

**Twenty-Second Session**  
**Recognition and Enforcement of Foreign Judgments**  
**18 June – 2 July 2019, The Hague**

<b>Document</b>	Preliminary Document <input checked="" type="checkbox"/> Information Document <input type="checkbox"/>	No 12 of June 2019
<b>Title</b>	Note on reconsidering “marine pollution and emergency towage and salvage” within the scope of the draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters	
<b>Author</b>	Permanent Bureau	
<b>Objective</b>	To consider “marine pollution and emergency towage and salvage” within the scope of the draft Convention	
<b>Annexes</b>	Articles in different Conventions regarding recognition and enforcement	
<b>Related documents</b>		

## I. INTRODUCTION

1. The Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (hereinafter, “Special Commission”), which took place in May 2018, produced the 2018 draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (hereinafter, “draft Convention”). Article 2(1)(g) of the draft Convention states:

“Article 2 Exclusions from scope

1. “This Convention shall not apply to the following matters –

[...]

(g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; [...].”

This provision excludes judgments arising from maritime-related matters from the scope of the draft Convention.

2. The current wording of Article 2(1)(g) of the draft Convention was modelled on Article 2(2)(g) of the *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, “2005 Choice of Court Convention”).<sup>1</sup> During its May 2018 meeting, the Special Commission discussed any potential amendments to the scope of the draft Convention. Participants considered whether the wording “marine pollution and emergency towage and salvage” should be removed from Article 2(1)(g) thereby allowing judgments on such matters to be covered by the draft Convention.<sup>2</sup>

3. The proponents of including these matters in the scope of the draft Convention argued that the draft Convention should reflect the common interests of preventing marine pollution and encouraging emergency towage and salvage. It was explained that failure to recognise and enforce judgments against marine polluters or in favour of emergency towers and salvors could promote the former activities and discourage the latter thereby allowing polluters and others to externalise the costs of their activities.

4. A further justification for including “marine pollution and emergency towage and salvage” within the scope of the draft Convention are the lack of existing specialised instruments in respect of emergency towage and salvage,<sup>3</sup> and the limited territorial and substantive scope of the existent specialised instruments regarding maritime pollution.<sup>4</sup>

5. Additionally, the proponents noted that the wider scope of the draft Convention, as compared to the 2005 Choice of Court Convention, could also justify the departure from the wording of the 2005 Choice of Court Convention, despite it being the source of inspiration for the provision in question.

6. Other delegations objected to the deletion of the wording “marine pollution” on the basis that there already are international instruments that facilitate recognition and enforcement of marine pollution-related judgments.

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<sup>1</sup> See “Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues”, drawn up by the Permanent Bureau, Prel. Doc. No 2 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments (available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under “Judgments” then “Special Commission on the Judgments Project”), p. 8.

<sup>2</sup> See Work. Doc. No 190 of October 2017, “Proposal of the delegation of the United States of America” (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)) (available on the Secure Portal of the HCCH website at < [www.hcch.net](http://www.hcch.net) > under “22<sup>nd</sup> Diplomatic Session”).

<sup>3</sup> See paras 50, 51, 54 and 68 below.

<sup>4</sup> See Minutes of the Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018), Minutes No 4, para. 46 (see path indicated in note **Error! Bookmark not defined.**).

7. Although there was some agreement to delete “emergency towage and salvage” from Article 2(1)(g), it was ultimately concluded that this part of the provision should remain unchanged due to the lack of relevant subject-matter expertise. A further reason for this conclusion was that more information on the international instruments dealing with “marine pollution and emergency towage and salvage” would be needed in the lead-up to the 22<sup>nd</sup> HCCH Diplomatic Session.<sup>5</sup>

8. Against this background, this Note intends to examine whether the existing maritime-related international instruments contain provisions regarding recognition and enforcement of foreign maritime-related judgments, and, if so, to consider the scope of their application focusing on “marine pollution” and “emergency towage and salvage” related judgments. Section II will look at the relevant discussions during the negotiations of earlier phases of the Judgments Project, which was launched by the HCCH in 1992 in relation to the international jurisdiction of courts and the recognition and enforcement of their judgments abroad. The section will include the discussion of the 2005 Choice of Court Convention. Section III will then present research findings in international maritime-related instruments that deal with the recognition and enforcement of foreign judgments on matters relating to marine pollution, emergency towage and salvage. Section IV provides recommendations to be considered at the Diplomatic Session. An Annex, that is included at the end of the Note, sets out the recognition and enforcement provisions that exist in the relevant international instruments in a table.

## II. DISCUSSIONS AT THE EARLIER PHASES OF THE JUDGMENTS PROJECT

9. Certain maritime-related matters have been excluded from the scope of all proposed texts for a future Convention on the recognition and enforcement of foreign judgments in civil or commercial matters since the earlier stages of the Judgments Project. For example, both the 1999 preliminary draft Convention<sup>6</sup> and the 2001 Interim Text excluded “admiralty or maritime matters” from their scope.<sup>7</sup> This was due to the highly specialised nature of the subject, which features a complex body of admiralty and maritime law that has developed over centuries, and the fact that not all States have adopted the relevant international conventions. The effect of such exclusions is that these conventions do not apply to claims in relation to ships, cargoes and seamen employment, including claims arising out of defective condition or operation of a ship, a contract for the hire of a ship, or carriage of goods or passengers on a ship.<sup>8</sup> It should be noted that at that stage, the Judgments Project aimed to develop an international treaty dealing with both international jurisdiction and recognition and enforcement of foreign judgments, the scope of which was later reduced to only dealing with the latter subject-matter.

10. The drafters of the 2005 Choice of Court Convention discussed whether the term “admiralty or maritime matters” should be abandoned on the basis that it is over-inclusive in incorporating matters that are dealt with by other international instruments. A suggested solution was to explicitly specify the matters that were intended to be excluded.<sup>9</sup> As a result, the wording “marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage” was adopted in

<sup>5</sup> *Ibid.*, paras 47-52; *Aide memoire* of the Chair of the Special Commission of May 2018 (see path indicated in note 2), para. 24.

<sup>6</sup> Art. 1(2)(h) of the “Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission on 30 October 1999 and Report by Peter Nygh and Fausto Pocar”, Prel. Doc. No 11 of August 2000, in *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, Cambridge – Antwerp – Portland, Intersentia, 2013, pp. 191-313 (hereinafter, “Nygh/Pocar Report”), p. 191.

<sup>7</sup> “Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference (6-20 June 2001): Interim Text”, prepared by the Permanent Bureau and the co-Reporters for the attention of Commission II on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of the Nineteenth Session, Art. 1(2)(h) (see path indicated in note 1).

<sup>8</sup> Nygh/Pocar Report, para. 42.

<sup>9</sup> See Minutes of the Meeting of the Special Commission of December 2003 on Choice of Court Agreements, Minutes No 1, in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Intersentia/Antwerp - Oxford - Portland, 2010, pp. 440-441, and Minutes of Commission II of the Twentieth Session on Choice of Court (June 2005), Minutes No 13, in *ibid.*, pp. 654-657.

Article 2(2)(g) of the 2005 Choice of Court Convention during the Twentieth Session. In effect, this wording excluded disputes relating to such matters from the scope of the 2005 Choice of Court Convention. (It should be noted that matters involving “the carriage of passengers and goods” are also listed as excluded in Article 2(2)(f) of the 2005 Choice of Court Convention.)

11. According to the “Explanatory Report on the 2005 Hague Choice of Court Convention” (hereinafter, “Hartley/Dogauchi Report”),<sup>10</sup> five specific maritime matters were excluded,<sup>11</sup> since application of choice of court agreements to such matters would not be acceptable for some States.<sup>12</sup> Shipping-related matters, such as marine insurance, non-emergency towage and salvage, shipbuilding, ship mortgages and liens, are included in the scope of the 2005 Choice of Court Convention.<sup>13</sup> The current revised draft Explanatory Report to the draft Convention adopts the same explanation regarding such inclusions in the scope of the draft Convention,<sup>14</sup> given that it was modelled on the 2005 Choice of Court Convention.

12. No record could be traced in the preparatory documents for the 2005 Choice of Court Convention explaining why those specific matters were excluded.

13. Considering the significance of changes in the nature of the Judgments Project, the differences between the draft Convention and the 2005 Choice of Court Convention in their circumstances and contexts, and the paucity of specific record of considerations that have led to the blanket exclusion currently contained in the draft Convention, past results and the text of the 2005 Choice of Court Convention may offer limited guidance for the current draft Convention. The weight of these factors may diminish the desirability of simply relying on the previous text thereby inviting further reflection on whether or not “marine pollution” and “emergency towage and salvage” should fall within the scope of the draft Convention.

