INTERNATIONAL REGULATION V NATIONAL REGULATION ON OFFSHORE OIL EXPLOITATION – THE USA AS AN EXAMPLE

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1. Introduction

The oil sector has historically been highly internationalised as a result of the key position of oil in industrial production. As the oil demand increases, the threat of marine oil pollution due to offshore oil exploitation is here to stay for good. Recent accidents on offshore platforms (United States, 2010; China, 2011; Brazil 2012) have raised many important questions of risk prevention and management regarding the deep and ultra-deep offshore oil production.

Environmental problems do not stop at the national borders and have an undeniable global dimension. The inevitable discussion on liability and compensation issues connected with transboundary pollution damage from offshore exploration and exploitation activities, however, did not lead to the establishment of the international regime at global level. The legal basis for its creation is provided by the provisions of the United Nations Convention on the Law of the Sea, 1982 (hereinafter 'UNCLOS'), which inter alia requires States to control pollution of the marine environment from sea-bed activities and to provide recourse for compensation for damage caused by such pollution.[1] The 1977 Convention on Civil Liability for Oil Pollution Damage from Offshore activities,[2] which contains the provisions for such a regime, has not, however, entered into force. Regional initiatives, such as the 1974 regional Convention between Denmark, Finland, Norway and Sweden on protection of environment,[3] which provides for compensation from oil spills from offshore platforms, are limited in their coverage and there are still many regions where offshore oil exploration and production are on-going without any regional regulation at all.

The main objective of this article is to address the current state of the international regulatory framework, specifically whether the international community should launch a process towards the elaboration of a global agreement or simply allowed the matter to

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[1] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, 397; 21 ILM. 1261 (1982).

[2] Convention on Civil Liability for Oil Pollution Damage from Exploration for and Exploitation of Seabed Mineral Resources, 1 May 1977, 14 ILM 1450 (1977).

[3] Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden, 19 February 1974, 13 ILM 591 (1974).

be regulated on a regional level. Finally, the paper concentrates on the US legal regime on offshore oil activities, as the United States of America, despite its significant position in the oil sector, did not ratify any of the essential international conventions in this matter (mainly because the limits of liability were too low). After the Exxon Valdez incident, the United States of America recognised the inadequacy of the nation's existing oil spills liability laws and sought to enact a more comprehensive and responsive liability regime. The result of the American legislative process, the Oil Pollution Act of 1990 (hereinafter 'OPA'),[4] is thus the main subject of the analysis.

2. Marine pollution from offshore operations

> Underwater oil drilling really took off in the 1970s, as the dual effect of a political factor - the desire of consumer countries to lessen their dependence on the Persian Gulf States by developing their own activity - and technological developments making it possible to drill ever further from coastlines and at ever greater depths.[5]

Hence, advances in exploring the deepwater relied mainly on the improvement in seismic technology, better understanding of the potential of the turbidite reservoirs and progress in rig technology. Using the example of the offshore oil exploitation in the Gulf of Mexico, the progression to deepwater exploitation was rapid, as companies quickly leapfrogged each other to go deeper and deeper for new oil. The global boom in offshore drilling, not limited only to the Gulf of Mexico, but also including the coasts of Brazil and the West Africa, has produced considerable revenues to oil companies as well as governments. '[In 2012] [...] almost a third of the oil consumed in the world comes from underwater areas.'[6] Oil demand is predicted to continue to increase due to high energy demands per capita in developed countries and dramatically rising levels of consumption in emerging economies in countries like China and India. The need to provide that energy will most likely influence the share of deepwater oil in the world energy mix. Consequently, the question of ultra-deepwater drilling naturally arises. At present, there are two obstacles to this idea. Firstly, the challenging project necessarily requires substantial capital and also the willingness of oil companies to invest. Secondly, they must identify sites with significant resources and very high potential flow rates to justify such large capital expenditure.[7]

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[4] The Oil Pollution Act of 1990 (33 U.S.C. 2701-2761) <http://epw.senate.gov/opa90.pdf> accessed 3 March 2013.

[5] Julien Rochette, 'Towards an International regulation of offshore oil exploitation' (Report of the experts workshop held at the Paris Oceanographic Institute on 30 March 2012), Working Papers N°15/12, IDDRI, Paris, France <http://www.iddri.org/Publications/Collections/Idees-pour-le-debat/WP1512_JR_workshop%20offshore.pdf> accessed 3 March 2013.

