for the settlement of disputes concerning transboundary harm. The convention encourages diplomatic negotiations, but in the event that these are unsuccessful, the parties resolve the dispute through the establishment of a claims commission.[164]

Whilst the establishment of a permanent arbitration tribunal would be desirable, it is unlikely. International marine pollution instruments (and others) often contain arbitration provisions, but these are predominantly conducted on an *ad hoc* basis and it would appear unlikely that the international community would deviate from this established practice. In conclusion, a global convention dedicated to offshore platform spills is most likely to gain international acceptance if it contains an *ad hoc* arbitration provision for instances where the claim lies between states, with claims between operators/owners and a state being resolved through domestic courts or arbitration.

4.6. ALTERNATIVES TO A GLOBAL CONVENTION:

Whilst the creation of a global liability regime for offshore platforms has been motivated, consideration must be given to critiques of this approach and possible alternatives. Tetley writes that 'the need for an international convention on offshore mobile craft appears doubtful, at least for the present, as legal problems relating to the operation of such craft tend to be local or regional, rather than international, and so lend themselves more readily to national legislation.'[165] This critique is common and rational, as a regional framework is presently the favoured approach for offshore platforms (which Tetley refers to as mobile craft). The benefits of national legislation (and regional agreements) are clear; they offer specialised regulation and can be

[162] Boyle and Handl (note 82 above) 427, where Boyle writes that there is a 'strong argument for a permanent body to facilitate mass claims.'
[163] See for example the Barcelona Convention, art. 28(2), OSPAR, art. 32(1), OPOL, clause 9.
[164] Space Objects Convention, art. XIV.
[165] W Tetley QC 'Uniformity of International Private Maritime Law - The Pros, Cons, and Alternatives to International Conventions - How to Adopt an International Convention' (1999-2000) 24 *Tul. Mar. L.J.* 775, 802.

amended faster than a global convention. It follows that a solution to the present lamentable state of the international liability regime relating to offshore platforms could be provided by the amendment of existing regional instruments. A number of commentators have proposed that existing compensation regimes applicable to tanker pollution, such as the CLC and Fund Conventions, should be expanded to cover such spills (which are presently excluded).

A common feature of many regional instruments is the inclusion of a *pactum de contrahendo* concerning liability. A number of these conventions are based on a model convention drafted by the United Nations Environmental Programme ('UNEP'), so presumably, should UNEP draft a model liability provision that specifically apportions liability in the event of an oil spill from an offshore platform, states may be encouraged to incorporate such a provision into the existing regional instruments. Hancock and Stone provide a compelling example of a successful regional instrument, OPOL, and argue that since offshore platforms drill along a narrow strip of the continental shelf (or in other shallow areas), regional agreements can serve as effective regulation.[166]

It is submitted that the method of including or amending liability provisions in existing regional instruments is plausible, but this would require states party to a number of instruments to agree on amendments. Almost every regional instrument (as they are presently written) would require some form of amendment. It would simply be more practical to create a single new instrument, but there is merit in the concern that the greater the number of states involved in negotiation, the more divergent the views. It is desirable to address offshore platforms in a separate convention from other 'vessels' as the potential liability is significantly different.[167] The notion that offshore drilling occurs within a certain area and thus is manageable by regional regulation is correct, but respectfully, it is short-sighted. This is because increased technological development coupled with increasing demand for oil has resulted in offshore platforms drilling in ever-deeper waters.[168] Thus it is submitted that the regional instruments will become less effective as time passes. A global convention avoids this failing as it caters for drilling in

[166] Hancock and Stone (note 85 above) 393.
[167] Richards (note 26 above) 338.
[168] See 2.2.6 of this dissertation where mention is made of the *Maersk Discoverer*, a platform with an operational drilling depth of 3 kilometres.

increasingly deeper waters by holding operators or owners accountable, even where the drilling is conducted in international waters. It is therefore a proposal that not only addresses present problems, but also regulates dilemmas that have yet to surface. Considering the slow pace of international law making, a convention that anticipates obstacles and pre-emptively resolves them is surely desirable.

A second critique of the regional approach is that it has proven ineffective thus far. The earlier analysis of the regional international regime revealed that states have agreed to a large number of conventions, but that these conventions are largely silent on liability - especially in the context of offshore platforms. To amend every convention in order to incorporate detailed liability provisions is a Herculean task. Finally, as Tetley acknowledges, the benefits of creating a unified international regime outweigh the disadvantages.[169] The advantages he lists include certainty, avoidance of a 'conflict of laws' scenario, economic development,[170] and procedural effectiveness.[171] A further advantage not stated by Tetley is that a convention, provided it finds enough state support, has the potential to achieve customary international law status.[172] At the very least a global convention could entrench certain key principles as customary international law, including strict state, operator and owner liability. This would develop the customary international law, enhancing the definition of the 'polluter-pays' principle and thereby strengthen existing marine pollution instruments.

4.7. CONCLUSION:

A global convention regulating oil platforms must contain a number of key features in order to be effective. The instrument must have a wide scope, wide enough to cover harm suffered as a result of oil pollution. The instrument must impose strict liability on the owners and operators of offshore platforms, and ideally upon states (although this is likely to meet with strong resistance from the international community). Such liability ought not to be unlimited (save in limited

[169] Tetley (note 165 above) 797.
[170] Tetley, ibid, writes that 'uniform international law is a boon to international commerce and thereby contributes substantially to creating conditions that foster both national and international economic growth.' In support of his contention, he cites the success of harmonisation of the insurance industry in the European Union.
[171] Ibid, 797-800.
[172] Carroll (note 10 above) 684.

circumstances)[173] as liability limitations are required to make the risk insurable. In conjunction with this liability framework, insurance or some other form of financial guarantee must be compulsory for both operators and owners. This will ensure that claimants are able to obtain redress in the event that the liable party is financially incapable of paying, or unwilling to pay, compensation. The exact form of the financial security should be left to the discretion of the coastal state, as they are the mostly likely to suffer any harm caused by oil pollution from the offshore platform. An effective liability regime cannot exist without an effective dispute resolution mechanism, and the current favoured approach - arbitration - will likely be sufficient. Where the claim lies between two states, a permanent arbitral tribunal would be ideal but again, such a body is unlikely given past practices of the international community.

Not all the aspects of a global convention catering to offshore platforms have been canvassed in this proposal. Such an instrument will obviously contain provisions covering a variety of different aspects including technical specifications, safety protocols, clean-up provisions and other industry-related issues. It is hoped that recent spills such as the Montara oil spill and the high-profile *Deepwater Horizon* spill will galvanise the international community into action. Whatever approach is ultimately decided upon, inaction is no longer an option.

[173] A good model would be Article 13(4) of the Sydney Draft which prevents an operator from limiting their liability in instances where they intentionally caused the harm or acted recklessly knowing that the harm was likely to occur.

CHAPTER 5: CONCLUDING REMARKS AND THE WAY FORWARD

The purpose of this dissertation has been to determine the adequacy of international and domestic instruments regulating offshore oil platforms, specifically whether they contain clear and adequate provisions for civil liability. As liability provisions do not exist in isolation, other features such as financial security provisions and dispute resolution provisions were assessed in order to provide a holistic view of the various instruments. As was noted in the first paragraph of this dissertation, offshore installations have the potential to cause massive pollution. The *Deepwater Horizon* leaked nearly five million barrels of oil.[1] The *Deepwater Horizon* may have been the largest offshore installation disaster in recent memory, but it is certainly not the only one. The *Montara Wellhead Platform* suffered a blowout on 21 August 2009, and whilst it may not have received the same attention in the media as the *Deepwater Horizon*, the resultant oil slick covered an estimated 90 thousand square kilometres - the largest oil spill in Australian history.[2] This spill also damaged the Indonesian coast, thus making the spill an issue not solely of Australian law, but also international law.

Chapter 2 sought to determine the applicability of existing international law principles and instruments to offshore installations, and whether they are sufficient to properly address situations such as the *Montara* and *Deepwater Horizon* spills. It soon became clear that the principles customary international law, whilst being applicable to offshore installations, are both unclear and difficult to enforce. Nowhere is this clearer than with the International Law Commission's Draft Principles allocating loss for transboundary harm.[3] It is telling that despite nearly three decades of work, the International Law Commission has been unable to produce anything more than a set of recommendations that are not binding on the international

[1] C Robertson and C Krauss 'Gulf Spill is the Largest of its Kind, Scientists Say' *N.Y. Times* 2 August 2010, available at *http://www.nytimes.com/2010/08/03/us/03spill.html?_r=1&fta=y*, accessed on 3 March 2013.
[2] M White 'First Montara, then Deepwater Horizon - is Australia protected from catastrophic oil spills?' *The Conversation*, available at https://theconversation.com/first-montara-then-deepwater-horizon-is-australia-protected-from-catastrophic-oil-spills-996, accessed on 25 August 2013.
[3] 2004 draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities (ILC, 2004) available in *Report of the International Law Commission on its Fifty-Sixth Session* (UN Doc. A/CN.4/L.661, 8 July 2004) ('Draft Principles').

community.[4] Whilst the draft principles do encourage the implementation of strict liability,[5] and recognise the need for adequate financial security,[6] the dire reality is that these principles fall far short of a binding convention. Despite positive steps such as the Rio Declaration[7] and the Space Objects Convention,[8] which indicate a growing international consensus that the creator of a transboundary harm ought to compensate the victim, customary international law has not yet developed to the point where it directly addresses transboundary oil pollution. This leads to the conclusion that customary international law does not, in its present form, hold the answer for allocating liability in the event of a transboundary oil spill.

Secondly it was concluded upon an analysis of global instruments addressing marine pollution that they do not adequately address offshore installations in the context of liability. Whilst UNCLOS[9] clearly sets out the rights (and obligations) of states in relation to offshore instruments,[10] it stops short at clearly imposing liability. UNCLOS also confers significant powers on the flag state, despite the coastal state being the state most likely to suffer harm in the event of an oil spill. When considering other conventions that are more focused on oil pollution, it is apparent that these conventions have been drafted to address pollution from oil tankers or cargo vessels. Offshore installations are either excluded (such as with the CLC[11] and Fund[12] Conventions) or are dealt with in an ancillary manner (such as MARPOL,[13] which imposes

[4] A Boyle 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17 *Journal of Environmental Law* 3, 26.
[5] Draft Principles, principle 4(2).
[6] Draft principles, principle 4(3).
[7] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 14 June 1992, U.N. Doc. A/Conf. 151/26 (Vol. I).
[8] Convention on International Liability for Damage Caused by Space Objects, 29 November 1971, 961 U.N.T.S. 187, 1 September 1972.
[9] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3 ('UNCLOS').
[10] Articles 60 and 80 of UNCLOS address the question of jurisdiction and rights over installations operating within the EEZ and the Continental Shelf. See 2.2.1 of this dissertation for a detailed discussion of these (and other) UNCLOS provisions.
[11] International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, 9 ILM 45 ('CLC Convention').
[12] Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 18 December 1971, 11 ILM 284 ('Fund Convention').
[13] International Convention for the Prevention of Pollution from Ships, 1973, adopted 2 November 1973, 1340 UNTS 184, (entered into force 2 October 1983), amended by Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973, adopted 17 February 1978, 1340 UNTS 61 (entered into force 2 October 1983) ('MARPOL').

liability for pollution from 'fixed or floating platforms',[14] but not for pollution arising out of drilling activities).[15] This state of affairs is clearly alarming, with some authors cautioning that states are reluctant to introduce greater international regulation to the offshore petroleum industry as they are reluctant to hamper the development of that industry.[16]

As the global regulatory framework is currently underdeveloped, the International Maritime Organisation has encouraged the development of regional agreements to address marine pollution.[17] Some of these regional instruments have proven to be very successful, chief amongst them the Offshore Pollution Liability Agreement ('OPOL').[18] The success of this agreement is particularly encouraging as it is a voluntary agreement managed by the offshore operators themselves (as opposed to the states), with the operators satisfying any pollution related claims.[19] Whilst OPOL is not without its flaws - claims are limited to $250 million - it imposes strict liability,[20] requires the furnishing financial security,[21] and has thus far proven to be successful.[22] It is submitted that the OPOL model, which is itself modelled after the CLC Conventions, is a model that ought to be adopted in other regions. Whilst this would not solve the present issue of an erratic international law regime applicable to offshore installations, it can only be beneficial to introduce liability provisions to existing regional conventions.