### III. RESEARCH FINDINGS ON INTERNATIONAL MARITIME-RELATED INSTRUMENTS

14. The exclusions in Article 2(1)(g) of the draft Convention capture various types of claims. These claims might be brought by individuals, businesses, governments or government entities. The exclusions capture judgments in respect of physical damage, such as, for example, damage to an oyster farm caused by marine pollution. They also apply to judgments in respect of economic loss, such as clean-up costs, and even to claims for sums which might not be characterised as “loss”, such as the value of a salvaged ship.

15. Many of these maritime-related matters are regulated by specialised treaties, some of which contain provisions on the recognition and enforcement of foreign judgments. The remainder of this Note will discuss such instruments that are relevant to the issues arising in the context of marine pollution and emergency towage and salvage.

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<sup>10</sup> T. Hartley & M. Dogauchi, “Explanatory Report on the 2005 Hague Choice of Court Convention” (hereinafter, “Hartley/Dogauchi Report”), in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court Agreements*, Antwerp – Oxford – Portland, Intersentia, 2010, p. 803, para. 59.

<sup>11</sup> Being “marine pollution; limitation of liability for maritime claims; general average; emergency towage and emergency salvage”.

<sup>12</sup> See *ibid.*, para 59.

<sup>13</sup> *Ibid.*, para. 59.

<sup>14</sup> “Judgments Convention: Revised draft Explanatory Report”, drawn up by F. Garcimartín and G. Saumier, Prel. Doc. No 1 of December 2018 for the attention of the Twenty-Second Session on Recognition and Enforcement of Foreign Judgments (hereinafter, “Revised draft Explanatory Report”), para. 49 (see path indicated in note 1).

## A. Marine pollution

16. According to Article 1.1.4 of the *United Nations Convention on the Law of the Sea* (hereinafter, "UNCLOS"),<sup>15</sup> pollution of the marine environment (hereinafter, "marine pollution") refers to "the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities".

17. Marine pollution may be traced to a variety of sources. Thirty years ago the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (hereinafter, "GESAMP") produced a rough estimate of the relative contributions of human-caused pollution into the marine environment.<sup>16</sup> It estimated that land-based discharges accounted for 44%; atmospheric sources accounted for a third; vessel pollution was just 12%, and dumping was 10%.<sup>17</sup> These figures have undoubtedly changed since then,<sup>18</sup> but it remains the case that the majority of marine pollution is a result of land-based and atmospheric pollution rather than ship-sourced pollution.<sup>19</sup>

18. Marine pollution affects and implicates a variety of actors. Private actors, like fishermen, may suffer loss as a consequence of pollution of the marine environment; governments and other public bodies may be tasked with cleaning up and shouldering the externalities of pollution caused by private actors. Marine pollution is thus the subject of private disputes and public regulation. The relationship between this subject matter and the discipline of private international law is complex. Marine pollution is subject to public international law instruments, including regional treaties;<sup>20</sup> the law of the sea; maritime law principles, which are not necessarily uniform between jurisdictions; and international environmental law, among other things.

19. Articles 207-212 of the UNCLOS taxonomises marine pollution into six sources: pollution from land-based sources, pollution from seabed activities subject to national jurisdiction, pollution from activities in the "Area", pollution by dumping, pollution from vessels and pollution from or through the atmosphere. These categories are considered in turn below.

20. Note that the UNCLOS imposes obligations on States to enforce national laws in respect of these categories of marine pollution. Where that enforcement involves domestic legal proceedings, judgments flowing from such proceedings may involve application of foreign penal laws and may be subject to the exclusion in respect of exemplary and punitive damages in Article 10 of the draft Convention.

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<sup>15</sup> The Convention entered into force on 16 November 1994 and has 168 Contracting Parties. It is available at the following address: <[https://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)> (last consulted on 14 June 2019).

<sup>16</sup> Considered in D.R. Rothwell and T. Stephens, *The International Law of the Sea*, Bloomsbury, 2<sup>nd</sup> ed, 2016, 366.

<sup>17</sup> Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, *The State of the Marine Environment*, Blackwell Scientific Publication, 1990, 88.

<sup>18</sup> "Vessel-source pollution accounts for 12% of all marine pollution, land based and atmospheric for 77%, ocean dumping for 10% and offshore production for 1% (GESAMP Report No. 39, p. 88).", in E.J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, Kluwer Law International, The Hague, 1998, p. 18, n. 12, quoted in D. Freestone, "The Impact of Human Used On The Marine Environment Beyond National Jurisdiction", in *Protecting the Oceans Beyond National Jurisdiction*, Brill, 2009, 1, 17 n 137.

<sup>19</sup> *Oceans and the Law of the Sea: Report of the Secretary General*, UN Doc A/64/66/Add.1 (2009) [225]; D.R. Rothwell and T. Stephens (*op. cit.* note 16) 366. See further: United Nations, Division for Ocean Affairs and the Law of the Sea, Group of Experts of the Regular Process, *The First Global Integrated Marine Assessment – World Ocean Assessment I* (2016). It is available at the following address: <<https://www.un.org/regularprocess/content/first-world-ocean-assessment>> (last consulted on 14 June 2019).

<sup>20</sup> See, generally, International Maritime Organization, *List of IMO Conventions* (2019). It is available at the following address: <<http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Default.aspx>> (last consulted on 14 June 2019).

21. A new legally-binding instrument is currently being developed on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction by the Preparatory Committee of the UN Division for Ocean Affairs and the Law of the Sea.<sup>21</sup> Although a few elements of the draft text of this instrument is related to pollution,<sup>22</sup> the text has not yet been finalised meaning that it remains unclear whether or not it would have any implications on or explicit provisions on the recognition and enforcement of foreign judgments.

**(i) Marine Pollution: Pollution from Land-Based Sources**

22. According to the *Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-based Sources* (1985)<sup>23</sup> (hereinafter, "Montreal Guidelines"), in this context "land-based sources" means "(i) Municipal, industrial or agricultural sources, both fixed and mobile, on land, discharges from which reach the marine environment, in particular: From the coast, including from outfalls discharging directly into the marine environment and run-off; Through rivers, canals or other water-courses, including underground water-courses; and via the atmosphere. (ii) Sources of marine pollution from activities conducted on offshore fixed or mobile facilities within the limits of national jurisdiction, save to the extent that these sources are governed by appropriate international agreements".<sup>24</sup>

23. Marine pollution from land-based sources represents a significant portion of all marine pollution, and also poses significant risks to both marine ecosystems and human health by virtue of its proximity to coastlines.<sup>25</sup> But such pollution has proven difficult to regulate at the international level.<sup>26</sup> This may be due to the fact that it would require States to regulate industrial and agricultural activities within their own territories, *cf.* other forms of marine pollution.<sup>27</sup> Consequently, regulation of marine pollution from land-based sources is left largely in the hands of coastal States, which take differing approaches to the issue.<sup>28</sup>

24. Marine pollution from land-based sources is subject to both hard and soft law.<sup>29</sup> The most significant hard law instrument at the international level is the UNCLOS.<sup>30</sup>

25. Article 207(1) of the UNCLOS provides that States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources. That obligation is supplemented by Article 213, which requires States to enforce their laws with respect to pollution from land-based sources. These obligations should be read subject to Article 207(4), which provides that States should develop their laws "taking into account characteristic regional features, the economic capacity of developing States and their need for economic development". States' poor economic performance and the poverty-levels of populations, together with population and

<sup>21</sup> UN General Assembly, *Resolution adopted by the General Assembly on 19 June 2015*, available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/187/55/PDF/N1518755.pdf?OpenElement>> (last consulted on 14 June 2019).

<sup>22</sup> See for example The Preparatory Committee, "Chair's streamlined non-paper on elements of a draft text of an international legally-binding instrument under UNCLOS", Fourth Session of the Prep Com, 10-21 July 2017, "duty not to transform one type of pollution into another or not to transfer damage or hazards" and "polluter-pays principle".

<sup>23</sup> See United Nations Environment Programme, "Protection of the Marine Environment Against Pollution from Land-Based Sources", (1985) 14 *Environmental Policy and Law* 77.

<sup>24</sup> Montreal Guidelines, para. 1(b).

<sup>25</sup> Y. Tanaka, "Regulation of Land-Based Marine Pollution in International Law: A Comparative Analysis Between Global and Regional Legal Frameworks", (2006) 66 *Journal of Comparative Public Law and International Law* 535, 536.

<sup>26</sup> M.W.D. White, *Australasian Marine Pollution Laws*, Federation Press, 2<sup>nd</sup> ed, 2007, p. 12.

<sup>27</sup> D.R. Rothwell and T. Stephens (*op. cit.* note 16), p. 407.

<sup>28</sup> D.L. VanderZwaag and A. Powers, "The Protection of the Marine Environment from Land-based Pollution and Activities: Gauging the tides of global and regional governance", (2008) 23 *Marine and Coastal Law* 423, 424.

