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A Civil Liability Regime for Offshore Petroleum Development in the Arctic Region

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A CIVIL LIABILITY REGIME FOR OFFSHORE PETROLEUM DEVELOPMENT IN THE ARCTIC REGION

A Thesis submitted for the award of degree of Doctor of Philosophy

By

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DECLARATION

Yr wyf drwy hyn yn datgan mai canlyniad fy ymchwil fy hun yw'r thesis hwn, ac eithrio lle nodir yn wahanol. Caiff ffynonellau eraill eu cydnabod gan droednodiadau yn rhoi cyfeiriadau eglur. Nid yw sylwedd y gwaith hwn wedi cael ei dderbyn o'r blaen ar gyfer unrhyw radd, ac nid yw'n cael ei gyflwyno ar yr un pryd mewn ymgeisiaeth am unrhyw radd oni bai ei fod, fel y cytunwyd gan y Brifysgol, am gymwysterau deuol cymeradwy.' Rwy'n cadarnhau fy mod yn cyflwyno'r gwaith gyda chytundeb fy Ngoruchwyliwr (Goruchwylwyr).

I hereby declare that this thesis is the results of my own investigations, except where otherwise stated. All other sources are acknowledged by bibliographic references. This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree unless, as agreed by the University, for approved dual awards. I confirm that I am submitting the work with the agreement of my Supervisor(s).

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ABSTRACT

The Arctic, characterised by its extreme weather conditions and expansive ice cover, holds immense ecological significance and socio-economic potential. However, accelerating ice melt, a consequence of climate change, is unlocking new prospects for commercial activities by opening up previously inaccessible areas. Many of these activities, most notably offshore petroleum development in the Arctic Ocean continental shelf, pose considerable pollution risks to the environment, property and livelihoods. During the last fifteen years, incidents such as the *Montara* and *Deepwater Horizon* oil well blowouts have globally raised serious concerns about the safety of offshore petroleum development and the accountability of operators. Even so, there remains a significant regulatory gap in international law, with no comprehensive agreement addressing the liabilities of offshore petroleum operators and existing conventions such as the 1992 Civil Liability Convention and Fund not covering such activities. This is despite an obligation in the 1982 UN Convention of the Law of the Sea for state parties to further develop international law relating to liability and compensation for damage caused by marine pollution.

In the Arctic region, the need for a robust regulatory framework to govern offshore petroleum development in the Arctic Ocean continental shelf is particularly pressing. With no international framework in place, states littoral to the Arctic Ocean must rely on their divergent domestic civil liability legislation, leading to challenges in ensuring prompt and adequate compensation, particularly in cases of transboundary pollution damage. This complexity highlights the necessity of a cohesive and unified approach, prompting exploration into the establishment of a regional treaty on civil liability for offshore petroleum development activities in the Arctic region. While the implementation of such a treaty would need to overcome several hurdles, including negotiation and ratification, it can offer extensive benefits, such as tailored, context-specific regulations and enhanced cooperation among Arctic states.

Accordingly, this thesis argues that a regional treaty focussing on the liabilities of offshore petroleum operators is essential in the Arctic. In doing so, it sets out a theoretical framework grounded in tortious liability and identifies key features necessary for effective civil liability regulation, such as mechanisms for channelling and limitation of liability. These features serve as a lens through which the effectiveness of relevant domestic and international law is examined, enabling a determination of the complexities and shortcomings in existing frameworks, including conflict of laws issues. This analysis provides a compelling rationale to

develop further rules regarding the liabilities of offshore petroleum operators. To address the identified areas of inconsistency, the thesis proposes a regional treaty as a viable solution and recommends complementary practical measures grounded in regional cooperation that can inform relevant policy decisions. Such an approach would provide a more effective and comprehensive civil liability regime for ensuring timely resolution, efficient clean-up, and fair compensation in the aftermath of offshore petroleum-related incidents in the Arctic region. This would not only address the immediate challenges posed by offshore petroleum development but also the broader environmental and socio-economic implications. By advocating for enhanced collaboration and alignment among Arctic states, the research endeavours to mitigate risks, promote responsible resource development, and safeguard the fragile Arctic ecosystem.

However, acknowledging the complex and time-intensive process of creating a regional treaty on civil liability for offshore petroleum pollution, and considering the significant transboundary implications of oil spills, this thesis also proposes a pragmatic interim solution. It recommends establishing a multilateral private international law agreement between the Arctic states to address cross-border cases of offshore petroleum pollution damage from offshore petroleum development in the Arctic continental shelf.

The findings and recommendations presented in this study also hold significant potential for broader application at an international level, offering a framework to enhance civil liability regimes in regions with offshore drilling activities and contributing to global efforts towards sustainable development and environmental protection. Through replication of the proposed strategies and principles outlined herein, stakeholders can work towards establishing a more resilient and equitable regulatory framework for offshore petroleum operations, not only in the Arctic but also in other regions facing similar challenges.

Keywords: Arctic region, Civil liability, Offshore petroleum operations, Pollution damage

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LIST OF ABBREVIATIONS

AEPS	Arctic Environmental Protection Strategy
AJAG	Administration of Justice Act for Greenland
AWPPA	Arctic Waters Pollution Prevention Act
AWPPR	Arctic Waters Pollution Prevention Regulation
BOEM	Bureau of Ocean Energy Management
$ CAD	Canadian Dollar
CER	Canada Energy Regulator
CLC	International Convention on Civil Liability for Oil Pollution Damage
CLEE	Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration of Seabed Mineral Resources
CMI	Comité Maritime International
COGOA	Canada Oil and Gas Operations Act
CPC	Criminal Procedure Code
CWA	Clean Water Act
CZMA	Coastal Zones Management Act
DECC	Department of Energy and Climate Change
DOJ	Department of Justice
DPR	Department of Petroleum Resources
EC	European Commission
ECS	Extended Continental Shelf
EIA	Environmental Impact Assessment
EEZ	Exclusive Economic Zone
EGASPIN	Environmental Guidelines and Standard for the Petroleum Industry in Nigeria
EPA	Environmental Protection Agency
EPL	Environmental Protection Law
EU	European Union
FPSO	Floating Production Storage and Offloading
FSO	Floating Storage and Offloading Units
ICJ	International Court of Justice
IEA	International Energy Agency
IFA	Inuvialuit Final Agreement

ILC	International Law Commission
IMF	International Oil Pollution Convention International Monetary Fund
IMO	International Maritime Organization
LLA	US Limitation of Liability Act
LLMC	International Convention on Limitation of Liability for Maritime Claims
MCC	Maritime and Commercial High Court
MDL	Multi-district Litigation
MLSA	Mineral Licensing Safety Agency
MODU	Mobile Offshore Drilling Unit
MRA	Mineral Resources Act
MSA	Merchant Shipping Act
MOSPA	Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic
NDC	Norwegian Dispute Act
NEPC	Nordic Environmental Protection Convention
NESREA	National Environmental Standards and Regulations Enforcement Agency
NOSCP	National Oil Spill Contingency Plan
OCSLA	Outer Continental Shelf Lands Act
OECD	Organization for Economic Development
OGUK	Oil and Gas UK
OPA	Oil Pollution Act
OPEC	Organization of Petroleum Exporting Countries
OPOL	Offshore Pollution Liability Agreement
OPRC	International Convention on Oil Pollution, Preparedness, Response and Co-operation
OSLTF	Oil Spill Liability Trust Fund
PAA	Petroleum Activities Act
RCC	Civil Code of the Russian Federation
SDR	Special Drawing Rights
UK	United Kingdom

UNCLOS	United Nations Convention on Law of the Sea
US	United States of America
USA	United States of America
$ USD	United States Dollar

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CHAPTER ONE
INTRODUCTION

1.1 Background of Study

Oil has been in use for several centuries,[1] and it still continues to be a sought-after commodity that is relevant to world politics, national strategies, and generating wealth for individuals, companies and nations.[2] Despite the development of renewable energy, which is environmentally friendly and the fastest growing form of energy,[3] fossil fuels continue to meet much of the world's energy demand.[4] Crude oil's end products underpin modern society and include petrol (gasoline), diesel fuel, kerosene, asphalt, heating oil, lubricating oil, aviation fuel and waxes.[5] Liquid fuels such as motor gasoline and diesel continue to be the dominant transportation fuels and industrial feedstocks, because of their energy density, cost, and chemical properties.[6]

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[1] Oil and gas had already been used to some extent, in ways such as for materials for construction or in lamps for lighting. The earliest known oil wells were drilled in China in 347 AD; Umar Ali, 'The history of the oil and gas industry from 347 AD to today' (*Offshore Technology*, 7 March 2019) <https://www.offshore-technology.com/comment/history-oil-gas/> accessed 15 October 2020.

[2] UKOG PLC, 'Why Oil is Important' <https://www.ukogplc.com/page.php?pID=74#:~:text=Oil%3A%20lifeblood%20of%20the%20industrialised,people%20all%20over%20the%20world> accessed 15 October 2020; Katinka Barysch, '8 Reasons Why the Politics of Oil have Changed' (*Weforum.org*, 19 February 2016) <https://www.weforum.org/agenda/2016/02/eight-reasons-why-the-politics-of-oil-have-changed/> accessed 15 October 2020; Oil Price, 'The Oil Industry and its Effect on Global Politics' (*Oilprice.com*, 22 October 2009) <https://oilprice.com/Energy/Oil-Prices/The-Oil-Industry-And-Its-Effect-On-Global-Politics.html> accessed 15 October 2020; Helen Thompson, 'Why Oil Matters for British Politics' (*LSE BPP*, 11 October 2017) <https://blogs.lse.ac.uk/politicsandpolicy/why-oil-matters-for-british-politics/> accessed 15 October 2020; E J W Slade 'The Influence of Oil on International Politics' (1923) 2(6) Journal of the British Institute of International Affairs 251-258; Paul Stevens, 'The Geopolitical Implications of Future Oil Demand' (*Chatham House Research Paper*, August 2019) <https://www.chathamhouse.org/sites/default/files/2019-08-14-FutureOilDemand.pdf> accessed 15 October 2020; Kevin Bogardus 'The Politics of Energy: Oil and Gas' (*The Center for Public Integrity*, 19 May 2014) <https://publicintegrity.org/environment/the-politics-of-energy-oil-and-gas/> accessed 16 October 2020.

[3] International Energy Agency, 'Renewables 2020' (IEA 2020) <https://www.iea.org/reports/renewables-2020> accessed 11 May 2021; Jillian Ambrose, 'Global renewable energy industry grew at fastest rate since 1999 last year' (*The Guardian*, 11 May 2021) <https://www.theguardian.com/environment/2021/may/11/global-renewable-energy-industry-grew-at-fastest-rate-since-1999-last-year> accessed 12 May 2021; Eurostat, 'Renewable Energy Statistics: Share of renewable energy more than doubled between 2004 and 2019' (4 May 2021) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Renewable_energy_statistics#Share_of_renewable_energy_more_than_doubled_between_2004_and_2019> accessed 11 May 2021.

[4] Ibid, IEA.

[5] US Energy Information Administration, 'Oil: crude and petroleum products explained' (23 May 2019) <https://www.eia.gov/energyexplained/oil-and-petroleum-products/#tab2> accessed 1 March 2020.

[6] US Energy Information Administration (EIA), International Energy Outlook 2019 26-32 <https://www.eia.gov/outlooks/ieo/pdf/ieo2019.pdf> accessed 28 February 2020; International Energy Agency, 'Renewables 2020' (IEA 2020) <https://www.iea.org/reports/renewables-2020> accessed 11 May 2021.

How states meet their energy demands also influences global oil exploration trends. For example, it is predicted that Africa will continue to meet its energy needs through crude oil in the foreseeable future, thus keeping the continent as a major consumer of these products.[7] It is also estimated that more than half a billion people will be added to the continent's population by 2040,[8] which translates into increased energy demand to meet needs such as industrial production, transportation and cooling. Although several global policies promote a shift to sustainable sources of energy, renewable energy investment in Africa is currently insufficient to facilitate an energy transition on such a large scale,[9] and about 600 million people on the continent lack access to reliable electricity.[10]

Despite the growth in using electricity as a renewable energy source for end-use fuel, global oil consumption is projected to increase by 24 percent between 2018 and 2050. Additionally, the world supply of crude oil is expected to rise by 44 percent during the same period.[11] These projections highlight that oil and gas exploration will persist in the foreseeable future, intensifying the need to discover new sources to meet growing demand. As a consequence, there is a potential for venturing from shallow waters to more challenging locations, such as the deep seabed, in the pursuit of oil and gas resources.[12] This is problematic because the global over-reliance on oil and oil-derived products comes with significant risks to the marine environment from exploration, production, transportation, commercial and distribution activities.

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[7] Higher than the demand of oil in China and second to India, likewise the third largest source of global demand for gas; International Energy Agency, 'Africa Energy Outlook 2019: World Energy Outlook special report' (November 2019) <https://www.iea.org/reports/africa-energy-outlook-2019> accessed 15 October 2020; European Commission Competence Centre on Foresight, 'Africa's growth potential' (*European Commission*, 5 October 2022) <https://knowledge4policy.ec.europa.eu/foresight/africas-growth-potential_en#:~:text=The%20African%20continent's%20population%20is,on%20inclusive%20and%20sustainable%20development> accessed 23 November 2022.

[8] Ibid.

[9] 'The African Common Position encourages striking a balance between ensuring access to electricity to catalysing the much-needed socio-economic growth in Africa and smoothly transitioning towards an energy system based on renewable and clean energy sources matching the ambitions of Agenda 2063.'; African Union (AU) Press Release, 'Africa Speaks with Unified Voice as AU Executive Council Adopts African Common Position on Energy Access and Just Energy Transition' (*African Union*, 22 July 2022) <https://au.int/en/pressreleases/20220722/africa-speaks-unified-voice-au-executive-council-adopts-african-common#:~:text=The%20African%20Common%20Position%20encourages,the%20ambitions%20of%20Agenda%202063> accessed 13 September 2022.

[10] Ibid.

[11] US Energy Information Administration (EIA), 'International Energy Outlook.
2019 Key Takeaway' <https://www.eia.gov/outlooks/ieo/pdf/ieo_infographics.pdf> accessed 28 February 2020.

[12] UNEP 'Oil and Gas from the sea' (2014) World Ocean Review 17 <https://worldoceanreview.com/wp-content/downloads/wor3/WOR3_en_chapter_1.pdf> accessed 28 February 2020.

One prominent risk is pollution damage, which takes various forms, including oil spills from tanker accidents during transportation, intentional discharges from oil tankers and other vessels, oil rig blowouts, pipeline damage, gas leakage, noise pollution, and improper waste disposal.[13] Annually, approximately four hundred and fifty-seven thousand tonnes of oil enter the ocean from regular shipping activities, with an additional twenty thousand tonnes from offshore exploration and production.[14] In total, between one and three million tonnes of oil enter the global marine environment each year.[15]

While these figures might suggest offshore petroleum development to be a relatively insignificant source of oil released into the sea, spills from offshore oil drilling can still lead to severe consequences.[16] With offshore oil and gas exploration increasingly taking place not only in shallow waters, but in deep and ultra-deep waters,[17] more pollution incidents with greater consequences and remedial costs are to be reasonably expected.[18] The escalating risk of spills from offshore oil production has been highlighted by catastrophic blowout incidents worldwide, occurring at an average interval of approximately 15 months.[19] Pollution originating from offshore petroleum activities can be exponentially worse when a spill occurs as a result of an oil well blowout.[20] Unlike ship-source oil spills, where the amount of oil carried

[13] Jędrzej George Frynas, 'Corporate Social Responsibility in the Oil and Gas Sector' (2009) 2(3) Journal of World Energy Law and Business 178, 195; Robert B Clark, *Marine Pollution* (5th edn, Oxford University press 2001) 161.

[14] Group of Experts on the Scientific Aspects of Marine Environmental Protection, 'Estimates of Oil Entering the Marine Environment from Sea-Based Activities, Reports and Studies' (GESAMP, 2007) <http://www.gesamp.org/publications/estimates-of-oil-entering-the-marine-environment-from-sea-based-activities > accessed 27 February 2020.

[15] Geographical coverage is: European Seas: NE Atlantic, Baltic, Mediterranean and Black Sea EU 25, EFTA (Norway and Iceland), Acceding countries to the EU (Bulgaria, Romania), Candidate country to the EU (Turkey), other Black Sea Countries (Russia and Ukraine), Mediterranean Countries non-EU (Syria, Lebanon, Israel, Egypt, Tunisia, Algeria and Morocco; European Environment Agency 'EN15 Accidental Oil Spills from Marine Shipping' <https://www.eea.europa.eu/data-and-maps/indicators/en15-accidental-oil-spills-from/en15-accidental-oil-spills-from> accessed 21 February 2020.

[16] Officer of the Watch, 'The Probability of an Offshore Accident' (6 August 2013) <https://officerofthewatch.com/2013/08/06/the-probability-of-an-offshore-accident/> accessed 21 February 2020; Scottish Government, 'MeyGen Tidal Energy Project Phase 1 Environmental Statement' 24.2 <https://marine.gov.scot/sites/default/files/chapter_24_accidental_events.pdf> accessed 21 February 2021.

[17] 'Typically offshore operations fall into one of three categories, Shallow water operations, where water-depth is smaller than 1,000ft, deep-water where water-depth is deeper than 1,000ft but under 5,000ft and, finally, ultra-deep water is anything over 5,000ft'; Victor Borges, 'Modelling different upstream oil and gas operations' (*DNV*, 8 August 2016) <https://www.dnv.com/article/modelling-different-upstream-oil-and-gas-operations-207958/#:~:text=Typically%20offshore%20operations%20fall%20into,is%20anything%20over%205%2C000ft. > accessed 18 February 2021.

[18] Ibid.

[19] Delving Into Deepwater: Before the blowout, Maritime Accident Casebook (July 2013) <www.maritimeaccident.org/2010/07/delving-into-deepwater-before-the-blow-out> accessed 18 March 2017.

[20] NOAA Fisheries, 'Sea Turtles, Dolphins, and Whales - 10 years after the Deepwater Horizon Oil Spill' (fisheries.noaa.gov, 10 September 2021) <https://www.fisheries.noaa.gov/national/marine-life-distress/sea-turtles-dolphins-and-whales-10-years-after-deepwater-horizon-oil> accessed 12 January 2022; Joan Meiners,

tends to be predictable, the maximum amount of oil that can be released from the seabed during a blowout is uncertain.

1.1.1 Offshore Oil Spills: Impacts and Liability

While a larger oil spill generally poses a higher risk to the marine environment, the volume of oil is just one determinant of the extent of damage. Environmental impact depends on various factors. For instance, a smaller spill in a sensitive body of water may prove much more environmentally disastrous than a larger spill elsewhere.[21] Additionally, the type of oil spilled plays a crucial role; thicker oils, like crude oil, pose greater clean-up challenges.[22] Nevertheless, when an oil spill occurs offshore, it often happens on such an extensive scale that it is considered a disaster. Moreover, the effects of an oil spill on water may diminish over time, but full recovery from extensive damage could take decades.[23] The aftermath of an offshore oil spill also extends beyond environmental harm to affect individuals' properties and livelihoods. This impact might manifest in reduced market values of real estate in pollution areas, loss of earnings for those dependent on the affected marine environment (such as fishermen and coastal tourism businesses), and the costs associated with clean-up or preventive measures taken by unrelated parties after the incident.[24]

Those affected by pollution damage from an offshore oil spill must try to determine whether their losses qualify for compensation. Additionally, they need to ascertain the claimable amount, identify the appropriate party or parties to direct their claims towards, and meet various technical and legal criteria to be successful in their civil liability claims. This complex process is further amplified when there is an international dimension, such as damage resulting from an offshore spill in a different country, which may trigger private international law issues.

'Ten years later, BP oil spill continues to harm wildlife especially dolphins' (National Geographic, 17 April 2020) <https://www.nationalgeographic.com/animals/article/how-is-wildlife-doing-now--ten-years-after-the-deepwater-horizon> accessed 12 January 2022; *Also see generally,* M G Barron and others, ' Long-term ecological impacts from oil spills: comparison of *Exxon Valdez, Hebei Spirit* and *Deepwater Horizon*' (2020) 54(11) EST <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7397809/> accessed 12 January 2022.

[21] UNEP Global Programme of Action for the Protection of the Marine Environment from Land-based Activities 'Global marine oil pollution Information Gateway: Facts on marine oil pollution' (2005) <http://oils.gpa.unep.org/facts/facts.htm> accessed 2 May 2019.

[22] Jessica Resnick-Ault, 'Explainer: Why is it so hard to clean up an offshore oil spill?' (*Reuters*, 5 October 2021) <https://www.reuters.com/business/environment/why-is-it-so-hard-clean-up-an-offshore-oil-spill-2021-10-05/> accessed 10 June 2022.

[23] Robert B Clark, *Marine Pollution* (5th edn, Oxford University Press 2001) 161.

[24] Charles H Peterson and others, 'Ecological consequences of environmental perturbations associated with offshore hydrocarbon production: a perspective on long-term exposures in the Gulf of Mexico' (1996) Canadian Journal of Fisheries and Aquatic Sciences 2637-2654, 2638.

These challenges faced by victims of pollution damage highlight the importance of developing comprehensive civil liability laws for offshore petroleum development. While liability for pollution from ships or vessels[25] is effectively addressed at an international level through widely adopted conventions,[26] in collaboration with ship owners, oil producers, and other industry stakeholders under the guidance of the International Maritime Organisation (IMO), the same cannot be said for pollution and compensation resulting from offshore petroleum development.[27]

The 1976 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Seabed Mineral Resources (CLEE) remains the sole treaty ever created addressing this matter, though its application is intended for the Northern Europe region, covering the Baltic, North Sea and North Atlantic areas. It channels liability to the operator(s) of the installation,[28] imposes strict liability with limited exceptions,[29] and offers financial limitation up to 40 million SDR for accidental discharges,[30] while ensuring unlimited liability for deliberate acts leading to pollution damage.[31] Additionally, it mandates evidence of financial responsibility and make provision for the establishment of a fund,[32] sets a limitation period,[33] designates courts as forum for adjudication, and addresses conflict of laws issues, including transboundary pollution cases.[34] However, the CLEE was never ratified by any of its signatories, preventing it from entering into force.[35]

[25] Ships and vessels are used interchangeably throughout this work. A similar use can be found in the 1982 United nations Convention on the Law of the Sea (UNCLOS) in Articles 90, 91, 92, 93, 248(d) and 292.
[26] 1969 Convention on Civil Liability for Oil Pollution Damage (CLC) and its 1992 Protocol, and the 1992 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the Fund Convention) and the 2003 Protocol; International Maritime Organization, 'Member States' <http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx> accessed 29 January 2020.
[27] Chiemela V Amaechi and others, 'Review on Fixed and Floating Offshore Structures. Part I: Types of Platforms with Some Applications' (2022) 10(8) Journal of Marine Science and Engineering <https://www.mdpi.com/2077-1312/10/8/1074> accessed 20 August 2022.
[28] Article 3(1) and (2).
[29] Article 3(3).
[30] Article 6(1-6).
[31] Article 6 (1) and (4).
[32] In the form of insurance or other proof of financial security to a minimum of 35 million SDR and subject to exemption in whole or in part, where the operator is a State party; Article 8(1) and (5).
[33] Twelve months from the day of reasonable knowledge of the damage and a maximum of four years from when the incident occurred; Article 10.
[34] Articles 11 and 12.
[35] Belgium, Denmark, Federal Republic of Germany, France, Ireland, Netherlands, Norway, Sweden, and United Kingdom; Gov.uk, 'Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources – UK Depositary Status List' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/603447/30._Oil_Pollution_Damage__1977___Status_list.pdf> accessed 21 March 2022.

There have also been prior attempts by the Comité Maritime International (CMI) aimed at extending existing rules of maritime law to offshore mobile crafts used for petroleum development activities, seeking international uniformity.[36] Unfortunately, consensus within the CMI was not reached.[37] Notably, during the early stages of CMI's efforts, it was discovered that the International Association of Drilling Contractors (IADC) and the Oil Industry International Exploration and Production Forum (E&P Forum) were not supportive of a universal convention on civil liability.[38] The IADC opposed the creation of any global convention on the subject, while the E&P Forum suggested that addressing civil liability should be done on a regional level rather than globally.[39]

This means that, currently, the civil liability regime overseeing compensation and clean-up costs related to oil spills from offshore petroleum development is determined by the domestic regimes of coastal states. However, this approach leads to significant diversity, complexity, and fragmentation in how different countries address issues of civil liability and compensation arising from offshore drilling incidents.[40] While some countries have comprehensive statutory regimes specifically tailored for civil claims related to oil spills from offshore drilling, others rely on broader civil liability laws intended to for various environmental pollution claims. These broader frameworks may lack the technical specifics needed to address pollution claims specifically from offshore drilling. Additionally, some countries depend on the discretion of judges or judicial precedent within their civil liability regimes.[41] Conditions at sea can lead to

[36] The CMI was and still is a prominent non-governmental international organisation in the field of maritime and commercial law that has proposed and drafted several international treaties that have been adopted. In contemporary times, they undertake this objective in collaboration with the United Nations (and more particularly, the IMO); Ukrainian Maritime Bar Association, 'Comité Maritime International' <http://www.umba.org.ua/en/about-us/cmi/#:~:text=According%20to%20the%20Article%201,law%20in%20all%20its%20aspects%E2%80%9D.> accessed 20 March 2023.

[37] 'CMI Conference – Rio De Janeiro 1977: Report of proceedings' (1977) Lloyd's Maritime and Commercial Law Quarterly 1 <https://www.i-law.com/ilaw/doc/view.htm?id=370759> accessed 23 January 2022.

[38] Michael White, 'Offshore Crafts and Structures: A proposed International Convention' (1999) 18 AMPLJ 21, 26-27.

[39] Ibid.

[40] The phrases 'offshore drilling, 'offshore petroleum development' and 'offshore hydrocarbon development' are commonly used to refer to the same thing, and would be used interchangeably in this thesis; International Association of Drilling Contractors, 'IADCLexicon Oil & Gas Drilling Glossary' <https://iadclexicon.org/offshore-drilling> accessed 10 February 2020.

[41] Currently, the outcome of any civil liability claim arising from oil pollution damage depends entirely on the cause and location of the incident that led to the claim. Some countries, such as the United States of America using the Oil pollution Act 1990 (OPA), have largely sufficient laws to handle civil liability claims of this nature, and extends liability beyond the licensed operator. Conversely, some countries rely on voluntary schemes. The United Kingdom as an example relies a voluntary oil pollution compensation scheme known as the Offshore Pollution Liability Agreement (OPOL), which offshore operators currently active in exploration and production on the UKCS are party to, however, the scheme only recognises the liability of the licensed operator. Furthermore, some countries still rely on native tort laws and court decisions to govern claims of this nature. Nigeria is an

persistent oils with a significantly larger impact radius due to high mobility driven by wind and water currents,[42] increasing the likelihood of transboundary pollution. This means that the divergent domestic legal regimes for managing oil pollution damage present further challenges, particularly when dealing with transboundary damage that may impact not only the coastal state of origin but also spread to multiple other states and international waters.[43]

Although some countries have regulations establishing safety standards for drilling to prevent oil pollution incidents, these regulations are largely directed toward the approval process of the hydrocarbon development project, rather than preventing incidents. Consequently, they do not eliminate the possibility of an incident occurring nor guarantee prompt and adequate compensation in case of an incident. For instance, a survey of 28 oil-producing countries revealed that, despite having diverse environmental policies and legal frameworks in place for expected safety standards, these measures often did not extend to addressing claims for civil liabilities resulting from pollution damages caused by oil and gas development projects in the surveyed countries.[44]

1.1.2 Offshore Oil Exploration in the Arctic

Nowhere is the dichotomy between high environmental risk and the need for a civil liability regime for oil pollution damage more evident than in the Arctic.[45] Characterised by its extreme

example, and these laws are considered largely inadequate for the technicality of pollution damage from offshore units; Cane Peter, 'Using Tort to Enforce environmental Regulation' (2002) 41 Washburn Law Journal 455; Anderson Michael, 'Transnational Corporations and Environmental damage: Is Tort Law the Answer?' (2002) 41 Washburn Law Journal 415-419; Thomas McGarity, 'Beyond Buckman: Wrongful Manipulation of the Regulatory Process in the Common Law of Torts' (2002) 41 Washburn Law Journal 549.

[42] Berrin Tansel, 'Propagation of impacts after oil spills at sea: categorization and quantification of local versus regional and immediate versus delayed impacts' (2014) 7 International Journal of Disaster Risk Reduction 1–8.

[43] Ibid.

[44] Bob Palmer, 'Oil Regulation in 28 Jurisdictions Worldwide' (2015) Getting the Deal Through 5-203 <https://cms.law/en/media/local/cms-aacs/files/publications/publications/edition-362-chapter-15-150728092213235-oil-regulation-2015-italy> accessed 20 September 2019.

[45] *For different definitions of the Arctic see;* the US Coast Guard definition of the Arctic is 'some 2,521 miles of shoreline, an international strait adjacent to the Russian Federation, and 647 miles of land border with Canada above the Arctic Circle. The U.S. Exclusive Economic Zone (EEZ) in the Arctic contains approximately 889,000 square miles of ocean.'; USCG, Arctic Strategic Outlook' (2019) 11; The IMO in its Guidelines for Ships Operating in Ice-Covered Waters defines the Arctic waters as those "located north of a line from the southern tip of Greenland and thence by the southern shore of Greenland to Kape Hoppe and thence by a rhumb line to latitude 67º03'9 N, longitude 026º33'4 W and thence by a rhumb line to Sørkapp, Jan Mayen and by the southern shore of Jan Mayen to the Island of Bjørnøya, and thence by a great circle line from the Island of Bjørnøya to Cap Kanin Nos and thence by the northern shore of the Asian Continent eastward to the Bering Strait and thence from the Bering Strait westward to latitude 60º North and following the 60th North parallel eastward as far as and including Etolin Strait and thence by the northern shore of the North American continent as far south as latitude 60º North and thence eastward to the southern tip of Greenland; and in which sea ice concentrations of 1/10 coverage or greater are present and which pose a structural risk to ships."; Arctic Council, 'Arctic Marine Shipping Assessment: Report' (2009) 19 <http://www.arctic.gov/publications/_AMSA_2009_Report_2nd_print.pdf>

cold weather conditions and vast expanses of drifting snow and ice, the Arctic seas present a unique and challenging environment.[46] Beyond its exceptional native species,[47] the Arctic has been inhabited by Indigenous Peoples for over 4000 years, adding a cultural dimension to its significance.[48] The marine Arctic is also full of valuable fish and crustaceans that have adapted to the frigid Arctic waters.[49] For example, the Barents Sea is considered an important nursery area for fish, which is often touted as the cleanest worldwide.[50] Additionally, the Arctic holds vast reserves of natural resources, including crude oil, which holds considerable socio-economic importance for the Arctic nations eager to explore and exploit these resources.[51] However, despite its significance, the Arctic Ocean is the smallest among the world's five oceans, and remarkably, it is also the least studied of the world's oceans, posing increased hazards for mariners due to a lack of navigation data.[52]

In addition to its ecological significance, the Arctic plays a crucial role in tracking global climate trends and changes. For example, the Arctic Ocean, covered by a perennial polar icepack, experiences a shrinking icepack during the summer months,[53] offering early insights into global climatic changes through patterns of sea ice melting.[54] Further, the reflective sea ice in the polar region helps with maintaining cool temperatures by reflecting sunlight back

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accessed 10 May 2020; the Arctic Monitoring and Assessment Programme (AMAP), a working group of the Arctic Council, defines the Arctic as "essentially includes the terrestrial and marine areas north of the Arctic Circle (66°32' N), and north of 62° N in Asia and 60° N in North America, modified to include the marine areas north of the Aleutian chain, Hudson Bay, and parts of the North Atlantic, including the Labrador Sea.'; *For other definitions used to define the "Arctic" see* Congressional Research Service, 'Changes in the Arctic: Background and Issues for Congress' (2022) 1-5 <https://sgp.fas.org/crs/misc/R41153.pdf> accessed 10 January 2023.

[46] Congressional Research Service, 'Changes in the Arctic: Background and Issues for Congress' (2022) 1-5 <https://sgp.fas.org/crs/misc/R41153.pdf> accessed 10 January 2023.

[47] Such as the musk oxen, Arctic hare, Arctic terns, snowy owls, and polar bears; Gail Osherenko and Oran R Young, The Age of the Arctic: Hot Conflicts and Cold Realities (Studies in Polar Research) (Cambridge University Press 1989) 111-117.

[48] Arctic Chronology, Avataq Cultural Institute <http://www.avataq.qc.ca/en/Institute/Departments/Archaeology/Discovering-Archaeology/Arctic-Chronology> accessed 6 March 2020.

[49] Olav Orheim, 'Protecting the environment of the Arctic ecosystem' (2003) Norwegian Polar Institute <https://www.un.org/Depts/los/consultative_process/documents/no3_npi1.pdf> accessed 11 January 2021.

[50] Such as the Northeast Arctic cod, Northeast Arctic haddock, capelin, Norwegian spring spawning herring, Northeast Arctic Greenland halibut and deep-sea redfish.

[51] n 31.

[52] Arctic Council, 'Arctic Marine Shipping Assessment: Report' (2009) 15-16 <http://www.arctic.gov/publications/ AMSA_2009_Report_2nd_print.pdf> accessed 10 May 2020.

[53] Susan Joy Hassol, 'Arctic Monitoring & Assessment Programme, Impacts of A Warming Arctic: Arctic Climate Impact Assessment (Acia) Overview Report' (2004) 8 <http://www.amap.no/documents/doc/impacts-of-a-warming-arctic-2004/786> accessed 6 March 2020.

[54] 'Sea ice is frozen water that forms, expands and melts in the ocean. It is different from icebergs, glaciers, ice sheets and ice shelves which originate on land; Professor Olav Orheim, 'Protecting the environment of the Arctic ecosystem' (2003) Norwegian Polar Institute <https://www.un.org/Depts/los/consultative_process/documents/no3_npi1.pdf> accessed 11 January 2021.

into the atmosphere.[55] However, rising climate temperatures have led to the Arctic losing sea ice at the fastest rate since 1900,[56] and the timeframe in which it melts is now being extended.[57] This can lead to disruption of normal ocean circulation, which in turn impacts the global climate.[58]

In recent years, the Arctic has become a focal point in political and economic discussions,[59] led by the belief that global warming and climate change will render the region more accessible to new opportunities for various commercial activities. The remarkable decline of sea ice in the Arctic is expected to create navigable routes, unlocking potential for tourism, mining, shipping, fishing, and hydrocarbon production.[60] Traditionally, navigating the Arctic required icebreaking ships,[61] as routes like the Northwest Passage were nearly impassable due to thick, year-round sea ice.[62] However, climate-induced sea ice loss in recent years has significantly

[55] Ibid.

[56] Daily Chart, 'Shipping logs show how quickly Arctic Sea ice is melting' (*The Economist*, 13 August 2019) <https://www.economist.com/graphic-detail/2019/08/13/shipping-logs-show-how-quickly-arctic-sea-ice-is-melting> accessed 14 August 2019.

[57] 'When warming temperatures gradually melt sea ice over time, fewer bright surfaces are available to reflect sunlight back into the atmosphere. More solar energy is absorbed at the surface and ocean temperatures rise. This begins a cycle of warming and melting. Warmer water temperatures delay ice growth in the fall and winter, and the ice melts faster the following spring, exposing dark ocean waters for a longer period the following summer.'; National Ocean Service, 'How does sea ice affect global climate?' (*National Oceanic and Atmospheric Administration*, 20 January 2023) <https://oceanservice.noaa.gov/facts/sea-ice-climate.html#:~:text=The%20bright%20surface%20of%20sea,cool%20relative%20to%20the%20equator.> accessed 28 May 2023; Øystein Jensen, 'The Imo Guidelines for Ships Operating in Arctic Ice-Covered Waters: From Voluntary to Mandatory Tool for Navigation Safety and Environmental Protection?' (2007) 5–7 <http://www.fni.no/doc&pdf/FNI-R0207.pdf> accessed 11 May 2020.

[58] Donald R Rothwell, 'International Law and the Protection of the Arctic Environment' (1995) 44(2) The International and Comparative Law Quarterly 280-312; Linda Nowlan, *Arctic Legal Regime for Environmental protection* (2001) IUCN Environmental Policy and Law Paper No 44 [1] <https://portals.iucn.org/library/sites/library/files/documents/eplp-044.pdf> accessed 9 February 2020.

[59] Ibid.

[60] Further evidenced by the creation and adoption of the International Code for Ships Operating in Polar Waters (Polar Code) 2017; Michael Gross, 'Artic Shipping Threatens Wildlife' (2018) 28 (15) Current Biology <https://doi.org/10.1016/j.cub.2018.07.053> accessed August 1 2019; Jessica Murphy, 'Is the Arctic set to become a main shipping route? (*BBC* News, 1 November 2018); S. R. Stephenson et. al., 'Climatic Responses to Future Trans-arctic Shipping' (2018) 45 (18) Geophysical Research Letters; Y Aksenov et. al., 'On the future navigability of Arctic sea routes: High-resolution projections of the Arctic Ocean and sea ice' (2017) 72 Marine Policy 300-317 <https://doi.org/10.1016/j.marpol.2015.12.027> accessed 15 August 2019 examines a high projection for the Arctic Ocean in the 21st century and the future navigability of the Arctic sea routes and sailing times.

[61] Sean Calebs, 'Ice breaking ships opening up passages to navigate the Arctic' (*CGTN America News*, 14 December 2015) <https://www.youtube.com/watch?v=Gt7U86Zcj08> accessed 3 March 2019.

[62] The Northwest passage is the route linking the Atlantic and Pacific Oceans via the northern coast of Canada and through its Arctic Archipelago; Geoscience News and Information, 'What is the Northwest Passage?' (Geology.com) <https://geology.com/articles/northwest-passage.shtml> accessed 3 March 2019; R. K. headland et. al., 'Transits of the Northwest Passage to end of the 2019 Navigation Season Atlantic Ocean ↔ Arctic Ocean ↔ Pacific Ocean' (2019) University of Cambridge Report <https://www.spri.cam.ac.uk/resources/infosheets/northwestpassage.pdf> accessed 23 October 2019.

increased access to these once-challenging routes.[63] An emblematic example of this change occurred in August 2016 when the first large cruise ship, *Crystal Serenity*, successfully traversed the Northwest Passage, garnering global attention.[64] A similar transformation has taken place in the Northeast Passage, which has become navigable during the Arctic summer due to the drastic disappearance of sea ice.[65] The Arctic Council forecasts that the Arctic Ocean could be entirely ice-free during the summer by 2050, allowing cargo ships to complete a full circumnavigation of the Arctic Ocean.[66]

The oil and gas industry have also been incentivised to participate in the race for the Arctic due to the lure of untapped oil in the seabed, facilitated by the reduction of sea ice and thawing permafrost, making previously inaccessible hydrocarbons more readily extractable.[67] While there had been some earlier informal considerations for offshore oil in the Arctic, the official interest in the potential for hydrocarbon development gained momentum with the publication of the 2008 US Geological survey.[68] The research suggested the presence of significant hydrocarbon reserves in the Arctic, projecting approximately ninety billion barrels of oil with

[63] Jonathan Amos, 'Climate change: Polarstern icebreaker begins year-long Arctic drift' (*BBC Science and Environment*, 4 October 2019) <https://www.bbc.co.uk/news/science-environment-49941340> accessed 10 October 2019; Harry Cockburn, 'Russia launches world's largest nuclear-powered icebreaker to open up Arctic shipping routes' (*Independent*, 26 May 2019) <https://www.independent.co.uk/news/world/europe/russia-icebreaker-ship-nuclear-power-arctic-sea-ice-shipping-oil-a8930711.html> accessed 10 October 2019; M. Q. Frederiksen, '4 ways climate change is opening the Arctic up for business' (*World Economic forum*, 27 September 2019)<https://www.weforum.org/agenda/2019/09/4-ways-climate-change-is-opening-the-arctic-up-to-business/> accessed 10 October 2019.

[64] Christiana Nunez, 'A Luxury Cruise Liner Is About to Sail the Arctic's Northwest Passage' (*National Geographic*, 16 August 2016) <https://www.nationalgeographic.com/news/2016/08/crystal-serenity-luxury-cruise-arctic-northwest-passage/> accessed 6 March 2019; Terry Macalister, 'Large cruise ship voyage through Arctic ice rekindles rows' (*The Guardian*, 13 August 2016) <https://www.theguardian.com/environment/2016/aug/13/large-cruise-ship-voyage-arctic-ice-crystal-cruises> accessed 6 March 2019.

[65] Also known as the Northern Sea Route, the route along the Siberian coast; Michael Gross, 'Arctic Shipping Threatens Wildlife' (2018) 28 (15) Current Biology <https://doi.org/10.1016/j.cub.2018.07.053> accessed August 1 2019.

[66] Arctic Council, 'Arctic Marine Shipping Assessment: Report' (2009) 27 <http://www.arctic.gov/ publications/ AMSA_2009_Report_2nd_print.pdf> accessed 10 May 2020.

[67] Ibid; Roger Anderson, 'why is oil usually found in deserts and Arctic areas?' (*Scientific America*, 16 January 2006) <https://www.scientificamerican.com/article/why-is-oil-usually-found/> accessed 10 May 2020.

[68] *For the timeline of territorial claims and agreements in the Arctic pre and post May 2008 see,* STIMSON, 'Evolution of Arctic Territorial Claims and Agreements: A Timeline (1903-Present)' (*Stimson.org*, 15 September 2013) <https://www.stimson.org/2013/evolution-arctic-territorial-claims-and-agreements-timeline-1903-present/> accessed 5 June 2021.

eighty-four percent of crude resources located offshore,[69] accounting for an estimated twenty-two percent of the world's undiscovered oil.[70]

The confluence of these factors, along with the opening up of the Northwest Passage, transforms the Arctic into not just a transit pathway for vessels but a destination route for accessing offshore Arctic hydrocarbons. Projections indicate that an estimated USD$100 billion or more could be invested in the Arctic over the next decade, predominantly directed towards the development of non-renewable natural resources.[71]

Drilling and production activities are already underway in the Arctic, particularly in the Russian Federation[72] and Norway. Over the past decade, Russia's oil and gas endeavours in the Arctic have witnessed substantial growth, with projections indicating a further twenty percent increase by 2035.[73] Illustrating Russia's commitment to continue petroleum development in the Arctic, President Vladimir Putin authorised tax exemptions aimed at stimulating upstream oil and gas production in the Arctic in March 2020.[74] Norway is the second largest oil and gas producer in Europe. With a daily output of approximately four million barrels of oil equivalent, Norway has ambitious plans to extend oil drilling into previously untouched Arctic areas.[75] Oil and gas exceed half the combined value of Norwegian exports of goods, making it pivotal to the country's economy.[76] The Norwegian government

[69] US Geological Survey, 'Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle' (2008) <https://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf> accessed 2 February 2020; Donald L Gautier and others, 'Assessment of Undiscovered Oil and Gas in the Arctic' (2009) 324 Science 1175-1179.

[70] Arctic Council, 'Arctic Marine Shipping Assessment: Report' (2009) 25 <http://www.arctic.gov/ publications/ AMSA_2009_Report_2nd_print.pdf> accessed 10 May 2020.

[71] However, given the high risk/potentially high reward nature of Arctic investment, this figure could be significantly higher or lower; USGS '90 Billion Barrels of Oil and 1,670 Trillion Cubic Feet of Natural Gas Assessed in the Arctic' (July 23, 2008), <http://www.usgs.gov/newsroom/article.asp?ID=1980> accessed 2 February 2020.

[72] Throughout this work the name 'Russia' is used as a synonym for or interchangeably with 'Russian Federation'. There is no legal difference between both names.

[73] Rosemary Griffin, 'Insight from Moscow: Russian Arctic oil and gas development continues' (*S&P Global Commodity Insights*, 03 September 2020) <https://www.spglobal.com/commodityinsights/en/market-insights/blogs/oil/090320-insight-from-moscow-russian-arctic-oil-and-gas-development-continues-despite-climate-concerns> accessed 2 February 2021.

[74] Charles Digges, 'Russia pushes major tax breaks for drilling Arctic oil and gas' (*BELLONA*, 10 March 2020) <https://bellona.org/news/arctic/2020-03-russia-pushes-major-tax-breaks-for-drilling-arctic-oil-and-gas> accessed 2 February 2021.

[75] Nerijus Adomaitis and Gwladys Fouche, 'Norway plans to offer record number of Arctic oil, gas exploration blocks' (*Reuters*, 24 January 2023) <https://www.reuters.com/business/energy/norway-offers-up-92-new-oil-gas-exploration-blocks-2023-01-24/>

[76] Norwegian Petroleum, 'Exports of Oil and Gas' (10 January 2023) <https://www.norskpetroleum.no/en/production-and-exports/exports-of-oil-and-gas/#:~:text=Liquids%20Natural%20gas-

recently announced that it was offering new blocs for oil and gas exploration, primarily situated in the Barents Sea, one of the marginal seas that make up the Arctic Ocean.[77]

Greenland, Canada and the United States of America (USA) have previously issued licenses for oil drilling and production in their Arctic continental shelves, although the issuance of new oil exploratory licenses has temporarily been halted.[78] Despite this pause, these states generally view oil exploration as a pathway to socio-economic growth,[79] emphasising the ongoing significance of the Arctic as a region of strategic importance for oil and gas activities. Although further development of offshore oil in the Arctic may currently appear uncertain due to the temporary suspension of licenses in some countries, it is evident that these measures are part of broader strategies to ensure the sustainable development of petroleum resources in the region. Despite these temporary halts, major oil and energy companies continue to demonstrate keen pursuits in Arctic drilling activities.[80]

A recent report published by the World Energy Outlook notes that finding alternatives to oil for road freight, the aviation industry, and for chemicals, may take until at least 2040.[81] Thus, the underlying reality remains that, until economically resilient alternatives to crude oil and its derivatives emerge in the global market, Arctic countries are likely to persist in exploring and exploiting natural resources within their territorial waters and continental shelves. This pursuit is driven in large part by the economic imperative to bolster the financial standing of their nations. As the dynamics of oil and gas activities in the Arctic evolve, the need for a robust

,Oil%20and%20gas%20exports,creating%20the%20modern%20Norwegian%20society> accessed 10 January 2023.

[77] Ibid.

[78] Emily Holden, 'Trump opens protected Alaskan Arctic refuge to oil drillers' (*The Guardian*, 13 September 2019) <https://www.theguardian.com/us-news/2019/sep/12/trump-arctic-national-wildlife-refuge-oil-gas-drilling> accessed 15 September 2019; Timothy Puko, 'Trump Plans for Oil Drilling in Arctic Refuge Clear Big Hurdle' (*The Wall Street Journal*, 12 September 2019) <https://www.wsj.com/articles/oil-drilling-in-alaskas-arctic-wildlife-refuge-to-have-negligible-impact-interior-department-says-11568319433> accessed 15 September 2019; Christiana Nunez, 'Norway Offers New Arctic Leases, Stoking Polar Energy Rush' (*National geographic*, 24 January 2015) <https://www.nationalgeographic.com/news/energy/2015/01/150122-norway-arctic-drilling-ice-climate-change-energy-oil/> ;The Guardian Interactive, 'The New cold war' (*The Guardian*, 16 June 2015) <https://www.theguardian.com/environment/ng-interactive/2015/jun/16/drilling-oil-gas-arctic-alaska> accessed 17 October 2019; Clay Dillow, 'Russia and China vie to beat the US in the trillion-dollar race to control the Arctic' (*CNBC*, 6 February 2018) <https://www.cnbc.com/2018/02/06/russia-and-china-battle-us-in-race-to-control-arctic.html> accessed 17 March 2018.

[79] Ibid.

[80] Nordea, 'Analyses of Key Companies having Business Operations in the Arctic: Extract of the report Climate Change in the Arctic' (April 2017) <https://insights.nordea.com/wp-content/uploads/2019/02/Analyses-of-Key-Companies-having-Business-Operating-In-the-Arctic_0.pdf> accessed 26 August 2018.

[81] International Energy Agency, 'World Energy Outlook 2016' <https://www.iea.org/reports/world-energy-outlook-2016> accessed 4 May 2020.

civil liability regime becomes increasingly vital to address potential risks to the environment and individuals, and ensure the responsible management of this delicate and unique region.

1.2 Problem Statement and Gap in Literature

Despite efforts to prevent and control petroleum development activities in the Arctic, accidents can still occur and are likely to have severe consequences. Even small oil spills in Arctic waters, where oil degradation is significantly decelerated because of the icy waters below zero degrees, can contaminate the environment.[82] The deleterious impact of oil on the Arctic environment can be seen in an incident that occurred in May 2020 when a storage tank collapse in Norilsk, northern Russia, resulted in a spill of 20,000 tonnes of diesel fuel.[83] The contamination spread over 15 kilometres, affecting nearby rivers, lakes, and soil.[84] While not a spill from a drilling rig or directly in the marine environment, the incident highlights the serious implications of a large scale oil spill in the Arctic ecosystem, because '…while bacteria are known to "clean up" oil spills elsewhere in the world, in the Arctic, their low numbers and slow rates of activity could mean diesel products linger for years, if not decades.'[85]

Biologists have further asserted that due to the slow rate of biological degradation of oil at extremely low temperatures like that of the Arctic, oil spilled in Arctic waters may remain for periods spanning more than 50 years.[86] The trapping of oil in ice also makes pollution longer-lasting and makes it possible for the oil to be transported over long distances.[87] Even with climate change resulting in reduced polar ice, studies emphasise that there will always be Arctic sea ice to contend with in the region.[88] The impact of a spill from offshore petroleum

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[82] Øystein Jensen, 'The Imo Guidelines for Ships Operating in Arctic Ice-Covered Waters: From Voluntary to Mandatory Tool for Navigation Safety and Environmental Protection?' (2007) 3–4 <http://www.fni.no/doc&pdf/FNI-R0207.pdf> accessed 11 May 2020.

[83] Reuters, 'Russia's Nornickel disputes $2 billion Arctic spill damages claim' (*Reuters.com*, 8 July 2020) <https://www.reuters.com/article/us-russia-pollution-nornickel/russias-nornickel-disputes-2-billion-arctic-spill-damages-claim-idUKKBN2491D2?edition-redirect=uk> accessed 7 September 2020.

[84] Ibid.

[85] Ibid.

[86] Karl Magnus Eger, 'Effects of Oil Spills in Arctic Waters' (*ARCTIS-search.com*, 2010) <http://www.arctis-search.com/Effects+of+Oil+Spills+in+Arctic+Waters> accessed 10 November 2020.

[87] The Research Council of Norway, 'Long-term Effects of Discharges to Sea from Petroleum Related Activities: Report' (2012) 3, 5 <http://www.dnv.com/industry/maritime/publicationsanddownloads/publications/updates/arctic/2012/01_2012/Ten_years_of_research_into_the_effects_of_discharges_from_the_petroleum_industry.asp> accessed 1 June 2020.

[88] Arctic Council, 'Arctic Marine Shipping Assessment: Report' (2009) 25 <http://www.arctic.gov/ publications/ AMSA_2009_Report_2nd_print.pdf> accessed 10 May 2020; Congressional Research Service, 'Changes in the Arctic: Background and Issues for Congress' (2022) 67-68 <https://sgp.fas.org/crs/misc/R41153.pdf> accessed 10 January 2023.

development is not only heightened by these environmental conditions,[89] but is also complicated by limitations in the region's response capabilities,[90] including the relatively remote and hazardous nature of Arctic waters and the lack of adequate infrastructure to implement oil containment, removal, or dispersal.[91] Response efforts will typically focus on the process of containment, removal or dispersal of the spilled oil by employing techniques such as in-situ burning[92] or dispersant application,[93] that require the use of aircrafts or vessels, and personnel knowledgeable in the operation specifically for polar conditions. However, it is crucial to recognise that no technique employed for oil spill response can completely eliminate the spilled oil, because optimally, only up to forty percent of spilled oil can be recovered through mechanical clean-up methods.[94] Moreover, as the spilled oil reaches the shoreline or disperses, the clean-up process becomes more challenging. This presents a severe threat to the Arctic's overall economic, health, and political landscapes beyond the immediate spill zone.[95] This is the first problem identified in this thesis: petroleum development, while economically and politically strategic for Arctic states, poses an environmental crisis due to the challenging and unpredictable conditions of the region.[96] The proliferation of offshore activities in what is undoubtedly an environmentally sensitive area gives rise to unique and complex risks that will necessitate careful consideration of policy, law, and governance issues.[97]

[89] For example, extreme cold, drifting ice floes, vicious winds, lack of sunlight and low visibility; EPPR, 'Circumpolar Oil Spill Response Viability Analysis: Technical Report' (2017) <https://www.bsee.gov/sites/bsee.gov/files/2017-circumpolar-oil-spill-response-viability-analysis.pdf> accessed 29 May 2020.

[90] Daria Shapalova, 'Can international Law Protect the Arctic from Oil Spills?'(*The Arctic Institute*, 26 March 2019) <https://www.thearcticinstitute.org/international-law-protect-arctic-oil-spills/> accessed 1 June 2020.

[91] Ibid.

[92] The process of burning floating oil at sea, usually in remote areas; International Tanker Owners Pollution Federation Limited (ITPOF), 'In-situ Burning'<https://www.itopf.org/knowledge-resources/documents-guides/response-techniques/in-situ-burning/> accessed 20 February 2023.

[93] International Tanker Owners Pollution Federation Limited (ITPOF), 'Dispersants' International Tanker Owners Pollution Federation Limited (ITPOF), <https://www.itopf.org/knowledge-resources/documents-guides/response-techniques/dispersants/> accessed 20 February 2023.

[94] Doug Helton, 'What Have We Learned About Using Dispersants During the Next Big Oil Spill?' (*NOAA Office of Response and Restoration*, 20 April 2015) <https://response.restoration.noaa.gov/about/media/what-have-we-learned-about-using-dispersants-during-next-big-oil-spill.html> accessed 10 June 2020.

[95] UNEP, 'How to manage damage from oil spills' (7 October 2021) <https://www.unep.org/news-and-stories/story/how-manage-damage-oil-spills> accessed 20 November 2021.

[96] Glada Lahn and Charles Emmerson, 'Arctic Opening: Opportunity and Risk in the High North' Chatham House and Lloyd's Risk Insight Report (2012) 6 <https://www.chathamhouse.org/sites/default/files/publications/0412arctic.pdf> accessed 19 September 2019.

[97] Donald R Rothwell, 'International Law and the Protection of the Arctic Environment' (1995) 44(2) The International and Comparative Law Quarterly 280-312.

A second, compounding problem is that offshore oil spills are likely to cause *transboundary* pollution in the Arctic, not only causing damage to the environment of an adjacent coastal country, but also affecting the property and livelihood of foreign citizens.[98] Occupations reliant on fishing, tourism, and marine recreation may be particularly affected, for example, and pollution could threaten traditional subsistence activities for indigenous communities in the Arctic. Pollution damage may also extend to the central Arctic Ocean, a maritime area beyond national jurisdiction.[99] The issue of transboundary pollution in the Arctic was recognised in the 1991 Arctic Environmental Protection Strategy (AEPS) by the eight Arctic states. The AEPS identified oil pollution as a source of five out of six recurrent environmental problems in the Arctic, highlighting its transboundary nature.[100] This concern persists in contemporary times,[101] and raises questions concerning the routes of legal redress available for citizens that wish to make pollution damage-related claims and in which jurisdiction they should pursue such claims. These questions may be further complicated by states' claims to extend maritime territory, particularly where these claims overlap or are not formally established, as it may be uncertain which state's territory is damaged or from which state's territory the pollution originates. Claims over extended continental shelves (ECS) beyond 200 nautical miles (nm) have made by the littoral countries of Denmark (in respect of Greenland),[102] Canada,[103]

[98] Ibid.
[99] Ibid.
[100] (the others were, Persistent Organic Contaminants, Noise pollution, Heavy Metals, Radioactivity, and Acidification); Declaration of the Protection of the Arctic Environment 1991, section 4; <http://library.arcticportal.org/1542/1/artic_environment.pdf> accessed 26 August 2018; Linda Nowlan, *Arctic Legal Regime for Environmental protection* (2001) IUCN Environmental Policy and Law Paper No 44 [2] <https://portals.iucn.org/library/sites/library/files/documents/eplp-044.pdf> accessed 9 February 2020.
[101] Robert Newton and others, 'Increasing transnational sea-ice exchange in a changing Arctic ocean' (2017) 5(6) The Earth Institute at Columbia University 633-647.
[102] The Kingdom of Denmark and the government of Greenland, 'Partial Submission of the Government of the Kingdom of Denmark together with the Government of Greenland to the Commission on the Limits of the Continental Shelf The Northern Continental Shelf of Greenland (2014)' <https://www.un.org/Depts/los/clcs_new/submissions_files/dnk76_14/dnk2014_es.pdf> accessed 10 June 2022.
[103] Government of Canada 'Partial Submission of Canada to the Commission on the Limits of the Continental Shelf regarding its continental shelf in the Arctic Ocean' (2019) <https://www.un.org/Depts/los/clcs_new/submissions_files/can1_84_2019/CDA_ARC_ES_EN_secured.pdf> accessed 10 June 2022.

Russia,[104] Norway,[105] and the USA[106] under Article 76 UNCLOS, which overlap in the central Arctic Ocean.[107] Successfully establishing ECS claims grants exclusive rights for resource exploration, including crude oil extraction.[108]

In light of these challenges, and in addition to oil spill response efforts, it can be argued that civil liability assumes a critical role in managing the damage from oil spills.[109] It provides a legal framework for determining who is responsible for the damage caused and holds them financially accountable. While prevention and pollution control are essential, legal liability ensures that prompt and adequate actions are taken to mitigate the impact of oil spills on the affected ecosystems, communities and individuals.[110] By establishing liabilities, there is clear delineation of the obligations and duties of various parties involved in oil-related activities. This includes oil companies, operators, and other entities engaged in offshore petroleum development. Further, providing clarity as to the liabilities of operators creates a sense of responsibility and arguably acts as a deterrent, encouraging these entities to adopt robust preventive measures and adhere to best practices to minimise the risk of oil spills.[111] Where private citizens are concerned, a definitive understanding of liabilities also allows them to understand their rights and avenues for seeking redress or compensation if they have been affected by an actor in the offshore petroleum development industry.

However, herein lies the third problem. As indicated above, there is no comprehensive framework in international law that addresses civil liability related to offshore petroleum development. Certainly, the most effective means to ensure global consistency as to the

[104] United Nations Division for Ocean Affairs, 'Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Partial revised Submission by the Russian Federation' <https://www.un.org/depts/los/clcs_new/submissions_files/submission_rus_rev2.htm#:~:text=On%2014%20February%202023%2C%20the,with%20addenda%20submitted%20on%2031>; <https://www.un.org/Depts/los/clcs_new/submissions_files/rus01_rev15/2015_08_03_Exec_Summary_English.pdf> accessed 10 June 2022.
[105] United Nations Division for Ocean Affairs 'Continental Shelf Submission of Norway in Respect of areas in the Arctic ocean, the Barents Sea and the Norwegian Sea' (2006) <https://www.un.org/depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf> accessed 10 April 2024.
[106] United States Department of State, 'The Outer Limits of the Extended Continental Shelf of the United States of America: Executive Summary' (Washington, 2023) *for the USA Arctic submission see,* sections 7.1 and 8 <https://www.state.gov/wp-content/uploads/2023/12/ECS_Executive_Summary.pdf> accessed 10 April 2024 (although the USA has not ratified the UNCLOS, it acknowledges that the Convention generally reflects customary international law and has made its submission based on this acknowledgement, *see,* page 7 para 3).
[107] See section 1.7 of this thesis.
[108] UNCLOS articles 77 and 81.
[109] Ibid.
[110] Ibid.
[111] Ibid.

regulation of any issue is to establish an international framework that can be applied at the national level. Under the 1982 United Nations Convention on the Law of the Sea (UNCLOS),[112] states not only have individual obligations relating to the marine environment, but must also engage in global or regional cooperation, as appropriate, to devise measures aimed at preventing, reducing, and controlling pollution of the marine environment.[113] In instances of pollution *damage*, UNCLOS similarly mandates that states establish national measures and also collaborate in implementing international measures to address harm to individuals and the environment.[114] Such measures encompass a spectrum of approaches, including legal avenues and other mechanisms such as guidelines, compulsory insurance, or compensation funds.[115] There are some environmental protection measures directed at offshore petroleum development that are applicable to the Arctic region[116] and also specific oil pollution measures tailored for the Arctic.[117] Other bilateral and multilateral agreements are also applicable to some Arctic states,[118] complemented by instruments established by organisations and industries, which contribute to this regulatory landscape.[119] Despite these, the efficacy and uniformity of prevention, response, and of most relevance to this thesis, compensation for pollution damage from offshore drilling, largely remains a legal lacuna.

Compounded by the inadequacies of international law in addressing civil liability related to offshore petroleum development, the current overall civil liability regime in the Arctic region is characterised by individual legal regimes among Arctic countries. However, a fourth and final problem is that these regimes, which handle claims for pollution damage resulting from offshore drilling, exhibit notable disparities, even though the importance of harmonising states'

[112] This is discussed in chapter three of the thesis.
[113] Articles 192, 194(1), 197.
[114] Article 235 (2).
[115] Ibid; article 197.
[116] For example, the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC).
[117] *For example*, 1991 Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOSPA); *for a detailed discussion on the legal regime for environmental protection in the Arctic see*, Linda Nowlan, 'Arctic Legal Regime for Environmental Protection' (2001) IUCN Environmental Law Programme 1-70.
[118] For example, *see list of IMO Conventions* <https://www.imo.org/en/about/Conventions/Pages/ListOfConventions.aspx> accessed 10 June 2021; *also* Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage; also the Danish-Canadian Agreement for Cooperation Relating to the Marine Environment, Copenhagen, 26 August, 1983, 1348 UNTS 113.
[119] *For example,* The Offshore Pollution Liability Agreement (OPOL) applicable to two Arctic states (Greenland and Norway).

respective national policies on matters such as these is recognised in the UNCLOS.[120] This diversity is especially significant where petroleum development claims are concerned because of the high likelihood of transboundary civil liability claims that raise questions concerning the basis of liability, jurisdictional issues, and the acceptable forum for dispute resolution. These complexities contribute to greater uncertainty in the applicable laws for compensating losses from offshore drilling in the Arctic region.

Moreover, the proliferation of offshore activities in the Arctic has transformed the region into a geopolitical arena, emphasising the international importance of protecting the Arctic environment. A prominent example is the Arctic Council, which facilitates discussions directed at the cooperation of the Arctic states in socio-economic matters,[121] but a notable limitation is that the Arctic Council lacks the ability to adopt legislation, rendering the guidelines and assessments it provides non-legally binding and unenforceable. However, considering the lack of a universally applicable treaty, the Arctic Council may provide a viable forum in which to contemplate the establishment of an Arctic regional regime specifically designed to address civil liability claims arising from offshore pollution damage resulting from petroleum development. Collaborative efforts among regional states are crucial to effectively manage the delicate Arctic marine environment and mitigate pollution risks associated with socio-economic development in the region.

Therefore, to summarise the problem statement; while economically vital for Arctic states, offshore petroleum development can cause significant environmental harm, which is exacerbated by the region's harsh conditions and is likely to result in transboundary pollution that affects both nationals and foreign citizens. The absence of a comprehensive international or regional legal framework addressing civil liability, coupled with disparities and complexities in existing domestic civil liability and conflict of laws regimes, creates uncertainty in compensating losses and resolving disputes in the Arctic.