[6] ibid 5.

[7] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Draft Staff Working Paper No 1 <http://www.cs.ucdavis.edu/~rogaway/classes/188/materials/bp.pdf> accessed 3 March 2013.

The nature of offshore drilling is inherently dangerous. The aspect of risk is undeniably present in onshore or shallow water operations as well, with the type of risk actually being very similar to offshore oil activities. Nevertheless, the recent oil spills appropriately require a dramatic reassessment of the risk associated with offshore drilling as the deepwater conditions create unique challenges for critical equipment. It is well recognised within the petroleum industry that both the velocity and irregularity of underwater currents as well as extreme pressures and temperatures and prodigious flow rates puts extra stress on subsea equipment.

'The offshore oil and gas industry currently accounts for only one to two per cent of total marine pollution, which is quite low compared to other sources of marine pollution.'[8] However, the industry still remains a high-risk business with the recognition of different types of risk associated with all stages of offshore oil developments. In the first stage of offshore operations risks are mostly related to the geological surveying of the seabed (seismic exploration may affect the lives of marine mammals which are dependent upon their sound detection organs). The exploration and production stage represents the greatest pollution hazard as drilling operations always create various forms of pollution that have considerable negative effects on marine and other wildlife.[9] The negative environmental effects are not exclusively related to the construction and operation of oil offshore facilities as the process of decommissioning[10] is a highly complex and technical exercise. Moreover, decommissioning for some types of installations at least, is still in its infancy. The impact on the immediate marine environment is related to the presence of at least residual amounts of dangerous substances and the use of explosive materials. Lastly, the offshore activities are not immune from the occurrence of accidents[11] or illegal acts such as terrorist attacks, sabotage, arson or intentional discharges of oil from offshore platforms.

The difficulty to target these problems and their causes has been illustrated in the recent accidents on offshore platforms. Usually, there are three main aspects of the cause of the accidents concerning offshore oil drilling.

> First, there is generally a late understanding of the situation which makes the accident more acute. Second, evidence shows that the industry is not fully prepared to remedy the crisis situation in deep and ultra-deep waters. Last, human errors can be systematically and retroactively pointed out, such

[8] Mikhail Kashubsky,'Marine Pollution from the Offshore Oil and Gas Industry: Review of Major Conventions and Russian Law (Part 1)' (2006), November-December Maritime Studies 1, 2 <http://newcustomscentre.files.wordpress.com/2012/09/marine_pollution_part1.pdf> accessed 3 March 2013.

[9] These include drilling muds, brine wastes, deck runoff water and flowline and pipeline leaks.

[10] I.e. physical removal and disposal of obsolete installations at the end of their working life.

[11] E.g. leakages from ruptured pipelines, oil well blowouts.

as engineering errors, non-compliance with procedures or lack of attention to early warnings.[12]

Hopefully, effective regulation at international, regional and national levels could bring a solution to this problem.

3. International agreements on offshore oil exploitation

The development of international environmental law as a separate field of law has built the foundation for the protection of the marine environment. The cornerstones of modern international environmental law are the generally recognised principles 21 and 22 of the Stockholm Declaration,[13] unanimously adopted during the United Nations Conference on the Human Environment held in Stockholm in 1972. Principle 21 lays down the responsibility of all states 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction', however, it confirms 'the sovereign right to exploit their own resources pursuant to their own environmental policies' in accordance with the Charter of the United Nations and the principles of international law.[14] The following principle 22 requires states 'to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction'.[15] 'But it is particularly in the area of their own liability (as distinct from the civil liability of private persons) over which States have proven to be highly reluctant to accept binding obligations.'[16]

The international framework on offshore oil exploitation, both fragmented and incomplete in nature, is primarily based upon international treaties and other international legal instruments.

3.1 UNCLOS,1982

The 1982 UNCLOS only provides general principles in the area concerning the protection of the marine environment. UNCLOS authorises states to construct offshore installation within safety zones and exercise jurisdiction over these installations; it calls upon the states to take all measures that are necessary to prevent, reduce and control pollution of the marine environment from any source and also to limit pollution from installations used in exploration or exploitation of the natural resources of the seabed; to adopt laws and regulations regulating seabed activities; to cooperate on the global

[12] Rochette (n 5) 6.