<sup>29</sup> E.A. Kirk, "Noncompliance and the Development of Regimes Addressing Marine Pollution from Land-Based Activities", (2008) 39(3) *Ocean Development & International Law* 235, 236.

<sup>30</sup> Other instruments, such as the UN Framework Convention on Climate Change, may also deal with marine pollution from land-based sources indirectly; see D.L. VanderZwaag and A. Powers (*op. cit.* note 28) pp. 424-427.

consumption patterns, are factors which may contribute to marine pollution from land-based sources.<sup>31</sup>

26. As the Montreal Guidelines' definition illustrates, marine pollution from or through the atmosphere may also be sourced from the land; however, atmospheric marine pollution is covered by Article 212(1) of the UNCLOS. It is considered further below.

27. In terms of soft law, the *Global Program of Action for the Protection of the Marine Environment from Land-Based Activities* (1995) was adopted by over 108 governments. In 2006, through the "Beijing Declaration on furthering the implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities", representatives of 104 governments and the European Commission recommitted to the "Global Programme of Action as a flexible and effective tool for the sustainable development of oceans, coasts and islands".<sup>32</sup> Nutrients management, marine litter and wastewater have been recently highlighted as priority source categories to address through the Global Program of Action.<sup>33</sup>

28. The result of these hard and soft law instruments is the promulgation of national laws dealing with land-sourced marine pollution.<sup>34</sup> Some of those laws may impose civil liability, or otherwise deal with civil liability.<sup>35</sup> Where land-sourced marine pollution causes damage in a case with a foreign element, the scope of application of one of these statutes may present acute problems of private international law and statutory interpretation.<sup>36</sup>

**(ii) Marine pollution: Pollution from seabed activities subject to national jurisdiction**

29. "Seabed pollution" involves exploring and exploiting resources of the seabed (e.g., hydrocarbons) which leads to the intentional or accidental release of pollutants.<sup>37</sup> It includes the release of chemicals used in drilling, the discharge of water from oil platforms, and emissions by the flaring of excess gas.<sup>38</sup> Seabed mining – including exploration and extraction – is the activity most likely to give rise to this kind of marine pollution.<sup>39</sup>

30. Article 208(1) of the UNCLOS provides that "Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with

<sup>31</sup> GESAMP Reports and Studies, *Protecting the Oceans from Land-based Activities. Land-based sources and activities affecting the quality and uses of the marine coastal and associated freshwater environment*, IMO/FAO/UNESCO-IOC/WMO/WHO/IAEA/UN/UNEP, 2001, p. 1.

<sup>32</sup> United Nations Environment Programme, *Report of the second session of the Intergovernmental Review Meeting on the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities*, UNEP/GPA/IGR.2/7, 24, Annex V, available at the following address: <[https://wedocs.unep.org/bitstream/handle/20.500.11822/10672/igr-2\\_final\\_meeting\\_report\\_english.pdf?sequence=1&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/10672/igr-2_final_meeting_report_english.pdf?sequence=1&isAllowed=y)> (last consulted on 14 June 2019).

<sup>33</sup> Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, available at the following address: <<https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/addressing-land-based-pollution/governing-global-programme>> (last consulted on 14 June 2019).

<sup>34</sup> See, e.g., Natural Resource Management Ministerial Council, Australia's National Programme of Action for the Protection of the Marine Environment from Land-Based Activities (2006), available at the following address: <<https://www.environment.gov.au/system/files/pages/2c223360-76b9-45e9-b1f9-caea4def637b/files/npa.pdf>> (last consulted on 14 June 2019).

<sup>35</sup> E.g., Protection of the Environment Operations Act 1997 (NSW) ss 167-170.

<sup>36</sup> See M. Keyes, "Statutes, Choice of Law, and the Role of Forum Statutes", (2008) 4 *Journal of Private International Law* 1; M. Douglas, "Choice of Law in the Age of Statutes: A Defence of Statutory Interpretation after Valve", in M. Douglas, V. Bath, M. Keyes and A. Dickinson (eds), *Commercial Issues in Private International Law – A Common Law Perspective*, Hart, 2019.

<sup>37</sup> It might also capture undersea noise; see K.N. Scott, "International Regulation of Undersea Noise", (2004) 53 *International & Comparative Law Quarterly* 287.

<sup>38</sup> D.R. Rothwell and T. Stephens (*op. cit.* note 16), pp. 399-400.

<sup>39</sup> See generally E.D. Brown, "Pollution from seabed mining: Legal safeguards", (1983) 10(4) *Environmental Policy and Law* 122.

seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction...". These States have an obligation to enforce such laws (Art. 213), and to ensure that recourse is available for compensation in respect of damage caused by such marine pollution (Art. 235(2)).

31. International instruments relevant to vessels, such as the International Convention for the Prevention of Pollution from Ships (hereinafter, "MARPOL"), may also be relevant to seabed pollution because offshore oil and gas installations fall under the definition of "ships".<sup>40</sup> Note, however, that Article 2(3)(b)(ii) of the MARPOL excludes release of harmful substances from exploration, exploitation and associated offshore processing seabed mineral resources from the definition of "discharge".

32. At a regional level, the 1992 *Convention for the Protection of the Marine Environment of the North-East Atlantic* (hereinafter, "OSPAR Convention") affects the North Sea and the North-East Atlantic.<sup>41</sup> The covered area is significant for oil and gas exploitation; the Convention thus has obvious relevance to seabed pollution. Article 3(1) of the OSPAR Convention prohibits dumping from offshore installations. Article 7 imposes an obligation on State Parties to take appropriate measures "to prevent and eliminate pollution resulting from the abandonment of offshore installations in the maritime area caused by accidents".

33. The preceding discussion demonstrates that marine pollution from sea-bed activities, just like that caused by land-based sources, remains subject to primarily domestic regulation. Although international instruments dealing with sea-bed activities do exist, none of these regulations contain explicit recognition and enforcement provisions leaving the matter of recognition and enforcement of judgments relating to marine pollution from seabed activities outside the scope of their provisions and largely unregulated at the international level.

### (iii) Marine pollution: Pollution from activities in the area

34. Article 1(1)(1) of the UNCLOS defines "Area" as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction". Since, the "Area" may be loosely understood as the underwater ground beneath the "high seas", international regulation in respect of high seas may also affect the Area.<sup>42</sup>

35. Article 209(1) of the UNCLOS provides that "International rules, regulations and procedures shall be established ... to prevent, reduce and control pollution of the marine environment from activities in the Area", while Article 209(2) requires States to adopt laws to prevent marine pollution from activities in the Area by vessels, installations under their flag or authority.

36. Part XI of the UNCLOS concerns the Area generally. Article 139(1) within that Part obliges States to ensure that activities carried out in the Area – either by the State or by juridical persons controlled by or the national of the State – are carried out in accordance with Part XI. Article 139(2) provides that damage caused by a State's failure in respect of its obligations under Part XI shall result in liability for the State.

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<sup>40</sup> See definition of "Ships" in Art. 2(4) of the MARPOL that reads "a vessel of any type whatsoever operating in the marine environment and includes...floating craft and fixed or floating platforms"; cf. C. Brown, "International Environmental Law in the Regulation of Offshore Installations and Seabed Activities: The Case for a South Pacific Regional Protocol", (1998) 17 *Australian Mining and Petroleum Law Journal* 109, pp. 113-4, 121-2.

<sup>41</sup> See definition of "Maritime area" that the OSPAR Convention primarily concerns in Art. 1(a) of the Convention; cf. D.R. Rothwell and T. Stephens (*op. cit.* note 16), p. 401.

<sup>42</sup> See Art. 86 of the UNCLOS defining the application of Part VII – High Seas that reads that it applies "to all parts of the sea that are not included in the economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State"; cf. E.J. Molenaar and A.G. Oude Elferink, "Marine protected areas in areas beyond national jurisdiction – The pioneering efforts under the OSPAR Convention", (2009) 5(1) *Utrecht Law Review* 5, 7.



**(iv) Marine pollution: Pollution by dumping**

37. Article 1(5)(a) of the UNCLOS defines “dumping” as “any deliberate disposal of waste or other matter from vessels, aircrafts, platforms or other man-made structures at sea”. This includes disposing of vessels and installations, such as oil rigs.<sup>43</sup> In contrast, Article III 1(a) of the 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (hereinafter, “1972 London Convention”) defines “dumping” as “any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea” and “any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea”. Emanations incidental to the operation of vessels are excluded by Article 1(5) of the 1996 *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (hereinafter, “1996 Protocol”).<sup>44</sup>

38. Dumping at sea is regulated by Articles 210 and 216 of the UNCLOS. States are obliged to adopt national laws to prevent marine pollution by dumping, and to enforce such laws.

