THE STATE'S ROLE IN BUILDING OF A LEGAL SYSTEM OF LIABILITY AND COMPENSATION FOR TRANSBOUNDARY DAMAGE IN THE GULF OF MEXICO

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Abstract

Concerning international State responsibility and liability, States rarely face the situation or reach substantial agreements. Therefore, this research addresses the legal issue of the existence of an international legal regime of responsibility and liability for transboundary damage resulting from offshore drilling activities on the Continental Shelf.

The research begins by determining the nature and scope of the legal relationships involved in these events, from which different rights and obligations emerge due to the subjects' condition or the legal system they come from. An analysis on the state of development of various international law sources and on the most relevant cases and practices affirms the need to develop conventional legal frameworks. A critical approach to several positions on strict liability held by legal writers is adopted, especially on the so-called liability for risk and its serious implications for a coherent theory on international State responsibility and liability.

From this holistic approach, political consensus elements and conventional State practices in developing specific responsibility y liability regimes are reviewed. Consequently, proposals are made for the bases on which an international agreement for the Gulf of Mexico should be negotiated and adopted. Such an agreement should establish the rules governing the existence of transboundary damage from offshore activities.

The implementation of this specific regime may have a positive impact on the eventual implementation of others, as well as on the progressive development of international law and its codification. Its precarious situation and the legal bases proposed by a considerable sector of legal writers, which are frequently in conflict with the existence of a coherent international State responsibility and liability regime, recommend the adoption of new approaches. All this constitutes a necessary contribution to the protection of oceans and the development of growingly responsible attitudes towards the human race and the environment.

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Last, and most importantly, I thank and dedicate this work to my family, my beloved wife and, especially, to my life's joy, my little Susana.

List of Acronyms

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BP	British Petroleum company
CLC regimen	Legal Regime composed of three treaties, namely: Convention on Civil Liability for Oil Pollution Damage (1992), International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992), and Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.
ILC	International Law Commission
IMO	International Maritime Organization
IOPC Funds	The International Oil Pollution Compensation Funds
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
MEDU	Mediterranean Action Plan Coordinating Unit.
U.S.	United States of America
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
NOAA	National Oceanic and Atmospheric Administration

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Introduction

Background

All activities undertaken in the Gulf of Mexico are under the national jurisdiction of the United States of America (U.S.), the United Mexican States (Mexico) or the Republic of Cuba (Cuba).[1] This semi-enclosed coastal sea has a "moderately high productivity that supports biological diversity and high biomass of fish, sea birds and marine mammals. Along with supporting a large recreational and commercial fishing industry, the Gulf of Mexico also provides vital services such as oil and gas production, tourism, habitat for endangered species, and support for many Gulf state economies."[2]

One of the greatest threats to the marine ecosystem in the Gulf of Mexico is posed by the gas and oil industry, which has an intense activity in this area. There are about 4,000 installations[3] operating under the jurisdiction of Mexico or the U.S. Moreover, Cuba has begun prospecting and drilling works in its continental shelf. Albeit fracking activities slow down high-risk deepwater investments, the growing tendency towards oil prospecting and production in ever deeper waters in the Gulf of Mexico is a fact.[4]

Two of the three largest oil spills in the world, Deepwater Horizon/Macondo and Ixtoc 1, took place in the Gulf of Mexico.[5]

In the case of Ixtoc 1 (June 3, 1979), the Government of the United States unsuccessfully tried to press claims against the Government of Mexico for transboundary damages. According to Melissa B. Cates "The Ixtoc 1 case illustrates the lack of effective international law for offshore oil explosions producing transnational damage, as well as the problems with using the

[1] See, Heritage Foundation, "U.S. Extended Continental Shelf Maps." May 15, 2012, at http://www.heritage.org/multimedia/infographic/2012/05/us-extended-continental-shelf-gulf-mexico

[2] See, NOAA´s Integrated Ecosystem Assessment, United States Department of Commerce. "About Gulf of Mexico." at http://www.noaa.gov/iea/regions/gulf-of-mexico/about.html

[3] Quiroz Salazar, Carolina "Transboundary cooperation in the management of oil spills from offshore installations in the Gulf of Mexico Large Marine Ecosystem." December, 2013, p. 16, at http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/mexico.html

[4] National Commission on the British Petroleum Deepwater Horizon oil Spill and Offshore Drilling. "Report to the President: The Gulf Oil Disaster and the Future Offshore Drilling." January, 2011, p.49, at http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf

[5] See, e.g., Mother Nature Network, "The 13 Largest oil spills in history." October 15, 2015, at http://www.mnn.com/earth-matters/wilderness-resources/stories/the-13-largest-oil-spills-in-history

traditional tort theory of negligence in this area. The need for international rules to determine liability and compensation following such an incident is clear."[6]

In the case of Deepwater Horizon (April 22, 2010), an estimated 206 million gallons was spilled into the Gulf of Mexico, being the largest accident of this type in U.S. history. After five years of law suits in U.S. courts, the federal government and Gulf Coast states announced a record-setting $18.7 billion settlement with BP. Attorney General Loretta Lynch stated "… this settlement would be the largest settlement with a single entity in American history",[7] which is a reflection of how serious the damages of an accident of this nature may be.

The BP disaster has increased the concerns among the countries of the area, as well as in other corners of the world, over a potential accident of this nature and catastrophic transboundary damage.

The lack of an international liability and compensation regime for transboundary environmental damage in case of oil spills worsens the situation and makes us think of the potential consequences that an event of this type may bring about for the relations among Gulf States.

Concerning civil liability matters, it shall be considered that "… not all potentially responsible private parties may have the same deep pockets as BP";[8] therefore, national courts may not always ensure appropriate compensation for the victims, including potentially affected States. Likewise, at the international level, countries like Cuba and the United States do not recognize the compulsory jurisdiction of any international court, including the International Court of Justice,[9] so there would be no assurances from the procedural point of view.

[6] Cates, Melissa B. "Offshore Oil Platforms Which Pollute the Marine Environment: A Proposal for an International Treaty Imposing Strict Liability Law of the Sea Conference." San Diego Law Review, Vol. 21, 1983-1984, p. 693.
[7] Lynch, Loretta E., the United States Attorney General, "Statement on the Agreement in Principle with BP to Settle Civil Claims for the Deepwater Horizon Oil Spill." July 2, 2015, at http://www.justice.gov/opa/pr/statement-attorney-general-loretta-e-lynch-agreement-principle-bp-settle-civil-claims
[8] Handl, Günther., "International Law and the Liability for Catastrophic Environmental Damage." Proceedings of the Annual Meeting, American Society of International Law, Vol. 105, March 23-26, 2011, pp. 423-427.
[9] United Nations, Treaty Collection. "Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court." at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&lang=en

Juridical problems

Legally speaking, a general question arises: Is it necessary to establish an international responsibility and liability regime in the Gulf of Mexico to ensure compensation to the victims of transboundary damage resulting from oil prospecting and drilling activities on the Continental Shelf?

In order to answer this question, the following specific objectives are set: (1) To determine the nature and scope of the rights and obligations contained in the international legal relationships established in relation to this matter and the subjects involved; (2) To analyze the state of development of the various sources of international law and their applicability to an event of this nature; (3) To characterize the different international State responsibility and liability regimes and to assess the legal elements on which they are based, according to existing legal writings; (4) To establish the need to develop a conventional legal framework specifically for offshore activities, as well as the legal basis of an eventual international agreement on responsibility and liability in the Gulf of Mexico.

To achieve these objectives, this research has been divided into four Chapters. Chapter 1 is aimed at clarifying the actual scope of the legal relationships established in an event of this type and their content. This will enable us to navigate the cloudy waters of the discussions held by legal writers, in which different rights and obligations are often confused due to the subjects' condition or the legal system they come from. In Chapter 2, a critical analysis will be conducted on the state of development of international law sources and the differing views held by legal writers on the scope of related international decisions will be reviewed.

In Chapter 3, a critical assessment will be made of the various elements used by legal writers to justify or argue in favor of certain types of international State responsibility and liability regimes. To conclude, Chapter 4 aims to determine political consensus elements and some conventional practices in the development of responsibility and liability regimes for certain activities at the international level. Taking into consideration the future conclusions of this research, the last heading will propose legal bases on which, in our view,

negotiations on a responsibility and liability regime for the Gulf of Mexico should be held.

Given the limited space typical of this type of research, some related matters will not be addressed. Nevertheless, this research has the objective of going as deeply as possible into existing controversial debates among legal writers. Efforts will be made to maintain a holistic approach to fragmentary analyses, by upholding the integrity of international law as a coherent whole. The above is in keeping with the efforts to increase the protection of our oceans and develop a growingly responsible attitude towards our planet and the human race.

Part I.- Key general concepts of International Law to successfully address responsability of States, particularly liability of States for transboundary damage caused by offshore activities.

Chapter 1.- Characteristics of the subjects and content of their legal relationships, concerning the issue of liability of States for transboundary damage caused by offshore activities.

1.1.- The role of the subjects of international law concerning the issue of liability of States for transboundary damage caused by offshore activities.

Before determining the existence of an international law general regime applicable to the liability of States in case of damage resulting from transboundary offshore activities, some conceptual matters must be clarified. There are various types of subjects[10] involved in such an event,[11] and the legal relationships generated among them are commonly mistaken. The content of these legal relationships emerge without distinction from national and international legal systems. Therefore, determining the nature of each subject is indispensable in order to understand the content and scope of its rights and obligations. This will enable the critical analysis of the various doctrinal stances on this issue.

The international legal system is composed of a group of principles and rules governing the legal relationships among States and between them and other special subjects.[12] Most of the authors agree that States are the only full

[10] In general terms, a *subject* is the conceptual unit on which a legal system attributes rights and obligations. Subjects of international law are persons with "…capacity to bear rights and duties under the international legal system." See, e.g., Cheng, Bin "Introduction to Subjects of International Law." at International Law: Achievements and Prospects. Part I, Martinus Nijhoff Publishers, Paris, 1991, pp. 23-ss.

[11] In the context of this research, *event* means the whole process going from the authorization granted by a State, in accordance with its legislation, for conducting activities on the Continental Shelf, up to the realization of the transboundary environmental damage and the legal actions taken as a result of the damage. It obviously includes, but it is not limited to, all oil and gas drilling and exploitation activities, as well as accidents or natural phenomena causing oil spills.

[12] See. e.g., Costa Ruda, Podestá. Derecho Internacional Público. Vol. I, Ed. Topografía Editora Argentina, Argentina, 1985, p.3. We, as well as the majority of authors, agree on this concept of International Law, although others, like Hans Kelsen, do not share this view. Kelsen considers that conceptualizing the International Law by the object of its rules is a mistake. See, Kelsen, Hans. Principles of International Law. The Lawbook exchange, Ltd., New Jersey, 2003, p.201. Nevertheless, Kelsen does not deny the legal personality of the State, like the French sociology school based on the radical ideas of Duguit. See, Duguit, Leon. "Lecciones de Derecho Público General: Impartidas en la Facultad

subjects of international law, which is a direct result of their sovereignty as an attribute and constituent. As subjects at the international level, States shall be attributed rights and obligations. Additionally, they have the capacity to create and flesh out new international legal relationships.

This capacity gives rise to the very existence of other subjects of international law, known as derived or secondary subjects,[13] namely international organizations, certain special cases such as the Holy See and the Order of Malta, the belligerent communities, the national liberation movements and the individual.[14] Regardless of the doctrinal debate on considering the individual as a subject of international law,[15] it is a fact that, in certain international legal relationships, States have provided individual with rights and obligations, and legitimized their capacity to act at the international level, even against the State itself.

Rather than a passive subject, persons have become active subjects within international law in areas such as Human Rights or the international regime for the protection of investments.[16] However, their existence as subjects is entirely conditioned by the sovereign will of States. It is a fact that persons lack sovereignty and, at the international level, they will always be subject to the jurisdiction of States. The person as a subject of international law may only exist in legal relationships of this nature as they are empowered by States.

Consequently, for the purpose of this research, there is no legal relationship per se between a State and a person at the international level. For an international

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de Derecho de la Universidad Egipcia, durante los meses de enero, febrero y marzo de 1926." Translated by Javier García Fernández, Ed. Marcial Pons, 2011.

[13] See, e.g., Crawford, James. Brownlie´s Principles of Public International Law. 8th Edition, Oxford University Press, United Kingdom, 2012, pp.115-202 or Portmann, Roland. Legal Personality in International Law. Cambridge University Press, 2010.

[14] For the purpose of this research, *person* or *persons* means every natural or juridical person with its own legal personality. Given their irrelevance to this research, we will not address matters related to other secondary or derived subjects of International Law.

[15] A comprehensive study of the individual as a subject of international law may be found in the work of Parlett, Kate. The Individual in the International Legal System: Continuity and Change in International Law. Cambridge University Press, 2011. A historical characterization of the various positions adopted on the person as a subject of law may be found in Diez de Velasco, Manuel. Instituciones de Derecho Internacional Público. Tomo. I, Ed. Tecnos, Madrid, 1983, p.254. Even authors, like Kelsen, provide individuals, at the international level, with legal capacity 'indirectly and collectively'. See, Kelsen, Hans. Principles of International Law. The Lawbook exchange Ltd., New Jersey, 2003, p.114.

[16] See, e.g,. Ulfstein, Geir. "Individual complaints." at UN Human Rights Treaty Bodies: Law and Legitimacy. Cambridge University Press, 2012, pp.73-115 and Muchlinski, Peter. "Policy Issues." at The Oxford Handbook of International Investment Law. Oxford University Press, 2008, pp.6-10.

legal relationship between a State and a person to exist, an international agreement establishing it must be in place.[17] The other legal relationships between a person and a State have a national character and their contents are determined by the *ius imperium* of States. Having set forth this matter let us thoroughly review the subjects participating in these events and the legal relationships generated.

In the event of transboundary damage, the State of Origin of contamination and the Affected State may be identified as the primary subjects.[18] The legal relationship between both State subjects will take place in the framework of International Law. The various sources of International Law will flesh out said legal relationship, thus attributing rights and obligations for the parties.

Transboundary damage is usually the direct result of authorized human activities[19] on the Continental Shelf. Such activities are generally developed by non-State subjects, whether their actions are attributable or not to the State as an abstract entity.[20] These non-State subjects include the victims, the operators and their subcontractors.

In the context of this research, operator means the person who leads directly the drilling and exploitation activities on the Continental Shelf. Moreover, this person has government authorization to conduct such activities.

The legal relationship between the State of Origin and the operator shall be essentially governed by the legislation of the State having jurisdiction over the Continental Shelf, unless there is an international treaty providing a specific

[17] This statement does not deny the consideration of subject of international law providing individuals with certain rules of customary international law. These rules, as well as treaties, are sources of international law. Said rules are essentially limited to the scope of Human Rights and the International Humanitarian Law.

[18] The concepts of transboundary harm, State of Origin and State that may be affected or Affected State, in the presence of harm, to be used in this research shall be as defined by the ILC in Article 2 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 411.

[19] The authorization for these activities is often granted by means of administrative concessions or contracts. Nonetheless, any form of express consent from the coastal State for a person to carry out these activities must be construed as its authorization. This position is supported by the conventional rules governing the sovereign and exclusive rights of States over the Continental Shelf.

[20] See, Watts, Arthur., "The International Law Commission. 1949-1998. Volume III: Final Draft, Articles and Other Materials." Oxford University Press, 1999, p. 1739.

regime.[21] Likewise, due to the complexity of these operations, the operator will subcontract a group of persons with whom other contractual relations will be established. Said legal relationships between the operator and the subcontractors will have a national or international commercial nature, as agreed.

Also, in the analysis of these events, the generic category of victims is used. It includes any person, either natural or juridical, that considers his/her interests have been affected, including States as abstract entities. Albeit this generalization is useful, it may sometimes pose a problem when understanding the nature of the rights and obligations of each one of these subjects considered as victims.

The legal relationships established between the victim and the responsible person may be classified as follows: (1) those emanating from the general international legal system and are established exclusively between the State of Origin and the Affected State; (2) those arising from a treaty between the State of origin and the Affected State. In this case, the *lex specialis* could include private persons as subject of rights and obligations;[22] (3) those deriving from the legal system of the Affected State and are established between that State as a punitive power and the persons who might be considered responsible for damage in its territory;[23] (4) those originating from the legal system of the State

[21] The word *essentially* is used, since it is known that in this legal relationship there could be elements of international private nature resulting from the nationality of the operator, a Bilateral Investment Treaty (BIT) or even from the signing of private documents between the State of Origin and the Operator.

[22] See, e.g. in the area of maritime hydrocarbon transportation, the Convention on Civil Liability for Oil Pollution Damage (1992), International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992), and Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992. In the nuclear level, the Convention on the Civil Liability of Operators of Nuclear Ships (1962) and the Vienna Convention on Civil Liability for Nuclear Damage (1963).
Concerning bilateral agreements, professor Handl states "the Canadian Government's bond guarantee of offshore drilling in the Beaufort Sea. In addition, the United States and Canada have agreed to apply on a reciprocal basis their respective national compensation schemes for damage from nuclear power activities. Under the agreement, the U.S. Government has potentially assumed direct liability *vis-a-vis* private Canadian claimants by committing public funds for compensation if Canadian claims exceed the amount for which U.S. power plant operators are required to carry insurance." See, Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law. Vol. 74, 1980, p.562.

[23] Based on the principle of sovereign equality and the *par in parem non habet imperium* formula, no State may be brought to the courts of another State. This principle of absolute jurisdictional immunity governs the procedure of States in matters relating to transboundary environmental damage. This procedure will be further analyzed in this paper, as well as the criteria to attribute a behavior to a State. Nonetheless, it should be noted that this rule of customary international law has evolved. Based on the difference of the act of a State as *ius imperis* o *ius gestionis*, considerations are made on whether jurisdictional immunity is absolute or relative. In this regard, the United Nations Convention on Jurisdictional Immunities of States and their Property, sets in its Article 12 that "Unless

of Origin and are established between the alleged responsible and the victims with legal standing.

These four legal relationship systems are applied to a reality: the event; but each one of them has their own content. Regardless of the effectiveness of the recourse, a non-State victim shall not have the right to compensation, but several rights according to the relevant legal relationship system. In case of environmental damage, local courts would likely impose a strict liability to the responsible. Similarly, the non-State victim would probably lack *locus standi* to demand compensation in the courts of the State of Origin. Likewise, the victim may appeal to its State of nationality, for it to either exercise or not its right to diplomatic protection against the State of Origin.[24]

Similarly, there will be not a single obligation to compensate for the damage, but different obligations to compensate for different types of damages. This will be determined according to the different subjects and the content of the national or international legal relationships.[25] Although everything is interconnected by the event as a whole, this part of the research will focus on determining the scope and content of international legal relationships resulting from transboundary damage.

Unless otherwise provided by States by means of a treaty, it may be affirmed that there is no international legal relationship between the State of Origin and the private victims of the transboundary damage or between the Affected State and the operator. First of all, in order to determine the existence of an international State liability regime for transboundary damage, the rights and obligations of States, as subjects of international law, must not be confused with

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otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."
See, e.g. Gutiérrez Espada, Cesáreo "La adhesión española (2011) a la Convención de las Naciones Unidas sobre las Inmunidades Jurisdiccionales de los Estados y de sus Bienes (2005)", at Cuadernos de Derecho Transnacional (October, 2011), Vol. 3, Nº 2, pp. 145-169.

[24] Victims as private persons do not have the right to Diplomatic Protection. The exercise of Diplomatic Protection is a discretional power of the State, as a subject of international law. This position is supported by a considerable number of international judgments: Affaire des concessions Mavrommatis en Palestine, Affaire Nottebohm, Affaire Barcelona Traction, and affaire du chemin de fer Panevezys-Saldutiskis.

[25] For example, punitive damages which exist and are compensable under US law [Clean Water Act 33 U.S.C.] are not recognized by International Law. [See, Case of Velásquez-Rodríguez v. Honduras. Inter-American Court of Human Rights. Judgment of July 21, 1989, para. 38, p.10. http://www.corteidh.or.cr/docs/casos/articulos/seriec_07_ing.pdf]

the rights and obligations of victims, operators and subcontractors, as subjects of national law.

Let us review at this point the content of the primary international legal relationships, so as to determine the origin and scope of the rights and obligations of States.

1.2.- Origin and nature of the primary general rights and obligations of States.

To disregard the existence of international law as an integrated whole is a serious methodological mistake if the intention is to discuss the content of its legal relationships. Therefore, this section is aimed at analyzing the content of some international legal relationships relevant to this topic as a whole. A thorough analysis of this topic will be conducted in Chapter 2. According to Boyle "[n]either conflict nor fragmentation are necessary consequences of the interaction of international environmental law with other branches of international law. In practice, international tribunals have usually found various ways of applying international law as an integrated whole, except where the parties themselves have made this difficult through the balkanization of dispute settlement and the selective choice of applicable law."[26]

In our analysis, the successive approximations method will be used on the object of study, being understood in this research as a set of international legal relationships which arise from transboundary damage resulting from the exploitation of natural resources on the Continental Shelf. Through a holistic approach, the question of the more general rights and their dynamic counterpart, the obligations, will be immediately addressed.

1.2.1.- The right of States over their natural resources under permanent sovereignty.

When examining the content of legal relationships resulting from transboundary damage caused by offshore activities, it is understood that the primary origin of the rights involved lies on the self-determination over the natural resources

[26] Boyle, Alan. "Relationship between International Environmental Law and Other Branches of International Law." at The Oxford Handbook of International Environmental Law. Oxford University Press, 2006, p.145.

under the sovereignty of a State. This international rule of customary law has a general and undisputed character. This right enjoys a wide conventional support and is one of the pillars of the contemporary international legal system. Just to mention an example, "the right of peoples to freely use their wealth and natural resources"[27] is recognized in the first article of every International Covenant on Human Rights.[28]

Regardless of the validity of Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources,[29] it reflects that, as part of the right to use the natural resources, States shall be able to affect the property of private persons. For instance, nationalization is a lawful act by its sovereign nature; nevertheless, it generates an obligation to compensate[30] whenever a property right is considered to be affected. As well noted by Fleming, the nations of the international community, virtually without exception, have fully recognized the right of any State to nationalize, since, in his view, it is axiomatic that no State may interfere in the sovereign right of another State.[31]

Two important conclusions to our research are drawn from this reflection. Firstly, the exercise of the rights related to the exploitation of natural resources is a matter of sovereignty of States, even when private persons take part in their exploitation. Secondly, despite the lawfulness of freely using these natural resources, under permanent sovereignty, if property rights are affected, then the obligation to compensate those affected emerges in international law.

Before going deeper into the obligations, let us examine the legal nature of the specific right of coastal States to exploit natural resources of gas and oil on their

[27] Delgado Sánchez, Lester. "Los Pactos sobre Derechos Humanos: Un paso en el camino." *Temas* Magazine, No. 59, July-September, 2009, p.66.

[28] See, International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights. Adopted and opened for signature on 16 December 1966. http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

[29] United Nations. "Resolution on Permanent sovereignty over natural resources." General Assembly, 17th session, A/RES/1803 (XVII). 14 December 1062. http://research.un.org/en/docs/ga/quick/regular/17

[30] Since it is not relevant to this research, the debate on the means to implement the obligation to compensate will be set aside. What is relevant is the very existence of the obligation to compensate, whether it be "appropriate" or, according to the well-known Hull rule, "prompt, adequate and effective." Nonetheless, we share the opinion on the non existence of the Hull formula as part of the Customary International Law. See, Roy Chowdhury, Subrata. "Permanent Sovereignty over natural Resources: Substratum of the Seoul Declaration." International Law and Development. Martinus Nijhoff Publish, The Netherlands, 1988, p.77. To see the exchange of views held between the Government of Mexico and the former US Secretary of State, Cordell Hull. See, Subedi, Surya P. "International Investment Law: Reconciling Policy and Principle." Second Edition, Oxford and Portland, Oregon, 2012, pp.6-ss.

[31] Fleming, John. "The Nationalization of Chile's Large Copper Communities in Contemporary Interstate Relations." Villanova Law Review, Vol. 18, March 1973, p. 602.

Continental Shelf. The consolidation of the regime of coastal States' rights over their Continental Shelf finds a turning point in the proclamations made by President Truman in 1945.[32] Apart from the meaning of said proclamations[33] for the subsequent development of the law of the sea, the fact is that they motivated the fast consolidation of the legal regime existing today. Unlike old claims by maritime powers, an expansion of the claims of rights of coastal States to "preserve the economic coastal commons"[34] was initiated.

The rights over the Continental Shelf were born in the international conventional level through the Geneva Convention on the Continental Shelf of 1958.[35] Under Article 2, coastal States have sovereign rights for the purpose of exploring and exploiting natural resources existing on the Continental Shelf.[36] The article itself clarifies that these rights have an exclusive character and that no one may exercise them without the express consent of the State. It categorically states that the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.[37]

Although the rights over the natural resources existing therein are *ipso facto* and *ab initio* rights, the existence in that area of an extension of the concept of territorial sovereignty, as a constituent of the State, cannot be affirmed. The rights of the coastal State in that area are clearly limited. Articles 4 and 5 of the Geneva Convention establish that the coastal State may not impede the laying and maintenance of submarine cables or pipelines on the Continental Shelf.

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[32] Presidential Proclamation No. 2667, 28 September, 1945 and Executive Order No. 9633, 28 September 1945.

[33] See, e.g,. García-Amador, F.V., "The Latin American Contribution to the Development of the Law of the Sea." American Journal of International Law, Vol 68, 1974, pp. 33-36; and Nelson, L.D.M., "The Patrimonial Sea." International and Comparative Law Quarterly, Vol. 22, October 1973, p. 673.

[34] See, Dupuy, Rene-Jean and Piquemal, A., "Les Appropriations Nationales des Espaces Maritimes.", Actualités du Droit de la Mer, Colloque de Montpellier, Paris, Pédone, 1973, p. 115.

[35] United Nations, Treaty Collection., Convention on the Continental Shelf. Geneva, 29 April 1958. https://treaties.un.org/Pages/CTCTreaties.aspx?id=21&subid=A&lang=en

[36] "Article 2: 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

[37] The emergence of this regime will be generally ratified and supported by the UN Convention on the Law of the Sea of 1982. See, article 77 ss.

Likewise, while exercising its rights in this area, the coastal State can neither unjustifiably hinder navigation.[38]

In summary, States have the sovereign right to explore and exploit gas and oil deposits on their Continental Shelf, as a result of international legal relationships, not because it is in fact part of the State's territory.[39] Consequently, this right can only be conceived as part of a special international regime for that area. In the case of the Gulf of Mexico, these international legal relationships are concluded by bilateral agreements among Mexico, Cuba and the United States.[40]

Therefore, whenever a private person conducts prospecting or exploiting activities of gas or oil deposits on the Continental Shelf, it must have the express consent of the coastal State to exercise its sovereign and exclusive rights. International law provides that these rights are completely independent of any proclamation or occupation, effective or notional. For that reason, since private persons cannot be described as subjects of international law, all international legal relationships emerging from transboundary damage are solely attributable to States. This matter will be further addressed in the analysis of the work of the International Law Commission, in Chapter 3 devoted to the specific question of responsibility and liability of States.

1.2.2.- Direct obligations of States in case of transboundary damage and in the development of marine activities.

The obligation to make reparations for damages in the relations among States is in accordance with the very harmonic existence of the International

[38] For further reference on the limited character of these "sovereign rights" and their patrimonial nature; See Castañeda, Jorge., "The Concept of Patrimonial Sea in International Law." Indian Journal of International Law, Vol 12, 1972, pp. 535-42.

[39] This does not mean we ignore that the basis for the creation of the special regime of rights governing the Continental Shelf was the alleged 'extension of a State's territory. However, according to the State's theory, assertions cannot be made that we are in the presence of the 'territory' on which the State exerts exclusively indivisible and inalienable sovereignty. What is permitted or not to the State in this special area emanates from international law and is limited by the rights of other States.

[40] See, e.g., Maritime Boundary Agreement Between the United States of America and the Republic of Cuba, 16 December 1977 (applied provisionally as from 1 January 1978); Agreement on the delimitation of the exclusive economic zone of Mexico in the sector adjacent to Cuba Maritime areas, 1976. Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles, 9 June 2000; and Treaty on maritime boundaries between the United States of America and the United Mexican States (Caribbean Sea and Pacific Ocean), 4 May 1978. http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/USA.htm

Community. It is axiomatic that no State may interfere in the sovereign right of another State and the principle *sic utere tuo ut alienum non laedas*.[41] The principle of sovereign equality, the cornerstone of Contemporary International Law, cannot be conceived if a State affects another State without bringing about international legal consequences. The lawful or unlawful character of the act of the State is irrelevant to the effects of the very existence of an obligation to make reparations.[42]

As a general rule,[43] State interference in property rights generates an international obligation to make reparations for damage caused, unless there is a cause for exoneration from the responsability.[44] It may be affirmed that, at the international level, affecting a private person's property without due compensation is wrongful. Neither the lawful character of the act of nationalizing nor of the act causing transboundary damage is relevant. The accountability of the State of Origin should be greater as it allowed its territorial sovereignty to be trespassed and the rights of another State affected. According to the judgment of Max Huber, former President of the International Court of Justice: "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory."[45]

The concept of diplomatic protection is the highest expression of the right of States to protect the interests of its nationals against the acts of any other State. It is a residual recourse of States for when there is no specific regime to

[41] Some authors see this principle as the genesis of the obligation not to harm the environment of other States or areas outside the national jurisdiction. See, e.g., Barros, James y Douglas M. Johnston. "Contaminación y Derecho Internacional." Translation by Flora Setaro. Buenos Aires: Marymar, 1977, p. 94.

[42] Regardless of our criticism of the work of the International Law Commission, to be explained below, its assessment on the licit nature of an act of State is undeniably important. This assessment and the extent of the fault will play an essential role for international courts to provide specific content to the obligation to make reparations.

[43] It is affirmed as a general rule because some authors consider the *clean hands* doctrine as one of the prerequisites for diplomatic protection. As stated by Crawford the International Court of Justice has never implemented this principle, although it has been applied in matters relating to investment. See, Crawford, James. "Brownlie´s Principles of Public International Law." 8th Edition, Oxford University Press, United Kingdom, 2012, p.701.

[44] We don´t said "circumstances precluding wrongfulness" – according article 20 of the ILC proposal- because the invocation of a circumstance precluding wrongfulness don´t affect the international obligation of make reparations.

