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ANY OTHER BUSINESS

Position paper of the Iberoamerican Institute of Maritime Law in relation to the need of an international convention on the Offshore extractive activity promoted by the IMO.

Submitted by IIDM

SUMMARY

Executive summary:	It is proposed the development of a International Convention on the Offshore extractive activity promoted by the IMO.
Strategic direction:	1; 7.2; 13.
High-level action:	7.2.2; 13.0.2
Planned output:	None.
Action to be taken:	Paragraph 46.
Related documents:	None.

I.-Introduction

1 The present paper was prepared by Mr. Jorge Radovich, member of IIDM and also Executive Counsellor of the CMI. The paper was submitted to the IIDM's Coordinator of International Organizations Committee, Ms. Fabiana Martins, and to the President of the IIDM, Mr. Luiz Roberto Leven Siano, who approved it to be sent as a paper to the 102nd session of the Legal Committee.

2 On October 22nd 2012 at the Comité Maritime International[1] Conference held at Beijing, China, the constitution of an International Working Group to analyze the convenience to elaborate an International Convention on hydrocarbons Offshore extractive activity was unanimously decided[2].

3 The exploration and exploitation of Offshore hydrocarbons is not a new phenomena, but it does is every time operations are undertaken in more profound waters, which entails a substantial increment of the risks in accordance with technical reports. Up to date, there is no international instrument covering and guaranteeing liability arising from the activity.

4 The extraction of hydrocarbons from the seabed does not involucrate only the so known as Offshore Platforms –where fixed or mobile- but a whole group of exploration and detection vessels and devices. For instance, those that collocate submarine pipelines, others called Floating Production Storage and Offloading (FPSO) that receive the hydrocarbon and process it on board, which in the past were tank vessels which had been disposed of their machinery that was replaced by the necessary elements for processing the hydrocarbon; and a whole universe of tug boats specialized in the service and maintenance of these structures.

5 We have to bear in mind that an important group of people lives and works on board of the Platforms. These people shall be transported, hosted, provided with food, medicine, entertainment, their disposals shall be treated. The platforms shall be equipped with elements, spare parts and materials, etc. Frequently platforms have facilities for the landing of helicopters, but the majority of the services are rendered by specialized tugboats. Those tugboats are called “Supply Vessels” and there are several types adapted to specific

[1] The Comité Maritime International, formally established in 1897, is the most antique non governmental and nonprofit organization devoted to maritime legislation. It is believed that a group of Belgian professionals and businessmen proposed to the International Law Association approximately in 1880 to prepare a uniform maritime code, which was the Comite’s formal birth seed in Antwerp. It gathers not only lawyers but all people interested in navigation, it has national associations in several countries. Its central objective is the uniformity of Maritime Law, and it had an important activity in the discussion and approval of International Conventions before IMO appearance. Conventions of that stage are known as Brussels due to the fact that the Belgium government called Diplomatic Conferences for its acceptance.
Undoubtedly, the most widespread one is 1924 Brussels Convention on unification of certain rules relative to Bills of Ladings –which Anglo-Saxon people call Hague Rules-which regulates the contract of carriage of goods by water. It currently maintains its importance as a recognized technical organism.

[2] Even the Norwegian delegate, after stating that the regulation of offshore activity corresponded to the State granting the license, and remarking that the Petroleum Act establishes objective and unlimited liability of operators, and that it subjects them to very stringent security, and prevention and environmental damage evaluation standards, agreed that the topic shall be studied since that situation did not take place in several countries, therefore even Norway may accept the treatment of offshore activity at IMO.

activities, among which we can mention the AHTS, whose mission is to lay and handle the anchor fields which maintain in their site and protect mobile Platforms.

II.-Attempts of international regulation

6 The international community did not remain impassible before the risks generated by this industry; we may cite several unsuccessful regulation attempts. In the first place, we will mention the Convention known by its acronym in English as CLEE (Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Seabed Mineral Resources) done in London in 1976, which characterizes for contemplating alternative limited and unlimited liability systems. This convention has never entered into force.

7 In 1977, in the Conference held in Rio de Janeiro the CMI prepared a draft of the Convention on "Offshore Mobile Crafts"[3]. It was not studied by the Intergovernmental Consultative Maritime Organization, antecedent of current IMO[4].