39. Dumping at sea is also regulated by the 1972 London Convention, and its revision via the 1996 Protocol. In 2006, amendments to the 1996 Protocol<sup>45</sup> permitted the storage of carbon dioxide under the seabed.<sup>46</sup>

40. Article II of the 1972 London Convention requires States to take “effective measures” to prevent marine pollution by dumping. Although the Convention contains a general prohibition of dumping, it permits some materials to be dumped with permits.<sup>47</sup> Article 3 of the 1996 Protocol requires States to apply a “precautionary approach to environmental protection from dumping wastes”.

41. Dumping within States’ territorial waters is subject to domestic legislation which may define offences and impose liability in respect of dumping.<sup>48</sup>

**(v) Marine pollution: Pollution from vessels**

42. Article 211 of the UNCLOS addresses pollution from sea-going vessels which may result from intentional and unintentional discharges. It requires States to adopt laws that ensure the sound construction and operation of ships to prevent the kinds of maritime accidents that cause pollution from occurring and take various other measures to prevent, reduce, and control pollution from vessels. Additionally, Article 211(4)-(7) allows coastal ships to adopt regulations to prevent, reduce, and control marine pollution by foreign vessels entering their territorial sea.

43. As UNCLOS itself does not contain a provision for the recognition and enforcement of foreign judgments, judgments related to most of the six areas of marine pollution it covers remain subject only to national laws regarding recognition and enforcement. The exception to this is pollution from vessels, which has been addressed by numerous international treaties that contain some recognition and enforcement provisions. Treaties with relevant provisions are listed below (the provisions themselves are tabled in the Annex to this Note). As will be noted in the following paragraphs, these treaties have limited application to the recognition and enforcement of foreign judgments in the area of ship source marine pollution.

<sup>43</sup> Art. 1(5)(a)(ii) of the UNCLOS.

<sup>44</sup> See generally H. Esmaili and B. Grigg, “Pollution from Dumping”, in J. Harrison (ed), *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment*, Oxford, 2017, p. 79.

<sup>45</sup> IMO Doc LC-LP.1/Cir.5 (2006).

<sup>46</sup> See Annex 1, Section 1.8 of the 1996 Protocol; cf. D.R. Rothwell and T. Stephens (*op. cit.* note 16), p. 404.

<sup>47</sup> See Art. IV(1)(b) of the 1972 London Convention; cf. H. Esmaili and B. Grigg (*op. cit.* note 47), pp. 80-81.

<sup>48</sup> *E.g.*, Environment Protection (Sea Dumping) Act 1981 (Cth) s 17.

- International Convention on Civil Liability for Oil Pollution Damage, and 1992 Protocol (hereinafter, “Civil Liability Convention” and “1992 Protocol”, respectively).<sup>49</sup> This Convention covers claims related to marine pollution specifically caused by maritime casualties involving oil tankers.
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, and its 2003 Protocol (hereinafter, “Fund” and “Fund 2003 Protocol”, respectively);<sup>50</sup> Like the Civil Liability Convention, this covers claims related to pollution caused specifically by oil tankers.
- International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (hereinafter, “HNS”).<sup>51</sup> This Convention covers claims related to pollution caused by the transportation of hazardous substances that could threaten humans and marine life if spilled, with the exception of crude oil as this was already addressed by the Civil Liability Convention.
- Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal (hereinafter, “Basel Protocol”).<sup>52</sup> This Convention covers claims related to damage resulting from the movement of hazardous wastes, including the illegal traffic of such wastes.
- The International Convention on Civil Liability for Bunker Oil Pollution Damage (hereinafter, “Bunker Convention”).<sup>53</sup> This Convention applies to claims related to pollution caused by any sea-going vessel carrying “bunker oil,” defined as any hydrocarbon used for the operation or propulsion of a ship.

44. The recognition and enforcement regimes adopted in these instruments follow a similar format and standard. They require the judgments to be enforceable in the State of origin and be no longer subject to ordinary forms of review in the State of origin. They also require that the judgments should be delivered by a court that is competent according to the jurisdiction rules set out in the respective instruments. In this regard, the jurisdictional basis provided in these instruments can be summarised

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<sup>49</sup> The Convention which was adopted on 29 November 1969 and entered into force on 19 June 1975 is accessible at the following address: <<https://treaties.un.org/doc/Publication/UNTS/Volume%20973/volume-973-I-14097-English.pdf>> (last consulted on 14 June 2019). The Convention was in force for 109 States; however, there are currently 34 Contracting States as many States have since denounced the Convention and become parties to an amending Protocol. The Convention was most recently amended by the 1992 Protocol, which was adopted on 27 November 1992 and entered into force on 30 May 1996, accessible at the following address: <<https://treaties.un.org/doc/Publication/UNTS/Volume%201956/v1956.pdf>> (last consulted on 14 June 2019). There are 137 Contracting States to the Convention as amended by the 1992 Protocol.

<sup>50</sup> The Convention was adopted on 18 December 1971 and entered into force on 16 October 1978. It was superseded by the 1992 Protocol, which was adopted on 27 November 1992 and entered into force on 30 May 1996. The 1971 Fund Convention ceased to be in force on 24 May 2002. The Fund 2003 Protocol (supplementary fund) was adopted on 16 May 2003 and entered into force on 3 March 2005. The Fund 2003 Protocol is available at the following address: <[https://www.iopcfunds.org/fileadmin/IOPC\\_Upload/Downloads/English/WEB\\_IOPC\\_-\\_Text\\_of\\_Conventions\\_ENGLISH.pdf](https://www.iopcfunds.org/fileadmin/IOPC_Upload/Downloads/English/WEB_IOPC_-_Text_of_Conventions_ENGLISH.pdf)> (last consulted on 14 June 2019). The Fund 2003 Protocol is available at the following address: <[https://www.iopcfunds.org/fileadmin/IOPC\\_Upload/Downloads/English/WEB\\_IOPC\\_-\\_Text\\_of\\_Conventions\\_ENGLISH.pdf](https://www.iopcfunds.org/fileadmin/IOPC_Upload/Downloads/English/WEB_IOPC_-_Text_of_Conventions_ENGLISH.pdf)> (last consulted on 14 June 2019).

<sup>51</sup> The Convention was adopted on 3 May 1996, but was not in force. It was then superseded by the 2010 Protocol, which was adopted on 30 April 2010 and not yet in force. The consolidated text of the Convention and the 2010 Protocol is accessible at the following address: <<https://www.hnsconvention.org/wp-content/uploads/2019/05/2010-HNS-Convention-English.pdf>> (last consulted on 14 June 2019).

<sup>52</sup> The Protocol was adopted on 10 December 1999 and is not yet in force. The Protocol is accessible at the following address: <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-3-b.en.pdf>> (last consulted on 14 June 2019). It should be noted that the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (“Basel Convention”) itself does not stipulate recognition and enforcement rules.

<sup>53</sup> The Convention was adopted on 23 March 2001 and entered into force on 21 November 2008. The Convention has 90 Contracting States and is accessible at the following address: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235987/8489.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235987/8489.pdf)> (last consulted on 14 June 2019).

as the State: 1) where the damage was caused;<sup>54</sup> 2) where the incident occurred;<sup>55</sup> 3) where the preventive measures were taken to prevent or minimise pollution damage;<sup>56</sup> 4) where the defendant has his habitual residence or principal place of business;<sup>57</sup> 5) where a fund for representing the limit of the ship owner's liability has been constituted,<sup>58</sup> and others.<sup>59</sup>

45. These instruments lay down compulsory grounds for refusal, such as if the judgment was obtained by fraud,<sup>60</sup> or if the defendant was not given reasonable notice and a fair opportunity to present the case,<sup>61</sup> public policy<sup>62</sup> and the existence of earlier judgments.<sup>63</sup>

46. It should be noted that the Basel Protocol deals with the relationship with other international instruments regarding the recognition and enforcement of foreign maritime-related judgments. As stated, the regime provided in the Basel Protocol does not apply "between Contracting Parties that are Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgements under which the judgment would be recognizable and enforceable".<sup>64</sup>

47. In comparison with the current text of the draft Convention that gives the discretion to the court addressed to decide whether to refuse recognition and enforcement or not, the grounds for refusal provided in these instruments are compulsory, requiring the court addressed to refuse the recognition and enforcement of the judgments. In addition, the grounds for refusal set out in these instruments are more limited than those of the draft Convention (e.g., the draft Convention also provides the inconsistency with judgment given in the requested State as a ground for refusal in Art. 7(1)(e)).