Whilst there are numerous regional instruments addressing marine pollution, most suffer from shared flaws. OSPAR,[23] and the Barcelona Convention,[24] explicitly endorse the polluter-

[14] M Kashubsky 'Marine Pollution from the Offshore Oil and Gas Industry: Review of Major Conventions and Russian Law (Part 1)' (2006) 151 *Maritime Studies* 1, 4.
[15] MARPOL, art. 2(3)(b)(ii).
[16] W Hancock and R Stone 'Liability for Transactional Pollution Caused by Offshore Oil Rig Blowouts' (1981) 5 *Hastings Int'l & Comp. L. Rev.* 377, 391.
[17] International Maritime Organisation, Resolution A.448(XI), 15 November 1979.
[18] Offshore Pollution Liability Agreement, (1974) 13 I.L.M. 1409 and (1975) 14 I.L.M. 147, available at *http://www.opol.org.uk/downloads/opol-agreement-jul12.PDF*, accessed on 1 June 2013 ('OPOL').
[19] OPOL, clause II(c)(1).
[20] OPOL, clause IV.
[21] Rules of The Offshore Pollution Liability Association Limited (as at 1 January 2012), available at http://www.opol.org.uk/downloads/OPOL-Rules-Jan2012.pdf, accessed on 1 June 2013 ('OPOL Rules') Part II, 2.2.
[22] R Shaw 'Trans-boundary Oil Pollution Damage Arising From Exploration and Exploitation of Offshore Oil. Do We Need An International Compensation Convention?' (2011), available at *http://www.comitemaritime.org/Uploads/Newsletters/CMI%20News%202011-3.pdf*, page 18.
[23] Convention for the Protection of the Marine Environment of the North-East Atlantic 1992, 22 September 1992, 2354 UNTS 67, 25 March 1998. ('OSPAR').
[24] Convention for the Protection of the Mediterranean Sea against Pollution 1976, 16 February 1976, 1002 UNTS 27, 12 February 1978 ('Barcelona Convention').

pays principle.[25] Whilst these conventions state that the loss resulting from pollution should be borne by the responsible party, both fail to adequately define the scope of loss covered or specify the exact limits of liability applicable. This problem is mirrored in similar regional instruments such as the Kuwait Convention,[26] and the Helsinki Convention,[27] which (as concerns liability) only contain a *pactum de contrahendo* - an agreement to agree on liability provisions at a later date.[28] Thus the overwhelming majority of regional conventions addressing oil pollution either fail to directly address oil spills from offshore platforms, contain vague liability provisions or simply fail to contain any liability provisions at all. It is submitted that the present regional framework is simply not adequate to address the threat of large-scale oil spills from offshore platforms.

After addressing the state of the present international law applicable to offshore installations, the dissertation next addressed the domestic law of select states - specifically the United States of America ('USA') and South Africa. The USA is currently adjudicating a number of civil claims between civilians affected by the *Deepwater Horizon* spill, British Petroleum ('BP') - the operator of the installation- and Transocean, the owner of the installation. The primary federal statute regulating oil pollution in the USA is the OPA 90.[29] The USA is not party to the CLC and Fund Conventions, and created its own similar regime in the wake of the *Exxon Valdez* spill. Whilst a few smaller claims have been brought in terms of the OPA 90, the *Deepwater Horizon* will be the first true test of many of its provisions, hopefully resolving questions relating to claims for pure economic loss and punitive damages. The OPA 90, in a manner not dissimilar to OPOL, imposes strict liability upon operators. Where the plaintiff can demonstrate that the operator acted with gross negligence, there is no limit on the compensation payable by the operator of the installation.[30] There are limited instances when an operator may limit its liability to $75 million plus removal costs,[31] or escape liability all together,[32] and these limitations closely

[25] OSPAR, art. 2(2)(b). Barcelona Convention, art. 4(3)(b).
[26] Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 24 April 1978, 17 *I.L.M.* 511, 1 July 1979 ('Kuwait Convention').
[27] 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 9 April 1992, 13 *I.L.M.* 546, 17 January 2000 ('Helsinki Convention').
[28] Ibid, art. 13(a).
[29] Oil Pollution Act of 1990, 33 U.S.C. §2701 ('OPA 90').
[30] OPA 90, §2704(c)(1)(A).
[31] OPA 90, §2704(a)(3).
[32] OPA 90, §2703(a).

resemble those proposed in chapter 4. OPA 90 also permits plaintiffs to claim from a compensation fund,[33] similar to the methodology under the CLC and Fund Conventions. Therefore, one can conclude that whilst the USA is not party to the CLC and Fund Conventions, it has created a comparable system. A key difference is that where the CLC and Fund Conventions exclude claims against offshore operators, such claims are permitted by OPA 90. Whilst the liability framework created by the OPA 90 is not entirely free from criticism – the liability limitation of $250 million (excluding clean-up costs) has been criticised as being too low – the Act ultimately creates a comprehensive liability regime that directly caters for spills from offshore installations.

South Africa differs from the USA as the former has acceded to the CLC and Fund Conventions, as well as their accompanying 1992 Protocols, although South Africa is still in the process of incorporating the conventions into its domestic law.[34] The primary legislation addressing marine pollution is the MPCCLA,[35] which imposes a now-familiar system of strict liability coupled with a limit on the compensation payable by the owner of the installation. Unfortunately, the MPCCLA is quite dated and does not adequately address pollution emanating from an offshore installation. Whilst claims against the owners of an offshore installation are possible in terms of the MPCCLA, such claims are only possible if the installation is located within the internal or territorial waters of South Africa.[36] Furthermore, the MPCCLA only permits claims against the owner of the installation,[37] thus excluding claims against operators (unless they are also the owner of the installation). Claims (in the absence of fault) are limited to approximately R200 million[38] - a paltry figure when one considers the potential costs of a large-scale oil spill. The MPCCLA does not require the owner (or operator) of an offshore installation to furnish security, only requiring security from the owners of vessels carrying oil in bulk as cargo.[39]

[33] U.S.C. 26, §9509(c)(1)(A).
[34] The two draft bills incorporating the conventions and their protocols are attached as annexures to this dissertation.
[35] Marine Pollution (Control and Civil Liability) Act 6 of 1981 ('MPCCLA').
[36] MPCCLA, s9(1) read with s1.
[37] MPCCLA, s9(1) read with s1.
[38] MPCCLA, s5(b)(ii).
[39] MPCCLA, s13(1)

The South African legislative regime is further complicated by the Maritime Zones Act[40], which states that laws applicable in the Republic are applicable to offshore installations operating within the EEZ or on the continental shelf.[41] This could conceivably permit the provisions of NEMA[42] to be used to impose liability on the operators of installations in the EEZ and continental shelf, and owners operating on the continental shelf. NEMA does not contain any liability limits,[43] nor does it contain any statutory exemptions to liability - thus it imposes absolute liability.[44] In addition to NEMA, the Maritime Zones Act permits the application of the common law to installations, although it seems unlikely that a plaintiff would elect to utilise the common law when he could proceed in terms of NEMA and avoid the burden of proving fault.

The unfortunate conclusion is that South Africa is not adequately protected in the event of an oil spill from an offshore installation. To determine the extent of liability, the claimant it forced to decipher a needlessly convoluted legislative regime. The primary statute addressing offshore oil pollution, the MPCCLA, is based on a dated convention and Parliament failed to appreciate the unique issues related to offshore installations when drafting the Act. Offshore installations have merely been grouped together with oil tankers, regulated by a statute clearly designed to regulate the latter. The results are a low liability limitation, a muddled jurisdiction for civil claims and non-existent financial security measures. The MPCCLA must be amended to sufficiently address pollution from offshore installations.

Due to a vague global liability regime (and a varied regional regime), Chapter 4 proposed a global convention addressing oil spills from offshore platforms. Whilst there is presently no global convention specifically concerning offshore platforms, there have been attempts at such a convention. The two most significant attempts are CLEE[45] and the Sydney Draft,[46] but neither is enforceable. Both attempts contain features found in other instruments addressing pollution,

[40] Act 15 of 1994.
[41] Maritime Zones Act, s9(1).
[42] The National Environmental Management Act 107 of 1998 ('NEMA').
[43] *Bareki NO and Another v Gencor Ltd and Others* 2006 (1) SA 432 (T), 440H.
[44] Ibid, 440I-441B.
[45] Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 1 May 1977, 16 ILM 1451 ('CLEE').
[46] Convention on Offshore Units, Artificial Islands and Related Structures Used in the Exploration for and Exploitation of Petroleum and Seabed Mineral Resources, 200 (OUC 200) May 2001 Draft, available at *http://www.comitemaritime.org/Uploads/Newsletters/2004/Binder1.pdf*, page 3.

specifically the CLC and Fund Conventions, and OPOL. These include strict liability, a limit on compensation payable per claim, limited exceptions from liability, the settlement of disputes by means of private arbitration, and robust financial security measures. The proposed convention creates a liability framework resembling that created to apportion liability for failed satellite launches,[47] and nuclear pollution.[48] There are numerous challenges facing the creation of a global convention, evidenced by the fact that numerous attempts to create such a regime have failed. However, it is submitted that such a system is the best chance of replicating the success of the oil tanker liability regime.[49]

In conclusion, the laws imposing liability for oil spills from offshore platforms are sporadic and inconsistent. One may expect some measure of deviation between the laws of different states, but it is unclear why uniformity should be absent from international law. Whilst there has been some recognition at both international and domestic law levels of strict liability, it is by no means an established norm. Furthermore, where the pollution is transboundary in nature, there is simply no definitive law applicable. One is therefore often forced to proceed by way of analogy and reliance on international customary law principles. Whilst there has been some success with instruments such as OPOL, such successes appear to be the exception and not the norm. It is submitted that this incomplete approach to regulation exists due to two factors: 1) the infrequency of large-scale spills from offshore installations, and 2) the desire of states to avoid interfering with the offshore petroleum industry.[50]

The offshore oil industry is simply massive, and there is an ever-continuing threat of a major spill from an offshore platform. As noted in the introduction of this work, such a spill threatens not only the environment but also the economy, having a noted impact on the tourism, fishing and real estate industries. The current approach of relying on regional conventions has not been successful, as most of these conventions do not contain liability provisions. A global convention presents the opportunity to unify not only liability provisions affecting offshore installations, but

[47] Convention on International Liability for Damage Caused by Space Objects, 29 November 1971, 961 U.N.T.S. 187, 1 September 1972.
[48] G Doeker and T Gehring 'Private or International Liability for Transnational Environmental Damage - The Precedent of Convention Liability Regimes' (1990) 2 *Journal of Environmental Law* 1, 8.
[49] Shaw (note 22 above) 18.
[50] W Hancock and R Stone (note 16 above) 391.

also safety and operational regulations. This in turn would allow the domestic laws of states to be harmonised with the international regime, simplifying the regulatory burden facing the offshore industry. Ultimately, there may be some debate as to the best method to address the threat posed by offshore installation spills, but it should be abundantly clear to all parties that inaction is not sustainable and could result in disaster.

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APPENDIX 1: MERCHANT SHIPPING (CIVIL LIABILITY CONVENTION) BILL AND MEMORANDUM

BILL

To enact the International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 into law; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

ARRANGEMENT OF SECTIONS

Sections

1. Definitions

PART 1

INTRODUCTORY PROVISIONS

2. Enactment of 1992 Protocol into law
3. Act binds State
4. Application of Act
5. Publication of list of states to which 1992 Liability Convention applies

PART 2

COMPENSATION

6. Construction of certain provision and references in 1992 Liability Convention
7. Claims for compensation
8. Applications to determine limit of liability

PART 3

INSURANCE CERTIFICATES

9. Interpretation
10. Application
11. Insurance certificates to be carried on certain ships
12. Issue of insurance certificates
13. Extension, cancellation and lapsing of insurance certificates
14. Ships owned by Government of Republic

No. of copies printed 1 800

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PART 4

MISCELLANEOUS

15. Regulations
16. Jurisdiction
17. Amendment of law
18. Transitional provisions
19. Short title and commencement

SCHEDULE

Definitions

1. In this Act, unless the context indicates otherwise, any meaning ascribed to a word or expression in the 1992 Liability Convention bears the meaning so ascribed, and—

"Authority" means the South African Maritime Safety Authority established by section 2(1) of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998);

"Contracting State" means a country or territory specified in a notice published in terms of section 5;

"Minister" means the Minister of Transport;

"organ of state" has the meaning ascribed to it in section 239 of the Constitution of the Republic of South Africa, 1996;

"prescribed" means prescribed by regulation in terms of section 15;

"the 1969 Liability Convention" means the International Convention on Civil Liability for Oil Pollution Damage, signed in Brussels on 29 November 1969 and published for general information under General Notice No. 58 of 1978 in *Gazette* No. 5867 of 27 January 1978;

"the 1992 Liability Convention" means Articles I to XII ter, including the model certificate, of the 1969 Liability Convention as amended by the 1992 Protocol and referred to in paragraph 2 of Article 11 of the 1992 Protocol;

"the 1992 Protocol" means the International Maritime Organisation Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969—

(a) approved on 23 October 1997 by the National Assembly and on 15 March 1999 by the National Council of Provinces as is required by section 231(2) of the Constitution of the Republic of South Africa, 1996; and

(b) published for general information under Notice No. 1535 of 2009 in *Gazette* No. 32723 of 20 November 2009;

"the Republic" includes the Prince Edward Islands referred to in section 4; and

"this Act" includes the regulations made under section 15.