8 Several States claim exclusive jurisdiction and incumbency to regulate extractive activity in their respective Continental Shelf or Economic Exclusive Zones, because they consider it directly linked to their sovereignty, which may explain the failure of international organisms to approve a convention of universal scope until now. In Latin America, this position has been defended vigorously by Brazil and Argentina, and might be shared by other nations of the area.

9 Furthermore, it has been said that IMO does not have incumbency in relation to the regulation of offshore hydrocarbons extractive activity due to the fact that its object concentrates in the maritime services of international transport carried out by vessels exclusively.

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[3] See "1977 CMI Rio draft Convention on Offshore Mobile Crafts" in CMI Handbook of Maritime Conventions – document 12.1.

[4] IMO is a United Nations specialized agency devoted to issues related to international maritime navigation. Its two principal objectives are maritime security and prevention of pollution of the marine environment, and regarding these two issues its activity is developed, sometimes enacting essentially technical legislation oriented to the amelioration of design and construction of vessels, and in other opportunities enacting properly legal legislation as conventions on liability limitation and indemnification for damages caused by hydrocarbons and noxious and dangerous substances.

10 Not worrying for polluting third parties or the marine environment is by not means an acceptable and sociable valuable behaviour.

11 We believe that these extreme positions are linked to political, ideological and state sovereignty aspects which –paradoxically- conserve great influence in the decisions adopted at IMO, displacing modern considerations of environmental character.

12 However, in 1979 and afterwards in 1989 IMO adopted the so called MODU Code, which practical effect consists in extending the application of the Conventions on Load Lines and SOLAS[5] to drilling mobile platforms, although they were originally designed exclusively for vessels. Moreover, OPRC Conventions on preparation, response and cooperation in respect to incidents of pollution by hydrocarbons and hazardous and noxious substances include expressly fixed or mobile offshore platforms.

13 In 1994 the CMI updated the 1977 draft in the Conference held in Sidney, Australia. This draft was neither accepted by IMO Legal Committee.

14 In 2001 the Canadian Association of Maritime Law drafted a very complete project, which includes from property, registration, privileges, mortgages, civil and penal jurisdiction to salvage, pollution and liability for leakage aspects[6].

15 Among extractive industry regional agreements we may mention the so called OPOL, which establishes objective, several and limited liability to USD 250 millions per event guaranteed by all the operators of the area. It applies to the North of Europe, excluding the Baltic. This agreement is not an international convention, but an agreement among industry operators.

III.- <u>International regional conventions</u>

16 There are a series of regional conventions related to the protection of the marine environment which do not refer specifically to the extractive offshore hydrocarbons industry, among those we can cite:

[5] International Convention for the Safety of Human Life at Sea, 1974 (SOLAS/74), amended text.
[6] Canadian MLA Draft Convention on Offshore Units, Artificial Islands, and Related Structures used in the Exploration for and Exploitation of Petroleum and Seabed Mineral Resources – Introduction, text and commentary,www.comitemaritime.org/Uploads/Newsletters/2004/Binder1.pdf.

17 The River Plate Treaty and its Maritime Front, 1973 signed by Argentine and Uruguay Republics, which defines pollution in Chapter IX and establishes that the parties shall adopt the preventive measures established in international conventions and those recommended by the international technical organisms and that they are responsible for the pollution generated to the other party. It establishes even an area of prohibition of pollutant activities. This convention has undoubtedly been pioneer in the topic[7]. However, neither a liability system nor the rights of the people affected by a pollutant event are concretely established. The extractive offshore industry is not expressly mentioned.

18 The 1981 Abidjan Convention –and its 1985 Protocol- for cooperation in the protection and development of the marine and coastal environment in Central and Occidental Africa[8] focus centrally in technical aspects and do not contain regulations regarding liability and compensations, although States are encouraged to enact intern regulation in this respect.

19 The so called 1992 OSPAR Convention for the protection of the marine environment of the Northeast Atlantic, neither regulates liability and compensation issues[9], but Section 3 and Annex III refer specifically to pollution originated by offshore industry[10].

20 The Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Platform and its Subsoil was adopted in October 1994 and is the first international instrument totally devoted to our subject of study.