#### **(vi) Marine pollution: Pollution from or through the atmosphere**

48. As flagged above, Article 212 of the UNCLOS provides that States shall adopt laws to prevent marine pollution "from or through the atmosphere". The obligation is connected to the airspace over which a State exercises sovereignty, and to the airspace through which vessels or aircraft flagged or registered to that State travel.<sup>65</sup> Article 222 of the UNCLOS requires States to enforce such laws. Since the two provisions are exhaustive of regulation of pollution from or through the atmosphere, the existing international obligations in this area, just like in the land-sourced marine pollution, do not mandate application of international standards, similar to that in respect of vessel-source pollution, and are in this respect less demanding.

#### **1. Reconsidering marine pollution matters within the scope of the draft Convention**

49. In deciding whether the future Convention should include marine pollution-related judgments, the scope of the existing instruments and the implication of including such judgments should be considered.

<sup>54</sup> See Art. IX.1 of the Civil Liability Convention; Art. 7 of the Fund; Art. 38.1 of the HNS; Art. 17.1(a) of the Basel Protocol; and Art. 9.1 of the Bunker Convention.

<sup>55</sup> See Art. 17.1(b) of the Basel Protocol.

<sup>56</sup> See Art. IX of the Civil Liability Convention; Art. 7 of the Fund; Art. 38.1 of the HNS; and Art. 9.1 of the Bunker Convention.

<sup>57</sup> See Art. 17.1(c) of the Basel Protocol.

<sup>58</sup> See Art. IX.3 of the Civil Liability Convention; Art. 7 of the Fund; Art. 38.5 of the HNS.

<sup>59</sup> In the case where an incident occurs outside the territory of any State, actions may be brought only in the courts: where the ship is registered or, in the case of an unregistered ship, the State Party whose flag the ship is entitled to fly; where the owner has habitual residence or where the principal place of business of the owner is established; where a fund has been constituted (see Art. 38.2 of the HNS).

<sup>60</sup> See Art. X.1(a) of the Civil Liability Convention; Art. 8 of the Fund; Art. 40.1(a) of the HNS; Art. 21.1(a) of the Basel Protocol; Art. 10.1(a) of the Bunker Convention.

<sup>61</sup> See Art. X.1(b) of the Civil Liability Convention; Art. 8 of the Fund; Art. 40.1(b) of the HNS; Art. 21.1(b) of the Basel Protocol; Art. 10.1(b) of the Bunker Convention.

<sup>62</sup> See Art. 21.1(d) of the Basel Protocol.

<sup>63</sup> See Art. 21.1(c) of the Basel Protocol.

<sup>64</sup> See Art. 21.3 of the Basel Protocol.

<sup>65</sup> See Art. 212(1) of the UNCLOS.

50. First, there are only a limited number of international instruments dealing with marine pollution that contain provisions for the recognition and enforcement of foreign judgments, and those that do are limited in scope. Instruments that are discussed in paragraph 43 are the only international treaties concerning marine pollution that contain such provisions. As explained above, these instruments mostly deal with marine pollution from vessels thereby leaving marine pollution from other sources largely unregulated. Furthermore, these treaties only address particular aspects of marine pollution from vessels, such as oil tankers, transportation of hazardous substances and wastes, and carriage of bunker oil. These factors relating to the scope of the existing international instruments leave judgments related to other types of marine pollution detailed by UNCLOS, including land-based, seabed, "Area", dumping, and atmosphere, without international means of recognition and enforcement, making it solely subject to domestic laws. Furthermore, insofar as they are relevant, these Conventions only provide compulsory grounds for refusal of recognition and enforcement of foreign judgments, while the draft Convention also contains discretionary grounds for the same in Article 7. Therefore, the recognition and enforcement of foreign judgments dealing with marine pollution is currently only facilitated in certain aspects of marine pollution from vessels, which represent narrow circumstances leaving much of marine pollution without a recognition and enforcement regime that ensures legal predictability and certainty.

51. Secondly, even within the instruments regulating pollution from vessels specified in paragraph 43, the status and number of States bound by the respective instruments, still differ. The HNS and the Basel Protocol are not yet in force, thus there is still no recognition and enforcement regime in place for judgments covered by these two instruments. For the other instruments, the number of Contracting States is significant, varying from 90 (the Bunker Convention) to 115 (the Fund 2003 Protocol) and to 137 (the 1992 Protocol of the Civil Liability Convention), and the relevant judgments are entitled to circulate under these regimes.<sup>66</sup> Nevertheless, there still are many States that have not yet ratified these treaties and thus are not bound by the same.

52. These two limitations of the existing international instruments present an opportunity for the draft Convention to fill the gap in the international regime, which may mean that it would be productive to insert marine pollution claims back into the scope of the draft Convention. Doing so would allow judgments related to marine pollution from all sources, not merely from vessels, to circulate under an international instrument for recognition and enforcement, which could serve a policy choice of preventing maritime pollution, holding marine polluters to account, and compensating those that have been affected by marine pollution. This inclusion would span a wide array of different types of claims, ranging from damage caused to the environment from hydrocarbon drilling operations in the seabed to economic losses suffered by fishing and tourism businesses as a result of marine pollution that stems from land facilities' poor waste disposal. Additionally, the draft Convention has the potential of being ratified and adopted by States which are not currently bound by the existing instruments thereby strengthening the international legal regime in the area of marine pollution.

53. Choosing to retain the exclusion of marine pollution-related judgments from the scope of the draft Convention would reflect a belief that these matters are too specific and nuanced to be dealt with by this draft Convention and should instead be handled by more specialised international instruments. As some of these specialised instruments already exist for pollution from vessels, proponents of this course of action may believe that the international community is well-positioned to craft more of such instruments, which removes the need for the inclusion of such matters in more generally-oriented Conventions, like the one in question.

54. Nevertheless, the consequences from the lack of an international regime that supports recognition and enforcement of marine-pollution-related judgments may warrant the inclusion of such matters into the scope of the draft Convention at the very least until more specialised

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<sup>66</sup> There are at the time of writing 69 HCCH Member States bound to the recognition and enforcement provisions of the 1969 Civil Liability Convention (either as a Contracting State to the Convention or to its amending Protocol); there are also at the time of writing 53 HCCH Member States Contracting States to the Bunker Convention.

mechanisms are negotiated. The current lack of international mechanisms facilitating recognition and enforcement of marine-pollution-related foreign judgments results in limiting remedies, whether in a form of compensation or otherwise, to parties around the world affected by marine pollution and in setting marine polluters virtually unaccountable for wrongful actions. This not only may allow polluters to externalise the cost of polluting marine resources that the international community is committed to protect,<sup>67</sup> but also it may contribute for a culture of lacking vigilance towards such resources, failing to encourage adoption and implementation of pollution-prevention measures. Instead, this state of affairs is a burden on the victims of marine pollution in having to respond to these incidents without being provided with effective access to recourse.

55. For those judgments ruling on the disputes dealt with in the existing and future international instruments regulating marine pollution that contain recognition and enforcement provisions,<sup>68</sup> it is necessary to consider the relationship between the draft Convention and the relevant international instruments. In this context, the question arises - should the general principle of *lex specialis derogat legi generali* apply, so as to give prevalence to the specific instruments, or should Article 24 of the draft Convention (Relationship with other international instruments) be applied?

56. *Lex specialis derogat legi generali* is the “generally accepted maxim” of international law and of law in general that dictates that prevalence should be given to a more specialised legal instrument in circumstances where two laws purport to regulate the same factual scenario.<sup>69</sup> It has been primarily used as a method of resolving issues of legal interpretation and conflict of norms.<sup>70</sup> In serving these purposes, the principle was considered to achieve a higher objective in helping to regulate the interactions between the international legal system as a whole and its “subsystems” (*i.e.*, legal branches), because it supports the primacy of legal norms, while also encouraging the development of more specialised subsidiary legal principles.<sup>71</sup> Given the longstanding history of operation of this maxim and its widespread application around the world, *lex specialis derogat legi generali* carries significant weight in favour of becoming a preferred mechanism for resolving issues of conflicting legal instruments and, in doing so, prevailing over any other provision purporting to resolve this issue that is adopted as part of a new Convention.

57. Article 24(2) of the draft Convention resolves the issue of conflicting results produced by the operation of the draft Convention and another “treaty [or international instrument] that was concluded before the draft Convention” in favour of the latter.<sup>72</sup> In practice this would mean that, in circumstances where the State of the court addressed is a Party to both the draft Convention and another treaty or international instrument that was concluded before the draft Convention, and where the application of the two instruments yield incompatible results, the court addressed should apply the earlier instrument. By the matter of the same logic, Article 24(3) of the draft Convention instructs the courts addressed to apply a “treaty [or other international instrument] concluded after th[e] [draft] Convention...for the purposes of obtaining<sup>73</sup> recognition and enforcement” in

<sup>67</sup> See Agenda 21 adopted at the 1992 Earth Summit in Rio, Section Two, Chapter 17: “Protecting and Managing the Oceans” that is part of the “global consensus document” available at: <[http://www.unesco.org/education/pdf/RIO\\_E.PDF](http://www.unesco.org/education/pdf/RIO_E.PDF)> (last consulted on 14 June 2019); Johannesburg Plan of Implementation of the World Summit on Sustainable Development, Chapter IV, para 30, p. 16, available at: <[https://wedocs.unep.org/bitstream/handle/20.500.11822/19097/Johannesburg\\_Plan\\_of\\_Action.pdf?sequence=1&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/19097/Johannesburg_Plan_of_Action.pdf?sequence=1&isAllowed=y)> (last consulted 14 June 2019).