[45] Island of Palmas case. (Netherlands v. U.S.A.), Award of 4 April 1928, La Hague, U.N.R.I.A.A., Vol. II, 2006, pp. 829-871, at 839. http://legal.un.org/riaa/vol_II.htm

demand responsibility from another State.[46] Nevertheless, the road to diplomatic claims is tortuous for States and unsafe for private victims, whose interests may become less salient due to a greater political interest. Let us not forget the Swahili proverb "When the elephants fight, it´s the grass that gets trampled."[47]

Additionally, the international regime for the protection of foreign investments is well known for the lack of strength to demand responsibility and liability from States in the face of any direct or indirect damage to the property relations of foreign investors. Certainly, there is a conventional regime in this case, but this regime has been reinterpreted and its scope expanded by the work of foreign investment courts. In this field, the international courts and the doctrine[48] have come to declare that a series of licit acts by a State, even when they are not intended to affect the property of an investor, is an indirect expropriation as it affects such property.

The tendencies in this area of the development of international law contrast sharply with the opinions of those who uphold that transboundary damage does not generate strict liability for the State of Origin. The International Law Commission itself joined this stand by stating: "The principles developed in the context of disputes concerning foreign investment may not automatically be extended to apply to the issues of compensation in the field of transboundary damage."[49]

We reject this approach for it does away with the holistic approach to this issue, and we believe it reflects a more political background rather than a legal one.

[46] See, CIADI Case "CMS vs. Argentina", of July 17, 2003, where the Court decided that: "45. Diplomatic protection itself has been dwindling in current international law, as the State of nationality is no longer considered to be protecting its own interest in the claim but that of the individual affected.25 To some extent, diplomatic protection is intervening as a residual mechanism to be resorted to in the absence of other arrangements recognizing the direct right of action by individuals. It is precisely this kind of arrangement that has come to prevail under international law, particularly in respect of foreign investments, the paramount example being that of the 1965 Convention." Note that Article 27 of the Washington Convention specifically limits to the States the exercise of Diplomatic protection for the cases of investor-State claims. It is only exercised if the condemned State does not follow the decision. See, ICSID Case no ARB/01/8. (CMS Gas Transmission Company v. Argentina Republic), Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003. https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/01/8&tab=DOC

[47] Fahn, James D., "A Land on Fire: The Environmental Consequences of the Southeast Asian Boom." Publisher Basic Books, 2004, p.154.

[48] See, e.g., Reisman, W. Michael., and Sloane, Robert D., "Indirect Expropriation and its Valuation in the BIT Generation." British Yearbook of International Law, 2004, pp-122-128.

[49] United Nations. "Report of the International Law Commission." General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10), p.150.

The international investment law and the environmental law may be two different branches, but they must be consistent with the main tree: international law. Regardless of all legal-theoretical argument, it is a fact that in foreign investment, underdeveloped States are, as a general rule, the responsible parties.[50] However, concerning hazardous activities likes use of nuclear energy or deep-water oil prospecting, those responsible will generally be developed States. The only common element is that in both international systems the interests of major transnational corporations prevail.

Let us conclude this general review with an approach to the obligations of States not to harm the marine environment and the interest of other States. Subject to a subsequent analysis on UNCLOS, at this point it would be interesting to compare articles 139[51], 235[52] and 263[53] of the Convention.

[50] See, Olivet, Cecilia., and Eberhardt, Pia., "Profiting from injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom." Published by Corporate Europe Observatory and Transnational Institute. Brussels/Amsterdam. 2012. https://www.tni.org/es/publicacion/cuando-la-injusticia-es-negocio?content_language=en

[51] Part XI. The Area. Article 139 Responsibility to ensure compliance and liability for damage.

1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

3. States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations.

[52] Part XII. Protection and Preservation of the Marine Environment. Article 235. Responsibility and liability.

1. States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

[53] Part XIII. Marine Scientific Research. Article 263. Responsibility and liability.

1. States and competent international organizations shall be responsible for ensuring that marine scientific research, whether undertaken by them or on their behalf, is conducted in accordance with this Convention.

2. States and competent international organizations shall be responsible and liable for the measures they take in contravention of this Convention in respect of marine scientific research conducted by other States, their natural or juridical persons or by competent international organizations, and shall provide compensation for damage resulting from such measures.

3. States and competent international organizations shall be responsible and liable pursuant to article 235 for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by them or on their behalf.

These articles contain three different regimes of responsibility and liability of States, according to place and conducted activities. For their analysis, the general provision in Article 304 must be taken into consideration.[54] It upholds the evolutionary and non-restrictive character of any possible interpretation of the responsibility and liability regimes provided for in the Convention.

Articles 139 and 263 cover the activities developed in the Area and those relating to marine scientific research, respectively. Many of the questions concerning the scope of the obligations of States in relation to activities in the Area were clarified in the Advisory Opinion by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea.[55] Although activities in the Area and scientific research may be developed outside the jurisdiction of States, both articles stipulate that any natural person conducting such activities must be under the control of a State Party or an international organization. The relevance of this provision arises from the fact that natural persons have no legal capacity as subjects of international law and, therefore, they cannot individually exercise rights in this regard.

In relation to private persons, States have the "obligation to ensure" they comply with the rules of the Convention. Given its content, we agree with ITLOS that this is a State's "due diligence" obligation.[56] At the international level, States must ensure that persons under their jurisdiction by *ius imperium* act in accordance with international law. What is forbidden for the king, if he is sovereign, is also forbidden for all the subjects. To hold States responsible for acts committed by persons under their jurisdiction, would be to dilute their own capacity as subjects of international law. Obviously, the person who does not abide by these provisions shall be punished by the State; hence, the content of their obligations, in this case, is to regulate and enforce the law.[57]

[54] Article 304 "The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law."

[55] Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. Advisory Opinion of 1 February 2011 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

[56] Id. Para 107 to 120. pp. 34-37.

[57] Id. para 120. p.37.

The above does not entail that in every treaty containing the expression “to ensure”, there is an obligation of conduct and not of result. It is regrettable how superficially ITLOS addressed this question in paragraphs 112 and 113 of its advisory opinion.[58] In our view, changing the scope of comments on Articles relating to the Responsibility of States was distorted. The phrase “is often used” is far from being an absolute conclusion. It is thus inappropriate to automatically move the condition of "obligation of conduct" to the content of UNCLOS Article 194.2.

If the English version were ambiguous, doubts may be easily dispelled by analyzing the equally authentic Spanish version.[59] The phrase “to ensure” of Article 139.1 and the phrase “to ensure” of Article 194.2 have been translated differently based on their scope. In case of Article 139.1, the phrase was translated as “velar”, giving the sense of “to ensure appropriate behavior”. This indicates the need for a due diligence, so the interpretation of Article 139 by ITLOS is correct. However, that is not the translation in Article 194.2 where the term used was “garantizar … que no causen perjuicio”. In our opinion, it means ensuring a result, not to allow something. This question will be further addressed later on, when discussing this specific obligation. Let us continue then with the analysis of Article 139.

After establishing the obligation of States to ensure that persons acting under their jurisdiction comply with international rules, Article 139.2 provides that damage caused by the failure of a State Party to carry out its responsibilities shall entail liability. It also limits the State liability for acts committed by private persons. It establishes that States shall not be liable for acts by sponsored contractors, if they have taken all necessary and appropriate measures.

[58] Paragraph “112. The expression “to ensure” is often used in international legal instruments to refer to obligations in respect of which, 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 (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).
Paragraph 113. An example may be found in article 194, paragraph 2, of the Convention which reads: “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment …”.

[59] Article 320 of the Convention regarded the texts in the six official languages of the United Nations as equally authentic. In fact, it issued no consideration on which version should prevail in case of conflicts.

From the above, it may be deduced that besides the obligation to ensure compliance by private persons under their jurisdiction, there are other direct obligations for States, the violation of which entails responsibility and liability. As wisely stressed by Professor Handl "… such obligations arise independently of the State's due diligence "obligation to ensure"…."[60]

Article 263 on the marine scientific research regime, establishes three clearly differentiated levels of responsibility and liability: firstly, states shall be responsible for ensuring that marine scientific research, whether undertaken by them or on their behalf, is conducted in accordance with this Convention." As in article 139.1, it establishes a due diligence obligation.

Secondly, it provides that states shall be responsible and liable for the measure they take in contravention of this Convention. Like article 139.2, it entails the existence of other direct obligations of States, the breach of which will bring about responsibility and liability.

Thirdly, it stipulates that states shall be responsible and liable for damage caused by pollution of the marine environmental arising out of marine scientific research undertaken by them or on their behalf. Unlike article 139.2, in this legal regime, the responsibility and liability of States for acts committed by private persons are not limited or separated. For damage caused by environmental pollution, this article refers to the regime established in Article 235.

Article 235 directly indicates that States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law. Regrettably, legislators decided to move the issue of creating a specific regime of responsibility and liability of States for environmental pollution to the future. The solution they found to the evident disagreements existing among States was to refer to international law and its subsequent development. This constructive ambiguity is common in texts negotiated at the UN, when an agreement is not reached.

[60] Handl, Günther., "Case Note: Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: The International Tribunal of the Law of the Sea´s recent contribution to International Environmental Law." Review of European Community & International Environmental Law, RECIEL 20 (2) 2011. p. 208.

From the above, it may be concluded that besides the obligation to monitor the activities of private persons under their control or jurisdiction, States have other direct obligations. Failure of States to comply with any of these obligations entails responsibility and liability.

Obviously, regarding the activities in the Area, there will be a difference between the obligations of States and those of sponsored contractors, since the latter become subjects of international law.[61] This difference does not exist in the field of marine scientific research, in which private persons will always act on behalf of a State. Consequently, paragraph 3 stipulates that States shall be responsible and liable for acts committed by private persons acting on their behalf. It is implied that marine scientific research may only be developed by States in their capacity as subjects of international law. Nonetheless, such paragraph refers to regime of Article 235 which, in turn refers to a barely developed legal framework of international law.

Likewise, Article 235 provides the opportunity to research on what these other direct international obligations might be. Its non-compliance will suffice to invoke responsibility and liability of States. Normally, since this is a multilateral treaty, legal relationships are established among all States Party. If these rules include rights and obligations of customary nature or constitute general principles, they may be invoked by any State.[62] Moreover, certain obligations enshrined in a multilateral treaty may be considered to be bilateral obligations, to the extent that they essentially concern two States.[63]

To protect and preserve the marine environment[64] is the first direct obligation that stands out. Its general character turns it into a reference for the acts of States. Its content is described in the obligations that follow that Part of the Convention.

[61] Under general legal framework established by the 1982 United Nations Convention on the Law of the Sea and its 1994 Implementing Agreement relating to deep seabed mining, the International Seabed Authority has developed the Mining Code. This set of international rules enables private persons to become subjects of rights and obligations at the international level. The set of rules, regulations and procedures which constitute the Mining Code is available at https://www.isa.org.jm/mining-code/Regulations

[62] Annacker, C., "The Legal Régime of Erga Omnes Obligations.", Austrian Journal of Public international Law, Vol. 46 1993, p. 136

[63] See, Sachariew, K., "State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and its Legal Status." Netherlands international Law Review, Vol. 35, 1988, p. 277.

[64] See, article 192 of UNCLOS.

Two specific and direct obligations for States arise from articles 194.1 and 194.2. On one hand, it establishes that states shall take all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source[65] and, on the other hand, the States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.[66]

In addition to the conclusions of the linguistic analysis made to the text of the Convention and its reference to the phrase "to ensure", the separate existence of these two obligations provides an important conclusion. If the obligation contained in Article 194.2 were of due diligence and not of result, its inclusion in the text would be unnecessary for it would contribute nothing new.

The content of the obligation stipulated in Article 194.1, with a clear due diligence standard, would suffice. Under this article, States shall take all necessary measures to prevent, reduce and control pollution of the marine environment. This obligation has a national and international scope. Additionally, Article 195 establishes that, in taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another.

In this case, are we in the presence of a tautology or the scope of Article 194.2 is different for this being an obligation of result? In our opinion, the text reflects a structural ambiguity. The nature of this obligation, as an obligation of result and not of due diligence, is based on a grammatical[67] and systemic[68] analysis

[65] See, article 194.1 of UNCLOS.
[66] See, article 194.2 of UNCLOS.
[67] We focus on Spanish language for it is the mother tongue of the researcher; however, an analysis of the text in French language bears similar results. The outcomes of a comparative linguistic analysis of the reference "to ensure" in articles 139.1 and 194.2 in the six UN official languages would be interesting.
[68] See, Anchondo Paredes, Víctor Emilio., "Métodos de Interpretación Jurídica." Biblioteca Jurídica Virtual. Instituto de Investigaciones Jurídicas of UNAM. 2012, pp.37-45.
http://www.juridicas.unam.mx/publica/librev/rev/qdiuris/cont/16/cnt/cnt4.pdf

of the Convention, on the good neighbor and abuse of rights principles,[69] as well as on the principle of sovereign equality. About this last principle, Peter-Tobias said: "It must be recalled, however, that the prohibition principle is based on sovereign right of states to their territory. There is no evidence that it is necessary to refer to a specific entitlement based on a single component in raising a complaint about transboundary pollution. One can thus conclude that the prohibition of transboundary pollution is based on the state interest in the environmental integrity of its territory. Treaty law reflects this notion."[70]

Incidentally, unlike UNCLOS, the draft articles on Prevention of transboundary harm from hazardous activities reflects another view of this issue. According to this proposal, the obligations explained above are modified into an obligation of prevention,[71] but construed as international obligation of conduct, in other words, of due diligence. Albeit in Article 194.2 States shall ensure not to cause damage and that pollution does not spread beyond their borders; the proposal of Article 3 of the Commission does only impose the duty to prevent a significant damage and minimize the risks. In the comments to this article, the Commission argues that its proposal is based on the principle *sic utere tuo ut alienum non laedas*, which in turn was reflected in Stockholm Principle 21.[72] In

[69] See, Lammers, Johan G. "Transfrontier Pollution and International Law: the Present State of Research." The Hague Academy of International Law, Center for Studies and Research in International Law and International Relations, Transfrontier Pollution and International Law, 1986, p. 100.

[70] Stoll, Peter-Tobias., "Transboundary Pollution." at International, Regional, and National Environmental Law. Eds. Fred L. Morrison and Rudiger Wolfrum. Kluwer Law International, 2000, p.174.

[71] United Nations. "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 390. Article 3. Prevention: The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

[72] We are familiar with remarks such as professor Handl's, where the limited scope of Stockholm Principle 21 is established. Quote: "Despite extensive discussion, this issue has remained a source of some confusion among international lawyers. Differences in terminology apart, one major reason for this state of affairs is the frequently encountered misconception of the scope of the primary rule of state responsibility embodied in Principle 21 of the Stockholm Declaration. Couched in wide terms, namely as the obligation to ensure -that no extraterritorial environmental damage is caused, this rule might be taken to imply that a state becomes internationally liable simply upon the occurrence of significant transnational pollution damage. A more careful analysis, however, makes it evident that, as a general proposition, the notion of state liability based on pure causality is without foundation in present international law." Handl, Günther., "International Liability of States for Marine Pollution." The Canadian Yearbook of International Law, Vol. 21, 1983. p. 94.
On the opinions given by the States in the discussions for the drafting of a treaty, we consider that they fall short in the intentions to prove the actual scope of the rule after its passing. This was supported by the International Court of Justice when it considered the value of these positions to interpret the scope of the UNCLOS provisions. [See, e.g., Fisheries Jurisdiction case (United Kingdom v. Iceland), Judgment of 25 July 1974 (Merits), I.C.J Reports 1974, p.3, at p. 23, para. 53.]
Professor Handl is not entirely wrong when stating that the practice of States does not entail an objective responsibility for transboundary damage. The natural reaction of States in case of transboundary damage provoked either by direct actions or by private persons, is to deny responsibility. However, there is an evident tendency of States to avoid international claims and to seek extrajudicial offset agreements [See, e.g., compensation to Canada

our view, instead of confirming the scope of these denigrated principles, through its proposals, the Commission has further diluted the content of the obligations of States in case of transboundary damage. Under this standard, "to ensure" is to prevent and minimize the risk of transboundary damage, which will also have to be significant.

By reviewing again the content of the remaining relevant direct obligations established at UNCLOS, we find the obligations to cooperate and to notify imminent or actual damage in case of transboundary harm.[73] Likewise, States shall keep under surveillance the effects of any activities, especially those they permit or in which they engage and are likely to have a negative impact on the environment.[74] They also have the obligation to produce and publish reports to assess the potential environmental effects of such activities.[75]

The obligations to assess, notify and collaborate among States were developed and codified by the Commission in its drafts articles on prevention and the draft principles on allocation of loss. The obligation to notify a risk is part of the international law,[76] but its exercise raises interesting questions when studying the responsibility and liability of States. On the basis of the good neighbor principle, States must obviously notify neighboring States in case of imminent danger. Nonetheless, consequences resulting from failure to notify dangerous activities and the potential effects of the neighboring State's response are not that clear.[77]

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in the Cosmos 954 case, Cheng, Bin.,. "Studies in International Space Law." Ed. Clarendon Press. Oxford. 1997. p. 288]. In all cases reviewed where a decision has been made on transboundary damage, courts have imposed the obligation to compensate, unless the damage is considered nonexistent or insignificant as the Lake Lanoux case. [See, e.g., Affaire du Lac Lanoux. (Espagne v. France), Sentence Arbitral du 16 Novembre 1957, U.N.R.I.A.A., Vol. XII, 2006, pp. 281-317. http://legal.un.org/riaa/vol_XII.htm]

[73] See, articles 197 and 198 of UNCLOS.

[74] See, article 204 of UNCLOS.

[75] See, article 206 of UNCLOS.

[76] Okowa, Phoebe N., "Procedural Obligations in International Environmental Agreements." British Yearbook of International Law, Vol 67, 1997, pp. 275-336.

[77] If risk is the element on which a strict responsibility regime for transboundary damage is sought to be developed, acquiesce or not of the State in the development of this activity could have an effect on the responsibility and liability of the State of Origin. For example, while performing offshore activities in the Gulf of Mexico, it is uncommon that States make consultations with each other. Does failure to notify the neighboring State of an extremely dangerous activity generate responsibility? Is the State of Origin relieved from responsibility if it had the consent of neighboring States? Does the neighboring State have the obligation to request consultations when these extremely dangerous activities near maritime areas under its jurisdiction are of public knowledge? These questions get further complicated rather than clarified as a result of the work developed by the International Law Commission. This is one of the many reasons why we consider that such projects will not become a reality in an

In terms of obligations, one last question emerges from analyzing paragraphs 2 and 3 of UNCLOS Article 235. Paragraph 2 compels States to ensure that their legal systems contain recourse against persons under their jurisdiction in order to guarantee prompt and adequate compensation in respect of damage caused by pollution. Evidently, this paragraph seeks to ensure access of private victims of transboundary damage to justice. Nevertheless, paragraph 3 refers to the international level with the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution.[78]

This reference to "all" indicates the existence of damage that cannot be compensated in accordance with national legal systems,[79] and still they must be compensated under the Convention itself and the international law, which it refers to. Let us review then the state of development of the various sources of international law, for a better understanding of the content of these international obligations of States and their eventual responsibility and liability.

international convention. Regardless of the good neighbor principle, it is obvious that the development of these activities is the sole responsibility of the State of Origin.

[78] A pertinent assessment of the work of the ILC and its consequences on the balance between the access to justice of private persons and the claims between States may be consulted at Boyle, A.E. "Globalizing Environmental Liability: the interplay of National and International Law." at Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law, Cambridge University Press, 2006, pp. 559-586.

[79] This would be the type of damage against the *res publica* a State or against private victims that would not or cannot directly make a claim against the State of Origin and demand their rights through diplomatic protection instead.

Chapter 2. Sources of International Law and State Practice. Assessment of and contribution to the content of international legal relationships on responsibility and liability of States, in case of transboundary damage.

Article 38.1 of the Statute of the International Court of Justice clearly determines the sources of international law.[80] This article considers treaties as the primary source of contemporary international law.[81] These treaties alone cannot solve the numerous conflicts generated by the very life of nations. Therefore, the need to appeal to custom and general principles of law increases due to the insufficient development of conventional law on a specific issue. Nevertheless, determining the existence of a legal provision under custom or general principles is, above all, a matter of subjective assessment. The task is even complex if an undisputable rule, like the prohibition of the use of force[82] and the current tendencies to undermine said prohibition,[83] is analyzed.

2.1. - International Treaties and Codification Attempts.

First and foremost, it should be noted that there is no international treaty regulating the responsibility and liability of States in general. The draft articles prepared by the ILC on State responsibility are the closest attempt, which has been widely recognized by international courts. However, evidently there is neither a political consensus on its adoption as a treaty[84] nor an international

[80] "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law."

[81] For some authors like Lukashuk, treaties are the only source of international law, for they clearly express the will of sovereign States to follow certain rules. Lukashuk, I., "Fuentes del Derecho Internacional Contemporáneo." El Derecho Internacional Contemporáneo. Ed. Progreso, Moscú, 1973, pp.188-189.

[82] See, e.g., Gray, Christine., "International Law and the Use of Force." Third Edition, Oxford University Press. 2008.

[83] See, Orakhelashvili, Alexander., "Changing Ius Congens through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions." The Oxford Handbook of the Use of Force in International Law, Oxford University Press, United Kingdom, 2015, pp. 157-178. Willmot, Haidi and Mamiya, Ralph. "Mandated to Protect: Security Council Practice on the Protection of Civilians." The Oxford Handbook of the Use of Force in International Law, Oxford University Press, United Kingdom, 2015, pp. 377-382.

[84] This matter has been repeatedly postponed by the Sixth Committee of the United Nations. Even the proposal to hold a Diplomatic Conference to assess this possibility has not reached consensus. During discussions, some States have directly expressed that the draft articles contain unacceptable elements in the international practice. Other States have indirectly obstructed the possibility to turn them into a conventional rule, arguing that a Diplomatic Conference might affect their prestige, if the text is open to negotiation. The latest discussions and background information on this matter are available at http://www.un.org/en/ga/sixth/68/StateRes.shtml.

treaty that generally regulate the general principles of environmental law.[85] Likewise, there are no multilateral treaties regulating the question of responsibility and liability of States for transboundary damage resulting from the exploration and drilling of the Continental Shelf.[86]

2.1.1. - The labor of the International Law Commission.

The issue of the responsibility and liability of States drew the attention of the Commission from very beginning. From 1955 to 2001, the Commission worked on the drafting of rules on State responsibility. In addition, the Commission decided to study the issue of International liability for injurious consequences arising out of acts not prohibited by international law.[87] This topic was included in the ILC agenda in 1978 and coincided with the approval by the Commission of the first set of articles on State responsibility.

At that time, the ambitious vision of F.V. García Amador[88] on the question of responsibility for injuries to the persons or property of aliens had failed. The Commission had stopped drafting primary rules on the matter and limited its analysis to a more pragmatic approach.[89] With this new approach, work became easier, although the compilation of secondary rules on State responsibility took another 40 years. According to Dupuy "[t]he first step was taken … eliminating

[85] The Stockholm and Rio Declarations, to be analyzed in Chapter 4, only show a certain level of political consensus and their non-binding character undermines their scope.

[86] UNCLOS provisions of general application constitute the closest approach to this topic. In addition to the treaties mentioned in footnote No. 22 on prevention and cooperation, See, e.g., 1992 Convention for the protection of the marine environment of the North-East Atlantic (the OSPAR Convention); 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 (The Barcelona Convention); and 1981 Convention (and 1985 Protocol) for co-operation in the protection and development of the marine and coastal environment of the West and Central African Region (The Abijan Convention). In the Gulf of Mexico area See, e.g., The Cartagena Convention in the Wider Caribbean Region and The Protocol for the Cooperation in Combating Oil Spills in the Wider Caribbean Region and Memorandums of Understanding between Mexico and the U.S. and the Wider Caribbean Region Multilateral Technical Operating Procedures (MTOP) for Offshore Oil Pollution Response.

[87] "Draft articles on Prevention of transboundary harm from hazardous activities." See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10); and "Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities." See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10).

[88] See, Yearbook of the International Law Commission 1956, Vol. II. Doc A/CN.4/96, pp. 173-231; Yearbook of the International Law Commission 1957, Vol. II. Doc A/CN.4/106, pp. 104-130; Yearbook of the International Law Commission 1958, Vol. II. Doc A/CN.4/111, pp. 47-73; Yearbook of the International Law Commission 1959, Vol. II. Doc A/CN.4/119, pp. 1-36; Yearbook of the International Law Commission 1960, Vol. II. Doc A/CN.4/125, pp. 41-68; and Yearbook of the International Law Commission 1961, Vol. II. Doc A/CN.4/134, pp. 1-54.

[89] Crawford, James., "The International Law Commission´s Articles on State Responsibility. Introduction, Tex and Commentaries." Cambridge University Press, United Kingdom, 2002, pp. 1-2.

all reference to the subjective and psychological dimensions of "fault," and replacing it with the notion of wrongful act as the origin of responsibility."[90]

Crawford rightly states that the State responsibility regime covers both strict liability and fault liability, construed as lack of due diligence or dolus.[91] Nonetheless, for the purposes of this project, responsibility depends on the violation of a primary rule (wrongful act) and not on the occurrence of the damage *per se*. Liability shall be "one of the consequences of the violation or non-observance of an international obligation."[92] Consequently, "[t]he ILC was then exposed to the danger of creating an artificial gap between wrongful acts and "acts not prohibited by international law."[93]

Not having answered the question on the existence of a primary international obligation not to harm another State, a question arose on what would happen if a State is harmed without having violated an international obligation.[94] In order to answer this trick question[95], the Commission decided to develop a new issue: International liability for injurious consequences arising out of acts not prohibited by international law. As a result, there was even greater confusion and the general question raised by this issue was never answered.

As a solution to the divergent political views of States, in 1991, Special Rapporteur Barboza suggested a new approach to this matter. The international liability for damage arising out of acts not prohibited was reduced to liability emerging from a dangerous activity.[96]

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[90] Dupuy, Pierre M., "The international Law of State Responsability: Revolution or Evolution?" Michigan Journal of International Law, Vol. 11, 1989-1990, p.127.

[91] Crawford, James., "The International Law Commission´s Articles on State Responsibility. Introduction, Tex and Commentaries." Cambridge University Press, United Kingdom, 2002, p. 13.

[92] García-Amador, F.V., "State Responsibility in the Light of the New Trends of International Law." The American Journal of International Law, 1955, p.340.

[93] Dupuy, Pierre M., "The international Law of State Responsability: Revolution or Evolution?" Michigan Journal of International Law, Vol. 11, 1989-1990, p.113.

[94] Id. p.123.

[95] The term trick question is used, because it entails the non-existence of the international obligation not to cause significant harm to other States. Where this obligation exists, and we consider this is the case, then any significant damage would be wrongful act. As a consequence, States would be responsible and would have the obligation to compensate for that damage.

[96] The process to classify an activity as dangerous is so subjective and changing that, to date, no criterion exists on which might be these activities. When de Commission passed its draft articles on prevention, it submitted a list as an example, recognizing this list would not be restrictive. When the draft principles to assign damage were passed, it just refused to do the task.

The question of international liability for injurious consequences arising out of acts not prohibited by international law will negatively result in: (1) a draft article that essentially upholds the idea that States must foresee that, while conducting their dangerous activities, they do not cause transboundary damage; (2) the question of liability for damages will be reduced to a timid draft principle on how to assign loss. On the limited legal validity of these principles, suffice it to quote the Commission itself: "It did not attempt to identify the current status of the various aspects of the draft principles in customary international law and the way in which the draft principles are formulated is not intended to affect that question."[97]

Summarizing the work of the ILC, the divide generated by the approach adopted in its works on State responsibility brought up the wrong question. The attempts to answer it affected the very system of international State responsibility. Consequently, it would seem lawful to harm another State as a result of acts not prohibited by international law. The lesson learned confirms the old proverb that goes: «As the twig is bent, so grows the tree».

2.2.- Customary International Law.

Under Article 38.1, custom is provided as a source of international law as it reflects a uniform and repeated practice of subjects of international law. Additionally, this standard of conduct must possess the subjective element of *opinio iuris sive necesitatis*.[98] This implies that States must be convinced they are acting under the law.

Custom is the oldest source; it originates from the fact that some States behave the same manner before a relation affecting them: such conduct, when continued and visibly adopted by a high number of States without opposition of others, is transformed into an international acquiescence, becomes part of the rules governing the generality of States, turns binding as a legal provision.[99] Its importance lies in the fact that "[i]nternational obligations may be established by

[97] See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10), p. 115.
[98] See, e.g., Schlutter, Birgit., "Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunal for Rwanda and Yugoslavia." Martinus Nijhoff Publishers and VSP, Netherlands, 2010, p.13.
[99] See, Podesta Costa, Luis A., "Derecho Internacional Público." Vol. I, TEA, Buenos Aires, 1955, p.31.

a customary rule of international law, by a treaty or by a general principle applicable within the international legal order."[100] Additionally, it is important to point out that treaties and custom are interdependent. As stated by Sands, custom may become a treaty and treaties may confirm the existence of custom.[101]

Moreover, we agree with professor Handl on the impossibility to have a practice indicating the existence of a strict liability regime, including for an ultra-hazardous activity.[102] We even question that someday a uniform and repeated State practice of repairing transboundary damage voluntarily and spontaneously may exist. The Cosmos 954 incident is evidence that even before the clearest conventional rules of strict liability, States will try to deny international responsibility. We must not forget that "[t]he matter was settled by a payment of three million dollars without admission of liability."[103]

In such complex and polemic matters, affirming the existence of a customary rule, without jurisprudential support, is mere speculation; even more if the intention is to affirm the existence of an entire legal framework. The debate may be transformed into the byzantine discussion on whether a glass is half full or half empty. That is why, the question on the concrete existence of rules of customary law that may be applied will be postponed until a concrete analysis is made of international decisions, as subsidiary sources of international law. Before that, some general principles of law must be clarified in order to fill the existing gaps and understand some statements included in international judgments.

[100] See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 126.
[101] Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p.147-149.
[102] Handl, Günther., "Liability as an Obligation Established by a Primary Rule of International Law." Netherlands Yearbook of International Law, 1985, pp.58-61. We believe this does not mean there is no rule of customary international law imposing responsibility and liability for transboundary damage.
[103] Dixon, Martin., McCorquodale, Robert., and Williams, Sarah., "Cases & Materials on International Law." 5th Edition, Oxford University Press, 2011, p.270.

2.3.- General Principles of Law, General Principles of International Law and Principles of International Environmental Law.