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[7] ARTICLE 47: To the effects of this Treaty, pollution means the direct or indirect introduction, by men, in the aquatic means of substances or energy of which result noxious effects.
ARTICLE 48: Each party obliges to protect and preserve the aquatic mediums and, in particular, to prevent pollution, by enacting rules and adopting appropriate measures in conformity with applicable international conventions and by conforming, as pertinent to the guidelines and recommendations of the international technical organisms.
ARTICLE 49: The parties compromise to abstain from reducing in their respective legal regimes:
a) Technical exigencies in force to prevent water pollution, and
b) Severity of sanctions in case of infractions.
ARTICLE 50: Parties oblige to reciprocally inform on every rule that they envisage to enact in relation to water pollution.
ARTICLE 51: Each party shall be responsible for damages caused as a consequence of pollution caused by their own activities or by those of individuals or corporations domiciled in their territory.
ARTICLE 52: Jurisdiction of each party in respect to every infraction caused regarding pollution shall be exercised without prejudice to the rights of the other party to be indemnified by the damages suffered, at the same time, as a consequence of the same infraction. To these effects, the Parties shall render mutual cooperation.

[8] Angola, Benin, Cameroon, Cape Verde, Congo, Cote d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mauritania, Namibia, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone and Togo are parties.

[9] Belgium, Denmark, Finland, France, German, Island, Ireland, Luxemburg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and the European Union are parties.

[10] It can be seen at www.ospar.org web page.

21 It establishes exigent security and building standards and the duty to evaluate environmental impact. It contemplates a regimen of authorization and licenses and the duty to have a contingency plan. It states that liability for pollution corresponds to the operator and is mandatorily insurable. Removal of installations is regulated as well as the revocation of licenses in cases of noncompliances. Transboundary pollution is expressly prohibited.

22 Nonetheless, this Protocol has only entered into force in 2011 as a consequence of the incidents that we mention in the following chapter and has received scarce ratifications.

23 Moreover, we have been informed of another regional agreement in the Arabic Gulf, but we do not have precisions.

24 We consider that there are very few regional agreements, only one contemplates our topic specifically and there is no uniformed regime of liability and compensation.

IV.- Two great disasters and its influence on IMO

25 The contrary attitude towards the elaboration of an International Convention by some States and OMI was affected by two important and recent disasters at sea. The first one is duly known, but the second one has passed unnoticed although its legal importance since it has implied transboundary pollution. The renowned case is the one concerning the DEEPWATER HORIZON Platform, which in April 2010 exploited and was fired in Mexico Gulf, in front of Luisiana State causing eleven deaths and a colossal spill that lasted 87 days since it could be obturated. The Platform operated in waters of approximately 1,500 meters deep and drilled at 2,700 meters, at 66 kilometers from Louisiana coast.

26 The Platform sank on April 22nd, 2010. It is estimated that the oil spill comprised between 700 and 780 millions of liters, and seriously affected the littoral of four North America States- Louisiana, Mississippi, Florida and Alabama, and also the Mexican coast.

27 As it was exploited by British Petroleum, this company had economic solvency to respond to claims, although it had not assured the Platform. Self-insurance is a reality extended in the industry. Nonetheless, it was reported that judicial claims submitted by Mexican people still remain unsolved by the US Justice.

28 The less known disaster is the MONTARA one- in 2009 a Platform operated by a Thailand Petroleum company was drilling that well when an explosion took place and great

amounts of oil were liberated. It was installed in Australia Economic Exclusive Zone, but it did not affect this State, it affected Indonesia. MONTARA was located in waters of approximately 77 deep meters and drilled at 2.500 meters deep[11]. It leaked during 74 days affecting Indonesia coast and not being an operator of first level as in the precedent case, the claims were not satisfactorily paid to the victims until recently[12].

29 This case evidenced the lack of a Convention establishing a Fund to face this type of transboundary pollution claims, or of sufficient compulsory insurance that assures the quick and correct indemnification of those prejudiced by a leakage caused by the extractive industry.

30 In 2012 Indonesia stated the issue before the IMO Security Committee. It was told to direct it to the Legal Committee because of incumbency questions. When the topic was treated at the Legal Committee, it faced opposing positions. Indonesia maintains that an international instrument regulating the issue shall be enacted.

31 Indonesia even organized a Conference in Bali in 2011 searching for an advance towards an International Convention guaranteeing compensation for transboundary pollution[13].

32 In the centesimal session of IMO Legal Committee, held in London from April 15th to 19th 2013, the topic was analyzed –among others- and the following conclusions were reached[14]:

. There is not an imperative necessity to prepare an international treaty on offshore activity;

. The objective shall be to assist States to reach bilateral or regional agreements creating workshops or consultative groups ;

. There is no necessity that IMO involves directly, which may delay bilateral or regional agreements;

. The States which have ratified bilateral or regional agreements should offer assistance to those which want to reach the same objective;

. Principles established in document Leg 100/13/2 should be considered, which reflects regulations of CLC and Fund 1992 and Bunkers Conventions[15];

[11] An International Convention on Off-Shore Hydrocarbons Leaks?, by Federal Australian Judge Steven Rares. Work published in Beijing Conference Proceedings, p. 258.