<sup>68</sup> For example, judgments on civil liability for oil pollution damages (and others regulated by the Fund or the Fund 2003 Protocol or the Bunker Convention).

<sup>69</sup> D. Lapas, “Some Remarks on Fragmentation of International Law: Disintegration of Transformation”, (2007) 40(1) *Comparative and International Law Journal of South Africa*, 25.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> For more explanation on the operation of Art. 24(2), see the Revised draft Explanatory Report (*op. cit.* note 14), paras 413-417.

<sup>73</sup> Note that it has been suggested by the Informal Working Group to replace the wording “for the purposes of” in the provision with the words “as concerns the” with the view of “...allow[ing] Contracting States to apply another later instrument...[and of] refus[ing] recognition and enforcement of judgments given by a court of a Contracting State that is also a party to that instrument”. See “Report of informal working group III – Relationship with other

circumstances where both the State of the court addressed and the State of the court that rendered the judgment in question are both parties to the later-concluded treaty or international instrument. It should be noted that there have been some discussions in relation to the means of distinguishing earlier instruments from the later ones. Instead of considering the point of time the draft Convention “entered into force” (as the draft currently does), it has been proposed that the question of whether another treaty or international instrument was concluded before or after the draft Convention should be determined by reference to the “conclusion of the draft Convention”.<sup>74</sup> The primary reason for this proposal was that this drafting would avoid the disparity of the position on enforceability of foreign judgments and on the issue of the applicable instrument in two States that are both parties to the draft Convention and another international instrument, but where it is only in one of those States where the draft Convention has entered into force.<sup>75</sup> Although this latter point remains to be discussed during the negotiations of the draft Convention, any concerns about uncertainty around conflicting international instruments, whether concluded before or after the draft Convention was “concluded” or “entered into force”, in the area of maritime pollution may be considered to have been adequately addressed by the already-included provisions in the draft Convention dealing with its relationship with other instruments (Art. 24(2), (3)). This may justify the lack of need for exclusion of maritime pollution matters from the scope of the draft Convention.

58. However, it may still be preferable to exclude marine pollution in order to preserve the centralisation of jurisdiction by the already established international regimes that some of the States may have adopted. This primarily relates to the specific aspects of marine pollution from vessels that are regulated by the Conventions discussed at paragraph 43 above. Each recognition and enforcement clause contained in all of those international instruments provides for recognition and / or enforcement of *only* those judgments that have been rendered by a court that has exclusive jurisdiction over the matter established in accordance with the instrument itself. In circumstances where the effect of the draft Convention would be recognition and enforcement of a judgment of a court that does not have an exclusive jurisdiction under an earlier specific convention, States may still prefer to deny recognition and enforcement in order to preserve the previously established regime, because it would conflict with the basic structure of the already operative regime. Although this remains an important consideration, this question should be assessed relative to the scope of application of these specific conventions, which, as previously discussed, is only narrow.

59. In comparing the two solutions to the conflicting results presented in the immediately preceding discussion, it is worth noting that Article 24(2) ensures broader application of other instruments that were concluded before the draft Convention than the principle *lex specialis derogate legi generali*. The latter principle is only applicable in circumstances where all relevant States in question conclude both the special treaty and the general treaty at issue, whereas the draft Convention contains no such limitation. Article 24(2) expressly provides that another treaty (*i.e.*, special treaty) prevails over the draft Convention containing general rules even if a relevant Contracting State to the draft Convention is *not* a Party to the other treaty. Therefore, the lack of necessity in excluding marine pollution matters from the scope of the draft Convention may be further justified.

60. If marine pollution were to be included in the future Convention, the relevant indirect jurisdictional filters would be Article 5(1)(a)-(f), and (j) (on non-contractual obligations).

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international instruments”, Prel. Doc. No 9 of April 2019, drawn up by Professor Keisuke Takeshita for the attention of the Twenty-Second Session on Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019) (see path indicated in note **Error! Bookmark not defined.**), p. 2.

<sup>74</sup> *Ibid.*, p. 3.

<sup>75</sup> *Ibid.*

## B. Emergency towage and salvage

### 1. Emergency towage

61. In general terms, towage is the assistance given by one vessel to accelerate the progress of another. Emergency towage concerns towage assistance to vessels incapacitated in order to prevent danger to life and environment, and may be regulated by relevant States' authorities.

62. There is no international treaty regulating marine towage, and therefore there are no unified rules on the recognition and enforcement of towage-related judgments in the international arena. The service of non-emergency towage is generally performed under contracts, and such contracts, which are often a standard form of contracts, contain dispute resolution clauses, differing from arbitration to litigation (with exclusive or non-exclusive choice of court clauses). As stated in the Hartley / Dogauchi Report, contracts of non-emergency towage are governed by the 2005 Choice of Court Convention, if they arise from exclusive choice of court agreements. By analogy, judgments on non-emergency towage which do not derive from exclusive choice of court clauses would fall under the scope of the draft Convention.<sup>76</sup>

63. In some cases, a judgment arising out of regulatory regimes may fall outside scope of the draft Convention on the basis that it is not a civil or commercial matter. Examples of the relevant regulatory regimes can be found in Australia in the *Protection of the Sea Act 1981*<sup>77</sup> and in the UK in the *Merchant Shipping Act 1995*.<sup>78</sup>

### 2. Emergency salvage

64. In general terms, salvage can be distinguished between salvage operations to protect life, property and the environment, where there is an immediate danger (emergency salvage), and where a vessel requires assistance due to loss of motive power, steerage malfunction, etc., and where there is no immediate danger (non-emergency salvage).

65. There are two international treaties dealing with salvage matters: the *Convention of 1910 for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea*<sup>79</sup> (hereinafter, "1910 Brussels Salvage Convention") and the *International Convention on Salvage of 1989* (hereinafter, "1989 London Salvage Convention").<sup>80</sup> The latter treaty defines salvage operation as "any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever".<sup>81</sup> In comparison with the 1910 Brussels Salvage Convention, the 1989 London Salvage Convention extends the scope of salvage law to cover environmental salvage.

66. Neither treaty contains provisions on dispute resolution. Generally, salvage (particularly non-emergency salvage) operates based on commercial contracts and agreements which salvors and shipowners conclude in individual cases, and such contractual relationships are rooted in commonly and widely used standard form contracts that are designed to facilitate the proposed marine salvage operation, such as the Lloyd's Open Form (hereinafter, "LOF"), the Japanese Form (hereinafter, "JSE"), Turkish Form (hereinafter, "TOF"), Scandinavian Salvage Contract, the Special Compensation P&I Club

<sup>76</sup> *Ibid.*, para. 49.

<sup>77</sup> *Protection of the Sea (Powers of Intervention) Act 1981* (Cth), Section 8, Section 19 and Section 11(1)(h), available at the following address: <<https://www.legislation.gov.au/Details/C2016C00088>> (last consulted on 14 June 2019).

<sup>78</sup> *Merchant Shipping Act 1995*, Schedule 3A, Section 1, 5 and 6, available at the following address: <<http://www.legislation.gov.uk/ukpga/1995/21/contents>> (last consulted on 14 June 2019).

<sup>79</sup> The Convention was adopted on 23 September 1910, in Brussels, Belgium, and was amended by a Protocol issued in Brussels on 27 May 1967.

<sup>80</sup> The Convention was adopted on 28 April 1989, in London, the United Kingdom, and entered into force on 14 July 1996. It replaced the 1910 Brussels Salvage Convention. The Convention has 70 Contracting States and is available at the following address: <<https://www.jus.uio.no/lm/imo.salvage.convention.1989/doc.html>> (last consulted 14 June 2019).

<sup>81</sup> Art. 1(a) of the 1989 London Salvage Convention.

Clause (hereinafter, "SCOPIC Clause").<sup>82</sup> All these standard agreements choose mediation or arbitration as the dispute resolution (over whether it was a salvage and the level of remuneration), such as Article I of the LOF, Clause 14 of the JSE, Article 6 of the TOF, Article 6 of the Scandinavian Salvage Contract and Article 16 of the SCOPIC Clause. It should be noted that even where such standard form contracts are used, recourse to litigation is still possible.