PART 1

INTRODUCTORY PROVISIONS

Enactment of 1992 Protocol into law

2. (1) Subject to this Act, the 1992 Protocol has the force of law in the Republic.

(2) The Minister may by notice in the *Gazette* publish for general information any changes made to the 1992 Liability Convention under Article 14 or 15 of the 1992 Protocol if those changes are binding on the Republic in terms of section 231 of the Constitution of the Republic of South Africa, 1996.

(3) For the purposes of this Act, the English text of the 1992 Protocol prevails for the purposes of interpretation.

Act binds State

3. This Act binds the State and every organ of state.

Application of Act

4. This Act also applies to the Prince Edward Islands referred to in section 1 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948).

Publication of list of states to which 1992 Liability Convention applies

5. The Minister must, by notice in the *Gazette*, publish a list of states, other than the Republic, to which the 1992 Liability Convention applies.

PART 2

COMPENSATION

Construction of certain provision and references in 1992 Liability Convention

6. (1) Paragraph 1 of Article VII of the 1992 Liability Convention, in so far as it relates to the Republic, must be construed as requiring the owner of a ship registered in the Republic to maintain the insurance or other financial security referred to in that paragraph.

(2) For the purposes of paragraph *(a)*(i) of Article II of the 1992 Liability Convention, and in so far as it relates to the Republic, the reference to the territorial sea must be construed as a reference to the territorial waters of the Republic referred to in section 4 of the Maritime Zones Act, 1994 (Act No. 15 of 1994).

(3) For the purposes of paragraph *(a)*(ii) of Article II of the 1992 Liability Convention, and in so far as it relates to the Republic, the reference to exclusive economic zone must be construed as a reference to the exclusive economic zone of the Republic within the meaning of section 7 of the Maritime Zones Act, 1994 (Act No. 15 of 1994).

Claims for compensation

7. (1) The High Court exercising its admiralty jurisdiction has jurisdiction, including jurisdiction for all incidental purposes, to hear and determine claims for compensation under the 1992 Liability Convention in respect of incidents—

(a) that have caused pollution damage in a place to which the 1992 Liability Convention applies; or

(b) in relation to which preventative measures have been taken to prevent or minimise pollution damage in a place to which the 1992 Liability Convention applies.

(2) For the purposes of this Act, the area of jurisdiction of a court shall be deemed to include that portion of the exclusive economic zone and the territorial waters of the Republic adjacent to the coastline of its area of jurisdiction.

Applications to determine limit of liability

8. (1) If a claim for compensation under the 1992 Liability Convention is made in the High Court against, or is apprehended by, the owner of a ship, or the insurer or other person providing financial security for the liability of the owner of the ship for pollution damage, the owner, insurer or other person, as the case may be, may apply—

(a) in the case where a claim for compensation under the 1992 Liability Convention has been made in the High Court, to the division of the High Court in which the claim for compensation has been made; or

(b) in any other case, to any division of the High Court having jurisdiction contemplated in section 7,

to determine whether he or she may limit his or her liability under the 1992 Liability Convention and, if so, the limit of that liability.

(2) If the High Court determines that a person's liability may be limited under the provisions of the 1992 Liability Convention, the High Court may make any order it thinks fit in respect of the apportionment and distribution, in accordance with those provisions, of a fund for the payment of claims under those provisions.

PART 3

INSURANCE CERTIFICATES

Interpretation

9. In this Part—

(a) **"Government ship"** means a ship, including a warship, owned by a state, and includes a ship owned by the Government of the Republic;

(b) a reference to a contract of insurance, or to other financial security, in respect of a ship, must be construed as a reference to a contract of insurance, or to other financial security, covering the liability of the owner of the ship under the 1992 Liability Convention for pollution damage caused in a place to which the 1992 Liability Convention applies; and

(c) a reference to the limits of the liability prescribed by paragraph 1 of Article V of the 1992 Liability Convention, in relation to a ship, must be construed as a reference to the amount to which the owner of the ship is entitled, under that paragraph, in its application to the ship as part of the law of the Republic, to limit his or her liability under the 1992 Liability Convention in respect of any one incident.

Application

10. (1) Subject to subsection (2), this Part applies to every ship that is carrying more than 2 000 tonnes of oil in bulk as cargo and, where such ship is unregistered, this Part applies to that ship as if it were registered in the state whose flag the ship is flying.

(2) This Part does not apply to a Government ship, or other ship operated by a state, including a ship operated by the Government of the Republic, that is being used for non-commercial purposes.

Insurance certificates to be carried on certain ships

11. (1) If a ship enters or leaves, or attempts to enter or to leave, a port in the Republic, or arrives at or leaves, or attempts to arrive at or to leave, a terminal in the territorial waters of the Republic, without having on board the ship the relevant insurance certificate that is in force in respect of that ship, the master and the owner of the ship are both guilty of an offence and liable on conviction to a fine not exceeding R250 000.

(2) If a ship that is registered in the Republic enters or leaves, or attempts to enter or to leave, a port in a state other than the Republic, or arrives at or leaves, or attempts to arrive at or to leave, a terminal in the territorial sea of such a state, without having on board the ship the relevant insurance certificate that is in force in respect of that ship, the master and the owner of the ship are both guilty of an offence and liable on conviction to a fine not exceeding R250 000.

(3) If, otherwise than in circumstances to which subsection (1) applies or, in the case of a ship registered in the Republic, to which subsection (2) applies, at any time a relevant insurance certificate is in force in respect of a ship to which this Part applies and that insurance certificate is not on board that ship, the master and the owner of the ship are both guilty of an offence and liable on conviction to a fine not exceeding R20 000.

(4) An officer may require the master or other person in charge of a ship to produce the relevant insurance certificate that is in force in respect of that ship and, if the master or other person refuses or fails to produce that insurance certificate to the officer, he or she is guilty of an offence and liable on conviction to a fine not exceeding R20 000.

(5) If the Authority has reasonable grounds to believe that the master or other person in charge of a ship is attempting to take the ship out of a port in the Republic at a time when the ship does not have on board the relevant insurance certificate that is in force in respect of that ship, the Authority may detain the ship until such insurance certificate is obtained or produced to the Authority, as the case may be.

(6) If a ship detained at a port in terms of subsection (5) leaves the port before it has been released from detention, the master and the owner of that ship are both guilty of an offence and liable on conviction to a fine not exceeding R500 000 or to imprisonment for a period not exceeding five years, or to both such fine and to such imprisonment.

(7) For the purposes of this section, a relevant insurance certificate in respect of a ship is—

(a) if the ship is registered in the Republic and is not a Government ship, a certificate issued in terms of section 12;

(b) if the ship is registered in a Contracting State and is not a Government ship, a certificate issued in respect of that ship under a law of the Contracting State in question giving effect to Article VII of the 1992 Liability Convention;

(c) if the ship is registered in a state that is not a Contracting State and the ship is not a Government ship, a certificate issued in terms of section 12 or a certificate that must be regarded as a relevant insurance certificate for the ship for the purposes of this paragraph in terms of the regulations;

(d) if the ship is owned by the Government of the Republic, a certificate issued in terms of section 14;

(e) if the ship is owned by the government of a Contracting State, a certificate issued in respect of that ship under a law of the Contracting State in question giving effect to Article VII of the 1992 Liability Convention or a certificate of the kind referred to in section 14(1) issued by the government of that Contracting State; or

(f) if the ship is owned by the government of a state that is not a Contracting State, a certificate of the kind referred to in section 14(1) issued by the government of the state in question or a certificate that must be regarded as a relevant insurance certificate for the ship for the purposes of this paragraph prescribed in terms of the regulations.

(8) In this section, "officer" means a person who—

(a) is an officer of customs within the meaning of the Customs and Excise Act, 1964 (Act No. 91 of 1964);

(b) is a surveyor for the purposes of the Merchant Shipping Act, 1951 (Act No. 57 of 1951); or

(c) is appointed by the Authority, in writing, to be an officer for the purposes of this section.

Issue of insurance certificates

12. (1) The owner, master or agent of a ship that is registered in the Republic or that is registered in a state that is not a Contracting State, may apply to the Authority for the issue of an insurance certificate for the ship.

(2) The application in terms of subsection (1) must be made in the prescribed manner and form together with the supporting documentation and information determined by the Authority.

(3) The Authority must—

(a) if it is satisfied that the owner of the ship is maintaining insurance or other financial security for the ship in an amount that will cover the limits of liability prescribed by paragraph 1 of Article V of the 1992 Liability Convention in relation to the ship, issue to the applicant an insurance certificate for the ship; or

(b) if it is not so satisfied, refuse to issue such a certificate in respect of the ship.

(4) An insurance certificate issued under this section in respect of a ship—

(a) must be in accordance with the prescribed form, being a form that contains, but is not limited to containing, the particulars set out in paragraph 2 of Article VII of the 1992 Liability Convention;

(b) comes into force on the day specified in the certificate; and

(c) remains in force, subject to this Part, until—

(i) a date 12 months after the day on which the certificate comes into force; or

(ii) the date that the Authority is satisfied is the last day in the balance of the period during which the insurance or other financial security in respect of the ship is to remain in force,

whichever is the earlier date.

Extension, cancellation and lapsing of insurance certificates

13. (1) If—

(a) a ship for which an insurance certificate has been issued under section 12 is not at a port in the Republic at the time when the certificate expires or is about to expire; and

(b) the Authority is satisfied that, after the day specified in the insurance certificate as the day until which the certificate is to remain in force, there will be in force a contract of insurance or other financial security for the ship in an amount that will cover the limits of liability prescribed by paragraph 1 of Article V of the 1992 Liability Convention in relation to the ship,

the Authority may extend the certificate for a period that expires on or before the day that the Authority is satisfied is the last day in the balance of the period during which that contract of insurance or other financial security is to remain in force, being a period that does not exceed one month from the day contemplated in paragraph *(b)*.

(2) An extension of an insurance certificate in terms of subsection (1) expires upon the ship's arrival at a port in the Republic.

(3) The Authority may cancel an insurance certificate issued under section 12 if it is satisfied that, because of any modification or variation of, or to, the contract of insurance or other financial security for the ship, the owner of the ship will not be covered for an amount that is not less than the limits of liability prescribed by paragraph 1 of Article V of the 1992 Liability Convention in relation to the ship.

(4) If, while an insurance certificate issued under section 12 for a ship registered in the Republic or in a state that is not a Contracting State is in force, the ship ceases to be registered in the Republic or in the state in question, as the case may be, the certificate so issued thereupon ceases to be in force.

(5) *(a)* If an insurance certificate issued under section 12 is cancelled in terms of subsection (3) or ceases to be in force by virtue of subsection (4), the master of the ship must without delay return the certificate to the Authority.

(b) A master who fails to comply with paragraph *(a)* commits an offence and is liable on conviction to a fine not exceeding R20 000.

Ships owned by Government of Republic

14. (1) The Minister may, with the approval of the Minister of Finance and in respect of a ship that is owned by the Government of the Republic, issue a certificate certifying that the ship is owned by the Government of the Republic and that any liability for pollution damage up to the limits of liability applicable in relation to the ship under Article V of the 1992 Liability Convention will be met by the Government of the Republic.

(2) Subject to subsection (3), a certificate issued under subsection (1) remains in force for the period stated in the certificate.

(3) If, while a certificate issued under subsection (1) is in force, the ship ceases to be owned by the Government of the Republic, the certificate so issued thereupon ceases to be in force.

(4) In any proceedings brought in a court in the Republic to enforce a claim in respect of a liability incurred under the 1992 Liability Convention, every Contracting State must be regarded as having submitted to the jurisdiction of that court and must be regarded as having waived any defence based on its status as a sovereign state, but nothing in this subsection must be regarded as allowing the levy of execution against the property of such a State.

PART 4

MISCELLANEOUS

Regulations

15. (1) The Minister may make regulations—

(a) regarding any matter which, in terms of this Act, may or must be prescribed;

(b) giving effect to Article X of the 1992 Liability Convention;

(c) fixing fees to be paid in respect of any matters arising from the application of Article X of the Convention;

(d) regarding the conversion of the amounts of money referred to in paragraph 1 of Article V of the 1992 Liability Convention into amounts of money expressed in South African currency;

(e) regarding guarantees that are acceptable for the purposes of paragraph 3 of Article V of the 1992 Liability Convention;

(f) regarding the extent to which the right of subrogation provided for in paragraph 5 of Article V of the 1992 Liability Convention may be exercised by a person other than a person referred to in that paragraph;

(g) the ascertainment of the tonnage of a ship, including the estimation of the tonnage of a ship in circumstances where it is not possible or reasonably practicable to measure its tonnage; and

(h) regarding any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.

(2) Any regulation fixing fees must be made with the approval of the Minister of Finance.

Jurisdiction

16. Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty prescribed by this Act.

Amendment of law

17. The law specified in the second column of the Schedule is hereby amended to the extent indicated in the third column thereof.