The General Principles of Law[104] reflect those rules that, in practice, will be used by courts in order to fill the existing gaps while settling disputes and are related to principles such as those of natural law.[105] Additionally, these principles may "… reflect customary law, others may reflect emerging legal obligations, and yet others might have a less developed legal status."[106]

In order to understand the scope of this concept in the context of this research, it is practical to divide it into three categories. First of all, differences must be established between the General Principles of International Law and the Principles of International Environmental Law as one of its branches. Secondly, there are more General Principles of Law that emerge from national legal systems and may be applied to international law.

Some of the general principles of law can be easily identified, for they are enshrined in the Charter of The United Nations. They possess an international character and come from the international law itself. These are constitutive binding principles for the entire international legal system. Other principles arise from national legal systems and their application and recognition are almost universal.[107] Both types of principles are reflected by conventional rules or by the customary international law, and they may be applied in international courts.

In this regard, some of them should be mentioned, namely the principle of the sovereign equality, non-interference in the internal affairs of States, the principles of good neighbor and international cooperation, as well as of good

[104] Some voluntaristic authors like Anzilotti, Cavaglieri and Strupp, as well as the old Soviet school represented by Tunkin, deny the existence of this source of International Law. This criterion is upheld only by a minority of legal writers. See, e.g., Barberis, Julio A., "Los Principios Generales de Derecho como Fuentes del Derecho Internacional." RIIDH, No. 14, 1991, pp. 11–41.

[105] Brownlie, Ian., "Principles of Public International Law." 4th Edition, Oxford: Clarendon Press, 1995, p.16.

[106] Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p.231.

[107] In the legal writings, several types of references to these principles may be found. Based on this, but taking into consideration the relevance to our analysis, a personal reference will be adopted. It is not comprehensive, but it has instrumental value. For further information on the various approaches See, e.g., Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, pp. 150-152; Beyerlin, Ulrich., "Different Types of Norms in International Environmental Law: Policies, Principles and Rules." The Oxford Handbook of International Investment Law, Oxford University Press, 2008, pp.425-447; or Novak, Fabián., and García-Corrochano, Luis., "Derecho Internacional Público." Volume I, Ed. Pontificia Universidad Católica, Lima, 2000, pp.367 and ss.

faith and abuse of rights. The principle of sovereign equality is the very basis of the conception of responsibility and liability of a State before another or the international community as a whole. Likewise, the principle of non-interference is highlighted, since transboundary damage is a disruption of the rights established in the territorial scope of a State.

From a Soft Law perspective, the principles of good neighbor and international cooperation may be the ones with more developed content. Numerous international documents as well as multilateral and bilateral treaties address this matter. According to Iturregui, the obligation to prevent, reduce and control pollution and environmental damage, and the obligation to cooperate in the mitigation of environmental danger and emergency[108] are derived from these principles. As explained before, concerning prevention of transboundary damage, the main problem arises when analyzing the potential consequences of following or not these conduct rules.

The principle of good faith when exercising rights has been addressed by international courts is cases relating to environmental damage.[109] Sands rightly summarizes that "… in the Fur Seal Arbitration in finding that the exercise of a right for the sole purpose of causing injury to another (abuse of rights) is prohibited."[110] This matter is also part of UNCLOS general provisions.[111]

These general principles are the cornerstone of International Law. Therefore, their application to any type of issue is beyond discussion. Similarly, and for the purposes of this research, Sands states the existence of others such as "the obligation to make reparation for breach of an engagement; the principle that a

[108] Iturregui, Patricia., "Principios del Derecho Ambiental Internacional y legislación Nacional: Apuntes para un Debate." p.415 in Derecho Internacional Ambiental. Eds. Pierre Foy, Germán Vera, Fabián Novak and Sandra Namihas, Perú, 2003, p. 87.

[109] See, Cheng, Bin., "General Principles of Law as Applied by International Courts and Tribunals." Cambridge University Press, 2006, pp. 121-136.

[110] Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p.150

[111] See, article 300. Good faith and abuse of rights. "States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

person may not plead his or her own wrong; the principle that no one may be a judge in his or her own suit …"[112]

The obligation to make reparations has a direct relation to the constituent idea of sovereign equality. As explained before, said obligation results from damage itself. Likewise, the principle that no person may plead his or her own wrong becomes one of the grounds for exoneration from State responsibility. The principle that no one may be a judge in his or her own suit shall have an essential relevance when determining if a State has the obligation to recourse to the jurisdiction of another State so that transboundary damage is repaired.

2.3.1.- Principles of the International Environmental Law.

There are two important principles for this research: the principle of sovereignty over natural resources and the responsibilities not to cause damage to the environment of the other states or to areas beyond national jurisdiction and the polluter-pays principle.

These principles are clearly derived from and closely related to other more general principles of international law. Nonetheless, unlike the latter, their character seems less binding as their scope is not that clear and they are still being developed. Regardless of the importance of these principles for developing Environmental Law, "[t]he la ICJ has only rarely relied on general principles…"[113]

This should not be alarming, for, whenever possible, the Court will try to rule based on conventional or customary standards. For example, the content of the "not to cause damage" principle must be analyzed in its specific policy context, as before, or in the decisions of international courts, as it will be further conducted. Nevertheless, at this point of the research, some considerations should be pointed out on the scope and applicability of the polluter-pays principle.

[112] See, Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p.152. In order to exemplify the jurisprudential recognition of these three principles, these cases are mentioned in the same order: Chorzow Factory case and Gabcikovo-Magymaros case; Jurisdiction of the Courts of Danzig; and Mosul Boundary case.

[113] Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p.150

The polluter-pays principle emerges on the international level from the national legal systems "…as opposed to traditional fault-based liability."[114] Under this principle, strict liability is imposed on the responsible for pollution, as determined by a national authority. One of the first precedents at the international level comes from the work of the OECD,[115] and is politically confirmed in principle 16 of the Rio Declaration.[116] This principle has been mentioned in important treaties, but from different approaches.[117] Generally, "[t]he polluter –pays principle establishes the requirement that the cost of pollution should be borne by the person responsible for causing the pollution."[118]

To say the least, the extrapolation of this principle to the international law is complex. When pollution is not transboundary, the national legal system may satisfactorily respond to the legal relationships emerging from the event on the basis of this principle. However, when damage is transboundary, international legal relationships appear. The "polluter" condition may no longer be assigned unilaterally by a national authority. The other difficulty is which subject must be attributed the condition of "polluter". Pollution is the result of human activity and generally comes from activities performed by private persons; but they are not subjects of international law, unless established by a treaty. At the international level, it is not possible to attribute the condition of responsible to those who do not have the condition of subjects.

The attempts to establish this principle in international treaties have somehow disrupted the legal logic by attributing the condition of subjects of international law to certain natural persons and talking about residual liability of States. These international responsibility and liability systems, as those approved for oil

[114] Schwartz, Priscilla., "Principle 16: The Polluter-Pays Principle." The Rio Declaration on Environment and Development. Ed. Jorge E. Viñuales, Oxford University Press. 2015. p. 441.

[115] "Recommendation of the Council Concerning International Economic Aspects of Environmental Policies, C(72)128, (OECD 1972).
http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=4&InstrumentPID=255&Lang=en&Book=False

[116] Rio Declaration on Environment and Development, in Report of the United Nations Conference on Environment and Development. UN Doc. A/CONF.151/26 (Vol.I), 12 August 1992, Annex I. http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm

[117] To verify the State practice in recognizing this principle in several international treaties, See, e.g., United Nations. "Report of the International Law Commission." General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10), p.145-146.

[118] Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p.279.

tankers and nuclear facilities, are established on the basis of strict liability for operators. According to Birnie and Boyle, said strict liability is limited and, with that reasoning, they drift away from the basic idea this principle upholds.[119]

In our opinion, what happens in these cases is that international responsibility of a State for transboundary damage is being transferred to private persons through a treaty establishing limited liability. The subsidiary nature of State liability regulated therein, emerges directly from the international responsibility of States as a result of harm to the rights of another State. As State liability is not covered by private persons, as passive subjects of international law, it will remain an international responsibility of the State of Origin.

Moreover, this principle of international environmental law is not considered a binding rule for States. Even in Europe, where this principle has wide political support, an arbitral tribunal stipulated: the Court observes this principle is present in some international instruments, both bilateral and multilateral, and has different levels of effectiveness. Without disregarding its importance for conventional law, the Court does not consider such principle to be part of general international law.[120]

2.4.- Subsidiary sources: Case Law and Legal Writings. Relevant case studies.

Through their judgments, international courts seek to solve concrete issues, instead of developing certain legal writings or creating laws. As a subsidiary source of international law, their character is clearly limited by Article 59 of the Statute of the International Court of Justice, which establishes: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

However, the study of these judgments will shed light on the existence and scope of some international rules that may be applicable to cases of

[119] Birnie, Patricia W., and Boyle, Alan E., "Basic Document on International Law and the Environmental." Oxford: Clarendon Press, 1995, pp. 93-94.

[120] See, "Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la République Française en application du Protocole du 25 Septembre 1991 Additionnel à la Convention relative à la Protection du Rhin contre la pollution par les chlorures du 3 Décembre 1976." Recueil Des Sentences Arbitrales. Vol XXV, Nations Unies, 2005, p. 312, para. 103.

international responsibility and liability of States for transboundary damage. Most of the authors[121] study the existence of these elements, although there is an extensive legal debate on the potential scope of these rules.[122]

2.4.1.- Cases cited by legal writers in support of the thesis on a strict liability of States for transboundary damage.

2.4.1.1.- Trail Smelter Case. United States vs. Canada. Arbitration-1938.[123]

This is a case of transboundary damage in US territory, caused by a great amount of sulfuric dioxide emanating from a factory located in Canadian territory. The tribunal issued the following award:

"The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, 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 or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[124]

The legal writers are divided in their analyses on the scope and content of this case. Some of them affirm that this is not a case of liability *sine delicto*, for they consider the case was resolved under the traditional regime of responsibility for wrongful act.[125] This position is based on the wrong supposition that the traditional regime of responsibility for wrongful act does not include the liability

[121] See, Fitzmaurice, Malgosia., "Environmental protection and the International Court of Justice." Fifty Years of the International Court of Justice. Essays in Honor of Sir. Robert Jennings. Cambridge University Press, 1999, p.300.
[122] The minority of authors believes that none of these rules would be applicable to a strict liability regime for lawful activities. See, e.g., Barstow, Daniel., "Transboundary Harm. The International Law Commission's study of international liability." American Journal of International Law, Vol. 80, 1986, p.320.
[123] Trail smelter case (United States of America v. Canada). Award of 16 April 1938 and 11 March 1941. U.N.R.I.A.A., Vol. III. 2006, pp. 1905-1982. http://legal.un.org/riaa/vol_III.htm. An extensive study of the case by different writers can be found at "Transboundary Harm in International Law. Lessons from the Trail Smelter Arbitration." Ed. Rebecca Bratspies and Russell Miller, Cambridge University Press, 2006.
[124] Id. p. 1965.
[125] See, Barboza, Julio., "Liability: Can We Put Humpty-Dumpty Together Again." Chinese Journal of International Law, Vol. 1, Issue 2, 2002, p. 517.

sine delicto.[126] For its part, Handl rightly considers there is confusion, caused by wrong identification, between strict liability and risk liability.[127]

First of all, it must be considered that, at the moment of the arbitration, the conceptual confusion prevailing today did not exist. Therefore, any consideration on the existence of risk liability, as currently understood, must be *a priori* disregarded. Nevertheless, this does not mean that "… the Trail Smelter case presents a questionable precedent for the "strict liability" proposition…"[128] To support this assertion, it must be verified whether, in this case, responsibility and liability were subjectively determined; that is, based on a certain level of fault of the subject, construed as negligence or fraud.

For some authors, the decision has a wide scope[129] and confirms, along with other decisions, the existence of a customary rule that prohibits using the territory of a State in a manner that affects another States. This would imply the existence of a strict liability regime in case of clear, evident and serious transboundary damage.[130] Other authors consider that this decision should not be attributed such scope and importance, due to the following reasons: (1) there was a commitment between the US and Canada authorizing the Arbitral Tribunal to learn about certain matters;[131] Canada's liability had already been anticipated; and (3) the applicable law was the International Law and the US domestic law. This makes it impossible to know whether a legal provision actually comes from the International Law.[132]

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[126] See, Barboza, Julio., "La Responsabilidad Internacional." at www.oas.org/dil/esp/1-32%20**Barboza**%20**Julio**%20def.pdf

[127] Handl, Günther., "Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited." The Canadian Yearbook of International Law, 1975, p. 167. Undoubtedly, these are different concepts and the source of this confusion is caused directly by the ILC work. This and other conceptual distinctions will be further analyzed in Chapter 3.

[128] See, Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law. Vol. 74, 1980, p. 537.

[129] Gómez-Robledo, Alonso., "Responsabilidad Internacional por Daños Transfronterizos." Universidad Autónoma de México, 1992, p. 41.

[130] See, e.g., Goldie, L.F.E., "Liability for Damages and the progressive Development of International Law." The International and Comparative Law Quartely. British Institute of International and Comparative Law, Vol. 14, 1965, p. 1230. Kelson, John., "State Responsibility and the Abnormally Dangerous Activity." Harvard International Law Journal, Harvard University, Vol. 13, 1972, p. 1972.

[131] For Kiss, the existence of the arbitration agreement proves the inefficiencies of the traditional regime to determine a State responsibility for transboundary damage. Kiss, Alexandre Ch., "Problèmes juridiques de la pollution de l´air." Recueil des Cours de la Académie de Droit International, 1973, p. 174.

[132] See, Handl, Günther., "Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited." The Canadian Yearbook of International Law, 1975, p.168.

Let us review these legal considerations. The supposed confusion that may arise from applying the US domestic law and the International Law in the case is clarified in the text of the award itself. It unambiguously states that the abovementioned principle has been established in accordance with both the international law and the US domestic law. As well pointed out by Barberis, whose view has been supported by international decisions, the transferability of general principles to the international law will only be possible when they are incompatible with existing international legal rules, which is not the case.[133] Even considering that the principle could only be derived from North American or Swedish law, its international validity would have to be accepted, as a result of the application of the general principles of law as a source of international law.[134] Otherwise, it would have to be claimed that the arbitral tribunal made a mistake, which is a speculative value judgment not shared in this research.[135]

Moreover, the arbitration agreement proves the existence of a legal dispute between the US and Canada. The establishment of this agreement is part of the international obligations of States to settle their disputes by peaceful means. This does not imply a concession[136] concerning the international responsibility and liability of States. As rightly indicated by Gómez-Robledo,[137] from the very arbitration agreement, Canada maintains not to have caused any damage to the US after 1 January 1932. In arbitration, it is common practice to request constituted courts to focus on certain questions, as was the case.[138] Note that

[133] See, Barberis, Julio A., "Los Principios Generales de Derecho como Fuentes del Derecho Internacional." RIIDH, No. 14, 1991, p.22.

[134] See, Goldie, L.F.E., "A General view of International Environmental Law. A survey of Capabilities trends and limits." La Protection de l´environnement et le droit international, Recueil des Cours de l'Académie de Droit International, Colloque, 1973, p. 71.

[135] See, Rubin, Alfred P,. "Pollution by analogy: the Trial Smelter arbitration." Oregon Law Review, 1971, pp. 259-282. A better supported and measured assessment of the matter is available at Handl, Günther., "Territorial sovereignty and the problem of Transnational Pollution." American Journal of International Law, 1975, pp. 60-63.

[136] See, Shenker, Arden., "Oral Proceedings." Oregon Law Review, Vol. 15, 1971, p. 284.

[137] Gómez-Robledo Verduzco, Alonso., "Temas Selectos de Derecho Internacional." Instituto de Investigaciones Jurídicas de la UNAM, México, 2001, p. 352. In spite of this, the author comes to the conclusion that Canada's responsibility was "accepted and established", but the decision of the tribunal did not derived from the agreement. See, Id., p. 361.

[138] See, "ARTICLE III. The Tribunal shall finally decide the questions, hereinafter referred to as "the Questions", set forth hereunder, namely: (1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indem-nity should be paid therefor? (2) In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent? (3) In the light of the answer to the preceding Question. What measures or regime, if any, should be adopted or maintained by the Trail Smelter? (4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?"

the work of the tribunal was not limited to determine the content of the obligation to make reparations. The Tribunal should have assessed the very existence of damage and, if any, whether it was compensable. In other words, the arbitral tribunal might have as well considered there was no damage and, consequently, there would be no predetermined liability for Canada, as stated by Ballenegger.[139] Otherwise, the existence of liability without damage[140] would have to be accepted.

Nonetheless, strikingly, States involved in legal disputes did not include in their arbitration agreement the need for the tribunal to rule the existence of international responsibility. In our opinion, this is in accordance with a political view; however, it was considered by the tribunal. Since the principle abovementioned was established, the tribunal stated: "Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter."[141]

In summary, it is our view that legal arguments aforementioned do not account adequately to minimize the importance of the content of this decision. Also, the existence of strict liability, construed as risk liability, cannot be affirmed, for the question of risk was not the basis for the court's judgment. Nonetheless, there is an evident strict liability on the basis of breach of the obligation mentioned before.[142] Furthermore, the tribunal never analyzed the existence of fault, understood as negligence or fraud, in the acts of Canada. The question of damage, as a result of a continuous action, was not considered either to attribute strict liability. Beyond that, the tribunal held Canada internationally responsible for the conduct of Trail Smelter. The criterion used was that the factory operated in Canadian territory and whether the activity was permitted or not by the international law was irrelevant.

[139] See, Ballenegger, J., "La Pollution en Droit International." Librairie Droz, Genève, 1975, p. 205.
[140] We consider that *liability* forcibly implies damage. Also, see, Barboza, Julio., "La Responsabilidad Internacional." pp. 4-5. at www.oas.org/dil/esp/1-32%20**Barboza**%20**Julio**%20def.pdf
[141] Trail smelter case (United States of America v. Canada). Award of 16 April 1938 and 11 March 1941. U.N.R.I.A.A., Vol. III. 2006, pp. 1965-1966.
[142] The conclusion is shared by some authors. See, e.g., Goldie, L.F.E. "Liability for Damages and the progressive Development of International Law." The International and Comparative Law Quartely. British Institute of International and Comparative Law, Vol. 14, 1965; and Jenks, W. "Liability for Ultra-Hazardous activities in International Law." Recueil des Cours de l'Academie de Droit International, T. 117, (1966-I).

In conclusion, the arbitral award has the virtue of simplicity. The tribunal determined, in an evident and clear manner, the existence of serious damage. As a consequence, it established the strict responsibility of Canada, based on the international responsibility generated by allowing the use of a territory in a manner affecting another State. Nonetheless, in assessing the damage, the arbitral tribunal was strict and ruled out all liability in cases of indirect, remote or uncertain damage.[143]

2.4.1.2.- Corfu Channel case. United Kingdom v. Albania. ICJ-1949.[144]

In 1946, British vessels Saumarez and Volage sunk in Albanian territorial waters. While exercising their right to innocent passage through the Corfu Channel, they hit some mines located in Albanian territorial waters.[145] The case was taken to the International Court of Justice, which delivered its judgment on 9 April 1949. The content of this judgment has generated a strong legal debate on the existence of an international obligation of States to make reparations for transboundary damage, under a strict responsibility regime. The apple of discord is related to the value of the statement: "… every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[146]

For some experts in public law[147], this phrase proves the existence of a customary rule of international law. This confirms, in their opinion, the existence

[143] This interpretation is in accordance with the Canadian Government stance during the Cherry Point oil spill in 1972. After the contamination of Canadian waters as a result of an oil spill in US waters, the Government of Canada addressed the US Government in the following terms: "We are especially concerned to ensure observance of the principle established in the 1938 Trail smelter arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and shall be responsible to pay compensation for any injury so suffered. Canada accepted this responsibility in the Trail smelter case and we would expect that the same principle would be implemented in the present situation." [See, Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law. Vol. 74, 1980, p. 545]
From the legal point, strict responsibility was not confirmed in this case for it never became an international dispute. The private company offered to pay for the clean-up operations, and Canada considered itself compensated. See, United Nations. "Anuario de la Comisión de Derecho Internacional." (A/CN.4/SER.A/1996/add.1 (part 2)), Vol. II, 1996, P.127.

[144] Corfu Channel case (Albania v. United Kingdom), Judgment of 9 April 1949 (Merits), I.C.J. Reports 1949, p.4. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=1&code=cc&p3=4

[145] There are several interpretations of these particulars, so a first-hand reading of its content is suggested. Nonetheless, See, e.g., Jones, Mervyn J., "The Corfu Channel Case." The British Yearbook of International Law. London, Vol XXVI, 1949; and García Arias, Luis., "El caso del canal de Corfú." Revista Española de Derecho Internacional. Vol II, Madrid, 1959.

[146] Corfu Channel case (Albania v. United Kingdom), Judgment of 9 April 1949 (Merits), I.C.J. Reports 1949, p. 22.

[147] See, e.g., Goldie, L.F.E., "Liability for Damage and the Progressive Development of International Law." The International and Comparative Law Quartely, British Institute of International and Comparative Law, London, Vol.

of a strict responsibility regime for States that cause transboundary damage. Other authors[148] consider this question irrelevant, since the liability analysis was based on the classic responsibility system.

A more reflective stance may be found in authors like Handl.[149] They say that the case does not show a strict liability for transboundary damage, but the existence of a fault liability, understood as negligence or fraud. The author maintains that Albania's liability was based on the fact that, having the possibility to notify and warn about the danger posed by the mines to the UK, it did not do so. He concludes that "the Corfu Channel decision must be considered to stand for the exact opposite of the asserted trend." [150]

Nevertheless, Handl recognizes that "[i]n the Corfu Channel case, for example, the ICJ stated, as a principle of international law of general applicability "every State's obligation not to allow knowingly its territory to be used contrary to the rights of others."[151] Based on this case and others, he generally concludes that "Non-negligent accidental losses pose a particular problem in any system of loss allocation in which "fault", traditionally is a key allocate criterion. The international legal system is no exception in this respect."[152] However, Handl starts from the wrong premise when considering that in a traditional State responsibility regime, fault, construed as negligence or fraud, must be proved.[153] As explained before, the extent of the fault is a criterion that will always be used by international courts to determine the extent of State responsibility and liability. Nonetheless, if the primary obligation is an obligation

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14, 1965, p. 1230; and Kelson, John., "State Responsibility and the Abnormally Dangerous Activity." Harvard International Law Journal, Harvard University, Vol. 13, 1972, p. 237.

[148] See, e.g., Akehurst, Michael., "International Liability for Injurious consequences arising out of acts not prohibited by International Law." Netherlands Yearbook of International Law, Leyden, Vol. 16. 1985; and Pastor Ridruejo, José A., "Curso de Derecho Internacional Público." Madrid, Tecnos, 1986.

[149] See also, Cahier, Philippe., "Le problème de la Responsabilité pour risque en droit International." Institut Universitaire de Hautes Études Internationales, 1977.

[150] See, Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law, Vol. 74, 1980, pp.537-538; See also, Handl, Günther., "International Liability of States for Marine Pollution." The Canadian Yearbook of International Law, Vol. 21, 1983, p. 96.

[151] See, Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law, Vol. 74, 1980, p. 528.

[152] Handl, Günther., "International Liability of States for Marine Pollution." The Canadian Yearbook of International Law, Vol. 21, 1983, p.97.

[153] The question of the fault will be further analyzed in the next chapter. For now, suffice it to consider the more than qualified opinion of Crawford, the last ILC special rapporteur on International State Responsibility. See, Crawford, James., "The International Law Commission´s Articles on State Responsibility. Introduction, Tex and Commentaries." Cambridge University Press, 2002, p. 13.

of result, there will be no need to prove the subject's fault or intention, for his or her relation to the result will suffice.

The facts under the consideration of the Court were far more complex, since there was a clear confrontation between both States. Additionally, in order to determine Albania's responsibility, the existence of a link between the mines and Albania had to be considered, which was denied by this country. This is a *conditio sine qua non* to invoke responsibility of a State, regardless of the type of responsibility and liability regime, either strict or fault.

The United Kingdom could never prove these mines were planted by Albania and it even claimed that the mines were planted by Yugoslavian vessels. If true, this would imply the international responsibility of former Yugoslavia, either before the UK for damage caused to the vessels, and/or before Albania if the planting of the mines had taken place without its consent, since this would have implied a violation of its sovereignty. Instead of considering whether the responsibility for damage is strict or fault, this challenge should be the basis for the Court to assess Albania's knowledge. If Albania did not know about the existence of the mines, then there would be no causal link, and under no regime Albania's liability could be invoked. Note that, unlike the principle mentioned in the Trail Smelter case, here the Court demands that the "territory be used" with the knowledge of the State. Albeit this could be presupposed in the Trail Smelter case, the responsibility of other States could be also involved, which would exclude Albania's.

The Court neither deemed important to consider if Albania itself had planted the mined, nor the fact that in Albanian coasts there were only a few boats and motorboats, nor the British suggestion that these mines had been planted by two Yugoslavian warships, upon request of or with the acquiescence of Albania. On this particular, the Court declared that such exceptionally serious accusation against a State would require a degree of certainty, which is absent on this occasion, and the origin of the mines planted in Albanian territorial waters remains a mere speculation.[154] However, after examining the topographical conditions of the area, the Court arrives to the circumstantial conclusion that the

[154] See, United Nations. "Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice (1948-1991)." UN Doc. (ST/LEG/SER.F/1), p.6. http://www.un.org/en/ga/documents/symbol.shtml

mines could not be planted without the consent of Albania. Consequently, from its mere knowledge, the obligation to notify and warn the British authorities also "emerges". This is not an object of discussion, for it implies a clear wrongful behavior, understood as negligent or serious misconduct.

In this context, the Court judgment must be interpreted systematically: “The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”[155]

The conclusion is not the need to determine the fault, understood as negligence or fraud, to demand State responsibility. In this case, Albania's knowledge of the activities conducted in its territory was determined, which is enough to invoke its liability. This, in turn, is a serious matter due to the wrongful character of its omission.

The degree of fault was very important when fleshing out the obligations to make reparations. Otherwise, the decision would have been obviously unjust, if the seriousness of the obligations breached by each party were considered in the abstract. The Court deemed the serious breach of Albania's sovereignty duly compensated by its mere recognition of the event.[156] Nevertheless, Albania had to pay a considerable amount of money for failing to notify and warn the British of a danger. The reason for this payment was that the Court believed that it entailed either the intention to cause those damages or a serious negligence.

[155] Corfu Channel case (Albania v. United Kingdom), Judgment of 9 April 1949 (Merits), I.C.J. Reports 1949, p. 22.
[156] The Court unanimously established the wrongfulness of British vessels subsequently entering into Albanian territory to seek evidence, in violation of Albania's sovereignty.

As well stated in the judgment, the obligations to notify and warn did not emanate from an international treaty, but from well-established general principles of international law. For example, “every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.” This is simply a primary obligation, although from its content other international obligations of conduct may derive. As long as there is no dictum limiting the scope of this rule, it clearly implies a strict liability.

In summary, two conclusions may be drawn from the reasoning of the court and its judgment. First, by administering justice, the Court held Albania responsible for a negligent act, which aggravated its liability. It particularly took into account the breach of the international obligation to notify and warn about the existence of a minefield. This obligation derived from general principles of international law. From the analysis of the judgment, it can be deduced that in order to attribute responsibility and liability to a State for damages to another State: (1) the nature of the subject carrying out the activity is irrelevant- in fact, the Court never determined who planted the mines; (2) the lawfulness of the activity or the acquiescence or consent of the State is unimportant; (3) the mere knowledge of the activity is enough. Under these considerations on the case, we are not in presence of a strict liability regime but of fault liability derived from assumptions without a formal evidence of fault.[157] For this last consideration to make sense and not to be an arbitrary judgment by the Court, a second conclusion must be considered.

The Court understands and confirms the existence of a general principle of law establishing the obligation that no State shall allow its territory to be used contrary to the rights of another State. This validates the principle set in the Trail Smelter case. From this and other general principles of law, more specific obligations of conduct may be derived, as done by the Court. The negligent and wrongful non-compliance with these obligations aggravates the liability of a State.

Summarizing, the case judgment was reached under the fault liability theory, but it reaffirms the possibility to establish strict liability of a State for

[157] Lévy, Denis., “La responsabilité pour omission et la responsabilité pour risque en droit international public.” Revue Générale de Droit International Public, Vol. 4, 1961, pp. 757-764.

transboundary damage. The primary obligation is deemed breached from the very moment the State does not fulfill its duty to protect the rights of other States in its territory. The liability will be aggravated so far as there is fault, construed as negligence or fraud.

2.4.1.3.- Other cases cited by legal writers.

The events in the ***Lake Lanoux case***[158] are very well known. Lake Lanoux is a hydrographic resource shared by France and Spain. The dispute originated from France's intention to divert the water in its territory to bring into operation a hydroelectric power plant, without affecting the amount of water flowing into Spain. The latter sued France under the existing bilateral treaties.[159]

Goldie believes this case supports the thesis that States has a strict liability for transboundary damage.[160] This deduction was made out of the following extract of the award:

"On aurait pu attaquer cette conclusion de plusieurs manières. On aurait pu soutenir que les travaux auraient pour conséquence une pollution définitive des eaux du Carol, ou que les eaux restituées auraient une composition chimique ou une température, ou telle autre caractéristique pouvant porter préjudice aux intérêts espagnols. L'Espagne aurait alors pu prétendre qu'il était porté atteinte, contrairement a l´Acte additionnel á ses droits. Ni le dossier, ni les débats de cette affaire ne portent la trace d'une telle allégation."[161]

Professor Goldie's thesis was excessively elaborated and unnatural. Assumptions had to be made that the tribunal had a strict responsibility regime

[158] Affaire du Lac Lanoux. (Espagne v. France), Sentence Arbitral du 16 Novembre 1957, U.N.R.I.A.A., Vol. XII, 2006, pp. 281-317.

[159] See, "Tratado de límites entre España y Francia desde el Valle de Andorra al Mediterráneo y Acta adicional a los tres tratados de límites entre España y Francia anteriores al que precede." Signed in Bayonne on 26 May 1866, at http://www.mojonesdelospirineos.com/documentacion.php

[160] Goldie, L.F.E., "A General view of International Environmental Law. A survey of Capabilities trends and limits." La Protection de l´environnement et le droit international, Recueil des Cours de l'Académie de Droit International, Colloque, 1973, p.72.