[12] As Justice Rares informed to the IWG during its meeting during the Dublin Symposium.

[13] "Conference on Liability and Compensation Regime for Transboundary Oil Damage resulting from Offshore hydrocarbon exploration and extraction". A complete report in English might be seen in CMI Newsletters N° 3, 2011.

[14] In conformity to Patrick Griggs report to CMI Executive Council, considered on its meeting of May, 2013.

. Regarding environmental issues, Sections 192, 194 and 197 UNCLOS[16] shall be taken into account.

33 Indonesia insisted in the following session of the IMO Legal Committee, but the Committee insisted with the position commented above.

34 In the Symposium organized by the Irish Association of Maritime Law held in Dublin in September 2013, Dr. Rosalie Balkin, IMO Director of Legal Affairs and External Relations Division who had continuous actuation in the Legal Committee, explained the position adopted by the organization.

35 She explained that the regulation of offshore activity is not part of IMO aims, which arises from its constitutive Convention. In effect, the instrument starts establishing the objective of the organization in the following terms:

"*Article 1*
The objectives of the Organization are:
a) to establish a system of collaboration among Governments regarding the regulation and governmental practices of technical issues of every aspect concerning commercial international navigation, and promote the general adoption of rules to reach the highest possible levels referring maritime security and efficiency in navigation;…"

36 It is real that the instrument centers in commercial international navigation and in prevention and compensation of pollution from vessels, and that there is no mention whatsoever to exploitation of offshore hydrocarbons. But it shall be taken into account that it dates from 1948, time when that activity was at an early stage in development and that nowadays an ecologist and conservationist conscious exist which was not present when the instrument was adopted.

37 This interpretation is in our opinion, contradictory with the central objectives that IMO states on its web page and that are stated on its own logo –which consists in improving

[15] In respect to the last one, see Griggs, Patrick, "International Convention on Civil Liability for Bunkers Oil Pollution Damages; 2001", available at the web site of the British Association of Maritime Law, www.bmla.org.uk. This Convention entered into force in November, 2008 and establishes objective, limited, canalized and mandatory insurable liability of the owner of the vessel for the damages caused by oil spill, including the cost of preventive measures or confinement and minimizing of the spill. It has obtained an important number of ratifications; however, neither Argentina nor Uruguay have ratified it yet.

[16] United Nations Convention on the Law of the Sea Montego Bay 1982 (known by its acronym CONVEMAR in Spanish and UNCLOS in English).

maritime security and promoting clean seas- especially in what refers to pollution by hydrocarbons. We believe that permitting the proliferation of offshore artifacts and its auxiliary and service vessels without exigent standards does not precisely promotes safety in navigation, and that the lack of an international regimen of prevention, contention and cleanliness of hydrocarbons leakages caused by offshore artifacts does not help seas to be cleaner.

38 Moreover, the adoption of the MODU Code by IMO –mentioned in Chapter II- also appears to be contradictory with such construction of IMO constitutive Convention. Also the SUA antiterrorism Convention applies to the Offshore crafts.

39 Frankly, after analyzing legal issues relating to the definition of vessels in international conventions, Dr. Balkin concluded that is not an strictly legal problem, but that it relates to a political issue- States do not want to resign their sovereignty over Continental Shelves and Economic Exclusive Zones and resist to subscribe an international convention relative to Offshore activity, which they understand may limit the jurisdictional powers over those areas.

V. <u>The topic at the academic and social level</u>

40 In the XVII Congress of the Ibero-American Institute of Maritime Law, held in Rio de Janeiro in November of 2012, a whole morning was devoted to hydrocarbons exploitation of the Economic Exclusive Zone –an ingenious mention was made to the “Blue Amazon”- and in the Continental Shelf. This shows the transcendence of the issue for our nations.

41 The Argentine Branch of the Ibero-American Institute of Maritime Law also organized a Seminar on June 5th and 6th, 2013 which included the treatment of the issue, and the same was done by the Argentine and Uruguay Association of Maritime Law on June 27th and 28th 2013, in the River Plate Seminar of Maritime Law. The Oriental Republic of Uruguay is seriously and professionally preparing in the process of regulating the granting of their first license of gas and hydrocarbons exploration and exploitation which may be found in their Economic Exclusive Zone and continental platform, neighbor to Brazil whose richness in the topic is widespread known.