Transitional provisions

18. Anything done, whether under a law or otherwise, prior to the commencement of this Act, and which can be done under a provision of this Act, must be regarded as having been done under this Act.

Short title and commencement

19. This Act is called the Merchant Shipping (Civil Liability Convention) Act, 2013, and comes in operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

(Section 17)

Act No. and Year	Short Title	Extent of amendment
Act No. 6 of 1981	Marine Pollution (Control and Civil Liability) Act, 1981	The repeal of sections 13, 14 and 15.

MEMORANDUM ON THE OBJECTS OF THE MERCHANT SHIPPING (CIVIL LIABILITY CONVENTION) BILL, 2013

1. PURPOSE OF BILL

The Bill seeks to enact the International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 (the Civil Liability Convention) into law. The Bill forms part of a package of measures designed to give effect to the Republic's obligations under the Civil Liability Convention and the International Maritime Organization Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (the Fund Convention). Parliament has already approved the two protocols under section 231(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution). The full package includes the Bill and the—

- Merchant Shipping (International Oil Pollution Compensation Fund) Bill, which gives effect to the Fund Convention;
- Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Bill, which is a money Bill contemplated in section 77 of the Constitution; and
- Merchant Shipping (International Oil Pollution Compensation Fund) Administration Bill, which deals with the administrative matters of the money Bill.

2. CIVIL LIABILITY AND FUND CONVENTIONS

2.1 The Civil Liability and Fund Conventions were adopted under the auspices of the International Maritime Organization. They deal with questions of liability and compensation for loss or damage caused by contamination resulting from the escape or discharge of persistent oil from tankers (i.e. ships constructed or adapted for the carriage of oil in bulk as cargo).

2.2 Under the Civil Liability Convention claimants are entitled to compensation from the registered shipowner (or the provider of financial security for the shipowner's liability) for pollution damage suffered in the territory (including territorial sea) or exclusive economic zone of a Contracting State. The shipowner's liability is strict (only limited exemptions and defences are available), but this liability is subject to limitation in accordance with the provisions of the Civil Liability Convention. Where limitation applies, the shipowner's liability is determined with reference to the tonnage of the ship concerned.

2.3 Whereas the Civil Liability Convention establishes and regulates the liability of the registered shipowner, the Fund Convention establishes an international fund, called the International Oil Pollution Compensation (IOPC) Fund, the purpose of which is to pay compensation to victims of pollution damage (within the meaning of the Civil Liability Convention) where they have been unable to obtain compensation, or compensation in full, under the provisions of the Civil Liability Convention. The IOPC Fund receives its funds from cargo owners, specifically from persons who receive annually, in the ports or terminal installations of the Contracting States, more than 150,000 tonnes of contributing oil. The maximum amount of compensation payable by the IOPC Fund in respect of a single incident is currently SDR 203 000 000 (± ZAR 3,04 billion)*. This amount includes the compensation paid by the shipowner or the shipowner's insurer under the Civil Liability Convention.

* 1 SDR (Special Drawing Right) = ZAR 15.014200 (value on 6 June 2013—see http://www.imf.org/external/np/fin/data/rms_mth.aspx. Website accessed on 7 June 2013).

2.4 Because the Fund Convention is supplementary to the Civil Liability Convention, a state cannot become a party to the Fund Convention without, at the same time, also becoming a party to the Civil Liability Convention.

3. SUMMARY OF BILL'S PROVISIONS

3.1 ***Clause 1*** is a standard provision that defines certain words and expressions.

3.2 ***Clause 2*** seeks to enact the Civil Liability Convention into law.

3.3 ***Clause 3*** is a standard provision dealing with the enactment's application to the State and its organs.

3.4 ***Clause 4*** seeks to extend the application of the Act to the Prince Edward Islands, as provided for in section 4 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948). In terms of section 4 an Act of Parliament does not apply to the Prince Edward Islands unless by such Act it is expressed so to apply.

3.5 ***Clause 5*** allows the Minister of Transport to give publicity to the Contracting States to the Civil Liability Convention by appropriate notification in the *Gazette*.

3.6 ***Clause 6*** seeks to construe a certain provision of and certain other references in the Civil Liability Convention. The clause provides for the interpretation of paragraph 1 of Article VII (which requires the owner of a ship registered in a Contracting State to maintain certain financial security) in relation to ships registered in the Republic. References in the Convention to territorial sea and exclusive economic zone are to be construed in a manner that is consistent with the Maritime Zones Act, 1994 (Act No. 15 of 1994).

3.7 ***Clause 7*** deals with claims for compensation under the provisions of the Civil Liability Convention. It confirms the High Court's admiralty jurisdiction in relation to such proceedings.

3.8 ***Clause 8*** deals with limitation proceedings under the provisions of the Civil Liability Convention that are brought in the High Court.

3.9 ***Clause 9*** is the first clause of Part 3 of the Bill. Part 3 deals with "Insurance Certificates", and the clause seeks to define "Government ship" and construe certain references in the Civil Liability Convention that are relevant to that Part.

3.10 ***Clause 10*** seeks to specify to which ships Part 3 applies. Part 3 does not apply to Government ships used for non-commercial purposes.

3.11 ***Clause 11*** provides for the enforcement of insurance certificate carriage requirements and establishes penalties for non-compliance.

3.12 ***Clauses 12 and 13*** deal with matters related to the issue, validity and cancellation of certain insurance certificates, and provide for the functions of the South African Maritime Safety Authority (SAMSA) in that regard.

3.13 ***Clause 14*** deals with Government ships. For ships owned by the State, it allows the Minister of Transport, with the consent of the Minister of Finance, to issue a certificate stating that liabilities under the Civil Liability Convention will be met by the State, and provides for the period of validity and for the lapsing of certificates of this kind. The clause also embodies the Convention's rules (in paragraph 2 of Article XI) on sovereign immunity in relation to claims against Contracting States.

3.14 ***Clause 15*** seeks to allow the Minister of Transport to make regulations. Regulations fixing fees are required to be made with the consent of the Minister of Finance.

3.15 ***Clause 16*** seeks to extend the jurisdiction of Magistrates' Courts in matters of punishment.

3.16 ***Clause 17*** and *the Schedule* deal with consequential amendments to the Marine Pollution (Control and Civil Liability) Act, 1981 (Act No. 6 of 1981).

3.17 ***Clause 18*** contains transitional provisions.

3.18 ***Clause 19*** is a standard provision dealing with the short title and commencement of the envisaged Act.

4. CONSULTATION

The Bill was published on 15 April 2009 in *Government Gazette* No. 32103 for comment. The Department of Transport did not receive any comments. The Department extensively consulted with the National Treasury from July 2009 to October 2012.

5. FINANCIAL IMPLICATIONS FOR STATE

There are no financial implications for the State; the Bill guarantees financial security for liability, and compensation, for loss or damage caused by contamination resulting from the escape or discharge of persistent oil from oil tankers.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Transport are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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APPENDIX 2: MERCHANT SHIPPING (INTERNATIONAL OIL POLLUTION COMPENSATION FUND) BILL AND MEMORANDUM

BILL

To enact the International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 into law; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

ARRANGEMENT OF SECTIONS

Sections

1. Definitions

PART 1

INTRODUCTORY PROVISIONS

2. Enactment of 1992 Protocol into law
3. Act binds State
4. Application of Act
5. Publication of list of states to which 1992 Liability Convention applies

PART 2

COMPENSATION

6. Construction of certain provision and references in 1992 Liability Convention
7. Claims for compensation
8. Applications to determine limit of liability

PART 3

INSURANCE CERTIFICATES

9. Interpretation
10. Application
11. Insurance certificates to be carried on certain ships
12. Issue of insurance certificates
13. Extension, cancellation and lapsing of insurance certificates
14. Ships owned by Government of Republic

BILL

To enact the International Maritime Organization Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1971 into law; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context indicates otherwise, any meaning ascribed to a word or expression in the 1992 Fund Convention must bear the meaning so ascribed, and—

"Authority" means the South African Maritime Safety Authority established by section 2(1) of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998);

"Minister" means the Minister of Transport;

"the 1971 Fund Convention" means the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1971 done at Brussels on 18 December 1971;

"the 1992 Fund Convention" means Articles 1 to 36 *quinquies* of the 1971 Fund Convention as amended by the 1992 Protocol and referred to in paragraph 2 of Article 27 of the 1992 Protocol;

"the 1992 Protocol" means the International Maritime Organization Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Oil Pollution Damage of 18 December 1971—

(a) approved on 23 October 1997 by the National Assembly and on 15 March 1999 by the National Council of Provinces as is required by section 231(2) of the Constitution of the Republic of South Africa, 1996; and

(b) published for general information under Notice No. 1534 of 2009 in *Gazette* No. 32723 of 20 November 2009;

"the Fund" means the International Oil Pollution Compensation Fund, 1992, established by Article 2 of the 1992 Fund Convention; and

"this Act" includes any regulation made in terms of section 11.

Enactment of 1992 Protocol into law and interpretation

2. (1) Subject to this Act, the 1992 Protocol has the force of law in the Republic.

(2) For the purposes of paragraph *(a)*(i) and (ii) of Article 3 of the 1992 Fund Convention and in so far as it relates to the Republic, the reference to the territorial sea must be construed as a reference to the territorial waters of the Republic referred to in section 4 of the Maritime Zones Act, 1994 (Act No. 15 of 1994).

(3) For the purposes of paragraph *(a)*(ii) of Article 3 of the 1992 Fund Convention and in so far as it relates to the Republic, the reference to the exclusive economic zone must be construed as a reference to the exclusive economic zone of the Republic within the meaning of section 7 of the Maritime Zones Act, 1994 (Act No. 15 of 1994).

(4) For the purposes of this Act, the English text of the 1992 Protocol prevails for the purposes of interpretation.

(5) The Minister may by notice in the *Gazette* publish for general information any changes made to the 1992 Fund Convention under Article 33 of the 1992 Protocol if those changes are binding on the Republic in terms of section 231 of the Constitution of the Republic of South Africa, 1996.

Act binds State

3. This Act binds the State and every organ of state contemplated in section 239 of the Constitution of the Republic of South Africa, 1996.

Application of Act

4. This Act also applies to the Prince Edward Islands referred to in section 1 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948).

Legal capacity of Fund

5. The Fund is hereby recognised as a juristic person.

Legal representative of Fund

6. The Director of the Fund is hereby recognised as the legal representative of the Fund.

Authority may request Fund for assistance

7. For the purposes of paragraph 7 of Article 4 of the 1992 Fund Convention, a request by the Authority to the Fund for assistance contemplated in that paragraph, must be regarded as a request by the Republic.

Jurisdiction of High Court

8. The High Court of South Africa exercising its admiralty jurisdiction under the Admiralty Jurisdiction Regulation Act, 1983 (Act No. 105 of 1983), has jurisdiction, including jurisdiction for all incidental purposes, to hear and determine claims against the Fund for compensation under Article 4 of the 1992 Fund Convention.

Fund may intervene in proceedings under Merchant Shipping (Civil Liability Convention) Act, 2013

9. The Fund may intervene in proceedings for compensation under Part 2 of the Merchant Shipping (Civil Liability Convention) Act, 2013.

Evidence in proceedings involving Fund

10. In any legal proceedings involving the Fund, the mere production of a certified true copy of—

(a) any document issued by an organ of the Fund; or

(b) any entry in or extract from any document in the custody of the Fund,

must be regarded as sufficient evidence of the fact that the document was so issued or is under the custody of the Fund, unless evidence to the contrary is adduced.

Regulations

11. (1) The Minister may make regulations—

(a) giving effect to Article 8 of the 1992 Fund Convention;

(b) fixing fees to be paid in respect of any matter arising from the application of Article 8 of the 1992 Fund Convention; and

(c) regarding any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.

(2) Any regulation fixing fees must be made with the concurrence of the Minister of Finance.

Short title and commencement

12. This Act is called the Merchant Shipping (International Oil Pollution Compensation Fund) Act, 2013, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE MERCHANT SHIPPING (INTERNATIONAL OIL POLLUTION COMPENSATION FUND) BILL, 2013

1. PURPOSE OF BILL

The Bill seeks to enact the International Maritime Organization Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971 (the Fund Convention) into law. The Bill forms part of a package of measures designed to give effect to the Republic's obligations under the Fund Convention and the International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (the Civil Liability Convention). Parliament has already approved the two protocols under section 231(2) of the Constitution of the Republic of South Africa, 1996. The full package includes the Bill and the—

- Merchant Shipping (Civil Liability Convention) Bill, which gives effect to the Civil Liability Convention;
- Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Bill, which is a money Bill contemplated in section 77 of the Constitution; and
- Merchant Shipping (International Oil Pollution Compensation Fund) Administration Bill, which deals with the administrative matters of the money Bill.

2. CIVIL LIABILITY AND FUND CONVENTIONS

2.1 The Civil Liability and Fund Conventions were adopted under the auspices of the International Maritime Organization. They deal with questions of liability and compensation for loss or damage caused by contamination resulting from the escape or discharge of persistent oil from tankers (i.e. ships constructed or adapted for the carriage of oil in bulk as cargo).