[161] Affaire du Lac Lanoux. (Espagne v. France), Sentence Arbitral du 16 Novembre 1957, U.N.R.I.A.A., Vol. XII, 2006, pp. 281-317, at p. 303. (Translated from French) "One might have attacked this conclusion in several different ways. It could have been argued that the works would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests. Spain could then have claimed that her rights had been impaired in violation of the Additional Act. Neither the file nor the discussions of this case reveal trace of an allegation of that nature."

in mind,[162] but France was not found guilty since the existence of significant damage was not verified. Even from this speculative view, certainly, the responsibility would always derive from the bilateral agreements signed between both countries. Handl[163] highlights the content of Article 12 of the Treaty of Bayonne additional Act, wherefrom the treaty obligation of France not to alter the water flow or its natural characteristics is deduced.

As a conclusion, we do not share the thesis that this case confirms the existence of a strict liability regime for transboundary damage. At best, the possible resulting argument is that the treaty shows a strict liability regime for water contamination. This would be an evidence of a State practice.

A similar conclusion may be drawn from the ***Gut Dam Arbitration*** affair, where, according to Handl, "… the dam was to extend across the international boundary between Adams and Les Galops Islands, U.S. approval had been sought and obtained, subject to the condition that the Canadian Government indemnify U.S. citizens for any damage or detriment incurred as a result of the construction or operation of the dam."[164] In summary, the strict responsibility of Canada was stipulated in the bilateral agreement, not in a "standard" adopted by the arbitral tribunal, as pointed out by Schneider.[165]

The ***Gabcíkovo-Nagymaros Project***, between Hungary and Slovakia,[166] is also cited by legal writers. As with the two previous cases, the responsibility and liability matter is about the breach of a bilateral treaty and not the determination of an international standard of strict liability for transboundary damage.[167]

[162] This is questioned by Dupuy. See, Dupuy, Pierre M., "La Responsabilité Internationale des États pour les dommages d´origine Technologique et Industrielle." Revue générale de droit international public. Publications, Vol. 27, 1976, p. 190.

[163] See, Handl, Günther., "Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited." The Canadian Yearbook of International Law, 1975, p.169.

[164] Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law. Vol. 74, 1980, p. 538.

[165] Schneider, J., "World Public Order of the Environment: Towards an International Ecological Law and Organization." Ed. Stevens, 1979, p.165.

[166] Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997, p.7. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=8d&case=92&code=hs&p3=4

[167] This is apart from the dissenting opinion of Judge Oda, who considered that, on environmental protection, obligations emanate even from beyond the bilateral treaty. See, Dissenting Opinion of Judge Oda, para.33.

Starting from the principle set in the ***Rainbow Warrior arbitration***[168] that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation," the ILC pointed out the following extract from the Gabcíkovo-Nagymaros case: "[it´s] well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect."[169]

The abovementioned implies that, if an international obligation of result existed, as in the Trail Smelter and Corfu cases, breaching that obligation would imply, according to the Commission, an international responsibility for wrongful act. Additionally, concerning the Gabcíkovo-Magymaros judgment, this would imply a liability to make reparations that does not disappear, not even before circumstances that allow the exclusion of the act wrongfulness, because "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[170]

In reference to reparations for environmental damage, there is also the ***Nauru v. Australia*** case brought to the ICJ.[171] This case was decided over through an extrajudicial agreement, whereby Australia paid Nauru for damage caused.[172] In spite of the fact that there are no court decisions, this case evidences a tendency of States to evade judgments in demands relating to responsibility for environmental damage. To do so, extrajudicial offset agreements for damage are signed, without formal recognition of the responsibility.

Another interesting case is the claim against France for the ***South Pacific Nuclear Tests***. Australia and New Zealand requested the ICJ to stop the nuclear tests announced by France in its overseas territories. In its famous preliminary award in 1973, the Court ordered *inter alia* that "…the French Government should avoid nuclear tests causing the deposit of radio-active fall-

[168] Rainbow Warrior Arbitration. (New Zealand vs. France). Awards of 30 April 1990, U.N.R.I.A.A., Vol. XX, 2006, p. 251, para 75. http://legal.un.org/riaa/vol_XX.htm

[169] See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 127.

[170] Id. p. 210.

[171] See, Certain Phosphate Lands in Nauru (Nauru v. Australia). 1989-1993. http://www.icj-cij.org/docket/index.php?p1=3&k=e2&case=80&code=naus&p3=0

[172] See, e.g., Barstow Magraw, Daniel., "International Law and Pollution." University of Pennsylvania Press, 1991.

out on the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands."[173] As a result of this provisional measure, France committed itself not to conduct such tests and the Court made a final decision, closing the case in 1974.[174]

What is interesting about this procedure is that, in order to establish its jurisdiction, the Court had to legitimize the pretentions of the claimants, including among others: the right of countries to prevent fallout from entering their territorial airspace as a result of these tests; the right not to be harmed in their territory; and even that these tests could affect their international rights of freedom of navigation and overflight, as well as the freedom to explore and exploit the resources of the sea and the seabed, without interference or detriment.[175]

Despite fact that there is no decision on the bottom of the issue, the decisive action of Court confirms, to some extent, the obligation of States not to damage other States for the activities conducted in its territory. In fact, it may be rightly argued that the provisional measure restrained the sovereign rights of France to conduct an activity in its territory, which is lawful under the international law.[176]

Finally, other cases were considered during this research, but they will only be mentioned due to the limited relevance to the objective of this research. These cases are the ***Pulp Mills on the River Uruguay case***,[177] the ***Mura case*** and the ***Liberian tanker Juliana oil spill***.[178]

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[173] See, Nuclear Tests case. (New Zealand v. France), Order of 22 June 1973 (Interim Protection), I.C.J. Reports 1973, p. 142. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nzf&case=59&k=6b&p3=0

[174] See, Nuclear Tests case (New Zealand v. France), Judgment of 20 December 1974, I.C.J. Reports 1974, p. 477, para 63.

[175] See, Nuclear Tests case. (New Zealand v. France), Order of 22 June 1973 (Interim Protection), I.C.J. Reports 1973, p. 139, para 23.

[176] Regrettably, the Court decision was not the same in 1995, when it refused to reopen the case. It formally considered the case was different from the 1974 case, because on this occasion they were not atmospheric but undersea nuclear tests. See, Nuclear Tests case: "Request for an Examination of the Situation in A whith Paragraph 63 of the Court´s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case." Order of 22 September 1995, I.C.J., Reports 1995, p 288. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=97&code=nzfr&p3=3

[177] See, Pulp Mills on the River Uruguay case (Argentina v. Uruguay). Judgment of 20 April 2010, I.C.J., Reports 2010, p, 4. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=4. Essentially, the Court only determined, based on a bilateral agreement, the wrongful acts committed by omission or negligence. The precautionary principle and the obligation to evaluate the environmental impact were consolidated, but the Court refused to seize an excellent opportunity to further develop the responsibility principles on the matter.

[178] What is curious about this oil spill in the Japanese coasts is that compensation was made by the flag State, not the ship owner. See, Handl note below.

On these two last cases, it is interesting to verify the practice followed by the States that compensated for transboundary damage. In the Mura river contamination case, Austria compensated for transboundary damage originated from its territory by a private person. Although we agree with professor Handl on the fact that Austria paid without formally recognizing its responsibility, we disagree with the conclusion that there was no strict liability in this case.[179] The existence of "compensation" necessarily implies a subject with the obligation to pay. Austria made reparations without a decision on the guilt; it assumed strict responsibility.

In direct relation to the object of this research, another good practice may be found in connection with offshore drillings in the Beaufort Sea in 1976 and 1977. In this case, it is pointed out that "…U.S.-Canadian discussions focused on the adequacy of compensation in the event of transboundary pollution as the key issue between the two Governments. Pursuant to the settlement eventually reached, Dome Petroleum was required to post bond to secure compensation to potential U.S. pollution victims. The Canadian Government itself guaranteed the availability and the payment of the sums involved. The Canadian Government thus committed itself to accept liability on a subsidiary basis in the event the bonding arrangement proved somehow inadequate to meet the full costs of the transnational pollution."[180]

2.4.2.- State Practice contrary to the recognition of their responsibility for transboundary damage.

These references would be incomplete without the examples of State practice that tends to disregard any responsibility and liability for transboundary damage. In this respect, Chernobyl case should be mentioned. Affected States didn´t file international claims against the State of Origin.[181]

[179] Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law, Vol. 74, 1980, p. 546.
[180] Id., p. 548.
[181] See, e.g., Dupuy Pierre M., "The international Law of State Responsability: Revolution or Evolution?" Michigan Journal of International Law, Vol. 11, 1989-1990, p. 115-116; McClatchey, Deveraux F., "Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility for International Disasters, 1986-1996." Georgia Journal of International and Comparative Law, Vol. 25, 1996, pp. 659-680; Mellor, Justin., "The Negative Effects of Chernobyl on International Environmental Law: The Creation of the Polluter Gets Paid Principle." Wisconsin International Law Journal, Vol. 17, 1999, pp. 65-86; See, also, Handl, Günther., "Towards a Global System of Compensation for

More in line with the purpose of this research, the Ixtoc I[182] and Montara[183] cases may be mentioned. In the Ixtoc I case, the Mexican Government was not sued. Besides being contrary to international law, bringing Mexico before US courts would be in conflict with the Foreign Sovereign Immunities Act, as well indicated by Handl.[184] Nonetheless, although Mexico was not sued at the international level, Sedco, Inc. signed an offset agreement with the US Government.[185] According to Handl, in the Montara case, the governments of Australia and Indonesia rapidly agreed that the rig operator should have been held responsible, but "[t]o date, Indonesia has been unable to secure compensation from the private operator for $2.4 billion in environmental damages. In view of these difficulties, the Indonesian government in 2010 suggested to IMO that the Montara and Deepwater oil spills proved a "compelling need" for an international regime for liability and compensation for transboundary pollution damage from offshore drilling activities."[186]

2.5.- Conclusions from the analysis on the sources of law and the established State practice.

As verified, there is no general conventional regime of State responsibility. A general environmental agreement establishing strict liability principles binding for States in case of transboundary damage was not found either. The responsibility and liability provisions of general regimes like the one established in Part XII of UNCLOS are ambiguous. The work of the ILC has not contributed to shed light on the matter and the scarce existing sectoral treaties establish a strict but limited liability for operators and place States on a subsidiary level.

Transboundary Nuclear Damage: Reflexions on the Interrelationship of Civil and International State Liability." Nuclear Accidents: Liabilities and Guarantees, OECD, Paris, 1992, pp. 497-509.

[182] See, e.g., Handl, Günther., "The Case for Mexican Liability for Transnational Pollution Damage Resulting from the Ixtoc I Oil Spill." Houston Journal of International Law, Vol. 2, 1979, pp. 229-238. For a contrary view, See Vargas, J. A., "La contaminación de las aguas marítimas más allá de las fronteras nacionales, y el derecho: los hechos, los principios y las normas. Mesa redonda efectuada el 26 de septiembre de 1979." Secretaría de Relaciones Exteriores, Instituto Mexicano Matías Romero de Estudios Diplomáticos. México, 1979.

[183] See, e.g., Allen, Jacqueline., "A Global Oil Stain - Cleaning up International Conventions for Liability and Compensation for Oil Exploration/Production." Australian and New Zealand Maritime Law Journal, Vol. 25, 2011, pp. 90-107 at p.98; Boyle, Alan., "International Law and the Liability for Catastrophic Environmental Damage: Introductory Remarks." American Society of International Law Proceedings, Vol. 105, 2011, pp. 423-430.

[184] Handl, Günther., Id. p. 229.

[185] See, Agreement Concerning Settlement of Claims Arising from the 1979 Oil Well Blowout and Oil Spill in the Gulf of Mexico. International Legal Materials, Vol. 22, Issue 3 (May 1983), pp. 580-590. 22 I.L.M. 580 (1983).

[186] Handl, Günther., p. 428., in Boyle, Alan. "International Law and the Liability for Catastrophic Environmental Damage: Introductory Remarks." American Society of International Law Proceedings, Vol. 105, pp. 423-430.

Likewise, there are not enough judgments to confirm the existence of a strict liability regime for transboundary damage as a rule of customary international law. In spite of that, from the sources of international law it may be deduced the existence of general principles of law, which impose as a primary international obligation of result not to use (or permit the use of) its territory in such a manner contrary to the rights of another State. This could be the basis to develop or demand the application of a strict liability regime for transboundary damage. Other specific obligations of due diligence, emanated from this principle, enjoy greater customary support.

In State practice, when facing a claim, States will try to solve the matter outside the international courts. This gives the Affected State the possibility to avoid the entangled mechanisms of an international claim, while allowing the State of Origin to compensate without formal recognition to its international responsibility. This situation was verified by the Cosmos 954, Cherry Point, Mura, Certain Phosphate Lands in Nauru, Liberian tanker Juliana, and Nuclear Test cases.

Additionally, clear examples of uncompensated transboundary damage may be found in State practice, where States refuse to make reparations or pass over their international responsibility to private persons. Despite that, there is no international decision that recognizes the existence of significant transboundary damage while considering the damage non-compensable.

Part II.- Bases for the creation of an international regime of responsibility and liability for transboundary damage resulting from offshore activities in the Gulf of Mexico.

Chapter 3.- Theoretical bases for the design of an international regime of responsibility and liability for transboundary damage resulting from offshore activities.

3.1.- Different types of international regimes of responsibility and liability applicable to transboundary damage resulting from offshore activities.

In discussing this issue, it is common to find references to different types of responsibility and liability regimes applicable to States which are not always properly used. For example, references are made to objective responsibility, absolute liability, strict liability, liability *sine delicto*, liability for risk, subjective responsability, liability for willful intent, dolus or gross negligence, negligence-based liability, fault-based liability, subsidiary liability, responsibility of states for international wrongful acts.[187] Confusion grows since there is no distinction in the continental system and no equivalent terms can be provided as a translation for responsibility and liability in *common law.*[188]

[187] See, e.g., Crawford, James., State Responsibility: The General Part. Cambridge University Press, United Kingdom, 2013; Xue, Hanqin., Transboundary Damage in International Law. Cambridge University Press, United Kingdom, 2003. Brownlie, Ian., "State Responsibility and the International Court of Justice." pp. 11-18, Goodwin-Gill, Guy S., "State Responsibility and the ´Good Faith´ Obligation in International Law." pp. 75-104, Loibl, Gerbard., "Environmental Law and Non-Compliance Procedures: Issues of State Responsibility." pp. 201-218, all at Issues of State Responsibility before International Judicial Institutions. Ed. Malgosia Fitzmaurice and Dan Sarooshi, Hart Publishing, 2004; Francioni, Francesco., and Tullio, Scovazzi., (eds.) International Responsibility for Environmental Harm. London and Boston: Graham & Trotman, 1991; Lefeber, René., Transboundary Environmental Interference and the Origin of State Liability. Kluwer Law International, 1996.; Fitzmaurice, Malgosia., and Elias, Olufemi., Contemporary issues. Eleven International Publishing, 2005; Barboza, Julio., The Environment, Risk and Liability in International Law. Martinus Nijhoff Publishers, 2011; Dupuy, Pierre M., La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle. Revue générale de droit international public. Publications, Vol. 27, 1976; Xue, Hanqin. Transboundary Damage in International Law. Cambridge University Press, United Kingdom, 2003.

[188] See, for example, how the ITLOS Chamber, in its advisory opinion, begins by mentioning this distinction [Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. Advisory Opinion of 1 February 2011 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. p. 1. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf]. Also, while dealing with State responsibility, the ILC unifies and mixes up both concepts [Crawford, James., State Responsibility: The General Part. Cambridge University Press, United Kingdom, 2013, p.63.]. A theoretical distinction may be found in [Handl, Günther., "Case Note: Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: The International Tribunal of the Law of the Sea´s recent contribution to International Environmental Law." Review of European Community & International Environmental Law, RECIEL 20 (2) 2011. p. 208.]. This linguistic problem is addressed by [Mejía, Martha., and Kaiser, Stefan., "Responsabilidad

The first element to be considered in terms of international State responsibility is that the ILC deemed the difference between responsibility and liability[189] to be unimportant[190]. Crawford explains that "in fact, the presence of the term ´liability´ on its own means no more or less than the term 'responsibility' would, and it is only the inclusion of an adjective that makes a difference…'responsability' as used in the ARSIWA and 'Liability' as it appears in the ILC's work on transboundary harm bear the same meaning."[191]

Likewise, the last special rapporteur on international State responsibility adds that "[o]nce more, it should be stressed, state responsibility is predicated on a principle of 'objective' liability,[55] in the sense that once the breach of an obligation owed under a primary rule of international law is established, this is *prima facie* sufficient to engage the secondary consequences of responsibility."[192] In footnote number 55 he explains that "the term itself is regrettable, and appears nowhere in the ARSIWA: it is -owing to the lack of a viable opposite number in the sense of a 'subjective' responsibility- generally be avoided. The correct view is that there is no such thing as 'objective' responsability or 'subjective' responsibility - there is only responsability properly so called." The essence of this last remark reflects that we cannot directly extrapolate from national concepts to international law. It may cause confusion and serious contradictions.

3.1.1- The classic regime of responsibility and the fault-based liability. The key role of legal damage.

In the continental system, the liability may be classified as 'objective' or 'subjective'. This classification is not just a practice by legal writers, but it brings about very important consequences. When the subject's responsibility is 'subjective', the existence of *mens rea or fault*, construed as negligence or

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Internacional: Un término, dos conceptos, una confusión." Anuario de Derecho Internacional, Vol. IV, 2004, pp. 411-437]

[189] See, e.g., Horbach, Natalie. Liability versus Responsibility Under International Law. Leiden, 1996.

[190] Although we do not share this position, it should be noted that, for authors like Barboza, the difference is important at the international level. Supposedly, it differentiates a 'responsibility with fault' from a 'liability without fault' of States. See, Barboza, Julio., The Environment, Risk and Liability in International Law. Martinus Nijhoff Publishers, 2011, pp. 21-24.

[191] Crawford, James., State Responsibility: The General Part. Cambridge University Press, United Kingdom, 2013, p.63.

[192] Id. p.61.

dolus, must be proved. When there is an 'objective' responsibility, suffice it to demonstrate the existence of damage and the causal link with the responsible subject. This type of responsibility is based on the fact that any harm or damage caused to another person is a wrongful civil act and generates the obligation to compensate,[193] unless there are exemptions.

In its concept of international State responsibility, the ILC rightly stated the thesis that there is no need to prove any fault for a breach of an international obligation to be a wrongful act. However, it omitted that the existence of a wrongful act presupposes the presence of harm or damage. The Commission seeks to demonstrate that "…there is no exception to the principle stated in Article 2…" and, to do so, it assumes that neither fault nor damage is necessary for a wrongful act to exist.[194]

From the viewpoint of the Commission, a wrongful act without damage takes place when a State does not enact a national law to comply with an obligation emanating from an international treaty.[195] This stance reflects a very limited concept of harm or damage and disregards the complex dynamics of the integration mechanisms of international law and domestic law in the State practice on treaties.[196]

Barboza demonstrates the invalidity of the Commission's thesis, when he wonders: What is an obligation to make reparations based on, if not on legal damage?[197] Obligation and right are the two sides of the content of legal relationships that make up international law. The breach of an international obligation always involves legal damage or harm to the 'object' of the international legal relationship. In civil matters, the 'object' of the legal relationship is construed as the entity which is the center of the interest involved

[193] See, e.g., Cuba's Civil Code, Law No. 59, Article 81. Wrongful acts are events that cause harm or damage to others. Article 82. The subject unlawfully causing harm or damage to another is obliged to compensate.

[194] See, Goodwin-Gill, Guy S., "State Responsibility and the ´Good Faith´ Obligation in International Law." at Issues of State Responsibility before International Judicial Institutions. Ed. Malgosia Fitzmaurice & Dan Sarooshi, Hart Publishing, 2004, p.203.

[195] See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), p.73.

[196] For an explanation on 'monist' or 'dualist' theories and the effect of this type of non-compliance, See, Delgado Sánchez, Lester., "Los Pactos sobre Derechos Humanos: Un paso en el camino." *Temas* Magazine, issue 59, July-September 2009, p.67.

[197] See, Barboza, Julio., "La Responsabilidad Internacional." pp. 4-5. at www.oas.org/dil/esp/1-32%20**Barboza**%20**Julio**%20def.pdf

in the relationship: tangible or intangible property, singular acts by other persons, services, family relations.[198] In criminal matters, the doctrine of the 'legal good damage' is used.[199] Regrettably, the conceptual development of these questions is limited, as evidenced by the ILC approach.

An 'obligation to give, do or not do'[200] is used by the Commission as an example of breach without damage. However, failure to comply with it always entails harm or damage, verified as material damage or damage to the 'legal security' States wished to grant a certain issue. The concrete assessment of the damage is a matter of judicial practice and takes into account the arguments held by the parties in conflicts, not a task for legislators as wrongly suggested by the Commission. Certainly, there is no record of any international lawsuit in which State responsibility has been invoked without verifying the existence of harm or damage. On the contrary, international decisions[201] show that the absence of damage or its qualification as insignificant could motivate the Court not to declare the international responsibility of a State, or even doing so, it could considerably weaken the content of its consequence: the obligation of restitution.

Also, on the question of the 'fault', the Commission clearly adopts a position: “A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.”[202]

This does not exclude the causal link between the existence of damage and the subject's acts. As well indicated by Loibl, “Thus, an affected State will not be

[198] See, Alessandri R., Arturo., Somarriva U. Manuel., and Vodanovic H. Antonio., Tratado de Derecho Civil: Partes Preliminar y General. Vol. I, Editorial Jurídica de Chile, 1998, p.294.
[199] See, e.g., Hefendehl, Marcial., La teoría del bien jurídico: ¿fundamento de legitimación del derecho penal o juego de abalorios dogmático?. Marcial Pons, 2007.
[200] In the Continental system such obligations are classified as 'obligación de prestación'. No equivalent legal term in English, but close to the concept of 'provision of service obligations'.
[201] This was evidenced by the Trail Smelter, Corfu Channel and Lake Lanoux cases, where the severe or significant damage is mentioned.
[202] See, United Nations., “Report of the International Law Commission.” General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), p.73.

able to invoke successfully the responsibility of a specific State for the damage suffered as, inter alia, it will not be possible to establish causality."[203] The element of causality is inherent to any responsibility or liability regime and should not be confused with the 'fault'.

Clarifying the concepts avoids countless misunderstandings. As indicated above, the State responsibility regime for wrongful acts implies a liability gradation, from 'objective' to 'subjective', but always in the presence of harm or damage. This gradation will depend on the type of primary international obligation allegedly breached.

It is a fact that, under this regime, there is no need to consider the State's intention to breach an international obligation. "Of course, no one doubts that either fault or intention (dol, dolus), when proved, are sufficient to generate responsibility."[204] This stance is clearly supported in the principle enunciated by international tribunals in the Trail Smelter and Corfu Channel cases. It is also supported by the practice of internationally sued States which, still without recognizing their 'fault', assume the reparation of transboundary damage, either directly or through private persons.

Having adopted this position, one might wonder whether for victims of transboundary damage to obtain more benefits, it is necessary to develop a more specific liability regime or one different from the classic regime of international State responsibility. Let us examine the theoretical bases of the various types of international liability regimes, the existence of which is argued by legal writers. In doing so, care should be taken not to undermine or weaken the bases of the international legal institution of State responsibility. It must be remembered that it's good fishing in troubled waters and, in this case, the fishermen would be those holding that States are not responsible for the damage.

[203] See, Loibl, Gerbard., "Environmental Law and Non-Compliance Procedures: Issues of State Responsibility." Issues of State Responsibility before International Judicial Institutions. Ed. Malgosia Fitzmaurice and Dan Sarooshi, Hart Publishing, 2004, p.203.

[204] Brownlie, Ian., "State Responsibility and the International Court of Justice." Issues of State Responsibility before International Judicial Institutions. Ed. Malgosia Fitzmaurice and Dan Sarooshi, Hart Publishing, 2004, p.12.

In this regard, any interpretation by legal writers which confuses the classic regime of international responsibility for wrongful acts with the regimes of liability for willful intent (dolus), gross negligence, and fault-based liability must be fully rejected. These forms of liability require the subject's psychological assessment in order to determine the existence or non-existence of a violation. The aforementioned does not deny the practical importance of arguing, in an international lawsuit, about the intention of the subject of international law when breaching the international obligation.

These liability regimes, seen as 'subjective responsibility', do not constitute the basis of the classic regime of international responsibility, as it is considered that damage and the breach of an international obligation presuppose each other in existence and form the wrongfulness of the State act. However, given the position held by the Commission in trying to establish the existence of an international wrongful act without damage makes us go deeper in the nature of international obligations.

Due to the nature of international legal relationships, the existence of an international obligation cannot be conceived without presupposing the existence of a right for one or several subjects of international law. Likewise, for a while the ILC classified international obligations, according to their nature, as obligations of conduct or of means and obligations of result.[205]

Crawford points out that: “The distinction between obligations of conduct and result is unfamiliar to the common law tradition. It derives from civil law systems, especially French law, which treats obligations of conduct as being in the nature of “best efforts” obligations, and obligations of result as being tantamount to guarantees of outcome.”[206] In its comments, the Commission clarifies the matter as follows: “The distinction referred to above must not obscure the fact that every international obligation has an object or, one might say, a result,

[205] See, Articles 20, 21 and 23 of the text on International State Responsibility adopted on first reading. United Nations., “Report of the International Law Commission.” General Assembly, Official Records, Thirty-fifth session, Supplement No. 10 (A/35/10), 1980, p. 32. For the Commission's comments to Articles 20 and 21, See, United Nations., “Report of the International Law Commission.” General Assembly, Official Records, Thirty-second session, Supplement No. 10 (A/32/10), 1977, pp. 11-29. For the Commission's comments to Article 23, See United Nations., “Report of the International Law Commission.” General Assembly, Official Records, Thirty-third session, Supplement No. 10 (A/33/10), 1978, pp. 81-86.

[206] Crawford, James., State Responsibility: The General Part. Cambridge University Press, United Kingdom, 2013, p. 222.

including the obligations called obligations 'of conduct' or 'of means'. Conversely, every international obligation, even if it is of the type called an obligation 'of result', requires of the obligated State a certain course of conduct. What distinguishes the first type of obligation from the second is not that obligations 'of conduct' or 'of means' do not have a particular object or result, but that their object or result must be achieved through action, conduct or means 'specifically determined' by the international obligation itself, which is not true of international obligations 'of result'. This is the essential distinguishing criterion for characterizing an international obligation as an obligation 'of conduct' or 'of means'." [207] Despite the fact that these articles adopted on first reading did not make the final draft, it should be stressed that "… that distinction is of fundamental importance in determining how the breach of an international obligation is committed in any particular instance."[208]

A special conclusion is drawn from the above: international obligations are deemed breached when the protected interest of the international legal relationship is affected. This confirms the position that the classic responsibility regime is 'objective', since damage to the protected legal interest is enough to consider the existence of a wrongful act. Once damage to the legal interest protected by the international legal relationship is determined, fault is not necessary to assess whether the subject is liable or not. Considerations on the subject's intention or fault serve to determine how and to which extent an international obligation has been breached. Conversely, the 'subjective responsibility' regimes exempt the subject of a violation from any responsibility, if in his/her conduct there was no intention to violate the legal rule. Additionally, the attribution of fault, as a psychological intention, to the State, as an abstract entity, poses several conceptual obstacles hard to overcome.

3.1.2- The different types of liability without fault.

Another important legal matter in our analysis is that the classic responsibility regime is not opposed to the concepts of absolute liability,[209] strict liability,

[207] See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Thirty-second session, Supplement No. 10 (A/32/10), 1977, pp. 13-14.
[208] Id. p.13
[209] Absolute liability is the more precise form of strict liability. Theoretically speaking, their difference lies on the fact that in the former there are small causes for liability exoneration. The conventional regime established in the

liability *sine delicto* and liability for risk concepts. All these concepts are assimilated into the so-called 'objective responsibility', for none of them requires considering the intention of the subject breaching the obligation, so that the subject's responsibility may be invoked.

In the legal analyses on transboundary damage, it is very common for the term strict liability/liability *sine delicto* to be assumed as a synonym of liability for risk. Besides the existing conceptual differences,[210] it should be pointed out that in international law there is strict liability whenever damage results from a hazardous or ultra-hazardous activity.[211]

According to Barboza, liability for risk is a responsibility that arises without breach of an international obligation.[212] This theoretical approach is extremely dangerous, for it implies a rupture with existing international customary rules and with the basic concepts of law. The proposal comes from the premise that harming a State as a result of acts not prohibited by the international law is lawful. Under this view, a State may be responsible without having violated any international obligation. Therefore, it moves away from the inherent purpose of every legal system: to ensure legal security.

Although this view is the result of conceptual gaps in the ILC work, it derives from wrong premises. Firstly, it maintains the error of the ILC approach of taking the existence of the wrongful act without legal damage as its base. Secondly, it confuses the legal relationships established at the national and international levels, in order to assess the lawful or unlawful character of a State act and of the activities conducted by subjects under the domestic law of a State.

Convention on International Liability for Damage Caused by Space Objects is a clear example. See, Goldie, L.F.E., "Concepts of Strict and Absolute Liability in Terms of relative Exposure to Risk." Netherland Yearbook of International Law, 1985, p. 194.

[210] Strict liability includes liability for risk, but not vice versa. Strict liability exists when proving fault is not necessary; when proving the existence of damage and causality between the subject's actions and the appearance of damage is enough. Thus, the victim is relieved of the burden of proof, in the sense of having to prove the intention of the subject as a liability condition. Risk is one of the potential bases to adopt this approach and, in such case, there could be a liability for risk.

[211] For a concept of ultra-hazardous activity, See, Jenks, C. Wilfred., Liability for Ultra-Hazardous Activities in International Law, Recueil des Cours, T. 117 (1966-I), p.107. For a concept of risk, See, Article 2 (a) of Articles on Prevention of Transboundary Harm form Hazardous Activities.

[212] See, Barboza, Julio., "La Responsabilidad Internacional." p. 3. at www.oas.org/dil/esp/1-32%20**Barboza**%20**Julio**%20def.pdf

Following Lefeber's[213] view, the concepts of liability for risk and liability *sine delicto* are the same. This type of liability is considered to be different from the classic one, because the activities causing damage are lawful in one case and wrongful in the other.[214] On this basis, the existence of strict liability, construed as liability for risk, challenges the classic responsibility regime.[215]

From our perspective, the existence of legal damage is *conditio sine qua non* for any international responsibility or liability regime. Nonetheless, in the case of liability for risk, the approach on the concept of 'damage' has specific characteristics. For activities entailing risks, damage caused is considered to be costs inherent to the activity… and they must be internalized.[216]

These concepts come from national legal systems. For example, Cuba's Civil Code shows the continental tradition of establishing the following causes for civil legal relationships: natural events, acts of law, wrongful acts, illicit enrichment, and risky activities.[217] In civil matters, each type of cause gives a different content to the civil legal relationships generated.