To the best of current knowledge, there is a significant gap in research, as no existing research has used the Arctic region as a jurisdictional context to examine civil liabilities relating to offshore petroleum development. A comparative analysis of the domestic regimes across all

[120] Article 194(1).
[121] The Arctic Council is an intergovernmental forum promoting cooperation, coordination and interaction among the Arctic States, Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular on issues of sustainable development and environmental protection in the Arctic; Arctic Council, 'About' <https://arctic-council.org/en/about/> accessed 29 March 2020.

Arctic states has not yet been done, leaving a substantial void in understanding the adverse implications arising from the lack of a comprehensive regime addressing civil liability for pollution damage resulting from offshore drilling. For instance, existing literature on civil liability related to petroleum development predominantly concentrates on scrutinising how individual oil-producing coastal states handle civil liability claims resulting from offshore drilling.[122] In instances where scholars have adopted comparative perspectives, they commonly utilise the European Union and the European Economic Area to assess the civil liability regimes applicable in individual countries.[123] Alternatively, some studies have compared the framework of a specific country with the legal landscape in the USA post-*Deepwater Horizon*,[124] or have used the polluter-pays principle and precautionary rule as their analytical framework to discuss the lack of an international legal regime on the subject.[125] Other literature has focused on detailing the regulatory mechanisms and licensing regimes implemented by various states.[126]

In the context of the Arctic, existing literature has primarily concentrated on aspects like prevention, technical preparedness, and emergency response actions.[127] Other texts have scrutinised the potential impact of incorporating public policy into the environmental

[122] Eleodoro Mayorga Alba, 'Environmental Governance in Oil Producing Developing Countries: Findings from a Survey of 32 Countries' (2010) World bank OGMC Extractive Industries for Development Series; Amy Aai Sheau Ye 'Commentary: Liability and Compensation Regime for Transboundary Oil Pollution Damage' (2013) 5 AJMOA 59-64 (Using the Malaysian perspective); Alexandra Wawryk and Katelijn Van Hende, 'Civil Liability for Oil Spills from Oil Rigs: The Development of Bilateral and Regional Principles' (2015) 2 LMCLQ 216, 244 (using the Indonesian perspective).

[123] *For example*, BIO by Deloitte, 'Civil Liability, Financial Security and Compensation Claims for Offshore Oil and Gas Activities in the European Economic Area, (2014) Final Report Prepared for European Commission—DG Energy 12 <https://ec.europa.eu/energy/sites/ener/files/documents/BIO_Offshore%20Civil%20Liability_Revised%20Final%20Report%20%2831102014%29.pdf> accessed 2 February 2019; M Faure, *Civil Liability and Financial security for Offshore Oil and Gas Activities*, (Cambridge University press 2016) (using the EU perspective)

[124] *For example*, Ruwantissa Abeyratne, 'The Deepwater Horizon – Some Liability Issues' (2010) 35 Tulane Maritime Law Journal, 125; On April 20, 2010, the Deepwater Horizon, a mobile deepwater offshore platform in the Gulf of Mexico, exploded, resulting in an estimated 4.9 million barrels of oil being spilled into the sea; BP, Deepwater Horizon Accident Investigation Report (2010) <http://www.bp.com/sectiongenericarticle.do?categoryId=9034902&contentId=7064891> accessed 18 March 2017.

[125] Amaduobogha, Simon Warikiyei, 'Adjustment of the International Legal Regime on Regulation of Accidental Pollution from Offshore Petroleum Operations' (PhD thesis, University of Dundee 2012).

[126] Bob Palmer, 'Oil Regulation in 28 Jurisdictions Worldwide' (2015) Getting the Deal Through; Commission Staff Working paper, 'Impact assessment Accompanying the proposal for a Regulation on Safety of offshore Oil and gas Prospection, Exploration and Production activities' (2011) <http://www.ec.europa.eu/energy/oil/offshore/standards_en.htm> accessed 9 March 2019; Violeta S Radovich, 'International Legal Regime of Offshore Structures: Environmental Concerns' 2015 <http://www.comitemaritime.org/Uploads/Young%20CMI/Paper_2_Violeta_Radovich.pdf> accessed 10 April 2019.

[127] *See*, Daria Shapovalova, 'International Governance of Oil Spills from Upstream Petroleum Activities in the Arctic: Response over Prevention' (2019) 34 The International Journal of Marine and Coastal Law 668-697.

management and governance of offshore activities in the Arctic.[128] Some scholars have also focussed on public law issues,[129] examining matters such as state responsibility for preventing transboundary harm and the adherence of states to their international law obligations in the Arctic.

Expanding on this, discussions related to transboundary pollution damage have traditionally centred on state responsibility, often drawing on the *Trail Smelter*[130] arbitration case as a basis for analysis.[131] However, these discussions frequently overlook the crucial role played by non-state actors in pollution damage, particularly multinational corporations engaged in offshore petroleum development and other private entities. Furthermore, existing discourse tends to neglect the examination of whether and under what circumstances claims can be initiated and judgments recognised and enforced by foreign entities in the state where the pollution originates, a common challenge in private international law[132] that has potential ramifications in the Arctic.

While some literature acknowledges the heightened risks in the Arctic due to limited resources to manage a well blowout and the potential impact on its unique ecosystems, surpassing that of the *Deepwater Horizon* incident,[133] there exists a significant gap in the literature examining the effectiveness of diverse domestic civil liability regimes of the Arctic states, for offshore petroleum development. Additionally, there is limited exploration of the applicability of existing international and regional arrangements concerning maritime, environmental, or offshore matters among Arctic-sharing countries in addressing complex issues such as

[128] *See*, Cecile Pelaudeix, 'Governance of Arctic Offshore Oil and Gas Activities: Multilevel Governance and Legal Pluralism at Stake' (2015) Arctic Yearbook.
[129] *For example*, Ognyan Savov, 'The Polluter-Pays Principle in a Transboundary Context-the case of the Arctic Ocean Continental Shelf Oil Production' (2021) 8 The Yearbook of Polar Law 192-209; Rachael Lorna Johnstone, *Offshore Oil and Gas Development in the Arctic under International Law: Risk and Responsibility* (Martinus Nijhoff 2014) 7-11.
[130] *United States v Canada*, 3 UN Rep Int'l Arbitration Awards 1907 (1941) (Where sulphur dioxide emanating from a copper smelter in the town of Trail in British Columbia, was carried by prevailing winds into the State of Washington, leading to the damage of crops, timber, and personal property. The affected parties could not find legal redress in either the US or Canadian courts due to the international nature of the tort, thus the matter was resolved by an international tribunal).
[131] Russell Miller and Rebecca M Bratspies, 'Transboundary harm in International Law: Lessons from the Trail Smelter Arbitration' (2012) Washington and Lee Legal Studies Paper Series (focused on 'the inherent tensions between international liability regimes, which presuppose that harmful conduct will continue, and international prevention regimes, which seek the cessation of harmful activities').
[132] For example, the essays contained in, Campbell McLachlan and Peter Nygh (eds), Transnational Tort Litigation: Jurisdictional principles (Clarendon press, 1996).
[133] Odd G Brakstad and ors, 'Biodegradation of dispersed Macondo oil in seawater at low temperature and different oil droplet sizes' (2015) 93 (1-2) Marine Pollution Bulletin 144-152; Per S Daling and ors, 'Surface weathering and dispersibility of MC252 crude oil' (2014) 87 (1-2) Marine Pollution Bulletin.

pollution damage liability from offshore drilling, aiming to ensure uniformity of practice in the region. Moreover, there is a dearth of literature addressing the potential conflict of laws issues that may ensue, a likely scenario given the transboundary nature of oil pollution. The lack of understanding regarding the timely resolution of such conflicts may impede the prompt execution of clean-up efforts and compensation.

In addressing these critical gaps in the literature, this thesis serves as a significant contribution to the existing body of knowledge by robustly examining the legal landscape concerning the compensation of civil liabilities for offshore petroleum activities in the Arctic. Through comprehensive analysis, this thesis explores the effectiveness of domestic civil liability regimes and the relevance of international and regional agreements in the Arctic context. By unravelling the complexities associated with pollution damage liability, including potential conflicts of laws, this research provides valuable insights that can inform policy decisions and practical approaches regarding creating a comprehensive legal framework, for ensuring timely resolution, efficient clean-up, and fair compensation in the aftermath of offshore petroleum-related incidents in the Arctic region.

Like VanderZwaag argues, 'a firm and comprehensive regulatory and policy responses at the global and extra-regional levels needs to be forthcoming',[134] even more so by the coastal states with territorial claims in the Arctic shelf. The unfortunate reality is that the absence of a comprehensive regional agreement designed to address civil liabilities arising from offshore drilling is a critical concern for the delicate and unique Arctic region. Relying solely on diverse domestic legal approaches for handling pollution damage claims is insufficient, given the inherently transboundary nature of oil pollution. There is a pressing need for proactive measures on establishing a robust regional framework to navigate the complexities of civil liabilities in the context of offshore drilling in the Arctic, and adopting a reactive or inactive stance on this matter should not be considered as a viable option.

1.3 Aims and Objectives of the Research

The overall aim of this thesis, as reflected in the hypothesis below, is to argue that civil liability claims arising from offshore petroleum development in the Arctic should be addressed through the establishment of a robust regional treaty. It contends that establishing such a comprehensive

[134] David VanderZwaag and others, 'Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering while the Arctic marine environment totters' (2002) 30 (2) Denver Journal of International law and Policy 131, 156.

legal regime will discourage Arctic states from unilaterally implementing inadequate and ambiguously defined domestic laws on the subject. Therefore, the thesis' first objective is to definitively demonstrate that current legal frameworks cannot effectively manage civil liability claims in the Arctic.

To achieve this, the thesis:

1. Identifies the key features of an effective civil liability regime.

2. Demonstrates that these features are largely absent in the current international and regional measures for safeguarding environmental integrity in the Arctic, meaning they cannot comprehensively and effectively govern civil liability claims for pollution damage from petroleum development.

3. Uses these features to illustrate disparities in the domestic legal regimes of Arctic coastal states that address civil liability for pollution damage from offshore petroleum development.

The thesis' second objective is to highlight the comparative benefits of a regional arrangement in the Arctic to comprehensively address this issue, over a new or amended global treaty or relying on the individual legal regimes of Arctic states. To this end, the thesis identifies specific areas where consensus can already be found in states' domestic legislation, aiming to demonstrate that working towards a regional approach to improve the management of civil liability claims in the Arctic is feasible.

1.4 Hypothesis

This thesis tests the hypothesis that comprehensive rules on the civil liability of operators in Arctic offshore petroleum development are essential for ensuring prompt and adequate compensation for affected individuals and states in pollution incidents. Implementing a regional legal arrangement provides the most effective and pragmatic solution compared to relying on individual Arctic states' domestic regimes or amending or creating an international agreement.

1.5 Research Questions

To help prove the hypothesis, the following research questions are considered:

1. What constitutes the essential components of an effective civil liability regime that ensures prompt and adequate compensation?

2. Are these essential components of a civil liability regime present in any existing international or regional legal frameworks that address pollution from offshore petroleum development in the Arctic region?

3. Do the domestic civil liability regimes of individual Arctic states contain the necessary components of a civil liability regime, and do the provisions of these laws sufficiently align to address the need for a comprehensive approach concerning losses from offshore petroleum development activities in the Arctic region?

1.6 Research Methodology

The thesis employs both comparative and doctrinal (or black letter) approaches to test the hypothesis. Maritime casualty and pollution cases are highly trans-boundary in nature and given the absence of a comprehensive international regime to govern the prompt and adequate satisfaction of civil liability claims from victims of pollution damage caused by offshore drilling, diverse approaches have emerged among Arctic coastal states. Some states have formulated specialised civil mechanisms to address pollution damage from offshore drilling, while others rely on general tort liability principles within their jurisdiction, often with differing liability limits. The complexity of the diverse practice is particularly evident in instances of oil pollution damage, which have significant trans-boundary implications. This situation necessitates a comprehensive and coordinated response across multiple jurisdictions, highlighting the importance of international cooperation, legal harmonisation, and effective regulatory frameworks to address environmental and socio-economic challenges effectively.

The Arctic region is a compelling example of a maritime region that would benefit from the creation of a comprehensive civil liability regime for reasons mentioned above. Each potential petroleum development project carried out in the Arctic, regardless of what country issues the permit, raises not only technical, environmental and infrastructure issues for the region in general, but also questions regarding whether the domestic laws of the Arctic states can achieve the same standard of prompt and adequate compensation to victims of pollution damage caused by these projects. Private international law issues arising from transboundary pollution adds a further dimension.

Hence, this research necessitates a comparative study. Utilising a comparative research approach allows for the examination and critical evaluation of domestic civil liability frameworks relevant to offshore drilling practices across Arctic states. This comparative research enables a critical evaluation of the key features of a civil liability regime in each Arctic state, highlighting the disparities among the diverse legal systems and facilitating a conflict of laws analysis. This is essential for finding and understanding the key gaps that need to be addressed more comprehensively.[135] Furthermore, conducting a comparative analysis is also key to finding areas of similarity and success in domestic legislation, thereby providing insights as to where consensus may be more readily achieved and how a uniform civil liability regime for the region can be developed.

Eight countries currently lay claim over natural resources in the Arctic: Norway, Sweden, Finland, Russian Federation, USA, Canada, Greenland (Denmark) and Iceland. Each country presents a distinct legal landscape in the absence of international governance on civil liabilities from offshore petroleum development. However, this study limits its comparative jurisdictional analysis to the five littoral countries of the USA, Canada, Greenland, Norway, and Russia. The jurisdictional scope of the thesis has been pragmatically narrowed down to these countries due to their territorial claims in the Arctic Ocean.[136]

Morris and Murphy suggest that comparative legal analysis can take a doctrinal approach or focus on addressing specific social phenomena.[137] In this thesis, employing a doctrinal methodology aids in examining the legal frameworks governing civil liabilities and compensation for pollution damage resulting from offshore drilling incidents internationally and in each Arctic country. This approach allows for a critical examination of the implications of these laws. Accordingly, to gather necessary information, primary and secondary literature sources are thoroughly investigated, encompassing specific and general materials such as relevant legislation, case law, journal articles, research papers, and books across the subject jurisdictions. Additionally, exploring historical instances of offshore drilling incidents with

[135] '…it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system.'; Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (2nd edn, Clarendon Press 1987) 6, 14-15.

[136] Although the subject jurisdiction of this study is limited to five Arctic coastal states, reference is sometimes made to the eight Arctic states that form the region when it is imperative to do so.

[137] Caroline Morris and Cian Murphy, *Getting a PhD in Law* (1st edn, Hart Publishing 2011) 37.

significant oil pollution beyond the Arctic region sheds light on the broader challenges and consequences associated with the offshore petroleum development industry, and allows for a comprehensive assessment of the effectiveness of domestic legal frameworks in addressing such crises.

1.7 Limitation and Scope of Study

The language of legal documents poses a constraint, with Russian, Norwegian, and Danish/Greenlandic laws officially published in their respective languages. Although English translations are utilised in this thesis,[138] it is important to note that most documents assert the primacy of the original text in case of inconsistencies with the English version. Consequently, the English translation may be lacking some legal nuances from the original text. However, this thesis includes clarifications as to words with multiple meanings where necessary.

Also, the goal of this research is not to create a new discourse for all the legal problems associated with oil pollution; therefore, the scope of this thesis is restricted to legal issues relating to the civil liability regime for oil pollution damage from offshore petroleum development activities. Accordingly, this study does not extend to any regime concerning criminal liability, pollution from other deep seabed mining activities, other sources of oil pollution issues, such as oil dumping and vessel spills, or any other matters relating to oil rigs such as drilling contracts or engineering.[139]

Similarly, the core focus of the thesis is on civil liabilities in the context of private law; that is the responsibility of the polluting private person, rather than state responsibility or other responsibilities found under public law, such as administrative or regulatory liabilities. The thesis also does not deeply engage in the topic of recourse liability available to the polluter, except in cases where a legal provision related to compensation owed to private persons is inextricably connected to recourse liability.

Furthermore, this thesis focuses on losses from crude oil, although the work occasionally uses 'oil and gas'[140] and 'hydrocarbons' as synonyms. Likewise, 'petroleum development' refers to engaging offshore facilities such as fixed or floating offshore platforms, offshore drilling

[138] Some translations are official, others unofficially made for student learning purposes, and others have been translated by the author through machine AI sources such as Google Translate.
[139] Except where the aforementioned are related to any legal and civil liability aspect for offshore oil rigs and requires it being referenced.
[140] Although the thesis occasionally makes reference to offshore 'oil and/or gas activities', it largely focuses on the disasters and liability caused by 'crude oil' and does not discuss the legal regime for natural gas disasters.

units, offshore wells and other related offshore installations or construction used for the objective of crude oil exploration, exploitation, and production in the ocean seabed of the continental shelf, commonly referred to as 'offshore drilling'.[141]

Additionally, in many countries, including the jurisdictions under this study, the process of offshore petroleum development begins only when a licensee is granted approval by the relevant government institution to drill in its undisputed maritime area. Accordingly, this study does not envisage civil liability from unlicensed operations. The licensing regimes and contractual agreements for prospecting, exploring, and producing offshore oil and gas in the Arctic countries, may be occasionally discussed where relevant, but not critically analysed.

Lastly, the maritime zones of focus are those in which a coastal state has jurisdiction, and so encompasses incidents which may occur in the EEZ and the continental shelf of a state. Accordingly, this thesis does not examine the exploitation of resources in the high seas and deep seabed (the Area).[142] This is because, the central Arctic Ocean, which includes the largest area of the high seas and the Area in the Arctic,[143] is surrounded by the EEZs and continental shelves of the five littoral Arctic states. Therefore, if liability issues for pollution damage arise in the Area, it will likely be in the context of state responsibility and liability, which is not within the scope of the thesis. However, the thesis may refer to the central Arctic Ocean to argue the possibility of transboundary pollution damage in the Arctic region.

Moreover, as ice melts in the Arctic, the Arctic states may be incentivised to continue to submit multiple and overlapping claims to extend their continental shelves, extending into the central Arctic Ocean.[144] While successful overlapping claims would require delimitation, this has the capacity to transform part of the Area into a maritime zone that falls under national jurisdiction. Current boundaries and claims are illustrated in figures 1 and 2 below. This territorial contention is not addressed in this work, and the focus remains on addressing civil liability issues arising from accidental pollution damage during offshore petroleum development in

[141] Kenneth S Schmitz, 'Ecology' (2008) Physical Chemistry 5-6.5.
[142] UNCLOS Part VII addresses the High seas and Part XI addresses the use of the Area; a detailed outline of the UNCLOS maritime zones is contained in chapter three of the thesis.
[143] Arctic Council, 'Exploring the Arctic Ocean: The agreement that protects an unknown ecosystem' (*Arctic Council*, 28 October 2020) <https://arctic-council.org/news/exploring-the-arctic-ocean-the-agreement-that-protects-an-unknown-ecosystem/> accessed 11 July 2021.
[144] UK Parliament, *International Relations and Defence Committee UNCLOS: the law of the sea in the 21st century* (2022) HL Paper 159 [155] <https://publications.parliament.uk/pa/ld5802/ldselect/ldintrel/159/15907.htm#footnote-251> accessed 1 April 2021.

these territories, though these claims are used to further highlight the need for a comprehensive Arctic regime.

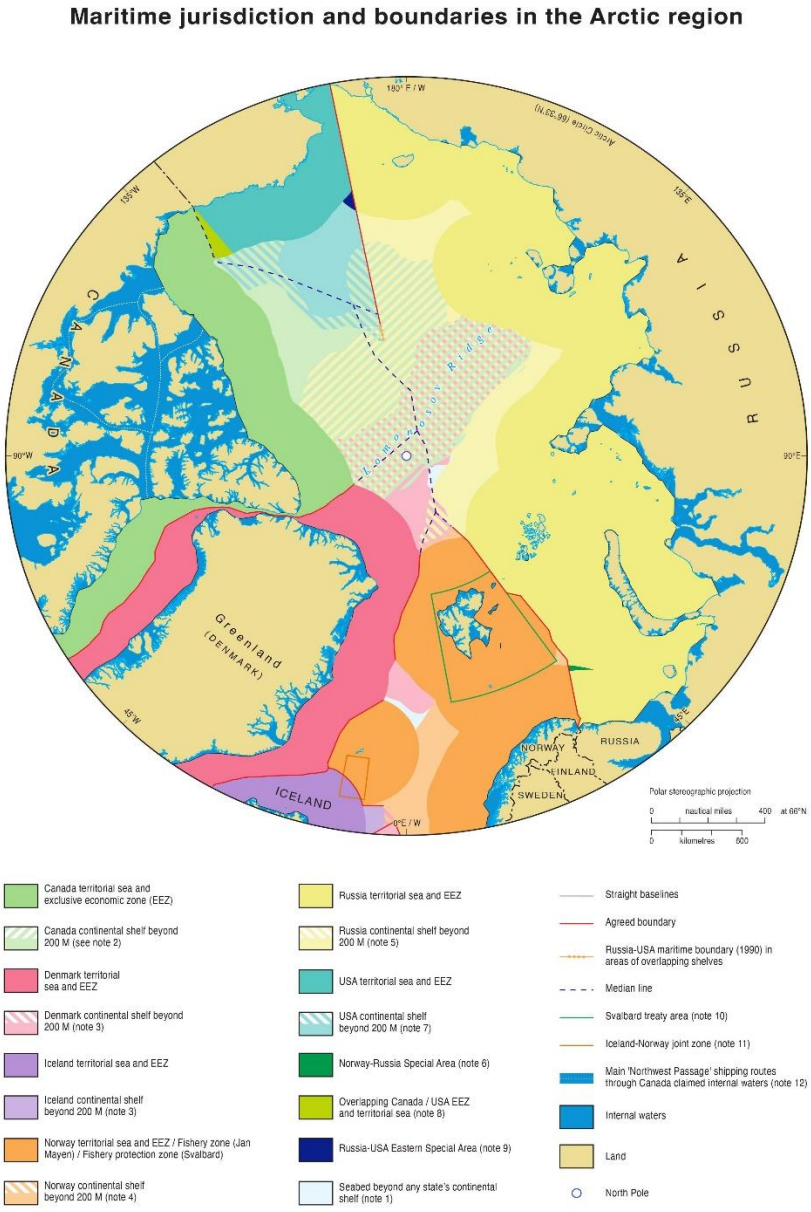

Figure 1 – Map of the Arctic showing the maritime boundaries as of January 2024[145]

[145] Source: IBRU Durham University (January 2024) <https://www.durham.ac.uk/research/institutes-and-centres/ibru-borders-research/maps-and-publications/maps/arctic-maps-series/> accessed 7 March 2024; briefing notes <https://www.durham.ac.uk/media/durham-university/research-/research-centres/ibru-centre-for-borders-research/maps-and-databases/arctic-maps-2024-january/Briefing-notes-for-IBRU-Arctic-map-series-January-2024.pdf> accessed 7 March 2024.

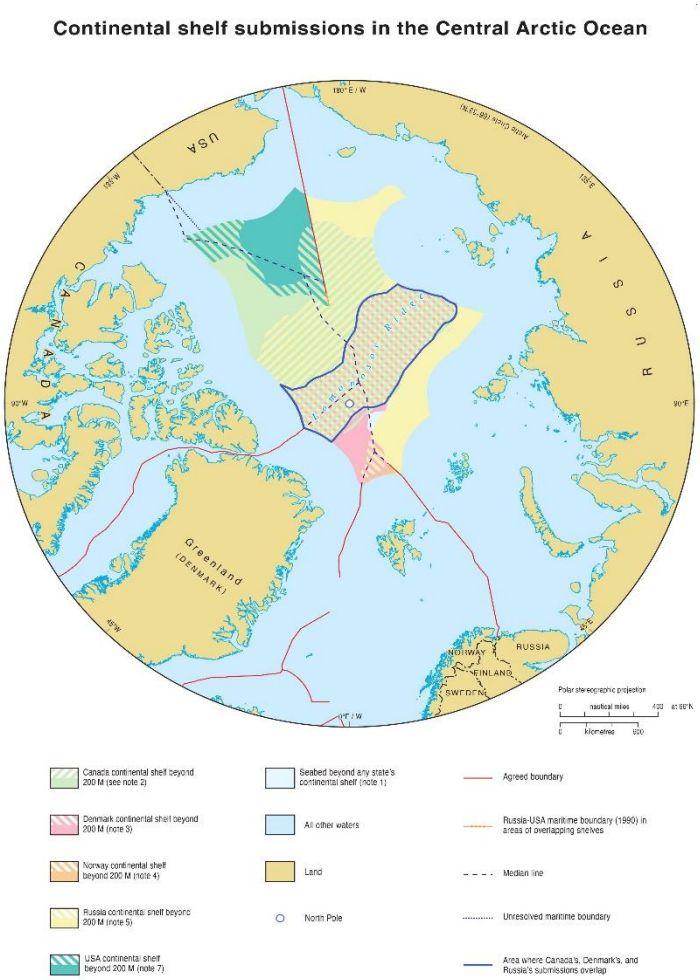

Figure 2 – Continental Shelf submissions in the Central Arctic Ocean as of January 2024[146]

1.8 Thesis Structure

The thesis comprises six chapters. The first chapter is this introduction, which affirms the ecological significance of the Arctic marine environment and explains how climate-induced ice melt may be incentivising the exploitation of new resources. It provides an overview of the increasing energy, maritime, and commercial activities in the region and the current state of offshore petroleum development, also clarifying the impacts of oil pollution on the marine environment and individuals. This sets out a clear rationale as to why effective civil liability rules, which facilitate prompt and adequate compensation and expedite clean-up, are needed in the Arctic in particular.

[146] Ibid.

Chapter two establishes the theoretical framework underpinning the thesis, which is primarily grounded in tortious liability. The chapter explores leading approaches and theories within the evolution of tort law, interrogating the objectives of tort law and analysing the contemporary application of effective civil liability regimes that serve as mechanisms for compensating and cleaning up damages resulting from legal ultra-hazardous activities with socio-economic implications. Using this theoretical framework, the chapter definitively identifies key features that are necessary in any tort-based civil liability regime that seeks to effectively address pollution damage. This directly addresses the first research question.

Chapter three analyses relevant international law, encompassing multilateral and regional treaties that broadly address offshore oil pollution issues. In doing so, the chapter assesses whether there are rules in international law that may be applicable to compensating losses arising from offshore petroleum development activities in the Arctic shelf. The chapter also considers other measures such as industry-led agreements that may influence the pursuit of civil liability claims in the Arctic region. This analysis answers the second research question by conclusively highlighting that the key features of an effective civil liability regime cannot be found in any international or regional arrangement for offshore petroleum development, both on a global level and, more specifically, in the Arctic region. This deficiency highlights a significant gap in international law concerning the comprehensive governance of marine oil pollution, and the imperative need for swift and effective compensation and clean-up in the Arctic region, in accordance with UNCLOS obligations.

Chapter four analyses the domestic civil liability regimes of the littoral Arctic countries (USA, Canada, Greenland, Norway, and Russia) concerning pollution damage from offshore petroleum development activities. Employing a comprehensive comparative analysis, the chapter evaluates the adequacy of national laws regarding civil liability for pollution damage against the background of the key features identified in chapter two of the thesis. The chapter exposes inconsistencies in the legal frameworks of the Arctic coastal states, highlighting that claims may be handled in fundamentally different ways depending on the state. The findings of this chapter partly address the third research question. However, the robust analysis also enables identification of similarities across the domestic regimes, which benefits the development of proposals and recommendations at the end of the thesis, given that it pinpoints existing areas of accord between states.

The interconnectedness and the geography of the Arctic means that there is a high potential for transboundary pollution damage, which may involve issues of private international law. Therefore, chapter five builds on the comparative analysis in chapter four by examining how questions of conflict of laws might be dealt with by domestic regimes and what influence this could have on transboundary claims for pollution damage resulting from offshore petroleum activities in the Arctic. This includes an examination of how Arctic states address court jurisdiction, choice of law, and the recognition or enforcement of judgments, which are also identified as integral aspects of a comprehensive civil liability regime in chapter two. This chapter conclusively addresses the third research question, concluding that while each Arctic state has a framework for managing private international law issues, significant disparities exist in their approaches. The discrepancies pose a notable challenge in ensuring timely and sufficient compensation for losses in the aftermath of an oil spill incident in the Arctic.

Chapter six summarises the findings and the conclusions drawn throughout the thesis in order to directly answer the research questions and prove the hypothesis. Having conclusively identified that legal gaps and inconsistencies prevent the efficient management of claims, chapter six reinforces the need for a comprehensive legal framework that guarantees prompt and adequate compensation in the Arctic region. First, the chapter considers previous attempts to create a comprehensive international regime for civil claims arising from offshore oil spills from petroleum development operations and reflects on the reasons why this was unsuccessful. Consequently, the chapter identifies and considers three proposals to move forward: modifying existing international law, creating a region-specific civil liability treaty, or creating a regional agreement to govern conflict of laws issues that arise when compensating losses from offshore drilling. The recommendation of a regional arrangement conclusively proves the hypothesis.

CHAPTER TWO

THEORETICAL FRAMEWORK OF STUDY: TORT LIABILITY

2.1 Introduction

Abend and Swanson define 'theoretical framework' as 'the structure that can hold or support a theory of a research study.'[1] According to them, theories are 'formulated to explain, predict, and understand phenomena and, in many cases, to challenge and extend existing knowledge within the limits of critical assumptions',[2] while a theoretical framework 'introduces and describes the theory which explains why the research problem under study exists.'[3] In other words, the theoretical framework explains the perspective or approach taken by the thesis to address the identified gap. In the same manner, legal theory serves as a crucial tool for enhancing the comprehension of specific areas of the law. This enhanced understanding, in turn, empowers legal practitioners to adapt effectively to the evolving landscape of legal practice.

This thesis is rooted in tort law; therefore, this chapter explores the development of tort liability, particularly its dynamic relationship with contemporary civil liability regimes. To achieve this, the chapter conducts a brief examination of legal theories that articulate the underlying objectives of tort law, alongside an exploration of the theoretical frameworks advocated by their proponents. By aligning with a specific theoretical standpoint, this chapter then analyses civil liability regimes, treating them as a natural extension of tort law. In doing so, it seeks to provide a thorough understanding of the concept of civil liability and identify the key features inherent in such regimes. This exploration is crucial for laying the groundwork for the subsequent and main argument in this thesis, which advocates for a comprehensive approach to civil liability in the context of offshore spills. This chapter also addresses the first research question; what are the key features of an effective civil liability regime that ensures prompt and adequate compensation?

[1] Gabriel Abend, 'The Meaning of Theory' (2008) 26 (2) Sociological Theory 173; Richard A Swanson, *Theory Building in Applied Disciplines* (Berrett-Koehler 2013) 3.
[2] Ibid.
[3] Ibid.

2.2 Origins and Diversity of Civil Wrong Systems: A Brief Look at Common Law and Civil Law Perspectives

Tort law, fundamentally a branch of private law, is concerned with addressing interpersonal wrongs.[4] Unlike contractual obligations, which are typically undertaken voluntarily, tortious obligations are not assumed consensually.[5] However, it is noteworthy that parties in private transactions may employ tort law as a foundation for contractual arrangements. The common law tort system, rooted in medieval England, is a legal framework primarily shaped by judge-made precedents that have evolved into established laws over time.[6] In contrast, the civil law delict system traces its origins to ancient Roman law, specifically the *lex Aquilia*, which originated in mainland Europe.[7] This system focuses on codified laws governing damage unlawfully inflicted (*damnum iniuria datum*) to property and wrongful property loss.[8] Over the centuries, various jurisdictions around the world have developed their current civil wrong systems by drawing from either the common law or civil law traditions, or by blending elements from both systems.[9]

For instance, the United States has developed its tort system from English common law, while Canada's system is a blend of English common law and French civil law, which applies particularly in Quebec. Scots law of delict draws from both the Scandinavian civil law and English common law traditions. South Africa and Israel also have mixed delictual systems, incorporating elements from both common and civil law. China and Japan have also adopted the European civil code system. This demonstrates the global influence and adaptability of legal systems across different regions.

Atiyah[10] comments that in England and Wales, until the nineteenth century and the birth of the 'industrial revolution', incidents giving rise to loss, discomfort, or those relating to the interference to the use and enjoyment of properties caused by pollution from technologies and

[4] Arthur Ripstein, 'Theories of Common law of Torts' (2022) The Stanford Encyclopaedia of Philosophy <https://plato.stanford.edu/archives/sum2022/entries/tort-theories/> accessed 25 December 2022.
[5] Ibid.
[6] Frederick Pollock, *The Law of Torts*, (Stevens and Sons Ltd 13th edn, 1929) 1.
[7] Cees van Dam, *European Tort Law*, (2nd edn, OUP 2013) 3, 5; For a detailed examination of the development of delictual systems see generally Christian von Bar, *The Common European Law of Torts: Volume one* (OUP 1998) 13-258 and Gert Bruggemeier, 'The Civilian Law of Delict: A Comparative and Historical Analysis' (2020) 7 European Journal of Comparative Law and Governance 339-383.
[8] Ibid.
[9] Jean Georges Sauveplanne 'Codified and Jugde Made Law: The Role of Courts and Legislators in Civil and Common law Systems' (1982) 45(4) Mededelingen Der Koninklijke Nederlandse Akademie Van Wetenschappen, Afd Letterkunde Nieuwe Reeks 95, 96; Gert Bruggemeier, 'The Civilian Law of Delict: A Comparative and Historical Analysis' (2020) 7 European Journal of Comparative Law and Governance 339, 324-343.
[10] Patrick S Atiyah, *The Rise and fall of Freedom of Contract: Part I The Beginnings of Freedom of Contract: The Story to 1770* (OUP 1985) 6-14.

inventions were rarely governed by statute or other regulatory mechanisms, thus cases of that nature had to be settled by the courts.[11] Subsequently, as the English judge made laws developed, it became the norm for the courts in other jurisdictions to take examples from the procedures of common law to settle private disputes arising from pollution.[12]

2.2.1 The Role of Civil Liability Regimes in Addressing Torts

Despite the common law origin of the term 'tort', contemporary usage has expanded to use it conventionally in the context of granting civil remedies in response to economic and social disputes in various regional or continental legal frameworks.[13] The umbrella use of the term 'tort' has also come to be the case due to the influence of international law systems on national laws, and likewise the proliferation of transborder political and business relations.[14] This study adopts the same idea and uses the term 'tort' as an umbrella terminology to also include earlier delict system found in the European civil codes.[15] This expansion highlights the interconnected nature of legal concepts across regions and the global evolution of legal terminology.

Some authors have submitted that this has become so mostly because of the civil wrongs that the different legal systems have in common and the solutions to the civil wrongs.[16] Therefore, there is a shared understanding of addressing civil wrongs, with a focus on compensation duties, protection of individuals' interests, loss distribution, and prevention of harm from socio-economic activities. The commission or omission of these actions may result in civil liability,[17] irrespective of the jurisdiction or legal tradition, which emphasises a universal concern for accountability and justice.

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[11] Ibid.

[12] Ibid, 13-14; Some have argued that common law courts 'embraced Roman law principle of sic utere tuo ut alienum non laedas (sic utere) that no person has a right to cause significant, foreseeable harm to others' and that this was used in the case of *Tenant v Goldwin* (1704) 2 Ld Raym 1089 ('requiring that every man must so use his own as not to damnify another'). This is known in tort as the 'duty of care'. However, the debates surrounding of the origins of this obligation (or of the 'law of obligation' generally) exceeds the scope of the thesis; See R V Percival, 'Liability for Environmental Harm and Emerging Global Environmental law' (2010) 25 Maryland Journal of International Law 37, 39; *For 'law of obligations' generally see*, Patrick S Atiyah, *The Rise and fall of Freedom of Contract: Part I The Beginnings of Freedom of Contract: The Story to 1770* (OUP 1985).

[13] Sandra Zellmer, 'Pre-emption by Stealth' (2009) 45 Houston Law Review 1659, 1673; Margaret Jane Radin, 'Compensation and Commensurability' (1993) 43 Duke Law Journal 56, 71-72; Douglas Wood, 'The law of Tort' in *Law and the Built Environment* (Red Globe Press 1999*)* 92

[14] van Dam (n 7) 5-6.

[15] This is also to escape the broadness of 'civil wrongs', which includes other areas such as law of contract, or administrative law. Nonetheless, this study may also make specific reference to 'delict' when seeking to emphasise on certain features found only in the civil law system of Roman law.

[16] n 7.

[17] The thesis employs the use of the phrase 'civil liability' to denote liability that arises from the commission of a tort.

In summary, ‘tort’ represents civil wrongs historically established through common law case precedents, however, over time, codified civil wrongs leading to potential civil liability, now fall under the umbrella term ‘tort’. While various activities may give rise to civil liability, this thesis primarily explores the act of pollution, and specifically focuses on pollution damage resulting from offshore petroleum development. A central contention of this thesis asserts that compensating pollution damage caused by offshore petroleum development is more effectively achieved through the creation of a civil liability regime. This is because civil liability regimes provide a more specialised and precise approach to tackling the uniqueness, complexities and nuances of such cases compared to a reliance on general tort principles.

By advocating for the use of civil liability regimes, this thesis argues that the specificity of such regimes, allows for streamlined processes and clearer guidelines in determining liability and assigning responsibility. This advocacy for civil liability regimes extends beyond academic discourse; it holds the potential to influence industry practices, regulatory frameworks, and risk management approaches. Moreover, the recognition of statutory civil wrongs as part of the broader category of ‘torts’, and incorporating statutory elements alongside common law principles to address issues like pollution from offshore petroleum development signifies a legal evolution and the adaptation of legal systems to modern challenges.

As this thesis explores the features of civil liability regimes and their implications for addressing pollution damage from offshore petroleum development, it is essential to contextualise these insights within the theoretical frameworks of tort law. The subsequent section will explore the theoretical frameworks that underpin the aims of tort law, presenting various perspectives, dichotomies, and leading theories. The aim of examining the theoretical underpinning is to gain a deeper understanding of how tort law operates, its fundamental objectives, and the diverse perspectives that shape its evolution. Therefore, this theoretical exploration will provide a robust foundation for comprehending the intricacies of civil liability in the context of pollution and further inform the thesis’ analysis of the effectiveness of civil liability regimes in addressing the challenges posed by offshore petroleum development.

2.3 Theoretical Perspectives and Objectives in Tort Law

As remarked by Wigmore, ‘every institute and principle of law has a philosophy—as every object in the sun has its attendant inseparable shadow.’[18] Evidenced by a robust body of

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literature,[19] the landscape of tort law theories remains dynamic, giving rise to a multitude of dissimilar interpretations.[20] As a result, various theories have been formed that approach the subject of the aim of tort law through either analytical or normative perspectives.[21] Those adopting an analytical perspective seek to interpret tort law by identifying its substantive norms and classifying its structural characteristics. This involves scrutinising wrongs recognised by tort, remedies provided, and mechanisms for enforcing these norms. Notably, this perspective is often embraced by civil recourse theorists. Conversely, scholars adopting a normative perspective seek to justify or reform tort law, often proposing changes to enhance its efficacy. This involves considering both legal and non-legal influences that have shaped the law in question, in order to justify its existence or to advocate for its reform.[22] Economists frequently employ this normative perspective in their analysis of the aim of tort law.

Another dichotomy emerges concerning whether the aim of tort law is viewed as instrumental or non-instrumental.[23] Proponents of the instrumental view see tort law as a mechanism for implementing social policies, such as the fair distribution of accident costs across society.[24] Distributive justice theorists often employ this perspective. On the other hand, non-instrumentalists focus solely on the moral imperative of tort law, emphasising compensation and repair between the injurer and the victim.[25] Corrective justice theorists assert this view. It is not within the scope of the thesis to scrutinise every theory developed under the different perspectives. However, in setting out a well-grounded theoretical framework against which the hypothesis of the thesis can be tested, a brief discussion on the four key theories of tort law and its aim is necessary: economic theory, distributive justice, corrective justice, and civil recourse as the leading schools of thought.

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[19] Such as retributive justice theory, legal pluralism, mixed-pluralism and so forth; Abel Richard, 'A Critique of Torts' (1990) 37 UCLA Law Review 785-830 (gives an insight into other legal philosophies of tort); *See also*, Jules Coleman and ors, 'Theories of the Common Law of Tort' in *Stanford Encyclopaedia of Philosophy* (The Metaphysics Research Lab Stanford 2015) 3.1.1-3.1.3 <https://plato.stanford.edu/entries/tort-theories/#CorJus> accessed 31 January 2021.

[20] Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 3, 5; John C P Goldberg, 'Twentieth Century Tort Theory' (2003) 91 Georgetown Law Journal 513, 580.

[21] Broadly speaking, this goes back to the philosophy of law (or jurisprudence) which is divided into analytical and normative schools, used in answering the question of 'what is law?'; Edward N Zalta, 'The Nature of Law' (2015) The Stanford Encyclopaedia of Philosophy <https://plato.stanford.edu/archives/fall2015/entries/lawphil-nature/> accessed 25 December 2022.

[22] Sometimes instrumentalists are referred to as externalist, and non-instrumentalists called internalist; *See* Michael L Rustad' Twenty-First-Century Tort Theories: The Internalist/Externalist Debate' (2013) 88(2) Indiana Law Journal 419-449 (using the internalist and externalist perspective).

[23] Ibid.

[24] Ibid.

[25] Ibid.

a. Economic Efficiency

The economist analysis of tort law has been the subject of rigorous and diverse debates,[26] and those who favour this theory view the goal of tort law from a normative perspective. The most dominant school of thought under this theory is that the aim of tort law is for wealth maximisation of social resources, by minimising the sum of 'the costs of accidents and the costs of avoiding them' and also offering a deterrence incentive for intentional or negligent accidents.[27] Calabresi's[28] argument supports this perspective, asserting that society implicitly accepted the inevitability of accidents by permitting activities with potential harm, like driving. The aim of tort law, according to this theory, is to analyse permissible risk, preassign liabilities to reduce expected accident costs, minimise the expenses of precautions taken by both the wrongdoer and the victim, and reduce administrative liability costs.[29] In simpler terms, economists equate legal liabilities, including those under tort law, are similar to concepts like taxes or licensing fees found in regulations in the form of levies.

However, a potential issue arises with this analogy as levies and liability differ in their connotations and consequences. Levies impose costs without necessitating wrongdoing, while liability holds a party accountable for a wrongdoing. It can be argued that this perspective may be suitable for viewing liability costs as administrative penalties for committing a tort,[30] but such penalties often go to the government and may not encompass losses suffered by private parties.

Nonetheless, there are other economic theory scholars[31] who favour a less interventionist approach of tort law that would allow the parties to create their own solutions to such problems

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[26] Richard Posner and William Landes are notable for being the leading proponents of the economic view. The scholars contend that the law of torts is best explained as a system for maximising wealth of the society; William A Landes and Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987); Richard A Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) 25; Richard A Posner, 'Instrumental and Non-instrumental Theories of Tort Law (2013) 88 Ind Law Journal 469.

[27] Posner writes that '…the common law of torts is best explained as if the judges who created the law through decisions operating as precedents in later cases were trying to promote efficient resource allocation.'; Richard A Posner, 'An Economic Theory of Intentional Torts' (1981) 1 International Review of Law and Economics 127, 130-132.

[28] Guido Calabresi, 'The Decision for Accidents: an approach to non-fault allocation of costs' (1965) 78(4) Harvard Law Review 713-745.

[29] Richard A Posner, 'Instrumental and Non-instrumental Theories of Tort Law (2013) 88 Ind Law Journal 469; Richard A Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) 25.

[30] For example, damage to the environment itself and costs and expenses incurred to mitigate damage to the environment.

[31] Such as Ronald Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1-3, 41-44 <https://www.law.uchicago.edu/files/file/coase-problem.pdf> accessed 23 January 2022 and Robert Cooter and Thomas Ulen, *Law and economics* (Addison-Wesley 1997) 171.

regardless of any court-imposed solution. For example, in a case of environmental pollution where an injunctive relief is granted by the court, economists such as Veljanovski[32] consider the injunctive relief as an instruction to the disputing parties to bargain and a starting point for negotiations, rather than a prohibition on the continuance of the polluting activity.[33] While this approach may work in certain torts like defamation, slander, trespass to land, and property rights, its practicality is questionable, because expecting consistent negotiation, especially in complex cases impacting numerous victims like pollution, oversimplifies the resolution process. In such cases, the matter often returns to court, where settlement through damages may be favoured.

In any case, while the different versions of economic theory offer advantages, such as creating regimes that discloses potential financial liabilities, a notable absence is the emphasis on justice, which a fundamental tenet of law. Thus, tort law itself should be rooted in a broader notion of justice rather than solely relying on wealth maximisation.

b. Distributive Justice

The proponents of distributive justice theory view tort law as an instrument for addressing the allocation of losses, with a focus on fair or efficient distribution of accident costs.[34] This approach entails allocating loss based on external factors, such as the financial status of the parties involved.[35] This theory asserts that tort law, by determining when a loss should be borne by the defendant rather than the plaintiff, inherently deals with distribution issues.[36] It expands the scope beyond just the victim and injurer, suggesting that liability costs for an accident may

[32] Cento Veljanovski, 'Legal theory, Economic Analysis and Tort' in William Twinning (ed) *Legal Theory and Common Law* (Oxford Basil Blackwell 1986) 127; In rendering an analysis of *Bellew v Cement Co Ltd* (1948)1 IR 61 (where the court granted a three month injunction against the only cement company in the Irish Republic at that time to halt the emission of dust and noise from its cement works. Highlighting that the law will not enjoin the claimant to put up with harm, because the nuisance caused by the defendant is for the benefit of the wider community), Veljanovski argues that in situations similar to the case, court granted injunctions are not 'a final solution which imposes on the parties some immutable set of consequences, but the starting points for negotiations between the disputing parties.'

[33] Similarly, in *Jaggard v Sawyer* [1995] 1 WLR 269, 287-288, the court may have also used this economic rationale in its decision to grant injunction in lieu of damages against the defendant's liability for trespass, caused by a building upon a land making use of a private right of way.

[34] Harry Street, *The Law of Torts* (Butterworths 1976) 6.

[35] *See* Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 Yale Law Journal 499-553 (who writes in detail about the theory of distributive justice); *Likewise,* Ken Cooper-Stephenson, 'Corrective Justice, Substantive Equality, and Tort Law', in Ken Cooper-Stephenson and Elaine Gibson (eds) *Tort Theory* (1993) 48 (who writes that distributive justice is independent of corrective justice).

[36] Ibid, Calabresi.

fall on the financially viable party or on the party capable of spreading the loss to society, given that society benefited from the activity leading to the accident.[37]

Further, since tort law determines the circumstances where a loss should be borne by the defendant rather than the plaintiff, it therefore involves issues of distribution.[38] Consequently, tort law ought to accommodate societal preferences when faced with distributing such losses. These preferences, which include factors like insurance presence, moral considerations, and political philosophies, are often reflected in the merit-based criteria applied by decision-makers.[39] However, a nuanced viewpoint is offered by Shmueli,[40] asserting that while loss distribution is a central concept to distributive justice theory, it should not be considered the core objective of tort law. Instead, it should be viewed as a technique employed by tort law to achieve its ultimate goal of compensation, akin to the optimal deterrence mechanism employed by economic theorists.

Although the advantage of distributive justice theory in tort law includes its focus on fair and efficient allocation of accident costs, considering external factors such as financial status, and extending beyond victims and injurers to address distribution issues in a societal context. However, a present limitation in the distributive justice theory is that it may overemphasise distribution, potentially neglecting other crucial aspects of tort law and may raise questions about whether the theory adequately addresses the broader objectives of justice and compensation. Furthermore, the incorporation of societal preferences as criteria for distributing losses introduces subjectivity into decision-making, and depending on prevailing societal views, this approach may not always align with fundamental principles of justice or fairness. Moreover, Shmueli assertion that loss distribution should not be considered the core objective of tort law, challenges the theory's ability to fully encompass the multifaceted goals of tort law.

[37] Benjamin Shmueli 'Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice' (2015) 48(3) U of M Journal of Law Reform 747, 753.
[38] Gert Bruggemeier, 'Perspectives on the Law of Contorts: A Discussion of the Dominant Trends in West German Tort Law' (1983) 6 (2) Hastings International and Comparative Law Review 355, 360-362 (discussing Esser's point of view on liability law).
[39] Izhak Englard, *The Philosophy of Tort Law* (Dartmouth Publishing 1993) 11.
[40] Ibid 754.

c. Corrective Justice

The corrective justice analysis of tort law, recognised as the most influential non-economic theory,[41] utilises an analytical perspective. It places importance on the moral duty of one party to compensate the other for a wrongdoing. In simpler terms, this perspective aims for justice to be served and the scales of fairness to be balanced. Weinrib,[42] acknowledged as the foremost contemporary scholar of corrective justice,[43] posits that the primary objective of tort law is to restore the *status quo ante* of the injured by compensation or repair, and is the idea that liability rectifies the injustice inflicted by one person on another.[44] This is done by establishing first and second-order duties, whereby the former prohibits certain conducts that violate the rights of others or prohibits the inflicting of injury upon another, while the latter embodies the duty to compensate or repair. Therefore ideally, the second order duties would be triggered by failure to observe the first order duties.

To put it in another way, tort law creates a duty to take care when carrying out an activity, which is the first order duty, and if the duty to care is not observed and results in an injury, then it would result in a duty to compensate the victim or to repair the damage done, which is the second order duty. Therefore, the aim of tort law is to compensate what it considers to be a wrong,[45] that is, a breach of the first order duty. This supports Beaver's[46] argument that 'if tort is a law of wrongs, we might also argue that it is a law of remedies'.

In addition, corrective justice theorists limit the application of these objectives of tort to just two parties.[47] Looking at tort law from this perspective undoubtedly helps us identify two other features of tort, which is linking the injurer and the victim, and also emphasising the duty of the one who inflicts the injury to repair the loss caused by his conduct.[48] Further, unlike the economic theory, tort liability in the corrective justice theory is not simply limited to cost

[41] Jules Coleman and ors, 'Theories of the Common Law of Tort' in *Stanford Encyclopaedia of Philosophy* (The Metaphysics Research Lab Stanford 2015) 3.1<https://plato.stanford.edu/entries/tort-theories/#CorJus> accessed 31 January 2021.
[42] Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 3, 20.
[43] *See also* Benjamin Shmueli 'Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice' (2015) 48(3) U of M Journal of Law Reform 747, 752 (authors alluding to Weinrib being the prominent corrective justice theorist); Coleman and ors, (n 41) 3.1.
[44] Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) The University of Toronto Law Journal 349.
[45] Dan B Dobbs, *The Law of Torts* (2000) 10, 15.
[46] Allan Beaver, *A Theory of Tort Liability* (Hart Publishing, 2016) 2.
[47] Englard (n 39) 220-221.
[48] Weinrib alludes to this, while arguing that this was also Aristotle's original intention with the idea of 'corrective justice' *in*, Ernest J Weinrib, 'Corrective Justice' (1992) 77 Iowa Law Review 403, 410.

shifting, but also includes some elements of justice for the victim. This theory arguably best reflects the corrective principles found in the historical origins of common law.[49]

However, a limitation of the corrective justice theory is that it largely focuses on loss suffered by an individual, which are private losses such as damage to property or loss of chattels. This means that tort law when looked at from this perspective alone cannot be an enforcer of public interests, such as environmental damage.[50] Further, contemporary torts such as mass torts affecting multiple people which may lead to a class action suit are incompatible with the traditional corrective justice theory of tort being between two parties.[51]

d. Civil Recourse

Civil recourse analysis aligns with the corrective justice premise that tort law establishes a wrong or duty not to cause harm (first-order duties) between two parties.[52] However, they diverge from the notion that tort law inherently generates a second-order duty to remedy the wrong.[53] Instead, they posit that the objective of tort law is to provide a 'legal power' to the victim, empowering them to choose whether to pursue redress against those who have wronged them.[54] In essence, these theorists argue that when the law deems an act wrongful, the act itself and the ensuing injury constitute the same wrong and fall under the same duty. Consequently, tort law is not concerned with whether an injury results from the wrongful act, and justice is administered without requiring proof of harm to the parties involved.

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[49] An example of such justice seen in earlier common law were through forms of action which sought to restore *disseised* interests. Although argued to have originated in the 12th century when it was used by the Royal courts the to settle instances where one is deprived of *seisin* (that is, their legal hold of a freehold interest in land), which then influenced the common law courts in the 14th century, but now loosely understood to mean forcefully or wrongfully take possession of someone's property or more commonly known as damages for trespass or interference; Donald W Sutherland, *The Assize of Novel Disseisin* (Clarendon Press, 1973) 175; For a detailed discussion on *seisin* and *desseised* see George E Woodbine, 'The Origins of Trespass' (1924) 33(8) Yale Law Journal 799-816.

[50] Izhak Englard, *The Philosophy of Tort Law* (Dartmouth Publishing 1993) 46, 98.

[51] Ibid, 222-223.

[52] Benjamin Zipursky and John Goldberg are stated to be the proponents of this theory; Michael L Rustad 'Twenty-First-Century Tort Theories: The Internalist/Externalist Debate' (2013) 88(2) Indiana Law Journal 419, 421-422; R A Posner, 'Instrumental and Non-instrumental Theories of Tort Law' (2013) 88(2) Indiana Law Journal 469, 469-470.

[53] John C P Goldberg and Benjamin C Zipursky, 'Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties' (2006) 75 Fordham Law Review 1563, 1580; John C P Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88(5) Texas Law Review 917-986.

[54] Larry Reibstein, 'Rethinking Tort Law: Professor Benjamin Zipursky's Civil Recourse Theory Moves to a Leading Position in American Tort Theory' (2012) Fordham Law Journal 12-14; *See* Benjamin C Zipursky, 'Rights, Wrongs and Recourse in the Law of Torts'(1998) 51 Vanderbilt Law Review 1 (introducing the view of civil recourse theory); *Likewise,* Benjamin C Zipursky 'Civil Recourse, Not Corrective Justice' (2003) 91 The Georgetown Law Journal 695, 697-699 (the author advances the theory of civil recourse being the underlying feature of tort law).

The civil recourse theory introduces a nuanced perspective by emphasising the empowerment of the victim within tort law. By framing the objective of tort law as the creation of a 'legal power' for the victim, this theory recognises and promotes individual agency. Victims can choose whether or not to pursue redress against those who have wronged them. This grants the victim autonomy and control over the legal proceedings, allowing them to choose the course of action that aligns with their preferences and circumstances. In doing so, the theory introduces a flexible and personalised approach to the resolution of tortious wrongs.

However, a key limitation lies in its potential to underemphasise or overlook the actual consequences of a wrongful act. By not requiring a consideration of whether an injury has occurred, the theory may neglect the tangible harm experienced by the victim. In situations where a wrongful act leads to significant harm, the theory's focus on the act itself might not fully align with societal expectations of justice, which often involve addressing and compensating for actual consequences. Additionally, the theory's reliance on the victim's discretion to exercise legal power may introduce challenges in cases where victims face power imbalances, financial constraints, or other factors that limit their ability to pursue redress effectively. This could result in situations where certain wrongs go unaddressed due to practical obstacles faced by victims. Further, the approach may raise questions about the uniformity and predictability of justice, as outcomes become contingent on the individual choices of victims.

2.3.1 Towards a Pluralistic Understanding of the Objectives of Tort Law

In the preceding discussion on tort law theories, what is prevalent is the assertion of oversimplified and monistic perspectives on the aims of tort law. The terms 'monism' and 'pluralism' are drawn from the realm of philosophy, where monism champions a single element as the primary determinant,[55] and pluralism asserts multiple fundamental substances or principles,[56] and rejects the idea of a universally valid single perspective or truth.[57] Applied to the thesis, monistic theories argue that the entirety of tort law can be encapsulated by one dominant function, while pluralism highlights the impracticality of reducing the unique and complex goals of tort law to one aim. Recognising the multi-faceted nature of torts, this thesis

[55] Dictionary.com, 'Monism' <https://www.dictionary.com/browse/monism>
[56] Dictionary.com, 'Pluralism' <https://www.dictionary.com/browse/pluralism> accessed 22 December 2022.
[57] Nicholas Rescher, *Pluralism: Against the Demand for Consensus* (Oxford Clarendon Press 1995) 1, 2-3.

contends that a complete summary of the aim of tort law cannot be achieved through monistic theories alone.[58]

Given these considerations, the thesis advocates for a more inclusive exploration of the aims of tort law, embracing a pluralistic approach. This involves recognising the diversity present in legal landscapes and acknowledging the complexities inherent to various types of torts. Authors like Shmueli advocate for the evolution of tort scholarship towards 'identifying or creating harmony between different goals'.[59] Similarly, authors like Englard argue that tort law should be complementary.[60] Their perspective does not seek to establish a new theory of tort law, but advocates for a holistic approach that captures the aim of tort law that is asserted by the four leading theories: the moral duty to compensate or repair a wrong, wealth maximisation, deterrence, and the fair distribution of losses in society.[61] Thus, their views align with the contention for a pluralistic understanding of the aim of tort law.

Several other scholars have also argued in favour of a pluralistic approach to the aim of tort law.[62] However, this thesis finds the most compelling arguments for a pluralistic approach in the perspectives of authors James[63] and Robinette[64]. James contends that the multifaceted nature of torts defies capture by a single objective, deeming it 'useless' to provide a complete analysis for something as 'naturally heterogeneous' as tort law theory.[65] While Robinette

[58] According to Epstein, 'it is unwise, indeed futile, to attempt to account for the complete structure of a complicated legal system by reference to any single value or principle - be it liberty or efficiency; R A Epstein, 'Causation and Corrective Justice: a Reply' (1979) 8 Journal of Legal studies 477.
[59] Benjamin Shumeli 'Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice' (2015) 48(3) U of M Journal of Law Reform 747, 758.
[60] Izhak Englard 'The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law' in D G Owen (ed), *Philosophical Foundations of Tort* (Oxford/Clarendon Press 1995) 185.
[61] For example, Englard proffered the use of complementarity as a practical way of way of striking a balance between the goals of compensation, deterrence, and loss distribution; Izhak Englard, *The Philosophy of Tort Law* (1993) (Dartmouth Publishing 1993) 85-92; Izhak Englard, 'The Cost of Accidents: A Retrospect View from the Cathedral' (2005) 64 Maryland Law Review 355, 361; *See also* Mark Geistfeld, 'Economics, Moral Philosophy, and the Positive Analysis of Tort Law' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (Cambridge University Press 2002) 250, 268 (arguing that 'the most moral and just resolution should be selected out of a series of possible efficient outcomes' by using what has been called a social welfare perspective. Geistfeld's theory however is argued to be akin to economic theory, but nonetheless a variant of that includes the feature of morality).
[62] *Such as* Scott Hershovitz, 'Harry Potter and the Trouble with Tort Theory' (2010) 63 Stanford Law Review 67-114; *Also,* Eyal Zamir and Barak Medina, *Law, Economics, and Morality* (OUP 2010); *See further,* Benjamin Shumeli (n 59) 747-812 (proffering what is called a 'new mixed legal pluralism' in tort law and authors who argue that approaching the theory of tort law through the lens of pluralism may be beneficial in modern times); *Also* W V Horton Rogers, *Winfield and Jolowicz on Torts* (16th edn, Sweet and Maxwell 2002) 2 (speaking on 'mixed-pluralism', where all relevant values are balanced).
[63] Fleming James Jr, 'Tort Law in Midstream: its Challenge to the Judicial Process' (1959) 8(3) Buffalo Law Review 315-344.
[64] Christopher J Robinette, 'Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine' (2005) 43 Brandeis Law Journal 369-413.
[65] Fleming James Jr, 'Tort Law in Midstream: its Challenge to the Judicial Process' (1959) 8(3) Buffalo Law Review 315, 320, 325.

emphasises that the historical development of tort law, rooted in judges' case-by-case rulings rather than a singular defined reason or goal, supports the view that the aim of tort law should be evaluated based on the components of each case.[66] This approach involves applying different theories as they align with the intricacies of individual cases.

Despite the absence of consensus regarding the singular goal of tort law,[67] it can be argued that the development of tort law has occurred under a specific theory of tort law. Based on the foregoing discussion, this thesis can identify four aims of tort law; justice and restoration to the *status quo ante* to a wronged party for harm suffered as a result of the breach of duty fixed by law; wealth maximisation; establishing a standard of conduct a defendant ought to adhere to, and to be mindful of the possible effects of their activities on others and their property; providing an incentive to serve as a deterrent to behaviours that are likely to cause harm by encouraging people to conduct activities with more precaution; and handling distribution of losses according to the social and political climate of its operation. However, this thesis contends that the aim of tort law proposed by each theory may find its applicability in specific types of torts, while not necessarily encompassing others.

By way of illustration, defamation cases involving damage to reputation may not be adequately addressed by a monistic wealth maximisation theory. These cases involve protecting an individual's reputation, and considerations of moral duty and corrective justice play a significant role. A monistic approach might overlook the importance of these non-economic factors, but a pluralistic framework would recognise both the financial impact and the moral duty to repair reputational damage. Similarly, in consumer product liability, a monistic focus on wealth maximisation may prioritise minimising costs for manufacturers, but overlook compensating injured consumers, deterring negligence, and ensuring corrective measures. Incorporating distributive justice into product liability cases may also ensure that losses are allocated fairly, taking into account the varying financial capacities of consumers affected. In medical malpractice, a purely deterrent-based monistic approach could overlook the nuanced aspects of patient care, individual suffering, and the moral obligation to provide compensation. A pluralistic viewpoint, incorporating corrective justice, could ensure that the aim of tort law is not solely about deterring medical negligence but also about providing justice to the affected individuals.

[66] Robinette (n 64) 378-382.
[67] W V Horton Rogers, *Winfield and Jolowicz on Torts* (16th edn, Sweet and Maxwell 2002) 1.

In intentional torts, like assault or battery, a monistic focus on economic efficiency may insufficiently address the moral duty to compensate, highlighting the need for considerations within the framework of corrective justice for deterrence and compensation. Public nuisance cases involving harm to communities may require more than a wealth-maximising goal, and a monistic perspective might overlook the importance of distributing losses fairly among affected individuals and communities, which is crucial for environmental justice. Cases involving employment-related torts, such as discrimination or harassment, may not be fully addressed by a monistic wealth maximisation approach. A pluralistic framework, integrating corrective justice, would prioritise compensating victims for the wrongs suffered and fostering a fair and just work environment.

Another illustrative example of such complexity is evident in cases of pollution damage caused by multinational corporations. A monistic approach solely focused on, for instance, wealth maximisation, might neglect the broader private, environmental and public health considerations. A pluralistic perspective would allow the incorporation of corrective justice, considering the duty to compensate for harm caused, deterring harmful activities and distributive justice, addressing how to distribute losses fairly. These examples highlight the complexity and nuanced nature of tort law, and challenges the notion of a universally applicable singular goal. A singular, monistic approach to the aim of tort law may inadvertently neglect certain aspects, resulting in potential gaps when addressing specific situations. In contrast, a pluralistic perspective not only provides a more nuanced and adaptable framework, accommodating the diverse nature of tort cases, but also stands out as a compelling approach for navigating the complex landscape of contemporary tort law issues.