2.2 Under the Civil Liability Convention claimants are entitled to compensation from the registered shipowner (or the provider of financial security for the shipowner's liability) for pollution damage suffered in the territory (including territorial sea) or exclusive economic zone of a Contracting State. The shipowner's liability is strict (only limited exemptions and defences are available), but this liability is subject to limitation in accordance with the provisions of the Civil Liability Convention. Where limitation applies, the shipowner's liability is determined with reference to the tonnage of the ship concerned.

2.3 Whereas the Civil Liability Convention establishes and regulates the liability of the registered shipowner, the Fund Convention establishes an international fund, called the International Oil Pollution Compensation (IOPC) Fund, the purpose of which is to pay compensation to victims of pollution damage (within the meaning of the Civil Liability Convention) where they have been unable to obtain compensation, or compensation in full, under the provisions of the Civil Liability Convention. The IOPC Fund receives its funds from cargo owners, specifically from persons who receive annually, in the ports or terminal installations of the Contracting States, more than 150,000 tonnes of contributing oil. The total amount of compensation payable by the IOPC Fund in respect of an incident is currently SDR 203 000 000 (± ZAR 3.04 billion)*. This amount includes the compensation paid by the shipowner or the shipowner's insurer under the Civil Liability Convention.

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* 1 SDR (Special Drawing Right) = ZAR 15.014200 (value on 6 June 2013—see *http://www.imf.org/external/np/fin/data/rms_mth.aspx*. Website accessed on 7 June 2013).

2.4 Because the Fund Convention is supplementary to the Civil Liability Convention, a state cannot become a party to the Fund Convention without, at the same time, also becoming a party to the Civil Liability Convention.

3. SUMMARY OF BILL'S PROVISIONS

3.1 ***Clause 1*** is a standard provision that defines certain words and expressions.

3.2 ***Clause 2*** seeks to enact the Fund Convention into law. It also provides for the interpretation of references in the Fund Convention to territorial sea and exclusive economic zone in a manner that is consistent with the Maritime Zones Act, 1994 (Act No. 15 of 1994).

3.3 ***Clause 3*** is a standard provision dealing with the enactment's application to the State and its organs.

3.4 ***Clause 4*** seeks to extend the application of the Act to the Prince Edward Islands, as provided for in section 4 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948). In terms of section 4 an Act of Parliament does not apply to the Prince Edward Islands unless by such Act it is expressed so to apply.

3.5 ***Clauses 5 and 6*** seek to give effect to paragraph 2 of Article 2 of the Fund Convention. This paragraph requires Contracting States to recognise the IOPC Fund as a legal person under their laws and to recognise the Director of the Fund as the Fund's legal representative.

3.6 ***Clause 7*** seeks to empower the South African Maritime Safety Authority to request assistance on behalf of the Government from the IOPC Fund for the purposes of responding to any pollution incident in respect of which the Fund may be called upon to pay compensation.

3.7 ***Clause 8*** applies to claims for compensation against the IOPC Fund. It confirms the High Court's admiralty jurisdiction in relation to such proceedings.

3.8 ***Clause 9*** gives effect to paragraph 4 of Article 7 of the Fund Convention. This paragraph allows the IOPC Fund to intervene in proceedings brought under Article IX of the Civil Liability Convention.

3.9 ***Clause 10*** deals with the way in which certain documentary evidence may be produced in legal proceedings involving the IOPC Fund.

3.10 ***Clause 11*** seeks to authorise the Minister of Transport to make certain regulations, *inter alia* to give effect to Article 8 of the Fund Convention. (Article 8 deals with the mutual recognition and enforcement of judgments in Contracting States.) Regulations fixing fees are to be made with the concurrence of the Minister of Finance.

3.11 ***Clause 12*** is a standard provision dealing with the short title and commencement of the envisaged Act.

4. CONSULTATION

The Bill was published in *Gazette* No 32094 dated 9 April 2009. Comments were received from Transnet, Shell and the South African Petroleum Industries Association (SAPIA). The Department extensively consulted with the National Treasury from July 2009 to October 2012.

5. FINANCIAL IMPLICATIONS FOR STATE

The Bill is not expected to have any financial implications for the State.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Transport are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

APPENDIX 3: SYDNEY DRAFT AND COMMENTARY

BILL

To enact the International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 into law; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

ARRANGEMENT OF SECTIONS

Sections

1. Definitions

PART 1

INTRODUCTORY PROVISIONS

2. Enactment of 1992 Protocol into law
3. Act binds State
4. Application of Act
5. Publication of list of states to which 1992 Liability Convention applies

PART 2

COMPENSATION

6. Construction of certain provision and references in 1992 Liability Convention
7. Claims for compensation
8. Applications to determine limit of liability

PART 3

INSURANCE CERTIFICATES

9. Interpretation
10. Application
11. Insurance certificates to be carried on certain ships
12. Issue of insurance certificates
13. Extension, cancellation and lapsing of insurance certificates
14. Ships owned by Government of Republic

RECOGNIZING THAT Coastal States shall not unreasonably expose neighbouring States or the common high seas area to the risk of damage to their environment as the result of action or inaction with respect to Offshore Units, Artificial Islands and Related Appurtenances.

HAVE AGREED AS FOLLOWS:

ARTICLE I
Definitions

1.1 For the purposes of this Convention:

(a) "Artificial Island" shall mean a permanent installation or structure rigidly affixed to the sea bed and used or intended for use for Economic Activities, including wellheads and associated equipment, but shall not include [pipelines] or installations formed from natural dredged materials or fill of natural origin.

(b) "Coastal State" shall mean the State Party which exercises rights under the *United Nations Convention on the Law of the Sea, 1982* ("UNCLOS") for the purpose of exploring for and exploiting the resources of the seabed and its subsoil in the area in or above which the Offshore Unit is situated.

(c) "Continental Shelf" has the meaning provided in UNCLOS.

(d) "Economic Activities" shall mean the exploration, exploitation, processing or storage of hydrocarbons and mineral resources of the seabed or its subsoil.

(e) "Exclusive Economic Zone" has the meaning provided in UNCLOS.

(f) "Licence" shall mean a licence, concession, permit or other authorization issued by a Coastal State for Economic Activities.

(g) "Licensee" shall include a holder of a licence or any person or corporation with a right to a licence.

(h) "Offshore Unit" shall mean any structure of whatever nature when not permanently fixed into the sea bed which

(i) is capable of moving or being moved while floating in or on water, whether or not attached to the sea bed 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.

(i) "Offshore Unit Worker" shall mean any person employed or engaged in contractual activities in whatever capacity in the operation of an Offshore Unit or Artificial Island.

(j) "Offshore Unit Occupant" shall include any natural person onboard an Offshore Unit or Artificial Island for any lawful purpose, including an offshore unit worker.

(k) "Owner" shall include the owner, lessee and operator of an Offshore Unit or Artificial Island.

(l) "Pollutant" shall mean the escape of any substance or the application of any energy or process which is deleterious to the marine environment.

(m) "Petroleum" shall mean a hydrocarbon of natural origin.

(n) "Related Appurtenances" shall include structures or installations associated with Artificial Islands or Offshore Units and which are used or intended for use with respect to activities ancillary to Economic Activities or in related Offshore Occupant accommodation.

(o) "Territorial Sea" has the meaning provided in UNCLOS.

ARTICLE II
Application

2.1 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.

2.2 State Parties to this Convention may extend that application of this Convention or parts thereof to their Territorial Sea or internal waters.

2.3 This Convention extends to Artificial Islands or components thereof while in transit from a place of construction to an intended place of installation, in transit between intended places of installation, and while in the process of being salvaged or removed, until such time as their elements are brought into land territory or are otherwise lawfully disposed of.

2.4 [Possible extension of application of Convention to new technologies e.g. seabed aquaculture, offshore commercial satellite launch facility.]

ARTICLE III
Ownership

3.1 Offshore Units, Artificial Islands and Related Appurtenances shall have ownership either in accordance with the law of the State Party in whose territorial waters they are located, or in accordance with this Convention.

3.2 Every Offshore Unit, Artificial Island and Related Appurtenances shall be owned by a

juristic entity or entities, being one or a combination of, a natural or legal person or by a State Party to this Convention.

3.3 Every State Party's law shall provide for and recognize ownership interests in Offshore Units, Artificial Islands or Related Appurtenances located in its Exclusive Economic Zone or seaward adjacent Continental Shelf.

3.4 Every State Party's law shall provide for and recognize rights of transfer of ownership or use of Offshore Units, Artificial Islands or Related Appurtenances.

3.5 All Offshore Units to which this Convention applies shall have a nationality.

ARTICLE IV
Registration

4.1 This Article applies to all Offshore Units except those while in actual use in State Parties' territorial sea or internal waters.

4.2 State Parties shall by their national law, provide for the registration of ownership and mortgage interests in Offshore Units and their Related Appurtenances.

4.3 State Parties shall not permit the use in their Exclusive Economic Zones or seaward adjacent continental shelves of unregistered or 'Stateless' Offshore Units.

4.4 Proprietary rights in Offshore Units [and Related Appurtenances] shall be governed by this Convention and by the law of the State Party where they are registered.

4.5 Each State Party shall take necessary measures to ensure that Offshore Units it enters in its register have owners or operators who are effectively identifiable for the purpose of ensuring their full accountability.

4.6 Recognition and enforcement of rights of ownership and security interests shall be governed by the law of the flag State Party.

4.7 An International Register recording all Offshore Units to which this Convention applies may be established in accordance with Article 12. On its establishment, the Register shall record an Offshore Unit's identity, flag and owner. The Register shall also record mortgages and hypothecs on Offshore Units. The Register shall require, and be entitled to record, sufficient information concerning the identity of owners and holders of mortgages and hypothecs to enable their identity and domicile to be known.

4.8 Upon exercising their responsibilities under paragraph 4.2, the Registries of State Parties shall transmit all Registry information on Offshore Units under their flag to the International Register.

4.9 The International Register shall be located in [Aberdeen, United Kingdom].

ARTICLE V
Mortgages, Liens and Creditors' Remedies

Mortgages

5.1 An Offshore Unit [and Related Appurtenances] may form the subject of a security interest by way of mortgage or hypothec.

5.2 State Parties shall implement and administer Registries for mortgages or hypothecs of Offshore Units [and Related Appurtenances].

Liens

5.3 The following claims upon Offshore Units [and Related Appurtenances] shall be secured by maritime liens:

(a) loss of life or personal injury to Offshore Unit Occupants or arising from operation of Offshore Units [and Related Appurtenances];

(b) claims of Offshore Unit Workers for wages and social benefits;

(c) salvage;

(d) tortious or delictual physical loss, in direct connection with the operation or navigation of the Offshore Unit.

Creditors' Remedies

5.4 Liens under paragraph 5.3 shall have priority over registered mortgages or hypothecs.

5.5 Among themselves, registered mortgages or hypothecs shall have priority according to their time of registration.

5.6 Among themselves, liens recognized by this Convention shall have priority according to their listing in paragraph 5.3.

[except that claims secured by liens under paragraphs 5.3 (a) and (b), which arose before an occurrence giving rise to a claim for salvage shall rank below the claim secured by such lien for salvage]

5.7 Where a mortgagee, lien holder, or other creditor exercises possessory, sale or other remedies against an Offshore Unit, it shall assume the obligations of the Owner of such unit, as provided in this Convention, from the time of taking possession or control of the Offshore Unit.

5.8 Paragraph 5.7 shall not be interpreted as to impose liability upon such creditor for acts or omissions of the owners, or of persons for whose acts or omissions the owner is legally responsible, which occurred before the creditor exercised the remedies referred to in the preceding paragraph.

5.9 A person asserting a remedy arising from the rights provided for in this Article may assert that

right by means of arrest of an Offshore Unit only if, at the time of arrest, the Offshore Unit is not on location for the purpose of engaging in Economic Activities.

5.10 When an Offshore Unit is on location for the purpose of engaging in Economic Activities, a person may assert a remedy arising from the rights provided for in paragraphs 5.1 or 5.3 by a method other than arrest ("Alternate Remedy").

5.11 Such Alternate Remedy may be one of

(a) a demand that the Owner post bail or security up to the lesser of the value of the claimant's reasonably arguable best case or the value of the Offshore Unit; or

(b) the registration of a *lis pendens* or caution or similar registerable charge in the Flag State Party register of the Offshore Unit.

ARTICLE VI
Civil Jurisdiction

6.1 Each State Party has a general right of regulation of Offshore Units, Artificial Islands and Related Appurtenances within its territorial waters, Exclusive Economic Zone and seaward adjacent Continental Shelf. These rights must be exercised with regard to the rights of other State Parties and the common area.

6.2 State Parties shall establish a competent and adequate administration for the purpose of carrying out their obligations under this Convention.