Under this national concept, certainly, the damage caused by a risky activity is assumed by the authorizing State and, therefore, its costs must be internalized. To do so, the State itself imposes an objective responsibility to all the subjects involved in the activity within its territory. However, the question is entirely different in International Law.

At the international level, no State may unilaterally prohibit an activity.[218] For such prohibition to exist, the State must give its consent, whether by signing a treaty or accepting an international customary law rule. This implies that the

[213] See, Lefeber, René., Transboundary Environmental Interference and the Origin of State Liability. Kluwer Law International, 1996.

[214] See, Barboza, Julio., "La Responsabilidad Internacional." p. 3. at www.oas.org/dil/esp/1-32%20**Barboza**%20**Julio**%20def.pdf

[215] See, Nguyen Quoc, Dinh., Daillier, Patrick., y Pellet, Alain., Droit International Public. Librairie Générale de Droit et de Jurisprudence, 1994, p.750.

[216] See, Barboza, Julio., "La Responsabilidad Internacional." pp. 9-10. at www.oas.org/dil/esp/1-32%20**Barboza**%20**Julio**%20def.pdf

[217] See, Cuba's Civil Code, Law No. 59, Article 47.

[218] International Law rules rarely focus on prohibiting human activities. The more notable cases are related to Human Rights and International Humanitarian Law. Due to its characteristics, the international legal system is centered on balancing the rights and obligations of sovereign subjects who live on an equal footing. Sands rightly describes that in the activities and management of hazardous substances, there "… is a patchwork of international regulations the applicability of wich depends upon the natural and characteristics of a particular substance and the location of the activity…" See, Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p. 618.

affected State never decided on the convenience of assuming the cost-risk of an activity to be developed under the jurisdiction of another State.

Additionally, the economic benefit of the risky activity causing transboundary damage hardly contributes to the economic development of the affected State. For example, the use of nuclear energy, which unquestionably entails risks, generates benefits for only a reduced group of States with the technological capacity to develop it. In this connection, neither the State threatened by the risk, nor the majority of States may impose an international prohibition on another State, nor demand the transfer of that technology. Besides the principles of sovereign equality and non-interference in the internal affairs of States, the supposed interest balance test, essential to create this type of regime, is not observed.[219] The foundations of this institution are radically different when brought to the international level.

When this type of national regimes is extrapolated to offshore activities, the natural link between 'assumed risk' and 'probable damage' in relation to the subject is broken. The international subject decides to assume the risk irrespective of the equally sovereign will of the subject who will eventually be affected by the transboundary damage. According to this reality, at the international level, the 'risk' is rather assumed as a type of 'fault' which will then generate a strict liability.

Barboza rightly indicates that it is possible to think of the existence of a conditional fault consisting in bringing to the creation of risk a form of fault that remains latent until the condition – the damage – takes place, which turns the potential fault into a fact.[220] He concludes saying that fault plays a minor, almost null, role in this field; however, it somehow exists.[221] This might seem the only valid reason to classify 'the activities not prohibited by international law' as risky or non-risky and to suggest the existence of a specific liability regime.

[219] See, Barboza, Julio., The Environment, Risk and Liability in International Law. Martinus Nijhoff Publishers, 2011. p. 18.
[220] See, Barboza, Julio., "La Responsabilidad Internacional." p. 10. at www.oas.org/dil/esp/1-32%20**Barboza**%20**Julio**%20def.pdf
[221] Id. p.14.

As indicated before, the international case law has never considered assessing the risk in order to analyze the lawful nature of transboundary damage. The national legislations regulating these questions normally establish a clear list of activities to be deemed risky. Nevertheless, this understanding does not exist internationally,[222] beyond the commitment undertaken by each State party to a treaty that regulates a concrete activity. Risk, as a basis for considering international State responsibility, will always introduce a significant degree of uncertainty, given the different levels of technological development and the access to it.

Likewise, understanding this type of liability based on illicit enrichment is a conceptual mistake.[223] This would require proving that the State of Origin became rich as a result of the damage suffered by the Affected States and that it has the obligation to refund up to the extent of enrichment without legitimate cause.

Also, no international court has stopped to assess the lawful or unlawful nature of the activity breaching an international obligation. Neither metal smelting, nor mine planting, nor failing to comply with the obligation to notify a danger, nor diverting the water course of a lake, nor conducting nuclear tests, just to mention some examples, constitute activities prohibited by international law. However, when there is significant transboundary damage the State of Origin paid compensation.

In conclusion, the development of an international liability regime based on the concepts of 'risk' and 'lawfulness' of an activity, seems to generate more gaps than the classic responsibility regime itself. However, it is true that the general principles of law could support the existence of strict liability for these activities, as for any international obligation of result. According to Handl " …all major

[222] Based on a study on the agreements regulating these activities, Sands highlights the existence of at least four different approaches to what is understood by hazardous substances and activities. See, Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p. 620.

[223] See, Barboza, Julio., "La Responsabilidad Internacional." p. 22. at www.oas.org/dil/esp/1-32%20**Barboza**%20**Julio**%20def.pdf

domestic legal systems in one way or the other provide for strict liability regimes for 'sources of increased danger' or 'abnormally dangerous activities'."[224]

The disadvantage results from distorting, fragmenting, and limiting the scope of the classic State responsibility regime. We do not consider pertinent to force the supposed existence of a general regime of strict liability for transboundary damage, as a consequence of a series of conventional rules agreed upon by States in specific contexts. The advantages of developing conventional rules with specific liability mechanisms are undisputed, given the conceptual debate prevailing on the matter.

Some of these advantages are the availability of funds to generally compensate the victims of transboundary damage; the collectivization of damage costs through international funds; the immediate and unlimited liability assumption by the 'operator' as the direct responsible at the national and international levels; the creation of mechanisms for judicial cooperation and the enforcement of judgment; as well as the indirect contribution to the development of ever-higher prevention and diligence standards for these activities. Likewise, these special regimes directly establish a 'subsidiary liability' for States, although this issue has two sides.

3.1.3- The subsidiary liability of States. Weakening of international responsibility or an acceptable way out?

The first question raised by this concept is: *what* or *whose* subsidiary liability are we dealing with? The answer is simple if we accept the concept as developed in the sectoral conventions aforementioned. It is a subsidiary liability that, under a treaty, is attributed to private persons involved in conducting certain activities, such as nuclear activities or oil shipping. Said international liability of such private persons emanates from and limits its existence to the relevant conventional rule. For that reason, to speak in general terms of the existence of an international subsidiary liability of States, when their international responsibility is primary by definition, is a mistake.

[224] See, Handl, Günther., "International Liability of States for Marine Pollution," The Canadian Yearbook of International Law, Vol. 21, 1983, p. 100.

Rather than a conceptual type of liability, this is essentially a mechanism to ensure a prompt and adequate compensation of victims.[225] In this regard, "[s]ubsidiary direct state liability is an eminently reasonable proposal."[226] Due to the characteristics of the legal relationships established in these treaties, States decide to attribute the condition of passive international subjects to private persons who benefit from an activity conducted under their responsibility. "After all, the policy reasons for imposing strict liability on the private operator *vis-á-vis* the individual transnational victims have equally compelling force on an international level, that is, between victim and acting states when damage is due to a transnationally hazardous activity."[227]

In our opinion, these conventional regimes may be an efficient mechanism in so far as the liability of the 'polluter' is not limited and the State guarantees 'subsidiarity' the compliance with the obligation to compensate any damage. Such compensation must occur under the full international responsibility of the State for harming the rights of another State.

After this first general approach to the issue of responsibility and liability regimes, let us review other two important issues. Focusing on transboundary damage resulting from offshore activities, the nature of the obligation considered violated will be analyzed, as well as the bases for its attribution to the State.

3.2.- The breach of international obligations.

In the proposed creation of a special regime of liability for risk, the supposed advantage for the victims of not having to prove the subject's fault,[228] is

[225] In these cases, compensation is the modality that has established itself through practice in order to repair damages. See, Dupuy, Pierre M., "La Responsabilité Internationale des États pour les dommages d´origine Technologique et Industrielle." Revue générale de droit international public. Publications, Vol. 27, 1976, p. 278.
[226] See, Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law. Vol. 74, 1980, p. 562.
[227] See, Handl, Günther., "International Liability of States for Marine Pollution," The Canadian Yearbook of International Law, Vol. 21, 1983, pp. 104-105.
[228] See, e.g., Lévy, Denis., "La responsabilité pour omission et la responsabilité pour risque en Droit International Public. » Revue Générale de Droit International Public, No. 4, 1961, pp. 744-764.

transferred to the burden of "… proof that the state's lack of due care or due diligence brought about the transnationally injurious event."[229]

This is based on the approach that, without violating an international obligation, there is a strict liability of a State, assuming its lack of due diligence. In contrast with this thesis, we consider that any significant transboundary damage is a wrongful act since it implies the violation of customary rules and/or principles of international law.[230]

Regarding marine transboundary damage due to offshore activities, there is a specific conventional obligation not to harm, although the nature of this international obligation could be argued. Let us forget for a moment the arguments held so far and the fact that this obligation emanates from more comprehensive principles recognized by international courts. Let us focus on reviewing, in terms of the ILC itself, the type of obligations we are facing, which will help define to what extent a State's fault, construed as dolus or negligence, must be proved.

The Commission considered the existence of two basic types of international obligations: obligations of conduct or of means, and obligations of result. It also deemed necessary including a third category of international obligations: the so-called obligations of prevention.[231]

The conceptual analysis of the two basic types of international obligations was impeccable. In both cases, the element to invoke international State responsibility was determined: conduct or result. In obligations of conduct, States have to follow a specific rule of conduct, the violation of which takes place even in the absence of physical damage. As stated by the Commission: "…for an international obligation to be characterizable as an obligation 'of conduct' or 'of means', it is not enough for the obligation to require of the State a

[229] See, Handl, Günther., "International Liability of States for Marine Pollution," The Canadian Yearbook of International Law, Vol. 21, 1983, p. 95

[230] Summarizing our considerations, the existence of significant transboundary damage would violate in principle the obligations recognized by international courts in the Palmas, Trail Smelter, and Corfu Channel cases. It would also violate the principles of sovereign equality, non-interference, *sic utere tuo ut alienum non laedas*, good neighbor, abuse of rights, and good faith, as well as the right of victims to be compensated. Likewise, more specific obligations, like those regulated by UNCLOS, could be considered violated.

[231] See, United Nations., "Report of the International Law Commission." General Assembly, Official Records, Thirty-fifth session, Supplement No. 10 (A/35/10), Vol. II, 1980, pp. 26-64.

course of conduct determined in some unspecific manner. The determination must, on the contrary, be extremely precise, in other words, the obligation must determine in a 'particular' manner what is required of a given branch of the State machinery."[232]

In the case of obligations of result, a specific conduct is not required. After a thorough analysis, the Commission concludes: "In the light of the foregoing considerations, there is, in the Commission's view, no doubt that, for the purpose of establishing how an international obligation which can be characterized in general terms as an obligation 'of result' is breached, what counts is the result actually achieved by the State as compared with the result required by the obligation. If the two results coincide, the obligation has been fulfilled; otherwise it must be concluded that the obligation has been breached. In other words, a comparison of the result achieved with the result which the State ought to have achieved is the only general and basic criterion for establishing whether an obligation 'of result' has been breached. The existence of a breach of an obligation of this kind is thus determined in international law in a completely different way from that followed in the case of an obligation 'of conduct' or 'of means' where, as indicated in connexion with Article 20, the decisive criterion for concluding that the obligation has been fulfilled or breached is a comparison between the particular course of conduct required by the obligation and the conduct actually adopted by the State."[233]

In conclusion, State responsibility may result from a conduct or a result contrary to an international obligation. Nonetheless, this conceptual clarity blurs when the Commission argues in favor of the so-called obligations of prevention.[234] This type of obligation of prevention can be clearly differentiated from the obligations of due diligence, like the obligations of conduct.[235] In fact, the

[232] See, United Nations., "Report of the International Law Commission." General Assembly, Official Records, Thirty-second session, Supplement No. 10 (A/32/10), Vol. II, 1977, p. 18.
[233] Id. p. 29.
[234] "In article 23, the Commission rounded off its work on that point by defining the specific condition to be fulfilled for the existence of another special type of obligations of result to be established, namely, those where the result specifically required of the State was to ensure the nonoccurrence of a given event." Id. p.81
[235] See, Crawford, James., State Responsibility: The General Part. Cambridge University Press, 2013, pp. 226-232. Based on the differentiation made by Crawford between the international obligation of prevention and that of due diligence, it may be argued, at least theoretically, an inversion of the burden of proof. The existence of damage is the evidence of the failure to prevent, for the polluter subject shall prove non-failure of its 'duty to prevent'.

Commission starts from the understanding that the obligations of prevention "are a special type of the general category of obligations 'of result'.[236] Nevertheless, it seems to contradict itself by defining that "…there is a breach of that obligation only if, ***by the conduct adopted***, the State does not achieve that result."[237]

The key to understand this apparent contradiction lies in the nature of the event to be prevented and the type of relation existing between the State, as an abstract entity, and the persons involved in the event. As rightly clarified by the Commission, these obligations are, in essence, obligations to prevent third persons from affecting the interests of other States.[238] In addition, the 'result'[239] is required as *condicio sine qua non* for the existence of breach of the obligation of prevention. The difference lies in the fact that two clearly differentiated conducts will serve as a basis for considering if the international obligation of prevention has been fulfilled or not.

Concerning international obligations of result, the conduct demanded is only expected or considered from the State. Obviously, States act through persons, but these persons shall be considered part of the State due to their condition or the activity they perform. For international obligations of prevention to be violated, two clearly differentiated conducts must coincide, which will be objectively and subjectively examined. Individuals not considered part of the State shall conduct themselves in a manner causing an event proscribed by international law. The conduct generated by this event shall perceived 'objectively'; that is, there will be no need to assess the intention of these subjects in order to continue with the analysis where assessing the subject's conduct will be required. At the international level, the diligent conduct of the State to *prevent its soil from being violated*[240] will be assessed.

Regrettably, this stance is not supported by a consistent practice of States or international courts that, as we have analyzed, have reviewed a limited number of cases.

[236] See, United Nations., "Report of the International Law Commission." General Assembly, Official Records, Thirty-second session, Supplement No. 10 (A/32/10), 1977, p. 85.

[237] Id.

[238] See comment 13. Id. p. 85

[239] The result is the event the State is obliged to prevent. According to the Commission, it must not be confused with damage. See, Id. p. 82.

[240] See, Moore, J. B., History and Digest of the International Arbitrations to which the United States has been a Party. Vol. I, Government Printing Office, Washington, 1898, p. 573.

These complex and abstract considerations makes us think that, occasionally, an international obligation may be deemed of result and also of prevention, depending on the subject involved in the event. For example, States have the obligation to ensure the inviolability of diplomatic offices. Such obligation shall be an obligation of result if the State orders its army to enter a diplomatic office, regardless of its motive to do so. In this case, it may be said this is an obligation of result considered to be breached from the very moment duly authorized individuals (soldiers) enter the diplomatic office. However, if a group of individual decides to attack that diplomatic office, the State shall be responsible only if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[241] Therefore, this will be an international obligation of prevention.

The above shows that the international obligation to prevent the conduct by a third party may be in turn construed as an obligation of result of its own acts; that is, they are directly attributed to the State. The special rapporteur Roberto Ago rightly presented the obligation of prevention as a special type of obligation of result, instead of conduct or of means. This same logic should be used in discussing the character of the obligation contained in UNCLOS Article 194.2. In our view, this international obligation should be considered of prevention and/or of result, according to the type of event and the subjects involved in it.[242]

3.3.- Bases for attributing responsibility to States in offshore activities.

As well indicated by Sands "[t]he responsibility of states not to cause environmental damage in areas outside their jurisdiction pre-dates the Stockholm Conference…"[243] and the negotiation of Principle 21.[244] The basis for the consequent development of this international obligation may be found in

[241] See, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment of 24 May 1980, I.C.J. Reports 1980, p.3.
[242] This is apart from the existence of general obligations and principles which impose on States an objective responsibility in the case of significant transboundary damage.
[243] See, Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p. 241.
[244] See, Sohn, Louis B., "The Stockholm Declaration on the Human Environmental." Harvard International Law Journal, Vol. 14, 1973, pp. 432- 515.

the Palmas Case[245] and subsequently recognized and adapted as appropriate in treaties and by international courts.

The question of attributing responsibility to States for transboundary damage in offshore activities has its own characteristics. The first notable element is that drilling activities on the Continental Shelf are conducted, as indicated in Chapter 1, in accordance with the exclusive sovereign rights, emanating from the international law, of the coastal State. The Coastal State alone may authorize and regulate the exploitation of natural resources over which there is permanent sovereignty.

Given the special characteristics of this activity, it could be argued that the occurrence of this event involves international State responsibility, for these being activities carried out by private persons exercising governmental authority and under the control of the State. The event evidences the existence of an act attributable to the State and considered as contrary to the conventional rights of other States.[246]

Based on Article 5[247], the 'event' could be considered State act attributable to the State, as a conduct of persons exercising governmental authority. Although this is not the classic act of sovereign power, taking into account its repressive character, it is undoubtedly an authorization to exercise sovereign rights[248] held exclusively by States at the international level.

In addition, Article 2.3 of the Convention on the Continental Shelf states that "[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation." Considerations of domestic law are irrelevant when claiming the lawful character of the activity if, as a result of such activity, an obligation of

[245] See, Island of Palmas case. (Netherlands v. U.S.A.), Award of 4 April 1928, La Hague, U.N.R.I.A.A., Vol. II, 2006, pp. 829-871.

[246] Phosphates in Morocco (Kingdom of Italy v. French Republic). Judgment of 14 June 1938 (Preliminary Objections), Judgments, Orders and Advisory Opinions, C.P.J.I. Series A/B, No 74 at p. 10. http://www.icj-cij.org/pcij/series-a-b.php?p1=9&p2=3

[247] See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 44. "Article 5. [on international responsibility of States] Conduct of persons or entities exercising elements of governmental authority: The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

[248] See, Id. p. 93. Footnote N° 133.

international law is breached, [249] even partially.[250] Likewise, "[t]he irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the commission."[251]

Attributing to the State the conducts of private persons under its leadership or control has been thoroughly addressed by legal writers.[252] The approaches generally refer to all activities entailing risk and, therefore, start from the premise of a marked division between the conduct of private persons and that of States, as due diligence in the international obligation of prevention.

On this matter, two remarks are worth making. Firstly, international law requires higher and exclusive involvement of coastal States in the authorization and regulation of drilling activities on the Continental Shelf.[253] Secondly, although in cases, like the Nicaragua vs. US case, a high degree of control has been demanded,[254] in other cases international courts have considered that "[t]he degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control."[255]

In summary, for offshore activities it is possible to invoke more directly the State responsibility taking into account the essentially governmental nature of the activity and the exclusive control exercised through the authorization and regulation. That is in addition to elements that confirm the existence of a general international obligation of result, which imposes a strict liability on States in case of significant transboundary damage, as long as there is a causal

[249] See, Id. p. 44. "Article 32. Irrelevance of Internal Law: The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part."
[250] See, Id. p. 125.
[251] See, Id. p. 87. Footnote N° 118.
[252] See, e.g., Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law, Vol. 74, 1980.
[253] See, article 81 de UNCLOS.
[254] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United Estates of America), Judgment of 27 June 1986 (Merits), I.C.J., Reports, 1986, p. 14. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=66&case=70&code=nus&p3=4
[255] See, Case No. IT-94-1-A (Prosecutor v. Du [Ko Tadi]). Judgment of 15 July 1999, p. 48. United Nations, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. http://www.icty.org/case/tadic/4#acjug

link. This part is concluded without underestimating the need and importance of developing specific conventional regimes on transboundary damage for offshore activities, including a potential international agreement for the Gulf of Mexico.

3.4.- Circumstances that may exclude State responsibility in these events. Effects of invoking it on liability.

Beyond political considerations, the reparation of significant transboundary damage is a standard conduct observed in State practice when an international claim is filed against the State of Origin.[256] Even when the individual and the Jurisdiction State are not closely related, the State is required to take preventive measures in order to prevent 'third' parties from affecting the rights of other States.[257]

As well pointed out by the Commission "…some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole)."[258] Concerning transboundary damage, the general obligation neither to harm nor to allow another State to be harmed is, inversely, the right of States not to be affected in their rights. The existence of a right could not be claimed if, when affected, it does not generate legal consequences. In this regard, responsibility is the necessary corollary of law. Responsibility brings about the obligation to agree on reparation when the obligation has not been met.[259]

Likewise, in General International Law, there are certain circumstances that exclude the State responsibility, such as consent, self-defense,

[256] In addition to arguments held in this research, See comments to Chapter II on State responsibility at the United Nations., "Report of the International Law Commission General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), pp. 248-299.

[257] As evidenced by the ICJ in the Corfu case, the presumption of knowledge or the permissibility of a concrete activity seems enough to fix the necessary causality between the State responsibility and the private acts under its jurisdiction, in case of significant damage. In fact, in the case study there is an authorization for a private person to carry out a governmental activity, in the sense that its development is exclusively recognized for States.

[258] See, United Nations., "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 72.

[259] See, Affaire des biens britanniques au Maroc espagnol. (Espagne contre Royaume-Uni), Sentence arbitrale du 1er mai 1925, La Haye, U.N.R.I.A.A., Vol. II, 2006, p, 641. http://legal.un.org/riaa/vol_II.htm

countermeasures due to the breach of an obligation, force majeure, extreme danger, state of necessity, and compliance with peremptory norms.[260] In Chapter 4, some concrete examples of specific conventional regimes for transboundary damage in certain activities will be mentioned. At the moment, attention will be focused on those considered to be relevant to the development of a responsibility and liability regime in the Gulf of Mexico, namely, consent, force majeure, and state of necessity.

In the last two cases, they are invoked when the resulting situation is not totally or partially caused by the conduct of the State invoking responsibility. That is, force majeure cannot be claimed if "[t]he State has assumed the risk of that situation occurring.";[261] or state of necessity cannot be claimed if "[t]he State has contributed to the situation of necessity."[262] Since exploring and drilling activities on the oil rig must be specifically authorized by the coastal State,[263] the possibility to invoke these reasons decreases considerably. For example, hurricanes in the Gulf of Mexico which hit the rigs might cause an oil spill, but they could not be considered a natural phenomenon of an exceptional, inevitable and irresistible character.[264]

Additionally, International Law establishes that invoking those reasons does not relieve the State of its duty to make reparations.[265] The issue of consent responds to basic notions of law [266] and, as indicated above, the consent of the

[260] Besides the positions held by the ILC, See, e.g., Aust, Anthony. Handbook of International Law. Second Edition, Cambridge University Press, 2010, pp. 383- 385; Crawford, James., The International Law Commission´s Articles on State Responsibility. Cambridge University Press, United Kingdom, 2002, pp. 160- 191; and Lefeber, René., Transboundary Environmental Interference and the Origin of State Liability. Kluwer Law International, 1996, pp. 98-113

[261] See, comments and Article 23.2 on State responsibility. United Nations., "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 183 and ss.

[262] See, comments and Article 25.2 on State responsibility. United Nations., "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 194 and ss.

[263] See, e.g., Mcdorman, Ted L., "The Continental Shelf." at The Oxford Handbook of the Law of the Sea, Oxford University Press, 2015, pp. 181-203. In his analysis on the nature of these substantives laws, he states "As a result, it is the exclusive right of the Coastal State to authorize through permits, leases, licenses, or concessions the undertaking of any exploration or exploitation of the mineral resource or sedentary species that may exist on its adjacent continental shelf." at p. 187.

[264] The frequent occurrence of hurricanes in the Gulf of Mexico and its impact on oil rigs are widely and generally known. Therefore, said phenomenon loses its condition of exceptional and inevitable from the moment the State authorizes the activity, assuming the known risk. In Chapter 4, there will be some examples of this rule at the international conventional level.

[265] See, comments and Article 27 on State responsibility. United Nations., "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10), pp. 209-211.

[266] Like the principle that a person may not plead his or her own wrong. See, e.g., Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p.152.

affected State is irrelevant to the undertaking of drilling activities on the Continental Shelf of the State of Origin. Nonetheless, based on the consent, it is possible and convenient to create specific regimes to determine the behavior of responsibility and liability in pre-determined situations.

3.5.- National and international victim compensation mechanisms.

There are several mechanisms involved in cases of transboundary damage caused by offshore activities in the Gulf of Mexico: first, the national courts of the State of Origin and the Affected State; and second, international mechanisms like ICJ, ITLOS and international arbitration, as well as diplomatic protection as a residual mechanism.

As explained in Chapter 1, in a case of transboundary damage caused by offshore activities, there would be different types of legal relationships. According to the subjects' conditions, in domestic or international law, there are various rights to be compensated and types of obligations to compensate. Existing national and international legislative gaps, as well as the multiple legal relationships and legal mechanisms, which get mixed and overlapped, jeopardize the fulfillment of the duty to ensure prompt and appropriate compensation for all victims.[267] The first complexity is given by the criteria to determine the damage, which can be as wide as suggested by the ILC[268] or as narrow as considered by the arbitral tribunal in the Trail-Smelter case.[269] Regarding transboundary environmental damage, this issue "has caused many differences of views, misunderstanding, and misinterpretations."[270]

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[267] This obligation is Principle 4 on the Allocation of Loss in the case of Transboundary harm arising out of Hazardous Activities. See, United Nations., "Report of the International Law Commission." General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10), pp. 151-166.
In addition to our considerations on the basis of this obligation in international law, See e.g., in the context of activities entailing risk, Boyle, Alan., "Liability for Injurious Consequences of Acts not Prohibited by International Law." at The Law of International Responsibility, Oxford Commentaries on International Law, Eds. James Crawford, Alain Pellet and Simon Olleson, Oxford University Press, 2010, pp. 101-103; and Lefeber, René., Transboundary Environmental Interference and the Origin of State Liability. Kluwer Law International, 1996, pp. 324. In connection to foreign investment, See, e.g., Sornarajah M., The International Law on Foreign Investment. Third Edition, Cambridge University Press, 2010, pp. 412-443.

[268] See, Principle 2 (a) on the Allocation of Loss in the case of Transboundary harm arising out of Hazardous Activities. See, United Nations., "Report of the International Law Commission." General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10), pp. 121-140.

[269] Trail smelter case (United States of America v. Canada). Award of 16 April 1938 and 11 March 1941. U.N.R.I.A.A., Vol. III. 2006, pp. 1905-1982.

[270] See, Fitzmaurice, Malgosia., "International responsability and liability." at The Oxford Handbook of International Environmental Law, Oxford University Press, 2007, p. 1014.

Although there are various approaches to the concept of damage and the convenience of the adjudicating body that shall determine it,[271] specific conventional regimes provide the possibility to establish such rules.[272] However, the question of punitive damage should be briefly addressed.

In international law, the issue of punitive damage is clearly excluded from State responsibility.[273] Nevertheless, some national laws[274] positively consider this matter against the operator. A new conventional regime[275] in which operators of offshore activities assume an unlimited international liability should contemplate a balanced solution. At the international level, a priority would be stipulated for transboundary damage compensation.[276] Once this damage has been compensated, the operator shall pay punitive damage, for which States shall establish judicial cooperation mechanisms. Yet, punitive damage will be excluded from complementary compensation levels.[277]

Moreover, important gaps on requirement of procedure should be bridged in the special conventional regime. Neither Cuba nor the United States recognize the compulsory jurisdiction of the ICJ.[278] The latter is not party to UNCLOS; consequently, access to ITLOS would be eventually compromised. In case of an event, this would require a previous negotiation on the adjudicating body, which might include the creation of an Ad Hoc arbitral tribunal. Also, the

[271] Even though this research is not aimed at deciding on the most convenient regime to define transboundary environmental damage, See, e.g., Bowman, Michael., "The definition and Valuation of Environmental Harm: An Overview." pp. 1-16; Boyle, Alan., "Reparation for Environmental Damage in International Law: Some Preliminary Problems." pp. 17-26; Fayette, Louise de La., "The Concept of Environmental Damage in International Liability Regime." pp. 149-190; all on Environmental Damage in International and Comparative Law: Problems of Definition and Valuation. Oxford University Press, 2002.

[272] See, Sands, Philippe., "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p. 905.

[273] See, e.g, Crawford, James., State Responsibility: The General Part. Cambridge University Press, United Kingdom, 2013, pp. 523-526.

[274] The Deepwater Horizon-Macondo and Exxon Valdez cases are examples that justify the importance of this institution for the US, although it is not used in Cuba. Professor Houck deems it the first procedural element which is important for the success of civil law in environmental cases. See, "Tres reflexiones sobre el Derecho Ambiental en Estados Unidos." at http://www.estrucplan.com.ar/articulos/verarticulo.asp?IDArticulo=828

[275] Built on bases similar to those existing for other activities such as launching objects to outer space or oil shipping. These bases will be reviewed in the next chapter.

[276] Prioritization could be similar to the one suggested by the ILC when it established the types of compensable international damage. See, Principle 2 (a) on the Allocation of Loss in the case of Transboundary harm arising out of Hazardous Activities. See, United Nations., "Report of the International Law Commission." General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10), pp. 121-140.

[277] According to the international practice to be assessed in the following chapter, these mechanisms could be an international fund with legal personality or simply the compliance by the State of Origin with its subsidiary liability.

[278] See, Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court. United Nations, Treaty Collection.
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&lang=en

diplomatic protection mechanism is influenced by the political considerations of States. This situation would eventually be detrimental to private victims.[279]

At the national level, access of victims to justice will depend on the will of States and often on their technical-legal training.[280] At this level, it seems neither convenient nor possible[281] to satisfactorily address the compensation for direct damage to the affected State as public trustee[282] or official responsible[283] for the protection of the *res publicae*.[284] For example, while there is a law in the United States regulating sovereign immunity of States,[285] in Cuba's legislation this matter is not regulated and invoking international treaties is not a judicial practice.[286] Also, "[t]hree Mexican states have asked the U.S. Supreme Court to review a 5th Circuit ruling that they cannot recover damages from BP for alleged property and economic losses caused by the 2010 Deepwater Horizon oil spill."[287]

In summary, the existence of important conceptual gaps and deficient mechanisms to ensure the rights of victims of transboundary damage suggest the convenience to develop a specific conventional regime for offshore activities in the Gulf of Mexico. The present context of bilateral relations between Cuba and the United States and the promotion of bilateral cooperation provide a unique opportunity to safeguard common strategic interests.