2.3.2 The Role of Pluralism and Tort Law in Shaping Civil Liability Regimes

The relationship between a civil liability regime and the pluralistic framework in tort law is interactive, with each influencing and shaping the other. While the pluralistic framework informs and guides the creation of civil liability laws, influencing lawmakers to consider multiple goals in tort law by acknowledging that tort law encompasses more than just one goal. Simultaneously, a civil liability regime plays a pivotal role in shaping the pluralistic framework within tort law, providing the legal infrastructure to balance and integrate diverse goals of tort law, by becoming a dynamic expression of societal values, aiming to harmonise moral duty, corrective justice, wealth maximisation, deterrence, and fair loss distribution. To demonstrate this, in addressing damage resulting from legally permissible activities that are considered

extra-hazardous, a civil liability law becomes a tangible expression of a pluralistic approach. Thus, a law will establish a duty not to cause damage (corrective justice and civil recourse) and the breach of such duty by omission or commission can be actionable (corrective justice). In addition, the law may include an economic function of favouring those who avoid causing harm by their activities (wealth maximisation), serve as a preventative measure of stopping the damage from occurring at all (optimal deterrence), aim to provide a fair compensation for damage (corrective justice), and ensuring the fair distribution of losses in society (distributive justice).[68]

Moreover, the pluralistic framework in tort law recognises cultural and jurisdictional variations, paving the way for future developments in policymaking that go beyond a one-size-fits-all approach. This adaptability allows tort law to accommodate diverse cultural contexts, and align with global societal values. The pluralistic perspective encourages a more inclusive and globally aware approach, allowing tort law to evolve alongside the cultural, ethical, and societal nuances worldwide. This adaptability is evident in the establishment of civil liability laws that are applicable internationally, shaping tort law into a dynamic and responsive legal framework that mirrors the diversity present in various jurisdictions. Further, a pluralistic approach may encourage a broader perspective and foster interdisciplinary dialogue. For example, when creating laws to address pollution damage, insights from various fields such as engineering, environmental or marine science or insurance,[69] may be incorporated. This interdisciplinary collaboration enriches the legislative process, aligning it more closely with the complex realities of tortious activities, especially in contexts like pollution damage arising from hazardous activities.

In jurisdictions with common law origins, where court decisions establish legal precedents, certainly, the process of lawmaking represents a pivotal transformation in the dynamics of tort law. A judge's discretion is shaped by factors such as the specific nuances of each case, legal principles and precedents. Therefore, in common law systems, where the creation of legal precedents is significant, the court's decisions, employing a law embodying the pluralistic framework of tort law, will reflect a blend of diverse goals outlined by different the theories.

[68] Rudiger Lummert, 'Trends in Environmental Policy and Law: Changes in the concepts of civil liability' in Michael Bothe (ed) *Trends in Environmental Policy and Law* (IUCN 1980) 235-264

[69] *Nettleship v Weston* [1971] 2 Q B 691; the concept of insurance has undoubtedly influenced the development of tort liability for pollution damage, and is usually a material consideration when determining which party bears the burden of loss. However, this may raise questions of whether the presence of insurance potentially absolves polluters from bearing financial responsibilities, thereby negating the risk reduction incentive tort liability provides. The entirety of this debate exceeds the scope of the thesis.

For example, when applied to cases related to pollution damage, this guarantees that judicial decisions factor in not just economic considerations but also encompass broader societal objectives, including environmental protection, justice, and deterrence. The pluralistic perspective embedded in a civil liability regime establishes a framework to navigate the intricacies of pollution-related torts, facilitating a more comprehensive and flexible response to the diverse challenges posed by the commission of such tort.

To conclude, by enacting laws that specifically address civil liabilities, policymakers acknowledge the need to balance various societal goals beyond economic considerations. Further, a civil liability regime enhances the way tort law is approached by encapsulating certain key features that are common to diverse legal systems, recognising that different goals may come into play in different circumstances. Having explored the origins and diversity of civil wrong systems, encompassing both common law and civil law perspectives, and also explored the theoretical foundations shaping tort law, the analysis now narrows its focus to practical aspects. In this section, attention shifts to the key features of civil liability regime concerning pollution damage. By connecting theoretical foundations with practical considerations, the aim is to highlight how a legislative framework can navigate the complexities outlined in the theoretical discussion, shedding light on their efficacy in addressing pollution-related challenges. The exploration of these key features will show how policymakers capture the pluralistic objectives of tort law into practical policies.

Further, in discussing the key features of a civil liability regime, it is also essential to consider their relevance on an international scale. This wider viewpoint encompasses cross-border legal practices and the establishment of an international benchmark in civil liability claims. Understanding how these laws may be applied beyond national borders is essential for addressing transboundary issues and ensuring consistency in legal standards. In the context of this thesis, these considerations will be based on civil liability laws pertinent to cases of pollution damage.

2.4 Identifying Key Features of a Civil Liability Regime for Pollution Damage

In the realm of environmental protection, numerous laws mandate compliance, and a breach of these obligations resulting in pollution can give rise to civil liability claims. Moreover,

internationally, there is a growing inclination towards using civil liability regimes to address pollution damage from different activities.[70]

When analysing these civil liability laws, several crucial questions come to the forefront. The primary inquiry revolves around determining if a tort[71] is created by the law. Additional considerations may include the type of liability arising from committing the tort, indicating the necessary standard and burden of proof, the channelling of liability, the recoverable damage types, limits of liability, the presence of financial assurance, the forum for dispute resolution, and the limitation period for bringing claims. These questions, collectively, encapsulate the key features of an effective civil liability system, forming the focal point of our exploration in the following discussion.

2.4.1 The Existence of a Tort and the Applicable Civil Liability Law

It is conventional practice for the common law doctrine of tort—or the law of delict—to make liable a person who brings harm to another person or their property or to provide a way to stop the continuation of a tort. This is generally regarded as the default stance on civil liability, applicable in most jurisdictions. However, it has become a widespread practice for lawmakers, at both national and international levels, to enact industry-specific liability rules. This is done to broaden the scope of the default position, especially in cases where an industry holds significance for socio-economic development but also carries the potential for significant harm.[72]

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[70] For example, the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969 (including its 1992 protocol and 2000 amendment), Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) 1992 (including its protocol of 2000 and supplementary fund protocol of 2003), the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 (including its protocol of 1996), the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (which is modelled on the CLC 1969, as amended, and also works in conjunction with the LLMC 1976, as amended). Other conventions include the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (NUCLEAR), 1971 (which works in conjunction with the liability framework provided for in the 1997 Vienna Convention on civil liability for Nuclear Damage and the Convention on Third Party Liability in the Field of Nuclear Energy 1960, as amended by the Additional Protocol of 1964, the Protocol of 1982, and the Protocol of 2004), the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS) 1996 (and its 2010 Protocol), and the Nairobi International Convention on the Removal of Wrecks 2007; although some of them are not globally ratified, they show how civil liability laws for activities that can lead to pollution damage can be made internationally.

[71] It bears re-emphasising that uses the term 'tort' as an umbrella terminology to also include earlier delict system found in the European civil codes, and accordingly, employs the use of the phrase 'civil liability' to denote liability that arises from the commission of a tort. Tort in this context is also used interchangeably with 'civil wrong'.

[72] This thesis will employ refer to the CLC tanker oil regime because of its nearly global ratification and the most developed international liability regime. As of 1st December 2020, the 1992 CLC had been ratified by 141 states and the 1992 Fund Convention by 118 states. Thirty-two states were parties to the 2003 Supplementary Fund Protocol.

In the context of pollution, civil liability regimes are crafted to create a framework for holding individuals or entities responsible for the adverse effects of their actions on the environment and others.[73] These regimes may encompass specific laws and regulations that define pollution and the breach of duty to prevent harm, resulting in civil liability for the responsible parties for the associated damage that could arise such as, harm to natural resources, adverse health effects on individuals, or damage to property.[74] This approach not only serves to compensate those affected but also acts as a deterrent, promoting responsible conduct and discouraging harmful environmental practice. A civil liability regime may also contain provisions pre-empting the use of other applicable laws or may allow interaction with other laws.[75]

Similarly, civil liability regimes may be instituted with the intention of promoting investment in the specific sector covered by the law. The presence of a specific civil liability regime offers a heightened level of certainty regarding the potential financial risks associated with ventures in that sector, allowing companies to budget effectively.

Further, the adoption of such rules serves to operationalise the 'polluter-pays principle' (PPP),[76] rendering it more practical, and streamlines the process of securing comprehensive compensation for the complete extent of damage, costs, and expenses resulting from the tortious act.[77] The PPP was initially developed through soft law instruments, such as 1968 Declaration of Principles on Air Pollution Control[78] and Organisation for Economic Co-operation and Development (OECD),[79] but has since been incorporated into both binding and

[73] R Bhanu Krisha Kiran, 'Liability and Compensation for Oil Pollution Damage: An examination of IMO Conventions' (2010) 3 NUJS Law Review 399, 401.

[74] For example, article I(6) of the CLC defines 'pollution damage 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 losses of profit from such impairment shall be limited to costs of reasonable measures of reinstatements actually undertaken or to be under taken; (b) the cost of preventive measures and further loss or damage caused by preventive measures'.

[75] For example, in the CLC no claim for compensation for pollution damage may be made against operator, manager, charterer of a vessel unless in accordance with the CLC (subject to how the ratifying country decides how the CLC interacts with their domestic laws); art III (4).

[76] A principle necessitating that 'natural or legal persons governed by public or private law who are responsible for pollution must pay the cost of such measures as are necessary to eliminate that pollution or to reduce it so as to comply with the standards or equivalent measures'; Recommendation on the Application of the Polluter-Pays Principle to Accidental pollution, C(89) 88 (Final), OECD, 1989.

[77] Berder notably asserts that the function of the principle is to deter pollution, encourage economic integration, and also serve curative and redistribution functions; Sharon Beder, *Environmental Principles and Policies: An Interdisciplinary Approach* (2006 UNSW Press) 34-37.

[78] Resolution 68(4) adopted by the Committee of Ministers of the Council of Europe <https://rm.coe.int/16804faaea> accessed 12 February 2021.

[79] The 1972 Recommendation on Guiding Principles concerning International Economic Aspects of Environmental Policies <https://legalinstruments.oecd.org/public/doc/4/4.en.pdf> accessed 12 February 2021; principle 4 'The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the

non-binding instruments.[80] Some consider the PPP to be the 'backstone of environmental policy',[81] because of its potential to make the polluting entity liable and its growing implementation into several domestic and international laws.[82]

Notwithstanding the apparent advantages, there are instances where codified civil liability regimes may prove to be less than ideal or may fall short in addressing the intended purpose for their creation. For example, codified civil liability rules may not always align seamlessly with the complexities of cases arising from certain industries or activities with distinct technicalities. This may lead to gaps in accountability and cases of potential harm without recourse. Similarly, the burden on the legal system is a practical concern when legal frameworks lack clarity or are ambiguous. This is because ambiguities or gaps in the law could lead to prolonged legal battles and challenges in determining liability, delaying justice and compensation for affected parties.[83] Moreover, if civil liability laws may lack sufficient penalties or deterrence measures, therefore, they may fail to effectively discourage harmful practices.[84]

In addition, the rigid nature of civil liability laws can hinder their adaptability to evolving circumstances, because as industries, technologies, and environmental challenges change, a

so-called 'Polluter-Pays Principle'. This Principle means that the polluter should bear the expenses of carrying out the abovementioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption.'

[80] For example, it is expressly included in Principle 22 of the Stockholm Declaration on the Human Environment and Principle 16 of the Rio Declaration on Environment and Development. Similarly, the PPP is contained in 1996 London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; 2001 Stockholm Convention on Persistent Organic Pollutants; and the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II); Christopher M Inwang, 'Polluter pays principle; A jus cogen or customary international law' (2021) 7(1) International Journal of Law 132, 134-135 (for a list of laws utilising the polluter pays principle).

[81] Dirk Heine and others, 'The polluter-pays principle in climate change law: An economic appraisal' (2020) 10(1) Climate Law 94, 95; Barbara Luppi, Francesco Parisi, and Shruti Rajagopalan, 'The Rise and Fall of the Polluter Pays Principle in Developing Countries', 32(1) International Review of Law and Economics 135 (2012), 136 (says it is an 'economic principle which later metamorphosed into an established legal principle'); Arne Bleeker, 'Does the Polluter Pay? The Polluter-Pays Principle in the Case Law of the European Court of Justice', 18 European Energy and Environmental Law Review 289 (2009), 292 (calls it an 'an economic principle translated into law').

[82] Christopher M Inwang, 'Polluter pays principle; A jus cogen or customary international law' (2021) 7(1) International Journal of Law 132, 134-135 (for a list of laws utilising the polluter pays principle).

[83] Guiseppe Dari-Mattiacci and Bruno Deffains, 'Uncertainty of Law and the Legal Process' (2007) 163(4) Journal of Institutional and Theoretical Economics 627, 634-635.

[84] Michael Faure and David Grimeaud, 'Financial Assurance Issues Of Environmental Liability, Deterrence, Insurability, and Compensation in Environmental Liability: Future Developments in the European Union' (2003) 19.

lack of flexibility in the law may render it insufficient to address emerging issues effectively.[85] Furthermore, stringent liability rules may also create barriers to innovation within industries, because companies may become hesitant to explore new technologies or approaches due to increased fears of liability.[86]

Internationally, civil liability regimes can also be negotiated by different states with different legal systems, thereby finding a common ground for legal practice. However, enforcement may not be seamless because adjudicatory and regulatory bodies may struggle to consistently apply and enforce the law, because of the differences in legal systems, thereby leading to disparities in accountability. For example, a fundamental principle of the CLC (and Fund)[87] regime is that disputes related to its interpretation or application should be resolved by the courts of the state or states where the pollution damage took place, granting them the ultimate authority in the matter.[88] This implies that the standards for determining the eligibility of compensation claims, as established by the governing bodies of the Funds, are not obligatory for national courts. Consequently, variations in the interpretation of these criteria may arise among the jurisdictions of states that are parties to these treaties.

Furthermore, in cases involving transboundary pollution or global industries, inconsistencies or gaps in statutory civil liability rules across jurisdictions may pose challenges to international cooperation and coordination in addressing environmental harm.[89] In conclusion, recognising and addressing the limitations of civil liability laws is essential for maintaining their effectiveness in the dynamic landscape of environmental challenges.

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[85] Frontier Economics, 'The Impact of regulation on growth' (May 2012) 6, 11 <https://assets.publishing.service.gov.uk/media/5a7905d040f0b676f4a7d401/12-821-impact-of-regulation-on-growth.pdf> accessed 5 May 2021.

[86] Matia Vannoni and Massimo Morelli, 'Regulation and economic growth: A 'contingent' relationship' (*Centre for Economic Policy Research*, 29 March 2021) <https://cepr.org/voxeu/columns/regulation-and-economic-growth-contingent-relationship> accessed 5 May 2021.

[87] The International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969 (including its 1992 protocol and 2000 amendment), Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) 1992 (including its protocol of 2000 and supplementary fund protocol of 2003).

[88] *See*, Martin Jacobsson, 'Compensation for pure economic loss resulting from tanker oil spills (part 1)' (2020) 26 Journal of International Maritime Law 396-408 (discussing how the CLC/Fund admissibility criteria has interpreted in claims for pure economic loss in different countries); also, In *IOPCF v M Gouzer, Tevere Shipping and Steamship Mutual Underwriting* (2006 DMF 1014), the French Court held that the criteria set by the IOPCF for the settlement of pollution claims are not binding on the court but may 'only constitute a reference of an indicative values'.

[89] International Maritime Organization Legal Committee 'Proposal to Add a New Work Programme Item to Address Liability and Compensation for Oil Pollution Damage Resulting from Offshore Oil Exploration and Exploitation - Submitted by Indonesia' (2010) <https://cil.nus.edu.sg/wp/wp-content/uploads/2013/03/Indonesias-proposal-for-a-new-programme-to-develop-an-international-regime.pdf> accessed 1April 2020.

2.4.2 The Standard of Liability, Burden of Proof and Causation

In cases involving pollution, legal wrongs are usually connected to a duty of care owed by individuals or entities to the environment and affected parties. A civil liability regime will typically contain rules for whom the burden lies on to prove a breach of this duty of care. Those responsible for pollution can breach this legal duty intentionally (as in nuisance and trespass), or unintentionally leading to negligence (fault-based liability), or strict liability. The rules of liability will also determine how the breach of legal duty, whether through action or inaction, led to the occurrence of damage—essentially, establishing causation.[90] Demonstrating a causal link between the actions of the defendant and the pollution involves showing that the defendant's conduct directly resulted in the harm.[91] For instance, in oil pollution cases, establishing causation involves determining whether the discharged oil is a 'but for' reason for the claimant's loss and whether compensation falls within the legal framework the claim is brought under.

In the realm of pollution damage liability, understanding the distinction between strict liability, negligence, and other types of liability is crucial for shaping how responsibility is assigned in damage caused by pollution. Therefore, highlighting their unique characteristics is crucial for the analysis of pollution-related legal frameworks. Furthermore, common law torts have played a crucial role in shaping the historical development of these liability types. Nevertheless, these liability types and their fundamental principles are now adopted by diverse legal systems. Consequently, any discussion on these liabilities inherently includes literature and commentary based on the common law position.

[90] Also aptly known as the 'but for' test; Herbert L A Hart and Tony Honroe, *Causation in the Law* (2nd edn, OUP 1985) 90; The analysis of causation has undergone rigorous debates by legal experts over the years, which this thesis does not explore. Nonetheless, the leading agreement is that a demonstrating a causal link involves establishing the elements of 'proximate cause' and 'foreseeability'. Proximate cause focuses on the directness of the connection between the defendant's actions and the resulting harm. It ensures that liability is not imposed for remote or unforeseeable consequences. While foreseeability requires proving that the harm caused by the pollution was reasonably foreseeable at the time of the defendant's actions. For detailed discussion on the subject see generally, James Angell McLaughlin, 'Proximate Cause' (1925) 39 Harvard Law Review 149; Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (OUP 2009); Fleming James Jr and Roger Perry, 'Legal Cause' (1951) 60 Yale Law Journal 761; Keith N Hylton, *Tort Law: A Modern Perspective* (Cambridge University Press, 2016); Charles E Carpenter, 'Concurrent Causation' (1935) 83 University of Pennsylvania Law Review 941; Law Commission, *The Illegality defence in Tort* (Consultation Paper No 160, 2001); W V Horton Rogers, *Winfield and Jolowicz on Tort* (20th edn, Sweet and Maxwell 2020) 195-231; *McGhee v National Coal Board* [1973] 1 WLR 1; *Gregg v Scott* [2005] 2 WLR 268.
[91] Ibid.

i. Trespass and Nuisance

Trespass and nuisance are traditionally used in the context of protecting private interests in land. Trespass denotes physical unauthorised entry upon land, by a person, animal or by placing some physical object on land, as a result of the defendants action.[92] While nuisance covers the protection of the right to use and enjoy land, without unreasonable interference from others.[93] Therefore, nuisance amounting to a 'reasonable' use is to be tolerated, whereas the law intervenes if the use is 'unreasonable'.[94]

Liability for trespass is actionable *per se*; thus, it may give way to a judgment for non-compensatory nominal damage.[95] However to establish compensatory damage—also known as special damage—under trespass, the law may require that a strong and direct link of causation must be established between the respondent's action and the trespass alleged.[96] Therefore, although trespass is not typically used for pollution cases, in some jurisdictions, a claimant may allege that the intrusion of a pollutant is as a result of a defendant's action. For example, in Nigeria, the Supreme Court in *Umudje v Shell BP Petroleum Development Company of Nigeria Ltd*[97] held that oil which intruded into ponds and lakes, thereby killing fish, entitled the claimant to damages under the tort of trespass. On the other hand, since most pollution damage cases often consist of particles, gases, or diffused chemicals, a claim for nuisance would normally be the first stop for cases of pollution damage.[98] Thus, the tort of nuisance can be argued to be the foundation of modern environmental pollution law.[99] However, in order to determine liability

[92] Catherine Elliott and Frances Quinn, *Tort Law* (11th edn, Pearson 2017) 385, 395-396.
[93] Kirsty Horsey and Erika Rackley, *Tort Law* (5th edn, Oxford University Press 2017) 537-538.
[94] Ibid.
[95] Nominal damage is a non-compensatory damage awarded where a tort is committed but no damage is caused and is used to acknowledge that the defendant has violated the claimant's rights, rather than to compensate for loss; Elliott and Quinn,(n 92) 385, 396.
[96] For example, in *Esso Petroleum Company v Southport Corporation* [1965] AC 218, the House of Lords held that trespass may not have occurred when oil from a tanker had been discharged into the sea because it was not certain whether the oil would be washed ashore or under what conditions such would occur; *See also, Eliochin (Nigeria) Limited and Others v. Mbadiwe* (1986) 1 SC 99, 134.
[97] [1975] 9-11 SC 155.
[98] Nuisance can be either a private or public offence. Private nuisance is mainly a civil action that protects interests associated with land and can be invoked when a claimant's use and enjoyment of a land or landed property is unreasonably and continuously interfered with, leading to the inconvenience or damage. Public nuisance on the other hand is a crime and is often dealt with by criminal law when a duty imposed for the benefit of the society (rather than a particular individual is breached) and can arise from activities not related to use of land. In this thesis, the use of the word 'nuisance' denotes private nuisance under common law and statute; Elliott and Quinn, (n 92) 288-308; Nicholas J McBridge and Roderick Bagshaw, *Tort Law* (5th edn, Longman 2017) 658.
[99] Francis H Newark, 'The Boundaries of Nuisance' (1949) Law Quarterly Review 480, 481.

in a case of nuisance, the law may require that the claimant proves that the harm was foreseeable and that the disturbance is substantially unreasonable.[100]

ii. Negligence

Negligence, also termed fault-based liability, demands the claimant to show evidence of fault and unintentional harm caused by the actions of the defendant.[101] In other words, the burden of proof is on the claimant to demonstrate on a preponderance of evidence that the damage was caused by the defendant. Pollution damage cases often fall under negligence, where the injured party must prove that the polluter acted intentionally or recklessly, breaching a duty to comply with required standard of care.[102] Thus, to establish liability under negligence not only involves demonstrating that pollution damage occurred, but also that the actions or omissions leading to pollution damage resulted from a breach of a specific legal obligation, or standard of care, or due diligence.

iii. Strict Liability

Strict liability is based on the notion that certain products or actions inherently put people at risk of injury, despite how much care is taken to prevent the injury from occurring—essentially, it implies liability without fault.[103] Therefore, when strict liability is made the standard for an act or omission by a law, the claimant need not prove negligence or tortious intent, but only prove that the tort occurred because of the defendant's activities.[104] An advantage of strict liability is that the use of strict liability relieves the court of the task of determining what the standard of reasonable care is, and relieves the claimant of the burden of proving the breach of the standard of care in abnormally dangerous activities considered complex or technical.[105]

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[100] Kirsty Horsey and Erika Rackley, *Tort Law* (5th edn, Oxford University Press 2017) 40-43.
[101] Victor Schwartz and others, *Prosser, Wade, and Scwatrtz's Torts Cases and Materials* (13th edn, Foundation Press 2015) 1-3.
[102] Miquel Martin-Casals, 'Technological Change and the Development of Liability for Fault: A General Introduction' in Miquel Martin-Casals (ed), *The Development of Liability in Relation to Technological Change* (Cambridge University Press 2010) 1, 3-6, 39.
[103] Louis T Vissher, 'Tort Damages' in Michael Faure (ed) *Tort Law and Economics* (2009) 156-158.
[104] Ibid.
[105] Such as petroleum development activities; Other examples can also be seen in the case of animals, where the courts have applied strict liability to situations involving a defendant who keeps a domesticated animal with known vicious tendencies or an animal which natural habitat exists in the wild; *DeHart v Austin*, Ind, 39 F 3d 718, 720 n 1 (7th Cir 1994) *Trager v Thor*, 516 N W 2d 69, 75 (Mich 1994).

The origin[106] of strict liability in tort law can be traced to the English case of *Rylands v Fletcher*.[107] Initially, Rylands was not held liable for flooding under negligence, trespass, or nuisance due to lack of knowledge about the shafts and the isolated nature of the incident.[108] However on appeal, Rylands was held liable without proof of negligence. The court reasoned that it seemed just for a property owner to compensate for damage caused by something they introduced to their own property; even if harmless on their property but harmful on a neighbour's.[109] The House of Lords affirmed Blackburn J's decision, specifying that the rule would apply when someone, through a non-natural use of their land, brings or stores something likely to cause damage if it escaped.[110] Unlike what is applicable in private nuisance cases, the rule in *Rylands* requires the escape of a thing that arises from a 'non-natural use' rather than how it would be typically used, thus not every introduction to land can fall under 'non-natural use'.[111]

The strict liability rule created by *Rylands v Fletcher* has been applied in different ways in several jurisdictions.[112] For example, regardless of the stricter duty or care the rule imposes on the defendant, some laws may permit certain defences to be raised by a defendant to reduce

[106] It is worthwhile to note Fridman's commentary that the creation of tort in *Rylands v Fletcher* was influenced by the progress of the Industrial Revolution in the eighteenth and nineteenth centuries, which saw Britain diversify its largely based manual agricultural economy to making advances in technology, factories and industrial plants, which often lead to damage to neighbouring lands in form of accidents, pollution and deaths. The courts in *Ryland's* case dealt with the situation by creating a new tort that attempted to render industrialist strictly liable for damages caused during their operations, irrespective of whether or not steps could have been taken to avert the damages done; Gerald Henry Louis Fridman, 'The Rise and Fall of Rylands v. Fletcher' xxxiv (1956) The Canadian Bar Review 810-823, 810,811.

[107] *Ryland v Fletcher* (1868) LR 3 HL 330 (*Rylands)*; John Rylands was a textile manufacturer in England who arranged for a reservoir to be built in order to provide water for the steam engines that powered one of his mills. The reservoir was built over old mine shafts and passages, some of which joined up with a mine situated on Thomas Fletcher's land and was discovered during construction by the contracted independent constructors and created plugs with earth. When the reservoir was filled, one of the plugs caved resulting in water flowing through and flooding the neighbouring mine worked by the plaintiff, Fletcher.

[108] ibid 793.

[109] stating that: [t]he true rule of law is that the person who, for his own purposes, brings on his land and keeps anything there likely to do mischief if it escapes, must keep it in at his own peril; and if he does not do so, he is *prima facie* answerable for all damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the claimant's default, or perhaps that the escape was the consequence of *vis major*, or the act of God; *Rylands v Fletcher* (1866) LR 1 Ex 265, 279.

[110] Per Lord Cairn, who was one of the three judges who sat on the case; *Rylands* (n 107) 340.

[111] In *Rickards v Lothian* (1913) AC 263, 280 the Privy Council per Lord Moulton held that an escape from water from ordinary plumbing did not fall under the scope of the rule in *Ryland* as it must also bring with it an increased danger to others, and not merely be the use of ordinary land.

[112] For example, in England and Canada, the legislation applying strict liability rules is much narrower with abnormally dangerous activities, and the courts have been very careful not to expand the ruling from *Rylands* v *Fletcher*. Conversely, in the United States, strict liability rules for abnormally dangerous activities are broader; Donal Nolan, '*Rylands v Fletcher* and Fire' in Andrew Grubb (ed), *The Law of Tort* (Butterworths 2002) 979-980.

their liability.[113] Other times, some laws may disallow the defendant from raising any defence to the strict liability it imposes. For example, in pollution damage cases, this is to prevent the reversal of the burden of proof back to the claimant or even aid the defendant escape liability entirely.[114] Strict liability is attractive in pollution cases when the goal of a civil liability law is to promptly halt the tort, achieve restoration, compensation, and clean-up. This approach avoids the lengthy and time-consuming process of establishing liability through fault or negligence in litigation or arbitration, given the complexities involved.

In a similar way, strict liability has become the prevailing standard internationally for pollution resulting from activities deemed ultra-hazardous,[115] and the risk of very serious or widespread damage places most of the activities covered by these conventions under the ultra-hazardous category.[116] These conventions show how civil liability regimes can be used to enforce private interests internationally. The adoption of these treaties also suggests that there is an established trend in the development of international law favouring the use of strict liability as the standard in pollution cases.

For example, in several jurisdictions, offshore petroleum development is deemed an ultra-hazardous activity, leading to arguments in favour of applying strict liability in pollution damage cases stemming from such activity.[117] This is because of the potentially large extent of the damage, the complex nature of the relationship of the injured person and the defendant, and the cause of the damage, which are unique characteristics that ought to be taken into account. Given the technical nature of offshore drilling and involvement of multinational companies,

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[113] Some civil liability laws rely on the original defences available under the initial *Rylands* rule are where the damage is caused by the unforeseeable act of a stranger, 'act of God' resulting from a wholly extraordinary natural forces, which the defendant could not have been expected to foresee or guard against, and the express or implied contributory fault of claimant. Other defences may also be used such as the contributory fault of claimant, '*volenti non fit injuria*' where the defendant will not be held liable where the claimant consents to the dangerous thing to be kept by the claimant, and lastly, if exceptions are provided by legislation; Horsey and Rackley, (n 93) 580-581.

[114] Nathan Richardson, *Deepwater Horizon and the Patchwork of Oil Spill Liability Law* (Washington, DC: Resources for the Future, 2010) 2 (discussing absolute liability regimes, where no exceptions can be relied on by the defendant to escape liability, being better suited for ultra-hazardous activities); L Frederick E Goldie, 'Concepts of strict and absolute liability and the ranking of liability in terms of relative exposure to risk', (1985) XVI Netherlands Yearbook of International Law 175, 201-102.

[115] This may also be referred to as 'abnormally dangerous' or 'inherently dangerous' elsewhere in the thesis.

[116] For example, nuclear, maritime, and aviation-based conventions that have been adopted in several jurisdictions impose strict liability on activities considered to be ultra-hazardous or inherently dangerous; L Frederick E Goldie, 'Liability for damage and the progressive development of international law', (1965) International and Comparative Law Quarterly 1189, 1192.

[117] *c/f* William M Landes and Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987*)* 259 (asserting that fault liability may be better suited as the standard of liability for pollution damage, because argue that in the instance of a fault-based liability, an operator can avoid all liability by complying with a predefined standard, thereby providing a higher incentive to avoid liability by working off what might be considered a checklist of standard of care) .

requiring claimants to prove complex matters may be unjust to make the injured suffer for damage caused by economic activities that may not benefit them as residents of the area; and even when it does benefit the residents, it is inappropriate for the injured to carry a heavy burden of proof because of the social utility derived from the polluting activity.[118]

Just as Weinrib states 'liability is strict because the law does not regard the activity that produces the injury as itself wrongful.'[119] The law permits the ultra-hazardous activity on the belief that it can be carried out without harm, and the occurrence of an injury implies that the defendant conducted its activities in a manner inconsistent with the belief of the law.[120] Therefore the danger lies in the gravity of the loss rather than the likelihood of its occurrence.[121]

2.4.3 Channelling of Liability

A crucial aspect of an effective civil liability regime is the channelling of liability, the aim of which is to identify the individuals subject to or excluded from any created liability.[122] It can be argued that this aligns with the pluralistic aim of tort, by facilitating easy identification of responsible parties for compensation, promoting efficiency and justice in addressing harms resulting from diverse activities. Channelling liability also justifies placing the burden on those creating high risks for economic benefit,[123] and may ensure prompt compensation to the affected party.[124] Further, channelling liability may help the risk-bearer to seek coverage for the potential risks that may arise from their activities.[125] In the context of pollution damage, a civil liability regime may subject exclusive liability to a specific party, typically the owner or operator of the source of pollution. The law may also channel liability either based on the

[118] Peter Cameron, 'Liability for Catastrophic Risk in the Oil and Gas Industry' (2012) 6 International Energy Law Review 207
[119] Ernest J Weinrib, *The Idea of Private Law* (OUP 2012)188.
[120] Ibid, 189.
[121] Ibid.
[122] Alan E Boyle, 'Globalising Environmental Liability: The Interplay of national and International Law' (2005) 17 (1) Journal of Environmental Law 14.
[123] International law Commission 58th session, 'Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (with commentaries)' (2006) UN Doc A/61/10 [Principle 3] 155 <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf> accessed 10 December 2021
[124] Julio Barboza, 'The Environment, Risk and Liability in International Law' in David Freestone (ed), *Legal Aspects of Sustainable Development* (Brill 2011) 24, 32-33.
[125] International Atomic Energy Agency, *Civil Liability for Nuclear Damage: Advantages and Disadvantages of Joining the International Nuclear Liability regime* (2010) A paper by the International Expert Group on Nuclear Liability (INLEX) 1, 12; Michael Faure, 'Attribution of Liability: An Economic Analysis of Various Cases' (2016) 91 Chicago-Kent Law Review 603, 623; Jan Albers, *Responsibility and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea* (Springer-Verlag 2015) 200.

importance a role in the economic activity or the proportion of the benefit a person will derive, or based on some other criteria.[126]

For instance, in the oil tanker liability regime, the shipowner is exclusively liable, excluding the charterer, manager, or operator of the ship from direct responsibility.[127] This approach makes it clear who is responsible for pollution damage caused by the vessel, streamlining the legal process. Conversely, the Bunker Convention takes a broader stance, deeming individuals like charterers, managers, or operators as shipowners for the purpose of channelling liability.[128] This approach widens the net of responsibility, potentially capturing a more comprehensive range of actors associated with the vessel. While this may create a more inclusive framework, it also introduces complexities in determining accountability, as multiple parties may share liability for pollution damage.

Additionally, civil liability regimes may explicitly identify individuals who are exempted from potential liabilities.[129] This nuanced consideration acknowledges that in certain circumstances, despite their involvement, certain parties should be absolved from direct liability. This recognition allows for a more nuanced legal framework that reflects the specificities of different situations, and roles of different individuals within the context of pollution-related liabilities. The law may also incorporate the concept of 'joint', 'several', or 'joint and several' liability, where the key idea is that multiple parties are held collectively responsible for the entire damage.[130] This allows the injured party to pursue compensation from any or all the responsible parties, however, there are subtle differences in its practical application.

'Joint Liability' means that there are more than one tortfeasors, they are jointly liable to a claimant for the same damage that arises from the commission of tort.[131] In other words, both tortfeasors are co-debtors. A common test for establishing joint liability is if the cause of action brought against each party is the same, and if the same evidence applies to each party (for

[126] Faure, ibid.
[127] However, where it can be proven that other persons such as the operator, ship master and crew, caused the damage wilfully or recklessly, they may be held liable; CLC 1992 art III (1).
[128] International Convention on Civil Liability for Bunker Oil Pollution Damage, 23 March 2001, art I (3).
[129] For example, art III (4) the CLC regime grants immunity from liability to a list of persons such as the agents or servants of the tanker owner, likewise the pilot, any crew member or non-crew member who carries out services for the ship, the charterer, manager or operator of the ship and their agents, any authorised salvage operator and their agents, and any person and their agents taking preventive measures for pollution damage. The only time the aforementioned group may be subject to liability is if they acted intentionally with the knowledge that damage would occur from their actions.
[130] Jan Albers, Responsibility and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea (Springer-Verlag 2015) 250-251.
[131] Practical Law Dispute Resolution 'Joint, several and joint and several liability' (*Thomson Reuters Practical Law*, 2022)

example, the act of a principal and their agent). If one joint tortfeasor is released from the liability, then it releases the others. 'Several liability' means that the acts of multiple tortfeasors are responsible for different damage to the same person.[132] The claimant can only recover from each tortfeasor the losses that are applicable to them. The release of one tortfeasor from liability, will not apply to the others and the tortfeasor who clears their liability has no right of contribution from the others. 'Joint and several liability' is a combination of joint liability and several liability.[133] It implies that all the tortfeasors are responsible for the liability incurred by each other. The claimant may sue one party for all the damage suffered, rather than pursuing individual actions against all the possible co-defendants. The defendants may then settle the outstanding balance amongst themselves. Moreover, when multiple parties can be held liable, it may also provide an incentive for 'mutual monitoring by potential injurers'.[134]

Depending on the legal jurisdiction and the nature of the polluting activity, channelling liability may be guided by the type of liability provided in the civil liability law, such as fault-based liability, strict liability, or a combination of both. For example, in the CLC and strict liability is channelled to the owner of the ship but other parties that intentionally contributed to a polluting incident may be subject to fault liability[135] Channelling legal liability, especially under strict liability where the claimant is not required to establish fault, serves to easily identify whom an aggrieved person can seek compensation from in cases of pollution damage. This reduces administrative costs, saves time, and simplifies the process for the aggrieved.[136]

Notwithstanding whom liability has been channelled to, ensuring prompt compensation can encounter obstacles due to issues like insolvency, limited financial resources, inadequate indemnity coverage, or dependence on liability limitations.[137] Acknowledging these challenges is crucial for establishing a well-balanced and effective legal framework that aligns with the diverse objectives of tort law.

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[132] ibid
[133] Ibid.
[134] Thomas H Tietenberg, 'Indivisible Toxic Torts: The Economics of Joint and Several Liability' (1989) 65(4) Land Economics 301-307.
[135] Article I(3).
[136] Neil Craik, 'Determining the Standard for Liability for Environmental Harm from Deep Seabed Mining' Activities (2018) 2 Centre for International Governance Innovation Liability Issues for Deep Seabed Mining Series 23; Michael Faure and Tom Vanden Borre, 'Compensating Nuclear Damage: A Comparative Economic Analysis of the US and International Liability Schemes' (2008) 33 William & Mary Environmental Law and Policy Review 219, 264.
[137] Jan Albers, Responsibility and Liability in the Context of Transboundary Movements of Hazardous Wastes by Sea (Springer-Verlag 2015) 249.

2.4.4 Types of Recoverable Damages

Civil liability regimes often acknowledge distinct types of recoverable damages and the eligible claimants. Claims broadly fall into compensatory or non-compensatory categories. Compensatory category for pollution damage encompasses claims such as financial loss, property damage, personal injury, and clean-up costs.[138] The purpose of compensatory damages is to restore the affected parties to their pre-harm condition as much as possible. Civil liability rules may deviate from the default legal position in a jurisdiction on damages that may be compensated and include more categories of losses that may be compensated. For example, pure economic loss, loss of commercial income, loss of means of sustenance, and damage to the environment itself.

Conversely, non-compensatory damages may be awarded at the discretion of the court, and may introduce a punitive aspect to the legal remedy. Examples like punitive or exemplary damages go beyond mere compensation,[139] serving as a deterrent for particularly egregious actions. This part aligns with the broader deterrence function of tort law, aiming not only to compensate victims but also to discourage wrongful behaviour in the future. Likewise, the courts may use its discretion to grant a prohibitory or mandatory injunction, thereby offering a proactive legal remedy.[140] A prohibitory injunction halts ongoing activities that contribute to the cause of action, preventing further harm. In contrast, a mandatory injunction compels the defendant to undertake specific actions to rectify or mitigate the harm caused.

In any case, the structured approach to recoverable damages offered by a civil lability regime serves a crucial role in preventing an overwhelming surge of liability or litigation, often referred to metaphorically as the 'floodgates of litigation'.[141] The concerns about a flood of litigation leading to inefficiencies and potential abuse of legal processes have been discussed

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[138] Gov.UK, 'Liability and Compensation for Pollution damage'(2019) [para 17] 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/338799/130802_Liability_and_Compensation_for_Pollution_Damage.pdf> accessed 11 December 2021; Vernon Valentine Palmer, Kristoffer Svendsen and Peter Wetterstein, 'Damage compensable' in Gunther Handl and Kristoffer Svendsen (eds), *Managing the Risk of Offshore Oil and Gas Accidents* (Elgar 2019) 285.

[139] Carol Brennan, *Concentrate Tort Law* (3rd edn, OUP 2015) 216.

[140] Injunctions are considered equitable remedies, thus not the right of the claimant per se, but ordered at the discretion of the courts; ibid 221.

[141] 'Floodgate' in legal contexts is put aptly by Justice Cardozo in *Ultramares Corp v Touche* (1932) 174 N E, 441, as the risk of making a defendant liable for an 'indeterminate amount for an indeterminate time to an indeterminate class'. A similar opinion was shared by Lord Denning in the case of *Spartan Steel & Alloys Ltd v Martin & Co Ltd* [1973] 1 QB 27 '…[F]or this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, or even false'; Horsey and Rackley (n 93) 57-58 (referring to it as 'a wish to prevent a flood of claims…which may in turn clog-up or slow down the tort system as a mechanism for compensation')

in various legal literature,[142] and interesting as it may be, it exceeds the scope of the thesis. Nonetheless, by establishing clear criteria and categories for recoverable damages, the civil liability regime maintains a balance between providing just compensation for the aggrieved parties and avoiding an excessive and unwarranted influx of legal claims.

Furthermore, specialised civil liability regimes for certain industries, intended for international application, may tailor the recoverable damages to the unique needs and risks of particular industry. This involves considerations beyond individual losses, extending to the broader ecosystem. Specific factors include the cost of environmental remediation, restoration efforts, and the long-term ecological impact of the pollution incident. For example, the CLC tanker oil regime considers the costs of clean-up of the polluted area, damage to property, and economic loss suffered by fishermen or businesses in surrounding coastal areas.[143]

However, in certain instances, the restrictive nature of some civil liability regimes may limit the scope of recovery, potentially hindering the ability of affected parties to seek redress for certain types of damages. For example, while loss of profit from environmental damage, and cost of reasonable measures for prevention or mitigation of environmental damage are recoverable under the CLC regime, claims for impairment of the environment itself are not recoverable.[144] Similarly, the CLC does not cover compensation for pure economic loss.[145] Therefore, finding the right balance between specificity and restriction in civil liability regimes can be challenging when crafting laws that address industry-specific harm while ensuring access to justice for those affected.

[142] See for example, Rudi Roscetti, 'Necessity or Nuisance? A comparative Review of the Approach towards the Recovery of Pure Economic Loss in English Law with that of French law' (2012) 1 The University of Manchester Review of Law, Crime and Ethics 60-72 (discussing whether the cautious approach of the floodgate argument is necessary in claims for negligence and pure economic loss in France and England); Noam Gur, 'Ronald Dworkin and the Curious Case of the Floodgates Argument' 2018 31(2) Canadian Journal of Law and Jurisprudence (considering how the floodgate argument in civil and tort cases implies that 'the court should avoid a decision that would lead to an excessive upsurge in the volume of litigation'); Toby J Stern, 'Federal Judges and Fearing the "Floodgates of Litigation"' (2003) 6(2) Journal of Constitutional Law 37-421 (criticising the floodgates arguments because 'they are not accompanied by an analysis tending to demonstrate that a certain judicial decision would, in fact, lead to a high amount of new federal court litigation').
[143] CLC 1992 art II.
[144] CLC 1992 art I(6).
[145] 'Pure economic loss means monetary loss which has not been caused by personal injury or damage to other property'; LexisNexis, 'Pure economic loss definition' <https://www.lexisnexis.co.uk/legal/glossary/pure-economic-loss> accessed 3 March 2022; Interestingly, claims for pure economic loss may be claimed by the IOPC Funds and interpreted discretionarily by the national courts of the ratifying state; Jacobsson (n 88).

2.4.5 Cap on Liability

Civil liability regimes often contain provisions outlining limitations or caps on the overall financial responsibility for repairing a harm caused. In other words, the party at fault may bear legal liability for harm caused, but their financial responsibility is restricted to a predetermined amount set by law.[146] However, civil liability laws vary in their approach to setting the cap—by explicitly stating liability to be unlimited, or leaving it discretionary for an authority to decide, or remaining undefined impliedly. While such caps may vary depending on the specific context and agreements, the basic idea of a cap on liability is to provide a degree of predictability for businesses, providing them with a clear understanding of their potential financial obligations, while ensuring that victims have access to sufficient compensation for the harm they have suffered.

An advantage of capping liability is its ability to make insurers more willing to cover the associated risks of specific activities.[147] Further, caps on liability provide a level of predictability regarding risk mitigation and compensation for claims that may involve international features.[148] For example, industries and businesses operating near international borders often face the risk of trans-boundary pollution incidents. Caps on liability in an international liability regime will provide a degree of economic certainty, allowing businesses to operate with a clearer understanding of their potential financial exposure in case of pollution-related incidents, and for victims to be ensured of justice regardless of the adjudicating country.[149]

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[146] Karine Fiore, 'No-Fault Compensation Systems' in Michael Faure (ed), *Tort Law and Economics* (Elgar 2009) 406, 418.

[147] European Commission, *White Paper on Environmental Liability*, (2000) COM 66 [24].

[148] For example, under the LLMC, claims for death, personal injuries, property, and pollution damage amount from 302 to1.51 million Special Drawing Rights (SDR); Special drawing rights (SDR) refer to an international type of monetary reserve currency created by the International Monetary Fund (IMF) in 1969 that operates as a supplement to the existing reserves of member countries. Created in response to concerns about the limitations of gold and dollars as the sole means of settling international accounts, SDRs augment international liquidity by supplementing the standard reserve currencies. SDR is essentially an artificial currency used by the IMF with daily conversion rates; International Monetary Fund 'About SDR' (September 2016) <https://www.imf.org/external/np/exr/facts/sdr.htm> accessed 17 April 2020; International Convention on Limitation of Liability for Maritime Claims 1976 , 1996 and 2012 Protocols; International Maritime Organization Convention on Limitation of Limitation of Liability for maritime Claims (LLMC) <http://www.imo.org/en/About/conventions/listofconventions/pages/convention-on-limitation-of-liability-for-maritime-claims-(llmc).aspx> accessed 17 April 2020.

[149] Arnold W Knauth, 'Characteristics of United States Maritime Law' (1953) 13(1) Maryland Law Review 7-10; Thomas J Schoenbaum, 'Liability for Damages in Oil Spill Accidents: Evaluating the USA and International Law Regimes in the Light of Deepwater Horizon' (2012) 24(3) Journal of Environmental Law, 395, 403; *Shipping Corporation v Baker,* 554 US 471 (2008).

However, they also raise important considerations regarding justice, deterrence, and the distribution of costs. For example, in cases of pollution damage, victims may not receive full compensation for their losses if the damages exceed the legislated caps. Therefore, the actual cost of remediation and restoration may surpass the capped amount, leaving impacted communities or ecosystems without proper restitution. Moreover, when caps on liability result in insufficient compensation for victims, the burden of care and support may shift to public resources.[150] This concern is particularly pronounced in industries where accurately forecasting all potential risks stemming from hazardous economic activities may prove challenging.[151]

Nevertheless, in practice, caps on liability have often proven insufficient to cover the full costs of repairing harm in worst-case scenarios, resulting in frequent breaches of these limits. Consequently, adjustments to liability limits are frequently made through the enactment of additional regulations,[152] highlighting the dynamic nature of environmental risks. This shows the ongoing challenge of balancing economic activities with the need to ensure fair compensation and environmental protection

2.4.6 Order of Claims

Traditional tort rules often prioritise claims based on the interests they protect, with courts deciding whether personal or proprietary interests take precedence over the financial interests of the government (related to preventive or mitigation measures) or other public concerns in pollution cases. While some argue that tort law, rooted in private dispute resolution, defaults to prioritising individual claims,[153] it is acknowledged that public interests are not entirely excluded from tort law considerations.[154] Civil liability regimes may establish priorities for claims, with some giving precedence to individual damages over third-party claims,[155] while

[150] For example, into victim compensation funds funded by the government or taxes of the public; Rick Swedloff, 'Uncompensated Torts' (2012) 28(3) Georgia State University Law Review 721, 771-772.
[151] Michael Trebilcock and Ralph Winter, 'The Economics of Nuclear Accident Law' (1997) International Review of Law and Economics 215, 229.
[152] For example, the claims following the Deepwater Horizon spill led and still continues to be a basis for changing liability regulations in several jurisdictions. Similarly, the *Prestige* and *Erika* oil spills, prompted the evaluation of the CLC compensation regime subsequently leading to increases in the liability limits and the creation of a victim compensation Fund; Hui Wang, *Civil Liability for Marine Oil Pollution Damage: A Comparative and Economic Study of the International, US and Chinese Compensation Regime* (Walters Kluwer 2011) 176 – 178.
[153] John Murphy, 'Tort's Hierarchy of protected Interests' (2022) Cambridge Law Journal 356, 382; J Plunkett, 'Principle and Policy in Private Law Reasoning' (2016) 75(2) Cambridge Law Journal 366, 376; Also, John Murphy, 'The Heterogeneity of Tort Law' (2019) 39 OJLS 455 (arguing that private interests is the default priority of tort law).
[154] John Choi, 'Whose Interests Prevail in Tort Law: The Individual's or the Public's?' (2021) 1 Warwick Undergraduate Law Journal 1, 3-10; An in-depth analysis of the hierarchy of protected interests under tort is contained in John Murphy, 'Tort's Hierarchy of protected Interests' (2022) Cambridge Law Journal 356-383.
[155] Ibid, Choi.

others treat claims equally and rely on a 'first come, first serve' basis, leaving the court to determine the prioritisation of the duty of care.[156]

Despite this, it has been argued that judges tend to give precedence to private claims over public interest claims in practice.[157] In cases where a civil liability regime establishes clear priorities for claims, there is a structured framework guiding the resolution of disputes. This can enhance efficiency and fairness, thereby ensuring that certain types of claims, such as damages by individuals, are given precedence over others. Moreover, such prioritisation may align with the principles of corrective justice, addressing disputes between private parties as the default focus of tort law. Nevertheless, striking a balance between private and public interests in the prioritisation of claims is a challenging task, which emphasises the need for nuanced legal approaches when creating civil liability regimes.

2.4.7 Limitation Period for Bringing Claims

The time limitations embedded within legislation hold significant implications for the initiation of legal claims. Historically, limitation periods, utilised in both common law and delict systems, served to establish temporal limits for civil actions.[158] The consensus in the law of limitations acknowledges that claimants cannot be granted an indefinite timeframe to bring claims against a defendant.[159] The rationale behind this is that a defendant should not have a cloud of litigation hovering above them in perpetuity, after the circumstances leading to the cause of action has 'long passed' Additionally, prolonged delays can compromise the 'quality of justice' delivered as evidence may be lost over time.[160]

Establishing specific limitation periods is also crucial for businesses and insurers, providing clarity on their potential liabilities and preventing the unreasonable burden of 'open-ended

[156] Ibid.
[157] Choi argues that judges are more inclined to so doing in the interest of promoting their authority and independence, because 'judges have a stake in creating the appearance that their decisions are shaped entirely by the application of legal principles onto individual facts' and not giving way for critics to label them as being 'unauthorised lawmakers'; Ibid, 3.
[158] Rudolph Sohm, *The Institutes of Roman Law* (2nd edn, Ledlie's Translation 1907) 317-323; Patrick J Kelley, 'The Discovery Rule for Personal Injury Statutes of Limitations Reflections on the British Experience' (1978) 24 Wayne Law Review 1641, 1641-1644; Harvard Law Review Association, 'Developments in the Law: Statutes of Limitations' (1950) 63(7) Harvard Law Review 1177, 1185;
[159] For detailed comparative analysis of the origin, rationale, and types of limitation periods in law, see Harvard Law Review Association, 'Developments in the Law: Statutes of Limitations' (1950) 63(7) Harvard Law Review 1177-1269 and also Edward G Longacre, 'The Statute of Limitations and the Conflict of Laws' (1919) 28(5) The Yale Law Journal 492-498.
[160] *Jones v Bellgrove Properties Ltd* [1949] 2 KB 700, 704

liability from unforeseen claims,[161] and may also allow for a more accurate assessment of potential liability.'[162] Summarily, limitation periods serve to strike a balance, allowing claimants time to assess their exposure to a committed tort while protecting defendants from stale claims.[163] Hence, it has become conventional to enact legislation governing limitation periods,[164] or to incorporate provisions for limitation period within industry specific legislation.[165] In cases where conflicts of laws arise, the expectation is that the law governing the action will also govern the limitation period.[166]

Notably, statutes of limitations are generally viewed as procedural and policy-driven rules rather than integral components of substantive law. Consequently, the court retains the ultimate authority in determining how these rules are applied to ensure they do not unduly 'restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.'[167] Thus, when a limitation period is provided by statute for a specific type of claim, it may be an indication that the enacting regulation is in favour of quick settlement of the action it governs.

There is also a material link between limitation periods and the commencement of claims. It is often the case that limitation periods for civil claims commence from the date the cause of action accrued, whether or not the claimant is aware of the potential claim.[168] However, this

[161] Law Reform Commission of Tasmania, *Limitation of Actions for Latent Personal Injuries* (Report No 69, 1992), 10.
[162] Ibid.
[163] New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims* (LRC 50, 1986) 3-4.
[164] For example, the Limitation Act 1980, applicable in England and Wales, provides for the time within which actions can be brought. Section 2 provides six years for certain actions under tort. However, section 33 states that in certain instances, it is at the discretion of the court to extend the limitation period. Similarly, sections 1 and 2 of the Foreign limitations Act 1984 states that where a court in England and Wales hears a claim governed by foreign law, the court applies the limitation period applicable under the law applicable to the claim. However, the courts may deviate from such limitation period if 'the result would be contrary to public policy because it would cause undue hardship to a person who is, or might be made, a party to the proceedings'. This rationale was used in the cases of *Bank St Petersburg v Arkhangelsky* [2014] EWCA Civ 593 and *Sophocleous and others v The Secretary of State for Foreign and Commonwealth Affairs and another* [2018] EWCA Civ 2167. The equivalent in Scotland is the Prescription and Limitation (Scotland) Act 1973.
[165] For example, in the CLC 'Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence'; article VIII.
[166] Harvard Law Review Association, 'Developments in the Law: Statutes of Limitations' (1950) 63(7) Harvard Law Review 1177, 1180, 1186-1188.
[167] *Stubbings and Others v United Kingdom* (1996) 23 EHRR 213, 50; See also another example in section 33 of the English Limitations Act 1980, which states that in certain instances, it is at the discretion of the court to extend the limitation period.
[168] This is not restricted to the law of tort, but also extended to law of contract, breach of equity or trust laws, and similar claims Law Commission, *Limitation of Actions: Item 2 of the Seventh Programme of Law Reform:*

default stance frequently leads to perceived injustices, as it may not account for situations where the injury suffered by the claimant does not become apparent for several years.[169]

In cases of oil pollution damage, determining the commencement date and limitation period can be contentious. The conventional practice is that the cause of action commences on the date when the spill occurred. While this has the advantage of allowing the claimant to act promptly without waiting for visible impacts, the hidden nature of oil pollution damage may mean that its effects only become apparent at a later date. Consequently, the claimant might lack a complete understanding of their loss before filing a claim.[170] To address this issue, some legislation incorporates a concept known as the knowledge date and a long stop date. The former allows claimants a reasonable period to become aware of the damage and its implications before the official commencement of the limitation period, while the latter ensures that there is an ultimate deadline for filing a cause of action, even if the knowledge date is extended.[171]

2.4.8 Forum for Dispute Resolution

The rules governing the establishment of and access to the procedural framework of adjudicative forums are significant variables in any legal regime. Civil liability regimes typically include provisions that dictate the forum for resolving disputes arising from legal claims. These provisions outline the specific venues or mechanisms where parties involved in a dispute must pursue resolution. The forums can range from traditional courts to alternative dispute resolution (ADR) methods like arbitration or mediation.[172] Unlike cases hinged on contractual obligations, tort cases are predominantly adjudicated by the courts, with assignments to specific courts depending on the nature of the case. For instance, in numerous jurisdictions, civil liability related to maritime or offshore matters is often litigated in admiralty

Limitation of Actions (Law Com No 270, 1965) para 1.5; Scottish Law Commission, *Report on Personal Injury Actions: Limitations and Prescribed Claims* (Scot Law Com No 207, 2007) 7-43'

[169] Law Commission, Limitation of Actions: Item 2 of the Seventh Programme of Law Reform: Limitation of Actions (Law Com No 270, 1965) para 1.5

[170] Susan Bright, 'Limitation Periods in Contract and Tort: How much time is there to bring a claim?' (University of Oxford Faculty of Law Blog, 14 July 2022) <https://blogs.law.ox.ac.uk/blog-post/2022/07/limitation-periods-contract-and-tort-how-much-time-there-bring-claim#:~:text=The%20applicable%20limitation%20period%20depends,%2C%20ss%202%20and%205).> accessed 28 August 2022.

[171] Ibid; for example, in the CLC claims must be raised within three years of the date when the damage occurred, and within six years of the date of the incident which caused the damage; Art VIII.

[172] ADR mechanisms are extensive and continues to develop, but in the context of the thesis ADR is specifically refers to Arbitration, Mediation, Conciliation, Negotiation and Settlement Conferences. However, arbitration appears to be the preferred alternative for specialised cases because of its shared similarities with litigation, for example, the use of an expert arbiter as an adjudicator who can also give binding decisions; L R Spain, 'Alternative Dispute Resolution for the Poor: Is It an Alternative?' (1994) 70 North Dakota Law Review 269-270.

courts or ad-hoc tribunals to facilitate a more prompt and efficient resolution.[173] Parties to tort cases cannot independently deviate from or independently consent to confer jurisdiction on another forum to settle their disputes.[174]

However, contemporary civil liability legislation, both at the national and international levels, increasingly offers diverse forums for the settlement of claims.[175] For example, there are instances where civil claims may be ordered to be taken to a pre designated ADR forum, and the ADR decision be binding.[176] Vidmar submits that 'some of the enthusiasm for ADR is promoted by courts in an attempt to reduce their overloaded trial calendars.'[177] Likewise, parties to a claim may be of the opinion that the type of solutions the court provides may be too formal, contentious, and restricted, and they may have no control over the final decision of the claim, unlike a certain level of flexibility that is applicable under ADR techniques, like arbitration.[178] Furthermore, ADR processes can be practical when resolution of an issue is time sensitive and requires the effective disbursal of funds, and when it is authorised by legislation, the proceedings may count towards the limitation period.[179]

However, not all tort issues will necessarily be suitable for ADR, for example, where the disputes involve multiple parties or a class action issue.[180] Moreover, ADR does not eliminate the possibility of litigation and, to some extent, relies on the court system. For example, ADR decisions may be a subject of litigation because cases may be settled based on the notion of

[173] Will Kenton, 'Admiralty Court: what it is, how it works, history' (*Investopedia,* 07 June 2022) <https://www.investopedia.com/terms/a/admiralty-court.asp> accessed 17 April 2023.
[174] Susan Rose-Ackerman, 'Tort Law as a Regulatory System: Regulation and the Law' (1991) 81(2) The American Economic Review 54, 54-55.
[175] For example, the United Nations Convention on International Settlement Agreements Resulting from Mediation 2018 (Singapore Mediation Convention) is an international framework for enforcing mediated settlements. Similarly, The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).
[176] In some jurisdictions, it is mandatory for disputing parties to participate in ADR first before litigation, under the guidance of an ADR judge. For example, in Lagos state, Nigeria, pursuant to section 89(1) of the High Court of Lagos Laws 2003 (as amended). Similarly it is encouraged in the UK in relation to commercial disputes; Civil Justice Council 'Compulsory ADR' (2012) <https://www.judiciary.uk/guidance-and-resources/mandatory-alternative-dispute-resolution-is-lawful-and-should-be-encouraged/> accessed 12 January 2022.
[177] Neil Vidmar, 'Commentary: Procedural Justice and Alternative Dispute Resolution' (1992) 3(4) Psychological Science 1.
[178] Ibid; for a thorough analysis of jurisdiction of courts and mobilisation of adjudication for conflict resolution see generally, John C Wells, *A Treatise on the Jurisdiction of Courts* (West Publishing Company 1880), Di Jiang-Schuerger, 'Perfect Arbitration = Arbitration + Litigation' (1999) 4 Harvard Negotiation Law Review 231-252 and, Austin Sarat and Joel B Grossman, 'Courts and Conflict Resolution: Problems in the Mobilization of Adjudication' (2014) 69(4) American Political Science Review 1200-1217.
[179] Ibid.
[180] Practical Law Dispute Resolution, 'Overview and comparison of ADR processes' (*Thomson Reuters Practical law*, 2016) <https://uk-practicallaw-thomsonreuters-com.ezproxy.bangor.ac.uk/Document/Id249f12f1c9611e38578f7ccc38dcbee/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_a607367> accessed 18 December 2021.

fairness, rather than the basis of rule of law.[181] Similarly, the enforcement of ADR decisions may also trigger court proceedings, potentially causing unnecessary delays for the parties involved. Moreover, unlike litigation, ADR settlements lack the establishment of legal precedents, as their deliberation processes are typically confidential, not subjected to public scrutiny.[182]

The assignment of liability may also be shaped by regulatory bodies overseeing the industry, in less common scenarios, civil liability regimes may delineate specific adjudicative roles and responsibilities for regulatory entities in monitoring and enforcing compliance.[183] However, a shortcoming of this is that resolving civil liability claims may tend to be more punitive in nature.

In any case, the jurisdiction of the adjudicating body holds a pivotal role in determining the legitimacy of a cause of action. Without proper authorisation to address a specific subject matter, a forum lacks the authority to adjudicate on it.[184] In cases where the adjudication forum is not explicitly specified by a civil liability regime, this ambiguity can lead to delays in proceedings for recovery or repair. Therefore, establishing clear criteria becomes imperative to ensure efficiency and clarity in the pursuit of justice.

2.4.9 Financial Assurance

Civil liability laws typically anticipate that the commission of a tort will result in the payment of compensation or carrying out repair. However, making a person subject to civil liability, does not automatically guarantee that they will have the financial resources to pay compensation or carry out full repair. Recovery of compensation may even be hampered if an entity becomes insolvent and cannot satisfy all its liabilities.[185] Therefore, liability alone without financial assurance, may prove to be less of an effective remedy.

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[181] John T McDermott, 'Arbitrability: The Courts Versus Arbitration' (1968) 23(1) 18, 30; Jiang-Schuerger (n 178) 247; Todd B Carver and Albert A Vondra, 'Alternative Dispute Resolution: Why it doesn't work and why it does' (1994) Harvard Business Review <https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does> accessed 12 January 2022.

[182] Ibid.

[183] Abiding by the provisions of a regulatory standard or being subject to regulatory liability is not regarded as a defence for tort or civil liability in the court, especially in relation to private actions. However, they may be considered when reaching a decision for compensation of a public authority; Susan Rose-Ackerman, 'Tort Law as a Regulatory System: Regulation and the Law' (1991) 81(2) The American Economic Review 54, 54-55.

[184] Horace Hawes, *The Law Relating to the Subject of Jurisdiction of Courts* (Bancroft-Whitney Co 1886) 9.

[185] Alan Schwartz, 'Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote-Risk Relationship' (1985) 14 Journal of Legal Studies 689; *see also* James Boyd, 'Financial Responsibility for Environmental Obligations: An Analysis of Environmental Bonding and Assurance Rules'

Hence it is common to find civil liability legislation for environmental problems that requires financial security as a condition for carrying out specific activities, especially if they prove risky.[186] The reason for this is to establish a source dedicated to compensation of damage or for any prevention and mitigation measures that may arise. Moreover, requiring proof of financial guarantee promotes a culture of responsibility among potential tortfeasors. This is because financial responsibility guarantees that the anticipated expenses associated with environmental risks are reflected in the financial statements of a company and factored into its business assessments.[187] Moreover, under a strict liability rule and without insurance, the risk-averse injurer faces the prospect of significant losses, leading to a tendency to exercise excessive caution.[188] Therefore, knowing that their financial resources are committed to addressing liabilities can incentivise compliance with regulations and encourage proactive risk management practices.

The proof of financial guarantee may be a sum equivalent to the liability limit, as stipulated by legislation, or an amount proportional to the magnitude of the risk and scale of potential losses.[189] Furthermore, the law may state the anticipated duration of the financial assurance, which typically aligns with the timeframe of the regulated activity.[190] This ensures a sustained commitment to potential liabilities throughout the entire lifecycle of a risky activity.

Civil liability regimes employ diverse instruments to ensure that potential tortfeasors possess adequate financial resources to fulfil compensation obligations, if needed. In cases that may result to pollution damage, a civil liability regime may permit the use of instruments such as mandatory insurance (including traditional insurance, mutual assurance, and P&I clubs), letters of credit, guarantees, indemnity bonds, and participation in industry funds or pooling

<https://www.ucl.ac.uk/cserge/Boyd.pdf> accessed 2 March 2022 (conducts an extensive and interesting discussion on financial responsibility for environmental harm).