42 Moreover, the issue has been discussed in the Symposium of the Irish Association of Maritime Law which was sponsored by the CMI, in October of 2013, with a very qualified panel, which captured the attention of the attending parties.

43 And the same happens with the Congress of our Ibero-American Institute of Maritime Law jointly organized with the American Association of Maritime Law, in Puerto Rico, in November of 2013, and in Lisbon in 2014.

44 The IWG on Offshore Activities of the CMI is preparing a Seminar on the issue that will be carried out in Istanbul in June of 2015.

45 Two important reports on the issue were published. In February an IDDRI Study entitled “Seeing beyond the horizon of deepwater oil and gas: strengthening the international regulation of offshore exploration and exploitation”. This document contains a comprehensive review of existing international, multilateral and bilateral agreements on the regulation of offshore activities. In addition the European Commission has published a Report prepared by Maastricht University entitled “Civil Liability and Financial Security for Offshore Oil and Gas Activities”. This report suggests that governments should encourage “risk pooling” between members of the drilling industry to create a broad based industry funded compensation scheme.

46 The IMO could contribute with all its experience with the successful CLC and Funds Conventions related to oil pollution originated in tanker vessels to establish an international convention covering the pollution produced by the Offshore industry.

47 The European Commission has also released a report prepared by Bio by Deloitte entitled “Civil liability, financial security and compensation claims for offshore oil and gas activities in the European Economic Area.” This report concludes that in all EU states there is no existing liability regime for third party claims for traditional damage caused by pollution from offshore activities, no regime for handling compensation payments and no assurance that operators would have adequate financial assets to meet such claims[17].

48 This shows the absolute actuality of the issue among the maritime academics, and we consider that the concern of the eventual victims and conservationist organizations is increasing in this respect.

49 Although it has no direct link to the issue under analysis, because it does not concern pollution events, the strong reaction caused by the earthquakes in Castellón de la Plana cost, in Spain, attributed by the public to Castor Project, demonstrate that people are increasingly

[17] Patrick Griggs’ Report to the CMI Executive Committee virtual meeting on November, 2014.

concern of the alterations to the environment which may cause gas and hydrocarbons explosions.

VI. Final comments

50 Does the decision of OMI Legal Committee close the doors to the work of an international convention regulating the topic?

51 We do not believe so. Bilateral or regional agreements may have standards, exigencies and levels of compensation very different, which goes against uniformity desired in issues related to Maritime Law and Sea Law –if they are considered autonomous- and Environmental Law.

52 Or they may directly fail to exist, leaving some areas without coverage against transboundary pollution originated in offshore extractive activity. As we have stated in Chapter III, they are scarce, except for one they do not comprise in an integral way the topic and a uniform system of liability and compensation cannot be extracted from them.

53 The CMI established an International Working Group (hereinafter IWG) on Offshore Activites, whose Chairman is the recognized author Patrick Griggs and the Rapporteur our Member Jorge M. Radovich. The IWG will evaluate in a first stage the existence, scope and requirements of the bilateral or regional agreements more rigorously and seriously than we have done in our preliminary study of Chapter III. And it will prepare, at we have stated, a license model.

54 Nonetheless, we believe that the repetition of a lack of rapid and effective compensation after a transboundary pollution event as the one suffered by Indonesia may not be admitted.

55 William Sharpe, a Canadian colleague and member of the CMI IWG participated in the IDDRI workshop in 2012 and its lecture supports the necessity of an international convention regulating uniformly the subject. This is also supported by Wilye Spicer –also Canadian and member of the CMI IWG-in an excellent article devoted to offshore exploitation in the Artic.

56 As regards the Artic ecosystem, due to its fragility and the absence of a convention protecting the pretensions of the States and the oil and gas companies –different from what

happens in the Antarctic- we believe that it is essential that an international treaty be promoted in this effect.

57 The same happens in relation to hydrocarbons exploitation in the seabed not submitted to sovereignty of any State.

58 Therefore, there exist as much practical requirements as institutional and academic opinions that encourage working in the design of an international convention which unifies the regulation of the extractive offshore industry, consequently this activity may and shall be faced in the IMO, whose recognized expertise in the fight against the pollution of the seas will be of utmost importance.