6.3 Each State Party shall ensure that its Courts possess the necessary jurisdiction to determine rights and claims arising from subjects covered by this Convention, including rights and claims arising from acts or omissions in the Territorial Sea, the Exclusive Economic Zone and seaward adjacent Continental Shelf.

6.4 Except as provided in paragraphs 6.5 and 6.6, Parties and legal persons engaged in the ownership or operation of Offshore Units, Artificial Islands and Appurtenances may contract or stipulate that rights and claims arising from subjects covered by this Convention, including rights and claims arising from acts or omissions in Territorial Sea, the Exclusive Economic Zone and seaward adjacent Continental Shelf may be determined by any Court established by any Party, or by an arbitral tribunal subject to the law of any Party.

6.5 A claimant may assert a right or claim in tort or delict arising from subjects covered by this Convention, including rights and claims arising from acts or omissions in territorial waters, the Exclusive Economic Zone and seaward adjacent Continental Shelf before a Court of competent jurisdiction in any of:

i) the place of the accident;

ii) the domicile of the claimant or of any person alleged to be responsible; and

iii) any place where rights under paragraph 6.4 may be asserted.

6.6 Unless an Offshore Occupant or his or her dependants are entitled to benefits under a scheme of workers' compensation under the law of the Offshore Occupant's domicile, State Parties shall permit Offshore Occupants the choice of places in which to assert claims as provided in paragraph 6.5, notwithstanding any contract or stipulation by the Offshore Occupant to the contrary.

6.7 Each State Party shall confer on its Courts the jurisdiction to consolidate or coordinate the determination of claims commenced in the Courts of different State Parties, arising from the same accident or occurrence in respect of a matter covered by this Convention.

6.8 Any judgment given by a Court of a State Party in respect of or arising from a matter covered by this Convention, which is enforceable in the State Party of origin where it is no longer subject to ordinary forms of review, shall be recognized by any State Party except where the judgment was obtained by fraud or where the defendant was not given reasonable notice of the claim or a fair opportunity to present its case. A judgment recognized under this subparagraph shall be enforceable without the merits of the case being re-opened.

6.9 State Parties shall extend obligations of rescue of shipwrecked persons to Offshore Unit Occupants and other shipwrecked persons that an Offshore Unit or Artificial Island may accommodate in safety.

6.10 State Parties shall recognize obligations of safe treatment and transit to shore of unauthorized individuals found on Offshore Units, Artificial Islands and Related Appurtenances as are accorded to stowaways on board ships.

ARTICLE VII
Penal Jurisdiction

7.1 This Article applies only to acts or omissions on or associated with Offshore Units and Related Appurtenances, of a nationality other than that of the Coastal State Party.

7.2 In this Article:

(i) "Regulatory Offense" means a contravention, under a law of a Coastal State or the domiciliary law of the Owner, of operating or safety standards applying to an Offshore Unit, Artificial Island and Appurtenances.

(ii) "Personal Offence" means a contravention

under a law of an Offshore Occupant's domicile, a law of a Coastal State or the domiciliary law of the Owner, of the bodily integrity or personal property of an Offshore Occupant.

(iii) "Public Order Offence" means a contravention under a law of an Offshore Occupant's domicile, a law of a Coastal State or the domiciliary law of the Owner, involving loss of life, bodily injury or property damage caused by persons other than Offshore Occupants.

7.3 The Coastal State has jurisdiction over Regulatory Offences.

7.4 Where their domestic law so provides for relevant offences, the Coastal State, the Owner's domiciliary State and the State of the Offshore Occupant's domicile each has jurisdiction over Personal Offences and Public Order Offences.

7.5 Where a Regulatory Offence, Personal Offence or Public Order Offence is believed to have been committed by an Offshore Occupant, the Coastal State shall afford the domiciliary State of the adversely affected Offshore Occupant the first opportunity of investigating the alleged offence and prosecuting the Offshore Occupant alleged to have committed such offence.

7.6 Where an Offshore Occupant is convicted for a Personal Offence or a Public Order Offence under the Owner's domiciliary law or the law of the Coastal State, the prosecuting State may not impose a more severe penalty than that provided by the law of the Offshore Occupant's domiciliary State.

7.7 Where an Owner, Licensee or Offshore Occupant is charged with a Regulatory Offence by the Coastal State or the Owner's domiciliary State, it shall be a defence that compliance with the law of the prosecuting State would necessarily result in a contravention of the law of the other State.

7.8 Where an Owner, Licensee or Offshore Occupant is convicted of a Regulatory Offence, Personal Offence or Public Order Offence, the person convicted shall not be prosecuted by a State other than the prosecuting State for an offence arising from the same acts or omissions upon which the first conviction was based.

ARTICLE VIII
Safety

8.1 Where an Artificial Island or Related Appurtenances is operated in physical association with an Offshore Unit, the Coastal State shall require the Owner of the Artificial Island or Related Appurtenance to establish and maintain a quality assurance management and operations system for the Artificial Island or related appurtenances compatible with ISM Code requirements applicable to the associated Offshore Unit.

8.2 Coastal State Parties shall ensure that the owners or operators of Artificial Islands and related appurtenances establish and maintain operational quality assurance systems appropriate to the type of structure and operations and compatible with generally accepted quality assurance standards.

8.3 The Offshore Unit flag state shall require that the operator of each Offshore Unit designate a single person to be in command of the Offshore Unit, with authority for navigation and safety purposes over all Offshore Unit Workers and Offshore Unit Occupants, to discontinue Economic Activities, to direct safety operations and to order Offshore Unit movement or evacuation without prior reference to the Offshore Unit Owner or Licensee or other management or governmental authority.

8.4 No disciplinary action shall be taken by the employer of a person in command against that person who exercises in good faith any authority under sub-article 8.3.

8.5 Coastal State Parties, by law or by terms of licences for the operation of Offshore Units Artificial Islands and Related Appurtenances, shall provide for standards of occupational health and safety for Offshore Unit Workers. Such standards shall be consistent with occupational health and safety practices generally accepted by the international technical community or as established by the International Labour Organization and shall include provision for:

(i) a comprehensible common language of command;
(ii) permissable hours of work and overtime;
(iii) victualling and accommodation;
(iv) protective clothing and equipment;
(v) training and supervision;
(vi) onboard medical resources;
(vii) evacuation, medical treatment and repatriation of Offshore Unit Workers to injured Offshore Unit Workers' domicile;
(viii) joint management/labour safety consultation; and
(ix) rights to Offshore Unit Workers, of confidential communication with regulatory authorities.

The standards provided by subclauses (ii), (iii), (iv), (xi) and (xii) shall extend to Offshore Unit Occupants.

8.6 Coastal State Parties shall provide for appropriate standards of operation of offshore support craft when operated in association with Offshore Units and Artificial Islands engaged in

Economic Activities. These standards shall include provision for:

(i) standby distances;
(ii) collision avoidance;
(iii) use of cranes;
(iv) pollution prevention and control;
(v) firefighting; and
(vi) search and rescue.

8.7 Coastal State Parties shall provide for appropriate standards of operation of offshore support aircraft and helicopters when operated in association with Offshore Units and Artificial Islands engaged in Economic Activities. These standards shall include provision for:

(a) pilot and aircrew training;
(b) flight planning;
(c) visibility standards;
(d) firefighting and evacuation; and
(e) search and rescue.

8.8 Coastal State Parties shall provide for appropriate standards of construction and operation of diving craft and equipment operated in association with Offshore Units and Artificial Islands engaged in Economic Activities. These standards shall include provision for:

(a) material and operations quality assurance;
(b) periodic inspection and maintenance;
(c) operator training and qualifications; and
(d) search and rescue.

8.9 Each State Party shall require that Owners of Offshore Units, Artificial Islands and Related Appurtenances establish and maintain an emergency response and search and rescue plan.

8.10 The emergency response and search and rescue plan shall contain provision for reporting, distress communications, firefighting, stability control, mustering, evacuation and use of survival craft and equipment.

8.11 Coastal State Parties shall establish and maintain search and rescue systems adequate to the extent and type of Economic Activities being carried on in their Territorial Sea, Exclusive Economic Zone or adjacent continental shelf.

8.12 Each State Party shall require that the Master or other person in charge of an Offshore Unit or Artificial Island report to a designated authority:

a) any death or serious injury of an Offshore Unit Occupant;
b) the sinking or destruction of an Offshore Unit or Artificial Island;
c) any uncontrolled loss of stability of an Offshore Unit;
d) any outbreak of fire on an Offshore Unit, Artificial Island or related appurtenance;
e) any collision or grounding involving an Offshore Unit, Artificial Island or related appurtenance ;
f) any structural failure of an Offshore Unit, Artificial Island or related appurtenance; and
g) any situation or condition, which, if left unattended, could induce an accident or incident of the type described.

8.13 Coastal State Parties shall establish and maintain accident investigation services to review reports made pursuant to sub-article 8.12, and where appropriate to investigate reported occurrences. Where a reported occurrence involves an Offshore Unit of a flag other than that of the Coastal State, or Offshore Unit Occupants other than residents of the Coastal State, the Offshore Unit flag State and the States of the Offshore Unit Occupants domicile shall be entitled to designate observers to participate in the investigation and have access to information gained from the investigation. The report of the Coastal State shall be publicized.

8.14 Coastal State Parties shall ensure, through conditions of license, provision of insurance or evidence of financial responsibility, or assumption of responsibilities by domestic non-governmental organizations or governmental entities, that Owners have administrative and financial resources appropriate to the effective implementation of standards and activities for which they are responsible under his Article.

8.15 An Offshore Unit flag state or a Coastal State may delegate administration of any operation or standard provided for in this Article to Licensees, Offshore Unit Owners or non-governmental entities. Such delegation does not relieve state parties to this Convention of their responsibilities of compliance with this Article.

8.16State Parties shall ensure that delegated authorities under this Article have sufficient technical expertise and financial resources to adequately discharge such administration.

ARTICLE IX
Salvage

9.1 This Article applies to Offshore Units, Artificial Islands and Related Appurtenances, and components thereof, while afloat or being carried by water during any period of transit or while on location other than while engaged in Economic Activities.

9.2 In this Article,

(i) 'hazard to navigation' means any obstruction above the seabed to ships exercising rights of innocent passage in territorial waters and any ships navigating or operating in the Exclusive Economic Zone or adjacent seaward Continental Shelf.

(ii) 'discharge of pollutant' means the discharge or emission of persistent oil or any substance or energy which has or is likely to have a deleterious effect upon the aquatic or shore biota of the Territorial Sea, Exclusive Economic Zone or adjacent Continental Shelf of any party, or of the common area.

9.3 Each State Party shall require that Owners or Operators of Offshore Units, Artificial Islands and Related Appurtenances have an emergency salvage plan.

9.4 The emergency salvage plan shall contain provision for response to uncontrolled discharges or emissions of pollutants from natural or artificial reservoirs with which the operation of the Offshore Unit, Artificial Island or Related Appurtenances is associated.

9.5 Each State Party shall require that the Master or other person in charge of an Offshore Unit, Artificial Island or Related Appurtenance under its jurisdiction report without delay any event involving a hazard to navigation or a discharge or probable discharge of a pollutant to:

a) any Coastal State in whose territorial waters, Exclusive Economic Zone or adjacent seaward Continental Shelf the event occurs;
b) any Party grantor of any applicable License; and
c) any Party in which the Offshore Unit is registered.

9.6 Each State Party shall establish a national system for responding promptly and effectively to such reports of hazards to navigation or discharges or probable discharges of pollutants consistently with the requirements of Article 60 of UNCLOS.

9.7 The Salvage Convention is extended to Offshore Units, Artificial Islands and Related Appurtenances while on location and not engaged in Economic Activities.

ARTICLE X
Removal

10.1 This Article applies to Offshore Units, Artificial Islands and Related Appurtenances located in navigable waters through which rights of innocent passage may be exercised, in the Exclusive Economic Zone or on the adjacent seaward Continental Shelf.

10.2 In this Article, "hazard to navigation" means any obstruction above the seabed to ships exercising rights of innocent passage in territorial waters and any ships navigating or operating in the Exclusive Economic Zone or adjacent seaward Continental Shelf.

10.3 Each State Party shall require that Owners or Operators of Offshore Units, Artificial Islands and Related Appurtenances have a plan for:

a) ensuring the continued safety of navigation and protection of the marine environment in the surrounding waters once use or operations cease; or
b) their removal or partial removal to permit safety of navigation and protection of the marine environment.

10.4 Each State Party shall establish a national system for responding to any Offshore Unit, Artificial Island or Related Appurtenances under its jurisdiction, which becomes abandoned or derelict and which may involve a hazard to navigation or a discharge or probable discharge of pollutants.

10.5 Where an Offshore Unit, Artificial Island or Related Appurtenances is abandoned or derelict and a hazard to navigation or the marine environment, each State Party shall take reasonable measures to mark, alter or remove any Offshore Unit, Artificial Island or Related Appurtenances within that Party's jurisdiction so that it ceases to be a hazard to navigation or to the marine environment.