[186] For example, financial assurance is required by oil tanker carriers in article VII of the CLC Convention in the form of 'insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund in the sums fixed by applying the limits of liability prescribed…'. A similar requirement is found in article 7 of the Bunker oil Convention. Likewise, article 10 of the Paris Nuclear Energy Convention. Additionally, in article 235(3) of the UNCLOS, states are urged to consider the 'development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds'.

[187] James Boyd, 'Financial Responsibility for Environmental Obligations: An Analysis of Environmental Bonding and Assurance Rules' 2-5 <https://www.ucl.ac.uk/cserge/Boyd.pdf> accessed 2 March 2022.

[188] Gerhard Wagner, 'Tort Law and Liability Insurance' in Michael Faure (ed), *Tort Law and Economics* (Edward Elgar 2009) 380.

[189] Hubert Bocken 'Alternative Financial Guarantees under the ELD' (2009) European Energy and Environmental Law Review 146, 169.

[190] Ibid.

systems.[191] This offers a more customised approach to financial assurance. There are also instances where the determination of which instrument serves as proof of financial guarantee is delegated to governmental authorities' regulatory agencies.[192] This introduces a regulatory oversight aspect, enabling adaptability to changing circumstances and evolving industry standards, thereby promoting effective risk management. In any case, Clear guidelines on acceptable instruments for financial assurance offer legal certainty for both regulators and entities that are subject to a civil liability regime. This contributes to a more predictable legal environment of a civil liability regime, minimising ambiguity and potential disputes.

2.4.10 Conflict of Laws

Engaging in activities with cross-border implications often introduces the potential for conflicts of laws. Such endeavours, spanning international boundaries, can lead to legal complexities as different jurisdictions may apply their own distinct legal frameworks. The interaction between multiple legal systems raises challenges in determining which set of laws governs the various aspects of the activity, including liability and dispute resolution. Conflict of laws (also known as private international law) deals the body of rules applied by the courts to cases accompanied by a foreign element such as the parties, the subject matter, or the cause of action to a dispute involving different countries. Conflict of laws matters do not answer the material question of a case itself, rather it deals with determining what rules are to be applied in order to answer the material questions of a case. Thus, it typically deals with the main questions of jurisdiction of the court, choice of law, and recognition or enforcement of the laws of other jurisdictions.[193]

With contractual obligations, the conflict of laws may be less encountered because the parties would typically make an agreement about the forum for dispute settlement and under what laws. However, the issues associated with conflict of laws are fundamentally essential to the practice of tort law, especially those with potentials for international implication such as

[191] Henri Smets, 'Major Industrial Risks and Compensation of Victims: The Role for Insurance' (1988) 27(10) Social Science and Medicine 1085, 1088; However, economists argue that insurance does not guarantee compensation, rather it is an efficient means of spreading loss or risks of an activity, *see*, Steven Shavell, *Economic Analysis of Accident Law* (Harvard University Press, 1987) 257.

[192] For example, article 14(1) of the Environmental Liability Directive 2004/55/EC (ELD) leaves it at the discretion of EU member States to take measures 'to encourage the development of financial security instruments…by the appropriate economic and financial operators…in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive'.

[193] Trevor C Hartley, International Commercial Litigation: Text, Cases and Materials on Private International Law (Cambridge University Press, 2009) 49; Jonathan Hill and Marie Ní Shúilleabháin, *Clarkson & Hill's conflict of laws* (5th edn, OUP 2016) 2.

transboundary pollution damage.[194] This is because tortious liability provided by law cannot be contracted away.[195]

In the context of international law, a civil liability regime will be in the form of a treaty.[196] Treaties may be bi-lateral, applicable between two contracting countries, or multilateral, involving several countries. When these treaties extend to private parties, they generally pre-empt and address potential conflict of laws issues that might arise.[197] This ensures a cohesive approach to civil liability matters across participating nations. For instance, in environmental civil liability treaties, there is often a stipulation ensuring reciprocity in the recognition and enforcement of judgments among the treaty parties.[198] This not only streamlines legal proceedings but also establishes a framework for consistent application of the provisions of the agreement across participating nations. Ultimately, a provision or an agreement addressing conflict of laws reflects a commitment to harmonise legal standards and facilitates prompt and effective resolution of claims in the face of cross-border challenges.

2.5 Conclusion

By establishing the theoretical framework as well as identifying the key features of a civil liability regime, especially for activities deemed ultra-hazardous, this chapter lays the foundation for the analysis in subsequent chapters. The next chapter of this thesis assesses the treatment of civil liability for damages stemming from offshore petroleum development within international law instruments applicable in the Arctic region. This analysis also extends to current regional arrangements in the Arctic related to offshore petroleum development and relevant industry initiatives that influence liability and compensation for harm from such activity.

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[194] Hassan Syed, 'International litigation: doctrine of lex fori vs lex loci' (2020) Intergovernmental Research and Policy Journal 1-2.

[195] Ibid.

[196] Treaty is used as a generic term embracing all instruments binding at international law concluded between international entities, regardless of their formal designation. They can be used interchangeably with 'agreement' or 'convention'. Treaty law is highly specialised, thus this thesis refrains from rendering an extensive analysis on the step-by-step practices and politics associated with the making of treaty law. However, see United Nations Office of Legal Affairs, 'United Nations Handbook on Treaty Law' <https://treaties.un.org/doc/source/publications/thb/english.pdf> accessed 21 December 2022 (Designed for use by States, international organizations and other entities with instructions, and touches upon many aspects of treaty law and practice); *see also*, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969 1155 UNTS 331.

[197] Noah Sachs, 'Beyond the liability wall: strengthening tort remedies in international environmental law' (2008) 55 UCLA law Review 837, 849-850.

[198] For example, article X of the CLC, article 8 of the Fund Convention, article 10 of the Bunker Convention, article XI (4) of the Nuclear Ships Convention, and article 40 HNS Convention deal with conflict of laws considerations for their respective subject matter.

The features identified and discussed in this chapter form the basis for this assessment. Namely, the existence of a civil wrong, liability types, burden of proof, channelling of liability, recoverable damage types, limits of liability, as well as considerations related to financial assurance and responsibility. Procedural requisites are also considered, such as claim priority, forum for dispute resolution, limitation periods for bringing claims, and resolution of conflict of laws issues.

CHAPTER THREE

INTERNATIONAL ENVIRONMENTAL REGIME RELEVANT TO OFFSHORE POLLUTION DAMAGE FROM PETROLEUM ACTIVITITES

3.1 Introduction

In chapter one of the thesis, several measures that impact environmental governance in the Arctic region are briefly outlined. These measures include overarching agreements and ancillary measures, such as multilateral, regional, bilateral agreements, and industry initiatives. Chapter two addresses the first research question, identifying the key features necessary for a successful civil liability regime. This chapter builds on this analysis and focusses on the second research question, investigating whether the key features of a civil liability regime are present in current environmental treaties and industry initiatives applicable in the Arctic.

As a preliminary note, it is useful to acknowledge that the main subjects of international law are states,[1] and through recognition or ratification of different sources of international law, states undertake to give domestic effect to their international law obligations. Individuals may also be right holders in international law, for example, in the areas of international human rights law[2] and international commercial law.[3] Nevertheless, this chapter does not consider the responsibility or liability of states as a potential avenue for affected private individuals to seek redress for pollution damage from offshore petroleum development.

[1] Myres S McDougal, Harold D Lasswell, and W Michael Reisman, 'The World Constitutive Process of Authoritative Decision' (1967) 19 Journal of Legal Education 253; The arguments on international law and states versus private individuals exceeds the scope of this chapter, challenging the state-orientated approach to international law and the role and ability of individuals to assert their rights internationally *see* R Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995).

[2] United Nations Human Rights Office of the High Commissioner, 'Instruments and Mechanisms: International Human Rights Law' <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law> accessed 2 May 2022 (reiterating 'Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.')

[3] For example, the International Centre for Settlement of Investment Disputes (ICSID) which is established by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). It is an arbitral institution that administers the settlement of investment disputes between governments and private sector foreign investors brought under the obligations and rights created by the ICSID convention and other rules such as the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules); International Centre for Settlement of Investment Disputes, 'Cases: Overview' <https://icsid.worldbank.org/cases> accessed 2 May 2022.

Given the pivotal role of international law in environmental governance,[4] this chapter starts by outlining the legal regime of the UNCLOS, which gives rights to the Arctic states regarding petroleum development on their continental shelves. It also discusses the limitations of the legal regime in handling challenges posed by Arctic petroleum development, specifically the lack of a suitable legal liability system for pollution damage linked to petroleum activities. The examination then turns to other existing international and regional legal arrangements that are relevant to the protection of the Arctic marine environment. The aim is to conclusively determine whether they inherently contain an avenue for private individuals to effectively seek redress for civil liability for pollution damage in Arctic offshore areas. Beyond established legal frameworks, the examination also extends to other mechanisms like industry-backed initiatives such industry agreements. These mechanisms are assessed for their relevance to compensating private actions for civil liabilities during petroleum activities in the Arctic region.

The examination conducted in this chapter holds critical significance in establishing the viability of existing environmental treaties and industry initiatives in providing a comprehensive approach to addressing civil liability claims for pollution damage resulting from offshore petroleum development in the Arctic region. In light of the examination, the central contention of this chapter is that there is a notable absence of a recognised mechanism of international application with the capacity to effectively handle civil liability claims stemming from oil spill incidents in the context of Arctic offshore petroleum development. This observation highlights the need for a more robust and internationally applicable approach to address the complexities associated with civil liability in the Arctic region.

3.2 International Legal Basis for Offshore Petroleum Development in the Arctic: 1982 United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS), often referred to as the 'constitution of the seas',[5] plays a vital role in the environmental governance of the Arctic. It also establishes rights, obligations and duties of states in relation to various marine issues by

[4] The term 'environmental governance' in this study refers to a multi-faceted framework which various stakeholders play a role in overseeing and regulating offshore oil and gas activities in the Arctic, especially with the critical factor of liability for pollution damage. These include legal and non-law-based initiatives; United Nations Environmental programme, 'About environmental rights and governance' <https://www.unep.org/explore-topics/environmental-governance/about-environmental-rights-and-governance> accessed 6 March 2023.

[5] Brandon A Carroll, 'Drilling in the Deep: Jurisdiction over Oil Rigs Operating Outside of the Territorial Zone in Light of the Deepwater Horizon Oil Spill' (2011) 18 Southwestern Journal of International Law 667, 673.

adopting a zonal approach. By dividing the ocean into maritime zones, the UNCLOS allows a coastal state to claim maritime territory from a baseline, typically the low-water line of its internal waters. A coastal state can exert sovereign control and enjoy broad rights in its territorial sea, extending 12 nautical miles (nm) from the baseline, and can also claim limited enforcement jurisdiction in a contiguous zone 24nm from its baseline.[6] UNCLOS further allows coastal states to claim an exclusive economic zone (EEZ) spanning up to 200nm from the baseline,[7] and a continental shelf also up to 200nm, which is extendable to 350 miles under certain conditions.[8] While both the EEZ and continental shelf are not considered part of a maritime territory of a nation *strico sensu*,[9] states also enjoy near exclusive rights to explore, exploit and manage natural resources within these zones, including oil and gas deposits.[10]

The remaining ocean territory consists of the high seas and the deep seabed ('the Area'),[11] which are beyond the limits of national jurisdiction and considered the common heritage of mankind, and are not subject to alienation.[12] However, states have broad freedoms in these areas and may use the resources therein for the benefit of their jurisdiction, in accordance with the provisions of the UNCLOS.[13] The UNCLOS has been ratified by seven of the eight Arctic countries;[14] notably the USA is not a signatory to the UNCLOS itself. However, it has signed the 1994 Agreement on the Implementation of Part XI of the UNCLOS regarding the Use of

[6] UNCLOS Part II; waters extending 12 nautical miles from the internal water baseline is the territorial sea and waters extending 12 nautical miles from the territorial waters (or 24 nautical miles from the baseline) is the contiguous zone and where a coastal state authority can exert sovereign control on matters such as customs, immigration, shipwrecks, waste management, and fiscal transactions.
[7] Part V.
[8] Part VII; Article 76 and 77; The Continental Shelf may extend beyond 200 nautical miles from the baseline up to 350 nautical miles depending on the geophysical characteristics of the seabed and as verified by the Commission on the Limits of the Continental Shelf (CLCS); UNCLOS article 55, 56(1) and 57.
[9] The EEZ and continental shelf are generally considered coextensive, though whether they fully overlap depends on the geology of the seabed. The continental shelf is the seabed and subsoil under the ocean, while the EEZ is the water column and ocean surface.
[10] Article 77.
[11] Parts VII and XI; part 1 article 1(1).
[12] Part XI section 2; article 140; article 150 (h)(i).
[13] Article 1(1); 147(2)(a-e); 137(2); 170; 142; Annex III article 1.
[14] UN Treaty Collection, 'Status of treaty' <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 10 May 2020.

the Area,[15] although ratification is pending. Nevertheless, the USA regards numerous provisions of the UNCLOS as customary international law.[16]

Therefore, to put the relevant provisions of the UNCLOS into the context of the thesis, the petroleum resources located in the continental shelves of the littoral Arctic states are generally subject to the jurisdiction of those states. However, the central Arctic Ocean which constitutes the largest expanse of the deep seabed in the Arctic region,[17] is subject to international governance according to UNCLOS provisions over the Area.[18] By providing a legal framework that outlines the rights, responsibilities, and limitations pertaining to the utilisation of marine resources, the treaty gives the Arctic countries significant rights and freedoms to explore and exploit the petroleum resources within their maritime territories.[19]

Of additional relevance to the subject matter of the thesis is part XII of the UNCLOS, which in article 192, generally addresses the obligatory duties of coastal states in the protection and preservation of the marine environment when enjoying their sovereign rights to explore and exploit petroleum their maritime territories, by enforcing regulations for the prevention of, reduction and control of pollution of the marine environment, including pollution from offshore instalments. Further, articles 194(3) and 208(1-2) recognise offshore installations and devices used in exploration or exploitation of natural resources, as potential sources of pollution.

While the UNCLOS serves as a broad normative framework for governing marine pollution,[20] the UNCLOS largely leaves the substantive aspects of addressing pollution damage to be

[15] 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 UN Doc. A/RES/48/263; addresses the principles governing the use of seabed, ocean floor and subsoil beyond the limits of national jurisdiction (that is the Area) for exploration and exploitation of mineral resources located therein; Part I; article 1; Part XI; article 133 (a) and (b).

[16] The US Court of Appeal has reflected this position on customary international law in *United States v Alaska* [1992] US 503 at 569, 588; *United States v Kun Yun Jho* [2008] 5th circuit 534 at 398; Emeka Duruigbo, 'Reforming International Law and Policy on Marine Oil Pollution' (2000) 31 Journal of Maritime Law and Commerce 65, 72-78.

[17] Arctic Council, 'Exploring the Arctic Ocean: The agreement that protects an unknown ecosystem' (*Arctic Council*, 28 October 2020) <https://arctic-council.org/news/exploring-the-arctic-ocean-the-agreement-that-protects-an-unknown-ecosystem/> accessed 11 July 2021.

[18] Part XI section 2; Article 136 and 140; Timo Koivurova and Sébastien Duyck, 'A New Ocean to Govern: Drawing on Lessons from Marine Management to Govern the Emerging Arctic Ocean' in David Leary & Balakrishna Pisupati (eds), *The Future of International Environmental Law* (2010) 179, 180.

[19] Article 193; part XI addresses the principles governing the use of seabed, ocean floor and subsoil beyond the limits of national jurisdiction (that is the Area) for exploration and exploitation of mineral resources located therein, however, as highlighted in chapter one of the thesis, the exploitation of resources in Central Arctic Ocean is not addressed in this thesis.

[20] Richard Barnes, David Freestone and David Ong, 'The Law of the Sea: Progress and Prospects' in Richard Barnes, David Freestone and David Ong, *The Law of the Sea: Progress and Prospects* (OUP, 2006), 3.

determined through other avenues.[21] As such, the UNCLOS does not offer specific provisions regarding compensating pollution damage from offshore petroleum development carried out by private entities, even though this falls within the broader scope of the UNCLOS, as these activities directly impact the protection of the marine environment. Rather, the UNCLOS, through article 235, leaves the matter of prompt and adequate compensation or other relief for pollution damage to be resolved by coastal states,[22] while also asking states to cooperate to develop international and/or regional agreements on this issue.[23]

Although the UNCLOS implicitly recognises the deleterious nature of pollution damage caused by private entities and warranting prompt and adequate redress,[24] the Convention cannot serve as a civil liability regime for individuals in the Arctic states seeking to remedy such damage. This is because the UNCLOS does not prescribe such a regime. Nevertheless, not only does article 235(3) give states the impetus to collaborate in developing international law on responsibility, liability assessment, and compensation criteria, the provision also envisions that other mechanisms that are not law-based, such as the use of compensation funds or insurance schemes, can be utilised internationally to ensure prompt and adequate compensation for pollution damage.[25]

Article 235(3)'s call for states to cooperate in implementing existing international law and further develop international law to assure prompt and adequate compensation, in respect of all damage caused by pollution of the marine environment, is not merely a suggestion but a legal obligation. This necessarily includes civil liability for offshore oil pollution in the Arctic. However, despite this obligation, international law remains deficient where pollution damage from offshore petroleum development is concerned. Where pollution caused by other marine activities is concerned, rules have been developed. For instance, through the IMO, several conventions with global application have been created, not only to improve safety in the

[21] Lan Ngoc Nguyen, 'Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits' (2021) 52(4) Ocean Development and International Law, 419-444, 419.
[22] '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'; article 235(2).
[23] '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'; article 235(3).
[24] Also see article 229.
[25] Myron H Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol iv (Martinus Nijhoff Publishers, 1991) 412.

shipping sector, but to also ensure prompt and adequate compensation for victims of oil pollution incidents arising from shipping activities, such as the CLC and Fund regime.[26]

The CLC 1992 has largely been discussed in the previous chapter, but key features include the scope of application to oil pollution damage within the territorial waters of member states and the EEZ caused by tankers carrying persistent oil as cargo.[27] It also establishes a system of strict liability for shipowners but includes provisions outlining exemptions and defences available to shipowners, such as acts of war, natural disasters, or intentional acts by third parties.[28] The CLC sets limits of liability for shipowners concerning oil pollution damage which are periodically reviewed and adjusted to reflect changes in economic conditions and the potential scale of damage,[29] and shipowners are required to maintain insurance or other financial security to cover their liability under the CLC. This ensures that sufficient funds are available to compensate victims in the event of an oil pollution incident.[30] The convention also establishes procedures for filing and adjudicating claims for oil pollution damage,[31] including a limitation period for filing claims,[32] and provides for the establishment of national and international compensation funds to facilitate the prompt payment of claims. Finally, the CLC contains provisions to govern potential conflict of laws issues.[33] However, while these international measures have been implemented to ensure prompt and adequate compensation for oil pollution damage resulting from maritime casualties involving oil tankers, the same cannot be said for addressing pollution damage caused by petroleum development.

However, the development of international law called for under UNCLOS serves not only to foster global cooperation in developing agreements and soft law measures, but also shows the importance of regional collaboration.[34] States, in accordance with other UNCLOS provisions, are required to cooperate '…as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and

[26] 1969 Convention on Civil Liability for Oil Pollution Damage (CLC) and its 1992 Protocol, and the 1992 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the Fund Convention) and the 2003 Protocol; the CLC regime is largely discussed in Chapter 2 of this thesis, given its relevance to identifying key features of civil liability regimes in the context of maritime accidents involving hazardous substances.
[27] Article II (a).
[28] Article III; Joint and several liability of shipowners is set out in article IV of the Convention.
[29] Article V.
[30] Article VII.
[31] Article IX.
[32] Article VIII.
[33] Article V(3); article X.
[34] Article 197; also, article 208 (4-5).

recommended practices and procedure for the protection and preservation of the marine environment, taking into account characteristic regional features.'[35]

The subsequent sections examine to what extent Arctic states have met this legal obligation on both international and regional levels, including collaborative regional initiatives currently in place that deal with oil pollution from offshore petroleum development.

3.3 Legal Initiatives and Collaborations of Arctic States in Addressing Oil Pollution from Offshore Petroleum Development

Having established the Arctic states' obligation under the UNCLOS to safeguard the marine environment, as well as the need to comprehensively address civil liability for offshore oil pollution in the Arctic, it becomes essential to examine the measures taken by Arctic states, both internationally and regionally, relevant to pollution originating from offshore petroleum development on their continental shelves. The aim is to evaluate whether the measures already implemented by Arctic states to protect and conserve the marine environment from pollution damage provide a comprehensive framework for private entities to seek recourse for civil liabilities arising from petroleum development in the Arctic region. This analysis is particularly crucial due to high likelihood of transboundary pollution damage and the associated complexities surrounding the conflicts of laws.

The Arctic states, being bordered by multiple oceans,[36] may participate in various regional agreements aimed at addressing marine pollution resulting from offshore petroleum development. However, this section concentrates on multilateral agreements either specifically tailored for the Arctic Ocean or agreements encompassing all oceans bordered by the Arctic states. Currently, only the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), the 2013 Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOSPA), and the 1974 Nordic Environmental Protection Convention (NEPC) are central to international and regional efforts in addressing pollution from offshore petroleum development in the Arctic.

[35] Ibid.
[36] *See,* World Atlas, 'Which countries border more than one ocean' <https://www.worldatlas.com/articles/which-countries-border-more-than-one-ocean.html> accessed 10 June 2020.

3.3.1 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation

The international regime that comes closest to the subject of pollution from offshore petroleum activities is arguably the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC).[37] The OPRC is a multilateral treaty created under the auspice of the IMO,[38] and is largely geared towards facilitating international cooperation on oil pollution in the marine environment.[39] It sets out provisions dealing with the prevention of marine pollution from offshore installations, and in the absence of a specific convention dealing with pollution from offshore installations,[40] the OPRC also prescribes that 'State parties must establish a national system to promptly and effectively respond to oil pollution incidents…'.[41]

Further, similar to the UNCLOS, the OPRC not only encourages the establishment of national mechanisms but also promotes the formation of bilateral and multilateral agreements, as well as collaboration between states and the oil industry. This collaborative approach aims to enhance oil pollution preparedness and response.[42] By fostering cooperation, tailored response measures can be developed to address the unique characteristics of diverse coastal regions.[43] A notable example of such regional collaboration is the 2013 Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOSPA).[44] Negotiated under the auspices of the Arctic Council and unanimously adopted by all eight Arctic states, MOSPA stands as a specialised and legally-binding regional treaty. Tailored for marine oil pollution preparedness and response within the Arctic states, MOSPA ensures that response strategies align with the unique characteristics of the Arctic region, thereby complementing the objectives of the OPRC.[45] Acknowledging that a significant spill in the Arctic could overwhelm the

[37] 1981 UNTS 51.
[38] All eight states of the Arctic have ratified the OPRC, so it is therefore recognised by the five Arctic coastal states which are the subject of this thesis; IMO, Status of Multilateral Conventions <www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx> accessed 14 May 2020; Ecolex, 'International Convention on Oil Pollution Preparedness, Response and Co-operation (Nov 30, 1990)/ Participant' <https://www.ecolex.org/details/international-convention-on-oil-pollution-preparedness-response-and-co-operation-tre-001109/participants/?> accessed 14 May 2020.
[39] '…floating and fixed structures engaged in exploration, production, loading and unloading of oil'; Article 2(4)
[40] Contained in articles 3, 4, 5 and 6.
[41] including establishing a competent national authority and a national contingency plan designed to respond to oil disasters and sets out the requirements for pollution emergency plans that vessels, offshore drilling units, production platforms, and onshore facilities must have; Article 3.
[42] OPRC article 10.
[43] Hossein Esmaeili, *The Legal Regime of Offshore Oil Rigs in International Law* (Ashgate/Dartmouth, 2001) 157.
[44] Arctic council, 'Preventing and Responding to Oil Spills in the Arctic' <https://oaarchive.arctic-council.org/handle/11374/529> accessed 14 May 2020.
[45] Arctic council, 'Preventing and Responding to Oil Spills in the Arctic' <https://oaarchive.arctic-council.org/handle/11374/529> accessed 14 May 2020.

resources of any single Arctic state, the MOSPA is designed to bolster 'collective capacity in spill response operations'.[46]

Response operations typically focus on containing the spill and maximising oil recovery. Their primary goal is to efficiently manage and mitigate the environmental impact of the incident by regaining control of the well to halt the oil flow.[47] Moreover, the process of halting the oil flow, such as seen with *Deepwater Horizon*, can be lengthy, sometimes extending more than five months.[48] However, as emphasised in the introductory chapter, no technique employed in an oil spill response can completely eliminate the oil spilled, because optimally, only up to forty percent of spilled oil can be recovered through mechanical clean-up methods.[49] Therefore, in addition to oil spill response efforts, legal liability is crucial in managing oil spill damage; a necessary framework to determine responsibility, hold parties financially accountable, and ensure prompt and adequate mitigation actions.

By establishing liabilities, there is a clear delineation of the obligations and duties of various parties involved in oil-related activities. This includes oil companies, operators, and other entities engaged in offshore petroleum development. Liabilities not only create a sense of responsibility but also act as a deterrent, encouraging these entities to adopt robust preventive measures and adhere to best practices to minimise the risk of oil spills.[50] Despite acknowledging the urgency of pollution response, the OPRC and MOSPA do not contain an inherent liability regime for compensation, making both regimes unsuitable avenues for private recourse for harm caused by offshore spills from petroleum activities.

3.3.2 The 1974 Nordic Environmental Protection Convention

The 1974 Nordic Environmental Protection Convention (NEPC)[51] serves as a legally binding multilateral agreement aimed at addressing transboundary pollution among Denmark, Finland, Norway, and Sweden, due to their close proximity and the consequential polluting impact of

[46] Government of Canada, 'Agreement on Arctic marine oil pollution' <https://www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/arctic-marine-oil-pollution.html> accessed 14 May 2020.
[47] Daria Shapalova, 'Can International Law Protect the Arctic from Oil Spills?'(*The Arctic Institute*, 26 March 2019) <https://www.thearcticinstitute.org/international-law-protect-arctic-oil-spills/> accessed 1 June 2020.
[48] Ibid.
[49] Doug Helton, 'What Have We Learned About Using Dispersants During the Next Big Oil Spill?' (*NOAA Office of Response and Restoration*, 20 April 2015) <https://response.restoration.noaa.gov/about/media/what-have-we-learned-about-using-dispersants-during-next-big-oil-spill.html> accessed 10 June 2020.
[50] Ibid.
[51] 1974 Convention on the Protection of the Environment Between Denmark, Finland, Norway and Sweden 1092 UNTS 279.

their activities on each other's environment.[52] While the NEPC does not explicitly mention offshore petroleum development, its framework is adaptable to various forms of pollution, including those arising from activities involving the seabed, which may lead to marine pollution.[53] Central to the NEPC is the principle of non-discrimination,[54] underlining that the environmental impact of activities felt in one contracting state should be treated equally to that in the state where the activities originate.[55] This principle serves as the bedrock for ensuring fairness and equity in evaluating the permissibility of such activities.

Complementary to the principle of non-discrimination, the NEPC incorporates provisions for equal access and information obligation. The latter necessitates the appointment of a Special Supervisory Authority (SSA) responsible for overseeing environmental concerns arising from activities in other contracting states.[56] Empowered by the NEPC, the SSA can initiate legal proceedings or provide input to competent courts or administrative bodies in another state regarding the permissibility of such activities.[57] The information obligation primarily aims to prevent environmental damage that could lead to disputes over transboundary pollution.

On the other hand, the provision for equal access ensures that individuals affected by environmentally harmful activities in another contracting state have the right to challenge their permissibility in the respective court or administrative bodies, with appeal rights akin to those available to local entities, in the state where the activity occurs.[58] This equal access extends to both preventing damage and seeking compensation, ensuring that compensation rules are not less favourable to the injured party than those of the state where the activities causing harm originated.[59] Consequently, transboundary procedural rights are established, allowing both

[52] Ibid, <https://treaties.un.org/doc/Publication/UNTS/Volume%201092/volume-1092-I-16770-English.pdf> accessed 22 February 2022.
[53] '…environmentally harmful activities shall mean the discharge from the soil or from buildings or installations of solid or liquid waste, gas or any other substance into water courses, lakes or the sea and the use of land, the ***seabed***, buildings or installations in any other way which entails or may entail environmental nuisance by water pollution or any other effect on water conditions, sand drift, air pollution, noise, vibration, changes in temperature, ionizing radiation, light etc.'; Article 1.
[54]Ad hoc Group on Transfrontier Pollution, The Nordic Environmental Protection Convention with a Commentary' AEU/TFP/ENV/74.6 (24 April 1974) 4 (where the Nordic Environmental Protection Committee regarded article 2 of the NEPC as its foundational provision, outlining its primary objective).
[55] 'When considering the permissibility of environmentally harmful activities, the nuisance which such activities entail or may entail in another Contracting State shall be equated with a nuisance in the State where the activities are carried out.'; Article 2.
[56] Articles 4.
[57] Ibid; and also how information about a potentially polluting activity ought to be shared between contracting states in articles 5-12.
[58] Article 3.
[59] Ibid.

public and private entities to challenge administrative decisions and initiate civil proceedings to seek compensation in the country where the harmful activity has taken place.

While the NEPC has been largely associated with addressing air pollution,[60] by providing a comprehensive and legally binding framework for transboundary pollution, the convention fulfils key aspects of a civil liability regime. For instance, the convention clearly identifies the legal harm and type of liability, being transboundary pollution causing nuisance,[61] the implication of which means that the burden of proof is on the claimant to demonstrate actual damage to land or interference impairing the enjoyment of land due to the responsible activity.[62] Moreover, the NEPC stipulates that compensatory damages can be sought by any affected individual.[63] Though not expressly mentioned, the possibility of injunctive relief, halting the activity causing nuisance, could be implied for those filing claims regarding the permissibility of environmentally harmful activities.[64]

Regarding channelling liability, scholars like Buns[65] suggest that compensation claims may be directed against the polluter, while Koivurova[66] asserts that ultimate responsibility lies with the 'company benefiting from the harmful activity'. Throughout the NEPC, adjudication of such claims is designated to the courts or administrative authorities in the country where the activity occurs. Further, as a legal framework addressing transboundary pollution damage, the NEPC inherently incorporates a conflict of laws resolution mechanism. This allows a legal entity from

[60] Timo Koivurova, *Transboundary Environmental Impact Assessment: the Nordic Environmental Protection Convention* (Brill Nijhoff 2007) 71; *see also*, Melina Antonia Buns, 'Making a model: the 1974 Nordic Environmental Protection Convention and Nordic attempts to form international environmental law' (2023) 48(1) Scandinavian Journal of History 93-115 (arguing that the 'Nordic countries attempted to address the external issue of transboundary air pollution through internal measures, with the aim of developing a model for environmental conventions that could be adopted at the international level').

[61] Though the NEPC does not clarify if this is public or private nuisance, the thesis takes the assumption of tort based private nuisance (rather than criminal law-based public nuisance) based on article 3 and the protocol to the convention providing that 'any person' and 'anyone' who is affected may bring claims for compensation. However, this does not deny the fact that tort based claims for public interest may also arise where a group of claimants may not necessarily seek redress for harm to their individual property interests, but rather for safeguarding community-related rights; Kirsty Horsey and Erika Rackley, *Tort Law* (5th edn, OUP 2017) 562; see also, Timo Koivurova, 'The Future of the Nordic Environment Protection Convention' (1997) 66 Nordic Journal of International law 505-525, 509.

[62] Horsey and Rackley (n 61) 529-530.

[63] Article 3; If the interference is ongoing, the court may grant injunctive relief to halt the nuisance. Conversely, if the interference has ceased, the court may award damages as compensation; ibid, 539.

[64] Ibid.

[65] Buns (n 60) 103, (stating that the NEPC did establish the polluter pays principle internationally).

[66] Koivurova, (n 61) 512, (discussing the combined impact of the UN Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and NEPC, stating that they reinforce the polluter pays principle).

one contracting Nordic country to seek economic compensation for nuisance caused by a polluter in another contracting country, under the most favourable applicable law.[67]

While the NEPC addresses certain aspects of civil liability, the convention does not provide exhaustive details or procedures for addressing every aspect of civil liability for transboundary pollution, implicitly deferring their determination to the domestic laws of the state where the pollution originates. The implication of the NEPC's approach is that stakeholders may need to consult and rely on the national laws and regulations of each member state to address any gaps in the convention's provisions, and to ensure the objectives of the NEPC are effectively implemented and enforced.

Despite the potential of the NEPC to serve as a foundation for ensuring a comprehensive regime for compensating damage caused by continental shelf activities, the scope of the convention is limited. The convention applies solely to four Nordic states,[68] which are also Arctic states. Among these, Norway and Denmark, part of the focus of the thesis, have maritime territories bordering the central Arctic Ocean. Hence, the applicability of the convention to the entire Arctic region is constrained by its geographic scope. Attempting to adapt these provisions to suit the diverse interests, priorities, and legal frameworks of other Arctic nations would likely encounter substantial hurdles. Diplomatic negotiations to reconcile these differences could become protracted and may not ultimately result in consensus or successful ratification. Instead, pursuing a tailored and collaborative initiative that account for the specific needs and circumstances of all Arctic nations in the context of compensating damage from offshore drilling in the Arctic continental shelf could be more effective. Nevertheless, even if a direct extension of the geographic scope of the NEPC is not plausible, the principles and mechanisms outlined within the convention illustrates how environmental pollution and policies can intersect across geographical and legal boundaries. The NEPC can still serve as a valuable reference for future collaborative efforts in addressing the challenges presented by the lack of a comprehensive civil liability regime for offshore drilling in the Arctic.

[67] Buns (n 60) 100-101.
[68] Buns writes that Iceland refrained from participating in the negotiations and did not sign the NEPC, primarily because of its geographical separation from the other Nordic countries; ibid, 107 footnote 4.

3.4 Industry Initiatives for Compensating Pollution Damage from Offshore Petroleum Development

While current multilateral treaties addressing marine pollution from offshore drilling in the Arctic states hold considerable merit in their effort to prevent or control oil spills, these existing treaties cannot be utilised by private persons as a meaningful framework to deliver prompt and adequate compensation for pollution damage in a comprehensive manner across the Arctic region. However, the UNCLOS not only provides a framework for legal cooperation but also acknowledges the utility of alternative approaches to ensure comprehensive and effective compensation in the event of pollution incidents. Recognising this gap, there are private initiatives employed by the offshore petroleum industry which can be deployed to cover their potential liabilities in a comprehensive manner. A prominent example is the Offshore Pollution Liability Agreement (OPOL),[69] which plays a pivotal role in addressing compensation for pollution damage.

The OPOL agreement is primarily focused on two key aspects: first, it aims to ensure that operators possess adequate financial resources to fulfil their obligations in compensating claims.[70] Second, it establishes a mechanism wherein other operators commit to contributing to claim payments if a responsible operator fails to meet its obligations under the agreement.[71] Therefore, when a claim is submitted to an operator, the sole responsibility for settling the claim rests with the operator. OPOL itself does not function as a compensation fund *per se*; rather, it serves as a safeguard, guaranteeing payment in situations where an OPOL member falls short of meeting its financial obligation of compensating pollution damage from offshore petroleum development.[72]

Originally an agreement that applied to operators on the United Kingdom Continental Shelf (UKCS), OPOL has since expanded its reach to include operators in further countries, including Norway and Greenland. Despite the exclusion of offshore facilities in the Baltic and Mediterranean seas from the purview of OPOL, the agreement does extend to addressing

[69] The agreement was made on 30 September 1974 and entered into force on 1 May 1975, with the most recent update made on 1 April 2016 OPOL, 'The Agreement' <https://www.opol.org.uk/agreement> accessed 10 June 2020.
[70] Clause VIII (c).
[71] Ibid.
[72] Michael Faure and Hui Wang, 'Compensating victims of a European Deepwater Horizon accident: OPOL revisited' (2015) 62 Marine Policy 25, 27.

liabilities related to offshore pollution damage from petroleum activities in the Arctic continental shelves of Norway and Greenland.

Further, despite its voluntary nature, the importance of OPOL is underscored by the fact that signing the agreement is a prerequisite for obtaining offshore exploration and exploitation licenses in certain countries, such as in Greenland.[73] This requirement enhances its effectiveness, as operators are compelled to acknowledge and assume responsibility for the potential consequences associated with their hazardous activities. The willingness of operators to adhere to the agreement also serves as evidence of their recognition of the responsibilities entailed and reinforces the role of OPOL in promoting accountability within the offshore petroleum industry.

Despite being a private initiative within the oil industry, OPOL embodies the nine key aspects of a typical civil liability regime identified in chapter two of the thesis. For example, OPOL imposes strict liability on operators for pollution damage and the costs associated with remedial measures following a spill.[74] These liabilities are solely directed towards the operator of an offshore rig, with only a few exculpatory provisions available to them.[75] Under OPOL, an operator is defined as 'a person [who] has been authorized to, and does, manage, conduct, and control the operation of an Offshore Facility'.[76]

Additionally, pollution damage in OPOL is defined as 'direct loss or damage…by contamination which results from a discharge of oil'.[77] As a result, while OPOL provides compensation for property damage and contamination of the environment, it does not extend to other types of damage such as economic losses or personal injuries. Furthermore, OPOL delineates the parties entitled to compensation, specifying that individual victims or public authorities may claim pollution damage. However, reimbursement for the costs of remedial action is restricted to public authorities.[78]

[73] Ibid.
[74] To the exclusion of 'well control measures and measures taken to protect, repair or replace any such Offshore Facility'; clause I (14) and (16).
[75] Clause IV(B) (1-4).
[76] Clause I (10).
[77] Clause I (14).
[78] Clause IV; No obligation shall arise if the incident; resulted from an act of war or a natural phenomenon of an exceptional, inevitable, and irresistible character; was wholly caused by an act or omission done with intent to cause damage by a third Person; was wholly caused by the negligence or other wrongful act of any Government or other authority; resulted wholly or partially, either from an act or omission done with intent to cause damage by a Claimant, or from the negligence of that Claimant.

The total liability of operators under OPOL is capped at $250 million (USD) per incident, with $125 million (USD) allocated for each category - claims of remedial damage and pollution damage. While these financial provisions may seem substantial, their adequacy is subject to debate, particularly in comparison to pay-outs following major incidents like the *Deepwater Horizon* disaster.[79] This raises concerns regarding the assurance of compensation for all affected claimants and the sufficiency of funds for environmental restoration efforts. Consequently, OPOL includes provisions acknowledging the possibility of other forms of civil liability settlement beyond the agreement's scope, as well as claims exceeding the specified financial limits.[80] Thus, the ultimate liability of responsible operators is contingent not only on the provisions within OPOL but also on additional international or domestic regulations applicable to offshore facilities.

OPOL mandates that operators secure financial responsibility through insurance, guarantees, and/or self-insurance, with verification conducted according to the provisions of the agreement.[81] This guarantee must be maintained, and any alterations that diminish financial responsibility must be promptly reported to the OPOL association.[82] The jurisdiction of OPOL is based on the location of the offshore facility rather than where pollution damage or remedial actions occur, which reflects OPOL's awareness of conflict of laws issues and the transboundary potential of pollution resulting from offshore petroleum development activities. By focusing on the location of the facility, OPOL addresses the risks associated with offshore petroleum operations across international boundaries and the complexities inherent in cross-border pollution by providing a framework for resolving disputes that arise in such scenarios.

Additionally, OPOL establishes guidelines regarding the limitation period for filing claims with operators and the forum for resolving disputes arising from an incident. To expedite compensation to victims, claims must be submitted within one year of the offshore incident,[83] and disputes regarding the claims filed with the operator is to be settled through arbitration under International Chamber of Commerce rules in London[84] where the laws of England and

[79] Marissa Smith, 'The Deepwater Horizon Disaster: An Examination of the Spill's Impact on the Gap in International Regulation of Oil Pollution from Fixed Platforms' (2011) 25 Emory International Law Review 1477, 1505; to put this into perspective, after the *Deepwater Horizon* incident, a consent decree issued by the US District Court for the Eastern District of Louisiana in 2016, approving a final settlement of approximately $20.8 billion (USD) to be put into a fund and to end future litigation for pollution damage from the incident.
[80] Clause VII (F).
[81] Form B clause 1-3.
[82] Ibid.
[83] Clause VI.
[84] Clause IX.

Wales will apply.[85] However, this procedural framework poses significant challenges in terms of accessibility and effectiveness.

First, the limited timeframe may not adequately accommodate the complexities of assessing and quantifying damages, potentially leaving claimants unable to fully address all losses incurred. This raises serious doubts about the feasibility of amending claims to reflect evolving circumstances. Second, for claimants in countries situated outside the UK, such as those in Greenland and Norway, the logistical hurdles of arranging arbitration proceedings in London adds an additional layer of difficulty, potentially hindering timely and fair resolution for affected parties.

Ultimately, while OPOL satisfies key components of a civil liability regime and its apparent advantages, the agreement falls short of addressing the gap concerning civil liabilities arising from offshore petroleum development in the Arctic. As it stands, OPOL remains a voluntary commitment among operators rather than a legally binding treaty among states. Moreover, OPOL is currently only relevant to petroleum development in Norway and Greenland, to the exclusion of the remaining Arctic states. Consequently, it lacks the comprehensive framework necessary to establish and safeguard the rights of private individuals from the risks associated with offshore activities in the Arctic region.

3.5 Conclusion

The UNCLOS, a key international convention governing maritime affairs, lacks detailed provisions for compensating individuals harmed by activities occurring on the continental shelf, particularly those with potential transboundary impacts. Instead, the UNCLOS mandates states to cooperate in developing international laws or consider alternative measures to address civil liabilities, emphasising the importance of tailoring measures to the distinctive characteristics of each region. Despite ongoing transnational efforts such as OPRC, MOSPA, NEPC and OPOL aimed at mitigating pollution from offshore petroleum development, and applicable to certain Arctic states, this chapter has conclusively established that there is currently no comprehensive global or regional framework addressing civil liability for such activities across the entire Arctic region. This gap is significant, given the likelihood of oil pollution crossing multiple national jurisdictions in this pristine environment.

[85] Clause XII.

In the absence of an appropriate global or regional framework guiding the Arctic's response to compensating civil liabilities originating from offshore petroleum development, reliance is placed on the legal systems of individual Arctic states to fill this significant void. The domestic laws of Arctic states also reflect their responsibility under the UNCLOS to prevent activities within their jurisdiction from contributing to environmental degradation and to safeguard the rights of their citizens concerning the environment. The next chapter undertakes a comparative analysis of the domestic laws of Arctic states, examining the extent to which these laws address civil liabilities arising from offshore petroleum development. Focusing on key features of a civil liability regime, this analysis highlights similarities, differences, strengths, and weaknesses in legal frameworks across the relevant Arctic nations, providing insights into potential areas of collaboration and improvement within the Arctic region in the context of offshore petroleum development.

CHAPTER FOUR

THE DOMESTIC CIVIL LIABILITY REGIME FOR OFFSHORE PETROLEUM DEVELOPMENT IN CANADA, GREENLAND (DENMARK), NORWAY, RUSSIAN FEDERATION, AND THE UNITED STATES OF AMERICA

4.1 Introduction

Following the discussion in chapter one, which highlights the proliferation of petroleum development in the Arctic and the high potential for transboundary pollution damage, chapter two of the thesis shows that effective civil liability legislation, especially where enacted for hazardous activities, implements certain key features in its design. This includes channelling liability, the standard of liability, the amount and limit of liability, heads of recoverable damage, proof of financial responsibility, statute of limitation, priority of claims and forum of dispute resolution, and conflict of laws resolution. Using these key features to analyse current international and regional law, chapter three shows that there is no comprehensive legal framework that can currently be relied upon for civil liability claims for pollution damage from offshore petroleum development in the Arctic continental shelf.

Consequently, this chapter makes an analysis of the domestic civil liability regimes in the subject Arctic countries governing offshore incidents. This is achieved by first identifying whether there is specific legislation in each state that addresses the issue, and subsequently using the aforementioned key features of a civil liability regime to assess the adequacy of various domestic laws. By so doing, the chapter ascertains whether the diverse legal frameworks ensure prompt and adequate compensation for losses resulting from offshore petroleum incidents within national jurisdictions. Furthermore, it seeks to ascertain whether the individual application of domestic legislation fosters sufficient legal certainty for both industry operators and affected parties in instances of transboundary pollution within the Arctic region.

The findings of this chapter partly answer the third research question of whether the domestic laws of Arctic states include the key features of a civil liability regime, and whether these laws sufficiently align so as to negate the need for comprehensive legislation to address losses from offshore petroleum activities in the Arctic region.

4.2 The Applicable Civil Liability Laws

As discussed in chapter two of the thesis, civil liability conventionally pertains to holding accountable those who cause harm to others or their property, or to provide a way to stop the continuation of a civil wrong. In many jurisdictions, if not all, the default position assigns strict liability to individuals responsible for harm stemming from activities deemed exceptionally hazardous. This default stance may stem from case law, statutory law, customary law, or a combination thereof.

For instance, Canada's legal system, influenced by its shared political history with England and France, blends common law and civil law. However, Canada's Arctic offshore region, situated in the north, operates under common law principles. Accordingly, civil liability in this region mirrors English common law principles, permitting claims for nuisance, trespass, negligence, and strict liability under the rule in *Rylands v Fletcher*.[1] Typically, strict liability applies to damages caused by activities categorised as non-natural land use or ultrahazardous, such as offshore petroleum development. Claims may target a wide array of potentially liable parties, who could be held jointly and severally liable.

Similarly, the legal framework in the USA derives from English common law but has evolved through American judicial precedents. Additionally, common law principles have been codified at both federal and state levels into general maritime laws.[2] Civil remedies akin to those under common law tort claims, can be pursued under general maritime law. Under these laws, polluters may face strict liability with limited exceptions, and all polluters can be held jointly and severally liable.[3]

In contrast to the default positions in Canada and the USA, Russia operates under a legal system rooted in civil law.[4] Here, rules and remedies for pollution-related damage and civil wrongs generally are primarily outlined in the Civil Code of the Russian Federation (RCC).[5] Similarly, the Norwegian legal system follows a civil law system, where statutes serve as the primary legal source. However, unlike Russia, Norwegian law also leans on case law to interpret or

[1] This was discussed in chapter two of the thesis.
[2] For example, The Merchant Marine Act 1920 (commonly referred to as the Jones Act) and the Limitation of Liability Act 1851 (LLA) are part of what is known as general maritime law, which are laws originating from English common law that govern maritime related matters; Allan I Mendelsohn and Eugene R Fidel 'Liability for Oil Pollution- United States Law' (1978) 10 Journal of Maritime Law 4.
[3] Ibid.
[4] This is not to be confused with the context of when civil law is used as a synonym for private law as discussed in section 2.2 of this thesis.
[5] Article 1064 (1).

clarify statutory provisions. For instance, regarding damage stemming from ultrahazardous activities, Norwegian courts generally adopt a default stance of strict liability tort or delict.[6]

On the other hand, the legal system in Greenland does not neatly fit into either the civil law or common law categories. Rather, it has evolved from a blend of the Danish civil legal system[7] and Greenlandic customary law.[8] Such systems often integrate principles from both civil and common law traditions, eventually codifying customary laws into statutes to form a cohesive legal regime.[9] However, the courts in Greenland will typically impose strict liability on individuals lawfully engaging in hazardous activities.[10]

Irrespective of the default position, countries often establish specific civil liability laws to either replace or enhance the scope of the default stance for certain sectors or activities, such as offshore petroleum development. The applicable rules may be consolidated into a single legislation or dispersed in multiple statutes forming the civil liability regime of the country. This diversity is evident in the civil liability regimes for offshore pollution damage in the five

[6] Svein Eng, 'Precedent in Norway' in Donald Neil MacCormick, Robert S Summers and Arthur L Goodhart (eds), *Interpreting Precedents: A comparative study* (Routledge 1997); Anders Møllmann and Vibe Ulfbeck, 'Liability for ship source oil pollution' in Vibe Ulfbeck and others (eds), *Responsibilities and Liabilities for Commercial Activity in the Arctic: The Example of Greenland* (Taylor and Francis, 2016) 11.

[7] Greenland was entirely ruled by the Kingdom of Denmark between the early 18th century until 1979 when it became an autonomous island country, but still remains a territory of Denmark, which has administrative oversight in some of its affairs; Kingdom of Denmark 'Greenland: The world's largest island'< https://denmark.dk/people-and-culture/greenland#:~:text=Greenland%20is%20officially%20the%20world's,of%20the%20Realm%20of%20Denmark.> accessed 29 June 2021.

[8] It is common to find the customary legal system in countries where there are indigenous settlements, such as the Inuit found in Greenland. A core feature of the customary law system is that it houses a set of rules which are rarely written down or passed by parliament, but is nonetheless used to regulate socio-economic relations, and also have a resolution mechanism that tends to be reconciliatory rather than punitive; Queen's University, 'Multiculturalism Policies in Contemporary Democracies - Denmark' <https://www.queensu.ca/mcp/indigenous-peoples/resultsbycountry-ip/denmark-ip#:~:text=Greenlandic%20customary%20law%20forms%20part,legal%20practices%20(Loukacheva%202007).> accessed 13 December 2022; *For a more thorough discussion on the subject, see*, Jens Brøsted, 'Territorial Rights in Greenland: some preliminary notes' (1986) 23(1) Arctic Anthropology 325-338; *also*, Agnete Weis Bentzon and others, 'Verner Goldschmidt: Danish Sociologist of Law and Culture' (2020) 43(4) Sage Journals <https://doi.org/10.1177/000169930004300410> accessed 12 December 2022.

[9] For example, the legal system in South Africa; World Intellectual property Organisation, 'Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues' (2013) 2, 11, 14, 17-18 <https://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf> accessed 14 December 2022; William Tetley, 'Mixed jurisdictions : common law vs civil law (codified and uncodified) (Part I)' Uniform Law Review/ Revue De Droit Uniforme (1999) 3 591, 604-605.

[10] Bernhard Gomard, 'Recent Developments in the Danish Law of Tort' (2009) Stockholm Institute of Scandinavian Law 233, 233-240; 'an aggrieved party is not precluded from seeking compensation under 'the general law of contractual damages and of non-contractual damages…or other legislation' Section 71 The Administration of Justice Act.

Arctic countries, where some nations have a single or couple of statutes governing civil liability for offshore petroleum activities, while others adopt a more fragmented approach.

For instance, in the USA, Russia, Norway, and Greenland, a consolidated legislative approach is observed. In the USA, the Oil Pollution Act of 1990 (OPA) stands as a dedicated law addressing civil liability and clean-up procedures for oil spills, encompassing offshore facilities within US jurisdiction.[11] However, in addition to the OPA, victims of pollution damage from offshore petroleum development can pursue civil remedies under the Clean Water Act of 1977 (CWA),[12] a federal legislation aimed at safeguarding US waters from unlawful pollution discharge, including from offshore facilities.[13] While many powers under the CWA are delegated to state environmental agencies,[14] private individuals still retain the ability to file certain claims.[15]

In Russia, alongside provisions in the RCC, the Federal Law on the Protection of Environment (EPL)[16] offers more specific guidelines for damages resulting from offshore petroleum activities.[17] Similarly in Norway, the Petroleum Activities Act (PAA)[18] specifically governs petroleum development in Norwegian maritime territories and addresses associated civil liabilities. [19] Moreover, as a designated state under the Offshore Pollution Liability Agreement

[11] An offshore facility is defined in the OPA as a 'facility of any kind, located in, on or under any of the navigable waters of the US and subject to US jurisdiction…other than a vessel'; section 1001(22).
[12]The amended form of the Federal Water Pollution Control Act of 1972.
[13] Sections 311(a)(6) and (11); section 311(b) (3); 33 US Code section 1251; United States Environmental Protection Agency, History of the Clean water Act <https://www.epa.gov/laws-regulations/history-clean-water-act> accessed 26 August 2021.
[14] Generally provided for in section 309; More specifically see section 309(b), (f), and (g).
[15] For example, claims by a private party seeking an injunctive relief against a polluting party, or a citizen suit for damages made against a polluting party . In the latter instance, any monetary compensation awarded goes to the government and not the pocket of the private person who files the citizen suit.
[16] Federal Law on Environmental Protection No 7-FZ and related decrees 2002 (as amended).
[17] The RCC provides that, where injury occurs as a result of an activity authorised by law, then redressing the damage will work collaboratively with the provisions of the law made specifically for redressing the injury—in this case, the EPL; Article 1064 (3).
[18] Nov 1996, No 72; section 7(2).
[19] PAA section 9(1); The PAA in section 1-4 states that the Act does not apply to Svalbard, perhaps because although it is a Norwegian sovereign area, the exploitation of its mineral resources is shared by the countries who are party to the Svalbard Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920 http://library.arcticportal.org/1909/1/The_Svalbard_Treaty_9ssFy.pdf> accessed 7 March 2022; The treaty was originally signed by 19 parties, however, there are now 46 signatories to the treaty. Offshore drilling is yet to take effect in Svalbard; however, Russia is said to be analysing oil sample once collected from the region in order to explore its potential for oil exploration and exploitation; Atle Staalesen, 'Why Russia is taking another look at Svalbard oil drilling samples from 1975' (*Arctic Today*, 3 September 2019) <https://www.arctictoday.com/why-russia-is-taking-another-look-at-svalbard-oil-drilling-samples-from-1975/?wallit_nosession=1> accessed 7 March 2022.

(OPOL), Norway incorporates OPOL into its civil liability regime.[20] Greenland also maintains a statutory civil liability framework tailored to offshore petroleum development, primarily outlined in the Greenland Parliament Act No. 7 of 7 December 2009 on mineral resources and mineral resource activities (the Mineral Resources Act 2009) as amended (MRA).[21] Notably, Greenland mandates offshore operators to be members of OPOL, differing from Norway's voluntary participation approach.

In Canada, the situation regarding civil liability is more complex, as various legislation may apply, however, there is limited clarity on their interaction. The Canada Oil and Gas Operations Act 1985 (COGOA)[22] stands as the primary federal legislation governing all offshore oil activities in Canada.[23] Sections 25 to 28 of COGOA outline the civil liability regime for spills from offshore petroleum development activities, covering any 'discharge, emission or escape of oil or gas, other than one that is authorized…[under] any regulation or federal law'.[24]

In addition to COGOA, the Arctic Waters Pollution Prevention Act of 1985 (AWPPA) and its associated regulations provide specific civil liability rules for oil spill damage in Canada's Arctic waters.[25] Furthermore, agreements between the Canadian government and indigenous tribes settlements located in Canada's Arctic territory, such as the Inuvialuit Final Agreement (IFA),[26] carry legal weight akin to legislation.[27] These agreements address civil liability,

[20] OPOL is a voluntary scheme for operators to participate, discussed in chapter three section 3.4 of the thesis.
[21] As amended in 2012, 2014, 2015, 2016, 2018 and 2019. Hereinafter referred to as 'MRA'; Government of Greenland 'Mineral Resources Act' https://govmin.gl/exploration-prospecting/get-an-exploration-licence/mineral-resources-act/ ; Unofficial consolidation of the Mineral Resources Act <https://govmin.gl/wp-content/uploads/2019/11/Unofficial_translation_of_unofficial_consolidation_of_the_Mineral_Resources_Act.pdf > accessed 29 June 2021; Section 9(1); Section 10 (i) 'The Act applies to Prospecting, exploration and exploitation of mineral resources as well as other activities related thereto.'
[22] Canada Oil and Gas Operations Act RSC 1985 c O-7 (as amended).
[23] Section 3(e); The 'Act applies in respect of the exploration and drilling for and the production, conservation, processing and transportation of oil and gas in the continental shelf of Canada and the waters suprajacent to the seabed of that continental shelf'.
[24] Section 24(1).
[25] Arctic Waters Pollution Prevention Act RSC 1985 c A-12 (as amended); Arctic Waters Pollution Prevention Regulations CRC c 35 (AWPPR); subsequent reference is made to both laws as the APPA regime, but when relevant, specific mention will be made to the AWPPR.
[26] According to the Canadian government, 'The Inuvialuit Final Agreement is a comprehensive land claim settlement agreement and deals with land and harvesting rights, participation in the management of land and wildlife, and financial compensation.' The agreement between the Inuvialuit and the Canadian federal government was entered into in 1978 (and the latest amendment in 2004). It applies to all development carried out in the region, which also includes offshore petroleum development operations; Government of Canada, 'How is the Inuvialuit Final Agreement different from the final Inuvialuit Self-Government Agreement?' <https://www.rcaanc-cirnac.gc.ca/eng/1437485673020/1529426849393> accessed 24 May 2021.
[27] Other statutes such as the Canada-Newfoundland Atlantic Accord Implementation Act SOR/95-123, and the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act SOR/88-262 (hereinafter referred to as the 'Accord Acts'), operate under the joint jurisdiction of the federal and provincial government and are applicable to liability that may arise in the offshore oil fields located in Newfoundland and Nova-Scotia, which houses the Atlantic waters rather than the Arctic. Likewise, the Canada Oil and Gas Installation Regulations,

compensation, and clean-up stemming from offshore petroleum development activities, particularly due to the reliance of indigenous communities on maritime resources. The Fisheries Act of 1985[28] is also pertinent, as it applies throughout Canada, including its maritime territories that are considered ecologically significant,[29] such as the Canadian Arctic offshore.[30] Under this act, civil liability may arise if a deleterious substance, including oil from petroleum development, enters waters frequented by fish.[31]

The sections below will analyse the civil liability legislation for offshore incidents in the five Arctic countries, examining whether it embodies the key features of a statutory civil liability regime as outlined in chapter two. This analysis aims to ascertain the similarity or divergence of domestic laws applicable in the Arctic continental shelf.

4.3 Channelling of Liability

The core aspect of channelling liability lies in determining which party or parties ultimately bear responsibility for the consequences of certain actions or events. The underlying rationale is often that those who generate significant risks for economic gain should shoulder the burden of adverse outcomes.[32] Consequently, in the context of offshore drilling, liability for any pollution incident is typically directed to the owner, licensee, or operator of the offshore facility, as well as certain third parties associated with the drilling project.

These titles typically represent distinct roles or functions in the offshore sector. Sometimes, these functions may be vested in one person or divided among multiple parties. For example, there are instances where the licensee may also be the operator, and other times, these roles are vested in multiple parties.[33] A licensee is typically granted a licence to use an oilfield for

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Canada Oil and Gas Diving Regulations, Canada Oil and Gas Geophysical Operations Regulations. Additionally, the Canadian Environmental Assessment Act, the Canadian Environmental protection Act, the Emergencies Act, and the Emergency Preparedness Act are also meant to be complied with regarding oil spill planning, preparedness, and response. Nevertheless, they all mirror the provisions of the COGOA, which is the overall federal law; Government of Canada, 'Introduction – Atlantic Canada' (29 January 2019) <https://www.nrcan.gc.ca/environment/resources/publications/impacts-adaptation/reports/assessments/2008/ch4/10339> accessed 24 May 2021.

[28] Fisheries Act RSC 1985 c F-14 (as amended).

[29] Section 35.2(1).

[30] Section 2.2.

[31] Section 42; Likewise, section 36(3) states '…[N]o person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.'; section 34(1) (a-e).

[32] Maureen Jennings, 'The Oil and Gas Industry, the Offshore Installation Manager (OIM), and the management of emergencies – Who is accountable for OIM competence?' (2017) 50(A) 131-141, 131-132.

[33] Julio Barboza, *The Environment, Risk and Liability in International Law* (Leiden: Martinus Nijhoff Publishers 2011) 32.

economic purposes.[34] While an operator of an offshore drilling unit is typically in charge of performing, managing and supervising petroleum development activity.[35]

For example, in England and Wales, a licensee's relationship with an operator is similar to an employer and independent contractor, and the licensee is generally not liable for the operator's actions after ensuring their competence.[36] However, exceptions exist through the rule in *Honeywill and Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd*,[37] where liability can arise for extra-hazardous activities, though courts advise restricting its application to exceptionally dangerous situations.[38] Vicarious liability may also apply in Joint Operating Agreements (JOAs) between a non-operating licensee and an operator,[39] although most JOAs in the UK Continental Shelf (UKCS) do not form partnerships but entail shared production without joint profits.[40] Thus, careful consideration ought to be given to the terminology used and the technical implications of so doing when channelling liability, in order to accurately pinpoint the appropriate party to hold accountable under a civil liability regime.

While some states adopt similar approaches to channelling liability, there is no single approach that is common to all five Arctic state. The primary challenge arises from differences in the terminology employed by these states when referencing the primary polluting party. To illustrate this, in Greenland, liability for pollution damage falls on the party who 'performs, manages, or supervises' the petroleum development activity.[41] In cases where this party is not the licensee, both parties are jointly and severally liable for any resulting damages.[42] Although the term 'operator' is not explicitly used, the MRA still recognises the potential distinction between the licensee and the party performing operator functions, thereby channelling liability to both entities.

Similarly in Russia, liability is channelled to 'the legal entity or the individual who possess the source of special danger by right of ownership, the right of economic or operative management

[34] Ibid.
[35] Ibid.
[36] Adanna Okoh-Chukwu Omaka, 'Civil Liability Framework for Oil Pollution from Offshore Drilling Platforms: An Assessment of the American, Nigerian, and United Kingdom Approaches' (LLM Dissertation, Bangor University 2017) 79-80.
[37] [1934] 1 KB 191, 200.
[38] *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2009] QB 725.
[39] Section 10 Partnership Act 1890.
[40] Scott Styles, 'Joint Operating Agreements' in Greg Gordon, John Paterson and Emre Usenmez (eds) *Oil and Gas Law: Current Practice and Emerging Trends* (2nd edn, Dundee University Press 2011) 12.13-12.17.
[41] Section 63 (2) and (3); section 69 (1) and 92(1).
[42] Ibid.

or on any other lawful ground.'[43] Though the RCC acknowledges that ownership and operation may be vested in different entities, the conjunction 'or', rather than 'and', introduces ambiguity, thereby suggesting alternative avenues for liability. However, subsequent sections clarify that multiple owners are jointly liable for damages, and the owner is invariably subject to joint liability with other involved parties, such as operators or sub-contractors.[44]

In the case of the USA, liability under the OPA is channelled to the 'responsible party' who in the case of offshore drilling, is defined as the 'lessee and permittee of the area in which the facility is located or the holder of a right to use…'.[45] The terms 'operator' or 'owner' are not explicitly mentioned in the context of offshore drilling, and are used only in reference to *onshore* drilling.[46] Yet, the phrase 'owner or operator' is used in section 1002(d)(2) when addressing the liability of third parties in connection with all petroleum development facilities in general, regardless of whether onshore or offshore. There is also no clarification regarding the operation of those terms in this section or elsewhere in the OPA regarding offshore drilling. Nevertheless, case law and scholarly interpretation suggest that licensees and operators bear joint and several liability for damages arising from petroleum development activities.[47]

In Norway, the PAA acknowledges that a licensee may not always be the operator of a facility, thus initially channelling liability to the licensee, and extending it to the operator if different entities hold these positions.[48] Notably, the PAA provides a comprehensive definition of an owner and operator in the context of offshore drilling,[49] distinguishing it from other Arctic

[43] Article 1079(1); 'The obligation of redressing injury shall be imposed on the legal entity or the individual who possess the source of special danger by right of ownership, the right of economic or operative management or on any other lawful ground.'
[44] Article 1079(3); article 1080 'Persons who jointly inflicted injury shall be jointly liable to the injured party. In response of the application of the injured person and in his interests the court of law shall have the right to impose liability on the persons who jointly inflicted injury in shares by estimating them with reference to the rules…of the RCC'; Federal Law No 287-FZ dated December 30, 2012 On Amending the Federal Law No 187-FZ of 1995 on the Continental Shelf of the Russian Federation and the Federal Law on Internal Marine Waters, the Territorial Sea and the Continuous Zone of the Russian Federation.
[45] Section 1001 32(c); section 1001(16) 'lessee' means a person holding a leasehold interest in an oil and gas lease on lands beneath navigable waters…or on submerged lands of the Outer Continental Shelf…';
[46] Section 1001 32(b).
[47] Nathan Richardson, 'Deepwater Horizon and the Patchwork of Oil Spill Liability Law' (2010) Resources for the Future, 1-2 <https://media.rff.org/archive/files/sharepoint/WorkImages/Download/RFF-BCK-Richardson-OilLiability.pdf> accessed 07 July 2022; Kenneth M Murchison, 'Liability Under the Oil Pollution Act: current law and needed revisions' (2011) 71(3) Louisiana Law Review 917.
[48] Section 7(3); A licensee is a 'physical person or body corporate, or several such persons or bodies corporate, holding a licence according to this Act or previous legislation to carry out exploration, production, transportation or utilisation activities.' and an operator is 'anyone executing on behalf of the licensee the day-to-day management of the petroleum activities'; section 1 para 6 (j-k).
[49] Section 7(3); A licensee is a 'physical person or body corporate, or several such persons or bodies corporate, holding a licence according to this Act or previous legislation to carry out exploration, production, transportation or utilisation activities.' and an operator is 'anyone executing on behalf of the licensee the day-to-day management

states. Moreover, if multiple licensees exist under one license, and one is also the operator, liability is primarily directed towards that licensee.[50] Thus, in any case, liability will always be channelled to the licensee.