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[279] See, Footnote N° 24 supra.

[280] See, e.g., Macrory, Richard., and Turner, Sharon. "Participatory Rights, Transboundary Environmental Governance and EC Law." Common Market Law Review, Vol. 39, No 3, 2002, pp. 489-522 at 521.

[281] See, Footnote N° 23 supra.

[282] On the question of legitimacy of States to file claims, particularly under US laws, See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10), p.137.

[283] In accordance with Cuban law, the person or entity that has personally suffered damage or harm may demand reparation or compensation. The term 'personally' prevents, in principle, claims by legal persons and foreign States. See, Article 71 of Law N° 81 On the Environment". Official Gazette of the Republic of Cuba, special issue, Havana, 11 July 1997.

[284] The term *res publicae* is more accurate when referring to legitimacy of a State to establish this claim, although ILC comments to the draft articles on prevention mention the *res communis omnium* and the *res nullius*. See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10), pp. 129-130.

[285] See, United States Code., "The Foreign Sovereign Immunities Act." Codified at Title 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611. Published at United States Code, 2006 Edition, Title 28 - Judiciary and Judicial Procedure. http://www.gpo.gov/fdsys/search/pagedetails.action?st=28+U.S.C.+1330&collection=USCODE&historical=true&granuleId=USCODE-2006-title28-partIV-chap85-sec1330&packageId=USCODE-2006-title28

[286] Delgado Sánchez, Lester. "Los Pactos sobre Derechos Humanos: Un paso en el camino." *Temas* Magazine, No. 59, July-September 2009, p. 66.

[287] Cicero, Rita Ann., "Mexican states ask Supreme Court to resolve oil spill claims." Westlaw Journal Environmental, 3 September 2015, at http://blog.thomsonreuters.com/index.php/mexican-states-ask-supreme-court-resolve-oil-spill-claims/

Chapter 4.- Political consensus and conventional practice in the development of international responsibility and liability for transboundary damage. Basis for an agreement on offshore activities in the Gulf of Mexico.

By way of summary, this research was initiated by determining the nature and genealogy of the rights and obligations deriving from transboundary damage. To that end, the importance of differentiating the content of the legal relationships emerging, nationally and internationally, from the nature of subjects was stressed. This led us through the dense and confusing legal writings on the development of international law sources and their implication in determining the existence of a strict liability regime for transboundary damage.

A holistic analysis on the current limited legal statements and the international practice of States in *ex gratia* agreements affirm that, on certain occasions, strict liability is required, under the general principle that no State may use or allow the use of its territory in a manner affecting the rights of other States. Considerable transboundary damage generates the international obligation to compensate. To date, no international court has reasoned against these statements. This principle prevails in considering the lawful or unlawful character of the activity that caused the damage, the existence or absence of damage, and the private or governmental character of the subjects involved in such activity.

The above does not entail *per se* a strict liability regime for certain activities. Actually, in Chapter 3, the potential bases for creating or proving the existence of a non-fault liability regime were critically assessed. This implies the automatic assimilation of domestic concepts at the international level, disregarding the nature of international obligations and conceiving the existence of responsibility-liability without breach of an international rule. Since the fact that any significant damage is unlawful by nature is not understood as a general principle, a false crossroads appears.[288] Opposed to this conceptualization, this research does

[288] According to this, we must choose a liability for risk, under existing legal writings, or we must prove the existence of a specific primary fault-based obligation, understood as negligence or dolus. In the second case, it is also necessary for criteria to concur so the conduct of an individual may be attributed to the State.

not deny the existence of an international situation, understood as the need to develop increasingly strict conventional responsibility and liability regimes, which ensure efficient mechanisms for prompt and appropriate compensation of victims of transboundary damage.

Let us then review the political consensus elements present in major international declarations on the matter, as well as the State practice in developing conventional regimes specifically for these purposes. With this framework, an analysis will be made on the main legal bases a responsibility and liability regime for offshore activities in the Gulf of Mexico should have.

4.1.- Non-binding legal instrument.

High-level policy statements play an important role in international relations and in Law. To a large extent, they contribute to further conceptualize Law at the national and international levels while reflecting a general political consensus on a given topic. Such is the case of the Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972)[289] and the Rio Declaration on Environment and Development (Rio de Janeiro, 1992)[290], which are landmarks concerning the evolution of International Environmental Law.[291]

According to professor Handl, "as diplomatic conference declarations, both instruments are formally not-binding. However, both declarations include provisions which at the time of their adoption were either understood to already reflect customary international law or expected to shape future normative expectations."[292] Consequently, it is indispensible to study them when addressing international general environmental questions, particularly at the time of determining the political consensus basis on which Gulf States could develop a special conventional responsibility and liability regime for transboundary damage in offshore activities.

[289] Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment. UN Doc. A/CONF.48/14, at 2 and Corr.1 (1972). http://www.un-documents.net/unchedec.htm

[290] Rio Declaration on Environment and Development, in Report of the United Nations Conference on Environment and Development. UN Doc. A/CONF.151/56 (Vol.I), 12 August 1992, Annex I. http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm

[291] See Handl, Günther. "Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992." United Nations Audiovisual Library on International Law, p.1. http://legal.un.org/avl/ha/dunche/dunche.html

[292] Ib. p. 4.

4.1.1.- Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972).

The Stockholm Declaration initiates the so-called *modern era*[293] of International Environmental Law, by providing a *new global approach*.[294] This is an undeniable milestone[295] concerning the evolution of that branch of international law and some of the principles therein "… apply also to the protection and preservation of the marine environment."[296] Regardless of the attitude adopted by the States[297], principles 21 and 22 are particularly important to our research.[298]

As a result of political discussions at that time and in conformity with the principles of the Charter of the United Nations[299], principle 21 recognizes the right of States to use their natural resources, while establishing the sole restriction in the text concerning the rights of States "which is probably the most important legal point."[300] It establishes that States have *the responsibility 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. The mutual limitation and balance of sovereign rights reflected therein are inherent to the very structure of International Environmental Law.[301]

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[293] See Sand, Peter H., "The Evolution of International Environmental Law." at The Oxford Handbook on International Environmental Law, Ed. Daniel Bodansky, Jutta Brunnée and Ellen Hey, 2007. pp. 33.

[294] See Dupuy, Rene-Jean. "Humanity and the Environment." Colorado Journal of International Environmental Law and Policy, Vol. 2, 1991, p. 201.

[295] See Mahmoudi, Said., "Introduction." The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003, p.3.

[296] Corell, Hans. "Keynote Address." at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003, p.43.

[297] See e.g. Faramelli, Norman J., "Toying with the Environment and the Poor: A Report on the Stockholm Environmental Conferences." Environmental Affairs, Vol. 2, 1972, pp. 469-486; or Joyner, Christopher C., Joyner, Nancy D. "Global Eco-management and International Organizations: The Stockholm Conference and Problems of Cooperation." Natural Resources Journal, Vol. 14, 1974, pp. 533-556; or Sohn, Louis B., "The Stockholm Declaration on the Human Environment." Harvard International Law Journal, Vol 14, pp. 423-515.

[298] See, "Principle 21. States have, in accordance with the Charter of the United Nations and the principles of international law, 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 or of areas beyond the limits of national jurisdiction.
Principle 22. States shall cooperate 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."

[299] United Nations, Charter of the United Nations. http://www.un.org/en/documents/charter/index.shtml

[300] Blix, Hans., "History of the Stockholm Declaration." at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003, p. 18.

[301] See, Brunnée, Jutta., "Structure and processes of International Environmental Law." at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003, p. 68.

This obligation is complemented in principle 22 by the obligation of States to cooperate in the development of an international responsibility and compensation legal regime for victims of potential transboundary damage. Both principles enjoy political consensus, although there are some differences when giving them a concrete meaning, within previously analyzed international law rules.

4.1.2.- The Rio Declaration on Environment and Development (Rio de Janeiro, 1992).

Principles 2 and 13[302] of the Rio Declaration reflected principles 21 and 22 of the Stockholm Declaration, respectively. It is true that slight changes in the rewording of said principles show a desire to dilute the primary responsibility of States[303] concerning the limits to the exercise of their sovereign rights. Nevertheless, the basic ideas of the Stockholm Declaration on the responsibility of States to avoid transboundary environmental damage still exist and the right of victims to compensation was further developed to the national level.[304]

As pointed out by Kiss, principle 21-Stockholm/2-Rio is repeated in numerous international documents.[305] Albeit its wording is unclear about some important issues[306], principle 21 has become "a customary international Law rule by its own virtue."[307] This stance has been supported by international courts in cases like Trail smelter[308], Corfu Channel[309], Lake Lanoux[310], Pulp Mills on the River

[302] See, "Principle 2. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental **and developmental policies**, and the responsibility 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. (…) Principle 13. **States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage**. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation **for adverse effects of environmental damage** caused by activities within their jurisdiction or control to areas beyond their jurisdiction." **(emphasis added)**

[303] For further details See, Guruswamy, Lakshman's opinion. "International Environmental Law: Boundaries, Landmarks, and Realities." Natural Resources & Environment, Vol. 10, 1995, p. 46.

[304] See, Sanwal, Mukul., "Sustainable Development, the Rio Declaration an Multilateral Cooperation." Colorado Journal of International Environmental Law and Policy, Vol. 4, 1993, p. 59.

[305] See, Kiss, Alexandre. "The Destiny of the Principles of the Stockholm Declaration." at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003, p.61.

[306] See, Brunnée, Jutta., "Structure and processes of International Environmental Law." at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003, p.68.

[307] Kiss, Alexandre. "The Destiny of the Principles of the Stockholm Declaration." The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003, p.61.

[308] Trail smelter case (United States of America v. Canada). Award of 16 April 1938 and 11 March 1941. U.N.R.I.A.A., Vol. III. 2006, pp. 1905-1982.

[309] Corfu Channel case (Albania v. United Kingdom). Judgment of 15 December 1949. I.C.J. Reports 1949, pp. 244. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=1&code=cc&p3=4.

Uruguay,[311] just to mention some cases that have already been analyzed, and it was clearly reflected in the Advisory Opinion on the Legality of the Thereat or Use of Nuclear Weapons.[312] The efforts to implement principle 22-Stockholm/13-Rio at the international level have not been equally successful.[313]

These two principles were strengthened in Rio with the inclusion of principles 18 and 19.[314] They established an immediate notification system for disasters or emergencies, the effects of which could transcend national borders, and the duty to provide information to and consult with neighboring States on activities that may have an adverse transboundary effect.

Likewise, Principle 15[315] raises behavioral standards of States when developing their activities in the oceans, beyond the disputes on the principle's scope.[316] The principle was supported by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in the Advisory opinion on Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.[317]

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[310] Affaire du Lac Lanoux. (Espagne v. France), Sentence Arbitral du 16 Novembre 1957, U.N.R.I.A.A., Vol. XII, 2006, pp. 281-317.

[311] Pulp Mills on the River Uruguay case (Argentina v. Uruguay). Judgment of 20 April 2010, I.C.J., Reports 2010, pp. 4-107.

[312] Legality of the Thereat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996). I.C.J. Reports 1996, pp. 226-267. http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=4

[313] See, Kiss, Alexandre. "The Destiny of the Principles of the Stockholm Declaration." The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003, p.62.

[314] Principle 18 "States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States.
Every effort shall be made by the international community to help States so afflicted."
Principle 19 "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."

[315] See Principle 15 "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. 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."

[316] See, e.g. the discussion of the jurisprudential development of this principle by the Judge of the International Court of Justice Antônio Augusto Cançado Trindade in "Principle 15: Precaution" in "The Rio Declaration on Environment and Development. A commentary." Ed. Jorge E. Viñuales. Oxford University Press. 2015. pp. 417-421.

[317] See, para. 135. "The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law." at ITLOS, "Reports of Judgments, Advisory Opinions and Orders." Martinus Nijhoff Publishers Martinus, Vol. 11, 2011, p. 47.

The implementation of these principles, which are clearly interconnected[318], might seem obvious and advisable for deep-sea oil prospecting and production activities in the Gulf of Mexico. Regardless of their potential transboundary effects, these activities are developed within the limits of science and technology, in a semi-enclosed coastal sea with valuable natural resources and strong sea currents.

However, the absence of a regional legal framework to regulate responsibility and liability for transboundary damage in case of oil spills is a fact, beyond the UNCLOS general provisions. Let us add other notes on this convention and review some conventional State practices. For example, the responsibility and liability regime in outer space, because it is the strictest regime and the three Gulf States are party to it; and the civil liability regime for oil shipping, because it is directly related to offshore activities.

4.2.- Binding legal framework.

4.2.1.-The umbrella regime of the UNCLOS: Part XII. Protection and Preservation of the Marine Environment.[319]

UNCLOS is considered the Constitution for ocean affairs and the law of the sea,[320] having a comprehensive scope and almost universal acceptance.[321] Part XII of the Convention, entitled "Protection and Preservation of the Marine Environment", provides the general principles on this matter and works as "an 'umbrella' or framework for the legal regime of marine pollution."[322]

[318] See, e.g., Duvic-Paoli, Leslie-Anne and Viñuales, Jorge E. "Principle 2: Prevention" pp. 107-138. / Fitzmaurice, Malgosia., "Principle 13: Liability and Compensation" pp. 351-382. / Cançado Trindade, Antônio Augusto "Principle 15: Precaution" pp. 403-428. / Okowa, Phoebe N., "Principle 18: Notification and Assistance in case of Emergency" pp. 471-492. / Boisson de Chazournes, Laurence and Sangbana Komlan "Principle 19: Notification and Consultation on Activities with Transboundary Impact" pp. 493-508; all in The Rio Declaration on Environment and Development. A commentary. Ed. Jorge E. Viñuales, Oxford University Press, 2015.

[319] United Nations, United Nations Convention on the Law of the Sea. http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

[320] See, e.g., "A Constitution for the Oceans. Remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, at the final session of the Conference at Montego Bay, Jamaica, on 6 and 11 December 1982." at http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf; or Nandan, Satya N., "An Introduction to the 1982 United Nations Convention on the Law of the Sea." Order for the Oceans at the Turn of the Century, Publish by Kluwer Law International, 1999, p. 9.

[321] See the high number of signatures and ratifications of the Convention. United Nations Database. https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en#EndDec

[322] Brown, Edward Ducan., The International Law of the Sea. Dartmouth Publishing Company, Vol. 1, 1994. p. 336.

Concerning the rights of States, Article 81 of the Convention clearly stipulates that "[t]he coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes." This exclusive right is confirmed in Part XII, Article 193, by stating "the sovereign right to exploit their natural resources."

In accordance with Stockholm Principle 21- 2 Rio, UNCLOS will reaffirm the need for a balance between these rights and the rights of the other States, including environmental protection as a matter of general interest.[323] It will do so through a thorough regulatory standard[324] which will negatively contrast with the gaps contained in Article 235 on *Responsibility and Liability.*[325]

Due to the compromise reached for said Article,[326] "[t]he UN Convention has surprisingly little to say about this importance aspect of marine environmental law."[327] Article 235 was drafted in such ambiguous general terms that left a non-existent international law with determining State responsibility and liability for unintentional transboundary damage. All the above confirms the tendency indicated by Handl in 1983 to evade the implementation of Stockholm Principle 22.[328] Beyond the author's statements in relation to the mistake of evading the concept of liability of States in the creation of a conventional liability regime for transboundary environment impairment.

In the context of this Convention, it is necessary to make two comments. Firstly, the United States is not a State party to this Convention[329]. Under the Roman

[323] See, Dzidzornu, David M., "Coastal State Obligations and Powers Respecting EEZ Environmental Protection under Part XII of the UNCLOS: A Descriptive Analysis." Colorado Journal of International Environmental Law and Policy, Vol. 8, 1997, pp. 283-321.

[324] For a positive approach to Part XII of the Convention, even though it recognizes existing loopholes in terms of liability, See, e.g., McConnell, Moira L., and Gold, Edgar., "The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment?" Case Western Reserve Journal of International Law, Vol. 23, 1991, pp. 83-106.

[325] For a critical approach to Part XII of the Convention, See, e.g., Starace, Vincenzo., "Protection and Preservation of the Marine Environment in the United Nations Convention on the Law of the Sea: An Appraisal." Italian Yearbook of International Law, Vol. 5, 1981, pp. 52-64.

[326] The text of Article 235 reflected the commitment between the States requesting a strict liability regime and those denying any type of State liability other than the direct result of a violation of the conventional international law. For details, see, e.g., Handl, Günther. "International Liability of States for Marine Pollution." Canadian Yearbook of International Law, Vol. 21, 1983, pp. 85-117.

[327] Brown, Edward Ducan., The International Law of the Sea. Dartmouth Publishing Company, Vol. 1, 1994, p. 343.

[328] See, Handl, Günther. "International Liability of States for Marine Pollution." Canadian Yearbook of International Law, Vol. 21, 1983, p. 85.

[329] For an approach to the historical stance of the US on UNCLOS and the potential role of dispute resolution mechanisms, see, Schiffman, Howard S., "U.S. Membership in UNCLOS: What Effects for the Marine Environment?" Journal of International & Comparative Law, Vol. 11, 2005, pp. 477-484.

rule *res inter alios acta tertiis nec nocent nec prosunt*, this implies that UNCLOS provisions are not binding for the US, unless they reflect an applicable rule of customary international law.[330] Secondly, neither Cuba nor the US recognizes the compulsory jurisdiction of the International Court of Justice. Therefore, the procedural options for an international transboundary damage claim, among Gulf States, are virtually non-existent under this Convention if there is no political will from the State of origin.

In summary, although UNCLOS provides a general regime of rights and obligations on the protection of the marine environment, which may be applicable to oil prospecting and production activities in the continental shelf, it does not establish an effective 'umbrella' to claim liability and compensation for transboundary damage in the Gulf of Mexico. Other conventional regimes must be reviewed, in search of key elements that will help develop a specific conventional regime in the Gulf of Mexico. According to State practice, the new regime will be an appropriate legal safeguard to protect important interests at stake.

4.2.2.- The absolute liability of States: Convention on International Liability for Damage Caused by Space Objects.[331]

To create a liability and compensation regime for transboundary damage caused by oil spills in the Gulf of Mexico, in which States play a primary role, would be crucial, but not a novelty in international law.

The United Nations General Assembly adopted Resolution 1962 (XVIII) by consensus in 1963. Operative paragraph 5 stated that “States bear international responsibility for national activities in outer space...”[332] This political principle was established in the Conventional International Law, in article VII of the Outer

[330] See, Vukas, Budislav. The Law of the Sea. Selected Writings. Ed. Vaughan Lowe, Oxford University, Publications on Ocean Development, Vol. 45, 2004, p. 16.

[331] Convention on International Liability for Damage Caused by Space Objects. Adopted by the General Assembly 26th session. RES 2777 (XXVI). 29 November, 1971. http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introliability-convention.html

[332] United Nations, Office for Outer Space Affairs. “Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.” General Assembly, 18th session. RES 1962 (XVIII). 13 December, 1963. http://www.unoosa.org/oosa/oosadoc/data/resolutions/1963/general_assembly_18th_session/res_1962_xviii.html

Space Treaty[333] and subsequently developed in the Space Liability Convention.[334]

The Space Liability Convention begins by stating that damage may on occasion be caused, notwithstanding the precautionary measures adopted.[335] This implies that "[w]hether the State took reasonable precautions or all necessary measures to avoid harm is irrelevant in imposing damages."[336] In the Convention, "both theories of international liability, that is, the liability for fault and the absolute liability (no reference to risks are made), are applicable."[337]

Fault shall be essential in attributing liability only if an accident occurs between States with space objects or launching States.[338] Its role shall be limited to determine the liability between the launching States. In these suppositions, fault shall be irrelevant to determining the liability of both launching States in relation to the damage caused in the territory or the property of a third State.[339] Such third State and its victims shall demand absolute liability for the damages and the launching States shall be jointly and severally liable. Except for this limited supposition, the use of the theory of liability for fault is irrelevant in the rest of the liability regime established by the Convention.

In general, the Convention provides that any damage caused to an aircraft or on the surface of the earth by a space object, shall fall within the principle of absolute liability.[340] Exoneration from this principle shall be only granted if the launching State proves that the claimant States caused the accident as a result of gross negligence or an act or omission done with intent to cause damage.[341]

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[333] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. Adopted by the General Assembly 21st session. RES 2222 (XXI). 19 December, 1966. http://www.unoosa.org/oosa/oosadoc/data/resolutions/1966/general_assembly_21st_session/res_2222_xxi.html

[334] Space Liability Convention is the shortened form for Convention on International Liability for Damage Caused by Space Objects.

[335] See, preambular paragraph 3 of the Space Liability Convention.

[336] Kovudhikrulrungsri, Lalin and Nakseeharach, Duangden. "Liability Regime of International Space Law: Some Lessons from International Nuclear Law." Journal of East Asia and International Law, Vol. 4, 2011, p. 295.

[337] Seara Vázquez, Modesto., Derecho y Política en el Espacio Cósmico. Ed. Universidad Autónoma de México. 1986. p.38. Unofficial translation of the reference: "Las dos teorías de la responsabilidad internacional, de la culpa y la absoluta (no se habla del matiz de riesgo), tienen aplicación."

[338] See, article III de la Space Liability Convention.

[339] See, article IV.I of the Space Liability Convention.

[340] See, article IV and V of the Space Liability Convention.

[341] See, article VI of the Space Liability Convention. Another exception is regulated in article VII, which establishes that the Convention shall not apply to damage caused to nationals of the launching States or foreign nationals participating in the launching operation.

This exceptional State responsibility and liability regime is the most rigorous in Conventional International Law. Nonetheless, it has been signed by 113 States and ratified by 92 States such as Mexico, the United States, and Cuba.[342] Its wide acceptance makes us wonder why this state liability regime has not been implemented in other areas of human activity, like deep-water oil prospecting and production or other hazardous activities. The answer is complex; but certainly it is not the magnitude of the potential transboundary damages what justifies this type of regime, but the underlying political context and the will of the States involved in its development.

The transboundary damages caused by the incident Cosmos 954, "…a much more serious and dramatic warning..."[343], pale besides the transboundary damages that may be caused by an oil spill in the Gulf of Mexico.[344] We must not waste the "window of opportunity" that opened, especially for the Gulf of Mexico, with the terrible accident Macondo, so as to create a liability regime for transboundary damages from oil spills. As indicated by Handl "…the memory of the accident fades and the pressure of public opinion diminishes…"[345]

Other elements of this liability regime may be of interest for our research. For instance, the dispute resolution mechanism initiated through diplomatic channels; and if no agreement is reached, a Claim Commission is established.[346]

In accordance with article XIX.2, the decisions of the Claim Commission shall not always be binding, since a previous agreement is needed. Viikari points out that "[t]he non-binding nature of the Liability Convention´s dispute resolution mechanism has been often criticized."[347] Although this criticism is well founded, it must be kept in mind that, in terms of compulsory jurisdictional State submission, not even the Statute of the International Court of Justice manages

[342] See, Status of the Space Liability Convention. United Nations, Office for Outer Space Affairs. http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/status/index.html

[343] Cheng, Bin. Studies in International Space Law. Ed. Clarendon Press, Oxford, 1997, p. 288.

[344] According to Cheng (Ibid. p.288) himself, the agreed damages paid for the incident Cosmos 954 amounted to $3 million Canadian dollars, which is insignificant compared to the transboundary damages of the incident Ixtoc 1 or to the $18.7 billion settlement with BP.

[345] Handl, Günther. "Transboundary Nuclear Accidents: The Post-Chernobyl Multilateral Legislative Agenda." Ecology Law Quarterly, Vol. 15, 1988, p. 204.

[346] See, articles IX-XIV of the Space Liability Convention.

[347] Viikari, Lotta., The Environmental Element in Space Law. Assessing the Present and charting the Future. Martinus Nijhoff Publishers, 2008, p. 291.

to implement it. However, certain balance is achieved by stipulating that *the parties shall consider [the decision] in good faith*, because bad faith could be on the reverse side of that coin. The solution to the case Cosmos 954 seems to confirm "… that questions of compensation for damage by a space object would be settled without major difficulty…"[348]

On the other hand, modifying the classic regime for exercising diplomatic protection, it is established that it does *not require the prior exhaustion of any local remedies* and that nothing prevents victims from filing direct claims to the launching State. In this case, the States could not file claims under the same concepts of personal damages.[349] In this innovative line, and to extend victims protection, the Convention thoroughly establishes who could be in a position to file claims against the launching State.[350]

Last but not least, it is striking how the Convention solves the problem of the applicable rule to determine the damage. Albeit the formula was agreed *in accordance with international law and the principles of justice and equity*, several approaches were brought to the negotiating table: the law of the *launching State*, the *lex patriae* or the *lex loci*.[351]

In our view, the solution is appropriate for a liability regime involving essentially sovereign States. However, it might be different in a regime where private entities play a major role. Let us review then a liability regime with those characteristics and in line with the goals of this research.

[348] Lyall, Francis., and Larsen, Paul B., Space Law. A Treatise. Ashgate Publishing Limited, 2009, p. 112.
[349] See, articles XI of the Space Liability Convention.
[350] See, articles VIII of the Space Liability Convention.
[351] See, United Nations, Official records., The preparatory work of the Space Liability Convention. http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/travaux-preparatoires/liability-convention.html

4.2.3.- The strict liability of private entities and the complementary role of States: The conventional regime on Civil Liability for Oil Pollution Damage (CLC regime).[352]

The basic pillars of the CLC regime are a strict but limited liability for the shipowner, the existence of a system of compulsory liability insurance and the creation of a compensation fund for pollution damage. The Civil Liability Convention will define these damages as:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, 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 actually undertaken or to be undertaken;

(b) the costs of preventive measures and further loss or damage caused by preventive measures."[353]

This definition "… provides that environmental damage per se is compensable but only so far as it is reasonable and only where reinstatement is actually undertaken or to be undertaken."[354]

In addition to the limited scope of the definition of 'pollution damage'[355] and to the controversy on what is understood by 'reasonable measures'[356], the CLC regime features exonerations from the principle of strict liability. Compared to the Space Liability Convention, the Civil Liability Convention introduces an

[352] This civil liability regime is composed of three treaties, namely: Convention on Civil Liability for Oil Pollution Damage (1992), International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992), and Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992. The texts are available at the official website of the The International Oil Pollution Compensation Funds (IOPC Funds). Available in http://www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e.pdf

[353] Convention on Civil Liability for Oil Pollution Damage (1992), articles I.6.

[354] Jing, Liu., Faure, Michael., and Hui, Wang., "Compensating for Natural Resource Damage Caused by Vessel-Induced Marine Oil Pollution: Comparing the International, U.S., and Chinese Regimes." Journal of Environmental Law and Litigation, Vol. 29, 2014, p.141.

[355] See, e.g., Adetoro, David O. and Adetoro, S. H., "Resolving Disputes Involving Accidental Pollution by Oil: What are the Challenges." European Energy and Environmental Law Review, Vol. 18, 2009, p. 212.

[356] See, e.g., Fitzmaurice, Malgosia. "International Responsibility and Liability." at The Oxford Handbook of International Environmental Law, Ed. Oxford University Press, 2007, pp. 1027-1030.

interesting exoneration from "…applicability when damage occurs as a result of war and armed conflict."[357]

The shipowner liability will be objective; thus, there will be no need to prove his/her fault. Nevertheless, the Convention stipulates financial limits for his/her obligation to compensate.[358] This legal rules system was completed by the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage. As a whole, they constitute a relatively efficient mechanism to compensate pollution damage resulting from oil shipping.

The question of the limit of liability undoubtedly affects the polluter-pays principle, even though it seeks a balance in establishing a viable compensation and shipping regime. For example, the incident of the Pacific Adventurer that took place on March 11, 2009, in the south-east coast of Queensland. In this respect, it has been said that "[t]he initial assessment of the clean-up costs was over USD 25,000,000, whereas the limit of liability for a vessel of the size of the Pacific Adventurer was of 7,556,400 SDRs. The limits of the 1996 Protocol thus fell significantly short of the cost of responding to this incident." [359]

At the ninety-sixth session of the IMO Legal Committee, the International Group of P&I Clubs submitted a document containing data on 595 bunker oil pollution incidents which occurred between 2000 and 2009. Its conclusions reflected that, only in 8 cases, the damages exceeded the compensation limits, for a low statistical incidence of 1.34%.[360] This percentage might seem mathematically insignificant, except for uncompensated victims. However, this issue becomes legally relevant if argued in favor of implementing the polluter-pays principle.

Article VI of the Civil Liability Convention establishes that no person shall be entitled to claim compensation beyond that limit. In addition, "… the shipowner is precluded from relying on the limitation of liability if the incident occurred as a

[357] Sands, Philippe. Principles of International Environmental Law. Second Edition, Ed. Cambridge University Press, 2003, p. 309.
[358] See, Convention on Civil Liability for Oil Pollution Damage (1992). Articles V.
[359] Martinez Gutierrez, Norman A., "The Bunkers Convention and the Shipowner's Right to Limit Liability." Journal of Maritime Law and Commerce, Vol. 43, 2012, p. 252.
[360] See, International Group of P & I Clubs. "International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001: Implementation of the Convention." LEG.96/6/2. http://www.igpandi.org/downloadables/submissions/imo/LEG%2096-6-2%5B1%5D.pdf

result of his actual fault or privity."[361] In such cases, the burden of proof is placed onerously on the victim.[362]

Other two elements deserve our attention, for they may be convenient when designing a liability regime in the Gulf of Mexico, in the case of transboundary damages caused drilling offshore activities: the demand for compulsory liability insurance for ships carrying a certain amount of oil[363] and the determination of a competent court to learn about the claims.[364]

The insurance shall be endorsed by the State controlling the shipping activity, and the other States may request consultations, if they consider that the insurer or the guarantor does not have enough financial standing. This system grants effective compensation assurances to the victims and calls for States to exercise certain control over activities carried out under their jurisdiction.