67. Outside of contracts that select arbitration or mediation as a dispute settlement mechanism, it is possible, if not too common, to see disputes on salvage dealt with by courts as permitted by the 1989 London Salvage Convention. Judgments resulting from such proceedings on non-emergency salvage, if derived from exclusive choice of court agreements, will be covered by the 2005 Choice of Court Convention.<sup>83</sup> By analogy, if they are not derived from exclusive choice of court agreements, these judgments in non-emergency salvage circumstances would be governed by the draft Convention as it currently stands.<sup>84</sup>

68. However, court intervention in salvage cases can also occur in emergency circumstances when there has been no time for the owner and salvor to conclude a salvage contract. As there is no international instrument dealing with the recognition and enforcement of judgments concerning salvage, the circulation of those judgments would only be subject to national laws or regional instruments if the current exclusion remains in place.

### **3. *Reconsidering emergency towage and salvage matters within the scope of the draft Convention***

69. The nonexistence of international legal instruments on towage or salvage containing rules on recognition and enforcement of judgments could be a reason for introducing emergency towage and salvage matters back into the draft Convention. By doing so, all civil or commercial disputes on towage or salvage, whether emergency or not, contractual or non-contractual, would be covered by the future Convention. This would ensure that judgments ruled on towage or salvage-related disputes are entitled to circulation among Contracting States of the future Convention, rather than being subject to national or regional laws on recognition and enforcement of foreign judgments. As such, it would enhance the access to justice for parties involved in the operation of towage or salvage, and, in particular, provide legal certainty to towage operators or salvors in emergency towage or salvage, thereby encouraging the provision of such services.

70. As raised by the proponents of the proposal, the departure from the wording of the 2005 Choice of Court Convention could be justified by the fact that the operation of the 2005 Choice of Court Convention is based on the exclusive choice of court agreements concluded by the parties, whilst the draft Convention has a wider scope of application, covering both contractual and non-contractual disputes. In addition, application of the draft Convention would eliminate some concerns that favour excluding emergency towage and salvage from the 2005 Choice of Court Convention, including that contracts of salvage or towage could not be concluded or negotiated in some circumstances, because the draft Convention contains other indirect jurisdictional bases that can be applied to emergency towage and salvage-related judgments, such as the habitual residence of the defendant. There is some debate as to how impactful removal of the emergency towage and salvage exclusion would be. To answer this, it may help to consider the scope of the exclusion and types of claims that would fall within it. Many emergency towage and salvage operations conducted through a contract would fall outside the scope of the draft Convention, as they are commonly governed by standard-form contracts that either designate a specific monetary award for a successful operation, or else call for resolution through arbitration.<sup>85</sup> If an emergency towage and salvage contract did recognise litigation

<sup>82</sup> T. Busch, *Lloyd's Open Form – fact and fiction*, available at the following address: <<http://www.marine-salvage.com/media-information/articles/archive/lloyds-open-form-fact-and-fiction/>> (last consulted on 14 June 2019).

<sup>83</sup> Hartley/Dogauchi Report, para. 59.

<sup>84</sup> The Revised draft Explanatory Report (*op. cit.* note 14), para. 49.

<sup>85</sup> In 2018 alone, 53 salvage claims were brought under the Lloyd's Open Form contract, the most popular type of standard-form salvage contract. Lloyd's Open Form Statistics. Available at the following address:



as an acceptable dispute resolution mechanism, then a judicial proceeding arising from that contract would be included in this draft Convention's scope.

71. However, other emergency towage and salvage operations are not governed by a contract; when a vessel is in immediate peril, entering into a formal agreement may not be possible. In these "pure" towage and salvage situations, the 1989 London Salvage Convention allows the salvor – whether a professional company or another passing ship – to subsequently sue for an award based on the merit of the service and the value of the salvaged property.<sup>86</sup> Such claims would then circulate under this draft Convention.

72. The types of emergency towage and salvage claims that could be resolved through litigation extend beyond the simple determination of the value of the monetary award. There may be a dispute regarding to whom the award should be paid.<sup>87</sup> The salvor or tower may have committed a fault in the process, allowing the owner of the vessel in distress to claim a right to compensation for damaged property.<sup>88</sup> Chapter IV of the 1989 London Salvage Convention also recognises a number of different claims and actions that may coincide with a claim for salvage compensation, concerning matters such as the vessel owner's payment of satisfactory security or an interim payment owed to the salvor. Finally, claims may be brought regarding damage to the environment caused during a towage or salvage operation, although the types of such claims that the draft Convention would recognise and enforce are limited by Article 5(1)(j) tort filter to those claims that were brought either in the defendant ship operator's home or at the place where the act of omission directly causing the harm occurred.<sup>89</sup> Judgments rendered in the types of disputes listed above are currently only covered by the draft Convention in non-emergency circumstances, but would extend to emergency circumstances should the exclusion be removed.

73. A number of emergency towage and salvage actions may be regulated by mandatory measures in some jurisdictions,<sup>90</sup> and those actions may not be considered voluntary acts eligible for salvage awards.

74. If emergency towage or salvage were to be included in the draft Convention, the relevant indirect jurisdictional filters would be Article 5(1)(a)-(f), (g) (on contractual obligations) and (j) (on non-contractual obligations).

#### IV. CONCLUSION AND RECOMMENDATIONS

75. Based on the analysis above and being mindful of the intention of protecting the marine environment against marine pollution and in favour of emergency towage and salvage, this Note draws the following two points for the Diplomatic Session's consideration.

76. Point 1: As to emergency towage and salvage, it is true that there are no rules on the recognition and enforcement of foreign judgments on such matters at the international level, and as such it may be worth considering deleting the reference to "emergency towage and salvage" from Article 2(2)(g) of the draft Convention, and enable judgments ruled on emergency towage and salvage to circulate under the draft Convention. However, since some emergency towage and salvage are mandatory operations regulated by or conducted under States' authorities, certain judgments on the disputes

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<<https://www.lloyds.com/market-resources/lloyds-agency/salvage-arbitration-branch/lof-statistics>> (last consulted on 14 June 2019).

<sup>86</sup> Art. 13 of the 1989 London Salvage Convention. The 1989 London Salvage Convention is widely ratified, with 71 Contracting Parties as of 12 March 2019. The information about the status of Conventions is available at the following address: <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>> (last consulted on 14 June 2019).

<sup>87</sup> *Bartholomew v. Crowley Marine Servs.*, 337 F.3d 1083 (9th Cir. 2003).

<sup>88</sup> Art. 8(1) of the 1989 London Salvage Convention.

<sup>89</sup> H. van Loon, "Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters", *Uniform Law Review*, Vol. 23(2) 2018, 44.

<sup>90</sup> See for example *Wreck and Salvage Act 1996* in South Africa; *Merchant Shipping (Salvage and Wreck) Act 1993* in Ireland; *Merchant Shipping Act 1995* in the UK.

arising from such operations may not be civil or commercial matters covered by the future Convention. This may mean that removing the emergency towage and salvage exclusion would not be particularly impactful.

77. Point 2: As to marine pollution, although there are several international marine pollution-related instruments dealing with recognition and enforcement of foreign judgments, the scopes of their application are limited in the aspect of the subject matters covered. It should, however, be noted that the membership to these several international instruments is significant. In this context, the Diplomatic Session would be invited to further consider whether it would be desirable to delete the reference to “marine pollution” from Article 2(1)(g) of the draft Convention, while noting that the policy considerations of the draft Convention and those relevant instruments containing recognition and enforcement regimes are the same, *i.e.*, to encourage the circulation of judgments and increase legal certainty.

- If deleted, the draft Convention will cover judgments ruling on marine pollution, requiring the Diplomatic Session to study the relationship with existing or future international marine pollution-related instruments dealing with recognition and enforcement of foreign judgments.<sup>91</sup>
- If not deleted, marine pollution-related judgments will only circulate according to national laws or regional instruments.

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<sup>91</sup> It should be noted that, at the time of writing, an HCCH informal working group is carrying out the discussion on the relationship with other international instruments.