ARTICLE XI
Pollution

Definition

11.1 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.

Application

11.2 This Article applies to Pollution Damage caused by or arising from the emission or discharge of pollutants from Offshore Units, Artificial Islands and Related Appurtenances at any time and to emissions or discharges from natural reservoirs or other geological formations only during the course of Economic Activities and which are caused by or arise from such Economic Activities.

11.3 This Article applies to pollution damage caused by or arising from the emission or discharge of pollutants from ships, except survey, standby and supply vessels, while engaged in Economic Activities.

Liability

11.4 Liability for pollution damage caused by or arising from the emission or discharge of pollutants from Offshore Units, Artificial Islands or Related Appurtenances shall attach to the Owner.

11.5 The Licensee shall be liable for pollution damage caused by or arising from the emission or discharge of pollutants from natural reservoirs or other geologic formations.

11.6 Where an Offshore Unit, Artificial Island or Related Appurtenances has more than one Owner, they shall be jointly and severally liable.

11.7 No liability for pollution damage shall attach to an Owner or Licensee if it proves that the damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character.

11.8 Rights of compensation under this Article shall be extinguished unless legal proceedings are brought within two years from the date when the pollution damage occurred. In no case shall legal proceedings be brought after six years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

11.9 If the Owner or Licensee proves that 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, the Owner or Licensee may be exonerated wholly or partly from his liability to such person.

11.10 No claim for compensation for pollution damage shall be made against the Owner or Licensee otherwise than in accordance with this Convention.

11.11 No claim for compensation for pollution damage under this Convention or otherwise may be made against the servants or agents of the Owner or Licensee.

11.12 A Licensee liable for pollution damage under this Article shall not have any right of recourse.

ARTICLE XII
Apportionment of Liability

12.1 This Article applies to any occurrence which may give rise to civil liability which is causally related to:

(a) Economic Activities;
(b) the movement of Offshore Units, Artificial Islands and Related Appurtenances by water or to or from a location where Economic Activities are intended to take place or have taken place;
(c) the presence of an Offshore Unit Worker or Offshore Unit Occupant on or in the proximity of an Offshore Unit, Artificial Island or Related Appurtenances; and
(d) a failure or neglect to comply with or perform any duty under this Convention.

12.2 Where loss is caused by the fault or neglect of two or more persons, their liability is proportionate to the degree to which they are respectively at fault or negligent, and if it is not possible to determine different degrees of fault or neglect, their liability is equal.

12.3 Persons that are at fault or neglect are jointly and severally liable to the persons suffering the loss, but, as between themselves, they are liable to make contribution to each other or to indemnify each other in the degree to which they are respectively at fault or negligent.

12.4 A person who is entitled to claim contribution or indemnity under this Article from another person that is or may be liable in respect of a loss may do so

(a) by proceedings under Article V of this Convention;
(b) by adding the other person as a party to a proceeding pending before a Court or tribunal of competent jurisdiction;
(c) by commencing a proceeding in a Court or tribunal of competent jurisdiction;
(d) if the other person has settled with the person suffering the loss, by commencing or continuing a proceeding before a Court or tribunal of competent jurisdiction.

12.5 No claim may be made under sub-article 12.4 (d) later than one year after the date of judgment in the proceeding or the date of the settlement agreement.

12.6 The Court or tribunal before which a proceeding is commenced or continued under sub-article 12.4 (d) may adjust or deny the amount awarded if it is not satisfied that the settlement was reasonable.

12.7 The rights conferred by this Article on a person that is found liable or settles a claim are subject to any existing contract, consistent with the duties and obligations under this Convention, between the person claiming and a person from whom contribution or indemnity is claimed.

ARTICLE XIII
Limitation of Liability

Application

13.1 This Article does not apply to:

a) claims subject to any international convention or national legislation respecting nuclear damage; and
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;

13.2 The Owner or Licensee of an Offshore Unit,

Artificial Island or Related Appurtenances, and persons for whose acts or omissions they are responsible, may limit their liability as set out in this Article.

13.3 The following claims are subject to limitation of liability:

i) claims in respect of loss of life or personal injury or loss of or damage to property occurring in direct connection with the operation of the Offshore Unit, Artificial Island or Related Appurtenances;
ii) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the Offshore Unit, Artificial Island or Related Appurtenances; and
iii) claims, other than under contract, in respect of the raising, removal, destruction or rendering harmless of the Offshore Unit, Artificial Island or Related Appurtenances.

13.4 A person shall not be entitled to limit its liability if it is proved that the loss resulted from personal act or omission, committed with intent to cause such loss, or recklessly and with the knowledge that such loss would probably result.

13.5 The limits of liability for claims arising on any distinct location, shall be calculated as follows:

[Units of Account per mass ton or deadweight ton]

[A. for Pollution damage]

[B. for non-Pollution damage]

13.6 Where the claim in respect of which limitation is asserted arises from the operation of two or more Offshore Units or Artificial Islands, the limit of liability is calculated on the basis of their combined mass tonnage or deadweight tonnage.

13.7 The limit of liability shall apply to the aggregate of claims which arise on any distinct occasion.

The Limitation Fund

Constitution of the fund

13.8 Any person alleged to be liable may constitute a fund with the Court or other competent authority of any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in paragraph 13.5 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.

13.9 A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.

13.10 A fund constituted by one of the persons mentioned in paragraph 13.2 or their insurer shall be deemed constituted by all persons stipulated in that paragraph.

Distribution of the fund

13.11 Subject to the provisions of paragraphs 5.3 and 5.6 of Article V and of paragraph 13.14, the fund shall be distributed among the claimants in proportion to their established claims against the fund.

13.12 If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

13.13 Such subrogation rights in respect of claims provided for in paragraph 13.12 may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

13.14 Where the person liable or any other person establishes that he may be compelled to pay, at a later date, in whole or in part any such amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to paragraphs 13.12 and 13.13 had the compensation been paid before the fund was distributed, the Court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.

Bar to other actions

13.15 Where a limitation fund has been constituted in accordance with this Article, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.

13.16 After a limitation fund has been constituted in accordance with this Article, any Offshore Unit or Related Appurtenance, belonging to a person on behalf of whom the fund has been constituted, which has been arrested within the jurisdiction of a State Party for a claim

which may be raised against the fund, or any security given, may be released or alternate remedy discharged by Order of the Court or other competent authority of such State. However, such release or discharge shall always be ordered if the limitation fund has been constituted in the State where the arrest is made.

13.17 The rules of paragraphs 13.15 and 13.16 shall apply only if the claimant may bring a claim against the limitation fund before the Court administering that fund and the fund is actually available and freely transferable in respect of that claim.

Governing law

13.18 Subject to the provisions of this Article, the rules relating to the constitution and distributions of a limitation fund, and all rules of procedure in connection therewith, shall be governed by the law of the State Party in which the fund is constituted.

ARTICLE XIV
Financial Responsibility

14.1 To cover its liability under this Convention, each Owner of an Offshore Unit shall be required to have and maintain insurance or other financial security of such type and on such terms as the flag state Party of the Offshore Unit shall specify, provided that the amount shall not be less than the greater of the limitation funds calculated in accordance with Article 13.5 in respect of the Offshore Unit.

14.2 To cover its liability under this Convention each Owner of an Artificial Island or related appurtenance shall be required to have and maintain insurance or other financial security of such type and on such terms as the grantor of the License in respect of the Artificial Island or Related Appurtenances as the grantor of the License shall specify, provided that the amount shall not be less than the greater of the limitation funds calculated in accordance with Article 13.5 in respect of the Artificial Island or Related Appurtenances.

14.3 To assist in the discharge of its obligations under this Convention, each Licensee shall be required to have and maintain insurance or other financial security of such type and on such terms as the grantor of the License shall specify, provided that the amount shall not be less than the cumulative amount of the limitation funds established by this Convention in respect of each Offshore Unit, Artificial Island or Related Appurtenances covered by the License.

14.4 An insurance or other financial security shall not satisfy the requirements of this Article if it can cease, for reasons other than the expiry of the period of validity of the insurance or security, before two months have elapsed from the date on which notice of its termination is given to the competent public authority of the Flag State Party or Party grantor of the License. The foregoing provision shall similarly apply to any modification which results in the insurance or security no longer satisfying the requirements of this Article.

14.5 Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the Owner or Licensee's liability for pollution damage. In such case the liability of the defendant shall be limited to the amount specified in accordance with paragraph 13.5 irrespective of the fact that the pollution damage occurred as a result of an act or omission by the Owner or Licensee himself, done deliberately with actual knowledge that pollution damage would result. The defendant may further avail himself of the defences, other than the bankruptcy or winding-up of the Owner or Licensee, which the Owner or Licensee himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the Owner or Licensee himself, but the defendant may not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the Owner or Licensee against him. The defendant shall in any event have the right to require the Owner or Licensee to be joined in the proceedings.

14.6 Any sums provided by insurance or by other financial security maintained in accordance with paragraph 14.1 and 14.2 shall be available in the first place for the satisfaction of claims under this Convention.

14.7 Where the Owner or Licensee is a State Party, the Owner or Licensee shall not be required to maintain insurance or other financial security to cover its liability.

ARTICLE XV
Administration and Revision

15.1 A Committee composed of a representative of each State Party is hereby established.

15.2 Within three months of the deposit of the final instrument of ratification or accession by which this Convention shall come into effect, the Committee shall meet to consider the establishment and procedures for the financing and administration of the International Register for Offshore Units authorized under Article IV.

15.3 The Committee may, by consensus or by vote of at least two thirds of State Party representatives present, recommend a procedure or procedures for the financing and administration of such International Register, and to make

recommendations with respect to such other matters related to this Convention as the Parties may requisition in accordance with this Article.

15.4 If the recommendation respecting the financing and administration of the International Register is accepted under this Article, the Committee shall meet at least annually to consider the continued administration, financing or dissolution of the International Register.

15.5 At the request of the International Maritime Organization, or of the International Labour Organization, or at the request of at least one third of the parties to this Convention received by [IMO or depository government] within any six month period, the Committee shall meet to consider the adoption of standards or guidelines with respect to Article VIII.

15.6 At the request of at least one third of the Parties to this Convention received by [IMO or Depository Government] within any six month period, the Committee shall meet to consider matters respecting the amendment of this Convention submitted for consideration by Parties.

15.7 The recommendations of the Committee shall be notified by [IMO or Depository Government] to all State Parties. A State Party, which, within six months of such notification, has not notified [IMO or Depository Government] that it is unable to accept such recommendation, shall be deemed to have accepted it.

15.8 A recommendation of the Committee shall become binding on State Parties if the recommendation has been achieved by consensus or is adopted unanimously, or has been accepted by at least two thirds of the State Parties.

ARTICLE XVI ET SEQ

[provisions on signature, ratification, acceptance, approval, accession, coming into effect denunciation and depository authority]

COMMENTARY ON MAY 2001 DRAFT OUC CONVENTION

Preamble

The preamble is intended to set out basic principles from which the convention is developed.

Definitions

"artificial island" installations formed from natural dredged materials or fill of natural origin are excluded from operation of the convention as:

- these are more likely to be found in the internal or territorial waters of states; and
- while UNCLOS does not permit creation of artificial islands for the purpose of manipulating maritime boundaries, the creation of an artificial island from natural materials is more likely to attract the application of domestic law relating to real property or immovables

Pipelines are excluded from operation of the OUC convention, as it is considered that existing provisions of UNCLOS sufficiently covers pipeline operation. Wellheads are covered, as they, rather than pipelines, are a critical link for operational risk management and the liability regime.

"Economic activities" – these are restricted to activities associated with hydrocarbons and mineral resources in view of the express preferences of national maritime law associations.

"coastal state" "continental shelf" "exclusive economic zone" "territorial sea" – the UNCLOS definitions are adopted to ensure consistency of application.

"License" "licensee" – this definition is cast broadly to reflect the wide range of rights of exploitation granted by coastal states, and to ensure the OUC convention is applied to the substance of offshore economic activities regardless of the form that concessions of use may take.

"Offshore Unit" – this definition is intended to be functional so as to include emerging future technologies as they are developed

"offshore unit worker" "offshore unit occupant" these persons are defined distinctively as the OUC convention applies in distinct ways to their distinctive status

"Owner" – this broad definition is intended to ensure that the obligations and benefits of the OUC convention applies to those in effective functional control, regardless of the form of use or operation.

"Pollutant" – this definition is intended to cover the broad range of substances chemicals and processes which may be undertaken on offshore units and artificial islands.

Application

2.1 With the exception of artificial islands or components in transit, the OUC is intended to

have the same geographic scope of application as UNCLOS.

2.2 A voluntary right extension of application of the OUC to territorial sea or internal waters is intended to facilitate general adoption of the OUC.