Moreover, the Civil Liability Convention establishes that "If claims cannot be settled out of court, jurisdiction lies exclusively with the courts of the State in which the damage occurred."[365] Unlike the outer space law, developing a national legislation to determine the damage will be an important element. Likewise, national judgments are enforceable in the other States Parties, without being subject to review. The judgment may be questioned if it was obtained by fraud or the defendant was not given reasonable notice and a fair opportunity to present his case.[366]

Also, the agreements of the 1992 Fund and the 2003 supplementary Fund will provide States with a secondary compensation role, in order "to ensure that adequate and full compensation are available to the victims."[367] To that end, States shall impose the payment of a contribution on persons directly benefiting

[361] Sands, Philippe. Principles of International Environmental Law. Second Edition, Ed. Cambridge University Press, 2003, p.281.
[362] See, Convention on Civil Liability for Oil Pollution Damage (1992). Articles V.2.
[363] See, Convention on Civil Liability for Oil Pollution Damage (1992). Articles VII.
[364] See, Convention on Civil Liability for Oil Pollution Damage (1992). Articles IX and X.
[365] Jacobsson, Mans., "Oil Pollution Liability and Compensation: An International Regime." Uniform Law Review, Vol. 1, 1996, pp. 260.
[366] See, Convention on Civil Liability for Oil Pollution Damage (1992). Articles X.
[367] See, preambular paragraphs of the International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992), and Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.

from that activity.[368] Thus, a Fund with legal personality is constituted to guarantee the second and third compensation levels. The Fund will cover compensation costs when: the first level established by the Convention on Civil Liability is insufficient for compensation; the established insurance or guarantee does not work; or, occasionally, when the shipowner is exonerated from the liability.[369]

The constitutional agreements of the Fund raise the compensation limits which the victims may aspire to, especially based on the 2003 Protocol. Fitzmaurice indicates that "one of the effects of the protocol will be the possibility of the payment of the compensation at 100 per cent of the amount of the damage agreed between the Fund and the victim in almost all cases. It will also avoid the need to fix the level of payment below 100 per cent of the amount of the damage suffered during the early stages of most major incidents as has been the case in respect of several recent incidents."[370]

As in the Convention on Civil Liability, the Fund may be exonerated from its compensation obligations.[371] This provision imposes a high burden of proof.[372] The victims shall be obliged to *prove that the damage resulted from an incident involving one or more ships.* This burden of proof decreases considerably in the case of oil rigs, given their relative immobility to operate.

These compensation obligations, structured in three levels by the aforementioned conventions, have a pragmatic basis. They do not explicitly recognize the liability of States to make sure that the activities under their control do not pollute the marine environment or affect other States, in accordance with article 194.2 of UNCLOS. Compensation is based on the assessment of the risk being understood as the amount of oil the ship may carry.

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[368] International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992), article. 15.
[369] Id. article. 4.1
[370] Fitzmaurice, Malgosia., "International Responsibility and Liability." at The Oxford Handbook of International Environmental Law, Ed. Oxford University Press, 2007, p. 1029.
[371] International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992), article 4.
[372] See, Fitzmaurice, Malgosia., "International Responsibility and Liability." at The Oxford Handbook of International Environmental Law, Ed. Oxford University Press, 2007, p. 1030.

In spite of the above, it may be affirmed that, through the Fund, States undertake two obligations when the causal relationship private subject-damages becomes less salient. In this regard, it is established that the Fund may not be exonerated from costs compensation for the adoption of reasonable preventive measures, even though the shipowner may do so under Article 3 of the Convention on Civil Liability.[373] Likewise, the Fund assumes the compensation when damages result from a natural phenomenon of an exceptional, inevitable and irresistible character.[374] Both cases reflect two classic liability exonerations: (1) No person may claim his/her own wrongdoing; and (2) the natural phenomenon of an exceptional, inevitable and irresistible character. In the two cases, the shipowner is exonerated from all liability under Article III.2 of the Convention on Civil Liability. Nonetheless, certain legal consequences - any compensation understood as a legal consequence of the act causing the damage- remain for the Fund in accordance with Articles 4.3 and 4.4 b). In this respect, it may be concluded that the Fund has some obligations to compensate, even assuming the shipowner's exoneration.

This assumption is confirmed by Article 4.1 a) of the Fund Convention. It evidences a liability for intergovernmental organizations, besides the one established for shipowners in the 1992 Convention. Therefore, the purpose of Article 2 “to provide compensation for pollution damage to the extent that the protection afforded by the 1992 Liability Convention is inadequate” is fulfilled. In addition, the circumstances excluding the liability of said intergovernmental organizations have a far more limited scope. In this connection, Article 4.2 provides: “2. The Fund shall incur no obligation under the preceding paragraph if: (a) it proves that the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by oil which has escaped or been discharged from a warship or other ship owned or operated by a State and used, at the time of the incident, only on Government non-commercial service; or (b) the claimant cannot prove that the damage resulted from an incident involving one or more ships.”

[373] International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992), article. 4.3.
[374] Id. article. 4.4. b).

This type of regulations should be considered in an eventual liability regime in the Gulf of Mexico, where hurricanes become *per se a natural phenomenon of an exceptional, inevitable and irresistible character.* As Handl points out "the crucial element in a state's original liability for private activities turns out to be the transnational significance of the risk associated with the activity concerned."[375] When Gulf States authorize the operation of oil rigs in their continental shelf, they do so knowing the existence of hurricanes as a risk. In 2005, the rig Thunder Horse was on the verge of collapsing as a result of hurricane Dennis.[376]

In summary, although it could be said that the CLC regime somehow replaces the international State responsibility with the shipowner's liability, its complementary mechanism evidences the prevalence of State responsibility in cases of transboundary damage. Also, "[t]here are several basic (and conceptually important) similarities between transnational damage caused by a tanker spill and transnational injury caused by an offshore drilling platform blowout."[377] The CLC regime may make important contributions to the creation of a legal framework in the Gulf of Mexico.[378] Despite its deficiencies, the CLC regime fulfills its duty of providing an effective possibility of compensation for the victims. Let us review then the question of creating a new legal framework of liability and compensation for transboundary damages in the Gulf of Mexico and the role States should play in it.

[375] Handl, Günther. "State Liability for Accidental Transnational Environmental Damage By Private Persons." The American Journal of International Law, Vol.74, 1980, p. 541.

[376] See, New York Times article "In BP's Record, a History of Boldness and Costly Blunders." July 12, 2010. http://www.nytimes.com/2010/07/13/business/energy-environment/13bprisk.html?_r=0

[377] Hancock, William N. and Stone, Robert M. "Liability for Transnational Pollution Caused by Offshore Oil Rig Blowouts." Hastings International and Comparative Law Review, Vol. 5, 1982, p. 384.

[378] It should be noted that neither Cuba nor the US is a State party to these treaties. Mexico is party to the Convention on Civil Liability for Oil Pollution Damage (1992) and International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992). http://www.iopcfunds.org/about-us/membership/a-z-listing/#fund-0

4.3.- Basis for an agreement on transboundary damage from offshore activities in the Gulf of Mexico.

The establishment of a conventional responsibility and liability regime in the Gulf of Mexico is necessary, convenient and possible. It is necessary because this is an area where there is an intense offshore activity; there are considerable economic and natural resources which may be affected; and where two of the three largest oil spills in history have occurred.[379] It is convenient because, despite the existence of certain legal bases to demand responsibility and liability from a State for significant transboundary damage to another State,[380] this will be subject to political considerations, legal and diplomatic complicated procedures, wide discretional powers granted to international courts and the limited role of national courts. It is possible due to important issues with political consensus and a conventional international practice aimed at strengthening the mechanisms of international State responsibility and liability, in their obligation to ensure prompt and appropriate compensation for victims of transboundary damage in certain activities.

In the Caribbean area, there is a regulatory framework on marine pollution prevention, reduction and control,[381] including pollution from activities relative to Sea-Bed.[382] However, the issue of State responsibility and liability is insufficiently addressed in those agreements.[383] Despite being Mexico, the US and Cuba States parties to said agreements, they are not the ideal framework to reach an agreement on responsibility and liability for offshore activities in the Gulf of Mexico.

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[379] See, Introduction, above.

[380] Including damage inflicted to private victims as nationals of the Affected State.

[381] See, Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (1983 Cartagena Convention) and three Protocols: the 1983 Cartagena Protocol Concerning Co-operation in Combating Oil Spills (1983 Cartagena Oil Spills Protocol), the 1990 Kingston Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region (1990 Kinston SPA Protocol), and the 1999 Protocol on the Prevention, Reduction and Control of Land-Based Sources and Activities (1999 LBS Protocol). http://www.cep.unep.org/

[382] See, 1983 Cartagena Convention, article 8.

[383] Article 14 of the 1983 Cartagena Convention establishes: "Liability and Compensation: The Contracting Parties shall co-operate with a view to adopting appropriate rules and procedures, which are in conformity with international law, in the field of liability and compensation for damage resulting from pollution of the Convention area." Additionally, arbitration, as dispute resolution mechanism, is limited to the 'common agreement' of the Parties. [See, 1983 Cartagena Convention, article 23.2]

The multilateral character of this regulatory framework would make negotiating the text more complex, particularly because this is a matter on which an understanding is difficult to achieve. Naturally, an eventual agreement would complement the regional efforts; but negotiations should be considered as bilateral or trilateral, according to the interests of States involved.

In this connection, taking into account the lessons learned in the Ixtoc I case; the recent memory of the BP threat; and the new chapter of political cooperation that was opened with the restoration of diplomatic relations between Cuba and the US, it is convenient to propose potential bases for the negotiation of said agreement. Sands summarizes the main issues that are often addressed in this type of agreements.[384] Based on this structure and considering the various conclusions arrived at in this research, the following legal bases are proposed to negotiate the agreement:

As a preamble,

(1) Recognition will be given to the important role of States in creating specific conventional regimes that strengthen and include the scope of international State responsibility in the event of transboundary damage.
(2) The exclusive sovereign right of States to freely use and exploit the natural resources existing on their Continental Shelf, either directly or through private persons, will be reaffirmed.
(3) As part of the responsible exercise of these Rights, the importance of the principles of sovereign equality, good neighbor and cooperation, *sic utere tuo ut alienum non laedas* and non-interference in the internal affairs of other States, including exercising their right to environmental protection, will be highlighted.
(4) The right of all victims, including States as trustees of the *res publicae*, to be promptly and duly compensated for significant transboundary damage will be ensured.
(5) Based on the exclusive character of the rights of coastal Gulf States to conduct or authorize activities in their Continental Shelf, an international mechanism of absolute or strict liability will be developed with the participation of major beneficiaries of these activities.

[384] See, Sands, Philippe. "Principles of International Environmental Law." Second Edition, Cambridge University Press, 2003, p. 871.

As provisions,

(6) The concept of 'significant transboundary damage' will be defined,[385] which will serve as a basis for invoking international State responsibility, in the various levels of liability.

(7) Based on the ILC work,[386] the following terms will be defined: 'State of Origin', 'Affected State', 'private victims', and 'operator', the latter understood as the person with authorization by the coastal State to conduct activities on its Continental Shelf. Nonetheless, the elements of risk or lawfulness of the activity as a basis for establishing legal relationships will be left aside.

(8) In order to attribute State responsibility and consequently resort to the conventional strict liability mechanism, only the existence of significant transboundary damage and its causal link to the activity authorized or developed with the knowledge[387] of the State of Origin will be needed.[388]

(9) As grounds for exemption[389] from State responsibility, the following will be considered: a) the Affected State granted its express and specific consent to carry out the concrete act causing transboundary damage,[390] and b) the accident causing transboundary damage was the result of a conduct attributable to the affected State, under the criteria established in the draft articles on State responsibility adopted by the ILC.[391]

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[385] Negotiations should seek a comprehensive definition of 'damage', including the widest concept of environmental damage. In that regard, Principle 2 proposed by the ILC could serve as a basis. See, "Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities." See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10).
In turn, the definition of the term 'significant' will rationally limit the invocation of responsibility and liability for cases actually requiring it. This position is also supported by the international case law reviewed in Chapter 2.

[386] Id.

[387] Knowledge, as a basis for establishing a causal link between damage and State responsibility for acts by third parties, was used by the ICJ in the Corfu Channel case.

[388] The existence of both elements allows to disregard beforehand all responsibility or liability if damage is not significant or transboundary. The same happens when the activity is carried out by an unauthorized private person without knowledge by the coastal State.

[389] In this context, the concept 'grounds for exemption' is recommended rather than 'circumstances excluding wrongfulness', a term used by the ILC. The Commission uses 'circumstances' because in the more general context of international violations, this allows the ILC to indicate the permanence of the international obligation to be followed in the absence of said 'circumstances' and of the duty to compensate the damage. In the new conventional regime, legal relationships are established around the fulfillment of the obligation to compensate all significant damage. That is why the phrase 'grounds for exemption' better reflects the effect of said 'circumstances' on the obligation to compensate.

[390] It is a general principle of law that one person cannot claim another person's responsibility or liability, if the former gave his/her consent for the action or omission causing damage or, if said damage was self-inflicted due to his/her negligence or dolous.

[391] Based on the classic responsibility regime, this would include any action or omission by persons acting under the control of a State, developing governmental activities, or in situations of the absence or default of the official

(10) It will be established that the responsibility and liability regime will be applied even in circumstances of force majeure, state of necessity or extreme danger.[392]

(11) In case of armed confrontation between the State of Origin and the Affected State, operator's liability will be excluded; however, State liability will remain if the spill was caused due to negligence or dolus. This is the only case where fault, as negligence or dolus, would have certain role.

(12) Two levels will be established with differentiated compensation mechanisms for significant transboundary damage. Firstly, operators will be held unlimitedly and directly responsible for all significant transboundary damage. Secondly, States will directly assume the payment to victims that have not been compensated in the first level.

(13) The first mechanism will establish as a principle that the courts of the damaged State will determine the extent of damage, leaving the possibility to consider punitive damage.

(14) As a complement to this mechanism, judicial cooperation will be established in a manner enabling the direct enforcement of civil judgments against operators.

(15) Likewise, States will undertake to ensure, within their legal systems, equal access to justice and non-discrimination to all victims, including transboundary damage victims.

(16) It would be convenient to assess the possibility to prioritize the enforcement of national judgments against operators, taking into account the nature of damage.[393] Thus, private victims would be favored in the payment and punitive damage would be pushed to the end.

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authorities. See, United Nations. "Report of the International Law Commission." General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10).

[392] As indicated before, these three circumstances excluding international State responsibility may not be invoked if the State contributed to the incident. This supposed contribution is considered part of the authorization regime with which any private person seeking to exercise exclusive sovereign rights of Coastal States must comply. Such rights must be acquired under International Law, not as a condition inherent to State territoriality.

[393] As established before, the priorities could be set in the same manner as in the definition of damage of ILC Principle 2, although punitive damage would be included at the end.

(17) Also, States will require operators to establish an insurance to cover certain level of damage and the costs of emergency measures adopted by States in case of disasters.[394]

(18) To establish an intermediate compensation level similar to an international fund or a general insurance pool would not be appropriate, due to financial reasons, rather than legal or political reasons. The low incidence of these accidents, although with potential catastrophic effects, would not justify the immobilization of large amounts of money.[395]

(19) Once exhausted the civil mechanisms to enforce judgments against operators, States will be able to directly claim to each other the payment of damages not compensated due to the operator's insolvency or bankruptcy.

(20) In this second compensation level among States, punitive damages will not be allowed. If the damage assessment conducted by national courts is in question, the compensation amount will be negotiated in a friendly manner and through diplomatic channels.

(21) The persons entitled to file claims, at the national or international level, would be: (1) private victims through their national courts or, at the international level, through diplomatic protection if so decided by the State of his/her nationality; and (2) States, at the international level, for damage not compensated through the first mechanism and caused directly to the State or its nationals.

(22) If a friendly agreement is not reached, the parties may resort to legal action in order to set the applicable compensation amount. Given its flexibility, we favor the *Ad Hoc* international arbitration under UNCITRAL rules.[396]

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[394] Such measure should not have a negative economic impact on the development of these operations, considering, for example, that the US security record in these activities since 1975 is 0.0001 per cent. For more information, including on the low impact of Hurricane Katrina and Hurricane Rita on offshore activities, See, Thornley, Drew. "Energy & Environment: Myths & Facts." Center for Energy Policy and the Environment at the Manhattan Institute, 2009, http://www.manhattan-institute.org/energymyths/myth8.htm

[395] For example, "Between 1971 and 2000, U.S. Outer Continental Shelf (OCS) offshore facilities and pipelines accounted for only 2 percent of the volume of oil spilled in U.S waters." [See, Thompson, Andrea. "FAQ: The Science and History of Oil Spills." http://www.livescience.com/9885-faq-science-history-oil-spills.html]

[396] The mechanism could be similar to the one established in Annex 1 of the Cartagena Convention. Additionally, the possibility to operate under UNCITRAL rules would contribute to introducing Rules on Transparency which estipulate public access to the case and the participation of third persons, like ONGs interested in environmental protection and the civil society in general. See, UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html

The need to exhaust all legal resources against the operator, whose liability will be unlimited; existing judicial cooperation mechanisms; and States' possibility to negotiate the remaining compensable amount will considerably reduce the number of contentious international conflicts among States. As long as private victims have priority in the enforcement of national judgments against operators, they will not be significantly affected as a result of political negotiations among States or States' ultimate relinquishment of their right to exercise diplomatic protection.

In summary, on the basis of the rules and practices established in international law, an international responsibility and liability regime for transboundary damage from oil spills in the Gulf of Mexico could be negotiated and created. Such conventional regime would bridge existing gaps; protect important economic and natural interests in the area; contribute to establishing higher prevention standards; and, in case of an accident, victims would be previously assured of an efficient compensation mechanism.

CONCLUSIONS

This research has shown that, despite the existence of rules which may be applicable to an event of this nature, a solid responsibility and liability regime for this type of events has not been developed in conventional law. International judicial statements have a limited scope. Moreover, there is a wide range of criteria, as well as confusion among legal writers, on the scope and type of responsibility and liability States should assume in case of transboundary damage.

The experience gained and the important economic and natural interests in the area enable us to address the necessity and urgency of developing a conventional responsibility and liability regime for the Gulf of Mexico. The success of this endeavor will depend on the political commitment of Gulf States to environmental protection, and to increasingly responsible international practices in which the role of States is essential and their commitment indispensable.

BIBLIOGRAPHIC REFERENCES

Books, articles and scientific research reports.

Adetoro, David O. and Adetoro, S. H., “Resolving Disputes Involving Accidental Pollution by Oil: What are the Challenges.” European Energy and Environmental Law Review, Vol. 18, 2009.

Akehurst, Michael., “International Liability for Injurious consequences arising out of acts not prohibited by International Law.” Netherlands Yearbook of International Law, Leyden, Vol. 16. 1985.

Alessandri R., Arturo., Somarriva U. Manuel., and Vodanovic H. Antonio., Tratado de Derecho Civil: Partes Preliminar y General. Vol. I, Editorial Jurídica de Chile, 1998.

Allen, Jacqueline., “A Global Oil Stain - Cleaning up International Conventions for Liability and Compensation for Oil Exploration/Production.” Australian and New Zealand Maritime Law Journal, Vol. 25, 2011.

Anchondo Paredes, Víctor Emilio., “Métodos de Interpretación Jurídica.” Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM. 2012. http://www.juridicas.unam.mx/publica/librev/rev/qdiuris/cont/16/cnt/cnt4.pdf

Annacker, C., "The Legal Régime of Erga Omnes Obligations." Austrian Journal of Public international Law, Vol. 46, 1993.

Aust, Anthony., Handbook of International Law. Second Edition, Cambridge University Press, 2010.

Ballenegger, J., La Pollution en Droit International. Librairie Droz, Genève, 1975.

Barberis, Julio A., “Los Principios Generales de Derecho como Fuentes del Derecho Internacional.” RIIDH, No. 14, 1991.

Barboza, Julio., “La Responsabilidad Internacional.” at www.oas.org/dil/esp/1-32%20Barboza%20Julio%20def.pdf

Barboza, Julio., “Liability: Can We Put Humpty-Dumpty Together Again.” Chinese Journal of International Law, Vol. 1, Issue 2, 2002.

Barboza, Julio., The Environment, Risk and Liability in International Law. Martinus Nijhoff Publishers, 2011.

Barros, James., and Douglas M. Johnston., Contaminación y Derecho Internacional, Traducción de Flora Setaro. Buenos Aires: Marymar, 1977.

Barstow Magraw, Daniel., “Transboundary Harm. The International Law Commission’s study of international liability.” American Journal of International Law, Vol. 80, 1986.

Barstow Magraw, Daniel., International Law and Pollution. University of Pennsylvania Press, 1991.

Beyerlin, Ulrich., “Different Types of Norms in International Environmental Law: Policies, Principles and Rules.” at The Oxford Handbook of International Investment Law, Oxford University Press, 2008.

Birnie, Patricia W., and Boyle, Alan E., Basic Document on International Law and the Environmental. Oxford: Clarendon Press, 1995.

Blix, Hans., “History of the Stockholm Declaration.” at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003.

Boisson de Chazournes, Laurence. and Sangbana Komlan., “Principle 19: Notification and Consultation on Activities with Transboundary Impact.” at The Rio Declaration on Environment and Development. A commentary. Ed. Jorge E. Viñuales, Oxford University Press, 2015.

Bowman, Michael., “The definition and Valuation of Environmental Harm: An Overview.” at Environmental Damage in International and Comparative Law: Problems of Definition and Valuation, Oxford University Press, 2002.

Boyle, A.E., “Globalising Environmental Liability: the interplay of National and International Law.” at Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law, Cambridge University Press, 2011.

Boyle, Alan., “International Law and the Liability for Catastrophic Environmental Damage: Introductory Remarks.” American Society of International Law Proceedings, Vol. 105, 2011.

Boyle, Alan., “Liability for Injurious Consequences of Acts not Prohibited by International Law.” at The Law of International Responsibility. Oxford Commentaries on International Law, Eds. James Crawford, Alain Pellet and Simon Olleson, Oxford University Press, 2010.

Boyle, Alan., “Relationship between International Environmental Law and Other Branches of International Law.” at The Oxford Handbook of International Environmental Law, Oxford University Press, 2006.

Boyle, Alan., “Reparation for Environmental Damage in International Law: Some Preliminary Problems.” at Environmental Damage in International and Comparative Law: Problems of Definition and Valuation. Oxford University Press, 2002.

Bratspies, Rebecca., and Miller, Russell., (Eds.) Transboundary Harm in International Law. Lessons from the Trail Smelter Arbitration. Cambridge University Press, 2006.

Brown, Edward Ducan., The International Law of the Sea. Dartmouth Publishing Company, Vol. 1, 1994.

Brownlie, Ian., “State Responsibility and the International Court of Justice.” at Issues of State Responsibility before International Judicial Institutions. Ed. Malgosia Fitzmaurice & Dan Sarooshi, Hart Publishing, 2004.

Brownlie, Ian., Principles of Public International Law. 4th Edition, Oxford: Clarendon Press, 1995.

Brunnée, Jutta., “Structure and processes of International Environmental Law.” at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003.

Cahier, Philippe., Le problème de la Responsabilité pour risque en droit International. Institut Universitaire de Hautes Études Internationales, 1977.

Cançado Trindade, Antônio Augusto., “Principle 15: Precaution.” at The Rio Declaration on Environment and Development. A commentary, Ed. Jorge E. Viñuales. Oxford University Press. 2015.

Castañeda, Jorge., “The Concept of Patrimonial Sea in International Law.” Indian Journal of International Law, Vol. 12, 1972.

Cates, Melissa B., “Offshore Oil Platforms Which Pollute the Marine Environment: A Proposal for an International Treaty Imposing Strict Liability Law of the Sea Conference.” San Diego Law Review, Vol 21, 1983-1984.

Cheng, Bin., “Introduction to Subjects of International Law.” at International Law: Achievements and Prospects, Part I, Martinus Nijhoff Publishers, Paris, 1991.

Cheng, Bin., General Principles of Law as Applied by International Courts and Tribunals. Cambridge University Press, 2006.

Cheng, Bin., Studies in International Space Law. Ed. Clarendon Press, Oxford, 1997.

Cicero, Rita Ann., “Mexican states ask Supreme Court to resolve oil spill claims.” Westlaw Journal Environmental, 3 September 2015. http://blog.thomsonreuters.com/index.php/mexican-states-ask-supreme-court-resolve-oil-spill-claims/

Corell, Hans., “Keynote Address.” at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003.

Costa Ruda, Podestá., Derecho Internacional Público. Vol. I, Ed. Topografía Editora Argentina, Argentina, 1985.

Crawford, James., Brownlie´s Principles of Public International Law. 8th Edition, Oxford University Press, United Kingdom, 2012.

Crawford, James., State Responsibility: The General Part. Cambridge University Press, United Kingdom, 2013.

Crawford, James., The International Law Commission´s Articles on State Responsibility. Introduction, Tex and Commentaries. Cambridge University Press, United Kingdom, 2002.

Delgado Sánchez, Lester. "Los Pactos sobre Derechos Humanos: Un paso en el camino." Revista Temas, No. 59, Julio-Septiembre de 2009.

Diez de Velasco, Manuel., Instituciones de Derecho Internacional Público. Tomo I, Ed. Tecnos, Madrid, 1983.

Dixon, Martin., McCorquodale, Robert., and Williams, Sarah., Cases & Material son International Law. 5th Edition, Oxford University Press, 2011.

Duguit, Leon., "Lecciones de Derecho Público General: Impartidas en la Facultad de Derecho de la Universidad Egipcia, durante los meses de enero, febrero y marzo de 1926." Translated by Javier García Fernández, Ed. Marcial Pons, 2011.

Dupuy Pierre M., "The international Law of State Responsability: Revolution or Evolution?" Michigan Journal of International Law, Vol. 11, 1989-1990.

Dupuy, Pierre M., "La Responsabilité Internationale des États pour les dommages d´origine Technologique et Industrielle." Revue générale de droit international public. Publications, Vol. 27, 1976.

Dupuy, Rene-Jean and Piquemal, A., "Les Appropriations Nationales des Espaces Maritimes." Actualités du Droit de la Mer, Colloque de Montpellier, Paris, Pédone, 1973.

Dupuy, Rene-Jean., "Humanity and the Environment." Colorado Journal of International Environmental Law and Policy, Vol. 2, 1991.

Duvic-Paoli, Leslie-Anne and Viñuales, Jorge E. "Principle 2: Prevention." at The Rio Declaration on Environment and Development. A commentary. Ed. Jorge E. Viñuales, Oxford University Press, 2015.

Dzidzornu, David M., “Coastal State Obligations and Powers Respecting EEZ Environmental Protection under Part XII of the UNCLOS: A Descriptive Analysis.” Colorado Journal of International Environmental Law and Policy, Vol. 8, 1997.

Fahn, James D., A Land on Fire: The Environmental Consequences of the Southeast Asian Boom. Publisher Basic Books, 2004.

Faramelli, Norman J., “Toying with the Environment and the Poor: A Report on the Stockholm Environmental Conferences.” Environmental Affairs, Vol. 2, 1972.

Fayette, Louise de La., “The Concept of Environmental Damage in International Liability Regime.” at Environmental Damage in International and Comparative Law: Problems of Definition and Valuation, Oxford University Press, 2002.

Fitzmaurice, Malgosia., “International responsability and liability.” at The Oxford Handbook of International Environmental Law. Oxford University Press, 2007.

Fitzmaurice, Malgosia., “Principle 13: Liability and Compensation.” at The Rio Declaration on Environment and Development. A commentary, Ed. Jorge E. Viñuales, Oxford Univerty Press, 2015.

Fitzmaurice, Malgosia., and Elias, Olufemi., Contemporary issues. Eleven International Publishing, 2005.

Fitzmaurice, Malgosia., Environmental protection and the International Court of Justice. Fifty Years of the International Court of Justice. Essays in Honor of Sir. Robert Jennings. Cambridge University Press, 1999.

Fleming, John., “The Nationalization of Chile’s Large Copper Communities in Contemporary Interstate Relations.” Villanova Law Review, Vol. 18, March 1973.

Francioni, Francesco., and Tullio Scovazzi., (eds.), International Responsibility for Environmental Harm. London and Boston: Graham & Trotman, 1991.

García Arias, Luis., “El caso del canal de Corfú.” Revista Española de Derecho Internacional. Vol II, Madrid, 1959.

García-Amador, F.V., “State Responsibility in the Light of the New Trends of International Law.” The American Journal of International Law, 1955.

García-Amador, F.V., “The Latin American Contribution to the Development of the Law of the Sea.” American Journal of International Law, Vol. 68, 1974.

Goldie, L.F.E., “A General view of International Environmental Law. A survey of Capabilities trends and limits.” at La Protection de l´environnement et le droit international, Recueil des Cours de l'Académie de Droit International, Colloque, 1973.

Goldie, L.F.E., “Concepts of Strict and Absolute Liability in Terms of relative Exposure to Risk.” Netherland Yearbook of International Law, 1985.

Goldie, L.F.E., “Liability for Damage and the Progressive Development of International Law.” The International and Comparative Law Quartely, British Institute of International and Compatarive Law, London, Vol. 1965.

Gómez-Robledo Verduzco, Alonso., Temas Selectos de Derecho Internacional. Instituto de Investigaciones Jurídicas de la UNAM, México, 2001.

Gómez-Robledo, Alonso., Responsabilidad Internacional por Daños Transfronterizos. Universidad Autónoma de México, 1992.

Goodwin-Gill, Guy S., “State Responsibility and the ´Good Faith´ Obligation in International Law.” at Issues of State Responsibility before International Judicial Institutions. Ed. Malgosia Fitzmaurice & Dan Sarooshi, Hart Publishing, 2004.

Gray, Christine., International Law and the Use of Force. Third Edition, Oxford University Press. 2008.

Guruswamy, Lakshman., “International Environmental Law: Boundaries, Landmarks, and Realities.” Natural Resources & Environment, Vol. 10, 1995.

Hancock, William N. and Stone, Robert M., “Liability for Transnational Pollution Caused by Offshore Oil Rig Blowouts.” Hastings International and Comparative Law Review, Vol. 5, 1982.

Handl, Günther., "International Liability of States for Marine Pollution." The Canadian Yearbook of International Law, Vol. 21,1983.

Handl, Günther., "State Liability for Accidental Transnational Environmental Damage by Private Persons." The American Journal of International Law. Vol. 74, 1980.

Handl, Günther., "Territorial sovereignty and the problem of Transnational Pollution." American Journal of International Law, 1975, pp. 60-63.

Handl, Günther., "Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited." The Canadian Yearbook of International Law, 1975.

Handl, Günther., "Case Note: Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area: The International Tribunal of the Law of the Sea´s recent contribution to International Environmental Law." Review of European Community & International Environmental Law, RECIEL 20 (2) 2011.