Further, although third parties are exempted from liabilities for pollution damage,[51] when a licensee fails to compensate pollution damage within the time limit stipulated by the judgment, then the aggrieved may channel liability to the exempted persons to the same extent as the PAA grants recourse to the licensee to recover from such third parties. The Norwegian PAA is the only civil liability legislation in the five Arctic states that expressly provides this avenue for the affected party to recover losses. Although this expands the pool of liable parties, the process of identifying and determining the extent of liability to the licensee may prove complex and time-consuming.

Canada has a more complex regime for channelling liability due to the plethora of laws that apply to petroleum development. For example, COGOA channels liability to the 'holder of an operating licence', and also the 'holder of an authorization',[52] who is permitted to conduct any work related to petroleum development.[53] While the term 'operator' is not explicitly used in COGOA, subsequent references throughout the Act are made to 'operator' liability. As such, it becomes unclear who amongst the 'holder of an operating licence' and the 'holder of an authorization' is considered the operator. Additionally, ambiguity arises regarding whether 'operating licence' refers to the licensee as an owner or as the operator.

To address this ambiguity, the recent Canada Energy Regulator (CER) 2021 guidelines clarify that references to 'operator' in COGOA encompass both the holder of the authorisation and the

of the petroleum activities'; section 1 para 6 (j-k); If the operator fails to fully satisfy compensation by the due date, then the unpaid remainder shall be 'covered by the licensees in accordance with their participating interest in the licence' and 'If someone fails to cover his share, this shall be allocated proportionately between the others.'

[50] Ibid.

[51] a) anyone who by agreement with a licensee or his contractors has performed tasks or work in connection with the petroleum activities; b) anyone who has manufactured or delivered equipment to be used in the petroleum activities; c) anyone [authorised to] undertake measures to avert or limit pollution damage, or to save life or rescue values which have been endangered in connection with the petroleum activities; d) anyone employed by a licensee or by someone [afore]mentioned.

[52] Who is also sometimes referred to in the COGOA as an 'authorised person'.

[53] These persons are expected to take 'all reasonable measures to prevent any further spill, to repair or remedy any condition resulting from the spill… or that may be 'reasonably expected to result from the spill' related to the exploration for or development or production of oil or gas; Section 5(1); Section 25 (2) and (3).

operating licence.[54] Similarly, liability is channelled to the 'developer' in the IFA,[55] which has now been aligned with the definition of 'operator' in the CER 2021 guidelines.[56]

In contrast, liability channels differ in the Fisheries Act and the AWPPA regime. The Fisheries Act attributes liability to '…the person who…owns the deleterious substance or have the charge, management or control thereof',[57] while the AWPPA regime directs liability to 'any person' who engages in offshore petroleum development activities.[58] Although the term 'person' used in both laws theoretically covers various stakeholders in a drilling project, it is unclear if liability extends to licensees, operators, and other contractors or subcontractors overseeing drilling projects.

Moreover, the presence of the conjunction 'or' in the Fisheries Act further contributes to this ambiguity, as it may suggest that listed parties are alternative options for liability rather than collectively liable. Since the CER guidelines only address the use of 'operator' in channelling liability in relation to the COGOA and the IFA, it is uncertain whether the same interpretation applies to the Fisheries Act and the AWPPA regime.

Evidently, the legislation in all five jurisdictions include provisions for channelling losses resulting from offshore drilling incidents, primarily directing liability to the oilfield owner, even if damage is caused by a separate party involved in drilling operations. However, these provisions utilise different terminologies and conjunctions, which may lead to varying interpretations, especially in the context of petroleum development and the roles of the parties involved in such projects. Consequently, parties may need to rely on domestic court interpretations to ascertain the appropriate party for strict liability.

In countries like the USA and Canada, given their common law origins, court decisions and legal practice can offer clarity and establish precedents regarding channelling liability.[59]

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[54] Canada Energy Regulator, 'Guidelines Respecting Financial Requirements May 1, 2021 (amended)' 5 <https://www.cer-rec.gc.ca/en/about/acts-regulations/other-acts/canada-oil-gas-operations-act/guidelines-respecting-financial-requirements/2021fnnclrqrmntgd-eng.pdf> accessed 03 August 2022.

[55] Article 13(15).

[56] Canada Energy Regulator (n 54) 7.

[57] Section 42(1)-(4).

[58] Section 6(1)(a); 'any person who is engaged in exploring for, developing or exploiting any natural resource on any land adjacent to the arctic waters or in any submarine area subjacent to the arctic waters'; Where a spill treating agent is used during response operations, such person will also be subject to absolute liability for such harm under the Fisheries Act as though the spill-treating agent were a deleterious substance; Section 25(3) COGOA.

[59] Vincent MacDonald, 'The Rule in *Rylands v Fletcher*, and its Limitations' (1923) 1-2 Canadian Bar Review, 140, 144; Katheryn Hendley, 'Russian legal system and use of law' (*Oxford Research Encyclopedia,* 30 January

Conversely, in Russia, as a civil law country, it is only when court decisions or opinions have been passed by the parliament, that can they be relied on.[60] However, depending solely on courts to determine financial liability before commencing remediation after an offshore spill in the Arctic may not always be practical or expedient. This approach leaves injured parties susceptible to wasted litigation efforts and the arduous task of identifying responsible parties. It also adds unpredictability to application and complicates governance of complex issues on the Arctic continental shelf under various domestic laws.

Moreover, in transboundary pollution cases, this approach may foster forum shopping, with parties seeking jurisdictions with vaguely defined provisions that can be manipulated for unfair advantage, whether by polluters evading liability or affected parties seeking extensive compensation.[61] This exacerbates the fragmentation of the legal regime governing petroleum development in the Arctic continental shelf.

4.4 Standard of Liability (Burden of Proof)

In addition to addressing channelling of liability, civil liability legislation typically outlines the type of liability and the burden of proof regarding damages or losses suffered. This may involve strict liability, where the tortfeasor is by default held liable regardless of their contribution to the damage,[62] or fault liability, where the affected party must demonstrate the tortfeasor's responsibility for the damage. In the subject Arctic states, the default position is that strict liability will apply for damage caused by ultrahazardous activities, this position is also reinforced by their civil liability legislation for offshore drilling. However, each jurisdiction employs distinct methods and terminology to articulate this position.

For instance, in Norway, the PAA stipulates that the liability of the licensee(s) and operator is 'without fault'.[63] Conversely, Greenland's MRA mandates strict liability for licensees and parties overseeing petroleum development activities, regardless of whether 'the damage has arisen fortuitously'.[64]

2024) https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-2248> accessed 3 March 2024.

[60] Oleg Kolbasov and Irina Krasnova, *Russian Federation, International Encyclopaedia of Laws* (Kluwer Law International 2003) 41.

[61] Christopher Granger, 'The conflict of laws and forum shopping: some recent decisions on jurisdiction and free enterprise in litigation' (1974) Ottawa Law Review 416, 417-418.

[62] In certain instances, the claimant may be required to show causal link between the incident and the damages they seek; Louis T Vissher, 'Tort Damages' in Michael Faure (ed) *Tort Law and Economics* (2009) 156-158.

[63] Section 7(3).

[64] Section 63 (3)

By comparison, the Russian EPL and USA's OPA add complexity by referencing other legislation to define the burden of proof. Although the EPL lacks explicit provisions on liability standards, it implies strict liability through the RCC's stipulation that 'legal entities and individuals whose activity is associated with increased hazard for people around…shall be obliged to redress the injury inflicted by a source of special danger in full'.[65] Similarly, the OPA defers to section 311 of the CWA for liability standards.[66] which, although not explicitly defined, is understood to imply strict liability based on court interpretations,[67] congressional intent,[68] and academic analysis.[69] In Canada, COGOA holds operators liable 'without proof of fault or negligence'[70] While the AWPPA,[71] the Canadian Fisheries Act,[72] and the IFA,[73] all impose 'absolute liability' on polluters.

The standard of liability also determines the availability of defences for the polluter. In the five Arctic countries there are varying exceptions to the polluter's liability. In Norway, under the PAA, the polluter may rely on the defence that the damage results from an inevitable event of nature, act of war, exercise of public authority, and other similar force majeure events that are beyond the control of the liable parties as exceptions to their strict liability.[74] The exact definition of 'other similar force majeure' incidents remain subject to judicial interpretation.

In the USA, the OPA allows the responsible party to rely on an act of God, an act of war, the act of a third party with no contractual relationship with the responsible party,[75] if the incident is caused by the gross negligence or wilful misconduct of the claimant, or any combination of

[65] Article 1079(1).
[66] Section 1001(17)
[67] King and Spalding, 'Fifth Circuit clarifies claim presentment requirements under the Oil Pollution Act of 1990' (*JDSupra*, 21 December 2015) <https://www.jdsupra.com/legalnews/fifth-circuit-clarifies-claim-14340/> accessed 07 July 2022; *Total Petroleum Inc v United States*, 12 Cl Ct 178, 180 (1987); *In Re Oriental Republic of Uruguay, 821 F Supp 934 (D Del 1993).*
[68] The Committee on Energy and Natural Resources, 'Congress second session to receive testimony on the liability and financial responsibility issues related to offshore oil production, including the deepwater horizon accident in the gulf of Mexico, including section 3346, a bill to increase the limits on liability under the Outer Continental Shelf Lands Act' (*US Government*, 25 May 2010) <https://www.govinfo.gov/content/pkg/CHRG-111shrg61828/html/CHRG-111shrg61828.htm> accessed 7 July 2022
[69] Richardson (n 47); Murchison (n 47) 922.
[70] Section 26(1).
[71] Section 7(1)
[72] Section 42(1)-(4).
[73] Article 13(15).
[74] Section 7(3).
[75] Provided that the responsible party exercised due care and took precautions against foreseeable acts or omissions and the foreseeable consequences of such acts or omissions. if it is proven that the discharge and damage were caused by a third party who is contractually unrelated to the responsible party, and it is also proven that the responsible party exercised due care and took precautions against foreseeable acts or omission and the consequences, then liability can be channelled to such third party as the responsible party; section 1003(a)(3)(A-B); section 1002(d)(1)(A).

these situations,[76] as defences to strict liability. Similar defences are provided under the CWA if the responsible party can prove that a discharge was caused solely by an act of God, an act of war, negligence on the part of the United States Government, or an act or omission of a third party without regard to whether any such act or omission was or was not negligent.[77] However, unlike the OPA, a claimant's contribution to the damage cannot be used as a defence.

The civil liability legislation in Russia and Greenland offers fewer defences to strict liability. In Russia, two exculpatory provisions are available to the polluter in the RCC; if they can prove that the incident was a result of a force majeure,[78] or that an injury was caused with the intent of the injured person.[79] While in Greenland, if it is shown that the injured person contributed to the damage intentionally or due to gross negligence,[80] and if the act was done under the indispensable directions of a public authority,[81] they may be relied on as defences under the MRA. However, unlike the defences available to the polluter in Norway and the USA, there is a notable exclusion of the force majeure or act of God defence in the MRA.

In Canada, there are no exceptions to the operator's liability under COGOA as the liability is stated to be 'without proof of fault or negligence'. Further, the AWPPA, Fisheries Act and IFA, impose absolute liability, therefore the case should be that no exceptions may be relied on to absolve the polluter from liability.

The concept of absolute liability was clarified by the Supreme Court of Canada in *R v Sault Ste Marie.*[82] According to the court, where the commission of a prohibited act subjects the defendant to strict liability,[83] the defendant may raise defences with the aim of showing that they took all reasonable care to avoid breaching the law, while absolute liability entails that

[76] Section 1003 (a-b); 'the defences to liability will not apply to a responsible party who fails or refuses (a) to report the oil spill incident as required by law if the responsible party knows or has reason to know of the incident, (b) to provide reasonable cooperation and assistance with removal activities, or (c) to comply, without sufficient cause, with the general removal authority of the President'; section 1003(c).
[77] Section 311(f)(1).
[78] Article 1079(1).
[79] Article 1083(1).
[80] Section 69 (3) and (4)
[81] Section 69(2).
[82] [1978] 2 SCR 1299, 1325-1326; although the Supreme Court in *Sault Ste Marie* made the distinction between strict and absolute liability from the perspective of criminal and regulatory liability for pollution, this distinction has been interpreted to also be valid in the context of civil liability in Canada;
[83] 'Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability; Ibid at 1326[2].

defendants cannot use defences to escape or delegate liability.[84] Further, if it is intended that absolute liability is to be the standard of liability, then it needs to be precisely contained in a legislation,[85] and the magnanimity of the risk posed by breaching the law is to be considered when subjecting a defendant to such standard of liability.[86]

Contrary to the understanding of absolute liability, the AWPPA provides a narrow exception where the conduct of the claimant has caused or contributed to the spill.[87] The Fisheries Act also allows defences for 'an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character;[88] or (b) an act or omission with intent to cause damage by a person other than a person for whose wrongful act or omission he is by law responsible'.[89] This raises uncertainty whether absolute liability truly applies or if it reverts to strict liability when defences are available, or if 'absolute liability' is used as a synonym for 'strict liability' in the AWPPA and Fisheries Act.

The COGOA also suffers a somewhat related limitation as it does not explicitly state whether liability is strict or absolute. However, the CER 2021 guidelines clarify that it is absolute,[90] aligning with the principles outlined by the Supreme Court of Canada in *R v Sault Ste Marie*.[91] Even so, the guidelines do not address the AWPPA and Fisheries Act's stance on defences to absolute liability, contributing to uncertainty in the Canadian regime.

Undoubtedly, some of the exceptions to strict liability bear similarities to common law exceptions found in cases like *Rylands*,[92] while others differ. Nonetheless, granting more exceptions to strict liability can increase the burden on claimants to prove damages and likewise places the onus the courts to establish negligence resulting from a highly complex and

[84] 'Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.'; ibid at 1326[3].
[85] Ibid; 'Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the [absolute liability] category.
[86] Ibid.
[87] Section 7(2)
[88] 'a natural phenomenon of an exceptional, inevitable and irresistible character' is subsequently referred to in this study as an act of God.
[89] Section 42(4).
[90] Canada Energy Regulator, 'Guidelines Respecting Financial Requirements May 1, 2021 (amended)' 7 <https://www.cer-rec.gc.ca/en/about/acts-regulations/other-acts/canada-oil-gas-operations-act/guidelines-respecting-financial-requirements/2021fnnclrqrmntgd-eng.pdf> accessed 03 August 2022.
[91] being the absence of exculpatory provisions and the significant risks of offshore drilling; [1978] 2 SCR 1299.
[92] The exceptions are act of God or vis major; act of a stranger; things not brought or collected on the land by the defendant; escape of things maintained with the consent and for the common interest of both the claimant and the defendant; and statutory authority; Vincent MacDonald, 'The Rule in *Rylands v Fletcher*, and its Limitations' (1923) 1-2 Canadian Bar Review, 140,145.

technical activity such as petroleum development. Individually, each of the five countries' legislation reduces the likelihood of additional exceptions to the strict liability of the primary responsible parties, thus increasing the chances of victims obtaining compensation for damages suffered. However, when viewed holistically, the variety of exceptions provided in the legislation of these countries lack coherence, significantly contributing to the inadequacy of individual domestic laws to comprehensively govern civil liability arising from petroleum development in the Arctic shelf.

While strict and absolute liability is the norm for the main responsible parties for pollution in the legislation of the five jurisdictions, some laws also allow for fault liability in certain circumstances. For example, persons whose fault or negligence contributes to a spill are subject to fault-based liability, and the operator will be jointly and severally liable to such fault liability in only the COGOA[93] and the AWPPA.[94] The situation is similar in Norway, if a third party working on behalf of the licensee is found liable, their liability will be fault-based, and the licensee will be jointly and severally liable to this fault liability.[95]

However, unlike what is applicable in Canada and Norway, in Russia, the polluter's liability is based on proof of fault only if the injury results from the gross negligence of the injured party.[96] While in Greenland, the MRA does not specify the standard of liability for parties other than the licensee who contributed to the damage or where fault liability may apply, thereby creating uncertainty.

It can be argued that the fault liability provisions in most of the legislation increases the avenue for compensating losses or damage by ensuring that other parties who have also contributed to the incident can be held accountable. Additionally, by making the licensees and/or operators jointly and severally liable with the fault liability of the any third party contributing to the loss or damage, jurisdictions reduce the ability of licensees and operators to shift liability to others.

Nevertheless, in contexts where offshore accidents occur, information about the technical steps taken to prevent the accident can be difficult to get a hold of or challenging to interpret. Implementing strict liability measures serves to mitigate the potential for firms to exploit these challenges by requiring them to bear responsibility for legitimate claims, even in the absence

[93] Section 26(1)(a).
[94] Section 42(1) and (3).
[95] Section 10(9).
[96] Article 1083 (2).

of clear evidence of negligence.[97] This ensures that companies cannot evade accountability and unfairly benefit from the complexities involved in proving negligence within offshore incidents. Moreover, strict liability serves to decrease transaction costs in the aftermath of offshore accidents. By eliminating the necessity for lengthy legal proceedings to establish negligence of the polluter, compensation processes are expedited. This expeditious approach enables swift settlements of lawsuits by minimising uncertainties surrounding potential judgments.

4.5 Types of Loss or Damage Compensable

Civil liability legislation also typically provides for the type of damage or loss which the polluter may be liable and who may seek such compensation—whether by the government, private individuals, or both. The five Arctic states share some similarities in the type of loss or damage that the polluter may be liable for, and who may recover the loss or damage. However, a significant impediment to their overall coherence is the dissimilar terminology employed by the different domestic legislation, some of which broadens, restricts or leaves vague the heads of loss or damage that may be claimed.

4.5.1. Damage to the Environment

In each of the five states, the predominant case is that the polluter may be responsible for environmental damage. However, this is worded differently in the different legislation, except in the case of the Norwegian PAA, where there is no express provision for damage to the environment itself.[98] In Greenland, the MRA explicitly states that damage to the environment itself is claimable,[99] but such claim can only be made by the government.[100]

In the Russian EPL, it is expressly stated that all persons who have caused environmental damage are liable to compensate it in full,[101] and the liability of the polluter will be calculated

[97] Washington University Open Scholarship 'Origin of the Modern Standard of Due Care in Negligence', (1976) 3 Washington University Law Quarterly 447-479.
[98] Even though the PAA provides for cost and expenses for mitigating damage to the environment in section 7(1).
[99] Section 63(1); 'Under the rules on environmental impact in sections 63-66, environmental damage means: (i) Pollution of the soil, the sea, the sea floor, the subsoil, water or air. (ii) Pollution of or other negative impact on the climate. (iii) Pollution of or other significant negative impact on nature, including human beings, fauna or flora. (iv) Significant disturbance of matters mentioned in (iii) above because of noise, vibrations, heat, light, etc.'; Part 14 of the MRA, which includes sections 63-66, is specifically dedicated to liability for environmental damage.
[100] Section 66.
[101] Article 77(1); 'The legal entities and natural persons which have inflicted a damage to the environment by polluting, depleting, damaging, destroying it, by irrational use of natural resources, degrading and destroying natural ecological systems, natural complexes and natural landscapes and another violation of the environmental protection legislation shall compensate it in full under law.'

according to the '…damage calculation methods approved in the established manner'.[102] However, if such calculation methods are unavailable, then liability environmental damage will be calculated by the courts 'on the basis of actual expenses incurred for restoration of deteriorated condition of the environment, with due regard to losses incurred, in particular profit missed.'[103] This aspect of liability for environmental damage under the EPL introduces complexity.

First, the EPL does not clearly specify who can make claims for environmental damage. Second, there is no defined 'established manner' in the EPL for calculating environmental damage. However, separate calculation formulas are provided for damage caused to aquatic biological resources,[104] damage inflicted to endangered species,[105] and loss of hunting opportunities.[106] The inclusion of 'loss of hunting opportunities' suggests a potential claim that may be made by a private individual, even though the EPL does not expressly state that a polluter may be liable for such losses.

Thus, what is unclear is whether these individual formulas are intended to determine the overall amount for compensating environmental damage itself or if they represent separate civil claims that may be sought by aggrieved parties as a result of environmental damage, in addition to claims for environmental damage itself, where the amount for compensation will be determined by the court in accordance with article 77(3).[107] This uncertainty is further complicated because, although the EPL stipulates that administrative liability may also arise for pollution damage, it does not distinguish or elaborate on the differences between civil and administrative liability.[108] This presents a confusing overlap between public law and private law.

In Russia's civil law system, courts are not legally required to rely on judicial precedents as in common law countries. However, the Supreme Court in Russia may issue informational letters

[102] Article 77(2)
[103] Article 77 (1); 'The injury inflicted on the personality or property of an individual, and also the damage done to the property of a legal entity shall be subject to full compensation by the person who inflicted the damage.'
[104] Order No 1166 of the Russian Federal Fisheries Agency dated November 25, 2011 On approval of formula for estimation of the extent of damage inflicted on aquatic biological resources.
[105] Order No 107 of the Ministry of Natural Resources of the Russian Federation dated April 28, 2008 On approval of fixed rates for estimation of the extent of damage inflicted on the species of animal life included in the Red Book of Endangered Species of the Russian Federation, and other species of animal life not rated as game and fishing resources and their habitat.
[106] Order No 948 of the Ministry of Natural Resources of the Russian Federation dated December 8, 2011 On approval of formula for estimation of the extent of damage inflicted on hunting resources.
[107] '…on the basis of actual expenses incurred for restoration of deteriorated condition of the environment, with due regard to losses incurred, in particular profit missed.'
[108] 'liable for Property, disciplinary, administrative and criminal liability under law is established for a breach of the environmental protection legislation.'; Art 75.

or Resolutions to summarise judicial practice or clarify legislative provisions.[109] These Resolutions may serve as advisory judicial precedent or be adopted as part of the law by the legislature.[110] Though the Russian Supreme Court has often provided analysis of judicial practice, in the settlement of environmental disputes and liability claims from pollution damage, and this approach has led to the EPL being interpreted by Resolutions several times to correct inconsistencies in its provisions that had resulted in contentious situations. However, the presence of these Resolutions has not completely eliminated the uncertainty surrounding some of the provisions of the EPL.

For example, Resolution No 255 of 3 March 2017,[111] only sets outs the formula for calculating administrative fees for environmental damage payable to the government.[112] It does not clarify whether or not the presence of the calculation formulas in the EPL for damage caused to aquatic biological resources,[113] damage inflicted to endangered species,[114] and loss of hunting opportunities[115] mean that private persons can claim such damage, or whether they are a sub-group of environmental damage that can only be claimed by the government.

Along another axis, it may be argued that since Resolution No 255 only relates to administrative liability, and in the absence of any other calculation formula for civil liability for environmental damage, then civil liability for environmental damage may arise and will be calculated 'on the basis of actual expenses incurred for restoration of deteriorated condition of the environment, with due regard to losses incurred, in particular, profit missed.'[116] If this latter point of view is taken, then certainly, similar to the laws in USA and Canada, the polluter may also be subject to civil liability for environmental damage, including loss of profits from such

[109] Oleg Kolbasov and Irina Krasnova, *Russian Federation, International Encyclopaedia of Laws* (Kluwer Law International 2003) 41.
[110] Ibid.
[111] Resolution No 255 of March 3, 2017 on the calculation and collection of fees for the negative impact on the environment (As amended).
[112] Article 78(2).
[113] Order No 1166 of the Russian Federal Fisheries Agency dated November 25, 2011 On approval of formula for estimation of the extent of damage inflicted on aquatic biological resources.
[114] Order No 107 of the Ministry of Natural Resources of the Russian Federation dated April 28, 2008 on approval of fixed rates for estimation of the extent of damage inflicted on the species of animal life included in the Red Book of Endangered Species of the Russian Federation, and other species of animal life not rated as game and fishing resources and their habitat.
[115] Order No 948 of the Ministry of Natural Resources of the Russian Federation dated December 8, 2011 on approval of formula for estimation of the extent of damage inflicted on hunting resources.
[116] Article 77 (1); 'The injury inflicted on the personality or property of an individual, and also the damage done to the property of a legal entity shall be subject to full compensation by the person who inflicted the damage.'

damage. Even so, there is still uncertainty in the EPL regarding who can make such claims, whether it is the government or private persons.

In clarifying this uncertainty, a subsequent Resolution No 49 of 30 November 2017,[117] states that 'Authorised public authorities of the Russian Federation, of constituent entities of the Russian Federation, a prosecutor, citizens, public associations and non-commercial organisations engaged in activities in the sphere of environmental protection may file civil claims for restitution of environmental damage'.[118] This Resolution clarifies that the right of private persons' to file claims for environmental damage can be drawn from article 12(1) of the EPL.[119] Further, Resolution No 49, in clarifying article 75 of the EPL, explains that claims for compensating environmental damage, will exist regardless of whether an administrative liability has arisen in the same regard.[120] Resolution No 49 explains that this position is based on article 46(6) of the Budgetary Code of Russia, which provides that if monetary compensation is awarded for environmental damage, then the entirety is to be directed to the budgets of the listed government authorities.[121] Thus, private persons can initiate claims for environmental damage itself, however, any monetary compensations awarded will be directed to the government.

While Resolutions like No. 49 are helpful for clarifying polluter liability for offshore pollution damage and are often utilised by courts within the legislative framework.[122] However, their appropriateness for pollution damage for offshore incidents is debatable, particularly in respect of whether they can truly be considered sources of law.[123] Moreover, the reactive nature of Resolutions, raises questions about the timeliness and efficiency of their creation. Thus, while

[117] Resolution No 49 of 30 November 2017 on Certain Matters of Application of Legislation for Compensation of Damage caused to the Environment <http://www.vsrf.ru/en/files/26620/> accessed 1 July 2023.
[118] Para 3.
[119] 'The public and other non-commercial associations pursuing their activities in the field of environmental protections are entitled to file complaints with a court claiming reimbursement of a harm inflicted to the environment'.
[120] Para 2; Also, seen in an earlier ruling of Federal Arbitrazh Court of the Moscow District dated November 17, 2010 no KG-A40/13697-10 case no A40-31537/10-61-247.
[121] Para 16; '100 % of the compensation sums awarded by courts in claims on restitution of environmental damage are to be directed to the budgets of municipal districts, city circuits, city circuits with intracity division, federal cities of Moscow, Saint-Petersburg and Sevastopol at the place where the environmental damage was caused'.
[122] For example, the provisions of Resolution no 49 have been regarded as part of the legislative framework for environmental damage in Russia by the European Human Rights Court and have been used for interpreting how to apply the EPL methods for calculating damages recoverable for environmental damage; see, *Kotov and Others v Russia* App no 6142/18 and 13 others (ECtHR, 11 October 2022), para 76-79.
[123] Kolbasov and Krasnova (n 109) 42.

these resolutions offer valuable guidance, their limitations and implications for addressing offshore pollution damage in Russia, warrant careful consideration.

In both Canada and the USA, the liability for damage to the environment itself is not explicitly stated but can be implied from their respective legislation. In Canada's COGOA, the operator is liable for 'all loss of non-use value of a public resource' that is affected by the spill.[124] Although the COGOA or the CER 2021 guidelines do not define non-use value of a public resource, they specify that claims for loss of non-use value can only be brought by the provincial or federal government.[125] This loss of non-use value can be interpreted as a potential avenue for claims against the polluting party for damage to the environment itself. Although compensation for environmental damage itself is not explicitly in the COGOA, 'loss of non-use value of a public resource' can be implied as a claim when the polluting party breaches section 25(3).[126]

In the USA, the polluter can be liable for injury to public natural resources and loss of use arising from such injury, as well as the reasonable cost of assessing the damage, which can only be claimed by the government or a government trustee under the OPA.[127] Thus, similar to the COGOA this OPA provision impliedly covers the liability of the polluter for damage to the environment itself, and such claim can only be recovered by the government. Additionally, under the CWA, a responsible party may also be subject to claims by a private person who initiates a citizens suit on behalf of the government for injury to the environment.[128] Monetary damages made for environmental damage pursuant to the CWA cannot be awarded to a claimant, but will be in the form of civil fines that are payable only to the government.[129] However, under the CWA, a claimant can also sue to recover attorney fees used to initiate an

[124] This includes instances when such loss of non-use value is caused by any measures taken in relation to curtailing the spill and its effects; COGOA section 26(1)(a)(iii).
[125] COGOA section 26(2)(2.6).
[126] 'Every person required to report a spill…shall, as soon as possible, take all reasonable measures consistent with safety and the protection of the environment to prevent any further spill, to repair or remedy any condition resulting from the spill and to reduce or mitigate any danger to life, health, property or the environment that results or may reasonably be expected to result from the spill.'; there are no equivalent provisions in the AWPPA regime, IFA and Fisheries Act.
[127]'Natural resources include land, fish, wildlife, air, water, ground water, surface water, and other such resources belonging to, managed by, held in trust by, pertaining to, or otherwise controlled by the United States [including Exclusive Economic Zone (EEZ) resources], any state or local government or Indian tribe, or any foreign government'; section 1002(b)(2)(a); section 1006.
[128] CWA section 311(b)(7)(A); The responsible party will be exempted if they have already been subject to an administrative or regulatory penalty under the CWA.
[129] Ibid.

action against the responsible parties,[130] and may seek an injunction against the responsible parties to stop or mitigate the polluting incident.[131]

4.5.2 Cost of Remedial Measures

In each of the five Arctic states, the polluter may also be liable for costs and expenses incurred for mitigating or restoring damage to the environment, and the predominant case is also that such compensation can only be claimed by the government or persons acting on behalf of the government. However, there are dissimilarities in the language used to convey this in the different domestic legislation. Some legislation uses the term 'reasonable costs', without elaborating on how 'reasonable' may be determined. For instance, in Greenland, the polluter may be liable for the compensation of 'reasonable costs' of measures to mitigate pollution and restore the environment, following pollution damage,[132] leaving the determination of what constitutes 'reasonable' open to interpretation.

On the other hand, other legislation makes the polluter liable for the entire cost and expenses for remedial actions. In the USA, for example, under the OPA, the polluter may be liable for removal costs,[133] which encompass 'all costs' incurred by preventive or mitigative efforts by the federal government, state government, or an authorised Indian Tribe, in response to an oil discharge or a substantial threat of discharge.[134] The responsible party is not exempted from losses caused as a result of the government or their authorised person carrying out response or mitigative measures.[135] Additionally, the responsible party may also be liable for the net loss of government revenues,[136] and for the costs of providing increased public service as a result of the incident.[137] However, these claims are only recoverable by the American government or their designated authority.[138]

Similarly, in Russia, the polluter may be liable for 'actual expenses' incurred due to restoration of deteriorated condition of the environment, with due regard to losses incurred, particularly

[130] Ibid.
[131] Ibid.
[132] Section 68 (iv) Reasonable costs of (a) measures to prevent and abate damage or injury; (b) restoration of the environment and nature; and (c) mitigation and neutralisation of pollution and any other negative impact on the environment, climate and nature.
[133] Section 1001 (30) and (31).
[134] Section 1002 (b)(1) (a-b).
[135] Section 311(c)(4).
[136] 'Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources'; Section 1002(b)(2)(d).
[137] Section 1002(b)(2)(f).
[138] Ibid.

profit missed.[139] In Norway, though there is no explicit provision in the PAA that makes the polluter liable for environmental damage itself, they may be liable for the 'costs of measures' taken to prevent or mitigate the damage caused, and for any damage or loss caused by such measures.[140]

The Canadian regime presents a blend of both approaches regarding the liability of polluters for costs and expenses for remedial measures. In the AWPPA regime, the polluter is liable for 'reasonable costs' of clean-up that have been incurred on the direction of government.[141] Similarly, under the IFA, clean-up costs in the Inuvialuit region are covered.[142] While in the Fisheries Act, the polluter is responsible for the costs and expenses associated with mitigating or remedying any adverse effects from a spill that may impact commercial fishing.[143] In the COGOA, the liability of the operator extends to the costs and expenses incurred by the government in relation to the spill.[144] However, the COGOA further specifies that taking over spill management does not make the government or the authorised third party liable for losses incurred by private persons, unless the third-party acts unreasonably while carrying out spill management.[145]

4.5.3 Loss Resulting from Damage to the Environment

In relation to damage to the environment, while it is the prevailing case in the five Arctic states is that the liability of the polluter for damage to the environment itself and the clean-up cost and expenses is only claimable by the government, the polluter may also be liable to private individuals who are affected by the consequences of the environmental damage. However, each jurisdiction's legislation allows for dissimilar claims under this category of loss.

For instance, in the USA, under the OPA, the responsible party may be held liable for various losses resulting from the damage to natural resources. Such as loss of profits and earning

[139] Article 77(2).
[140] Section 7(1); Section 8(3).
[141] Section 6(2).
[142] Section 13 (15); Section 13(18); '…[C]ompensation for damage to or loss of harvesting equipment and for loss or reduction of hunting, trapping or fishing income…[T]he type of compensation that may be claimed include the cost of temporary or permanent relocation, replacement of equipment, reimbursement in kind subject to harvestable quotas, provision of such wildlife products as may be obtainable under existing Acts and Regulations, payment in lump sums or by instalments or any reasonable combination thereof.' This is applicable to persons who rely on wildlife harvest as a form of sustenance or as part of their gross income.
[143] Section 42(1).
[144] Section 26(1)(a)(ii); Section 25(5-7).
[145] Section 25(9)

capacity due to damage of natural resources,[146] as well as loss of subsistence use of natural resources.[147] On the surface, this appears analogous to damages for injury to public natural resources and loss of use arising from such injury, which are only claimable by the government or a government trustee under section 1002(b)(2)(A).[148] However, the difference is that this allows any private individual to make claims, regardless of natural resource ownership or management.

However, ambiguity appears regarding potential double recovery and the definition of subsistence use. Although the OPA prohibits double recovery for damage to natural resources,[149] it remains unclear whether this prohibition extends to preclude aggrieved private individuals from making the aforementioned claims related to natural resource damage if the government has already filed a claim under section 1002(b)(2)(A). Further, the lack of clarity surrounding what constitutes subsistence use introduces uncertainty regarding which claims can fall under this category of loss.

4.5.4 Loss to Fishermen Resulting from Damage to the Environment

Only in Norway and Canada do explicit provisions exist regarding the liability of the polluting party to affected fishermen due to damage to the environment, albeit with differing approaches in each country. In Norway, claims can be filed against the polluting party for damage or loss suffered by fishermen due to 'reduced possibilities for fishing'.[150] While this provision implies that any fisherman can make such a claim, it lacks clarity regarding the nature of damages sought. It does not specify whether the claim covers reduced leisure or subsistence fishing, whether it encompasses pure economic loss or loss of natural resources, and whether a leisure fisherman can seek monetary compensation for loss resulting from reduced fishing opportunities.

Additionally, chapter 8 of the PAA outlines special rules for compensating financial losses incurred by registered Norwegian fishermen when fishing is significantly impeded by the mere

[146] 'Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources'; section 1002(b)(2)(e); see discussion on pure economic loss below.
[147] Section 1002(b)(2)(c).
[148] 'Natural resources include land, fish, wildlife, air, water, ground water, surface water, and other such resources belonging to, managed by, held in trust by, pertaining to, or otherwise controlled by the United States [including Exclusive Economic Zone (EEZ) resources], any state or local government or Indian tribe, or any foreign government'; section 1002(b)(2)(a); section 1006.
[149] Section 1006(d)(3).
[150] Ibid.

presence of an offshore facility in a fishing area, regardless of any oil spill or damage.[151] However, in such cases, the state is mandated to compensate these losses, while retaining recourse liability against the polluting party.[152] This setup implies that while the state can recover losses from the polluter, there still exists the possibility for taxpayers to be encumbered with the responsibility for compensating losses caused by the polluter. This aspect raises questions about the allocation of financial liabilities and the extent to which taxpayers should be held accountable for environmental damages caused by private entities. This highlights the need for careful consideration of the distribution of liabilities and the balance between industry interests, environmental protection, and taxpayer accountability in the context of offshore activities. Nevertheless, when pollution occurs from petroleum development activities in Norway, the licensee also remains separately liable for financial losses incurred by registered fishermen, this is different from losses stemming from the occupation of an offshore facility in a fishing field.[153]

In Canada, the liability of the polluter towards licensed commercial fishermen is stipulated under the Fisheries Act, encompassing loss of income but excluding fishermen engaged in recreational or non-commercial sustenance activities.[154] While the COGOA hold the operator liable for loss of income and future income, with an additional provision for loss of hunting, fishing, and gathering opportunities for Aboriginal peoples of Canada.[155] This does not include the loss of income of a licensed commercial fisherman,[156] which is already covered by the Fisheries Act.

While the term 'Aboriginal peoples of Canada' is not interpreted in the COGOA or the CER 2021 guidelines, the Canadian government defines it as persons in First Nations (North American Indian), Métis or Inuk (Inuit).[157] Consequently, there arises a question of eligibility for individuals who are resident of an aboriginal region and are affected by a spill, but do not fall under the Canadian government's categorisation of Aboriginal peoples, to make any claim

[151] Section 8(1) 'Norwegian fishermen are in this chapter defined as persons registered in the registration list of fishermen and owners of vessels listed in the registry of Norwegian shing vessels subject to registration licences.'
[152] Section 8(2).
[153] Section 8(3).
[154] Section 42(3)
[155] Section 24 (2).
[156] Ibid.
[157] Canada Constitution Act 1982, Section 35 (2); As of April 2021, they are now referred to as 'Indigenous group of people; Statistics Canada 'Aboriginal group of person' <https://www23.statcan.gc.ca/imdb/p3Var.pl?Function=DECI&Id=246581> accessed 30 November 2021; Government of Canada 'Indigenous peoples and communities' <https://www.rcaanc-cirnac.gc.ca/eng/1100100013785/1529102490303> accessed 30 November 2021.

for loss of hunting, fishing and gathering opportunities under the COGOA. This limitation is similar in the IFA, where the polluter can be liable for loss of actual or future wildlife harvest that is integral to gross income or for sustenance,[158] but only liable to an Inuvialuit as defined by the IFA.[159]

This ambiguity potentially shifts the burden of proof onto affected individuals to demonstrate their indigenous status or eligibility under the agreements. Such a situation could create obstacles for those seeking compensation for losses incurred due to spills, as they may face challenges in proving their entitlement. Furthermore, this ambiguity could provide operators with an opportunity to contest absolute liability by exploiting uncertainties in the definition and criteria, ultimately hindering the effectiveness of the legal framework in addressing the impacts of oil spills on affected communities.

4.5.5 Damage to Property and Associated Pecuniary Loss

Away from the liability of the polluter for environmental damage, clean-up costs, and loss suffered as a result of damage to the environment, the polluter may also be liable for damage to property and associated pecuniary losses. However, the definitions and terminology used to address such losses lack consistency across the domestic legislation of Arctic states. For instance, the usage of terms like 'economic loss' and 'financial loss' poses challenges in determining whether pure economic loss is intended by the language employed in different legislation.

In law, economic loss is often defined as pecuniary loss suffered as a consequence of injury or damage, sometimes referred to as consequential loss.[160] Pure economic loss, on the other hand, refers to pecuniary loss not resulting from injury or damage. However, 'financial loss' can be interpreted to encompass economic or consequential loss, pure economic loss, or a combination

[158] Section 13 (15); Section 13(18); '…[C]ompensation for damage to or loss of harvesting equipment and for loss or reduction of hunting, trapping or fishing income…[T]he type of compensation that may be claimed include the cost of temporary or permanent relocation, replacement of equipment, reimbursement in kind subject to harvestable quotas, provision of such wildlife products as may be obtainable under existing Acts and Regulations, payment in lump sums or by instalments or any reasonable combination thereof.' This is applicable to persons who rely on wildlife harvest as a form of sustenance or as part of their gross income.

[159] Where it means 'those people known as Inuvialuit, Inuit or Eskimo who are beneficiaries under this Agreement by reason of the settlement of their claim to traditional use and occupancy of the land in the Inuvialuit Settlement Region and who are represented by COPE…' as established in articles 4 and 5.

[160] Francensco Parisi and ors, 'The comparative law and economics of pure economic loss' (2005) 28 George Mason University School of Law 2-4; Mauro Bussani and Vernon Palmer, 'The Frontiers of Tort Liability: Pure Economic Loss in Europe' in M Bussani and V Palmer (eds*), Liability for Pure Economic Loss: Frontiers of Tort Law* (Cambridge University Press, 2001).

of these.[161] While these terms are synonymous with monetary or pecuniary losses in the English dictionary, they carry different legal implications, subject to interpretation by the courts.

By way of illustration, in the USA, the responsible party will be liable in the OPA for damage to real or personal property and economic losses arising from such damage.[162] Claims for this consequential economic loss can be made by the owner of the property or the lessee.[163] However, the provision lacks clarity on whether both property owners and lessees can make separate claims for the same damage or if a priority exists when both parties file identical claims. The polluter may also incur liability for loss of profits and earning capacity due to damage of real or personal property.[164] Though not explicit in the OPA, this provision has been interpreted to extend beyond consequential economic loss, making the responsible party liable for pure economic loss that any aggrieved person may recover.[165] However, claims for pure economic loss can be disadvantageous, potentially leading to extensive litigation that exceeds the financial capacity of responsible parties,[166] and resulting in redundant cases.[167]

Nonetheless, the provision limits such claims to losses 'due to' the injury, destruction, or loss of real property, personal property, or natural resources, thereby narrowing the scope of recoverable purely economic losses to ensure claims are brought by parties with sufficient interest and are proximately and directly related to wrongful acts. Otherwise, the number of claimants who may seek to recover an economic loss under this provision could become extensive. Similarly, in the CWA, a responsible party in the USA may be liable for damage to property,[168] initiated by a private individual through a citizen's suit on behalf of the

[161] Francensco Parisi and ors, 'The comparative law and economics of pure economic loss' (2005) 28 George Mason University School of Law 11.
[162] Section 1002(b)(2)(b)
[163] Ibid.
[164] 'Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources'; Section 1002(b)(2)(e).
[165] For example, the claims for pure economic loss under the OPA which arose in the aftermath of the *Deepwater Horizon* incident were settled by BP through reaching an agreement with the claimants; *Deepwater Horizon* No. 13-30315, consolidated with No 13-30329, 13-31220 and 13-31316)
(Fifth Circuit Court of Appeals, 3 March 2014) <http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-31220-CV0.pdf> accessed 11 February 2017; John C P Goldberg, 'Liability for Economic Loss in Connection with the Deepwater Horizon Spill', (2011) 30 Mississippi College Law Review; A B Davis, 'Pure Economic Loss Claims Under the Oil Pollution Act: Combining Policy and Congressional Intent' (2011) 45 Colombia Journal of Law and Social Problems 3; David W Robertson, 'Criteria for Recovery of Economic Loss under the Oil Pollution Act of 1990' (2011) 7 Texas Journal of Oil, Gas and Energy Law 241, 242; David W Robertson, 'OPA and Economic Loss: A Response to Professor Goldberg' (2011) 30 Mississippi College Law Review 217.
[166] Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials (*2nd edn, 2003 Oxford University Press). 339–423.
[167] Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] QB 27.
[168] Section 311(b)(7)(A); The responsible party will be exempted if they have already been subject to an administrative or regulatory penalty under the CWA.

government.[169] However, it is important to note that the CWA does not allow monetary damages to be awarded directly to the claimant. Instead, any damages awarded take the form of civil fines payable solely to the government.[170]

In Greenland, Russia and Norway, other liabilities that the responsible party may incur lack elaboration, as such, insufficient details or explanation is provided regarding the scope of such loss or damage. For instance, in Greenland under the MRA, responsible parties may be liable for property damage and other financial losses,[171] implying that claims can be made for consequential and pure economic losses. However, the absence of exclusionary provisions renders the bounds of claimants for financial loss uncertain, and this may potentially lead to a floodgate of claims.

In Norway, apart from the specific mention of compensating registered Norwegian fishermen, the polluter may be liable for damage or loss caused by the discharge of oil from a facility,[172] but the PAA does not specify what damage or loss may be claimed, leaving the polluting party exposed to an uncertain range of civil claims. Similarly, in Canada under the AWPPA regime[173] and COGOA[174], the polluter is liable for actual loss or damage, with no further elaboration on what constitutes actual loss or damage beyond the specific mention of losses suffered by Aboriginals. The situation is even less elaborate in Russia, where other potential liabilities from petroleum development activities are straightforwardly outlined without clarification: 'Property, disciplinary, administrative and criminal liability under law is established for a breach of the environmental protection legislation.'[175]

This lack of clarity raises uncertainty regarding whether claims for property damage exclude claims for losses following property damage, potentially placing affected parties at a disadvantage as polluters may rely on this section to avoid other possible losses or damage caused by the spill. Moreover, the civil liability legislation of the subject Arctic states is restrictive or silent towards claims for economic loss. This may also discourage firms from implementing necessary measures to minimise losses from oil spill incidents.

[169] Ibid.
[170] Ibid.
[171] Section 68
[172] Section 7(1).
[173] Section 2; also, in section 4(1) of the AWPPR.
[174] section 26(1)(a)(i).
[175] Article 75.

It is important to acknowledge the valid rationale behind restricting claims for economic loss, especially cases involving pure economic loss, which is the prevention of illegitimate claims or floodgate of claims,[176] however, the legal proceedings that ensued after the *Deepwater Horizon* disaster, shows the complexity of claims following an oil spill incident. This highlights the necessity for a balanced approach, that is unambiguous and practical, to ensure full compensation for legitimate victims while guarding against the risk of illegitimate claims.

4.5.6 Personal injury

Another aspect of liability that the polluter may face pertains to personal injury. However, only the legislation of the USA, Greenland, and Russia explicitly addresses such compensation. Even within this legislation, there is a lack of consistency in the terminology used. In legal practice, personal injury is often distinguished from physical injury. The former encompasses a broader range, including bodily harm, emotional or even mental distress,[177] whereas the latter specifically refers to tangible bodily harm.[178]

In the USA, personal injury is not explicitly covered by the OPA. However, compensation for physical injury may be available under the CWA or other general maritime laws.[179] In Greenland, the MRA allows for compensation for personal injury or loss of dependency.[180] While in Russia, the EPL provides for compensation for harm inflicted on an individual's health,[181] aligning with Article 1064(1) of the RCC, which mandates compensation for 'injury inflicted on the personality…of an individual' shall be compensated. Thus, it can be argued that personal injury is the more fitting category for coverage in Russian legislation. However, the Norwegian and Canadian legislation is silent on the liability of the polluter for personal or physical injury.

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[176] Aptly put by Justice Cardozo in *Ultramares Corp v Touche* (1932) 174 N E, 441, as the risk of making a defendant liable for an 'indeterminate amount for an indeterminate time to an indeterminate class'. A similar opinion was shared by Lord Denning in the case of *Spartan Steel & Alloys Ltd v Martin & Co Ltd* [1973] 1 QB 27 for economic loss, stating that '[I]f claims for economic loss were permitted for this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, or even false.'

[177] LexisNexis 'Personal injury definition' <https://www.lexisnexis.co.uk/legal/glossary/personal-injury> accessed 17 February 2022.

[178] LexisNexis, 'Actual bodily harm definition' <https://www.lexisnexis.co.uk/legal/glossary/actual-bodily-harm> accessed 17 February 2022.

[179] Section 311(b)(7)(A).

[180] Section 68.

[181] Article 79(1); 'A harm inflicted to citizens' health and property by a negative effect on the environment resulting from the economic and other activities of legal entities and natural persons shall be subject to compensation in full.'

Countries with explicit provisions for personal injury liability provide better legal protection for individuals who suffer harm as a result of pollution incidents. This ensures that victims have a clear avenue for seeking compensation for various forms of harm they may experience, including bodily injury, emotional distress, or mental anguish. On the other hand, the absence of explicit provisions in the legislation of Norway and Canada, leaves individuals potentially vulnerable in cases of personal injury resulting from pollution offshore incidents. This creates uncertainty for victims regarding their legal rights and avenues for seeking redress. It may also lead to inequity, as individuals in these countries may face greater hurdles in obtaining compensation compared to those in countries with explicit provisions.

Ultimately, the variation in the legal landscape governing damage that may be recovered in each civil liability legislation, directly influences the level of protection available to those impacted by pollution incidents. It emphasises the imperative of establishing comprehensive and robust legal mechanisms to safeguard the rights and well-being of individuals affected by environmental harm across borders in the Arctic region.

4.6 Limits on Liability

Civil liability legislation may include provisions regarding the limit of liability, defining the overall financial responsibility of the party accountable for the loss or damage incurred. This provision may set a specific cap on liability as defined by statute or leave it open-ended.[182]

In some cases, liability may be explicitly stated in the legislation to extend to the full extent of the harm suffered. Alternatively, it may be implied by the absence of any clauses limiting liability, or it may be left to the discretion of courts or other government authorities. This scenario is particularly common in industries where accurately forecasting risks from hazardous economic activities, such as offshore oil drilling, proves challenging.

4.6.1 Unlimited Strict and Absolute Liability

In Norway, the PAA does not specify any financial extent of the strict liability it prescribes; therefore, it is inferred that strict liability under the PAA is unlimited. However, if the licensee's right to recourse against negligent third parties is transferred to an aggrieved party, liability

[182] Karine Fiore, 'No-Fault Compensation Systems' in Michael Faure (ed), *Tort Law and Economics* (Elgar 2009) 406, 418.

may be limited by the court based on considerations of reasonable conduct, economic ability, and overall circumstances.[183]

Similarly, in Greenland, the Mineral Resources Act (MRA) does not address any financial limitation of liability, suggesting liability is unlimited. Moreover, there is no mention of any specific framework for calculating compensation for loss or damage, leaving the determination of compensable amounts at the discretion of the courts. Although both Danish and Greenlandic laws are applicable in Greenland, the Danish Offshore Safety Act,[184] which addresses private law liability for petroleum development activities and contains figures towards which liability may be limited,[185] expressly states that it does not apply in Greenland.[186] However, literature suggests that as a general practice, courts in Greenland rely on a rough estimate of the loss incurred balanced against the claim made when calculating damages.[187]

Additionally, it is important to highlight the differing approaches to operator participation in spill incident compensation schemes between Greenland and Norway. In Greenland, operators are obligated to participate in the Oil Pollution Control Fund (OPOL),[188] while in Norway, participation is voluntary.[189] As a result, if the operator is unable to pay, compensation may be available in the OPOL, where the operator's liability is capped at $250 million USD, with $125 million allocated for pollution damage claims and $125 million for remedial measures claims.

On the other hand, Russian law explicitly states that there is no limit of liability for the polluting party. Consequently, they are fully liable to compensate for strict liability damage under the RCC[190] and EPL.[191] However, the courts have discretionary powers to limit compensation to an aggrieved based on factors like the 'property standing' of the polluter,[192] or make an order for the repair or replacement of the injured item and to take such voluntary repair into

[183] Sections 7(4) and (5).
[184] Act No 125 of 6 February 2018.
[185] Section 69; Gives limit of liability for pollution damage caused by offshore oil and gas operations on mobile installations but does not apply to FPSOs and FSOs.
[186] Section 77.
[187] Henrik Peytz, 'Denmark' https://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/denmark_en.pdf> 15 accessed 7 June 2021.
[188] Discussed in chapter three of the thesis.
[189] Michael Faure and Hui Wang, 'Compensating victims of a European Deepwater Horizon accident: OPOL revisited' (2015) 62 Marine Policy 25, 27 and 35.
[190] Article 15.
[191] Articles 77 and 79.
[192] Article 1082 RCC; articles 79(2) and 80 EPL.

consideration when awarding further compensation.[193] The payment of administrative penalties will however not relieve a polluter of civil liability claims or limit the compensation due to the victim [194]

Although the term 'property standing' is not clearly defined, the RCC allows an aggrieved party to challenge any discretionary reduction in compensation if the property standing of the polluting party has improved. However, interpreting this provision could lead to a lengthy process, potentially leaving victims in a challenging position as they pursue rightful compensation for damage caused by a polluting incident.

4.6.2 Limited Strict and Absolute Liability

Conversely, in countries like the USA and Canada where liability limits exist, questions arise about whether these limits adequately cover potential damages in worst-case scenarios. Adjusting these limits also depends on legislative permission. Although liabilities under the CWA and general maritime laws, such as claimants' attorney fees and personal injury, are determined at the courts' discretion in the USA,[195] the OPA sets a strict liability limit of $75 million USD for damages and total removal costs.[196] However, the *Deepwater Horizon* incident highlighted the insufficiency of this limit in covering removal costs and damages.[197] Consequently, the OPA limits were revised, with the current limit for offshore petroleum development-related damage set at $134 million USD.[198] Additionally, guidelines for periodic adjustments to liability limits were established, tying adjustments to significant increases in the

[193] For example, In the ruling of the Eighth Arbitrazh Appeal Court No 08АП2528/2014 dated June 16, 2014, RN Yuganskneftegaz argued on appeal that since it had been on its own account restoring the environment to its initial state after a pipeline oil spill, thus it constitutes 'payment in kind'. Thus, they ought to be exempt from paying further monetary damage because it would amount to dual compensation, a concept not covered by the legislation. The courts disallowed the arguments stating that such monetary damages are awarded on the basis of the actual losses suffered from the pollution, separate from actual environmental damage. Furthermore, prior to the appeal case; Similarly, the Ruling of SAC No SAC8493/13 of 16th July 2013.

[194] *See* Eighth Arbitrazh Appeal Court No 08АП2528/2014 dated June 16, 2014, the appellants had already been subject to an administrative fine of 300,000 Rubbles, which was not taken into consideration by the courts in the award of damages to the aggrieved.

[195] Section 311 (b)(7)(b); since claims initiated by private persons under the CWA for environmental damage are considered to be citizen suits, the responsible party is subject up to compensation of $25,000 per day of violation of the CWA in the form of a civil penalty that goes to the government, or the responsible party's liability may be limited to an amount up to three times the costs incurred by the Oil Spill Liability Trust Fund (OSLTF), depending on the severity of the case and as determined by the courts.

[196] Section 1004(a)(4); $ in the context of the USA denotes the Unites States Dollar.

[197] OPA section 1004(d)(4); US Department of the Interior - Bureau of Ocean Energy Management, 'Consumer Price Index Adjustments of the Oil Pollution Act of 1990 Limit of Liability for Offshore Facilities Proposed Rule' (2014) 79 Federal Register 10, 56 <http://www.gpo.gov/fdsys/pkg/FR-2014-03-19/html/2014-06047.htm> accessed 22 August 2021.

[198] ibid.

consumer price index over time.[199] These proactive adjustments ensure that liability limits remain practical and aligned with the evolving economic landscape, enhancing their effectiveness in addressing potential damages and removal costs associated with offshore incidents.

The case in Canada is complex, with the fragmented regime affecting liability limits alongside concerns about feasibility. To illustrate this, under COGOA, operators can limit their absolute liability to $1 billion CAD,[200] inclusive of spill response costs.[201] Any increase requires regulatory enactment,[202] meaning courts cannot independently award damages exceeding this cap. This raises questions about compensating losses and expenses surpassing the liability limit. Similarly, the absolute liability for spills is capped at $40 million under the AWPPR,[203] The last amendment of the maximum liability in the AWPPA and AWPPR was a limit set in 1980 and not adjusted since.[204] Despite concerns raised in the early 1990s about adequacy, especially by the Inuvialuit Environmental Impact Review Board (IEIRB),[205] the limits remain unchanged, failing to reflect inflation or previous claims experiences like those from the *Deepwater Horizon* incident. Consequently, the appropriateness of this amount for civil claims in Canada's Arctic shelf is questionable.

Conversely, the Fisheries Act and the IFA do not provide a limit of absolute liability they prescribe for the operator, leaving compensation determination to judicial discretion.[206] The difference in liability limits within the Canadian regime raises uncertainties regarding interactions between different limits potentially leading to inconsistency in outcomes and challenges in predictability for both claimants seeking compensation and operators facing liability claims. This gives emphasis to the need for clarity and coherence in civil liability frameworks to ensure fairness and efficiency in compensating victims of oil spill incidents while holding operators accountable for their actions.

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[199] ibid.
[200] Section 26(2)(2.2)(a); Section 3; $ sign in the context of Canada denotes Canadian Dollars.
[201] Section 26(1)(a)
[202] Section 26(2)(2.3).
[203] Section 8(f) Arctic Waters Pollution Prevention Regulations (C.R.C., c. 354) regulations made pursuant to the AWPPA; This limit is also recognised in section 26 of COGOA.
[204] SOR/80-75, s 1 and SOR/80-413, s 1.
[205] The IEIRB stated that 'It is painfully obvious that the Department of Indian Affairs and Northern Development policies and practices with respect to limits on absolute liability… at $40 million is not only unclear [but] require serious over-haul and extensive critical analysis'; Inuvik Environmental Impact Review Board, 'Public Review of the Gulf Canada Resources Limited Kulluk Drilling Program 1990 – 1992' (1990) 52 <https://eirb.ca/wp-content/uploads/registry/project-858/Kulluk_Review_Final_Report.pdf> accessed 3 June 2022.
[206] Section 24(2); section 87(1).

From one perspective, the cap on strict liability in the USA and Canadian regime means that offshore petroleum companies can get insurance coverage up to the potential liability, as the insurance industry is hesitant to cover indeterminate risks.[207] However, capped liability ultimately shifts the remaining cost of clean-up and compensation not covered, to the affected entities. This leads to a converse argument for leaving liability uncapped for activities like petroleum development, where predicting the amount of oil released from the seabed and fully capturing the spill's continuing impact is challenging. For instance, the costs of compensation and clean-up after the *Deepwater Horizon* incident exceeded the OPA's limit of limit of liability. Therefore, an unlimited liability regime may be more suitable for the Arctic, where weather conditions and icy waters could hinder response efforts to slow down or control the spill.

Even when a company compensates the immediate damage caused by a spill, the long-term costs remain incalculable. Removing the cap on civil liability offers several benefits, especially in aligning liability costs with the true magnitude of disaster-related expenses. By eliminating the cap, companies are compelled to fully internalise the risks associated with their operations.[208] This ensures that they bear the genuine costs of their actions, including both immediate and long-term damages. Further, uncapped liability serves as a potent incentive for companies in the offshore oil industry to prioritise and invest in risk-averse behaviours and adopt robust safety measures during their activities.[209] This incentivisation may be difficult to achieve without a significant financial incentive for potentially responsible parties to adopt such practices. Moreover, this shift towards risk-aware and safety-focused practices not only enhances overall industry standards but also reduces the likelihood of future incidents and their associated costs.[210]

4.6.3 No Limits on Fault Liability

In all five Arctic states, the fault liability of the responsible party is without limit, although only in Canada is it explicitly stated that there is no cap on fault liability of the operator or any third party working under the authorisation of the operator in the COGOA.[211] Moreover, a

[207] Cambridge Centre for Risk Studies, 'Developing Scenarios for the Insurance Industry' (2020) 5-6 <https://www.jbs.cam.ac.uk/wp-content/uploads/2021/11/crs-developing-scenarios-for-the-insurance-industry.pdf> accessed 3 June 2022.
[208] Daniel P Kessler, 'The Economic Effects of the Liability System' (*Hoover institution,* 1 June 1999) <https://www.hoover.org/research/economic-effects-liability-system> accessed 10 June 2022.
[209] Ibid.
[210] Ibid.
[211] Section 26(1); 'to the extent determined according to the degree of fault or negligence proved against them'.

person who is authorised by the government to manage a spill may face separate unlimited fault liability under the COGOA if further damage occurs during spill management.[212] Similarly, the AWPPA does not impose a limit on fault-based liabilities for both the operator and any negligent third party, leaving compensation determination to the discretion of the judge.[213]

Conversely, Canada's IFA and Fisheries Act are silent on fault-based liability caps. Similarly, in USA, Norway, Russia and Greenland, there are no specific provisions limiting fault-based liability, suggesting liability is unlimited. There is also no mention of any specific framework that may be used by the courts to calculate compensation, therefore leaving amounts compensable at their discretion. However, a recurring theme across all five countries is that punitive or monetary fines paid for administrative and criminal liability in an offshore petroleum incident are not factored into civil liability claims or compensation awards.

Evidently, the regulatory landscape regarding liability limits in Arctic petroleum development are multifaceted and vary across jurisdictions. While some countries like Norway, Greenland, and Canada uphold unlimited strict and absolute liability for operators, others such as the USA and Canada impose limits on fault liability. The absence of financial constraints in strict liability regimes can provide victims with greater assurance of compensation in the event of spills, yet may place significant financial burdens on operators and potentially hinder their ability to obtain insurance coverage. Conversely, capped liability in fault-based regimes offers some financial predictability for operators but may inadequately cover the full extent of damages incurred, as evidenced by incidents like the *Deepwater Horizon* disaster. Moreover, the lack of harmonisation and clarity in liability frameworks across Arctic states raises concerns about consistency in compensation outcomes and may hinder the effectiveness of spill response and mitigation efforts.

Overall, achieving a balance between adequate compensation for victims and ensuring accountability for operators remains a critical challenge in Arctic petroleum development governance.

[212] COGOA Section 25(9).
[213] Section 24(2); AWPPR section 87(1).

4.6.4 Applicability of shipping law liability limits

Taking into account the use of Mobile Offshore Drilling Units (MODU)[214] that are shaped in the form of a ship for offshore petroleum development, the civil liability legislations of Russia, Greenland, and Canada do not address the subject. Only the USA and Norway clarify liability regarding ship-shaped drilling crafts and whether any shipping industry-related liability regime can apply.