## **ANNEX**

## ARTICLES IN DIFFERENT CONVENTIONS REGARDING RECOGNITION AND ENFORCEMENT

Convention	Provisions on Recognition and Enforcement	Provisions on Jurisdictional Bases
<b>International Convention on Civil Liability for Oil Pollution (Civil Liability Convention)</b>	<p>Article X</p> <p>1. Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any Contracting State, except:</p> <p>(a) where the judgment was obtained by fraud; or</p> <p>(b) where the defendant was not given reasonable notice and a fair opportunity to present his case.</p> <p>2. A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in the State have been complied with. The formalities shall not permit the merits of the case to be re-opened.</p>	<p>Article IX</p> <p>1. Where an incident has caused pollution damage in the territory including the territorial sea of one or more Contracting States, or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea, actions for compensation may only be brought in the Courts of any such Contracting State or States. Reasonable notice of any such action shall be given to the defendant.</p> <p>2. Each Contracting State shall ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation.</p> <p>3. After the fund has been constituted in accordance with Article V, the Courts of the State in which the fund is constituted shall be exclusively competent to determine all matters relating to the apportionment and distribution of the fund.</p>
<b>International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund)</b>	<p>Article 8</p> <p>Subject to any decision concerning the distribution referred to in Article 4, paragraph 5, any judgment given against the Fund by a court having jurisdiction in accordance with Article 7, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the Liability Convention.</p> <p>Note: the Liability Convention is the Civil Liability Convention mentioned above.</p>	<p>Article 7</p> <p>1. Subject to the subsequent provisions of this Article, any action against the Fund for compensation under Article 4 or indemnification under Article 5 of this Convention shall be brought only before a court competent under Article IX of the Liability Convention in respect of actions against the owner who is or who would, but for the provisions of Article III, paragraph 2, of that Convention, have been liable for pollution damage caused by the relevant incident.</p> <p>3. Where an action for compensation for pollution damage has been brought before a court competent under Article IX of the Liability Convention against the owner of a ship or his guarantor, such court shall have exclusive jurisdictional competence over any action against the Fund for compensation or indemnification under the provisions of Article 4 or 5 of this Convention in respect of the same damage. However, where an action for compensation for pollution damage under the Liability Convention has been brought before a court in a State Party to the Liability Convention but not to this Convention, any action against the Fund under</p>

		Article 4 or under Article 5, paragraph 1, of this Convention shall at the option of the claimant be brought either before a court of the State where the Fund has its headquarters or before any court of a State Party to this Convention competent under Article IX of the Liability Convention.
<b>Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund 2003 Protocol)</b>	<p>Article 8</p> <p>1. subject to any decision concerning the distribution referred to in article 4 paragraph 3 of this Protocol, any judgment given against the Supplementary Fund by a court having jurisdiction in accordance with article 7 of this Protocol, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in article X of the 1992 Liability Convention.</p> <p>2. A Contracting State may apply other rules for the recognition and enforcement of judgments, provided that their effect is to ensure that their judgments are recognized and enforced at least to the same extent as under paragraph 1.</p>	<p>ARTICLE 7</p> <p>1. The provisions of article 7, paragraphs 1, 2, 4, 5 and 6, of the 1992 Fund Convention shall apply to actions for compensation brought against the Supplementary Fund in accordance with article 4, paragraph 1, of this Protocol.</p> <p>2. Where an action for compensation for pollution damage has been brought before a court competent under article IX of the 1992 Liability Convention against the owner of a ship or his guarantor, such court shall have exclusive jurisdictional competence over any action against the Supplementary Fund for compensation under the provisions of article 4 of this Protocol in respect of the same damage. However, where an action for compensation for pollution damage under the 1992 Liability Convention has been brought before a court in a Contracting State to the 1992 Liability Convention but not to this Protocol, any action against the Supplementary Fund under article 4 of this Protocol shall at the option of the claimant be brought either before a court of the State where the Supplementary Fund has its headquarters or before any court of a Contracting State to this Protocol competent under article IX of the 1992 Liability Convention.</p> <p>3. Notwithstanding paragraph 1, where an action for compensation for pollution damage against the 1992 Fund has been brought before a court in a Contracting State to the 1992 Fund Convention but not to this Protocol, any related action against the Supplementary Fund shall, at the option of the claimant, be brought either before a court of the State where the Supplementary Fund has its headquarters or before any court of a Contracting State competent under paragraph 1.</p>
<b>International Convention on Liability and Compensation for Damage in connection with the</b>	<p>RECOGNITION AND ENFORCEMENT</p> <p>Article 40</p> <p>1. Any judgement given by a court with jurisdiction in accordance with Article 38, which is enforceable in the State</p>	<p>JURISDICTION IN RESPECT OF ACTION AGAINST THE OWNER</p> <p>Article 38</p> <p>1. Where an incident has caused damage in the territory, including the territorial sea or in an area referred to in Article 3(b), of one or more States</p>

<p><b>Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS)</b></p>	<p>of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:</p> <p>(a) where the judgement was obtained by fraud; or</p> <p>(b) where the defendant was not given reasonable notice and a fair opportunity to present the case.</p> <p>2. A judgement recognized under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.</p> <p>3. Subject to any decision concerning the distribution referred to in Article 14, paragraph 6, any judgement given against the HNS Fund by a court having jurisdiction in accordance with Article 39, paragraphs 1 and 3 shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each State Party.</p>	<p>Parties, or preventive measures have been taken to prevent or minimize damage in such territory including the territorial sea or in such area, actions for compensation may be brought against the owner or other person providing financial security for the owner's liability only in the courts of any such States Parties.</p> <p>2. Where an incident has caused damage exclusively outside the territory, including the territorial sea, of any State and either the conditions for application of this Convention set out in Article 3(c) have been fulfilled or preventive measures to prevent or minimize such damage have been taken, actions for compensation may be brought against the owner or other person providing financial security for the owner's liability only in the courts of:</p> <p>(a) the State Party where the ship is registered or, in the case of an unregistered ship, the State Party whose flag the ship is entitled to fly; or</p> <p>(b) the State Party where the owner has habitual residence or where the principal place of business of the owner is established; or</p> <p>(c) the State Party where a fund has been constituted in accordance with Article 9, paragraph 3.</p> <p>3. Reasonable notice of any action taken under paragraph 1 or 2 shall be given to the defendant.</p> <p>4. Each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under this Convention.</p> <p>5. After a fund under Article 9 has been constituted by the owner or by the insurer or other person providing financial security in accordance with Article 12, the courts of the State in which such fund is constituted shall have exclusive jurisdiction to determine all matters relating to the apportionment and distribution of the fund.</p> <p>Article 39</p> <p>1. Subject to the subsequent provisions of this Article, any action against the HNS Fund for compensation under Article 14 shall be brought only before a court having jurisdiction under Article 38 in respect of actions against the owner who is liable for damage caused by the relevant incident or before a court in a State Party which would have been competent if an owner had been liable.</p> <p>3. Each State Party shall ensure that its courts have jurisdiction to entertain such actions against the HNS Fund as are referred to in paragraph 1.</p>
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<p><b>Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Protocol)</b></p>	<p>ARTICLE 21 Mutual recognition and enforcement of judgements</p> <p>1. Any judgement of a court having jurisdiction in accordance with Article 17 of the Protocol, which is enforceable in the State of origin and is no longer subject to ordinary forms of review, shall be recognized in any Contracting Party as soon as the formalities required in that Party have been completed, except:</p> <p>(a) Where the judgement was obtained by fraud;</p> <p>(b) Where the defendant was not given reasonable notice and a fair opportunity to present his case;</p> <p>(c) Where the judgement is irreconcilable with an earlier judgement validly pronounced in another Contracting Party with regard to the same cause of action and the same parties; or</p> <p>(d) Where the judgement is contrary to the public policy of the Contracting Party in which its recognition is sought.</p> <p>2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each Contracting Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be re-opened.</p> <p>3. The provisions of paragraphs 1 and 2 of this Article shall not apply between Contracting Parties that are Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgements under which the judgement would be recognizable and enforceable.</p>	<p>ARTICLE 17 Competent courts</p> <p>1. Claims for compensation under the Protocol may be brought in the courts of a Contracting Party only where either:</p> <p>(a) The damage was suffered; or</p> <p>(b) The incident occurred; or</p> <p>(c) The defendant has his habitual residence, or has his principal place of business.</p> <p>2. Each Contracting Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.</p>
<p><b>The International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention)</b></p>	<p>ARTICLE 10 Recognition and enforcement</p> <p>1. Any judgement given by a Court with jurisdiction in accordance with article 9 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any State Party, except:</p> <p>(a) where the judgement was obtained by fraud; or</p>	<p>ARTICLE 9 Jurisdiction</p> <p>1. Where an incident has caused pollution damage in the territory, including the territorial sea, or in an area referred to in article 2(a)(ii) of one or more States Parties, or preventive measures have been taken to prevent or minimise pollution damage in such territory, including the territorial sea, or in such area, actions for compensation against the shipowner, insurer or</p>

	<p>(b) where the defendant was not given reasonable notice and a fair opportunity to present his or her case.</p> <p>2. A judgement recognised under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened.</p>	<p>other person providing security for the shipowner's liability may be brought only in the courts of any such States Parties.</p> <p>2. Reasonable notice of any action taken under paragraph 1 shall be given to each defendant.</p> <p>3. Each State Party shall ensure that its courts have jurisdiction to entertain actions for compensation under this Convention.</p>
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