Handl, Günther., "Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992." United Nations Audiovisual Library on International Law, at http://legal.un.org/avl/ha/dunche/dunche.html

Handl, Günther., "International Law and the Liability for Catastrophic Environmental Damage." Proceedings of the Annual Meeting, American Society of International Law, Vol. 105, March 23-26, 2011.

Handl, Günther., "Liability as an Obligation Established by a Primary Rule of International Law." Netherlands Yearbook of International Law, 1985.

Handl, Günther., "The Case for Mexican Liability for Transnational Pollution Damage Resulting from the Ixtoc I Oil Spill." Houston Journal of International Law, Vol. 2, 1979.

Handl, Günther., "Towards a Global System of Compensation for Transboundary Nuclear Damage: Reflexions on the Interrelationship of Civil and

International State Liability." at Nuclear Accidents: Liabilities and Guarantees, OECD, Paris, 1992.

Handl, Günther., "Transboundary Nuclear Accidents: The Post-Chernobyl Multilateral Legislative Agenda." Ecology Law Quarterly, Vol. 15, 1988.

Hefendehl, Marcial., La teoría del bien jurídico: ¿fundamento de legitimación del derecho penal o juego de abalorios dogmático?. Marcial Pons, 2007.

Horbach, Natalie., Liability versus Responsibility Under International Law. Leiden, 1996.

Houck, Oliver., "Tres reflexiones sobre el Derecho Ambiental en Estados Unidos." University of Tulane. http://www.estrucplan.com.ar/articulos/verarticulo.asp?IDArticulo=828

Iturregui, Patricia. "Principios del Derecho Ambiental Internacional y legislación Nacional: Apuntes para un Debate." at Derecho Internacional Ambiental. Eds. Pierre Foy, Germán Vera, Fabián Novak and Sandra Namihas, Perú, 2003.

Jacobsson, Mans. "Oil Pollution Liability and Compensation: An International Regime." Uniform Law Review, Vol. 1, 1996.

Jenks, W., "Liability for Ultra-Hazardous activities in International Law." Recueil des Cours de l'Academie de Droit International, T. 117, (1966-I).

Jing, Liu., Faure, Michael., and Hui, Wang., "Compensating for Natural Resource Damage Caused by Vessel-Induced Marine Oil Pollution: Comparing the International, U.S., and Chinese Regimes." Journal of Environmental Law and Litigation, Vol. 29, 2014.

Jones, Mervyn J., "The Corfu Channel Case." The British Yearbook of International Law. London, Vol XXVI, 1949.

Joyner, Christopher C., Joyner, Nancy D., "Global Eco-management and International Organizations: The Stockholm Conference and Problems of Cooperation." Natural Resources Journal, Vol. 14, 1974.

Kelsen, Hans., Principles of International Law. The Lawbook exchange, Ltd. New Jersey, 2003.

Kelson, John., “State Responsibility and the Abnormally Dangerous Activity.” Harvard International Law Journal, Harvard University, Vol. 13, 1972.

Kiss, Alexandre Ch., “Problèmes juridiques de la pollution de l´air.” Recueil des Cours de la Académie de Droit International, 1973.

Kiss, Alexandre., “The Destiny of the Principles of the Stockholm Declaration.” at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003.

Kovudhikrulrungsri, Lalin and Nakseeharach, Duangden. “Liability Regime of International Space Law: Some Lessons from International Nuclear Law.” Journal of East Asia and International Law, Vol. 4, 2011.

Lammers, Johan G., “Transfrontier Pollution and International Law: the Present State of Research.” The Hague Academy of International Law, Center for Studies and Research in International Law and International Relations, Transfrontier Pollution and International Law, 1986.

Lefeber, René., Transboundary Environmental Interference and the Origin of State Liability. Kluwer Law International, 1996.

Lévy, Denis., “Le responsabilité pour omission et la responsabilité pour risque en droit international public.” Revue Générale de Droit International Public, Vol. 4, 1961.

Loibl, Gerbard., “Environmental Law and Non-Compliance Procedures: Issues of State Responsibility.” at Issues of State Responsibility before International Judicial Institutions. Ed. Malgosia Fitzmaurice & Dan Sarooshi, Hart Publishing, 2004.

Lukashuk, I., “Fuentes del Derecho Internacional Contemporáneo.” at El Derecho Internacional Contemporáneo, Ed. Progreso, Moscú, 1973.

Lyall, Francis., and Larsen, Paul B., Space Law. A Treatise. Ashgate Publishing Limited, 2009.

Macrory, Richard., and Turner, Sharon., “Participatory Rights, Transboundary Environmental Governance and EC Law.” Common Market Law Review, Vol. 39, No 3, 2002.

Mahmoudi, Said., “Introduction.” at The Stockholm Declaration and Law of the Marine Environment, Published by Kluwer Law International, 2003.

Martinez Gutierrez, Norman A. “The Bunkers Convention and the Shipowner's Right to Limit Liability.” Journal of Maritime Law and Commerce, Vol. 43, 2012.

McClatchey, Deveraux F., “Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility for International Disasters, 1986-1996.” Georgia Journal of International and Comparative Law, Vol. 25, 1996.

McConnell, Moira L., and Gold, Edgar., “The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment?” Case Western Reserve Journal of International Law, Vol. 23, 1991.

Mcdorman, Ted L., “The Continental Shelf.” at The Oxford Handbook of the Law of the Sea, Oxford University Press, 2015.

Mejía, Martha., and Kaiser, Stefan., “Responsabilidad Internacional: Un término, dos conceptos, una confusión.” Anuario de Derecho Internacional, Vol. IV, 2004.

Mellor, Justin., “The Negative Effects of Chernobyl on International Environmental Law: The Creation of the Polluter Gets Paid Principle.” Wisconsin International Law Journal, Vol. 17, 1999.

Moore, J. B., History and Digest of the International Arbitrations to which the United States has been a Party. Government Printing Office, Washington, Vol. I, 1898.

Muchlinski, Peter., “Policy Issues.” at The Oxford Handbook of International Investment Law. Oxford University Press, 2008.

Nandan, Satya N. “An Introduction to the 1982 United Nations Convention on the Law of the Sea.” at Order for the Oceans at the Turn of the Century, Publish by Kluwer Law International, 1999.

National Commission on the British Petroleum Deepwater Horizon oil Spill and Offshore Drilling., “Report to the President: The Gulf Oil Disaster and the Future Offshore Drilling.” January, 2011. http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf

Nelson, L.D.M., “The Patrimonial Sea.” International and Comparative Law Quarterly, Vol. 22, October 1973.

Nguyen Quoc, Dinh. Daillier, Patrick., y Pellet, Alain., Droit International Public. Librairie Générale de Droit et de Jurisprudence, 1994.

Novak, Fabián., and García-Corrochano, Luis., Derecho Internacional Público. Tomo I, Ed. Pontificia Universidad Católica, Lima, 2000.

Okowa, Phoebe N., “Principle 18: Notification and Assistance in case of Emergency.” at The Rio Declaration on Environment and Development. A commentary. Ed. Jorge E. Viñuales, Oxford Univerty Press, 2015.

Okowa, Phoebe N., “Procedural Obligations in International Environmental Agreements.” British Yearbook of International Law, Vol. 67, 1997.

Olivet, Cecilia., and Eberhardt, Pia., “Profiting from injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom.” Published by Corporate Europe Observatory and Transnational Institute. Brussels/Amsterdam, 2012. https://www.tni.org/es/publicacion/cuando-la-injusticia-es-negocio?content_language=en

Orakhelashvili, Alexander., “Changing Ius Congens through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions.” at The Oxford Handbook of the Use of Force in International Law, Oxford University Press, United Kingdom, 2015, pp. 157-178.

Parlett, Kate., The Individual in the International Legal System: Continuity and Change in International Law. Cambridge University Press, 2011.

Pastor Ridruejo, José A., Curso de Derecho Internacional Público. Madrid, Tecnos, 1986.

Podesta Costa, Luis A., Derecho Internacional Público. Tomo I, TEA, Buenos Aires, 1955.

Portmann, Roland., Legal Personality in International Law. Cambridge University Press, 2010.

Quiroz Salazar, Carolina., "Transboundary cooperation in the management of oil spills from offshore installations in the Gulf of Mexico Large Marine Ecosystem." December, 2013, at http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/mexico.html

Reisman, W. Michael., and Sloane, Robert D., "Indirect Expropriation and its Valuation in the BIT Generation." British Yearbook of International Law, 2004.

Roy Chowdhury, Subrata., Permanent Sovereignty over natural Resources: Substratum of the Seoul Declaration. International Law and Development. Martinus Nijhoff Publish, The Netherlands, 1988.

Rubin, Alfred P., "Pollution by analogy: the Trial Smelter arbitration." Oregon Law Review, 1971.

Sachariew, K., "State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and its Legal Status." Netherlands international Law Review, Vol. 35, 1988.

Sand, Peter H., "The Evolution of International Environmental Law." at The Oxford Handbook on International Environmental Law, Ed. Daniel Bodansky, Jutta Brunnée and Ellen Hey, 2007.

Sands, Philippe., Principles of International Environmental Law. Second Edition, Cambridge University Press, 2003.

Sanwal, Mukul., "Sustainable Development, the Rio Declaration an Multilateral Cooperation." Colorado Journal of International Environmental Law and Policy, Vol. 4, 1993.

Schiffman, Howard S., "U.S. Membership in UNCLOS: What Effects for the Marine Environment?" Journal of International & Comparative Law, Vol. 11, 2005.

Schlutter, Birgit., Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunal for Rwanda and Yugoslavia. Martinus Nijhoff Publishers and VSP, Netherlands, 2010.

Schneider, J., World Public Order of the Environment: Towards an International Ecological Law and Organization. Ed. Stevens, 1979.

Schwartz, Priscilla., "Principle 16: The Polluter-Pays Principle." at The Rio Declaration on Environment and Development. Ed. Jorge E. Viñuales, Oxford University Press. 2015.

Seara Vázquez, Modesto., Derecho y Política en el Espacio Cósmico. Ed. Universidad Autónoma de México. 1986.

Shenker, Arden., "Oral Proceedings." Oregon Law Review, Vol. 15, 1971.

Sohn, Louis B., "The Stockholm Declaration on the Human Environmental." Harvard International Law Journal, Vol. 14, 1973.

Sornarajah M., The International Law on Foreign Investment. Third Edition, Cambridge University Press, 2010.

Starace, Vincenzo., "Protection and Preservation of the Marine Environment in the United Nations Convention on the Law of the Sea: An Appraisal." Italian Yearbook of International Law, Vol. 5, 1981.

Stoll, Peter-Tobias., "Transboundary Pollution." at International, Regional, and National Environmental Law. Eds. Fred L. Morrison and Rudiger Wolfrum. Kluwer Law International, 2000.

Subedi, Surya P., International Investment Law: Reconciling Policy and Principle. Second Edition, Oxford and Portland, Oregon, 2012.

Thornley, Drew. "Energy & Environment: Myths & Facts." Second Edition. Pub. Manhattan Institute, Center for Energy Policy and the Environment. 2009, at http://www.manhattan-institute.org/energymyths/myth8.htm

Ulfstein, Geir., “Individual complaints.” at UN Human Rights Treaty Bodies: Law and Legitimacy. Cambridge University Press, 2012.

Vargas, J. A., “La contaminación de las aguas marítimas más allá de las fronteras nacionales, y el derecho: los hechos, los principios y las normas. Mesa redonda efectuada el 26 de septiembre de 1979.” Secretaría de Relaciones Exteriores, Instituto Mexicano Matías Romero de Estudios Diplomáticos. México, 1979.

Viikari, Lotta., The Environmental Element in Space Law. Assessing the Present and charting the Future. Martinus Nijhoff Publishers, 2008.

Vukas, Budislav., The Law of the Sea. Selected Writings. Ed. Vaughan Lowe, Oxford University, Publications on Ocean Development, Vol. 45, 2004.

Watts, Arthur., The International Law Commission (1949-1998). Volume III: Final Draft, Articles and Other Materials. Oxford University Press, 1999.

Willmot, Haidi and Mamiya, Ralph. “Mandated to Protect: Security Council Practice on the Protection of Civilians.” at The Oxford Handbook of the Use of Force in International Law, Oxford University Press, United Kingdom, 2015, pp. 377-382.

Xue, Hanqin., Transboundary Damage in International Law. Cambridge University Press, United Kingdom, 2003.

Legislation, agreements and international documents.

Abidjan Convention Secretariat. “Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region and Protocol concerning Co-operation in Combating Pollution in Cases of Emergency.” Abidjan, 21 March 198. http://abidjanconvention.org/index.php?option=com_content&view=article&id=104&Itemid=204&lang=en

Bilateral Agreement. “Agreement on the Delimitation of the Exclusive Economic Zone of Mexico in the Sector Adjacent to Cuba Maritime Areas.” 26 July 1976. http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MEX.htm

Bilateral Agreement. “Maritime Boundary Agreement between the United States of America and the Republic of Cuba.” 16 December 1977 (applied provisionally as from 1 January 1978).” http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/USA.htm

Bilateral Agreement. “Tratado de límites entre España y Francia desde el Valle de Andorra al Mediterráneo y Acta adicional a los tres tratados de límites entre España y Francia.” Bayonne, 26 May 1866. http://www.mojonesdelospirineos.com/documentacion.php

Bilateral Agreement. “Treaty between the Government of the United States of America and the Government of the United Mexican States on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles.” 9 June 2000. http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/USA.htm

Bilateral Agreement. “Treaty on Maritime Boundaries between the United States of America and the United Mexican States [Caribbean Sea and Pacific Ocean].” 4 May 1978.” http://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/USA.htm

Cuban Law No. 59 “Civil Code” [16 July 1987]. Extraordinary Official Gazette of the Republic of Cuba, No. 9 [15 October 1987]. http://www.gacetaoficial.cu/

Cuban Law No. 81. “On the Environment” [11 July 1997]. Extraordinary Official Gazette of the Republic of Cuba, No. 7 [11 July 1997]. http://www.gacetaoficial.cu/

International Atomic Energy Agency. “Convention on the Liability of Operators of Nuclear Ships.” Brussels, 25 May 1962. https://www.iaea.org/Publications/Documents/Conventions/liability.html

International Atomic Energy Agency. “Vienna Convention on Civil Liability for Nuclear Damage.” Vienna, 21 May 1963. https://www.iaea.org/Publications/Documents/Conventions/liability.html

International Group of P & I Clubs. “International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001: Implementation of the Convention.” LEG. 96/6/2. http://www.igpandi.org/downloadables/submissions/imo/LEG%2096-6-2%5B1%5D.pdf

IOPC Funds. “Convention on Civil Liability for Oil Pollution Damage.” London, 27 November 1992. http://www.iopcfunds.org/publications/

IOPC Funds. “International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage.” London, 27 November 1992. http://www.iopcfunds.org/publications/

IOPC Funds. “Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992.” London, 16 May 2003. http://www.iopcfunds.org/publications/

ISA. “Mining Code of the International Seabed Authority.” https://www.isa.org.jm/mining-code/Regulations

MEDU. “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.” Barcelona, 16 February 1976. http://marine-litter.gpa.unep.org/framework/region-4-next.htm

Naciones Unidas. “Anuario de la Comisión de Derecho Internacional.” UN doc. (A/CN.4/SER.A/1996/add.1 (part 2)), Vol. II, 1996.

OSPAR Commission. “Convention for the protection of the marine environment of the North-East Atlantic.” Paris, 22 September 1992. http://www.ospar.org/convention

The Caribbean Environment Programme. “Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region.” Cartagena de Indias, Colombia, 24 March 1983. http://www.cep.unep.org/cartagena-convention

The Caribbean Environment Programme. “Protocol Concerning Co-operation and Development in Combating Oil Spills in the Wider Caribbean Region.” Cartagena de Indias, Colombia, 24 March 1983. http://www.cep.unep.org/cartagena-convention

The Caribbean Environment Programme. “Protocol Concerning Pollution from Land-Based Sources and Activities.” 6 October 1999. http://www.cep.unep.org/cartagena-convention

The Caribbean Environment Programme. “Protocol Concerning Specially Protected Areas and Wildlife (SPAW) in the Wider Caribbean.” 18 January 1990. http://www.cep.unep.org/cartagena-convention

The Caribbean Environment Programme. “Wider Caribbean Region Multilateral Technical Operating Procedures for Offshore Oil Pollution Response.” March 2014.” http://cep.unep.org/racrempeitc/regional-oprc-plans/Final_MTOP_Public_version.pdf.

United Nationes, Office for Outer Space Affairs. “Convention on International Liability for Damage Caused by Space Objects.” Adopted by the General Assembly 26th session. RES 2777 (XXVI). 29 November, 1971. http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introliability-convention.html

United Nations Commission on International Trade Law. “Rules on Transparency for Treaty-based Investor-State Arbitration.” 1st April 2015 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html

United Nations, Office for Outer Space Affairs. “Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.” General Assembly, 18th session. RES 1962 (XVIII). 13 December, 1963. http://www.unoosa.org/oosa/oosadoc/data/resolutions/1963/general_assembly_18th_session/res_1962_xviii.html

United Nations, Office for Outer Space Affairs. “Convention on International Liability for Damage Caused by Space Objects.” 29 November 1971, http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introliability-convention.html

United Nations, Office for Outer Space Affairs. “Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.” Adopted by the General Assembly 21st

session. RES 2222 (XXI). 19 December, 1966. http://www.unoosa.org/oosa/oosadoc/data/resolutions/1966/general_assembly_21st_session/res_2222_xxi.html

United Nations, Official Records of the Sixth Committee. “on Responsibility of States for internationally wrongful acts.” http://www.un.org/en/ga/sixth/68/StateRes.shtml

United Nations, Official records. “The preparatory work of the Space Liability Convention.” http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/travaux-preparatoires/liability-convention.html

United Nations, Treaty Collection. “Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.” New York, 28 July 1994. https://treaties.un.org/pages/CTCTreaties.aspx?id=21&subid=A&lang=en

United Nations, Treaty Collection. “Charter of the United Nations and Statute of the International.” San Francisco, 20 June 1945. https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-1&chapter=1&lang=en

United Nations, Treaty Collection. “Convention on the Continental Shelf.” Geneva, 29 April 1958. https://treaties.un.org/pages/CTCTreaties.aspx?id=21&subid=A&lang=en

United Nations, Treaty Collection. “Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court.” https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&lang=en

United Nations, Treaty Collection. “United Nations Convention on Jurisdictional Immunities of States and their Property.” New York, 17 January 2005. https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf

United Nations, Treaty Collection. “United Nations Convention on the Law of the Sea.” Montego Bay, 10 December 1982. https://treaties.un.org/pages/CTCTreaties.aspx?id=21&subid=A&lang=en

United Nations. “International Covenant on Civil and Political Rights.” New York, 16 December 1966. http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

United Nations. “International Covenant on Economic, Social and Cultural Rights.” 16 December 1966. http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10). http://legal.un.org/ilc/reports/2004/

United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10). http://legal.un.org/ilc/reports/2009/

United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Thirty-fifth session, Supplement No. 10 (A/35/10). http://legal.un.org/ilc/reports/reports1980.shtml

United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Thirty-second session, Supplement No. 10 (A/32/10). http://legal.un.org/ilc/reports/reports1980.shtml

United Nations. “Report of the International Law Commission.” General Assembly, Official Records, Thirty-third session, Supplement No. 10 (A/33/10). http://legal.un.org/ilc/reports/reports1980.shtml

United Nations. “Resolution on Permanent sovereignty over natural resources.” General Assembly, 17th session, A/RES/1803 (XVII). 14 December 1062. http://research.un.org/en/docs/ga/quick/regular/17

United Nations. “Rio Declaration on Environment and Development.” Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol.I), 12 August 1992, Annex I. http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm

United Nations. “Stockholm Declaration on the Human Environment.” Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14, at 2 and Corr.1 (1972). http://www.un-documents.net/unchedec.htm

United Nations. “Yearbook of the International Law Commission 1956.” Vol. II., (Doc A/CN.4/96) http://legal.un.org/ilc/publications/yearbooks/1949_1959.shtml

United Nations. “Yearbook of the International Law Commission 1957.” Vol. II., (Doc A/CN.4/106) http://legal.un.org/ilc/publications/yearbooks/1949_1959.shtml

United Nations. “Yearbook of the International Law Commission 1958.” Vol. II., (Doc A/CN.4/111) http://legal.un.org/ilc/publications/yearbooks/1949_1959.shtml

United Nations. “Yearbook of the International Law Commission 1959.” Vol. II., (Doc A/CN.4/119) http://legal.un.org/ilc/publications/yearbooks/1949_1959.shtml

United Nations. “Yearbook of the International Law Commission 1960.” Vol. II., (Doc A/CN.4/125) http://legal.un.org/ilc/publications/yearbooks/1960_1969.shtml

United Nations. “Yearbook of the International Law Commission 1961.” Vol. II., (Doc A/CN.4/134) http://legal.un.org/ilc/publications/yearbooks/1960_1969.shtml

United States Code., “Clean Water Act.” Codified at Title 33, Chapter 26, §§1251- 1274. Published at United States Code, 2006 Edition, Supplement 5, Title 33 - Navigation and Navigable Waters. http://www.gpo.gov/fdsys/granule/USCODE-2011-title33/USCODE-2011-title33-chap26-subchapI-sec1251/content-detail.html

United States Code., “The Foreign Sovereign Immunities Act.” Codified at Title 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611. Published at United States Code, 2006 Edition, Title 28 - Judiciary and Judicial Procedure. http://www.gpo.gov/fdsys/search/pagedetails.action?st=28+U.S.C.+1330&collection=USCODE&historical=true&granuleId=USCODE-2006-title28-partIV-chap85-sec1330&packageId=USCODE-2006-title28

United States Presidential Proclamation No. 2667, 28 September, 1945 and Executive Order No. 9633, 28 September 1945. http://www.archives.gov/federal-register/executive-orders/1945-truman.html

Cases and judgments.

Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la République Française en application du Protocole du 25 Septembre 1991 Additionnel à la Convention relative à la Protection du Rhin contre la pollution par les chlorures du 3 Décembre 1976. (Les Pays-Bas v. France), Sentence arbitrale du 12 mars 2004, U.N.R.I.A.A., Vol. XXV, 2005, pp.267-344. http://legal.un.org/riaa/vol_XXV.htm

Affaire des biens britanniques au Maroc espagnol. (Espagne contre Royaume-Uni), Sentence arbitrale du 1er mai 1925, La Haye, U.N.R.I.A.A., Vol. II, 2006, pp. 615-742. http://legal.un.org/riaa/vol_II.htm

Affaire des concessions Mavrommatis en Palestine. (République hellénique v. Royaume-Uni), Exception d'incompétence, Arrêt du 30 août 1924, Recueil des Arrêts C.P.J.I., Série A, No 2, p. http://www.icj-cij.org/pcij/series-a.php?p1=9&p2=1

Affaire du Lac Lanoux. (Espagne v. France), Sentence Arbitral du 16 Novembre 1957, U.N.R.I.A.A., Vol. XII, 2006, pp. 281-317. http://legal.un.org/riaa/vol_XII.htm

Affaire Nottebohm. (Liechtenstein v. Guatemala), Judgment of 6 April 1955, I.C.J. Reports 1955, p. 4. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=26&case=18&code=lg&p3=4

Affaire Nottebohm. (Liechtenstein v. Guatemala), Preliminary Objections, Judgment of 18 November 1953, I.C.J. Reports 1953, p. III. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=26&case=18&code=lg&p3=4

Agreement Concerning Settlement of Claims Arising from the 1979 Oil Well Blowout and Oil Spill in the Gulf of Mexico. at International Legal Materials, The American Society of International Law, Vol. 22, 1983.

Barcelona Traction, Light and Power Company, Limited. (Belgium v. Spain), Judgment of 5 February 1970, I.C.J. Reports 1970, p.3. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=1a&case=50&code=bt2&p3=4

Barcelona Traction, Light and Power Company, Limited. (Belgium v. Spain), Preliminary Objections, Judgment of 24 July 1964, I.C.J. Reports 1964, p.6. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=1a&case=50&code=bt2&p3=4

Case No. IT-94-1-A (Prosecutor v. Du [Ko Tadi]). Judgment of 15 July 1999. United Nations, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. http://www.icty.org/case/tadic/4#acjug

Case of Velásquez-Rodríguez v. Honduras. Inter-American Court of Human Rights. Judgment of July 21, 1989. http://www.corteidh.or.cr/docs/casos/articulos/seriec_07_ing.pdf.

Certain Phosphate Lands in Nauru (Nauru vs. Australia). 1989-1993. http://www.icj-cij.org/docket/index.php?p1=3&k=e2&case=80&code=naus&p3=0

Corfu Channel case (Albania v. United Kingdom). Judgment of 15 December 1949. I.C.J. Reports 1949, p. 244. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=1&code=cc&p3=4

Corfu Channel case (Albania v. United Kingdom). Judgment of 9 April 1949 (Merits), I.C.J. Reports 1949, p.4. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=1&code=cc&p3=4

Fisheries Jurisdiction case. (United Kingdom v. Iceland), Judgment of 25 July 1974 (Merits), I.C.J Reports 1974, p.3. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=9d&case=55&code=gi&p3=4

Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997, p.7. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=8d&case=92&code=hs&p3=4

ICSID Case no ARB/01/8. (CMS Gas Transmission Company v. Argentina Republic), Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003. https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/01/8&tab=DOC

International Tribunal for the Law of the Sea. “Reports of Judgments, Advisory Opinions and Orders.” Martinus Nijhoff Publishers Martinus, Vol. 11, 2011.

Island of Palmas case. (Netherlands v. U.S.A.), Award of 4 April 1928, La Hague, U.N.R.I.A.A., Vol. II, 2006, pp. 829-871. http://legal.un.org/riaa/vol_II.htm

Jurisdiction of the Courts of Danzig. (Advisory opinion of 3rd March 1928), Collection of Advisory Opinions, C.P.J.I. Series B Nº 15. http://www.icj-cij.org/pcij/series-b.php?p1=9&p2=2

Legality of the Thereat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996). I.C.J. Reports 1996, p. 226. http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=4

Military and Paramilitary Activities in and against Nicaragua. (Nicaragua v. United Estates of America), Judgment of 27 June 1986 (Merits), I.C.J., Reports 1986, p. 14. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=66&case=70&code=nus&p3=4

Mosul Boundary case: "Article 3, paragraph 2, of the Treaty of Lausanne. Frontier between Turkey and Iraq." (Advisory opinion of 21 November 1925), Collection of Advisory Opinions, C.P.J.I. Series B Nº 12. http://www.icj-cij.org/pcij/series-b.php?p1=9&p2=2

Nuclear Tests case (New Zealand v. France), Judgment of 20 December 1974, I.C.J. Reports 1974, p. 457. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nzf&case=59&k=6b&p3=0

Nuclear Tests case. (New Zealand v. France), Order of 22 June 1973 (Interim Protection), I.C.J. Reports 1973, p. 135. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nzf&case=59&k=6b&p3=0

Nuclear Tests case: "Request for an Examination of the Situation in A whith Paragraph 63 of the Court´s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case." Order of 22 September 1995, I.C.J., Reports 1995, p 288. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cd&case=97&code=nzfr&p3=3

Phosphates in Morocco (Kingdom of Italy v. French Republic). Judgment of 14 June 1938 (Preliminary Objections), Judgments, Orders and Advisory Opinions, C.P.J.I. Series A/B, No 74. http://www.icj-cij.org/pcij/series-a-b.php?p1=9&p2=3

Pulp Mills on the River Uruguay case (Argentina v. Uruguay). Judgment of 20 April 2010, I.C.J., Reports 2010, p, 4. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=4

Rainbow Warrior Arbitration. (New Zealand vs. France). Award of 30 April 1990, U.N.R.I.A.A., Vol. XX, 2006, pp. 215-284. http://legal.un.org/riaa/vol_XX.htm

Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. "Advisory Opinion of 1 February 2011 Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area." https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

The Factory at Chorzów. (Germany v. Polish Republic), Judgment of 26 July 1927, Collection of Judgments, C.P.J.I., Series A, N^{o} 9. http://www.icj-cij.org/pcij/series-a.php?p1=9&p2=1

The Panevezyś-Saldutiskis Railway case (Republic of Estonia v. Republic of Lithuania), Judgment of 28 February 1939, Collection of Judgments, C.P.J.I. Series A/B N^{o} 76. http://www.icj-cij.org/pcij/series-a-b.php?p1=9&p2=3

Trail smelter case (United States of America v. Canada). Award of 16 April 1938 and 11 March 1941. U.N.R.I.A.A., Vol. III. 2006, pp. 1905-1982. http://legal.un.org/riaa/vol_III.htm

United Nations. "Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice (1948-1991)." UN Doc. (ST/LEG/SER.F/1), available from http://www.un.org/en/ga/documents/symbol.shtml

United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment of 24 May 1980, I.C.J. Reports 1980, p.3. http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=c9&case=64&code=usir&p3=4

Newspaper articles, statements and other sources of information.

Heritage Foundation, “U.S. Extended Continental Shelf Maps.” May 15, 2012, at http://www.heritage.org/multimedia/infographic/2012/05/us-extended-continental-shelf-gulf-mexico

Koh, Tommy T.B., “A Constitution for the Oceans. Remarks by Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, at the final session of the Conference at Montego Bay, Jamaica, on 6 and 11 December 1982.” at http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf

Live Science. “FAQ: The Science and History of Oil Spills, by Andrea Thompson.” April 23, 2010. at http://www.livescience.com/9885-faq-science-history-oil-spills.html

Lynch, Loretta E., the United States Attorney General, “Statement on the Agreement in Principle with BP to Settle Civil Claims for the Deepwater Horizon Oil Spill.” July 2, 2015, at http://www.justice.gov/opa/pr/statement-attorney-general-loretta-e-lynch-agreement-principle-bp-settle-civil-claims

Mother Nature Network, “The 13 Largest oil spills in history.” October 15, 2015, at http://www.mnn.com/earth-matters/wilderness-resources/stories/the-13-largest-oil-spills-in-history

New York Times article “In BP’s Record, a History of Boldness and Costly Blunders.” July 12, 2010. at http://www.nytimes.com/2010/07/13/business/energy-environment/13bprisk.html?_r=0

NOAA´s Integrated Ecosystem Assessment, United States Department of Commerce. “About Gulf of Mexico.” at http://www.noaa.gov/iea/regions/gulf-of-mexico/about.html

Recommendation of the Council Concerning International Economic Aspects of Environmental Policies, C(72)128, (OECD 1972). http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=4&InstrumentPID=255&Lang=en&Book=False