[13] Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc.A/CONF.48/14, (1972).

[14] ibid principle 21.

[15] ibid principle 22.

[16] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Taylor & Francis 2002), 242.

level in formulating international standards for the protection of the marine environment and to establish the standard of compensation for damage caused by pollution to the marine environment. UNCLOS creates the international legal basis for the regulation of the offshore oil activities but lacks any definite or special rules that would apply to the prevention of marine pollution resulting from offshore oil drilling.

3.2 The London Convention, 1972

The London Convention[17] is one of the first global conventions to protect the marine environment from human activities having eighty-seven signatories after the issue was raised by the United Nations Conference on the Human Environment. It contributes to the international control and prevention of marine pollution by prohibiting the dumping of certain hazardous materials. In addition, a special permit is required prior to dumping certain identified materials and a general permit for other waste or matter. The Convention addresses dumping from offshore platforms and other man-made structures, but does not cover the disposal of wastes in connection with offshore processing of the mineral resources.

The 1996 Protocol,[18] which replaced the 1972 Convention, represents a major change of approach to the question of how to regulate the use of the sea as a depository for waste materials. Rather than stating which materials may not be dumped, it prohibits all dumping, except for possibly acceptable wastes on the so-called 'reverse list' contained in an annex to the Protocol. Article 3(1) of the London Protocol contains a list that adopts the 'precautionary approach', which requires that 'appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects'. [19]

3.3 MARPOL , 73/78

The International Convention for the Prevention of Pollution from Ships (hereinafter 'MARPOL')[20] is the main international convention covering the prevention of pollution of the marine environment by ships from operational or accidental causes signed under auspices of IMO. Nonetheless, MARPOL also applies to fixed or floating platforms operating in the marine environment and requires that they are equipped with the same pollution control devices required for certain vessels. 'Although MARPOL

[17] Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matters, 29 December 1972, 36 ILM 1.
[18] 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matters 1972, 7 November 1996, 36 ILM 1.
[19] ibid art 3(1).
[20] International Convention for the Prevention of Marine Pollution from Ships 1973, 2 November 1973, 1340 UNTS 184 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.

generally applies to offshore platforms in mobile configuration it does not address many other operational aspects of offshore oil and gas exploration and production which may cause harm to the marine environment.'[21]

As the 1973 MARPOL Convention had not yet entered into force, the 1978 MARPOL Protocol absorbed the parent Convention.

3.4 OPRC, 1990

The main focus of the International Convention on Oil Pollution Preparedness, Response and Co-operation of 1990 (hereinafter 'OPRC')[22] is to combat major incidents or threats of marine pollution. The Convention is designed to facilitate international cooperation and mutual assistance in matters of major oil pollution incidents and to encourage states to develop an adequate capability to deal with oil pollution emergencies. Parties to the OPCR are required to establish measures for dealing with pollution incidents on national, regional or international level. The OPRC Convention with its specific and detailed provisions is probably the most important international legal document that regulates the pollution of the marine environment resulting from offshore oil activities.[23]

3.5 Other relevant legal instruments

An attempt to regulate the liability and the standard of compensation is expressed in the Convention on Civil Liability for Oil Pollution Damage (hereinafter 'CLEE')[24] which was elaborated in 1977. The Convention is specific to States which have coastlines on the North Sea, the Baltic Sea or that part of the Atlantic Ocean to the north of 360-North latitude. Although the CLEE Convention has never entered into force it currently has six signatories and sets out the principles of a limited objective liability, compulsory insurance and the possibility to take actions against insurer.

The issue of liability and compensation for oil pollution damage resulting from offshore oil exploration and exploitation was mentioned to the International Maritime Organisation (hereinafter 'IMO') in March 2010 at the sixtieth session of the Maritime Environment Protection Committee (hereinafter 'MPEC') by the Indonesian delegation.[25] Subsequently, the Indonesian delegation submitted a proposal in this regard to the ninety-seventh session of the Legal Committee which is a traditional

[21] Kashubsky (n 8) 4.