In Norway, the Norwegian Maritime Code (NMC) provides instances where a MODU or Floating Production Storage and Offloading (FPSO) may be registered as a ship.[215] However, for civil liability for damage from petroleum development activities, the NMC is explicit that a licensee or operator will be subject to the provisions of the PAA regarding limitation of liability,[216] rather than the LLMC,[217] a multilateral treaty which enables shipowners to limit their liability in maritime claims related to death, personal injuries and property damage resulting from shipping activities based on the gross tonnage of the ship.[218] Notably, the LLMC does not apply to ships specifically constructed or adapted for, and involved in, drilling activities or floating platforms utilised for exploring or exploiting natural resources beneath the seabed or subsoil.[219] Moreover, the Norwegian PAA explicitly stipulates that liability for damage resulting from petroleum development can only be pursued according to the rules outlined within the Act.[220]

Conversely, in the USA, operators of MODUs and owners of other shipping vessels used for storing, producing, or transporting oil from an offshore facility as part of its operations, may limit their liability based the Limitation of Liability Act of 1851 (LLA). This is enabled by the

[214] MODUs can either be ship-shape, jack-up, submersible barges or semi-submersible rigs. The platform involved in the *Deepwater Horizon* disaster was a semi-submersible rig, which is a MODU; Rigzone.com RigLogix Rig Data <http://www.rigzone.com/oil/data/offshore-rig-search/rig-profile/153/semisub/transocean_ltd/deepwater_horizon/> accessed 29 April 2017.
[215] Sections 208 and 209.
[216] Ibid.
[217] The International Convention on Limitation of Liability for Maritime Claims 1976 and Protocol of 1996 plus 20122 amendment (LLMC) 1456 UNTS 221; Currently, Canada, Greenland (under Denmark), Norway, and Russia have ratified the latest 1996 protocol regarding the Arctic. However, the USA has not joined the LLMC 76 or its 1996 Protocol.
[218] LLMC 76, Article 2; International Maritime Organization, 'Convention on Limitation of Limitation of Liability for maritime Claims (LLMC)' <http://www.imo.org/en/About/conventions/listofconventions/pages/convention-on-limitation-of-liability-for-maritime-claims-(llmc).aspx> accessed 10 April 2022.
[219] Articles 15(4) and (5b).
[220] Section 7(4).

Jones Act,[221] as 'they are capable of being navigated'.[222] The Jones Act also requires that facilities and vessels capable of being used in a navigation capacity should be registered as a ship in the USA.[223] Thus, liability limitation under general maritime law depends on whether the offshore petroleum development facility is in navigation and not permanently fixed to the bottom of the ocean at the time of the accident.

The LLA permits limitation of liability only for the post-accident value of a vessel or its cargo.[224] Thus, even if the responsible party cannot prove they had no knowledge of the negligent act leading to the accident and the MODU is a total loss, the owner may limit their liability to zero and may not settle claims arising from the pollution incident. Furthermore, claims for personal injury (or death) are calculated at $420 per gross tonnage of the vessel, and for other damages at less than $420 per gross tonnage.[225]

The ability to limit liability to zero suggests that the monetary worth of an offshore platform might not cover general maritime law claims arising from a pollution incident. For example, following the *Deepwater Horizon* incident, Transocean claimed limited liability under the LLA at $26,767,083 USD, although the pre-accident value of the drilling platform was estimated at $650 million USD.[226]

The USA has not ratified the LLMC where liability limits for loss of life and personal injury starts from 3.02 million Special Drawing Rights (SDR)[227] for ships less than 2000 gross

[221] The Jones Act defines a vessel as 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water';
[222] In *re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico* MDL No.2179 in the US District Court of Eastern Louisiana <https://www.courtlistener.com/laed/bQip/in-re-oil-spill-by-the-oil-rigdeepwater-horizon/> accessed 1 August 2019; Spagnoletti & Co, 'What Constitutes a Vessel under the Jones Act' <http://www.spaglaw.com/Jones-Act-Claims/What-Constitutes-a-Vessel-Under-the-Jones-Act.shtml> accessed 9 May 2019; Harold K Watson, 'Applicable Law in Suits by Foreign Offshore Oil Workers' (1981) 41(3) Louisiana Law Review 827, 832.
[223] Ibid.
[224] In *Place v Norwich & New York Transport Company* (1885) 118 US 468, the Supreme Court held that the 'value' is the value of the vessel after the accident.
[225] S 1004(a) (3); Richard Faulk, 'Stretching the Boom? Limiting Liability for Offshore Drilling Disasters' (2010) Westlaw Environmental Journal <http://works.bepress.com/richard_faulk/49> accessed 11 April 2020.
[226] Alliance for Justice, 'Factual Background and Legal Framework Governing Gulf Oil Spill Claims' <http://www.afj.org/resources-and-publications/films-and-programs/crude_justice/crude-justice-factual-background-and-legal-overview.pdf> accessed 10 March 2020.
[227] Special drawing rights (SDR) is an international type of monetary reserve currency created by the International Monetary Fund (IMF) in 1969 as a response to concerns about the limitations of gold and dollars as the sole means of settling international accounts. SDRs augment international liquidity by supplementing the standard reserve currencies. SDR is essentially an artificial currency used by the IMF with daily conversion rates which can be found on the IMF website; International Monetary Fund 'About SDR' (September 2016) <https://www.imf.org/external/np/exr/facts/sdr.htm> accessed 7 June 2020.

tonnage, to other higher amounts claimable for up to in excess of 70,000 tons.[228] For property claims, it starts at 1.51 million SDR for ships less than 2000 gross tonnage, to other higher amounts claimable for up to an excess of 70, 000 tons.[229]

In contrast to the LLMC, the LLA offers a notably lax limitation regime for claims emerging from maritime operations. This leniency may not align well with adequate compensation for damages and liabilities incurred in the event of accidents or incidents, particularly in light of technological progress and the increased sizes of vessels that are currently employed for petroleum activities.

4.7 Assurance of Financial Responsibility

The discussion surrounding civil liability regimes is incomplete without addressing the crucial aspect of ensuring sufficient financial resources to cover potential liabilities arising from major incidents. Merely having liability rules in place does not guarantee that defendants can adequately compensate for the harm caused by catastrophic events. Therefore, it is common for civil liability laws to mandate financial security as a prerequisite for engaging in high-risk economic activities like offshore drilling.[230] It has been suggested that a core reason the vessel-source civil liability regime has succeeded is due to the mandatory requirement to arrange financial cover for the liability of shipowners, in order to provide adequate compensation against oil pollution damage.[231]

To ensure adequate compensation for victims, civil liability regimes often require the party engaging in the risky activity to secure their liabilities through various financial mechanisms.[232] These may include insurance, self-insurance, risk pooling schemes, surety bonds, or

[228] For larger ships, the following additional amounts are used in calculating the limitation amount:
For each ton from 2,001 to 30,000 tons, 1,208 SDR; for each ton from 30,001 to 70,000 tons, 906 SDR; for each ton in excess of 70,000, 604 SDR.
[229] For larger ships, the following additional amounts are used in calculating the limitation amount: for each ton from 2,001 to 30,000 tons, 604 SDR; for each ton from 30,001 to 70,000 tons, 453 SDR; for each ton in excess of 70,000 tons, 302 SDR.
[230] For example, financial assurance is required by oil tanker carriers in Art VII of the CLC Convention in the form of 'insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund in the sums fixed by applying the limits of liability prescribed…'. A similar requirement is found in article 7 of the Bunker oil Convention. Likewise, Art 10 of the Paris Nuclear Energy Convention.
[231] Mohammad Masum Billah, 'The Role of Insurance in Providing Adequate Compensation and in Reducing Pollution Incidents: The Case of the International Oil Pollution Liability Regime' (2011) 29 Pace Environmental Law Review 42.
[232] Michael Faure and Hui Wang, 'The Use of Financial Market Instruments to Cover Liability Following a Major Offshore Accident 'in M Faure, *Civil Liability and Financial Security for Offshore Oil and Gas Activities* (Cambridge University Press 2016) 235-237, 249-251.

participation in industry liability compensation schemes.[233] Moreover, demonstrating financial responsibility is typically a regulatory requirement before commencing any exploration project. Thus, the funds provided to satisfy financial responsibility obligations serve as a crucial resource for settling claims made by entities seeking recovery for loss, damage, costs or expenses resulting from offshore spills. This requirement represents a fundamental similarity across the civil liability regimes of all five Arctic states.

4.7.1 Requirement to show proof of financial responsibility

In Russia, offshore operators must furnish financial guarantees before commencing operations.[234] These guarantees cover various obligations, including the costs associated with oil spill prevention and clean-up, as well as compensation for environmental damage and third-party liabilities arising from such damage.[235] Similarly, in the USA, the OPA mandates evidence of financial assurance as a prerequisite for operations.[236] Norway's regulations under the PAA also demand that licensees demonstrate proof of financial responsibility.[237] While in Greenland, license conditions may specify that the licensee's liability must be backed by insurance or another form of security.[238] Furthermore, the civil liability regimes in Russia, Norway, Greenland and the USA do not impose requirements for the ongoing maintenance of financial assurance throughout the course of petroleum development.

Canada is the only country where operators are required to demonstrate general financial security of the firm before commencing petroleum development activities.[239] Operators are also required to demonstrate proof of actual funds set aside and maintained to cover potential financial obligations arising during petroleum development.[240] In addition to the COGOA, operators in Canada's Arctic shelf may also be required to furnish evidence of financial responsibility under the AWPPA.[241] Neither the Fisheries Act nor the IFA in Canada contain provisions regarding financial assurance. The interaction between the financial responsibility requirements of the COGOA and the AWPPA remains unclear and raises questions about

[233] Ibid.
[234] Federal Law No 287-FZ dated December 30, 2012 on Amending the Federal Law No 187-FZ of 1995 on the Continental Shelf of the Russian Federation and the Federal Law on Internal Marine Waters, the Territorial Sea and the Continuous Zone of the Russian Federation.
[235] Ibid.
[236] Section 1016; 33 Code of Federal Regulations section 553.
[237] 1997 Regulations to Act relating to petroleum activities (as amended).
[238] Section 92(3) MRA.
[239] COGOA Section 26.
[240] COGOA Section 27.
[241] Section 8(1)(a).

whether operators can utilise a single financial account as proof under both laws. Additionally, it is uncertain whether demonstrating proof under the COGOA exempts operators from providing proof under the AWPPA.

4.7.2 Instruments for evidencing financial responsibility

Civil liability regimes may specify the instruments through which potential liable parties can demonstrate their capacity to meet compensation requirements or will state if such instrument is to be decided by a regulatory agency or the government.[242] These instruments ensure that victims of incidents caused by polluters are not left uncompensated. While each Arctic state has its prescribed forms, insurance and bonds emerge as common instruments across these countries.

In the USA, the OPA mandates potential responsible parties to provide financial assurance through various means, including insurance policies, surety bonds issued by US companies, guarantees, letters of credit, self-insurance qualification, or other evidence of financial responsibility approved by the President.[243] Similarly, in Greenland, if a petroleum development license requires coverage, insurance is the preferred form of proof, followed by alternative securities.[244] Norway prefers insurance coverage, but the Ministry of Petroleum and Energy (MPE) may approve alternative forms of financial security.[245] In Russia, financial guarantees can take the form of a bank guarantee, insurance contract, or proof of the operator's reserve fund.[246]

Canada's COGOA does not specify the preferred form for demonstrating pre-commencement financial resources, but for actual funds set aside during petroleum development, options include letters of credit, guarantees, indemnity bonds, or participation in an established industry fund.[247] While in the AWPPA, insurance or indemnity bonds are preferred for evidencing financial responsibility,[248] although the Governor in Council has the discretion to prescribe

[242] For example, art 14(1) of the Environmental Liability Directive 2004/55/EC (ELD) leaves it at the discretion of EU member States to take measures 'to encourage the development of financial security instruments…by the appropriate economic and financial operators…in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive'.
[243] Section 1016 (e).
[244] Section 92(3).
[245] 1997 Regulations to Act relating to petroleum activities (as amended) section 73.
[246] Federal Law No 287-FZ dated December 30, 2012 On Amending the Federal Law No 187-FZ of 1995 on the Continental Shelf of the Russian Federation and the Federal Law on Internal Marine Waters, the Territorial Sea and the Continuous Zone of the Russian Federation.
[247] Section 27(1)(a).
[248] Section 8(1).

alternative satisfactory forms, as far as the method of proving financial assurance will enable direct recovery.[249]

4.7.3 Amount required as proof of financial responsibility

The provision regarding proof of financial responsibility may be explicit about the minimum amount required, or may leave the amount to be determined by an authority.[250] Provisions regarding proof of financial responsibility vary across Arctic states, with some specifying a minimum amount and others leaving it to the discretion of regulatory authorities. In the USA, for facilities beyond the seaward boundary of a state, financial assurance is set at $35 million (USD), [251] with the President empowered to raise this to $150 million (USD) for higher-risk operations.[252] Although not explicitly stated, drilling in the US Arctic shelf will likely warrant a higher amount due to the gravity of potential environmental risks.

Conversely, in Norway, Greenland, and Russia, regulatory agencies determine the minimum amount. Norway does not specify a figure but requires cover to be 'reasonable enough' to cover the risk of the activity; including pollution damage, liabilities towards third parties, and the costs of wreck removal and clean up, with the Ministry of Petroleum and Energy (MPE) having the authority to demand additional coverage if deemed necessary.[253] In Greenland, the Mineral Licence and Safety Authority (MLSA) decide on the amount,[254] while in Russia, either the Federal Agency for Subsoil Use ('Rosnedra') or the Federal Service for Supervision of Nature Use ('Rosprirodnadzor') exercises discretion over the extent of financial guarantees.

Canada presents a mix of scenarios regarding the amount required as proof of financial responsibility seen in other Arctic states. In the AWPPA, the decision on the amount required as proof of financial responsibility rests with the Governor in Council.[255] However, in the COGOA, the determination is two-fold. First, the CER assesses the financial state before commencing petroleum development, and COGOA does not make known how the CER determines the minimum amount, but one thing COGOA makes clear is that the CER is not

[249] Ibid.
[250] Hubert Bocken 'Alternative Financial Guarantees under the ELD' (2009) European Energy and Environmental Law Review 146, 169.
[251] Section 1016 (c)(1)(B).
[252] Section 1016(c)(1)(C) .
[253] Ibid.
[254] The MLSA handles the application processes and ensures that all requirements are met before any licence is granted by the government.
[255] Section 8(1)(a)-(c).

mandated to consider the loss of non-use value of a public resource when setting this amount.[256] Second, regarding proof of actual funds maintained, the COGOA sets a minimum of $100 million CAD for letters of credit, guarantees, or indemnity bonds,[257] or $250 million CAD for participation in an industry fund.[258] The CER may adjust these amounts if necessary.[259]

It is notable that the required amount for operating license holders is less than the liability cap of $1 billion (CAD), but the CER's flexibility suggests the actual amount may be higher. Despite this, historical practices under the former regulator, the National Energy Board (NEB) suggest adherence to prescribed amounts in the COGOA.[260] This is likely to continue under the CER.

4.7.4 Creation of an industry compensation scheme

In certain civil liability regimes, provisions may be made for the creation of or participation in an industry compensation scheme. This serves as an added layer of assurance that compensation and clean-up will be made, by proactively transferring some of the financial liability for response, mitigation, and compensation to a dedicated industry fund or an agreement. This enhances the overall capacity for compensating catastrophic losses, especially where the risk of pollution damage from offshore petroleum development may prove difficult to adequately insure.[261] Or where the damage from such incident may exceed the financial assets of the polluting company and insolvency becomes an hinderance for satisfying victim compensation.[262]

As mentioned above, Canada will accept evidence of participating in an industry fund as proof of financial assurance, and expects that financial responsibility will be maintained through the duration of the project, however, there is no obligation to participate in a specific fund or agreement. In Greenland, while the MRA provides for the creation of a fund,[263] it does not

[256] Section 26.1 (3).
[257] Section 27(1)(a).
[258] Section 27(1.01); this minimum amount may also be increased by regulation.
[259] Section 27(1)(b); Money out of the pooled fund may be used to cover a liability of the holder of an authorisation, however, such authorised person is subject to reimbursing the amount to the pool; S 27(5).
[260] Gowling WLG, 'Guide to doing business in Canada; Oil and gas' (*Gowling WLG*, 21 October 2022) https://gowlingwlg.com/en/insights-resources/guides/2022/doing-business-in-canada-oil-and-gas/> accessed 15 December 2022.
[261] Michael Faure, 'Environmental Liability' in Michael Faure (ed) *Tort Law and Economics* (Edward Elgar, 2009) 247, 263-267; Richard Zeckhauser, 'The Economics of Catastrophes' (1996) 12 Journal of Risk and Uncertainty 113, 133-134; Howard Kunreuther and Paul Freeman, 'Insurability, Environmental Risks and the Law' in Anthony Heyes (ed) *The Law and Economics of the Environment* (Edward Elgar Publishing, 2001) 302.
[262] Ibid.
[263] Section 95(a)(1).

specify if licensees or operators contribute to the fund. Moreover, the fund is limited to aiding private parties in damage assessment or identifying issues related to a petroleum development activity, rather than for compensating loss or damage. However, as earlier mentioned, operators in Greenland are required to participate in the OPOL agreement.[264]

In the USA the Oil Spill liability Trust Fund (OSLTF) serves as an additional safety net, ensuring that not only the prompt clean-up or containment of a spill occurs, but also that specified losses or damages outlined in the OPA are promptly compensated.[265] Funded primarily by a tax on domestic or imported petroleum products, including crude oil, consumed within the country,[266] the OSLTF also receives financing from transfers from other legacy pollution funds, investment interest, and penalties recovered from responsible parties of a spill.[267]

Notably, the availability of the OSLTF does not absolve responsible parties of their liability,[268] thereby providing the US government with recourse against the responsible party for the amount they are liable for.[269] Claims settled from the OSLTF per incident are capped at $1 billion or the balance of the fund.[270] Of this, $500 million is allocated for damage to natural resources, while between $50 million to $100 million is reserved for costs of removal and natural resource damage preassessment.

In instances where the responsible party incurs damage or removal costs exceeding the OPA limit of liability, they may also seek reimbursement from the OSLTF.[271] Should a claim against the responsible party remain unresolved after 90 days, the claimant has the option to submit the claim directly to the OSLTF, however, the state may seek removal costs from the OSLTF without such claim to the responsible party.[272]

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[264] This is discussed in chapter three, section 3.4 of the thesis.
[265] The fund is managed by the United States Coast Guard's National Pollution Funds Center (NPFC); United States Coast Guard - National Pollution Funds Center 'Oil Pollution Act (OPA) Frequently Asked Questions' 21 December 2016 <https://www.uscg.mil/npfc/about_npfc/opa_faqs.asp> accessed 2 August 2021.
[266] Ibid.
[267] James E Nichols 'Oil Pollution Act of 1990 (OPA): Liability of Responsible Parties', Congressional Research Service June 2010 <https://www.bsee.gov/sites/bsee.gov/files/notices-to-lessees-ntl/notices-to-lessees/ntl99-n01.pdf> accessed 2 August 2021.
[268] Section 1012(f).
[269] Ibid.
[270] United States Coast Guard, 'Oil Spill Liability Trust Fund (OSLTF) Funding for Oil Spills' (*USCG*, January 2006) 2 <https://www.uscg.mil/Portals/0/NPFC/docs/PDFs/OSLTF_Funding_for_Oil_Spills.pdf> accessed 2 August 2021.
[271] Ibid, 7.
[272] Ibid, 3.

However, it crucial to note that the OSLTF only applies to OPA damage occurring within US maritime territory, up until the Exclusive Economic Zone (EEZ),[273] thus in cases where pollution crosses international boundaries, such as spills that affect neighbouring countries' waters or coastlines, the OSLTF may not directly address the compensation and clean-up needs beyond the US EEZ. This could lead to challenges in coordinating clean-up efforts and ensuring timely compensation for affected communities and ecosystems. Moreover, despite the existence of the OSLTF, it is typically the case that the OSLTF is first used to settle clean-up and removal operations, which may take a while, before claims by private persons can be settled.[274]

The civil liability regime of Russia is silent on the subject, while operators in Norway may voluntarily participate in the OPOL agreement, even though it does not function as a fund for compensation.[275]

Overall, the requirement to demonstrate proof of financial responsibility reflects a proactive approach by Arctic jurisdictions to mitigate the financial risks associated with offshore petroleum development, by ensuring operators can cover costs related to spill prevention, clean-up, and liabilities. However, discrepancies exist in ongoing maintenance requirements, particularly in Russia and Norway. Furthermore, the absence of dedicated compensation funds in some of the civil liability regimes, gives emphasis to the disparity in the level of financial protection available to victims of pollution damage in the Arctic region. While participation in initiatives like the OPOL may exist, they may not adequately address the immediate compensation needs of affected individuals or communities. This highlights the need for greater harmonisation and enhancement of civil liability frameworks across Arctic nations to ensure equitable and timely compensation for all those impacted by offshore petroleum activities.

4.8 Forum of Dispute Resolution, Order of Claims, and Limitation Period

The forum for dispute resolution, priority of claims, and limitation period for civil liability claims are crucial components of a civil liability regime. These features are not only substantive but also intricately tied to procedural aspects that determine access to justice in many

[273] Ibid.
[274] De Smedt Kristel and ors, 'Civil Liability and Financial Security for Offshore Oil and Gas Activities' 125.
[275] OPOL, 'Key points for claimants' <https://www.opol.org.uk/claims> accessed 19 February 2022.

jurisdictions. Therefore, ensuring accuracy in these legal aspects is vital for a civil liability law to be efficient and effective.

4.8.1 Forum of dispute resolution

The jurisdiction of the adjudicating body is fundamentally tied to the legitimacy of a cause of action. If a forum lacks the legal authorisation to address a specific subject matter.[276] Ambiguity regarding the adjudicating forum in a civil liability regime can lead to delays in recovery or repair proceedings. Some legislation may specify courts or other alternative places for dispute resolution.[277] In the Arctic states, the civil liability legislation generally designates courts in the location of the damage or federal courts as appropriate forums. However, other dispute resolution bodies or petroleum regulators may also play a role in adjudication.

For instance, in the USA, civil liability claims are exclusively heard in US district courts situated where the discharge occurred, or where the responsible party resides or has its principal place of business. In Norway, a similar framework exists regarding the forum for settling claims under the PAA, with courts in the district where the discharge has taken place or where the damage has occurred, being designated.[278] However, a distinction arises in that the Petroleum Safety Agency (PSA), acting as the regulator, has the authority to determine alternative venues for claim resolution.[279] This may occur if the discharge or damage happens where there are no court districts, if uncertainty exists regarding the jurisdiction of the court, if the damage location differs from the discharge site, or if damage spans multiple court districts. [280] Additionally, claims by private persons who are licensed fishermen under chapter 8 are settled through a commission appointed by the King, as well as its composition and procedures.[281] Although this introduces a unique combination of regulatory and civil liability, nevertheless, it can be inferred that in this capacity, the commission will possess quasi-judicial powers and its formation will be on *ad hoc* basis.

[276] Horace Hawes, The Law Relating to the Subject of Jurisdiction of Courts (Bancroft-Whitney Co 1886) 9.
[277] ADR mechanisms are extensive and continues to develop, but in the context of the thesis ADR is specifically refers to Arbitration, Mediation, Conciliation, Negotiation and Settlement Conferences. However, arbitration appears to be the preferred alternative for specialised cases because of its shared similarities with litigation, for example, the use of an expert arbiter as an adjudicator who can also give binding decisions; Larry R Spain, 'Alternative Dispute Resolution for the Poor: Is It an Alternative?' (1994) 70 North Dakota Law Review 269-270.
[278] Section 7(8).
[279] Ibid.
[280] Ibid.
[281] Section 8(6).

In Canada, a range of forums, including courts and arbitration boards, may be utilised depending on the nature of the claim. Claims sought under the AWPPA[282] and the Fisheries Act,[283] can be recovered in any court of competent jurisdiction in the country. Conversely, claims under the IFA follow a different path, requiring attempted resolution through mediation initially. If mediation fails, the matter may then proceed to the Arbitration Board, whose decisions are binding on all parties.[284] Civil liability claims brought pursuant to COGOA can be heard in any court with competent jurisdiction, including a federal court.[285] In addition, COGOA grants quasi-judicial powers to the regulator through its commissioners. These powers resemble those of a superior court, enabling the CER to make adjudicative decisions on COGOA-related claims up to the limit of the financial assurance maintained with it. These decisions carry enforceability akin to those of a federal superior court.[286] However, it remains uncertain whether CER commissioners are required to possess legal training or expertise to function as adjudicators. This uncertainty raises questions regarding the competency and qualifications of CER commissioners in decision-making on civil liability claims.

In Russia, civil disputes relating to compensation of a damage inflicted to the environment or related to environmental damage can resolved voluntarily or through court decisions, including those of an 'arbitration court'.[287] However, it is essential to clarify the term 'arbitration courts' due to potential misinterpretations. Generally, arbitration panels or tribunals are Alternative Dispute Resolution (ADR) mechanisms usually set up voluntarily on agreement between both parties', it is common to find countries where arbitration is a compulsory step for civil litigation, leading to the establishment of specialist arbitration courts.[288]

[282] Section 6(4).
[283] Section 88; 'All courts and justices in Canada have the same jurisdiction with respect to offences under this Act as they have under sections 257 and 258 of the Canada Shipping Act, 2001 with respect to offences under that Act, and those sections apply to offences under this Act in the same manner and to the same extent as they apply to offences under the Canada Shipping Act, 2001.'
[284] Section 13(20)-(24); While the IFA makes it clear that parties are allowed recourse to other means of legal settlement, when a claim settlement process has commenced and finalised under the mediation and Arbitration Board procedure, the decision reached becomes final and binding; Section 13 (25).
[285] Section 27(3).
[286] Ibid; Section 13 (1) 'Any order made by the Committee may, for the purpose of enforcement thereof, be made an order of the Federal Court and shall be enforced in like manner as any order of that Court'.
[287] RCC Article 76; RCC Article 78(1).
[288] For example, in Lagos state, Nigeria, pursuant to section 89(1) of the High Court of Lagos Laws 2003 (as amended), it is mandatory for disputing parties in civil matters to participate in ADR first before litigation, under the guidance of an ADR judge. Similarly it is encouraged in the UK in relation to commercial disputes; Civil Justice Council 'Compulsory ADR' (2012) <https://www.judiciary.uk/guidance-and-resources/mandatory-alternative-dispute-resolution-is-lawful-and-should-be-encouraged/> accessed 12 January 2022.

Russia primarily has two types of courts: those with general jurisdiction and commercial courts ('Arbitrazh'). Unlike some jurisdictions, Russia does not have dedicated arbitration courts specifically for arbitration matters.[289] Moreover, article 33(2) of the Russian Commercial Procedure Code,[290] prohibits the use of arbitration for settling claims related to environmental harm. Similarly, Article 22.1 of the Russian Civil Procedure Code states that disputes arising from relations linked to compensation for environmental harm cannot be arbitrated.

Therefore, in the context of the Russian legal system, 'arbitration courts' mentioned in the RCC likely refers to commercial courts. While a Russian lawyer would understand this implication, foreign claimants, especially in cases involving transboundary pollution damage, might misconstrue it with the traditional concept of arbitration. This could lead to confusion or misinterpretation and time-wasting during the legal process, especially considering that arbitration is not permitted for claims related to environmental harm under Russian law.

In the case of Greenland, the absence of provisions in the MRA for dispute settlement venue adds complexity to resolving disputes. The only reference pertains to judicial review of administrative decisions made by the Mineral Licensing and Safety Agency (MLSA), the regulator, against the licensee.[291] Consequently, courts may need to address pre-trial issues such as whether the matter is time barred, the appropriateness of the adjudication forum, and compensation priority. This may contribute to making such claims even more complicated, financially burdensome and time consuming.

Moreover, while claims originating in Greenland can be heard in Danish courts as a matter of practice,[292] claimants may be faced with logistics cost and language barrier.[293] In Denmark, the Maritime and Commercial High Court (MCC) in Copenhagen specialises in maritime and

[289] Evgeny Raschevsky and others, 'Commercial Arbitration in Russia' (*Global Arbitration Review*, 4th May 2022) <https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/russia#:~:text=There%20are%20no%20specialist%20arbitration,courts%20of%20the%20Russian%20Federation> accessed 15 September 2022.
[290] Civil Procedural Code of the Russian Federation No. 138-Fz Of November 14, 2002 (as amended).
[291] MRA Section 3 (d).
[292] The Danish Judicial System <https://www.domstol.dk/om-os/english/the-danish-judicial-system/> accessed 12 December 2022; Stockholm Institute for Scandinavian Law 'The Danish Courts – an Organisation in Development' The Danish Court Administration (1957-2010) 582; In Greenland, the hierarchical order of courts is composed of the Magistrates' Courts which are presided by lay judges who are not lawyers, the High Court of Greenland, the High Court of Eastern Denmark which can hear appeals from the High Court of Greenland, and the Supreme Court as the final court of appeal, which seats in Denmark. The Magistrates courts can hear civil claims in the first instance, while the High Court has original jurisdiction over matters that are deemed to require legal expertise or considered to be a major case.
[293] Ibid, 584.

commercial disputes, sharing jurisdiction with High Court in Greenland.[294] The MCC can hear Greenland-related matters if parties agree.[295] However, due to the absence of civil disputes involving offshore oil spills in Greenland, there is no precedent to show the practicality of settling such claims in Danish courts, or whether parties are allowed to reach a private agreement on forum of litigation in tort cases. This uncertainty can also contribute to delay of proceedings.

In addition to this, there is also the limitation of the language of the legislative text of Danish laws. Danish laws applicable to Greenland may lack official interpretations in Kalaallisut (Greenlandic) or English.[296] Despite adjustments made to accommodate the Greenlandic legal system, this language limitation poses an additional hurdle to promptly compensating claimable damages in Greenland.

4.8.2 Order of claims

The next significant matter addressed by a civil liability regime is the order of claims. Civil liability legislations often stipulate the liability of polluters to various parties, including government entities, fishermen, indigenous communities, and others. Additionally, the law may also provide for the priority of claims when distributing compensation funds among these claimants. This is especially relevant in cases where there is a cap on liability and insufficient funds to cover all claims.

In the majority of Arctic states, including Norway, Greenland, and Russia, the civil liability regime does not establish a priority for settling claims. However, in the USA, while the OPA and CWA lack specific provisions for order of claims, there is an implied priority for claims seeking compensation from the OSLTF. In such cases, priority is accorded to government-incurred costs for spill response before private individuals' claims for damages.[297] Moreover, when the OSLTF is insufficient to cover all strict liability claims, priority is given to personal

[294] European Law Institute, 'Maritime and Commercial High Court of Denmark' <https://www.europeanlawinstitute.eu/membership/institutional-members/maritime-and-commercial-high-court-of-denmark/> accessed 12 December 2022.
[295] Section 6(5) and Section 20 The Administration of Justice Act.
[296] The Human Rights Council of Greenland (HRC), 'Stakeholder submission of the HRC at the Universal Periodic Review of Denmark 24th session of the UN Human Rights Council 2016' (22 June 2015) <https://menneskeret.dk/files/media/dokumenter/monitorering/upr/2015_06_22_dk_greenland_upr_report.pdf> page 2-4 accessed 12 December 2022; Kevin McGwin, 'Denmark is willing give Greenland control of its justice system—but not more money to pay for it' (*The Arctic Journal*, 24 March 2017) <https://www.arctictoday.com/denmark-is-willing-give-greenland-control-of-its-justice-system-but-not-more-money-to-pay-for-it/?wallit_nosession=1> accessed 12 December 2022.
[297] OPA section 1012 (a).

injury or death claims under general maritime laws.[298] While the OSLTF framework in the USA is robust compared to other Arctic states, a potential limitation is its consideration of the fiscal balance of the fund before settling claims.[299] This means that in situations of low fund balance, it may not fully compensate all claims arising from an incident.

In Canada, priority is granted to claims for actual loss and damage before government-incurred costs and expenses for response and mitigation under the COGOA[300] and AWPPA regime.[301] However, no provision exists regarding the priority of claims under the IFA and the Fisheries Act. This absence may stem from each legislation's focus on specific categories of persons, such as commercial fishermen and Inuit communities, respectively.

4.8.3 Limitation period

Finally, the limitation period dictates the timeframe within which claims for pollution damage must be filed. The limitation period is also a crucial aspect of civil liability legislation in the five countries, with variations in complexity.

In Canada, the limitation period varies across legislation. Under COGOA, claims must be filed within three years from the occurrence of loss, damage, costs, or expenses, with a maximum limit of six years from the day the spill occurred.[302] Conversely, under the AWPPA regime, claims for actual loss or damage and associated costs and expenses must be made within two years from the spill occurrence or when it reasonably became known to those affected.[303] This flexibility allows courts to determine a reasonable date, considering the immediate and long-term effects of spills on the environment and affected individuals. Nonetheless, a claim for damage cannot exist in perpetuity, so the preference for a definite limitation period becomes apparent. Thus, to the extent that the provisions of the AWPPA proves inconsistent with that of the COGOA, it is only regarding the subject of limitation period that it is clear the latter's limitation period will apply.[304]

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[298] OPA section 1004(a) (3); Richard Faulk, 'Stretching the Boom? Limiting Liability for Offshore Drilling Disasters' (2010) Westlaw Environmental Journal <http://works.bepress.com/richard_faulk/49> accessed 5 May 2019.

[299] [299] United States Coast Guard, 'Oil Spill Liability Trust Fund (OSLTF) Funding for Oil Spills' (*USCG*, January 2006) 1 <https://www.uscg.mil/Portals/0/NPFC/docs/PDFs/OSLTF_Funding_for_Oil_Spills.pdf> accessed 2 August 2021.

[300] Section 26(3).

[301] Section 6(4)(a-b).

[302] Section 26(5).

[303] Section 6(5)

[304] Section 26(4)

Under the IFA, civil liability claims under have a three year limitation period from when the damage first occurred,[305] while under the Fisheries Act, claims must be filed within two years from the spill date.[306] It can be argued that the difference in limitation period in the IFA and Fisheries Act does not significantly impact the overall Canadian regime because the two laws address distinct aspects of civil liability not covered by each other or by the COGOA and AWPPA regimes.

In the USA, the limitation period differs for removal costs and damages. Recovery of removal costs must occur within six years of completing all removal actions, while other damage claims must be filed within three years from the day the injury and its connection with the incident was reasonably discovered or a date later than when a damage assessment is completed.[307] There is no precise definition as to what reasonable means, but it can be argued that the courts would assess if the claimant has acted with due care and taken all measures to check for damage following the spill within the limitation period.

The limitation period is less certain in the civil liability legislation of Norway and Russia. In Norway, the only limitation period contained in the PAA is specifically for compensating licensed Norwegian fishermen, requiring claims to be brought within seven years after the occupation of the facility.[308] However, as this limitation period is confined to Chapter 8 of the Act, governing losses for licensed fishermen, it likely applies solely to the subject matter of that chapter rather than civil liability claims under the PAA generally.

In Russia, the limitation period for civil liability claims for damage to the environment itself is twenty years.[309] However, it is less clear is if this limitation period also extends to other civil liability claims caused by pollution damage, as the RCC does not specify a limitation period for other claims. This ambiguity creates uncertainty regarding the application of limitation period. Furthermore, the Russian Civil Procedure Code stipulates that in cases where no limitation period is provided by law for a particular civil claim, it is at the discretion of the courts to determine the appropriate course of action.[310]

[305] Section 13 (17).
[306] Section 88; 'All courts and justices in Canada have the same jurisdiction with respect to offences under this Act as they have under sections 257 and 258 of the Canada Shipping Act, 2001 with respect to offences under that Act, and those sections apply to offences under this Act in the same manner and to the same extent as they apply to offences under the Canada Shipping Act, 2001.'
[307] Section 1013 (h)(1) and (2).
[308] Sections 8(2) and 8(3).
[309] Article 78(3) RCC.
[310] Article1(4) RCPC.

The limitation period is entirely uncertain in Greenland, mirroring the lack of provisions for claim priority and dispute settlement venue in the MRA. Thus, in addition to clarifying whether the claim has been instituted in the right adjudication forum, and which party has priority of compensation, the claimant may also be saddled with the burden of ensuring claims are not time barred. This may compound the complexity, financial strain, and time required for resolving claims. While these issues may be addressed through general civil procedure rules, it is preferable for lawmakers to explicitly include such provisions in the statutory regime for offshore oil spill damage, ensuring clarity and minimising ambiguity.

Overall, while some jurisdictions have clearer frameworks, others exhibit ambiguity and complexity, which can impact the efficiency and effectiveness of the civil liability regime in addressing oil spill damages in the Arctic. The variations in dispute resolution forums, claim prioritisation, and limitation periods across Arctic civil liability regimes can affect the accessibility of justice, the efficiency of claim resolution, and the adequacy of compensation for affected parties. For instance, unclear or absent provisions regarding dispute resolution venues can lead to procedural delays and increased financial burdens on claimants. Moreover, the lack of prioritisation of claims may result in inequitable distribution of compensation funds, particularly in cases where there are insufficient resources to cover all claims. Similarly, uncertainty surrounding limitation periods can hinder timely resolution of claims, potentially depriving claimants of their rights to seek compensation. Consequently, addressing these discrepancies and ensuring clarity within statutory frameworks is essential to promote fairness, efficiency, and effectiveness in addressing oil spill damages in the Arctic region.

4.9 Conclusion

This chapter highlights the existence of statutory civil liability regimes in the five Arctic states for compensating losses resulting from petroleum activities within their jurisdictions. While civil liability typically pertains to liability towards private individuals, the examination of domestic regimes shows that polluter liability operates on dual levels; general damage and costs that private individuals and government authorities may claim, and expenses for response measures only claimable by government authorities. Table 1 in Appendix 1[311] summarises the findings of this chapter according to the key features of a civil liability regime.

[311] In page 244 of this thesis.

However, the domestic laws exhibit inadequacies and limitations where key features of a civil liability regime are concerned. A significant limitation is the diverse terminology employed in relevant provisions; some legislation uses ambiguous terms, while other laws may not include such terms at all. Another challenge is the fragmentation of laws in most of the countries, which further complicates an already difficult subject matter. This demonstrates that the domestic laws of the Arctic states, when applied individually, may not suffice to address the need for a comprehensive legislation concerning losses suffered due to offshore petroleum development activities in the Arctic region. A victim of pollution damage bringing a claim against the operator of an offshore facility petroleum may have a different experience and receive different results in each of the five Arctic states, and various issues with the domestic legislation could mean that claims are drawn out or have an unsatisfactory outcome.

Given the interconnected nature of the Arctic ecosystem, it is clear that pollution incidents in the Arctic continental shelves of the subject states are likely to have transboundary implications. Therefore, such implications must be carefully considered. The presence of multiple and diverse civil liability regimes in the Arctic gives emphasis to the importance of examining how these regimes would be implemented in the event of a transboundary pollution incident. The *Montara* spill incident serves as a poignant illustration of the complex and protracted nature of transboundary pollution damage claims.[312] Despite its occurrence in 2009, a resolution was only achieved in 2022 when PTTEP, the operator, a Thai entity operating in Australia, reached a settlement. This settlement, amounting to $129 million USD compensation for affected Indonesian seaweed farmers, was extrajudicial and made without admission of liability.[313] Moreover, despite this settlement, there are still unresolved claims for transboundary damage to the environment and natural resources, underscoring the enduring complexities associated with addressing such incidents across borders.

Given the current reliance on domestic regimes in the Arctic region, incidents such as these demonstrate the need for addressing conflict of laws or private international law considerations, which is a crucial component within civil liability regimes. The analysis in the subsequent

[312] 'The oil spill started on August 21, 2009, following an explosion and uncontrollable oil spill in the Timor Sea, off the northern coast of Western Australia, that lasted 74 days, until a relief well was drilled that stopped the leak. PTTEP operated the Montara field in Australian waters at the time of the accident, which occurred 250 kms southeast of Indonesia's Rote Island and reportedly affected thousands of Indonesian seaweed farmers'; Bloomberg and Energy Voice, 'Indonesia to file $1.7bn Montara oil spill lawsuit against Thailand's PTTEP' (*Energy Voice*, 25 November 2022) <https://www.energyvoice.com/oilandgas/asia/463399/indonesia-to-file-1-7bn-montara-oil-spill-lawsuit-against-thailands-pttep/> accessed 23 February 2023.
[313] Ibid.

chapter assesses how private international law issues are resolved across the five Arctic states, evaluating the efficacy of their legislation in fostering legal certainty in the Arctic region. Through this examination, the thesis offers conclusive insights into whether these domestic laws effectively align to meet the pressing need for comprehensive legislation on civil liabilities stemming from offshore petroleum development activities in the Arctic region.

CHAPTER FIVE

PRIVATE INTERNATIONAL LAW CONSIDERATIONS FOR TRANSBOUNDARY POLLUTION DAMAGE FROM OFFSHORE PETROLEUM DEVELOPMENT IN THE ARCTIC

5.1 Introduction

In the previous chapters, the thesis explores the fundamental aspects of civil liability regimes and their relevance in the context of offshore petroleum development activities in the Arctic region. It has been well demonstrated that transboundary pollution incidents pose complex challenges for legal frameworks, particularly in regions like the Arctic where offshore accidents often span vast geographic areas and transcend national boundaries. Building upon this foundation, this chapter examines relevant private international law or conflict of laws issues within the domestic regimes of Arctic states. These issues are of paramount importance as they may significantly influence the efficacy and coherence of civil liability frameworks in addressing transboundary damage arising from offshore accidents.

The analysis in this chapter examines how private international law matters are resolved across the five Arctic states,[1] focussing on their ability to ensure legal certainty in the region. By examining the extent to which their domestic laws align, considering the need for comprehensive legislation on civil liabilities arising from offshore petroleum activities, this investigation aims to provide nuanced insights into the regulatory landscape governing transboundary pollution damage claims in the Arctic region.

This chapter conclusively addresses the third research question, which interrogates whether the existing domestic laws of each Arctic country sufficiently align to meet the need for a comprehensive regime on civil liabilities in the Arctic region. By identifying issues with respect to private international law arrangements in the Arctic context, this chapter further contributes to a comprehensive understanding of the challenges associated with current approaches in addressing civil liabilities associated with offshore petroleum development in

[1] This section exclusively focuses on litigation, and does not talk about alternative dispute resolution methods like arbitration, mediation, or conciliation. This is because the prevalent approach in the civil liability regimes of Arctic states favours courts as the primary forum for addressing pollution damage claims. Moreover, there is some consistency in the recognition and enforcement of arbitral awards among the Arctic countries studied, as they are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York, 10 June 1958); <https://www.newyorkconvention.org/countries> accessed 10 January 2023.

the Arctic region, as well as identifying potential avenues for enhancing cooperation and harmonisation in the future.

5.2 Resolution of Private International Law Issues in Arctic Civil Liability Regimes

In cases involving transboundary harm, three interconnected questions of private international law must be addressed. These are the questions of jurisdiction, choice of law and the recognition and enforcement of foreign judgments.[2]

The issue of jurisdiction involves determining which court or courts hold the authority to hear the case.[3] This involves establishing where the legal proceedings should take place, considering factors such as the location of the incident and the parties involved. Choice of law involves selecting the legal system's laws that should govern the case.[4] This decision affects the substantive rights and obligations of the parties involved, raising questions about applicable regulations and principles. While the aspect of the recognition and enforcement of foreign judgments addresses whether a judgment issued in one country will be accepted and enforced in another jurisdiction.[5]

As international treaties and agreements continue to expand, courts increasingly consider the relevance of international law in determining jurisdiction over cases involving foreign elements, such as pollution incidents with transboundary effects. This is particularly pertinent in scenarios where conflicting laws govern the location of the incident and the resulting damage. However, the Arctic states lack specific legislation, such as the EU Brussels I Regulation[6] and Brussel I recast,[7] or the Lugano Convention,[8] that can be relied on by national courts to govern the recognition and enforcement of civil, commercial or maritime matters in the Arctic region, and may also determine questions regarding the jurisdiction for transboundary claims for pollution damage. Neither do the Arctic states benefit from a

[2] Adrian Briggs, *The Conflict of Laws* (4th edn, OUP 2019) 5.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 012 (16 January 2001).
[7] Council Regulation (EU) No 1215/2012 of the European parliament and of the council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
[8] Council Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations. OJ L 199/40 (31 July 2007).

framework analogous to the Rome II Regulation,[9] which governs the matter of the law applicable to non-contractual obligations in the EU.

Chapter two of this thesis has already emphasised the significance of addressing substantive conflict of laws issues through civil liability treaties. Given the absence of a regional treaty in the Arctic states comparable to the Brussels I Regulation or the Lugano Convention, as well as the Rome II Regulation, conflict of laws matters are resolved through the individual conflict of laws rules of each Arctic country. The subsequent sections examine how foreign victims pursue legal action for pollution originating in another Arctic country,[10] addressing questions of jurisdiction, choice of law and the recognition and enforcement of foreign judgments.

5.3 Jurisdiction: which court should adjudicate the case?

The issue of jurisdiction in legal disputes is fundamental to the administration of justice, especially in cases involving transboundary elements such as pollution damage. This is especially evident in scenarios where a foreign claimant alleges harm from a pollution incident originating from a different country, linked to offshore petroleum development. Essential considerations in establishing rules of jurisdiction often revolve around ensuring fairness to both the claimant and defendant, while also respecting the authority of other countries.[11] This also means that the claimant has the opportunity to bring their claim before a reasonable court to ensure their right to a fair hearing, and conversely, the defendant should not be compelled to defend the claim in a court that is unreasonable.[12] Additionally, if a court in another country has a legitimate prior claim to hear the case, this must also be taken into consideration. The challenge lies in striking a balance between these various factors.[13] Typically, this is achieved by assessing the link or connection between the court and the defendant, in some instances the claimant too, alongside the events that led to the claim.[14] These considerations would typically be contained in legislation or developed through case law.

[9] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2007.
[10] In some of the jurisdictions, the law distinguishes jurisdiction procedure between corporate and natural persons as defendants. The analysis in the subsequent sections is based on a corporate defendant, who will likely be the defendant in cases of transboundary pollution from offshore drilling.
[11] Trevor C Hartley, 'Basic Principles of Jurisdiction In Private International Law: The European Union, the United States and England' (2021) British Institute of International and Comparative Law 3.
[12] Ibid.
[13] Ibid.
[14] Ibid.

Summarily put, the essential factors for jurisdiction in private international law include the legal framework, the criteria for jurisdiction, the scope and limitation of application, and judicial discretion. Understanding the factors influencing jurisdiction in the various Arctic countries is crucial for navigating the complexities of seeking justice across borders.

5.3.1 The legal framework

In the USA, Canada, Norway, Greenland, and Russia, distinct legal frameworks are employed to determine the jurisdiction of courts in private international law matters. In the USA, each state operates two distinct court systems: the state courts and federal courts, each functioning independently. The Alien Tort Statute (ATS) grants federal courts the authority to adjudicate tort-based actions arising from certain wrongs under international law which includes the law of nations or treaties that the USA is a party to.[15] However, the resolution of conflicts of laws issues may also involve the application of varying state laws, which differ from state to state.[16]

The legal system is somewhat similar in Canada, where court jurisdiction over disputes involving foreign parties is determined by a combination of common law, civil law (in Quebec) and legislation.[17] While common law applies nationwide except in Quebec, which follows the Quebec Civil Code (CCQ),[18] some provinces and territories have adopted provisions from the Uniform Court Jurisdiction and Proceedings Transfer Act (CJPTA) into their local laws.[19] This uniform framework ensures consistency in jurisdictional decisions across different jurisdictions within Canada.

Central to both the legal frameworks of the USA and Canada is the Transboundary Pollution Reciprocal Access Act (TPRA) of 1982. This legislation contains provisions specifically addressing jurisdictional disputes between the two countries,[20] ensuring that affected claimants

[15] 28 USC §1350 (also known as the Alien Tort Claims Act).
[16] Julian G Ku, 'The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization' (2008) 73 Mo L Rev 1063-1069, 1064.
[17] In Canada, with its federal structure and mixed legal system, each province and territory has its own rules for handling cases involving foreign elements. Given the proximity of numerous Canadian regions to the Arctic, this analysis looks at jurisdictional rules across Canada rather than focusing on specific provinces or territories.
[18] 1991 c 64.
[19] In British Columbia via the Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28; in Saskatchewan via the Court Jurisdiction and Proceedings Transfer Act, SS 1997, c C-41.1; in Nova Scotia via the Court Jurisdiction and Proceedings Transfer Act, SNS 2003 (2nd Sess), c 2; and in the Yukon via the Court Jurisdiction and Proceedings Transfer Act, SY 2000, c 7.
[20] Section 1; 'reciprocating jurisdiction means a state of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of Canada, which has enacted this Act or provides substantially equivalent access to its courts and administrative agencies.'

in each country have access to the courts where the pollution originates.[21] However, the effectiveness of the TPRA hinges on reciprocity, requiring enactment by a US state or Canadian province to have jurisdictional effect in their respective jurisdictions. This requirement introduces a layer of complexity and potential fragmentation of applicable law. Currently, only four Canadian provinces and seven USA states have enacted the TPRA.[22] Consequently, transboundary pollution damage resulting from offshore activities in areas such as Alaska or the Canadian Arctic shelf may not be covered by the TPRA unless both parties mutually provide substantively equivalent access to their courts. Moreover, even though the TPRA fundamentally shows how an agreement for equal court access can be established, no court has rendered a decision based on the provisions of the Act thus far.[23]

In Norway, individuals seeking redress for harm caused by an incident can turn to the Norwegian Dispute Act (NDA) to navigate the legal procedures involved in seeking recourse through Norwegian courts.[24] While in Greenland, the jurisdictional framework is heavily influenced by its political relationship with Denmark.[25] As Greenland's self-governance does not extend to the administration of justice, Danish law governs legal matters within the territory. Therefore, the Danish Act on Administration of Justice in Greenland (AJAG) should apply to regulate legal proceedings with international elements in Greenland.[26]

In Russia, jurisdiction is outlined in the Civil Procedure Code (CPC),[27] which grants Russian courts the authority to consider civil cases with foreign elements,[28] and more specifically, cases

[21] Section 2.
[22] Only the four Canadian provinces of Ontario, Manitoba, Nova Scotia and Prince Edward Island, and the seven USA states of Michigan, New Jersey, Wisconsin, Colorado, Oregon, Connecticut and Montana have enacted the TRRA; Environmental Rights Database <http://environmentalrightsdatabase.org/canada-u-s-uniform-transboundary-pollution-reciprocal-access-act-model-law/> accessed 15 March 2022.
[23] While the TPRA has been mentioned in a case precedent, it was merely listed among various US measures for pollution control, not directly influencing the outcome of the case; *NL Industries, Inc v Commercial Union Insurance*, 926 F Supp 446 (DNJ 1996).
[24] Act relating to mediation and procedure in civil disputes (The Dispute Act)/ Lov om mekling og rettergang i sivile tvister (tvisteloven) LOV-2005-06-17-90 (as amended).
[25] It is important to note that the Brussels Regulation and Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters does not apply to Greenland, although they apply to Denmark; Jens Rostock-Jensen and Jakob Dahl Mikkelsen, 'Enforcement of Foreign Judgments: Denmark' (Kluwer 2024) 3.
[26] Herved bekendtgøres retsplejelov for Grønland, lov nr 305 af 30 April 2008 / Danish Act no 305 of 30 April 2008 on Administration of Justice in Greenland.
[27] Civil Procedure Code (Federal Law 138-FZ, dated 14 November 2002).
[28] Article 22; 'The courts shall consider and resolve the cases with the participation of foreign citizens, of stateless persons, of foreign organizations and of organizations with foreign investments, as well as of international organizations.'

of transboundary pollution damage cases,[29] making Russia the only country with a such specialised regime applicable to the subject matter of the thesis.

Overall, it can be argued that the existence of a legal framework in the five Arctic states is evidence of a common objective to foster accountability and access to justice for those impacted by transboundary incidents from offshore petroleum development in the Arctic region.

5.3.2 The criteria for jurisdiction

Regardless of the presence of a legal framework, understanding the criteria for jurisdiction in different countries is also essential for individuals and entities seeking legal recourse for damages caused by transboundary pollution incidents. Each of the Arctic states has its own criteria for establishing jurisdiction, which influences whether a case can be heard in its courts.

In the USA, the brevity of the provisions of the ATS, means that its practical implications and criteria has primarily evolved through case law, necessitating reliance on judicial interpretations and precedents. The Supreme Court decision in *Sosa v Alvarez-Machain*,[30] established that federal courts can exercise general jurisdiction over tort-based actions under international law if the claims are 'specific, universal, and obligatory'.[31] This sets a standard for the types of claims that can be brought under the ATS, providing some clarity on the scope of jurisdiction.

However, the requirement for a 'sufficient connection' between the cause of action and the domestic conduct of the defendant, as emphasised in *Nestlé USA, Inc v Doe*,[32] introduces an additional layer of complexity. While the Supreme Court acknowledges the necessity of such a connection, the lack of further clarification on what constitutes a 'sufficient connection' leaves room for interpretation and inconsistency in its application. Therefore, while the ATS provides a legal avenue for addressing transboundary tort-based actions, the lack of specificity in its provisions and the need for further clarification on key criteria like 'sufficient connection'

[29] Article 402(3)(5); 'The courts in the Russian Federation also have the right to consider cases involving foreigners, if an action or other circumstance which has served as the grounds for filing a claim for the recompense of the damage in a case on the compensation for the damage inflicted upon the property has taken place on the territory of the Russian Federation.'
[30] *Sosa v Alvarez-Machain* 542 US 692, 724-725 (2004).
[31] Ibid.
[32] 141 S Ct 1931, 1937 (2021).

may result in challenges for litigants and courts in determining jurisdiction and resolving disputes effectively.

In the USA, under state laws, courts must possess both general and specific jurisdiction to hear a case.[33] They refer to the concept of 'minimum contacts', which, if established, could allow a court to assert personal jurisdiction over a corporate defendant within that state, without breaking due process, regardless of the nature of the claim.[34] Typically, states confer general jurisdiction upon their trial courts, allowing them to handle a broad spectrum of legal matters not exclusively vested in the jurisdiction of another court.[35] However, even if a state lacks general jurisdiction over an out-of-state corporation defendant, it may still assert personal jurisdiction based on specific jurisdiction.[36] This means that the court can assert jurisdiction over the defendant for a particular case, even if it does not have authority over all matters involving that defendant. Nevertheless, the establishment of 'minimum contacts' varies depending on state laws and court interpretations. Case law suggests that for 'minimum contacts' to be established 'the defendant must perform some act by which he purposefully avails himself of the privilege of conducting activities within the forum state'[37] Further, the claim must 'arise out of or relate' to the minimum contacts and the forum state,[38] for jurisdiction to be valid.

In Canada, under common law applying jurisdictions, courts will hear transboundary tort cases when a 'real or substantial' connection exists between the subject matter and the country.[39] This connection is often established by factors such as the defendant's domicile or business operations within Canada.[40] The list is non-exhaustive and lower courts retain the discretion to consider additional connecting factors in future cases, being guided by principles of fairness,

[33] According to the US Supreme Court ruling in *International Shoe v Washington*, 326 US 310 (1945).
[34] Cornell Law School Legal Information Institute, 'General jurisdiction' <https://www.law.cornell.edu/wex/general_jurisdiction> accessed 26 November 2023.
[35] For instance, Article VI, Section 14 of the Arizona Constitution confers general jurisdiction upon the state's trial courts, known as superior courts. This jurisdiction extends to various legal matters, including equity cases, criminal cases involving felonies or misdemeanours, civil cases with property values exceeding $1,000, probate matters, and cases where exclusive jurisdiction is not vested in another court by law.
[36] According to the US Supreme Court ruling in *McGee v International Life Insurance*, 355 US 220 (1957).
[37] According to US Supreme Court ruling in *Hanson v Denckla*, 357 US 235, 253 (1958).
[38] Trevor C Hartley, 'Basic Principles of Jurisdiction In Private International Law: The European Union, the United States and England' (2021) British Institute of International and Comparative Law 9.
[39] In *Chevron Corp v Yaiguaje* 2015 SCC 42, 82; also, *Club Resorts Ltd v Van Breda* (*Van Breda*), 2012 SCC 17, 90.
[40] Ibid, *Van Breda*, 91-92, 95-100.

order, and comity.[41] However, for personal jurisdiction, the courts will exercise if the polluting party is present in the province, regardless of whether a real or substantial connection exists.[42]

In the civil law province of Quebec, the courts will assume jurisdiction for a tort claim with an international element in one of three instances; if the defendant is domiciled or resides in Quebec,[43] if the defendant is a legal person not domiciled in Quebec but it has an establishment in the province and the dispute relates to the defendant's activities in Quebec,[44] or if a fault was committed, an injury was suffered, or an injurious act or omission occurred in Quebec.[45] This framework provides clarity and predictability for litigants and emphasises the importance of territorial connections in establishing jurisdiction.

Additionally, Canadian courts in the provinces and territories where the Uniform Court Jurisdiction and Proceedings Transfer Act (CJPTA)[46] applies follow a more structured approach to jurisdictional determinations. The CJPTA focuses on establishing a 'real and substantial connection' between the defendant and the province or territory where the claim has been filed,[47] considering various factors outlined in section 10 of the Act.[48] The key takeaway of the CJPTA is that the courts will assume jurisdiction if an alleged tort has been committed in its province or territory.[49] Overall, Canada's jurisdictional framework provides clarity and predictability for litigants while also upholding principles of fairness by ensuring that cases are adjudicated in jurisdictions where they have a meaningful connection. This

[41] Ibid.
[42] *Chevron Corp v Yaiguaje*, 2015 SCC 42, para 87 ('Where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists.'); Ibid, *Van Breda*, 79 ('…[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.'); Court Jurisdiction and Proceedings Transfer Act (1994) section 3.
[43] Articles 3148 (1); Further article 307 provides that residence-based jurisdiction applies to natural persons, while the domicile of a legal person is its head office; Also, article 3134 'In the absence of any special provision, Québec authorities have jurisdiction when the defendant is domiciled in Québec.'
[44] Article 3148 (2).
[45] Article 3148 (3).
[46] In British Columbia via the Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28; in Saskatchewan via the Court Jurisdiction and Proceedings Transfer Act, SS 1997, c C-41.1; in Nova Scotia via the Court Jurisdiction and Proceedings Transfer Act, SNS 2003 (2nd Sess), c 2; and in the Yukon via the Court Jurisdiction and Proceedings Transfer Act, SY 2000, c 7; the CJPTA was amended in 2021, however, as at the time of writing this section, the changes had not yet been acted on by the provinces and territories that enacted the 1994 Act.
[47] Section 3 (for natural persons as defendants) and section 7 (for juridical persons).
[48] *For the provisions of section 10 (a-l) and commentary, see*, Uniform Law Conference of Canada Uniform Court Jurisdiction and Proceedings Transfer Act (2021) <https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Court-Jurisdiction-and-Proceedings-Transfer-Act-(2021).pdf> accessed 5 November 2023.
[49] Section 10(g); and also 'whether a real and substantial connection exists is determined for the proceeding as a whole, not just for one claim in the proceeding' CJPTA commentary 10.3.

reflects a balance between facilitating access to justice for plaintiffs and maintaining procedural integrity in resolving transboundary tort disputes.

In Norway, the NDA stipulates that a matter with a foreign element can only be brought before Norwegian courts if there is a 'sufficiently strong connection' to Norway.[50] Failure to establish this connection will lead to rejection of the case,[51] thereby indicating a strict approach to jurisdictional criteria in Norway. The determination of what constitutes a 'sufficiently strong connection' is left to the courts, creating a degree of uncertainty for litigants. However, in tort cases, factors such as the place where the damage originated,[52] and the domicile of the defendant are key considerations for establishing a strong connection in Norway.

The example of the *Operafjell accident* case[53] further demonstrates the application of this jurisdictional principle. The aggrieved parties from Ukraine, Russia and Moldovia sought compensation in Norwegian courts from the airline and their insurers, which had their place of business domiciled in Russia.[54] Despite the involvement of Norwegian authorities in investigating the incident and its occurrence in Svalbard,[55] the Supreme Court of Norway held that there was no strong connection to grant the Norwegian court competence over the case.[56] This decision emphasises the strict adherence to the requirement of a 'sufficiently strong connection' and highlights the significance placed on factors such as the domicile of the defendant in determining jurisdiction in Norway.

In Russia, foreign parties possess the right to file claims for damages in Russian civil courts, essentially granting them the same legal standing as residents.[57] Thus, foreign claimants can access the Russian legal system to address grievances stemming from activities or incidents that occur within Russian jurisdiction. However, in order to do so, the damage should be as a

[50] Section 4-3(1).
[51] Section 4-7(3).
[52] Section 4-5(3); 'Actions for damages for economic and non-economic loss in tort and actions against an insurer in matters relating to cover for such loss may be brought in the place where the damage originated…'.
[53] *Operafjelldommen* (Appeals Selection Committee of the Supreme Court of Norway Rt 1998 page 1647); The Vnukovo Airlines Flight 2801 which took off from Moscow, carrying Russian and Ukrainian coal miners to the Norwegian Arctic Circle territory of Svalbard. The flight crashed into the Operafjellet mountain. The particular area of the crash was owned by the Soviet Union after buying it for mining in 1927, the Norwegian authorities took full responsibility for the recovery and investigation.
[54] Mark Finlay, 'Vnukovo Airlines Flight 2801: The Story of The Operafjell Accident' (*Simple Flying*, 28 August 2022).
[55] Norway has sovereignty at Svalbard, but the Svalbard Treaty of 1920 grants all signatory countries non-discriminatory rights to fishing, hunting and exploring mineral resources in the Svalbard archipelago, and not all Norwegian rules apply in the area.
[56] *Operafjelldommen* (Appeals Selection Committee of the Supreme Court of Norway Rt) 1998, page 1647.
[57] Article 398.

result of activities conducted within the territory of the Russian Federation.[58] Additionally, claimants must meet the requirement of having 'procedural capacity' according to laws of their home country,[59] and the defendant must either be situated within the territory of Russia or be a resident there for the court to exercise jurisdiction.[60]

Greenland's jurisdictional landscape, governed by the AJAG, lacks specific provisions addressing court competency in civil claims with a foreign element. Without clear guidelines or criteria outlining when and how courts can assert jurisdiction over such cases, parties involved in transboundary pollution incidents may face challenges in determining which courts have the authority to hear their claims. This lack of specificity leaves room for potential inconsistencies in how courts handle transboundary pollution cases in Greenland. It also raises questions about whether any particular legal connection is required to give the court jurisdiction over such claims, such as the domicile of the defendant, the location of the pollution incident, or the nationality of the affected parties. The absence of clear provisions may result in prolonged legal disputes, delays in justice, and increased legal costs for all parties involved.

Overall, the subject Arctic states share a common emphasis on the importance of territorial link and other significant connection between the defendant or the facts of the claim and the forum itself before transboundary pollution claims can be adjudicated. This implies that foreign claimants need to carefully assess the defendant's connections to the forum state and the nature of their activities within that jurisdiction.

However, each Arctic state provides varying degrees of clarity in their provisions regarding criteria for establishing such connection, from 'sufficient connection' and 'minimum contact' (USA), 'real or substantial connection' (Canada), to 'sufficiently strong connection' (Norway). Thereby leading to potential ambiguity in jurisdictional matters for transboundary pollution damage arising offshore petroleum development in the Arctic region. Moreover, failure to establish these connections could result in the dismissal of the case for lack of jurisdiction.

5.3.3 Scope and limitation of the jurisdiction of foreign courts

Understanding the extent to which foreign courts can assert jurisdiction in cases involving transboundary issues, along with the constraints they encounter, is crucial. These factors reveal

[58] Article 402(3)(4 and 5).
[59] Article 399 (1-2).
[60] Article 402(2).

whether the legal framework for jurisdiction aligns with the nature of the damage being sought, which is essential for navigating complex legal landscapes and pursuing effective legal remedies.