2.3 It is considered that the existing international legal regime covering ships would apply to offshore units while in transit. However, is much less likely that an artificial island or a component (such as the caisson foundation of a gravity based structure) would be regarded as a ship. Therefore the OUC is intended to apply to artificial islands throughout the time of their functional existence, to ensure the objectives of safe operation and removal are met.

2.4 Provision should be made for the extension of the OUC to new forms of economic activities such as seabed aquaculture, tourist accommodations another future technologies

Ownership

3.1 This clause is intended to facilitate application of the OUC to territorial waters by those states parties which require maritime activities in territorial waters to be undertaken by domestic flag vessels only. Outside of territorial and internal waters, the OUC does not require offshore units or artificial islands to fly the flag of coastal state, as long as they have some nationality.

3.2, 3.3 In view of the significant legal incidents of offshore unit and artificial island operation, it is critically necessary to avoided the operation of "stateless" offshore units. As a corollary, states parties are required to recognize ownership interests and rights to transfer and use of offshore units artificial islands

Registration

4.1- 4.3 are a corollary to article 3 and intended to carry it into effect.

4.5 This paragraph is derived from the 1986 United Nations registration of ships convention and is intended to ensure obligations under the OUC may be enforced effectively

4.6 This provision is analogous to the registration and mortgaging of ships

4.7 Considerable interest was expressed by some national maritime law associations for an international register of offshore units. This is functionally an optional clause, for the establishment, financing and continuation of the international register is subject to the provision of the committee of states parties under article 15.

Mortgages, Liens and Creditors' Remedies

5.1, 5.2 are intended to facilitate the financing of offshore units and to minimize conflicts of laws issues

5.3 This draft article was the subject of considerable discussion. As persons having an operational or business relationship with offshore units are generally commercially sophisticated, and therefore may manage risk by voluntary contractual means, it was not thought appropriate to grant recognition of any maritime liens ex contractu. Exceptions are the maritime liens granted to offshore units occupants for loss of life or personal injury and for wages and social benefits, where equal bargaining power cannot be assumed. Claims arising from employment of offshore unit occupants have a given rise to significant conflict of laws issues. These are also addressed in article 6.

Creditors remedies

5.4-5.6 reflect generally regimes common to liens and mortgages of ships. There was less consensus whether a reversal of priorities in time with respect to salvage claims is necessary or desirable to encourage salvage operations of offshore units.

5.7, 5.8 As the operation of an offshore unit has a far greater risk potential than, for example, an insolvent owners' bulk carrier secured in a harbor, it is desirable to control the scope of remedies exercised by secured creditors.

5.9-5.11 These subarticles are similarly intended to reflect a balance between creditors rights and the necessity of the safe operation of active offshore units.

Civil jurisdiction

6.1 is intended to reflect general UNCLOS policies

6.2, 6.3 A consistent theme of the OUC convention is the necessity for states parties to properly administer it

6.4 Apart from offshore unit occupants and tort victims, the offshore industry should be entitled to contractual freedom in choice of law and choice of forum.

6.5-6.8 Similarly to international conventions on carriage of goods by sea and for a civil liability for a pollution, a clear set of rules for jurisdictions in which claims may be commenced is desirable. If the domiciliary state of an offshore unit occupant has a system of workers compensation, the offshore unit operator should not have to deal with forum shopping by an injured worker.

6.9-6.1 2 There have been examples of persons fleeing coastal areas beset by strife attempting to seek refuge aboard offshore units. These persons and stowaways have rights of physical protection under international humanitarian law.

Penal Jurisdiction

7.1 Where the nationality of offshore unit or related appurtenances is the same as that of the coastal state, there is little potential for conflicts of law in penal jurisdiction, a particularly as the OUC requires states parties to have an effective regulatory administration.

7.2 Penal offenses are classified into three categories as they attract different priorities and interests of the coastal state, the law of the offshore unit's flag and the domiciliary country of the offshore unit occupant.

7.5 While states parties may have differing a domestic policy interests in jurisdiction over penal offenses, this paragraph is intended to give the domiciliary state first opportunity to investigate and prosecute personal or public order offenses, while permitting the coastal state to act if the domiciliary state declines to do so.

7.7, 7.8 These paragraphs are intended to avoid double jeopardy and explicitly recognize the defense of compulsory compliance.

Safety

8.1 Because offshore units are explicitly subject to the ISM Code, there are safety concerns if an offshore unit is operated in conjunction with and artificial island or related appurtenances which themselves are not subject to SOLAS. This paragraph is not intended to compel application of the entire ISM code to a functionally associated artificial island or related appurtenance, as long as there is compatibility between the quality assurance system in use on the associated structures and the offshore unit.

8.2 This paragraph is goal oriented and intended to permit owners flexibility to adopt new technology and operational methods.

8.3, 8.4 These paragraphs reflect findings and recommendations of the *OCEAN RANGER* and *PIPER ALPHA* inquiries and are intended to ensure that the single person in command can take proper emergency measures without delays associated in obtaining clearances or fear of employment retribution.

8.5 This paragraph is intended to ensure the coastal state has a basic regulatory or monitoring regime in place for a offshore unit workers and occupants. Flexibility in the method of achieving that these goals is permitted. For example, a coastal state may adopt industry standards, recognize other flag state standards, or develop its own.

8.6, 8.7, 8.8 These paragraphs are intended to ensure that coastal states address these safety issues. Flexibility in the method of implementing these standards is permitted.

8.9-8.12 These paragraphs reflect findings and recommendations of the *OCEAN RANGER* inquiry.

8.13 These requirements are analogous to the protocols established by ICAO for investigation of aviation accidents involving aircraft or persons of one country involving an occurrence in another.

8.16 While administrative and operational flexibility is desirable, it should not be abused to evade effective administration.

Salvage

9.1-9.6 The initial clauses are intended to apply OPRC principles to offshore units and artificial islands.

9.7 The exclusion of the operation of the Salvage Convention to offshore units, arose in part from industry concerns over the dangers of intervention by salvors inexperienced in offshore unit characteristics. These considerations do not apply where the offshore unit is not engaged in economic activities.

Removal

10.1 The application of the OUC is extended to the navigable waters in the territorial sea, because the UNCLOS rights of innocent passage presuppose a safe navigating environment. If the coastal state obtains economic benefits from permitting all offshore units or artificial islands to operate in navigable waters, its obligation to ensure the safety of such waters from artificial structures should be acknowledged.

Pollution

This article is an adaptation of the CLEE convention with the optional clause deleted.

Apportionment of Liability

While historical admiralty law rules and the collision convention recognize apportionment of fault, in collisions between ships, not all countries domestic laws provide for similar apportionment of liability concerning wrongs not related to shipboard activities or involving structures which are not ships. This article is derived from part 2 of the Canadian *Marine Liability Act*, and is intended to

provide for a general apportionment regime which works consistently over all waterborne operational aspects of the offshore industry.

Limitation of liability

These articles follow the 1976 Limitation Convention

Administration and revision

This article provides a mechanism for the voluntary establishments, maintenance, and winding up of international offshore units registry, and for future amendment said to the OUC with a similar deemed acceptance regime to that of SOLAS.

NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

NEWS FROM UNCITRAL

THE THIRTEEN SESSION OF THE WORKING GROUP III (TRANSPORT LAW)

The Report of the Working Group on the work of its thirteen session, held in New York, 3-14 May 2004, is available on the UNCITRAL website.

RATIFICATION AND DENUNCIATION OF INTERNATIONAL CONVENTIONS

INSTRUMENTS OF RATIFICATION OF AND ACCESSION TO THE FOLLOWING CONVENTIONS HAVE BEEN DEPOSITED WITH THE DEPOSITARY: *

- **International Convention on Oil Pollution Preparedness, response and co-operation, 1990**
  Jordan: 14 April 2004

- **Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969**
  Kuwait: 16 April 2004

- **International Convention on Maritime Liens and Mortgages, 1993**
  Ecuador: 16 March 2004
  Nigeria: 5 March 2004
  The Convention will enter into force on 5 September 2004

- **Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976**
  France: 7 January 2004
  Malta: 13 February 2004
  The Protocol entered into force on 13 May 2004

- **International Convention on Arrest of Ships, 1999**
  Algeria: 7 May 2004

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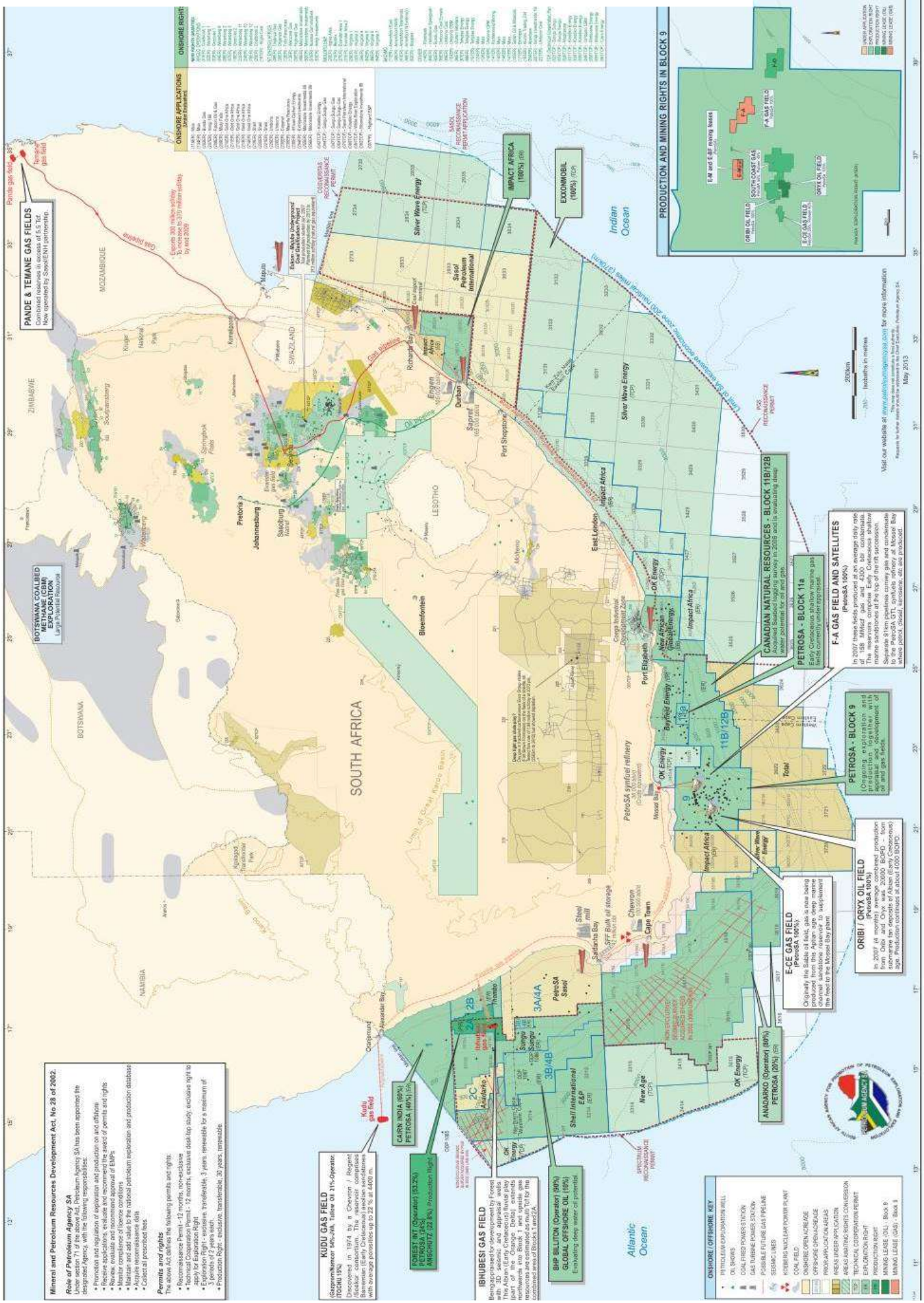
* The dates indicated are the dates of deposit of the instrument..

APPENDIX 4: PETROSA MAP OF OFFSHORE PETROLEUM ACTIVITIES



Available at *http://www.petroleumagencysa.com/images/pdfs/Hubmap10a13.pdf*, accessed 12 November 2013

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4 March 2014

Mr Karl Andre Blom 209503902
School of Law
Howard College Campus

Dear Mr Blom

Protocol reference number: HSS/0324/013M
New Project title: Civil liability for damage caused by oil pollution from off-shore platforms-a comparative study of domestic instruments

Approval - Change of project title

I wish to confirm that your application dated 3 March 2014 in connection with the above mentioned project has been approved.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach/Methods must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number. Please note: Research data should be securely stored in the discipline/department for a period of 5 years.

Best wishes for the successful completion of your research protocol.

Yours faithfully

Dr Shenuka Singh (Chair)
Humanities & Social Sciences Research Ethics Committee

/pm

cc Supervisor: Dusty-Lee Donnelly
cc Academic Leader Prof M Carnelley
cc School Administrator: Mr Pradeep Ramsewak