[22] International Convention on Oil Pollution Preparedness, Response and Co-operation 1990, 30 November 1990, 30 ILM 1991.

[23] ibid 2.

[24] Convention on Civil Liability for Oil Pollution Damage resulting from Exploration and Exploitation of Seabed Mineral Resources 1977, 1 May 1977, 16 ILM 1451 (not in force).

[25] Report of the Marine Environment Protection Committee on its sixtieth Session, 12 April 2010, MEPC 60/22, 1.7 <http://www.gc.noaa.gov/documents/gcil_imo-mepc_60-22.pdf> accessed 3 March 2013.

forum for such matters.[26] This agendum had to face two main problems before the Legal Committee - procedural and substantive.

Today, the IMO Council requires that all new proposals are consistent with the IMO Strategic Plan developed for each biennium. This is clearly not the case regarding the Indonesian proposal and the change of the Strategic Plan would obviously require the consecutive Council's consent. Similarly, the substantive aspect of the proposal did not call forth uniform responses from the Committee. The arguments in favour of the proposal included: (i) it is appropriate at this time for the organisation to discuss the issue in the light of recent accidents; (ii) the Committee should not wait for another serious incident to occur before acting; (iii) the IMO is the only reliable and appropriate forum to address the issue due its characteristics, experience and expertise as a specialised agency of the United Nations; (iv) incidents involving transboundary pollution damage from offshore platforms might occur in any part of the world and not every country is able to tackle the problem on its own - accordingly, international regulation is advisable; (v) oil pollution knows no borders and accordingly it seems important to have a mechanism in place to compensate victims.[27]

Counter arguments included (i) according to UNCLOS, International Maritime Organisation's competence relating to offshore platforms is limited to their impacts on maritime navigation; (ii) Article I of the IMO Convention confines the Organisation's pollution prevention activities to vessel-source pollution; (iii) the proposal to amend the Strategic Plan does not clarify which authority would regulate and control the offshore oil exploration activities in order to ensure the necessary effectiveness to a system based on the liability of operators; (iv) the IMO cannot duplicate, for the offshore oil sector, the liability rules applicable to oil leaks caused by ships - offshore oil exploration and exploitation activities only exceptionally have an international impact while shipping normally involves many jurisdictions and may potentially affect any country; (v) the issue of transboundary pollution damage arising from offshore oil activities would be better addressed through bilateral or regional agreements.[28]

During the ninety-ninth session held in April 2012, the IMO Legal Committee expressed its desire to continue with the analysis of the liability and compensation issues regarding the transboundary pollution damage resulting from offshore oil exploration and exploitation activities in order to assist the states interested in implementing bilateral or regional agreements.[29] The Committee takes the view that there is no

[26] Legal Committee (LEG), 99th Session, 16-20 April 2012, Opening Address <http://www.imo.org/mediacentre/secretarygeneral/secretary-generalsspeechestomeetings/pages/leg-99-opening.aspx> accessed 3 March 2013.

[27] Rochette (n 5) 8.

[28] ibid.

[29] Legal Committee (n 24).

compelling justification for pursuing the development of international convention on this subject.[30]

4. Regional conventions on offshore oil exploitation

International conventions and agreements concluded at a regional level are considered to represent the effective approach to the regulation of marine pollution from the offshore oil sector. Some of these regional conventions will be discussed below.

4.1 OSPAR Convention, 1992

The North Atlantic region is governed by the Convention for the Protection of the Marine Environment of the North Atlantic (hereinafter 'OSPAR')[31] with fifteen contracting parties whose main objective is to prevent and eliminate pollution and to protect the maritime area against all sources of marine degradation (not only pollution), except fishing, atmospheric and vessel-source pollution, which are considered to be appropriately regulated within other frameworks.[32] Moreover, the Convention applies to all maritime zones within and beyond national sovereignty and jurisdiction, including internal water and the high seas (in accordance with international law). The contracting parties are required to use 'best available techniques' and 'best environmental practice' and to adopt programmes and measures for the prevention of pollution from the offshore industry.[33] The OSPAR Convention prohibits the dumping of wastes and other matter from offshore installation and also the dumping of disused platforms without necessary a permit. This prohibition does not relate to discharges or emissions from offshore sources. The use, discharge or emission of substances which may reach and affect the maritime area are, however, strictly subject to authorisation or regulation by the competent authorities. 'So far, this regime and cooperation between OSPAR contracting parties have produced important results in terms of a reduction in the traditional sources of pressure in the area.'[34]

4.2 Barcelona Convention, 1972 (BARCON)

The 1976 Barcelona Convention for the Protection of the Mediterranean Sea against pollution (hereinafter 'BARCON')[35] is one of the older regional agreements addressing the issue of protection of the marine environment from pollution. The twenty-two contracting parties will individually or jointly take all appropriate measures in order to

[30] ibid.