In the USA, state courts may hear tort cases involving oil pollution damage under the OPA and CWA with an international element. However, in federal courts, while the ATS has been invoked in cases involving transnational violations of civil rights,[61] there has been no conclusive evidence to ascertain whether the ATS can be relied upon for cases involving transboundary oil pollution damage caused by the activities of private actors or corporations in the USA. This is primarily due to three reasons: first, there is no relevant treaty in the USA addressing civil liability for pollution damage arising from petroleum activities. Second, there is presently no law of nations allowing private parties to bring claims against foreign private actors for pollution damage, particularly from offshore petroleum development. Finally, it is unclear if a claimant's cause of action can be founded under a breach of US national laws.

Although the USA considers much of UNCLOS as CIL,[62] the convention itself does not establish a civil liability regime for private parties for marine pollution damage.[63] Arguably, the UNCLOS includes obligations of due diligence and a precautionary approach to pollution prevention, though these obligations primarily apply to state parties rather than private individuals. Moreover, precedents like the *Beanal v Freeport-McMoran Inc.*,[64] show that an environmental claim alleging an international tort by relying on the polluter pays principle and the precautionary principle and the proximity principle is not enough to make a claim for the commission of a tort under international law that may enable a cause of action under the ATS.[65] Similarly, the Southern District of New York court ruling in *Amlon Metals Inc v FMC Corp,*[66] highlights that an environmental claim based on the 'general sense to the responsibility of

[61] For example, *Sosa v Alvarez-Machain* 54 US 692 (2004) <https://www.lexisnexis.com/community/casebrief/p/casebrief-sosa-v-alvarez-machain> accessed 5 March 2021 (where Alvarez alleged Sosa arbitrarily detained him, and relied on citing violations of the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and customary international law. The district court granted Alvarez summary judgment and damages on his ATS claim against Sosa, a decision upheld by the appellate court).

[62] United States Mission to the United Nations, 'Remarks at a UN General Assembly Commemoration of the 40th Anniversary of the Opening for Signature of the 1982 Law of the Sea Convention' <https://usun.usmission.gov/remarks-at-a-un-general-assembly-commemoration-of-the-40th-anniversary-of-the-opening-for-signature-of-the-1982-law-of-the-sea-convention/> accessed 20 March 2024.

[63] Discussed in chapter three, section 3.2 of the thesis.

[64] 969 F Supp 362, 366, 369 (E D La 1997); Eastern District of Louisiana court ruling.

[65] Ibid, 383.

[66] 775 F Supp 668, 669-670 (SDNY 1991); (where the foreign claimants alleged that the transportation of hazardous materials, rather than the non-hazardous materials as contained in the contract entered between them was a fraudulent transaction was in violation of Principle 21 of the 1972 Stockholm Declaration

nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders',[67] may not suffice to establish a tort claim under international law, thus limiting potential causes of action under the ATS.

Some scholars argue that courts are more inclined to accept ATS claims based on allegations of human rights abuses, even though environmental considerations may underpin such claims.[68] This perspective is plausible, considering the potential challenge of relying on treaty law to pursue claims for harm arising from petroleum development under the ATS. Consequently, in such scenarios, affected victims might opt to pursue alternative avenues by alleging violations of their human rights, such as the right to life or a clean environment. However, others contend that relying solely on allegations of human rights violation in pollution damage cases may introduce ambiguity, potentially complicating the practicality of pursuing a cross-border suit in the USA for civil liability compensation via the ATS.[69]

Nevertheless, it remains the case that the ATS continues to apply to violations occurring within the USA under treaty law or law of nations relevant to the USA. As a result, aggrieved individuals are likely to persist in seeking to persuade the courts to entertain maritime or other environmentally related claims under the ATS.[70] However, case law indicates that the ATS does not automatically grant personal or international jurisdiction to USA courts for lawsuits initiated by individuals domiciled abroad.[71] Thus, for the ATS to be applicable, the jurisdiction of USA courts to hear each case must first be established based on its individual merits.

Overall, significant legal uncertainty exists concerning whether a foreign individual can bring a case to USA courts for transboundary pollution damage resulting from an offshore petroleum

[67] Ibid, 671.
[68] Natalie L Bridgeman, 'Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims' 6 yale Human Rights and Development law Journal (2003) 1; James Boeving, 'Half Full or Completely Empty?: Environmental Alien Tort Claims Post *Sosa v Alvarez-Machain*' (2005) 18 Georgia International Environmental Law Review 109; 117; see also, *Alexis Holyweek Sarei et al vs Rio Tinto Plc and Rio Tinto Ltd* 499 F 3d 923 (2007) (the claimants, inhabitants of Bougainville, Papua New Guinea, sought to rely on the ATS to sue Rio Tinto, a mining company, claiming that it had caused harm to their health and the environment a breach of the law of nations).
[69] Tony Kupersmith, 'Cutting to the chase: corporate liability for the environmental harm under the Alien Tort Statute, Kiobel, and Congress' (2013) 37(3) William Mary Environmental Law Policy Review 885, 906-911.
[70] James Boeving, 'Half Full or Completely Empty?: Environmental Alien Tort Claims Post *Sosa v Alvarez-Machain*' (2005) 18 Georgia International Environmental Law Review 109, 120.
[71] Ibid.

incident on the US Arctic continental shelf. Without a treaty or law of nations establishing such liability, court discretion could lead to unfavourable outcomes for victims.[72]

In Canada, courts have jurisdiction based on factors such as where the tort occurred or where the consequences were felt, but the local action rule may affect the outcome of transboundary pollution damage cases. Generally, both under the common law and civil law frameworks, courts typically assert personal jurisdiction if the polluting party is physically present in the province, irrespective of whether a real or substantial connection exists.[73] However, the situation becomes more complex when determining whether a common law court should assume subject matter jurisdiction, particularly due to the application of the 'local action rule', often referenced as the rule applied in the *Mocambique* case.[74] The local action rule stipulates that that foreign courts do not have jurisdiction to issue orders concerning immovable property, such as land or houses, in another jurisdiction,[75] the purpose of which is to preserve comity and to prevent conflicts with foreign jurisdictions.[76] Although originating from the court of England and Wales, the rule in *Mocambique* is referred to as case law in Canada.[77] However, the scope of its application has been heavily debated, especially as some common law jurisdictions have made exceptions to the rule.[78] For example, the English legal system has slightly deviated from

[72] Bradford Mank, 'Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?' (2007) 4 Utah Law Review 1086, 1170.
[73] *Chevron Corp v Yaiguaje*, 2015 SCC 42, para 87 ('Where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists.'); *Club Resorts Ltd v Van Breda*, 2012 SCC 17, para 79 ('…[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.'); Court Jurisdiction and Proceedings Transfer Act (1994) section 3.
[74] A private international law rule originating from the case of *British South Africa Co v Companhia de Moçambique* [1893] AC 602, 629 (HL), where the parties were in dispute as to mining rights over land in Mozambique. It was held that the courts of England and Wales did not have jurisdiction to determine either title to land situated abroad or to determine claims for tort of trespass in relation to that land.
[75] *Lucasfilm v Ainsworth*, [2011] UKSC 39, 57.
[76] Ibid.
[77] Used in cases such as *Duke v Andler* [1932] SCR 734, 740–41; *Tezcan v Tezcan* (1987) 46 DLR (4th) 176, 179; and *Khan Resources Inc v WM Mining Company* (2006) 79 OR (3d) 411, 415 (Ont CA)).
[78] For example, questions as to whether or not it is limited to questions of title to land or whether or not it applies to all disputes with international element where an immovable property is involved, including cases of torts; *See for example*, William R Johnson, 'The Mozambique Rule and the (Non) Jurisdiction of the Supreme Court of Western Australia over Foreign Land' (2003) 31 Western Australian law Review 266-292 (questioning its influence and use in the commonwealth countries); *also*, Bruce Welling and E A Heakes, 'Torts and Foreign Immovables Jurisdiction in Conflict of Laws' (1979) 18(1) University of Western Ontario Law Review 295, 309–310 *and* Stephen C McCaffrey, 'Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation between Canada and the United States' (1973) 3(2) California Western International Law Journal 191, 226-228 (commenting on its use in the Canadian cases of *Albert v Fraser Companies* Ltd (1936) [1937] 1 DLR 39, 40 (New Brunswick Supreme Court (Appeal Division)), *Brereton v Canadian Pacific Railway Co* (1898) 29 OR 57 (Ontario High Court of Justice) and *Boslund v Abbotsford Lumber, Mining and Development Co* [1925] 1 DLR 978 (British Columbia Supreme Court)); *See also generally*, Stephen G A Pitel and Nicholas S Rafferty, *Conflict of Laws* (2nd edn, Irwin Law 2016), 332–336.

the rule by making exception, particularly in tort cases where the title to land is not the primary issue.[79]

Even though some have argued that the rule 'simply does not [apply]…in relation to transboundary environmental litigation' in Canada,[80] there may be still be questions regarding whether it might still restrict the jurisdiction of common law courts in Canada when adjudicating cases of transboundary pollution arising from offshore petroleum development.[81] On one hand, in cases involving personal injury, the application of the local action rule may not necessarily preclude the court's jurisdiction, as the rule typically pertains to issues related to immovable property. However, on the other hand, situations involving environmental damage, harm to natural resources, and property damage may indeed implicate immovable property issues, thus potentially invoking the local action rule. As a result, determining whether the Canadian common law court can assume jurisdiction over a case stemming from an offshore spill incident ultimately falls within the discretion of the court. It is incumbent upon the court to carefully evaluate the specifics of each case and weigh various factors, including the applicability of the local action rule, in deciding whether to assert jurisdiction over matters of environmental or property damage.

In the CJPTA applying provinces and territories where the key principle is that courts will assume jurisdiction if an alleged tort has occurred within their province or territory, the question of determining where a tort takes place may arise. Prompting debate over whether it is determined by the location of the polluting incident or the place where its effects are felt. In addressing this question, guidance can be sought from the case of *Van Breda*,[82] where the

[79] UK Civil Jurisdiction and Judgments Act 1982 (as amended) section 30(1).
[80] Guillaume Laganière, 'Local polluters, foreign land and climate change: the myth of the local action rule in Canada' (2020) 16(3) Journal of Private International Law 390, 409; *See also, Godley v Coles* (1988) 39 CPC (2d) 162, 164-166 (Ontario District Court) (where the judge pointed out that the *Mocambique* rule '…should not be taken for authority that wherever damage to land is included in the statement of claim, that an action for negligence to recover those damages should be precluded from being brought in the Province of Ontario where the land is situate elsewhere.').
[81] *For example*, Stephen C McCaffrey, 'Of Paradoxes, Precedents and Progeny: The Trail Smelter Arbitration 65 Years Later' in Rebecca M Bratspies and Russell A Miller (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press, 2006) (Arguing that even with British Coulumbia's (BC) Court Jurisdiction and Proceedings Transfer Act 2003, the common law rule has not been completely disregarded by some BC courts, the birth place of the seminal *Trail Smelter arbitration case*); Karine Péloffy, '*Kivalina v Exxonmobil: A Comparative Case Comment*' (2013) 9(1) McGill Journal of Sustainable Development and the Law 121, 135-136 (arguing that a transboundary action involving climate change would stand a better chance at the place of harm because of the rule); Martijn van de Kerkhof, 'The Trail Smelter Case Re-Examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute' (2011) 27 Utrecht Journal of International and European Law 68, 78-80 (argues that in similar cases such as *Trail Smelter*, it would be difficult for a foreign claimant to sue in Canadian courts due to the local action rule).
[82] *Club Resorts Ltd v Van Breda*, 2012 SCC 17, 89.

Canadian Supreme Court emphasised the absence of a strict definition for determining the location of a tort and that a tort may also be deemed to occur at the place of harm.[83]

This highlights the potential flexibility of the CJPTA courts in addressing complex cases such as transboundary pollution damage. It acknowledges the strategic implications associated with both the location of the incident and the location of the resulting injury in transboundary environmental litigation. For instance, pursuing legal action at the site of injury may pose challenges in gathering evidence effectively. Conversely, initiating legal proceedings at the location where the incident occurred might present financial obstacles for foreign residents with limited resources. However, in the absence of further legislative clarification, the applicability of this case law-based rationale in a statute-based (CJPTA) case of transboundary pollution damage in Canada remains arguable.

Conversely, the Russian CPC stands out among the domestic legislative frameworks of Arctic states by explicitly addressing its application to cases involving personal injury and property damage occurring in another country due to activities conducted within Russia.[84]

While in Norway, unlike the legal framework for private international law of the other Arctic states, actions for damages in tort, encompassing both economic and non-economic losses, can be brought not only against the polluter but also directly against the polluter's insurer to seek compensation for the damage.[85] Thus, in cases where establishing a strong connection between the polluter and Norway proves challenging, jurisdiction may alternatively be established if the insurer is domiciled in Norway. This expands the scope of jurisdiction and ensures that claimants have recourse to legal remedies within the Norwegian legal system. Additionally, it highlights the importance of insurers and their role in providing compensation for damages resulting from pollution incidents.

The NDA also specifies that Norwegian courts will honour agreements between parties to a civil dispute regarding the legal venue for resolution,[86] provided such agreements are made in writing. However, there is no explicit provision in the law regarding its applicability to claims under tort law.[87] Nevertheless, literature indicates that party consent concerning the forum is

[83] Ibid.
[84] Article 402(3)(4-5).
[85] Section 4-5(3).
[86] Section 4-6(1).
[87] Section 4-6(2).

typically limited to contractual matters and does not extend to non-contractual disputes like tort claims.[88]

In Greenland, due to the lack of clarity in the AJAG, the scope of application and other legislative constraints for transboundary pollution cases is uncertain. This uncertainty poses challenges for individuals and entities seeking legal recourse for damages caused by transboundary pollution incidents in Greenland. Without clear guidelines or legislative provisions, navigating the legal landscape becomes more complex, potentially hindering the ability to effectively address and resolve transboundary pollution issues through legal means.

5.3.4 Judicial discretion

Judicial discretion plays a pivotal role in shaping the legal landscape of the various Arctic countries on the subject of jurisdiction of the court. This discretion allows courts to make informed decisions based on the unique circumstances of each case while considering factors such as national interests, international obligations, and fairness to all parties involved. Across different jurisdictions, judicial discretion manifests in distinct ways, reflecting the legal principles and practices of each country.

In the USA and Canada's common law framework, judicial discretion significantly influences jurisdictional matters, particularly concerning transboundary issues. Courts possess broad discretionary powers, allowing them to abstain from asserting jurisdiction over cases involving foreign elements, regardless of where the polluting incident has taken place within their territories. This discretionary authority often finds expression through the doctrine of *forum non conveniens*,[89] permitting courts to dismiss civil actions without prejudice, even if the forum or venue is appropriate, and the court have jurisdiction over the case and parties, provided that a more suitable and convenient alternative forum to try the case exists elsewhere.[90] Thus, this leads to considerations regarding whether the court should have jurisdiction over the case and whether it will indeed assume jurisdiction.

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[88] Lin Hoel Ringvoll, 'Norway: Choice of Law – When Norwegian Law Prevails' (*MONDAQ*, 24 February 2011) <https://www.mondaq.com/contracts-and-commercial-law/121800/choice-of-law---when-norwegian-law-prevails> accessed 23 March 2023.

[89] Although a common law doctrine, it is also provided in the CJPTA in section 11(1) 'After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a clearly more appropriate forum in which to hear the proceeding.'; also, in the CCQ articles 3135 and 3137.

[90] Thomson Reuters Practical Law, 'Forum non conveniens' <https://uk.practicallaw.thomsonreuters.com/2-341-8952?comp=pluk&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=a8d1964959f24ed1ad8794ed06bec637&skipAnonymous=true> accessed 05 March 2021

It can be argued that the application of the doctrine of *forum non conveniens* to cases of transboundary pollution damage carries certain advantages. It enables courts to assess whether the affected party can seek adequate redress in another jurisdiction, [91] potentially leading to a more efficient resolution of transboundary pollution cases. By avoiding unnecessary duplication of legal proceedings, courts can ensure that the affected party receives fair and effective justice.

However, it may conversely contribute to further delays for the claimant, prolonging the legal process and potentially resulting in additional time and resources being expended. This happens because, when courts exercise discretion in deciding whether it will jurisdiction over a case, it introduces an additional step in the legal proceedings. The court may need to consider various factors, hear arguments from both parties, and potentially engage in complex legal analysis before reaching a decision. This process can take time, causing delays in the resolution of the claimant's case. Additionally, if the court decides not to assume jurisdiction and dismisses the case, the claimant may need to pursue legal action in another jurisdiction, further prolonging the overall legal process and requiring additional time and resources.

In its practical application, it has been suggested that a discernible trend exists in the USA courts, whereby an increasing number granting motions for *forum non conveniens*, especially in cases involving foreign plaintiffs.[92] This suggests a perception that international courts may offer more suitable venues than USA courts for addressing transboundary pollution matters.[93] Conversely, in Canada, it has been submitted that there is lack of case practice, in both common law and CJPTA provinces, where the courts have chosen to dismiss a case with an international element based solely on the doctrine of *forum non conveniens*,[94] suggesting a tendency to retain jurisdiction over cases with foreign elements.

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[91] Olivier De Schutter, 'Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations' (2006) 48-49 <https://media.business-humanrights.org/media/documents/df31ea6e492084e26ac4c08affcf51389695fead.pdf.> accessed 5 March 2021.
[92] Daniel H Augenstein and Nicola Jägers, 'Judicial remedies: the issue of jurisdiction' in Juan Jose Álvarez Rubio and Katerina Yiannibas (eds) *Human rights in business: removal of barriers to access to justice in the European Union* (Routledge 2017) 26.
[93] Bradford C Mank, 'Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?' (2007) 4 Utah Law Review 1086, 1088, 1166-1167, 1168 (arguing that this is best because 'many of UNCLOS's terms are indefinite and there is little international case law about its marine pollution provisions'. Further, that 'nations must negotiate better international agreements to address…and develop effective mechanisms for reducing transboundary pollution').
[94] Laganière (n80) 419.

Additionally, both the USA and Canada permit the exercise of discretionary authority of the courts to apply the principle of comity, evaluating the appropriateness of adjudicating matters of significant interest to foreign governments. This evaluation could influence the court's decision on whether to proceed with the case or defer to alternative forums where the interests of all parties, including foreign governments, may be more effectively addressed. While USA courts prioritise international comity and seek to avoid conflicts with foreign laws,[95] Canadian courts have demonstrated a reluctance to dismiss cases based solely on this doctrine unless the defendant can prove that proceeding with the case conflicts with the public interest of Canada.[96] By often choosing to retain jurisdiction over cases with foreign elements, Canadian courts demonstrate a commitment to prioritising fairness and access to justice for all parties involved, while also aiming to streamline the legal process and conserve resources.

Similarly, both Norwegian and Russian courts possess a degree of judicial discretion in determining whether to entertain a legal matter. In Norway, this discretion may be exercised to safeguard the state's interests and adhere to international obligations.[97] Likewise, Russian courts have the authority to exercise discretion in accepting jurisdiction, taking into account factors such as reciprocity,[98] or agreement between the parties regarding venue changes.[99] This discretionary power allows courts in both countries to carefully consider various factors before proceeding with legal proceedings, ensuring that they align with national interests and legal principles.

Additionally, in Russia, where the claimant lacks 'procedural capacity' according to laws of their home country,[100] the courts may determine the procedural capacity of the claimant.[101] This implies that Russian courts have the authority to assess the eligibility of a foreign claimant

[95] In *Hilton v Guyot* (1895) 59 US 113, 163-64, the US supreme Court explained that 'Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws'; *See*, Emeka Duruigbo, 'Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection' (2006) 29 Fordham International Law Journal 1245 (for a discussion of concerns about comity for foreign plaintiffs).

[96] Jeffrey Talpis and Shelley L Kath, 'The Exceptional as Commonplace in Québec *forum non conveniens* Law: Cambior, A Case in Point" (2000) 34 (3) Revue juridique Thémis 731, 861–862; *See generally,* Joost Blom, 'Canada' in Catherine Kessedjian and Humberto Cantu Rivera (eds), *Private International Law Aspects of Corporate Social Responsibility* (Springer International Publishing 2020) 183, 211–217.

[97] NDA Section 30-13 (1).

[98] CPC Article 398(4) 'The Government of the Russian Federation may establish reciprocal restrictions with respect to foreigners - the citizens of those states in whose courts the same restrictions of procedural rights of Russian citizens and organizations are introduced.'

[99] CPC article 404 and 405.

[100] Article 399 (1) and 400(1).

[101] Article 399(5) and 400 (5).

to pursue legal action, even if it deviates from the standards set by the claimant's home jurisdiction. This highlights the flexibility of the Russian legal system to adapt its procedures when necessary, ensuring access to justice even when claimants may not meet the requirements of their home country's legal framework.

In Greenland, the absence of explicit provisions in the AJAG regarding the scope of application or legislative constraints for transboundary pollution cases leaves jurisdictional considerations entirely to the discretion of the courts.[102] However, the lack of practice evidence makes it challenging to anticipate how courts may exercise this discretion or which factors they might consider in such cases.

Overall, each Arctic state employ distinct legal frameworks and criteria for determining jurisdiction in transboundary pollution cases, with each facing challenges and uncertainties regarding their application and scope. While legislative provisions and judicial discretion play crucial roles, differences in legal doctrines and precedents contribute to varying outcomes in all jurisdictions. Moreover, there is a presumption of prioritising international comity and avoiding conflicts with foreign laws in each domestic framework, highlighting the importance of maintaining harmonious relations with other countries when adjudicating transboundary disputes. Consequently, navigating the legal process in a foreign country may still present challenges for foreign claimants, particularly in incidents involving offshore petroleum development in the Arctic region.

5.4 Choice of law: which civil liability law should the adjudicating court rely on?

The determination of which law should govern a legal dispute, known as choice of law, holds significant ramifications for the parties involved. This decision directly impacts substantive rights and obligations, prompting careful consideration of applicable regulations and principles. In cases of transboundary pollution damage, identifying the appropriate legal framework may be challenging for adjudicating courts, especially in the Arctic region where diverse domestic laws may exert significant influence on the outcome of a claim. It is important to note that choice of law rules do not prescribe which law(s) will be applicable. Rather, they provide the court with decision-making guidance concerning the substantive rules that will ultimately dictate the outcome of the case.

[102] AJAG Section 201 and 215.

Consequently, navigating the complexities of choice of law in such cases requires courts to delicately balance competing interests and legal frameworks to ensure a fair and just resolution. This involves an examination of the pertinent legal framework and jurisprudential approach, as well as the international implications inherent in cross-border disputes. As courts deal with these complexities, they must strive to achieve a nuanced understanding of the various factors at play, ensuring that the chosen law effectively addresses the concerns of all parties involved while upholding principles of justice and equity.

5.4.1 The legal framework and jurisprudential approach

In the different Arctic states, the choice of law is based on either legislative provisions or case law, and determining which law to apply is further divided, with courts sometimes relying on the law of the place where the damage occurred and at other times, on the law of the forum.

The jurisprudential approach in the USA tends to be divided, with some reliance on the law of the place where the damage occurred and others relying on the law of the forum. With tort cases generally, the traditional approach in the USA has been to look to the law of the jurisdiction where the damage occurred for guidance.[103] To be more specific within the context of the thesis, if a foreign plaintiff initiates a transboundary tort lawsuit in the state of Alaska, historical legal precedent indicates a consistent adherence to this principle.[104] However, according to the *Restatement on Conflict of Laws* in the USA,[105] the applicable law for a transboundary pollution claim is to be determined by the choice-of-law rules of the state where the dispute is filed.[106] In cases where no specific law applies, the factors outlined in section 6(2)(a-g),[107] would be utilised to decide the choice of law. These factors, while enumerated, are not prioritised, allowing courts discretion in their application when determining the

[103] *Babcock v Jackson*, 240 NYS 2d 743, 746 (1963); M Rheinstein and others, 'Conflict of laws' (Encyclopaedia Britannica, 20 July 1998) <https://www.britannica.com/topic/conflict-of-laws/Choice-of-law> accessed 8 February 2022.
[104] James A Meschewski, 'Choice of law in Alaska: a survival guide for using the second restatement' (1999) Alaska Law Review 1-5.
[105] '…the difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. All that can presently be done in these areas is to state a general principle, such as application of the local law "of the state of most significant relationship", which provides some clue to the correct approach but does not furnish precise answers.'; The *Restatement of the Law, Second: Conflict of Laws* (1971) <http://www.kentlaw.edu/perritt/conflicts/rest6.html> accessed 8 February 2022.
[106] Section 6(2).
[107] 'The needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, the protection of justified expectations, the basic policies underlying the particular field of law, certainty, predictability and uniformity of result, and ease in the determination and application of the law to be applied.'

applicable law. Consequently, the choice of law may vary on a case-by-case basis, potentially favouring either the law of the forum or the law governing the location of the harm. Although recent literature suggests a tendency for American courts to lean towards applying the law of the forum in conflict of laws scenarios,[108] indicating a likelihood of US law being applied in transboundary pollution cases. However, the situation remains nuanced and introduces a degree of unpredictability in its application.

In Canada, the courts will apply the laws of the forum (*lex fori*) to procedural matters. As a result, each Canadian province and territory employs its own rules when determining whether it will apply its own laws or the laws of a foreign jurisdiction in a case with an international element. These choice of law rules are contained in case law, as well as the Civil Code of Quebec (CCQ).

In Canadian common law provinces, courts employ the law of the place where the wrongful activity occurred (*lex loci delicti*), following the precedent set by *Tolofson v Jensen* (*Tolofson*).[109] However, in *Tolofson*,[110] the court also highlighted exceptions to focusing solely on the 'wrongful activity' in determining the applicable law (*lex loci delicti*), notably in transboundary pollution cases where the consequences of the wrongful act extend to a different location.[111] The court recognised situations where an act in one location leads to consequences felt elsewhere. In such instances, determining where the tort actually occurs becomes complex and it is plausible that the consequences themselves could be deemed the wrongful act.[112] Therefore, there is a possibility of applying the law of the place where the damage occurs rather than solely focusing on the location of the activity.

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[108] In the 2020 survey of choice of law practice in American state and federal appellate courts (excluding federal district courts and other lower courts), the author notes that nine states (Alabama, Florida, Georgia, Kansas, Maryland, New Mexico, South Carolina, Virginia, and West Virginia) in the USA still use the *lex loci* rule, subject to certain exceptions; Symeon C Symeonides, 'Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey' (2021) 69(2) The American Journal of Comparative Law 177, 189.

[109] [1994] 3 SCR 1022, 1049-1051; *For the details and intricacies of the case se*e, Robin M Junger, '*Tolofson v Jensen* case comment' (1995) 23 Manitoba Law Journal 689 <https://www.canlii.org/en/commentary/doc/1995CanLIIDocs152#!fragment/zoupio-_Tocpdf_bk_1/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zhoBMAzZgI1TMAjAEoANMmylCEAIqJCuAJ7QA5KrERCYXAnmKV6zdt0gAynlIAhFQCUAogBl7ANQCCAOQDC9saTB80KTsIiJAA> accessed 15 March 2022.

[110] Ibid.

[111] *Tolofson* (n 109) 1050 '…it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place, but the consequences are directly felt elsewhere…the issue of where the tort takes place itself raises thorny issues. In such a case, **it may well be** that the consequences would be held to constitute the wrong'.

[112] Ibid.

In Quebec, the CCQ stipulates that in cases of transboundary harm, the law of the place where the harm occurs will apply.[113] However, an additional consideration arises regarding whether 'the author of the harm should have reasonably foreseen that the injury would manifest itself there'.[114] This introduces an extra burden on the claimant to prove foreseeability. In essence, only upon establishing this foreseeability will the law of the place of harm be applied, otherwise, the relevant Quebec laws will apply.[115] Proving foreseeability can be challenging, especially in transboundary pollution cases, due to the potential geographical distance between the incident country and the country experiencing the damage, in addition to the technicalities involved in offshore petroleum development. Perhaps, a provision in the CCQ establishing a 'presumption of foreseeable damage' could have alleviated the burden on the claimant.

In Norway, the legal framework for choice of law is embodied in the Petroleum Activities Act (PAA), however, it only has limited application. First, this is with respect to compensating transboundary pollution damage that occurs offshore in a territory belonging to any state that has acceded to the Nordic Environmental Protection Convention (NEPC).[116] Compensating such damage will be subject to Norwegian civil liability laws. However, it remains uncertain whether the NEPC applies to Greenland through Denmark, as there is no legislative guidance or literature clarifying this aspect. Consequently, it is unclear whether a Greenlandic claimant seeking compensation in Norwegian courts for transboundary pollution damage resulting from petroleum development on the Norwegian continental shelf would be governed by Norwegian laws.

Furthermore, the PAA stipulates that the interests of entities defined as 'Norwegian' in 'adjacent sea areas', such as Norwegian vessels or Norwegian hunting or catching equipment, fall under the Norwegian civil liability regime.[117] However, the PAA lacks a clear definition of the term 'Norwegian', creating ambiguity regarding who qualifies as 'Norwegian' for compensation purposes. Whether a Norwegian citizen, a resident of Norway, or both. Similarly, the term 'adjacent sea area' is not explicitly defined in the PAA, adding to the uncertainty. However, some authors have suggested that the legislative intent behind this term encompasses

[113] Article 3126; 'The obligation to make reparation for injury caused to another is governed by the law of the State where the act or omission which occasioned the injury occurred. However, if the injury appeared in another State, the law of the latter State is applicable if the author should have foreseen that the injury would manifest itself there.'
[114] Ibid.
[115] Gérald Goldstein and Ethel Groffier, *Droit international privé, vol 2: règles spécifiques* (Yvon Blais 2003) 466.
[116] S 7-2 para 2; discussed in chapter 3, section 3.3.2 of this thesis.
[117] Section 7-2 para 1.

sea areas bordering the Norwegian continental shelf, [118] potentially including the continental shelves of other countries sharing a common boundary with Norway. Under this interpretation, it implies that claimants from other Arctic states with damaged vessels fishing and hunting equipment, may be subject to Norway's civil liability regime for compensation purposes.

For non-Norwegian claimants from other Arctic countries not party to the NEPC, and in the absence of any treaties or agreements on choice of law, a persuasive argument is that the laws of the place where the damage is felt should be applied by the Norwegian court. This argument is supported by the language of the PAA, which predominantly focuses on the location of the damage rather than the incident itself, with exceptions noted in chapter 8 for compensating financial losses suffered by registered fishermen.[119]

Moreover, some authors have asserted that Norwegian courts may apply the laws of the place where the effect of the damage is felt.[120] They base this assertion on the provision in the repealed Norwegian Petroleum Act of 1985, particularly section 38, which inspired section 7 of the current PAA. This provision explicitly applied the law of the place of harm to transboundary delict cases.[121] However, despite this historical context, the current wording of the PAA leaves the interpretation of choice of law rules covering transboundary pollution damage of Norwegian origin open to the discretion of the court.

The legal framework governing choice of law in Russia is primarily derived from the Russian Civil Code (RCC),[122] supplemented by international treaties, domestic legislation, and established customs.[123] According to the RCC, in situations where determining the applicable law poses challenges, precedence is given to the law most closely linked to the civil legal relationship complicated by foreign elements.[124] Similarly, the RCC specifies that obligations arising from inflicted harm are governed by the laws of the country where the actions or

[118] Ulf Hammer and others, *Petroleumsloven/The petroleum Act* (Universitetsforlaget/ Scandinavian University Press, 2009) 542; Propositions: Ot.prp.nr.72 (1982–1983) Act on petroleum activities 71 <https://lovdata.no/dokument/PROP/forarbeid/otprp-72-198283> accessed 10 June 2022.
[119] Except for chapter 8's special rules for compensating financial losses suffered by registered fishermen, where only the placement of the petroleum development installation in a fishing field is relevant for compensation, regardless of whether a spill has occurred.
[120] Kristoffer Svendsen, 'The Impact of Choice-of-Law Rules in Cross-Border Pollution Damage Caused by Petroleum Spills from Offshore Rigs and Installations: The Case of the Barents Sea' (2016) VIII The Yearbook of Polar Law 163, 173.
[121] Worded as 'For pollution damage that occurs outside the areas as specified in the first and second paragraphs, the delict compensation rules in that state in which the harm occurred shall apply.'; ibid.
[122] Part 3, section VI.
[123] Article 1186(1); however, if there is conflict between a treaty and a CIL covering the same issue, then the treaty supersedes; Art 1186(3).
[124] Article 1186(2); Also, article 11(4) Civil Procedure Code (Federal Law 138-FZ, dated 14 November 2002.

circumstances leading to the damages occurred.[125] In other words, Russian civil liability laws will apply in such cases.

Nonetheless, the RCC allows for the application of interpretations from foreign laws in cases where a term is not explicitly provided for in Russian law.[126] Consequently, in scenarios involving transboundary pollution damage where identifying the relevant damage under Russian law is impossible, the law of the country where the damage occurs will apply, without necessitating reciprocal choice of law rules.[127] For instance, while the RCC and Environmental Protection Law (EPL) provisions concerning civil liability for pollution from petroleum development in Russia do not explicitly address the liability of insurers in offshore spill incidents, the RCC's choice of law rules explicitly allow foreign claimants to directly initiate claims against the insurer of a polluting party if permitted by the civil liability regime of the country which is to be applied.[128]

Hence, the RCC potentially enables broader legal avenues for foreign claimants to pursue claims not covered by the Russian civil liability regime, such as claims for pure economic loss, or other torts recognised under common law systems like those in Canada and the USA. However, the extent to which this legal strategy is viable remains uncertain due to the lack of historical data or caselaw.

Greenland faces unique challenges due to the absence of specific provisions on choice of law in its legislation, the AJAG. This creates uncertainty in transboundary pollution cases, with potential reliance on Danish law complicating matters further. Denmark's exclusion from the European Rome II Regulation on the law applicable to non-contractual obligations directs

[125] Article 1219 'Obligations emerging as a result of infliction of harm shall be governed by the law of the country where the action or other circumstance that has served as grounds for the damages claim occurred in cases when the action or other circumstances caused harm in another country, the law of that country may be applied if the person causing the harm foresaw or should have foreseen the onset of the harm in that country.'; See also, article 11(5) of the Civil Procedure Code (Federal Law 138-FZ, dated 14 November 2002) 'In conformity with the federal law or with an international treaty of the Russian Federation, the court shall apply in resolving the case the norms of the foreign law'.

[126] Article 1187 (2); 'If, when applicable law is being defined, legal terms that require qualification are not known to Russian law or are known in another wording or with another content and if they cannot be defined by means of construction under Russian law a foreign law may be applied to the construction thereof.' However, this is subject to the provisions of article 1192.

[127] See also article 1189(1) on reciprocity; 'A foreign law **shall be** applicable in the Russian Federation, irrespective of the applicability of Russian law to relations of the same kind in the relevant foreign state, **except for** cases when the application of a foreign law on reciprocal basis is required by law.' (emphasis added for provisos); Likewise, article 1190(1-2) 'Any reference to foreign law in compliance with the rules of the present section shall be deemed a reference to substantive law rather than the law of conflict of the relevant country…cases of reference to the Russian law defining the legal status of a natural person.'

[128] Article 1220(1).

attention to the Danish Retsplejeloven.[129] However, akin to the situation with the AJAG, this avenue lacks specific provisions addressing choice of law. Moreover, the dearth of precedent in transborder litigation concerning non-contractual civil claims prompts an expectation that courts will exercise discretion, likely considering either the law of the forum or the law of the place of harm, in their choice of law determination.

It may also be argued that in the absence of legislative clarity, the Greenlandic courts may also take into account any agreements reached by the parties regarding the choice of law. Although such agreements are more common in contract law, rather than non-contractual torts, some conflict of laws experts suggest that contemporary legal practice is increasingly receptive to solutions that allow the tort victim to choose between the laws of the two jurisdictions or authorise the court to select the law most favourable to the victim.[130] Consequently, claimants may benefit if empowered to select between the laws of the involved jurisdictions or if the court opts for the law most favourable to them. This could potentially lead to a more advantageous legal outcome for their claim. However, despite the apparent advantage, this may also prompt claimants to strategically negotiate choice of law agreements to maximise their chances of success in litigation, potentially exploiting laws that offer greater protections or higher compensation. Conversely, this may prompt defendants to engage in forum shopping for countries with more lenient civil liability laws.

5.4.2 Consideration of International implications

In choosing to apply foreign laws, a key similarity in the legal framework of the Arctic states is the courts will do so in consideration of the autonomy of foreign legal systems and to maintain international relations. In the USA, one of the factors provided in the *Restatement on Conflict of Laws* where the courts may refrain from applying foreign law is if it contradicts public order as understood on international relation.[131] Similarly, in Canada, *Tolofson* and the CCQ both stipulate that the courts may refrain from applying foreign law if the application goes against the principle of comity or constitute an injustice,[132] or if it 'would be manifestly

[129] The Administration of Justice Act (as amended LBK no 1835 of 15/09/2021).
[130] Symeon C Symeonides, 'Choice of law in cross-border torts: Why plaintiffs win and should' (2009) Hastings law Journal 61(2) 337, 399, 398-403 (the author considers different foreign solutions to cross-border tort conflicts).
[131] This includes, 'the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue'; Section 6(2).
[132] *Tolofson* (n 109*)* 1050; the case may be different for a different type of tort, however, the focus here is solely on what relates to transboundary pollution damage.

inconsistent with public order as understood in international relations'.[133] Likewise, Russian courts will refrain from applying a foreign law that if it contradicts the provisions of section VI of the RCC or infringes upon public order of Russia, as determined by the factors specified in article 1220.[134] In cases where a foreign law fails to meet these criteria, only claims permitted under Russia's civil liability regime pertaining to pollution damage from offshore petroleum activities will be considered.[135]

In Norway, while there is no explicit provision in the PAA regarding the implications for international relations or public policy, the Act only mentions that agreement with a foreign state regarding rules relating to liability for pollution damage caused by petroleum activities may be acknowledged.[136] Moreover, in other civil disputes, albeit for contractual matters, literature shows that the if the application of foreign law leads to a result that conflicts with the public policy of the forum, these rules are overlooked by the court.[137]

Although Greenland's AJAG lacks specific provisions addressing choice of law, it is presumed that the courts would consider public policy and international relations when determining whether to apply either the law of the forum or foreign law in a transboundary pollution damage case.

Overall, the implications of choice of law in the Arctic region emphasises the complexity of navigating transboundary pollution disputes within diverse legal systems. Given the sensitivity of the Arctic ecosystem, effective choice of law mechanisms are crucial for addressing transboundary pollution disputes and safeguarding environmental integrity. While legal frameworks vary across jurisdictions, considerations of international relations, public order,

[133] Article 3081; *However, cf* article 3079 'Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another State with which the situation is closely connected. In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application'.
[134] 'The following, i.a., shall be determined on the basis of the law governing obligations emerging as a result of infliction of harm: 1) a person's capacity to be liable for harm inflicted; 2) the vesting of liability for harm in a person who is not the cause of harm; 3) grounds for liability; 4) grounds for limitation of liability and relief from liability; 5) the methods of compensation for harm; 6) the scope and amount of compensation for harm.'
[135] Article 1191(3) 'If, despite measures taken in compliance with the present articles, the content of foreign law norms fails to be established within a reasonable term, Russian law shall apply.'; Article 1193 Public order clause.
[136] Section 7-2 para 3.
[137] Lin Hoel Ringvoll, 'Norway:Choice of Law – When Norwegian Law Prevails' (*MONDAQ*, 24 February 2011) <https://www.mondaq.com/contracts-and-commercial-law/121800/choice-of-law---when-norwegian-law-prevails> accessed 23 March 2023.

and legal clarity remain paramount in a transboundary civil liability claim in the legal framework of the subject Arctic states.

Diplomatic relations among Arctic nations requires cooperative and harmonious legal frameworks to resolve disputes by recognising the autonomy of foreign laws, without straining international ties, while upholding public order ensures that legal outcomes resonate with societal values, bolstering trust and stability across jurisdictions. Additionally, clear and unambiguous legal frameworks are essential for providing guidance to stakeholders in petroleum development in the Arctic region, facilitating effective dispute resolution, and promoting compliance with environmental regulations.

5.5 Recognition and enforcement of foreign judgments: Will a judgment rendered in one Arctic country be acknowledged or enforced in another Arctic country?

In the realm of private international law, a significant consideration is whether a judgment issued in one country will be recognised or enforced in another jurisdiction. This aspect addresses the cross-border implications of legal decisions and ensures uniformity and consistency in outcomes, particularly in cases involving transboundary issues such as pollution damage. The legal framework and procedural criteria are relevant factors that influence the recognition and enforcement of foreign judgments across different jurisdictions.

5.5.1 The legal framework for recognition and enforcement

Each Arctic state has its own approach to the recognition and enforcement of foreign civil judgments, with some encompassed within the same private international law framework on jurisdiction and choice of law, while others have distinct legal frameworks outlining criteria for recognition and enforcement.

In the USA, the legal framework for recognition and enforcement is primarily established by federal common law, heavily influenced by the landmark case of *Hilton v Guyot* (*Hilton*).[138] As a legal precedent, *Hilton* has been supported by state practice,[139] and is now codified in the *Restatement (Fourth) of Foreign Relations Law*.[140] Additionally, foreign judgments can be

[138] 159 US 113, 202, 227-228 (1895).
[139] Stacie I Strong, 'Recognition and Enforcement of Foreign Judgments in US Courts: Problems and Possibilities' (2014) 33 Rev Lit 45; John B Bellinger III and Reeves Anderson, 'Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition' (2014) 54 Virginia Journal of International Law 501, 513-520.
[140] 'a final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy'; Restatement (fourth) of Foreign Relations Law (2021) section 481.

enforced under the 1962 Uniform Foreign Money Judgments Recognition Act or the 2005 Uniform Foreign-Country Money Judgments Recognition Act, though these Acts only apply to monetary judgments.[141] However, it is important to note that these Acts are model legislation and do not automatically apply nationwide. Adoption varies among states, but Alaska, situated in the Arctic region of the USA, has enacted the 1962 Recognition Act. Consequently, foreign claimants may potentially use this Act to enforce foreign monetary judgments in Alaska.

In Canada, the legal framework governing the recognition and enforcement of foreign judgments varies among provinces and territories. Each jurisdiction has its own distinct set of rules governing this aspect of law. While some jurisdictions have enacted specific legislation to address recognition and enforcement, these laws do not necessarily override the common law position but rather serve to complement and enhance it. This position was highlighted by the Supreme Court in *Chevron Corp v Yaiguaje* (*Chevron Corp),*[142] affirming the coexistence of statutory provisions and common law principles in this regard.

In most Canadian courts, legal practice closely adheres to established case law,[143] which serves as a significant guide in ensuring consistency and predictability in recognition and enforcement outcomes. However, exceptions exist in certain jurisdictions such as Quebec and New Brunswick. In Quebec, the Civil Code of Quebec (CCQ) governs matters pertaining to recognition and enforcement, diverging from the common law framework applied elsewhere in Canada. Similarly, in New Brunswick, the enforcement of foreign judgments is regulated by the Foreign Judgments Act (FJA),[144] introducing unique considerations compared to other provinces and territories.

Conversely, in Russia, the legal framework for the recognition and enforcement of civil judgments from foreign courts in Russia is primarily established through the CPC and any treaty on the subject.[145] Notably, the civil legal system in Russia does not accord case law significant authority. However, the Supreme Court may issue clarifications, particularly on

[141] Under both statutes, for a foreign judgment to be recognisable, it should 'concern a certain monetary amount, be final and conclusive, and be enforceable in the country where rendered'; *See,* 1962 Model Act sections 2–3 and 2005 Model Act section 3(a)(2).
[142] 2015 SCC 42, 80; 'The enforceability of a foreign judgment depends on the jurisdiction in which enforcement is sought. A foreign judgment may be recognized in Canada if it meets the requirements of the common law or statutes of the jurisdiction in which recognition is sought…'
[143] For example, Saskatchewan's The Enforcement of Foreign Judgments Act, SS 2005, c E-9.121, section 4(a-h).
[144] RSNB 2011, c 162.
[145] CPC article 13(5) and article 409 provides for Federal law and international treaty.

complex legal matters like conflict of laws, which can inform legal practices across the country.[146]

In contrast to the legal framework of the USA and Canada, where case law holds significant influence, and Russia, where it may affect legal practice, in Norway the recognition and enforcement of foreign judgments primarily revolves around legislation and international agreements. Key components of this framework include the Norwegian Enforcement Act,[147] the Norwegian Dispute Act (NDA),[148] and the Lugano Convention.[149] These laws outline the criteria and procedures governing the recognition and enforcement of foreign judgments within Norway's legal system. This reliance on statutory provisions highlights a more centralised approach to recognition and enforcement, with less emphasis placed on judicial precedents.

In Greenland, the legal framework for enforcing foreign judgments is primarily outlined in Section 598(2)(8) of the AJAG. This specific provision only allows for the reciprocal enforcement of compensatory judgments made outside Greenland and Denmark. However, beyond this provision, the AJAG offers no explicit guidelines for enforcing other foreign judgments. This limited approach compared to the other Arctic states, highlights a significant gap in the enforcement mechanism, particularly concerning transboundary pollution damage in the Arctic region.

5.5.2 The procedural criteria

The procedural criteria for recognising and enforcing foreign judgments further highlight the different approaches taken by each Arctic state. In the USA, the precedent set by *Hilton* mandates that federal courts should recognise and enforce foreign judgments meeting specific criteria, including competent jurisdiction, adherence to the principle of comity, and consistency with the legal standards in the USA.[150] This precedent continues to shape recognition and

[146] For instance, the Russian Supreme Court has previously issued guidance on topics such as the international jurisdiction of Russian commercial courts and the application of foreign law in commercial matters. An illustrative example is ruling No. 23 On Consideration by Commercial Courts of Economic Disputes Involving Cross-Border Relations (27 June 2017), which addresses private international law considerations in commercial disputes involving cross-border transactions.

[147] Law 1992-06-26 No 86 Ministry of Justice and Emergency Preparedness (Emergency Act) (Machine translation to English) <https://www.wipo.int/wipolex/en/text/504832> accessed 9 November 2022.

[148] Section 19-13; section 19-16(1).

[149] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007.

[150] The court stated that the trial should have been conducted '[U]pon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the

enforcement practices across the country,[151] providing a framework for evaluating the validity of foreign judgments.

Though enforcing a foreign judgment in the USA theoretically hinges on establishing that the conditions of the case abroad align with USA standards, yet practical challenges often arise. A case exemplifying this complexity is Chevron's dispute with Ecuador's Lago Agrio claimants.[152] Originating from petroleum development activities, this case illustrates the hurdles faced by foreign litigants seeking enforcement in the USA. Despite Texaco's (pre-Chevron acquisition) operations in Ecuador being carried out under license with the government owned PetroEcuador, allegations of significant pollution damage persisted after Chevron's departure. The Lago Agrio claimants pursued legal action in US courts, only to face dismissal due to *forum non conveniens*, leading them to seek recourse in Ecuador.[153] Despite winning a substantial judgment in Ecuador, Chevron contested its enforcement in the USA, citing illegalities in the Ecuadorian proceedings. A federal court ruling against enforcement further complicated the matter, resulting in minimal progress toward enforcing the judgment within the USA.[154]

In Canada, the decision to recognise and enforce a foreign judgment depends on whether it meets the requirements of the common law or relevant statutes. Given the decentralised nature of the Canadian legal system, the specific criteria considered in each jurisdiction may vary significantly. Nevertheless, in *Chevron Corp,* the court notably mentions that 'recognition' and 'enforcement' of foreign judgements requires separate process, each requiring its own analysis

judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh'; ibid, 202-03.

[151] For example, in the cases of, *Ritchie v McMullen*, 159 US 235 (1895) (Which was another foreign judgement delivered on the same day, the Court held that a judgement from Ontario was conclusive on the merits because the English courts—and also by extension, the Canadian courts—would reciprocally enforce a comparable judgement given by the USA); *Saskatchewan Mutual Insurance Co v CE Design Ltd*, 865 F 2d 537 (7th Cir 2017); *DRFP LLC v Republica Bolivarian de Venezuela*, 706 Fed App 269 (6th Cir 2017); *Goldgroup Res Inc v DynaResource De Mexico, S A de C V* Civil Action No 16; S I Strong, 'Recognition and Enforcement of Foreign Judgments in US Courts: Problems and Possibilities' (2014) 33 Rev Lit 45, 58-59.

[152] *Chevron Corp v Donziger* 974 F Supp 2d 362, 386-391 (SDNY 2014).

[153] Ibid, 539.

[154] The claimants have since sought to enforce the judgement in other countries such as Argentina and Canada where Chevron has subsidiary companies, however, the corporate law practice whereby the court has to consider whether or not a parent company can be held for the liabilities of its subsidiaries has made it impossible to get the judgment enforced and also based on the competency of the courts of those countries to assume jurisdiction over the case; San Ramon, 'Fraudulent Ecuadorian judgment is unenforceable against chevron's Canadian subsidiary' (*Chevron.com*, 4 April 2019) <https://www.chevron.com/newsroom/2019/q2/fraudulent-ecuadorian-judgment-is-unenforceable-against-chevrons-canadian-subsidiary#:~:text=In%202011%2C%20the%20plaintiffs%20obtained,witness%20tampering%2C%20judicial%20bribery%2C%20Foreign> accessed 7 March 2021.

in the courts,[155] and highlights three prominent factors are generally considered in reaching a decision on recognition and enforcement: international relations such as reciprocity agreements and maintaining the principle of comity, the general jurisdiction of the foreign court, and the jurisdiction of the foreign court over the dispute or parties under the law of the foreign country.[156]

In New Brunswick, the FJA employs the common law approach, but specifies further that in assessing foreign court's jurisdiction over the parties and the dispute, the court will consider whether the defendant is ordinarily resident in the country where the judgement was made,[157] and if the defendant submitted to the jurisdiction of that court.[158] Similarly, in Quebec, the CCQ provisions on jurisdiction of the foreign court are considered,[159] along with considerations regarding the substantial connection of the dispute with the state whose authority is seized of the matter,[160] or alternatively, that the cause of action arose from an activity that occurred there.[161]

In Norway, the recognition and enforcement of foreign judgments are contingent upon certain criteria. These include the finality and enforceability of the foreign judgment,[162] the jurisdiction of the foreign court over the specific legal matter,[163] and compliance with Norwegian mandatory laws and legal principles.[164] If the foreign judgment originates from a member state of the Lugano Convention, it may be recognised and enforced in Norway, provided it is in

[155] 2015 SCC 42, 80; '…However, even if a foreign judgment is recognized in Canada, it does not follow that it will be enforced. Enforcement is a separate and distinct legal process, requiring its own analysis under Canadian law'.
[156] 2015 SCC 42, 82.
[157] Section 2 (a)
[158] 'becoming a plaintiff in the action, voluntarily appearing as a defendant in the action without protest, or having expressly or impliedly agreed to submit to the jurisdiction of that court.'; section 2 (b).
[159] Article 3155; If 'the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title; (2) the decision, at the place where it was rendered, is subject to an ordinary remedy or is not final or enforceable; (3) the decision was rendered in contravention of the fundamental principles of procedure; (4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has become final, is pending before a Québec authority, first seized of the dispute, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec; (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations; (6) the decision enforces obligations arising from the taxation laws of a foreign State.'
[160] Article 3186.
[161] Article 3164; *Barer v Knight Brothers LLC* 2019 SCC 13, 86, (article 3164 could be interpreted as an alternative condition to article 3168, when considering the jurisdiction of a foreign court before enforcing its decision).
[162] NDA section 19-16(1).
[163] Ibid, (2).
[164] Ibid, (3).

conformity with Norwegian public policy,[165] is not a default judgment,[166] corresponds with domestic judgments,[167] and adheres to the jurisdictional provisions outlined in the Lugano Convention.[168] However, none of the other Arctic countries are parties to this convention. While Denmark's membership in the Lugano Convention could potentially offer a pathway for recognition and enforcement, the exclusion of Greenland from Denmark's ratification prevents Greenlanders from utilising this avenue. Moreover, the interconnected nature of Greenland's judiciary with Denmark's introduces ambiguity regarding whether a judgment originating from Greenland but adjudicated in a Danish court can be acknowledged and enforced in Norway, given Denmark's Lugano Convention membership.

In Greenland, the AJAG only vaguely stipulates that reciprocity plays a significant role in recognition and enforcement of foreign judgments. However, Greenland currently lacks any known agreements for the reciprocal recognition and enforcement of non-contractual civil judgments with the other subject Arctic countries. Moreover, similar to the uncertainty in Norway regarding the applicability of the Lugano Convention, the interconnectedness of the Greenlandic and Danish judiciary further complicate matters, raising uncertainty regarding whether a Norwegian victim can rely on the Lugano Convention to seek recognition and enforcement of a Norwegian court judgment in a Danish court, concerning transboundary pollution originating from Greenland's Arctic shelf.

In Russia, recognition and enforcement may be considered based on the competence of the foreign court,[169] principles of reciprocity or comity,[170] and if it does not violate Russian public order.[171] However, if a foreign court assumes jurisdiction over a matter exclusively within the purview of Russian commercial courts, its decision will not be recognised or enforced in Russia.[172]

Overall, the varied legal frameworks and procedural criteria across Arctic states present challenges for achieving consistency in recognising and enforcing foreign judgments, particularly in cases of transboundary pollution damage from offshore petroleum development

[165] Article 34(1).
[166] Article 34(2); also, article 38-47.
[167] Article 34(3-4).
[168] Article 35 (1-3).
[169] CPC article 407(2)(2).
[170] CPC article 406(1) and 407.
[171] CPC article 407(2)(1).
[172] Part 2, para 5 Supreme Court ruling No 23 'On Consideration by Commercial Courts of Economic Disputes Involving Cross-Border Relations.

in the Arctic region. However, despite the differences, there are some areas of convergence among the subject Arctic states. Principles of comity and reciprocity are commonly considered, along with requirements for jurisdictional competence and adherence to public policy standards. However, the absence of a comprehensive treaty among Arctic states poses challenges, particularly in addressing transboundary pollution damage effectively. These shared criteria present an opportunity for regional cooperation to develop a cohesive legal framework tailored to judgment enforcement mechanisms for pollution-related disputes across Arctic borders.

5.6 Conclusion

Where transboundary pollution damage originates from offshore petroleum development in one of the Arctic countries, the private international law analysis reveals a complex legal landscape in the Arctic region that is characterised by jurisdictional limitations, choice of law dilemmas, and challenges in recognising and enforcing foreign judgments. This conclusively answers the third research question, which interrogates whether the domestic laws of each Arctic country align to meet the need for a comprehensive regime on civil liabilities in the Arctic region. Table 2 in Appendix 2[173] of the thesis summarises the findings of the private international law regimes applicable to transboundary pollution damage across the subject Arctic states.

Moreover, the analysis highlights the complex relationship between national legal systems and international considerations. A local victim seeking recourse in another Arctic country's court system must navigate various legal procedural hurdles and complexities associated with petroleum spills like establishing liability for the spill, assessing the extent of damages incurred, understanding the legal frameworks specific to petroleum spills, before ultimately seeking recognition and enforcement of foreign judgments against liable parties. As observed, the legal regimes of these countries vary significantly in this regard. Additionally, the victim must consider cost implications and observe applicable statutes of limitations, identify the appropriate court in the foreign country, navigate legal representation requirements and potential language barriers, and consider the possibility of class action suits, all of which complicate the pursuit of prompt and adequate compensation.[174]

[173] On page 254 of this thesis.
[174] Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?' (2002) 41 Washburn Law Journal 399, 409.

This is already complicated, but navigating transboundary pollution cases involving multinational corporations and their subsidiaries adds yet another layer of complexity to cross-border claims, as offshore petroleum operations are typically conducted by subsidiaries of foreign companies. Countries may well reject jurisdiction over cases involving foreign company subsidiaries,[175] sparking debates on parent company liability for subsidiary violations and exacerbating conflict of laws issues, hindering access to justice and timely remediation efforts. While examining international corporate legal practices is beyond the scope of this thesis, enacting laws imposing direct obligations on corporate actors under a unified regional regime may mitigate potential complexities in such scenarios.

Even if Arctic states' domestic civil liability regimes permit foreigners to sue transboundary polluters in their courts, determining the applicable laws to the case's substantive issues remain uncertain.[176] The different civil liability regimes across Arctic states, offering varying remedies to victims of pollution damage, could further impede swift and adequate compensation under the diverse private international law rules. Additionally, the recognition and enforcement of foreign judgments in the Arctic countries are primarily governed by domestic law, except in cases specifically covered by reciprocal treaties. It is widely recognised in the legal practice of the subject Arctic countries that the recognition and enforcement of international civil judgments within domestic courts do not occur automatically.

Overall, the potential complications arising from private international law issues further emphasise the importance of harmonising legal frameworks to facilitate the resolution of transboundary disputes effectively and comprehensively. In the context of petroleum activities in the Arctic, a regional agreement on private international law could be significant. Such an arrangement could ensure that remedies for damages are promptly and adequately provided, maintaining uniformity across all participating countries. This means that irrespective of the nationality of the victim, whether local or foreign, they have equal access to remedies regardless of where they choose to pursue their claims. The establishment of a regional agreement could also enhance clarity and certainty regarding issues of foreign jurisdiction, rights, obligations, and compensation for all parties involved. This includes not only the claimants, defendants, and the courts but also potential stakeholders in offshore petroleum

[175] Daniel H Augenstein and Nicola Jägers, 'Judicial remedies: the issue of jurisdiction' in Juan Jose Álvarez Rubio and Katerina Yiannibas (eds) *Human rights in business: removal of barriers to access to justice in the European Union* (Routledge 2017) 7.

[176] Robert Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age' (2002) 40 (2) Columbia Journal of Transnational Law 209 – 210.

activities in the Arctic continental shelf. Such an agreement would not only provide a structured framework for addressing these matters, but may also include specific provisions regarding court jurisdiction and the recognition and enforcement of judgments related to pollution damage originating from Arctic petroleum development.

Despite the existence of laws in all relevant Arctic countries facilitating the creation of reciprocal agreements concerning conflict of laws for civil matters and pollution damage, no such agreements have been established to date. Presently, none of the Arctic nations have reciprocal treaties addressing transboundary pollution damage arising from offshore petroleum activities in their Arctic continental shelves. However, the existing laws in these countries suggest a willingness to entertain reciprocal agreements on the aforementioned issues.

CHAPTER SIX

THE WAY FORWARD: RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

The Arctic region presents a unique and challenging environment for offshore petroleum development activities, necessitating a robust civil liability regime to address potential risks and environmental concerns. This thesis conducts a comparative and doctrinal analysis of the civil liability regime for offshore petroleum development applicable to countries in the Arctic region. It hypothesises that comprehensive rules on the civil liability of operators in Arctic offshore petroleum development are essential for ensuring prompt and adequate compensation for affected individuals and states in pollution incidents. Further, the thesis submits that implementing a regional legal arrangement provides the most effective and pragmatic solution compared to relying on individual Arctic states' domestic regimes or amending or creating an international agreement.

To help prove that this hypothesis is correct, the thesis interrogates three research questions: First, what are the essential components of an effective civil liability regime ensuring prompt and adequate compensation? Second, are these crucial elements found in current international or regional legal frameworks addressing pollution from offshore petroleum development in the Arctic? Finally, do the domestic civil liability laws of individual Arctic states include these necessary components, and are their provisions aligned enough to address the comprehensive needs arising from offshore petroleum development activities in the Arctic? The findings of these questions are summarised below and subsequently inform the proposals and recommendations.

In response to the objectives of the thesis, this final chapter consists of two sections. First, this chapter satisfies the first objective by collating the results of the research according to the research questions outlined above, and definitively demonstrates that current international, regional and domestic frameworks cannot effectively manage civil liability claims in the Arctic. Second, this chapter proposes options to resolve the identified issues in the research and improve civil liability concerning offshore petroleum development in the Arctic, and in doing so, fulfils the second objective of demonstrating the benefits of a regional arrangement in the Arctic. The chapter's conclusion restates how the thesis contributes significantly to

charting a course forward for the development of a comprehensive civil liability regime tailored to the unique needs of offshore petroleum development activities in the Arctic region.

6.2 Findings of the Research

1. The role of tort law in addressing environmental damage claims and the advantages of codified compensation frameworks

The discussion in chapter two highlights the importance of legal theory in shaping modern civil liability regimes, particularly concerning ultrahazardous activities like petroleum development. The aims of tort law, such as fairness, justice, deterrence, and economic efficiency,[1] align with the need to prevent pollution and compensate victims of pollution damage promptly and adequately. This provides a rationale for creating a theoretical framework based upon tort law and its associated theories. While some scholars advocate that tort law has a singular aim, many others argue for a more nuanced, pluralistic approach, encompassing various societal objectives.[2] In aligning with this pluralistic perspective, it is submitted that codifying compensation and remediation frameworks offers a more suitable approach for addressing claims such as pollution damage caused by petroleum development.

An examination of how tort law approaches environmental damage claims in practice affirms this, particularly as it focuses on accountability and offers means of quantifying costs and obtaining compensation and remedies. The analysis of civil liability legislation, such as those applicable in the shipping industry, reveals a nuanced approach to addressing the pluralistic goals of tort law and provides valuable insights into their conceptualisation and features. By identifying and examining key features such as the type of liability, burden of proof, channelling of liability, recoverable damages, limits of liability, financial assurance, forum for dispute resolution, limitation periods, and solutions to conflict of laws issues,[3] it is evident that these legislative frameworks are and should be designed to balance various societal objectives, including fairness, justice, deterrence, and economic efficiency.

The research findings show that a codified civil liability regime can provide a comprehensive and standardised framework for dealing with pollution damage claims, providing clarity, confidence and efficiency for both claimants and defendants. The codification of financial

[1] Chapter two, section 2.3.
[2] Chapter two, section 2.3.1-2.3.2.
[3] Chapter two, section 2.4

compensation is particularly appealing as it should ensure direct reparation for the injury and means that resources for environmental clean-up can be promptly allocated, once damages are accurately assessed and awarded. Therefore, chapter two answers the first research question, identifying what constitutes the essential components of an effective civil liability regime that ensures prompt and adequate compensation. This lays the groundwork for subsequent chapters, enabling a comprehensive analysis of international and domestic civil liability regimes in the context of these key components.

2. Civil liability for petroleum development incidents within current international law

As noted above, one of the objectives of the thesis is to conclusively determine whether existing international or regional legal frameworks adequately address civil liability concerns related to pollution from offshore petroleum development in the Arctic. If the key components of civil liability regimes are found to be absent or inadequate in these frameworks, this means that reliance is placed solely on the individual legal regimes of the Arctic states to address the potential environmental consequences of offshore petroleum development in the Arctic region, including transboundary pollution. This raises questions about access to justice and applicable laws, and would also highlight the need for enhanced cooperation or the establishment of comprehensive international or regional agreements to ensure effective governance of civil liability in the Arctic region. This leads to the second research question, which interrogates whether essential civil liability components are present in any existing international or regional legal frameworks governing marine pollution resulting from offshore petroleum development in the Arctic region.