[31] Convention for the Protection of the Marine Environment of the North Atlantic 1992, 22 September 1992, 32 ILM 1069 (1993).

[32] OSPAR Preamble.

[33] ibid annex III, art 2.

[34] Veronica Frank, The European Community and Marine Environmental Protection in the International Law of the Sea (Martinus Nijhoff Publishers 2007) 35.

[35] Convention for the Protection of the Mediterranean Sea against Pollution 1976, 16 February 1976, 1102 UNITS 27.

contribute to sustainable development. The Convention aims at facilitating the cooperation in the protection of the Mediterranean Seas against pollution resulting from inter alia offshore oil activities. The structure of the Convention is very similar to other regional agreements (such as OSPAR) based on the fact that its body contains general principles (e.g. the precautionary principle, the polluter pays principle), general obligations for contracting states to control several sources of pollution and also procedural and institutional rules. BARCON is further specialised in amended Protocols which form an integral part of the Convention. In particular, the 1994 Madrid Protocol (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)[36] covers a full range of aspects of offshore petroleum exploration and exploitation. The Protocol concentrates on the safety measures in connection with offshore activities including design, installations constructions and their maintenance. Furthermore, the Protocol also addresses the liability and compensation side of offshore activities. Until the Protocol enters into force states are required to take all measures necessary to ensure that liability for damage caused by offshore activities is imposed on operators who shall be required to pay prompt and adequate compensation and also to ensure that operators have and maintain insurance cover or other financial security of such type that is compatible with the compensation standard specifications.

Due to the strong political, economic and social diversity among Mediterranean coastal States, the numerous problems affecting the area have made cooperation in the region quite difficult. The Barcelona regime suffers from strong implementation gaps, as well as a lack of monitoring and reliable data.[37]

4.3 Helsinki Convention, 1992

With the 1992 Helsinki Convention[38] for the first time ever, all the sources of pollution around an entire sea were made subject to a single convention which applies to the Baltic Sea. The governing body of the Convention is the Helsinki Commission – Baltic Marine Environment Commission – also known as HELCOM. The Convention sets out a comprehensive legal framework for fostering the 'ecological restoration' of the Baltic Sea, eliminating pollution from all sources and reducing adverse impacts of human activities on marine ecosystems. The Convention defines notions such as offshore activity, offshore unit, exploration and exploitation and regulates discharges during exploration and exploitation stages. Abandoned, disused, or accidentally wrecked offshore units must be entirely removed and brought to the shore, and disused drilling

[36] 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 1994, 14 October 1994 (not in force).
[37] ibid 39.
[38] Convention for the Protection of the Marine Environment of the Baltic Sea Area 1992, 9 April 1992, 1507 UNTS 167.

wells must be plugged. Moreover, the Convention strongly emphasises cooperation, notification, consultation and reporting.

'So far, cooperation between the Baltic coastal states has been rather successful, but there are still serious implementation gaps.'[39] Regional seas conventions definitely have the potential to fill most gaps in the global international regime. However, the use of soft law and policy instruments together with financial, institutional and political constraints has, so far, prevented regional conventions from being fully effective.

5. US legal regime on Offshore Facility Liability

The US oil consumption makes it the world's largest petroleum consumer with almost forty-five percent of the volume representing imported petroleum.[40] In last few years, the dependency of the United States of America upon foreign suppliers has declined since the peaking point in 2005. Since most oil is transported by sea, the US with its long coastline (more than twenty states in the US are coastal states) is at great risk of marine oil pollution.

The non-existence of the global international convention dealing with liability for oil spills from offshore facilities has caused the US to regulate liability system in the US Oil Pollution Act 90 which covers inter alia the incidents of offshore oil pollution. The OPA 90 was precisely the legal instrument that was applied to the recent accident in the Gulf of Mexico. The enactment process of the US OPA was triggered off by the Exxon Valdez incident that happened in 1989 which caused public outrage. On 24 March 1989, the US flag tanker Exxon Valdez ran aground on Bligh Reef in Prince William Sound, Alaska and out of the fifty-three million gallons of crude oil which were carried, more than ten million gallons of oil spilled into the sea.

> Different than the international conventions, the US OPA does not deal merely deals with the civil liability and compensation, but presents rather a more 'comprehensive' regime, incorporating different aspects of oil pollution. It covers the prevention of, response to and compensation for marine oil pollution; the liabilities imposed by the Act often include civil, criminal and administrative liabilities.[41]

According to the title of the Act, the US OPA deals only with oil pollution and not with other forms of pollution. It applies to discharges (spills) from vessels and facilities, distinguishing between onshore and offshore facilities. Importantly, OPA contains a definition of a mobile offshore drilling unit (hereinafter 'MODU'), such as the Deepwater Horizon, stating it is 'a vessel [...] capable of use as an offshore facility'.[42] The recent

[39] ibid 37.

[40] Energy Information Agency, <http://www.eia.gov/energy_in_brief/foreign_oil_dependence.cfm>.

[41] Wang Hui, *Civil Liability for Marine Oil Pollution Damage* (Wolters Kluwer 2011) 190.

[42] The Oil Pollution Act of 1990 (n 4) s 1001.

accident in the Gulf of Mexico was the first challenge to the OPA's liability limits.[43] 'The OPA has established a system that which consolidates the various federal liability provisions into one, without pre-empting state law or implementing the international convention.'[44]

5.1 Offshore Facility Liability

The US OPA places liability only on the 'responsible parties' which definition depends upon the source of the discharge of oil. The responsible party for an offshore facility is not the owner or operator of the facility, but the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act[45] for the area in which the facility is located (if the holder is a different person than the lessee or the permittee).[46] In this regard, the responsible party for an offshore facility from which oil is discharged or which poses the substantial threat of a discharge of oil shall be held liable for the removal costs and damages that result from such incident. The OPA does not make any reference to negligence or any other term that implies fault as a basis for liability and thus imposes the strict liability on responsible parties. The OPA recognises only three defences to liability: (i) an act of God; (ii) an act of war; [or] (iii) an act or omission of a third party.[47] Importantly, to invoke any of these defences, the external circumstances giving rise to the defence must have been the 'sole cause' of the discharge. If the conduct of the responsible party contributed to the discharge in any way, the defences may not be invoked. In cases including several responsible parties, their liability is joint and several.[48]

The liability of the responsible party for an offshore facility liability is limited to 'all removal costs plus USD [seventy-five] million'.[49] Unlike the limits for vessels, the limit for offshore facilities does not include removal costs, for which OPA provides no limit.

5.2 Financial Responsibility

Furthermore, the statute requires that responsible parties maintain evidence of financial responsibility when the facility 'is used for exploring for, drilling for, producing, or transporting oil from facilities engaged in oil exploration, drilling, or production' and when the facility 'has a worst case oil spill discharge potential of more

[43] The disaster represents the first occasion to apply the law pertaining civil liability after the enactment of the Oil Pollution Act.
[44] ibid 207.
[45] Outer Continental Shelf Lands Act of 2000 (43 U.S.C. 1301-1356) < http://epw.senate.gov/ocsla.pdf > accessed 3 March 2013.
[46] The Oil Pollution Act of 1990 (n 4) s 1001.
[47] ibid s 1003 (a).
[48] ibid s 1003 (c).
[49] ibid s 1004 (a)(3).

than 1,000 barrels of oil'.[50] The amount of financial responsibility for offshore facilities is (i) $35,000,000[51] for an offshore facility located seaward of the seaward boundary of a State; or (ii) $10,000,000[52] for an offshore facility located landward of the seaward boundary of a State.[53] The President may increase the amount, however, to a maximum of $150,000,000[54] if 'justified, based on the relative operational, environmental, human health, and other risks posed by the quantity or quality of oil' involved.[55] Providing that the responsible party is responsible for numerous offshore facilities, the party must attest that the amount of financial responsibility complies with the amount prescribed for the facility with the greatest financial responsibility only. The means to provide evidence for the existence of financial responsibility involves 'evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility'.[56]

5.3 Compensation Fund

The US OPA sets up an Oil Spill Liability Trust Fund (hereinafter 'OSLTF' or 'Fund') which is available to pay for the removal costs incurred by federal or state government; the costs for the government in assessing natural resource damages, developing and implementing restoration plans; uncompensated removal costs and uncompensated damages, and administrative costs related to the oil spill. Under the standard procedure the claimant must first submit its claim for oil pollution damage compensation to a responsible party before either making a claim against the Fund or filing suit under OPA against the responsible party. If the responsible party denies its liability or if the claim is not settled within ninety days since its presentation, then the claimant may either file an action before a court against the responsible party or to present the claim directly to the Fund. 'The intention of this provision is said to ensure that no claimant is out of pocket for a period of more than [ninety] days following submission of a claim.'[57] The compliance with this procedure is a mandatory requirement under the threat of dismissing the claim.

Oil is expected to remain a primary source of energy in the United States of America for at least next several decades.[58] The recent Deepwater Horizon incident showed various

[50] ibid s 1016 (c)(1)(A)(iii).
[51] Circa €27,300,00.
[52] Circa €7,800,000.
[53] The Oil Pollution Act of 1990 (n 4) s 1016 (c)(1)(B)(i).
[54] Circa €117,000,000.
[55] The Oil Pollution Act of 1990 (n 4) s 1016 (c)(1)(C).
[56] ibid s 1016 (c)(2)(e).
[57] Hui (n 40) 207.
[58] Energy Information Administration (EIA), Annual Energy Outlook, 2010, Early Release, December 2009, available at <www.eia.gov>.

shortcomings in the current liability regime.[59] Nevertheless, it is quite difficult to formulate a straightforward policy recommendation as the inefficiencies from economic perspective are to a large extent remedied by the legislation itself. The main problems may be associated with the ineffective compensation standard policy (under-compensation) and the need to restructure the OSLTF in order to be more risk related.

6. Conclusion

The study of the current international framework on offshore oil exploration and exploitation shows that its nature is fragmented and incomplete. At a global level, UNCLOS provides the legal basis for offshore activities, but so far, the outlined opportunity has not brought any relevant outcomes. The key issue in this context remains whether the international community should launch the process towards the elaboration of a universal agreement for all aspects of offshore oil activities or try to adopt other legal instruments that might be more suitable for this area of law. The main two reasons this process has not yet commenced is firstly the fact that the offshore petroleum industry contributes very little to the overall pollution of the marine environment in comparison to other sources of pollution and secondly the strong opposition from certain countries particularly from the United States of America to the adoption of a universal agreement. Another reason may be that every maritime region has its own environmental specifications which require a unique approach to address them. This belief may be confirmed by the number of effective regional agreements implemented in the regions such as the North Atlantic or Mediterranean Sea. In some regions the lack of funds and human resources may be at risk to adopt such kind of agreement.

The inherent component of the offshore oil activities and safety issues pose a problem of finding the most relevant way to internationally address the matter. It is clear that the way through the IMO Legal Committee is blocked and therefore the only hope is a unique convention addressing both safety and liability issues. The identification of the international organisation which would take the lead in the discussion on the offshore exploration and exploitation activities remains an open question. The United Nations Environment Programme (hereinafter 'UNEP') may be considered as a best choice, even if this institution has not demonstrated a real interest in this predicament in recent years. Possibly, a joint UNEP/IMO initiative could also make sense.

However, many coastal states have developed national legislation and standards that deals with the offshore oil pollution. For example, the US legal regime on offshore facility liability for oil pollution of the maritime environment deals with the complex and diverse legal issues that emanate from the discharge of oil into the water of the

[59] The Deepwater Horizon catastrophe was an oil spill in the Gulf of Mexico on the BP operated facility which might claim the dubious title of the world's largest accidental release of oil with the estimated four million barrels of oil released into the sea.

United States. In contrast with the lack of global international framework the US Oil Pollution Act contains liability regime for offshore facilities which could be effectively applied in the Deepwater Horizon incident in 2010.