Consequently, one of the findings of chapter three is that the UNCLOS provides a broad legal framework applicable to offshore oil development in the Arctic region;[4] a *lex generalis*. However, comprehensive rules addressing civil liability for pollution damage from petroleum development are beyond its scope, with the UNCLOS envisaging this *lex specialis* to be developed in other agreements.[5] The UNCLOS stipulates that coastal states have sovereign rights over natural resources within their EEZs and continental shelves, but also requires that states cooperate with respect to the implementation of existing international law and the further development of international law to ensure prompt and adequate compensation for damage caused by marine pollution. Regional agreements are also encouraged by the UNCLOS to take

[4] Chapter 3, section 3.2.
[5] Ibid, pages 76-77.

into account the special characteristics of the region in addressing pollution prevention and control, and the compensation of environmental damage such as that caused by offshore oil activities.[6]

However, despite the establishment of international frameworks such as the OPRC, and regional frameworks such as MOSPA and NEPC, the findings show that there remains a notable gap in comprehensively addressing civil liability claims arising from offshore petroleum development activities in the Arctic region. While these frameworks provide for pollution prevention and response, they lack provisions for establishing liability regimes to ensure prompt compensation for damages. Additionally, industry initiatives like the OPOL Agreement, though containing elements of a liability regime, are voluntary and have limited applicability in the Arctic. None of the regimes therefore contain all the essential components of an effective civil liability regime, and as a result, individuals affected by offshore spills cannot rely solely on these frameworks for redress. The thesis acknowledges that oil spill response techniques are important, but as they can only recover up to forty percent of spilled oil,[7] civil liability is crucial in managing spill damage. In the same vein, while pollution prevention is ideal, legal liability ensures prompt and adequate mitigation actions to address impacts on ecosystems, communities, and individuals.[8]

The research findings also highlight that, while it lacks legislative authority, the Arctic Council plays a significant role in facilitating cooperation among Arctic states in addressing environmental and maritime issues, including those related to offshore oil extraction.[9] Notwithstanding current political tensions in the Arctic Council, it could serve as a platform for dialogue and collaboration in more fully implementing UNCLOS provisions pertaining to oil activities, and the establishment of the MOSPA also exemplifies the Arctic Council's important role in facilitating regional cooperative measures for addressing oil-related matters.

Above all, the research findings in chapter three highlights the importance of developing a comprehensive legal regime tailored to address civil liability claims for pollution damage from offshore petroleum development activities in the Arctic. Such a regime should ideally take into

[6] Ibid, page 77.
[7] Doug Helton, 'What Have We Learned About Using Dispersants During the Next Big Oil Spill?' (*NOAA Office of Response and Restoration*, 20 April 2015) <https://response.restoration.noaa.gov/about/media/what-have-we-learned-about-using-dispersants-during-next-big-oil-spill.html> accessed 10 June 2020.
[8] UNEP, 'How to manage damage from oil spills' (7 October 2021) <https://www.unep.org/news-and-stories/story/how-manage-damage-oil-spills> accessed 20 November 2021.
[9] Chapter three, section 3.3.1.

account the unique environmental and geopolitical challenges of the region while ensuring prompt and adequate compensation for affected parties.

3. Findings from the comparative analysis of the individual civil liability regimes of the subject Arctic states for offshore petroleum development incidents

Chapter four of the thesis partly answers the third research question: do the domestic civil liability regimes of individual Arctic states contain the necessary components of an effective civil liability regime, and do the provisions of these laws align sufficiently to address the need for a comprehensive approach concerning losses from offshore petroleum development activities in the Arctic region? The research findings show that while Arctic states' domestic laws contain provisions that incorporate the key components of a civil liability regime,[10] there are significant inadequacies and limitations that restrict prompt and adequate compensation. Some of the countries also have significantly fragmented civil liability regimes, the most prominent being Canada which has five applicable laws.[11] Accordingly, it cannot be argued that the Arctic states' domestic regimes align in a such way that satisfies the need for a clear and unified regime addressing civil liabilities from offshore petroleum pollution. The main limitations are summarised here to support the discussion of findings.

a. Ambiguities and Inconsistencies in Legal Frameworks: The comparative analysis reveals a concerning prevalence of vague and ambiguous legal provisions within existing legal frameworks governing civil liability in the Arctic region. These uncertainties lead to challenges in the application and interpretation of regulations, inadequate enforcement mechanisms, and create a breeding ground for potential legal disputes. The key issues as they relate to each civil liability component are outlined briefly below:

i. **Channelling of liability:** Greenland has a system where responsibility is jointly shared between licensees and operators, but in Russia, liability is channelled to the entity owning the hazard source, with shared accountability among owners, operators, or subcontractors. Meanwhile, the USA designates the responsible party, typically the lessee or permittee, with primary liability, sometimes alongside joint and several liability for licensees and operators. In Norway, liability begins with the licensee, potentially extending to the operator if distinct entities occupy these positions. In Canada, the focus is on holders of operating

[10] Chapter 4, sections 4.2-4.7.
[11] Chapter 4, section 4.1.

licenses or authorizations, recently clarified to encompass both operators and licensees.

ii. **Standard of liability:** In each of the Arctic countries, strict liability prevails for ultrahazardous activities, as reinforced by civil liability statutes for offshore drilling. However, each jurisdiction employs distinct methods and terminology to define and implement this liability type.[12] For instance, Norway's PAA mandates 'without fault' liability for licensees and operators, while Greenland's MRA mandates strict liability for licensees and overseeing parties. Conversely, the Russian EPL and USA's OPA both reference other legislation for liability standards, implying strict liability through indirect provisions. In Canada, COGOA holds operators liable 'without proof of fault or negligence', while the AWPPA, Fisheries Act, and IFA all impose 'absolute liability' on polluters. Exceptions to strict liability vary among the Arctic countries, with Norway and the USA allowing defences such as force majeure events, whereas Russia and Greenland provide fewer exculpatory provisions. Also, uncertainty exists regarding whether there is 'true' absolute liability or if it reverts to strict liability when defences are available in some jurisdictions. Fault liability may also apply in certain circumstances, particularly in Canada and Norway, where parties contributing to spills may face fault-based liability. However, clarity is lacking in Greenland's MRA regarding the standard of liability for non-licensee parties.

iii. **Damages recoverable:** Civil liability legislation across Arctic states varies in defining the types of damage for which polluters may be liable for and who may seek such compensation. While similarities exist, dissimilar terminology and broad or vague provisions complicate coherence.

Damage to the environment:[13] Predominantly, polluters may be responsible for environmental damage, though wording varies. Greenland's MRA explicitly allows government claims for environmental damage, while Russia's EPL lacks clarity on claimants and calculation methods. Uncertainty also exists in Russia regarding private claims, with differing interpretations by the courts and resolutions attempting to clarify matters.

[12] Chapter four, section 4.4.
[13] Chapter four, section 4.5.1.

Cost of remedial measures:[14] Liability generally extends to costs for mitigating damage, albeit with nuances in terminology. Some states' statutes stipulate 'reasonable costs', while others hold polluters liable for all expenses.

Loss resulting from damage to the environment:[15] Polluters may also be liable to private individuals for losses resulting from environmental damage. However, variations exist in claim types, with the USA also allowing private claims for certain losses, creating potential for double recovery.

Loss to fishermen resulting from damage to the environment:[16] Only Norway and Canada provide explicit provisions for compensation to affected fishermen, but eligibility criteria are ambiguous, potentially hindering claims.

Damage to property and associated pecuniary loss:[17] Terminology inconsistencies complicate the understanding of liability for property damage and financial losses. The use of terms like 'economic loss' and 'financial loss' poses challenges in determining whether pure economic loss and/or consequential loss is intended by the language employed in different legislation.

Personal injury:[18] Only some legislation explicitly addresses personal injury liability, while other laws remain silent, leaving victims potentially vulnerable and uncertain about their legal rights.

iv. **Limitations on liability:** The civil liability regimes of the Arctic countries also reveal diverse approaches concerning liability limits.[19] USA and Canada have both strict and absolute liability limits,[20] while Norway, Greenland and Russia have unlimited strict liability.[21] However, fault liability is unlimited in all Arctic states, and administrative or criminal fines are not factored into civil liability claims in any of the countries.[22] Norway (through the LLMC) and the USA (through the LLA) clarify liability for MODUs; regarding liability for offshore drilling units shaped like ships Norway's approach ensures that liability is governed by petroleum development laws rather than shipping liability regimes. In contrast, the USA allows for liability limitation under the Limitation of

[14] Chapter four, section 4.5.2.
[15] Ibid, section 4.5.3.
[16] Ibid, section 4.5.4.
[17] Ibid, section 4.5.5
[18] Ibid, section 4.5.6
[19] Chapter four, section 4.6.
[20] Ibid, section 4.6.1.
[21] Ibid, section 4.6.2.
[22] Ibid, section 4.6.3.

Liability Act of 1851, potentially resulting in inadequate compensation for damages in the event of accidents. Canada, Greenland, and Russia do not address the subject of MODUs.[23]

v. **Financial assurance:** The civil liability regimes of all Arctic countries require operators to demonstrate proof of financial responsibility before commencing offshore drilling operations.[24] This is predominantly achieved through insurance or bonds, with regulatory agencies determining the minimum amount needed. In Russia, the USA, Norway, and Greenland, operators are obligated to provide financial guarantees. Canada goes further by requiring both general financial security and actual funds to be set aside. The USA sets limits for proof of financial responsibility, with a baseline of $35 million USD and flexibility for higher-risk operations. In contrast, regulatory agencies in Norway, Greenland, and Russia determine the minimum amount required. Certain countries have industry compensation schemes in place, like the OPOL (Norway and Greenland) and OSLTF (USA). Canada accepts participation in such schemes as evidence of financial assurance. The USA has the OSLTF to aid in clean-up and compensation, but its coverage is limited to US maritime territory.

vi. **Forum, order of claims, and limitation period:** Regarding dispute resolution forums, Arctic states typically designate courts or alternative bodies for handling civil liability claims.[25] For instance, in the USA, such claims are exclusively heard in district courts, while Norway assigns jurisdiction to courts in the district where the damage occurred. Canada offers a range of forums, including courts and arbitration boards, with regulatory bodies also possessing quasi-judicial powers. Conversely, Russia resolves disputes primarily through court decisions, while Greenland's legislation lacks clarity on dispute settlement venues.

The order of claims is another critical aspect, with some jurisdictions prioritising certain types of claims over others.[26] In the USA, the OPA does not mention an order, however, government-incurred costs take precedence before

[23] Ibid, section 4.6.4.
[24] Chapter four, section 4.7.
[25] Chapter four, section 4.8.1.
[26] Ibid, section 4.8.2.

private claims in the OSLTF. Canada prioritises claims for actual loss and damage, however, Norway, Greenland, and Russia lack specific provisions for claim prioritisation.

The limitation period that dictates the timeframe for filing pollution damage claims varies across jurisdictions.[27] In Canada, different legislation sets varying limitation periods, providing flexibility for different circumstances. The USA establishes different limitation periods for removal costs and other damage claims. However, Norway and Russia have less certain limitation periods, leading to ambiguity in the applicable laws. Greenland's legislation also lacks clarity on limitation periods, further complicating claim resolution.

Though there are there are prominent areas of convergence, the disparities result in differing legal requirements and enforcement mechanisms, exacerbating complexities for civil liability management in the region.

b. Challenges of Diverse Legal Systems and Languages: The challenges posed by the diversity of legal systems and languages among Arctic nations is another complicating matter. Some countries are influenced by common law, civil law, or a combination of both.[28] This diversity exacerbates regulatory inconsistencies, hindering domestic laws from being used as a unified approach to civil liability management in the Arctic region.

c. Inadequate Financial Compensation Limits: The research brings to light the inadequacies of current financial compensation limits for oil pollution damage, notably in Canada and the USA,[29] and particularly in light of the *Deepwater Horizon* incident. Such limitations fail to address the potential scale and scope of environmental harm in the fragile Arctic ecosystem. As a result, there is a pressing need for revisiting and possibly revising these compensation thresholds to ensure they align with the unique environmental sensitivities of the region.

d. Broader Implications to the Arctic: In addition to the legal complexities, the findings of chapter four hold broader significance across various domains. The environmental ramifications are noteworthy, given the severe threats posed to Arctic ecosystems, marine

[27] Ibid, section 4.8.3.
[28] Chapter four, section 4.1.
[29] Chapter four, section 4.5.5.

life, and indigenous communities by transboundary oil pollution damage.[30] The absence of a comprehensive international regime leads to divergent approaches adopted by coastal states in protecting these interests, notably in Greenland, Canada and Norway. Moreover, there is ambiguity in these regimes regarding persons who can be considered as part of indigenous communities or enjoy other protected interests.

e. Conflict of Laws Implications: The interconnected nature of the Arctic ecosystem highlights the potential transboundary implications of pollution incidents in the Arctic continental shelf. With multiple civil liability regimes in place, the importance of assessing their consistency and implementation in the event of transboundary pollution incidents is clear. As highlighted in chapter four, the *Montara* spill incident serves as a compelling illustration of the complexities of transboundary oil pollution damage claims. Despite occurring in 2009, resolution was only achieved in 2022 through an extrajudicial settlement without admission of liability. This settlement, though significant, highlights the enduring complexities associated with addressing transboundary incidents.

Overall, based on a comparative analysis, the findings of chapter four emphasise the urgent need for a comprehensive and harmonised approach to civil liability in the Arctic region, considering its unique challenges and complexities. Effective management of oil pollution damage requires international and regional cooperation, legal harmonisation, and the development of robust regulatory frameworks to safeguard the environment and ensure fairness, justice, deterrence, and economic efficiency for all stakeholders in the Arctic.

4. Private international law regimes of the subject Arctic states applicable to transboundary pollution damage

Chapter five also partly answers the third research question by considering whether the domestic laws of the Arctic countries can foster greater legal certainty in the region, not directly through their civil liability rules, but by way of their conflict of laws regimes. The analysis specifically focusses on transboundary pollution damage cases, which involves jurisdictional questions, choice of law dilemmas, and issues with recognising and enforcing foreign judgments. These were identified as key aspects of a civil liability regime in chapter two. The hypothetical scenario used to explore these aspects involves a foreign claimant filing a claim

[30] Chapter four, section 4.5.4.

for transboundary harm in the courts of another Arctic state where the polluting incident originated.

Key findings emerged from this analysis. First, the legal landscape is complex, marked by jurisdictional constraints, challenges in choosing applicable laws, and difficulties in enforcing foreign judgments. Second, each Arctic country possesses its own distinct legal framework governing the jurisdiction of the domestic court over a foreign claimant, the choice of what law to apply to substantive issues, and the recognition and enforcement of foreign judgments, leading to significant variations in approach and criteria:[31]

a. **Jurisdiction:** The key research findings reveal a complex framework. In the USA, courts require jurisdiction over both the subject matter and the defendant to hear a dispute. The ATS plays a crucial role in establishing competence for national courts, particularly concerning transnational violations of civil rights, though recent court decisions have limited the applicability of ATS, especially in environmental and pollution damage cases. Canada's jurisdictional landscape is diverse, varying across provinces and territories due to its federal structure and mixed legal system. Common law or civil law principles are applied based on substantial connections to the country. The local action rule, particularly in common law jurisdictions, may influence jurisdiction in cases of transboundary pollution damage. A finding central to the USA and Canada is the judicial discretion to apply *forum non conveniens* permitting courts to dismiss civil actions without prejudice, even if the forum or venue is appropriate and the court have jurisdiction over the case and parties, provided that a more suitable and convenient alternative forum to try the case exists elsewhere.[32] In Russia, foreign parties have the right to file claims for damages in civil courts, with equal legal standing to residents, provided the damage results from activities within Russian territory and claimants meet procedural capacity requirements. However, jurisdiction is contingent upon the defendant being situated within Russian territory or being a resident there. In Norway, jurisdiction is determined by the connection of the case to Norwegian territory and the domicile of the defendant, while Greenland's jurisdictional framework aligns with Danish law, with courts exercising discretion in competency assessments for civil claims with foreign elements.

[31] Chapter five, section 5.3.
[32] Ibid, section 5.3.4.

b. **Choice of law:** The key research findings reveal a bifurcated practice in the USA regarding choice of law in cases of transboundary pollution damage. Traditionally, the law of the place where the damage occurred was applied, but recent literature suggests a shift towards utilising the law of the forum for conflict of laws issues. However, this dual approach creates uncertainty for claimants and highlights the need for clearer legal standards. In Canada, each province and territory employ its own rules for determining the applicable law in cases with international elements. Generally, Canadian common law provinces apply the law of the place where the wrongful activity occurred (*lex loci delicti*), with exceptions made for cases where the consequences of the wrongful act are felt elsewhere. The Transboundary Pollution (Reciprocal Access) Act (RCA) in certain provinces mirrors this approach, applying the law of the RCA enacting state to transboundary pollution cases.

In Norway, for transboundary pollution cases involving countries that are party to the NEPC, such as Greenland (via Denmark), the Norwegian civil liability regime applies. However, the Norwegian PAA lacks clearer guidelines on the choice of law and ambiguities in terminology, such as 'Norwegian' and 'adjacent sea areas', contribute to interpretational challenges. In Russia, the RCC favours the application of the law most closely related to the country where the action or circumstance leading to the damages occurred. The RCC allows for the application of foreign law in the absence of specific provisions in Russia, provided it complies with Russian legal standards. In Greenland, the absence of explicit provisions regarding choice of law in the legal framework leads to uncertainty. While one might rely on Danish law due to Greenland's association with Denmark, the lack of specific regulations or case law on transborder litigation complicates matters. Courts may exercise discretion in applying *lex fori* or *lex loci damni*, and agreements between parties on choice of law could influence the outcome.[33] However, the absence of clear guidelines highlights the need for legal clarity and potential reliance on evolving international practices.

c. **Recognition and enforcement of foreign judgments:** The USA, Canada, and Russia primarily rely on domestic laws to address recognition and enforcement, with each nation having unique approaches shaped by their legal tradition and practice. Norway uses both domestic legislation and international agreements, such as the

[33] Chapter five, section 5.4.1.

Lugano Convention, while Greenland's legal provisions lack specificity and the country's ties with the Danish judicial system contributes to uncertainty, particularly regarding the application of the Lugano Convention.[34]

Third, local victims seeking redress in foreign courts encounter procedural obstacles, cost considerations, and language barriers, complicating their quest for compensation. Moreover, cases involving multinational corporations and their subsidiaries add further layers of complexity, as there is potential for debates over parent company liability, which can further complicate conflicts of laws. Lastly, and equally as important as identifying the disparities in domestic regimes, the findings in chapter five highlight a shared understanding among Arctic nations regarding factors such as jurisdiction, comity, and reciprocity. This provides a basis for potential future collaboration, which is crucial for addressing transboundary issues like pollution damage effectively and ensuring uniformity in legal proceedings across the Arctic region.

6.3 Establishing a Comprehensive Legal Regime for Pollution Damage from Arctic Offshore Petroleum Activities: The Way Forward

The findings of the research questions show that notable deficiencies exist within the current framework, including vague legal provisions, unrealistic financial compensation limits, diverse legal systems, inconsistent rules applicable across the region, and challenges stemming from different languages, currencies and conflict of laws issues. These challenges contribute to an environment of uncertainty and hinder the efficient resolution of civil liability claims arising from offshore petroleum development activities in the Arctic. This satisfies the first objective of the thesis and proves the first part of the hypothesis, also going some way to substantiate the second part.

In satisfying the second objective and proposing a solution that would address these identified problems, three distinct options are explored based on the research findings: the modification of existing international law,[35] the creation of a regional treaty focusing on civil liability,[36] and the establishment of a multilateral agreement concerning matters of private international law.[37] This thesis largely precludes the consideration of a new international civil liability convention

[34] Chapter five, section 5.5.
[35] Section 6.3.1 below
[36] Section 6.3.2 below
[37] Section 6.3.3 below; 'Agreement' used in the context of this study includes 'treaty', 'convention' and 'protocol'.

for offshore petroleum development. This decision arises from historical opposition faced during initial attempts by the CMI to establish such a global convention, particularly from industry stakeholders like the International Association of Drilling Contractors (IADC) and the Oil Industry International Exploration and Production Forum (E&P Forum).[38] The IADC opposed the creation of any convention on the matter, while the E&P Forum suggested that regional level governance on the subject would be more suitable than a global approach.[39] This is arguably a strong indication that there would be little stakeholder support for a new international treaty.

Additionally, the Ilulissat Declaration, adopted by the Arctic Five (A5),[40] argues against the necessity of new comprehensive international legal regimes governing Arctic Ocean matters, citing the existing robust framework provided by the international law of the sea, including the UNCLOS.[41] While the UNCLOS does not address civil liability directly, this statement's inclusion in the Declaration suggests that Arctic states are hesitant to globalise Arctic matters,[42] which may feasibly include civil liability for offshore petroleum development. This further highlights a potential reluctance to support the creation of a new international convention on the subject. Given an arguably clear lack of political will for a new treaty, this thesis limits its consideration of an international solution to the potential modification of existing agreements.

6.3.1 The modification of existing international law

This option involves exploring potential modifications to conventions currently in force to incorporate specific provisions tailored to Arctic petroleum development activities, rather than creating a new international civil liability convention for offshore petroleum development. One of the clear advantages of this approach is that it leverages existing legal frameworks that are already widely recognised and ratified by numerous states. Furthermore, modifying existing

[38] Michael White, 'Offshore Crafts and Structures: A proposed International Convention' (1999) 18 AMPLJ 21, 26-27.
[39] Ibid.
[40] Ilulissat Declaration, Arctic Ocean Conference 28 May 2008, 48 ILM 362 <https://cil.nus.edu.sg/wp-content/uploads/2017/07/2008-Ilulissat-Declaration.pdf> accessed 27 March 2020.
[41] Klaus Dodds, 'The Ilulissat Declaration 2008: The Arctic States, Law of the Sea, and Arctic Ocean', (2013) SAIS Review of International Affairs, 45,46.
[42] For example, leading up to the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, UN Doc. A/CONF.232/2023/4 (19 June 2023) (BBNJ), the Arctic coastal States, notably favoured a regional approach over a global treaty 'that shall not undermine existing regional and sectoral bodies and institutions'; *see* Vito De Lucia, 'Reflecting on the meaning of "not undermining" ahead of IGC-2' (*The NCLOS* Blog, 21 March 2019) <https://site.uit.no/nclos/2019/03/21/reflecting-on-the-meaning-of-not-undermining-ahead-of-igc-2/> accessed 21 April 2024 and Vito De Lucia, 'The BBNJ negotiations and ecosystem governance in the Arctic' (2022) 142 (103756) Marine Policy 1, 2.

international law may in some cases be considered simpler than negotiating and ratifying entirely new treaties or agreements. It avoids the lengthy and arduous negotiation processes typically associated with drafting new multilateral treaties, involving multiple stakeholders and extensive diplomatic efforts, thereby potentially expediting the implementation of necessary changes to address civil liability issues in the Arctic.[43]

The most viable option for modification is arguably the CLC and Fund regime, as it already contains key components of a civil liability regime applicable to oil pollution damage, as discussed in chapters two and three. In their current form, the conventions are only applicable to pollution damage involving shipping of oil in bulk as cargo,[44] but by modifying the conventions to encompass offshore petroleum development, existing legal mechanisms and the infrastructure already in place could be leveraged, ensuring coherence with established international norms.

Nonetheless, there are notable challenges and considerations that may arise with this approach. Modifying an existing treaty requires careful consideration to ensure that any amendments are compatible with the overarching principles and objectives of the original convention or protocol. Any proposed changes must strike a balance between addressing the unique needs of Arctic petroleum development and preserving the integrity and effectiveness of the existing legal frameworks. In this respect, there may simply be insufficient political will to initiate the amendment process. For instance, to revise or amend the CLC, the IMO may convene a conference of state parties at the request of not less than one-third of the state parties.[45] In practice, this means that over 40 states must request such a conference.[46]

Even where this does happen, amendments and additions to other conventions such as International Convention for the Safety of Life at Sea (SOLAS)[47] and International Convention for the Prevention of Pollution from Ships (MARPOL)[48] show the complexity of amending existing IMO treaties. The regulation of several key shipping issues is still missing from the

[43] Joseph F DiMento, 'Arctic Environmental Governance' (2016) 6 (23) UC Irvine Law Review 49.
[44] *See* chapter two, sections 2.1.1-2.4.9 of this thesis.
[45] CLC 1992, art 16(2).
[46] This is based on the 121 State Parties to both the 1992 Civil Liability Convention and the 1992 Fund Convention; IOPC Funds, <https://iopcfunds.org/?download_memberships_a_to_z=1&custom_lang=> accessed 21 April 2024; IOPC Funds, 'Parties to the international liability and compensation Conventions' <https://iopcfunds.org/about-us/membership/a-z-listing/> accessed 21 April 2024.
[47] International Convention for the Safety of Life at Sea (adopted 1 November 1974, entry into force 25 May 1980) 1184 UNTS 3.
[48] 1973/78 International Convention for the Prevention of Pollution from Ships (adopted 17 February 1978, entry into force 2 October 1983) 1340 UNTS 184.

Polar Code,[49] which aims to supplement the general maritime regulations with polar-specific measures for maritime safety and pollution prevention, and several of its provisions are recommendatory rather than mandatory. Any amendment of the CLC and Fund may well suffer the same consequence.

Difficulty in achieving consensus among state parties on proposed modifications to existing conventions or protocols may also hinder attempts at amendment. Given the diverse interests and priorities of Arctic and non-Arctic states, reaching agreement on some provisions related to civil liability may prove almost as challenging and time-consuming as negotiating a new convention. This difficulty can be illustrated by disagreement on the classification of oil rigs under general maritime law, particularly given that consensus on this would be necessary if amending an existing treaty. There has long been discussion by the international community on whether to expand the definition of 'ship' to include all craft used in offshore petroleum development.[50] One example is the MARPOL which extends to offshore drilling crafts, however, countries like Canada[51] and Finland[52] initially sought to exclude oil rigs and platforms from its scope until its final adoption. Other international instruments have adopted different definitions of 'ship' depending on the purpose of the legislation in question.[53]

Previous attempts to place offshore oil rigs into a comprehensive international law framework spearheaded by organisations like the CMI.[54] In 1977, the CMI adopted a draft Convention on Offshore Mobile Crafts, known as the Rio Draft, with the aim of clarifying how existing

[49] IMO Resolution MSC.385(94) (21 November 2014).

[50] International Conference on Marine Pollution, 1973 (MP/CONF) Conference Documents <https://www.imo.org/en/KnowledgeCentre/ConferencesMeetings/Pages/MP_CONF_1973-Default.aspx> accessed 20 March 2023.

[51] International Conference on Marine Pollution, 1973 (MP/CONF) MP/CONF/C.1/WP.5 <https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/MP_CONF_1973/MP%20CONF%20C.1%20WP.5.pdf> accessed 20 March 2023;

[52] International Conference on Marine Pollution, 1973 MP/CONF/8/7 <https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/MP_CONF_1973/MP%20CONF%208%207.pdf> accessed 20 March 2023.

[53] In the interests of brevity, an exhaustive list of all maritime related conventions and the use of the term 'vessel' or 'ship' is not provided here, however, *see* Hossein Esmaeili, *The Legal Regime of Offshore Oil Rigs in International Law* (Ashgate 2001) 20-53 (examining the different use of 'vessels' and 'ships' in a number of different Conventions and municipal maritime laws); M B Summerskill, *Oil Rigs: Law and Insurance* (Stevens & Sons 1979) 26.

[54] The CMI was and still is a prominent non-governmental international organisation in the field of maritime and commercial law that has proposed and drafted several international treaties that have been adopted. In contemporary times, they undertake this objective in collaboration with the United Nations (and more particularly, the IMO); Ukrainian Maritime Bar Association, 'Comite Maritime International' <http://www.umba.org.ua/en/about-us/cmi/#:~:text=According%20to%20the%20Article%201,law%20in%20all%20its%20aspects%E2%80%9D.> accessed 20 March 2023.

maritime law rules, including those for limitation of liability, applied to offshore 'mobile crafts' not traditionally considered as ships.[55] Despite many states' domestic law not permitting the registration of MODUs as ships, they were often accepted for registration without scrutiny of their legal status as ships.[56] Some members suggested explicitly including 'drilling vessels' in the Rio Draft instead of using the term 'crafts',[57] but the majority believed that the terminology issue should be addressed by the IMO or another sub-committee.[58]

Returning to this issue in 1993, in an update regarding the Rio Draft, the CMI viewed that the CLC regime should cover instances where oil escapes from a craft itself,[59] but there were reservations about including certain types of rigs under CLC coverage and whether limitation of liability should be based on tonnage or monetary value.[60] This was largely due to the technical advancement of offshore drilling crafts, and more particularly the proliferation of using offshore oil rigs shaped in the form of a ship (FPSOs), which in many cases are converted from a tanker ship instead of jack-up rigs.[61] The lack of progress made by the CMI or the IMO legal committee on this crucial issue, even forty-seven years after the Rio Draft, suggests that the CLC regime is not ripe for modification to address offshore petroleum development.

Further, while the IMO plays a central role in shaping international maritime law, historically, it has advocated that the unification of maritime rules regarding safety and pollution control should only happen when a clear and compelling need is established.[62] Consequently, maritime law conventions often emerge in response to specific maritime challenges. Therefore, it is submitted that the reluctance of the IMO to harmonise existing maritime laws for civil liability

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[55] Pre-1977, there were 15 treaty laws applicable to maritime activities under the auspice of the IMO (known then as Inter-Governmental Maritime Consultative Organization); United Nations 'Chapter XIV - The Inter-Governmental Maritime Consultative Organization (IMCO)' 1977(2) The Yearbook of the United Nations 1151; Nicholas J Healy and Joseph C Sweeney, 'Basic Principles of the Law of Collision' (1991) 22 JMLC 359, 378-380 (discussing the provisions of the Rio Draft).

[56] Richard Shaw, 'Offshore Craft and Structures Report to the Legal Committee of the International Maritime Organisation from the International Subcommittee of the Comite Maritime International' (1998) CMI Yearbook 145, 146 <https://comitemaritime.org/wp-content/uploads/2018/06/1998-YEARBOOK-ANNUAIRE.pdf> accessed 10 February 2023.

[57] 'CMI Conference – Rio De Janeiro 1977: Report of proceedings' (1977) Lloyd's Maritime and Commercial Law Quarterly 1 <https://www.i-law.com/ilaw/doc/view.htm?id=370759> accessed 23 January 2022.

[58] Then known as Inter-Governmental Maritime Consultative Organization (IMCO)

[59] Comite Maritime International, 'News from the CMI' 1993(1) CMI Newsletter 1, 5-6 <https://comitemaritime.org/wp-content/uploads/2018/06/News-Letters-1993.pdf> accessed 10 February 2023.

[60] Ibid.

[61] Ibid.

[62] Para 3, IMCO Resolution A.500(XII) adopted on 20 November 1981 <https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.500(12).pdf> accessed 16 March 2023; Para 4 IMCO Resolution A.777(18) adopted on 4 November 1993 <https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.777(18).pdf> accessed 16 March 2023.

in offshore incidents may stem from a perceived lack of demonstrated necessity, and this lack of political will also presents a significant challenge for modifying the CLC and Fund regime to apply to offshore petroleum development.

6.3.2 Creating a Regional Treaty Focusing on Civil Liability

The second option involves crafting a comprehensive regional agreement that would incorporate the key civil liability features outlined in chapter two of the thesis and be tailored to the unique challenges and characteristics of Arctic petroleum development. In theory, this would provide a more effective and targeted solution to civil liability issues in the region, and unlike the case with vessel source pollution, it has been acknowledged that addressing pollution from offshore drilling is more effectively managed through regional conventions rather than global ones.[63] Further, the development of relevant regulatory frameworks at the regional level offers the 'most practical and realistic option',[64] as it would enable countries sharing the same maritime area and similar economic interests, to collaboratively create legal regimes that align with their respective interests.

Hence, by focusing on the distinct environmental, social, and economic considerations of the Arctic region,[65] such a treaty can provide more nuanced and contextually relevant provisions compared to general international agreements. Despite the flexibility provided by international agreements for countries to interpret and apply rules from their own legal systems, a regional civil liability treaty would offer victims of offshore pollution damage a distinct advantage, which is providing consistent legal recourse throughout the Arctic region.

Moreover, a regional treaty facilitates enhanced cooperation among Arctic states, fostering a collaborative approach to managing civil liability issues as mandated by the UNCLOS,[66] and

[63] Boleslaw Adam Boczek, 'Global and regional approaches to the Protection and Preservation of the Marine Environment' (1984) 16(1) Case Western Reserve Journal of International Law 39, 46; Peter Hayward, 'Environmental Protection: Regional Approaches' (1984) 8(2) Marine Policy 106, 118-119; *see also* Michael White, 'Offshore Crafts and Structures: A proposed International Convention' (1999) 18 AMPLJ 21, 26-27 (on the Exploration and Production Forum suggesting that the subject of civil liability from offshore drilling should be handled regionally, than globally); *cf* R L Friedheim, 'Ocean Governance at the Millennium; Where We Have Been; Where We Should Go' (1999) 42 Ocean and Coastal Management 747-765, 748 (arguing that many ocean problems are not amenable to bilateral or regional solutions).

[64] Sergei Vinogradov, 'The Impact of the Deepwater Horizon: The Evolving International Legal Regime for Offshore Accidental Pollution Prevention, Preparedness, and Response'(2013) 44(4) Ocean Development & International Law 335-362, 352.

[65] UNCLOS article 197.

[66] Julien Rochette and Lucien Chabason, 'A regional approach to marine environmental protection: the regional seas experience' in Pierre Jacquet, R Pachauri and Laurence Tubiana (eds), *A Planet for life* (TERI Press 2011) 111-121, 115.

collective action on an issue is easier when a smaller number of states are involved.[67] Further, there is a greater capacity for effective cross-border enforcement as states may be more motivated to cooperate in enforcing rules that have been negotiated collectively among regional neighbours.[68] By bringing together relevant stakeholders, including government agencies, industry representatives, and indigenous communities, a regional treaty can promote dialogue, information sharing, and joint decision-making, thereby strengthening overall governance and oversight of petroleum development activities.[69]

By virtue of their closely shared maritime spaces and collaborative history, the Arctic states are likely to trust that other littoral states can be relied upon to honour the regional arrangement[70] and implement and enforce laws mandating compensation for victims affected by the actions of private actors,[71] thereby fostering greater accountability and justice. Already, the Arctic Environmental Protection Strategy (AEPS) represents an indication of the willingness of the Arctic states to cooperate in the environmental governance of the region and to ensure the long-term well-being of the Arctic environment and its inhabitants.[72] Although the AEPS is a political commitment rather than a legal one,[73] and it predates the formation of the Arctic Council,[74] it remains an important strategy of the Arctic Council.[75] Recent agreements, such as the International Agreement to Prevent Unregulated Fishing in the High

[67] Thomas Diez and others, 'Introduction: Promoting Regional Integration and Transforming Conflicts?' in Thomas Diez and Natalie Tocci (eds), *The EU, Promoting Regional Integration, and Conflict Resolution* (Palgrave Macmillan 2017)1, 5-11.
[68] Jonas Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union' (2002) 56(3) International Organization 609, 639- 643.
[69] Regina S Axelrod and Miranda Schreurs, 'Environmental Policy Making and Global Leadership in the European Union' in Regina S Axelrod and Stacy VanDeveer (eds), *The Global Environment: Institutions, Law, and Policy* (4th edn, CQ Press 2014) 157-186.
[70] Nele Matz-Lück and Johannes Fuchs, 'The Impact of OSPAR on Protected Area Management Beyond National Jurisdiction: Effective Regional Cooperation or a Network of Paper Parks?' (2014) 49 Marine Policy 155, 163.
[71] UNCLOS article 235(2).
[72] Evan Bloom, 'Establishment of the Arctic Council' (*US DOS*, 1999) <https://2009-2017.state.gov/e/oes/ocns/opa/arc/ac/establishmentarcticcouncil/> accessed 3 March 2020.
[73] Cécile Pelaudeix and Christoph Humrich, 'Global Conventions and Regional Cooperation: The multifaceted dynamics of Arctic governance' in Finger Matthias and Gunnar Rekvig (eds), *GlobalArctic - an introduction to the multifaceted dynamics of the Arctic* (Springer 2021) 443, 448-449.
[74] The Arctic Council is an intergovernmental forum promoting cooperation, coordination and interaction among the Arctic States, Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular on issues of sustainable development and environmental protection in the Arctic; Arctic Council, 'About' <https://arctic-council.org/en/about/> accessed 29 March 2020.
[75] The Arctic Monitoring and Assessment Program (AMAP); Protection of the Arctic Marine Environment (PAME); Emergency Prevention, Preparedness and Response (EPPR); and Conservation of Arctic Flora and Fauna (CAFF); Esko Rajakoski, 'Multilateral Cooperation to Protect the Arctic Environment: The Finnish Initiative' in *The Arctic: Choices for Peace and Security* 54-55 (1989).

Seas of the Central Arctic Ocean,[76] show that a readiness to formally cooperate on regional environmental issues also exists.

Streamlined legal procedures are another significant advantage of a regional treaty. By establishing clear and standardised mechanisms for addressing civil liability claims, such a treaty can reduce ambiguity, uncertainty, potential disputes and avoid the 'race to the bottom',[77] thereby enhancing the efficiency and effectiveness of the legal process. By harmonising and strengthening flawed national laws and complex private international legal processes, a regional treaty will ensure prompt and adequate compensation for victims affected by pollution damage, whether within state boundaries or across borders in the Arctic region. Regional-level governance can also inspire other regional approaches, which in turn may collectively stimulate more effective governance on a global scale.[78]

However, even with these advantages, there are also potential challenges associated with establishing a regional treaty with respect to negotiation, ratification and enforcement.

a. Negotiating and reaching consensus among Arctic states

Negotiating and reaching consensus among Arctic states on the terms of the treaty may prove to be a complex and time-consuming process, particularly given the diverse interests and priorities of the parties involved. There are also differing perspectives on the key components of a civil liability regime. For example, the different liability limits in each of the Arctic countries where the USA and Canada have both strict and absolute liability limits, while Norway, Greenland and Russia have unlimited strict liability. A similar challenge was encountered when negotiating the CLEE.

As highlighted in chapter one of the thesis, the CLEE stands as the sole treaty ever created addressing the matter of civil liability for offshore petroleum development, even though its application is intended for the Northern Europe region, covering the Baltic, North Sea and

[76] Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (adopted 3 October 2018, entered into force 25 June 2021). In addition to the five littoral Arctic states, China, Iceland, South Korea and the European Union were also part of the negotiations.

[77] Jefferey L Dunhoff, 'Levels of Environmental Governance' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 85, 94-95; *cf* Katharina Holzinger and Thomas Sommerer, ''Race to the Bottom' or 'Race to Brussels'? Environmental Competition in Europe' (2011) 49(2) Journal of Common Market Studies 315-339.

[78] Martin Visbeck and others, 'A Sustainable Development Goal for the Ocean and Coasts: Global Ocean Challenges Benefit from Regional Initiatives Supporting Globally Coordinated Solutions' (2014) 49 Marine Policy 87, 88; Ramesh Thakur and Luk Van Langenhove, 'Enhancing Global Governance Through Regional Integration' (2006) 12(3) Global Governance 233-240.

North Atlantic areas.[79] It contains the essential components of a civil liability treaty outlined in chapter two of this thesis. However, available literature mentions that when negotiating the CLEE, a notable reservation about the creation of the convention was regarding limited liability versus unlimited liability, with some countries already operating under and favouring unlimited liability regimes.[80] Others argued that the CLEE enabled injured parties to directly pursue operators' insurers for claims, potentially deterring insurers due to uncertain liability.[81] Proposed solutions included granting signatories the right to adjust liability limits during ratification and considering reciprocity for transboundary pollution cases. Unfortunately, despite the CLEE serving as a valuable model for developing similar regimes, it still lacks sufficient ratifications to enter into force. It is unclear if the disputes over the provisions for liability limits were ever resolved or whether they may have contributed to states' reluctance to ratify.

To overcome the challenges associated with establishing a regional civil liability treaty for Arctic petroleum development, particularly in the face of diverse key provisions of the domestic laws of each Arctic state, such as the limits of liability, a comprehensive approach integrating various strategies can be employed.

i. First, persistent diplomacy among Arctic states is essential. By consistently engaging in diplomatic efforts, Arctic nations can build trust and foster dialogue, which are crucial for reaching consensus on key issues related to the civil liability treaty for the Arctic. This continuous dialogue allows for the consideration of diverse interests and priorities, ensuring that all stakeholders have a voice in the decision-making process. It is worth noting that that discussions and negotiations of multilateral agreements among these nations already exist to a large extent through forums like the Arctic Council. This familiarity with diplomatic discussions and negotiations among Arctic nations can provide a foundation for addressing civil liability issues in the region.

[79] Belgium, Denmark, Federal Republic of Germany, France, Ireland, Netherlands, Norway, Sweden, and United Kingdom; Gov.uk, 'Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources – UK Depositary Status List' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/603447/30._Oil_Pollution_Damage__1977___Status_list.pdf> accessed 21 March 2022.
[80] Richard Shaw, 'Offshore Craft and Structures Report to the Legal Committee of the International Maritime Organisation from the International Subcommittee of the Comite Maritime International' (1998) CMI Yearbook 145, 157-159.
[81] Ibid.

For instance, a legally binding agreement that has resulted from the Arctic Council's discussions in protecting the interest of the Arctic marine ecosystem is the International Agreement to Prevent Unregulated Fishing in the High Seas of the Central Arctic Ocean (CAOFA).[82] While other agreements like the MOSPA,[83] an Arctic regional iteration of the OPRC, have been specifically negotiated under the auspice of the Arctic Council. Although these agreements do not directly address civil liability for petroleum development, they demonstrate a foundation for cooperation within the Council. Moreover, it can be argued that the subject of civil liability for petroleum development aligns with priority topics of the Arctic Council.[84]

ii. Second, identifying areas where the five countries have agreement can also simplify the negotiation process, providing a foundation upon which to build consensus on more contentious issues. Such areas are highlighted in the analysis in chapter four. For example, while there are variations in how liability is assigned among licensees, operators, and other parties, all five countries have mechanisms in place to ensure accountability for petroleum-related hazards. All Arctic countries require operators to demonstrate proof of financial responsibility before commencing offshore drilling operations, typically through insurance or bonds. Each jurisdiction designates forums for handling civil liability claims, establishes the order of claims, and sets limitation periods, albeit with some differences. There is a common understanding of the importance of providing avenues for dispute resolution and setting reasonable timeframes for filing claims. Nevertheless, while these areas offer a starting point for negotiation and may facilitate discussions, addressing disparities in other facets of civil liability regimes remains essential for achieving a comprehensive regional treaty.

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[82] Signed 3 October 2018 and in force 25 June 2021, which is an agreement aimed at preventing commercial fishing by the signatory states in the high seas of the Arctic Ocean for the next 16 years following the Agreement' Arctic Council, 'An Introduction to: The International Agreement to Prevent Unregulated Fishing in the High Seas of the Central Arctic Ocean' (*Arctic Council*, 25 June 2021) <https://arctic-council.org/news/introduction-to-international-agreement-to-prevent-unregulated-fishing-in-the-high-seas-of-the-central-arctic-ocean/#:~:text=25%20June%202021&text=The%20Agreement%20will%20prevent%20commercial,a%20retreating%20sea%20ice%20cover.> accessed 21 April 2024.

[83] Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOSPA) (signed 2013) this was discussed in chapter 3 section 3.3.1 of this thesis; *See also other legally binding agreements negotiated under the auspice of the Arctic Council,* Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (signed 2011) and Agreement on Enhancing International Arctic Scientific Cooperation (signed 2017).

[84] The oceans, climate and environment, sustainable economic development, and people in the North'; Arctic Council, 'Norway's Chairship, 2023-2025' <https://arctic-council.org/about/norway-chair-2/#:~:text=Through%20four%20priority%20topics%3A%20the,vibrant%20and%20sustainable%20Arctic%20region.> accessed 21 April 2024.

iii. Third, flexibility within the civil liability treaty can also facilitate the implementation of innovative approaches with respect to the diverse key provisions of the domestic laws of each Arctic state. One of the key benefits of flexibility is the ability to address evolving circumstances, enabling parties to respond proactively to these changes, whether they are related to shifting environmental conditions, emerging economic opportunities, or evolving geopolitical dynamics in the Arctic. By allowing for adjustments that reflect the changing needs and perspectives of all parties involved, flexibility enhances the legitimacy and support of the treaty, ultimately contributing to its long-term success. This adaptability ensures that treaties remain relevant and effective in addressing contemporary challenges and opportunities by exploring new approaches, technologies, and best practices that can enhance the achievement of the treaty objectives.

One example of such flexibility is the encouragement of research and development into more suitable drilling techniques. By so doing, operators can adapt to the unique environmental conditions of the Arctic while minimising risks and liabilities. This proactive approach will encourage exploring alternative solutions and adapt to changing circumstances, showcasing flexibility in the pursuit of safe and sustainable petroleum extraction in the Arctic region.

While this thesis does not engage deeply in technical or engineering aspects of drilling, the treaty could acknowledge the industry data supporting the suitability of floating ship-shaped crafts like FSOs, FPSOs, and drilling ships,[85] over fixed platform crafts for frontier areas like the Arctic's marginal seas and its unstable icy conditions.[86] This acknowledgment could serve as the foundation for the treaty's provisions, allowing operators to utilise either fixed or floating crafts for their offshore operations, but also emphasising the importance of operators utilising floating crafts for petroleum extraction activities in the Arctic continental shelf. Moreover, the low icy conditions also mean that fixed drilling platforms may only be operational within a restricted timeframe, typically within the summer months, thereby leading to a relatively extended timeline for the project and increased cost,[87] two factors that operators will seek to avoid.

[85] By contrast with drilling barges, because drillships are typically utilised for deep waters and can self-propel, while barges typically operate in inland, shallow or smooth offshore areas where the water depth is typically less than 150 meters; Subsea Oil and gas directory, 'Drill barge' (*Subsea.org*) <https://www.subsea.org/drilling-rigs/drill-barge/> accessed 23 March 2023.

[86] Odd Jarl Borch, *Offshore service vessels in high Arctic oil and gas field logistics operations* (2018) Nord universitet FoU-rapport nr 22 <https://core.ac.uk/download/pdf/225907014.pdf> accessed 1 April 2022.

[87] Justia, 'US patent application for floating drilling platform for offshore oil / gas drilling and exploration in ice-infested polar areas' (7 January 2019) <https://patents.justia.com/patent/20200056342> accessed 27 March 2022.

Furthermore, in light of the varying limits of liability, within this flexible framework, adjustments for higher liability levels based on tonnage, storage capacity, and expected output of these drilling ships can be established. This approach recognises that larger vessels with higher storage capacities may pose increased risks in the event of an incident and, therefore, should be subject to higher liability limits to ensure adequate compensation for affected parties. Moreover, the treaty could incorporate provisions for comprehensive risk assessment and insurance coverage tailored to the characteristics of floating crafts, especially converted tanker ships. By leveraging the known storage capacities of these vessels, risk assessment models can be developed to accurately quantify potential liabilities and determine appropriate insurance coverage levels. This approach may incentivise the adoption of a regional civil liability treaty as a practical solution for Arctic drilling.

However, it is equally important to consider potential pollution risks stemming from natural reservoirs in the Arctic region. While floating crafts offer operational advantages in icy conditions, they may also pose unique environmental challenges, such as the release of hydrocarbons from naturally occurring seeps. Therefore, the treaty should also include mechanisms for addressing these risks, such as contingency plans and emergency response protocols, to mitigate the impact of pollution incidents on the Arctic ecosystem.

b. *Ratifying and enforcing the treaty*

An additional challenge may arise in ratifying and enforcing the treaty, as each participating state will need to undertake domestic legal processes to formalise their commitment to the treaty. As transnational laws are susceptible to forum shopping for countries with lax compliance with the rules, states' compliance and enforcement of the agreement are also crucial considerations since these would remain within the responsibility of the domestic governments.[88]

i. One possible solution to address this challenge is to establish mechanisms for oversight and monitoring. This could involve creating a regional supranational body or agency tasked with overseeing the implementation of the treaty provisions and ensuring compliance by participating states. Currently, the Arctic Council plays a significant role in facilitating cooperation among Arctic states and indigenous peoples on various issues of common interest, including environmental protection, emergency response and sustainable development, but it

[88] Joan Petersilia, 'Conditions That Permit Intensive Supervision Programs to Survive' (1990) 36 CRIME & DELINQ 126, 129.

may not be the most suitable entity for overseeing the ratification and enforcement of a treaty related to offshore petroleum activities in the Arctic region. Nevertheless, the Arctic Council can still contribute significantly by facilitating dialogue, cooperation, and information sharing among Arctic states.

However, the arrangement is made more complex by the inclusion of non-Arctic states as observers within the Arctic Council. This raises questions regarding the potential role and participation of non-Arctic states in negotiating and supporting the implementation of a regional agreement concerning civil liability regarding offshore petroleum activities. These non-Arctic states may have different economic interests, resource extraction priorities, and regulatory frameworks compared to Arctic nations. Their participation may introduce competing priorities and impair the focus on addressing the specific needs and concerns of the Arctic region, thereby impeding progress towards an effective and comprehensive civil liability framework tailored to the unique circumstances of the Arctic environment. Nevertheless, by serving as a forum for discussing common challenges, sharing best practices, and coordinating efforts to address environmental and regulatory concerns, the Arctic Council can still play a valuable role in supporting the implementation of offshore petroleum-related treaties in the region.

The Arctic Council has been instrumental in not only driving significant policy advancements, some of which have been partly influenced by early deliberations within the Council, but also contributing to their implementation. For instance, the IMO adoption of the Polar Code under SOLAS and MARPOL started through initial discussions in the PAME working group of the Arctic Council,[89] and currently, the Arctic Council and IMO work together to promote implementation of the Polar Code. The Arctic Shipping Best Practice Information Forum, convened by the Arctic Council, serves as a platform for both private and public sectors to collectively discuss the implementation of the Polar Code and its influence on the trajectory of Arctic shipping.[90]

[89] PAME's Arctic Marine Shipping Assessment first produced in 2009 contained recommendations that Arctic States 'cooperatively support efforts at the IMO to augment global ship safety and pollution prevention conventions with specific Arctic requirements'; Arctic Council, 'Navigating Arctic Waters with the Arctic Council and the International Maritime Organization' (*Arctic Council*, 27 November 2020) <https://arctic-council.org/news/navigating-arctic-waters-with-the-arctic-council-and-imo/> accessed 21 April 2024.
[90] Ibid.

Moreover, authors like Caddell and Koivurova[91] suggest that the Arctic Council, especially through its working groups like the PAME, has the capability to implement international legally binding instruments within the Arctic region. Their assertion highlights the Council's robust foundation for achieving marine-based goals in the Arctic.[92] This argument lends support to the notion that the Arctic Council could effectively spearhead the implementation of a regional-based civil liability treaty. While Caddell and Koivurova's arguments primarily focus on marine biodiversity conservation and environmental assessment projects, their suggestions are equally pertinent to the creation of a regional treaty addressing civil liability arising from petroleum development in the Arctic continental shelf.

ii. Furthermore, capacity-building and technical assistance programs could be established to support participating states in strengthening their domestic legal frameworks and enforcement mechanisms.[93] This would help ensure that states have the necessary resources and capabilities to effectively implement and enforce the treaty provisions. Providing technical assistance and expertise to support signatories in evaluating and implementing liability regimes can enhance their capacity to navigate complex legal and regulatory issues. This can facilitate the effectiveness of the civil liability treaty in the Arctic. Notably, capacity-building and technical assistance are identified as vital components for the successful implementation of the recently adopted BBNJ Agreement.[94]

iii. Additionally, by raising public awareness about the significance of the treaty obligations and their impact on society, public engagement can help garner support for compliance efforts and hold governments accountable for fulfilling their commitments.[95] Civil society organisations, advocacy groups, and the media can help promote the message of compliance and enforcement of the treaty.[96] They can serve as advocates both domestically and regionally, urging governments to prioritise treaty obligations in their policy decisions

[91] Timo Koivurova and Richard Caddell, 'Managing Biodiversity Beyond National Jurisdiction in the Changing Arctic' (2018) 112 AJIL Unbound 134, 137 (the article discusses the BBNJ Agreement before its adoption).
[92] Ibid, 138.
[93] Diva Amon and others, 'Conservation and sustainable use of marine biodiversity beyond national jurisdiction: Capacity building and technology transfer considerations for the Caribbean 2022' (CARICOM Report 19 August 2022) 1. <https://www.pewtrusts.org/-/media/assets/2022/08/caribbnjreport220822.pdf> accessed 8 June 2023.
[94] Part V, Articles 42-47 (of the BBNJ Draft Agreement Advanced, unedited, pending paragraph renumbering 4 March 2023).
[95] Sally Hussey, 'Why is Community Engagement Important?' (*Granicus*) <https://granicus.com/blog/why-is-community-engagement-important/#builds-communities> accessed 8 June 2023.
[96] UNOHCHR, 'Engagement and partnerships with Civil Society' in *Training Manual on Human Rights Monitoring* (2001) 15-19.

across borders.[97] By highlighting the interconnectedness of the Arctic region and the importance of regional cooperation, these stakeholders can help to mobilise public support for multilateral efforts to address common issues and achieve shared goals..

c. *Opposition from various parties with distinct concerns and interests in the Arctic*

An additional significant obstacle to establishing a regional civil liability treaty for offshore petroleum development in the Arctic may be opposition from various parties, each with distinct concerns and interests. This may include Arctic states concerned about sovereignty, the oil and gas industry with concerns about an additional regulatory burden, and indigenous communities.[98]

i. Liability and compensation issues in offshore oil incidents often intersect with political dynamics, reflecting state sovereignty over maritime zones. Some Arctic states may resist participation in treaties on offshore extraction, due to the fear that treaty restrictions or obligations may limit their jurisdictional powers in their maritime territories, which could disadvantage them economically or politically. However, exclusivity in civil liability for petroleum development risks being impractical, especially in the Arctic region. Moreover, overlooking the interconnectedness of the sea and the need for international cooperation could lead to ineffective management of offshore risks in the region.[99] The Arctic states already incorporate key components of a civil liability regime into their domestic laws, albeit with variations. Therefore, a regional treaty can complement and strengthen these national laws, providing a framework to regularise and harmonise regulations across the region while respecting the sovereignty of each state. It should be emphasised that the civil liability treaty is intended to complement existing national laws and regulations rather than override them and should not impose undue restrictions on their rights to manage their own territories and resources. It is highly unlikely that any negotiated treaty would depart from the rights set out under the UNCLOS.

ii. Companies involved in offshore petroleum development may oppose a civil liability treaty if they perceive it as imposing additional regulatory burdens or financial liabilities. They may argue that such a treaty could increase the costs of exploration and production activities,

[97] Ibid.
[98] Robert L Friedheim, 'Ocean Governance at the Millennium; Where We Have Been; Where We Should Go' (1999) 42 Ocean and Coastal Management 747-765.
[99] Yubing Shi, 'Climate Change and the International Shipping: the regulatory framework for the reduction of greenhouse gas emissions' (2017) 23 Legal Aspects of Sustainable Development 413-415.

reduce profitability, or deter investment in the region. The civil liability regimes of all Arctic countries already require operators to demonstrate proof of financial responsibility before commencing offshore drilling operations, predominantly through insurance or bonds, though regulatory agencies set varying minimum amounts, leading to inconsistency in the region. By establishing clear and uniform guidelines for demonstrating proof of financial responsibility across the Arctic region, a regional civil liability treaty can help alleviate concerns about additional regulatory burdens and ensure that companies understand their obligations upfront.

Moreover, by streamlining the financial responsibility requirements, a treaty could enhance transparency and predictability in cost assessments for exploration and production activities. Operators can more accurately anticipate and plan for the financial implications of compliance, reducing the risk of unexpected expenses and mitigating concerns about reduced profitability. Additionally, a regional civil liability treaty can provide a level playing field for all operators in the Arctic region, regardless of their location or jurisdiction. This can help prevent competitive disadvantages for companies operating in states with stricter regulations and promote fair competition within the offshore industry. Additionally, establishing cooperative insurance pools can incentivise offshore oil companies to secure adequate insurance coverage and liability protection which can be beneficial for compliance with the treaty obligations.

Further, engagement with industry representatives throughout the treaty negotiation process is vital. By ensuring their perspectives are heard and integrated where possible, mutually acceptable solutions can be found that align with the goals of the civil liability treaty for the Arctic region. For example, conducting a comprehensive cost-benefit analysis can demonstrate to the oil and gas industry the long-term advantages of implementing a civil liability treaty. This would highlight how improved environmental protection and risk management measures can lead to reduced clean-up costs, minimised legal liabilities, and enhanced public trust, ultimately benefiting the reputation of the company and their revenue.[100] Emphasising the importance of sustainable development and long-term planning in offshore petroleum activities can also encourage oil companies to adopt the holistic approach of a civil liability treaty that

[100] Ministry of Environment Republic of Indonesia, 'Final Report: Cost Benefit Analysis for Fuel Quality and Fuel Economy Initiative in Indonesia' (2017) 8 <https://wedocs.unep.org/bitstream/handle/20.500.11822/16842/CBA_Indonesia.pdf?sequence=1&isAllowed=y> accessed 28 January 2024; Peter Clinch, 'Cost-Benefit Analysis Applied to Energy' (2004) Encyclopedia of Energy 715, 716-717.

considers environmental, social, and economic factors, rather than focusing solely on short-term profits.

iii. Additionally, indigenous communities living in or near Arctic regions may oppose the treaty if they feel that it fails to adequately address their concerns or safeguard their rights, particularly regarding the environmental and social impacts of offshore petroleum development on their traditional lands and livelihoods. First, recognising the severe threats posed to Arctic ecosystems, marine life, and indigenous communities emphasises the urgent need for a unified approach. Second, the divergent approaches adopted by coastal states, such as Greenland, Canada, and Norway, highlight the current lack of cohesion and clarity in addressing the protection of indigenous communities from transboundary oil pollution damage. Russia and the USA do not explicitly address these interests at all. By establishing a comprehensive regional regime, consistent protection of these vital interests across all Arctic coastal states can be ensured. The ambiguity surrounding the definition of indigenous communities and other protected interests also gives emphasis to the need for a standardised framework. A regional civil liability regime could play a crucial role in clarifying the status of indigenous communities and ensure their rights and interests are adequately protected in the event of oil pollution damage.[101] Given that indigenous representation is already established within the Arctic Council, such a regime could ensure their meaningful participation in decision-making processes related to offshore petroleum activities. Furthermore, the regional civil liability regime could facilitate the establishment of long-term monitoring and oversight mechanisms for offshore petroleum activities, with active involvement from indigenous representatives in the monitoring processes. This would not only ensure ongoing compliance with treaty provisions but also mitigate adverse impacts on indigenous lands and livelihoods.

Addressing the concerns of these diverse stakeholders and engaging them in the treaty negotiation process will be essential for overcoming opposition and fostering consensus on the provisions of the treaty. By carefully considering the interests and perspectives of all parties involved, efforts to establish a civil liability treaty can achieve a balanced and equitable framework that promotes sustainable petroleum development and protects the interests of all stakeholders in the Arctic region. When stakeholders perceive that agreements will be enforced effectively and fairly, it can enhance their trust and support in the regional civil liability treaty.

[101] Joseph Onele, 'Impact and benefit Agreements and the Protection of Indigenous People's Rights: Any new lessons from Canada' (2018) 16(1) Oil, Gas, Energy Law 1-2.

However, enforcement alone may not fully resolve the issue if stakeholders fundamentally oppose the agreement or feel excluded from the decision-making process. Therefore, a comprehensive approach that combines robust enforcement with meaningful engagement with stakeholders is necessary for ensuring the legitimacy, effectiveness, and long-term success in the development and implementation of regional agreements regarding civil liability for offshore petroleum activities in the Arctic.

6.3.3 Establishing a Multilateral Private International Law Agreement between Arctic States for Cross-border Cases of Offshore Petroleum Pollution Damage

This option encompasses not only the recognition and enforcement of judgments but also addresses critical aspects such as choice of law and jurisdiction, offering a holistic solution to civil liability issues in the region. One of the primary advantages of a multilateral private international law agreement is its capacity to provide clarity and predictability regarding the applicable legal standards and procedures across Arctic states. By establishing common rules for determining the governing law and jurisdiction in civil liability cases related to offshore petroleum pollution, such an agreement could reduce ambiguity and uncertainty for parties involved in disputes and mitigate the risk of conflicting judgments. This can help facilitate more efficient and effective resolution of civil liability issues, thereby enhancing the overall functioning of the legal systems in the Arctic region. Moreover, a multilateral private international law agreement can enhance access to justice for parties involved in civil liability disputes. By providing clear rules and procedures for determining the applicable law and jurisdiction, an agreement could reduce barriers to litigation and facilitate the resolution of disputes through more accessible and efficient legal channels. This can help ensure that victims of civil liability are able to seek redress and compensation for damages incurred, thereby promoting fairness and accountability in the legal system.[102]

For example, EU countries[103] already benefit from private international law treaties such as the EU Brussels I Regulation (recast),[104] the Lugano Convention,[105] and the Rome II Regulation.[106]

[102] Alan E Boyle, 'Globalising Environmental Liability: The Interplay of national and International Law' (2005) 17 (1) Journal of Environmental Law 3, 12.
[103] And certain non-EU countries, such as the UK, Switzerland, Norway and Iceland.
[104] Regulation (EU) No 1215/2012 of the European parliament and of the council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
[105] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2007; extending to non-EU countries of Switzerland, Norway and Iceland.
[106] Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations. OJ L 199/40 (31 July 2007).

The Brussels I Regulation and the Lugano Convention are agreements that facilitate the recognition and enforcement of judgments across EU member states by establishing uniform rules on jurisdiction and the recognition of judgments in civil and commercial matters.[107] The Rome II Regulation provides clarity on the applicable law for non-contractual obligations, specifically in cases of tort and delict in the EU. By striking a fair balance between the interests of the liable party and the injured, the Rome II Regulation covers various aspects of liability, including who can be held liable and the extent of that liability.[108] It addresses grounds for exemption, limitations or divisions of liability, and the assessment of damages and remedies sought. Additionally, it outlines court measures to prevent or terminate damage, rules for obligation extinguishment, and provisions for transferring compensation rights. It also addresses liability for the acts of others.

While these examples of EU private international law treaties may not be specifically tailored for offshore petroleum pollution cases, they demonstrate how multilateral private international law agreements can indeed facilitate claims by providing clear rules and procedures for determining jurisdiction, applicable law and recognition of a foreign judgment in a regional context.[109] By drawing from these existing regional agreements, it is reasonable to expect that a similar agreement tailored to offshore petroleum pollution cases in the Arctic could also enhance access to justice and facilitate the resolution of transboundary disputes in a cooperative and harmonised manner in the region.

Furthermore, it is submitted that attaining a regional consensus on private international law might prove more feasible in the interim. This proposition stems from the likelihood that foreign judgments concerning civil liability from pollution damage will predominantly aim for compensation rather than punitive measures. Additionally, the focus of this approach on procedural aspects, rather than necessitating the establishment of substantive rules, may encounter less opposition, thus increasing the likelihood of consensus among Arctic states.

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[107] EUR-lex An official website of the European Union, 'Court jurisdiction in legal cases involving different EU countries' (*EUR-Lex*, 24 September 2015) <https://eur-lex.europa.eu/EN/legal-content/summary/court-jurisdiction-in-legal-cases-involving-different-eu-countries.html> accessed 16 April 2023; EUR-lex An official website of the European Union, 'Strengthening cooperation with Switzerland, Norway and Iceland: the Lugano Convention' (*EUR-Lex*, 24 September 2015) <https://eur-lex.europa.eu/EN/legal-content/summary/strengthening-cooperation-with-switzerland-norway-and-iceland-the-lugano-convention.html> accessed16 April 2023.

[108] EUR-lex An official website of the European Union, 'Summary of the law applicable to non-contractual obligations' (*EUR-Lex*, 26 October 2015) <https://eur-lex.europa.eu/EN/legal-content/summary/the-law-applicable-to-non-contractual-obligations.html> accessed 16 April 2023.

[109] Ibid.

However, challenges may also arise in establishing a multilateral private international law agreement.

a. Reconciling diverse legal traditions and practices among Arctic states

One challenge is the need to reconcile divergent legal traditions and practices among Arctic states. The agreement would need to accommodate the diverse legal systems and interpretations in the region, which could complicate the negotiation process and pose challenges for achieving consensus on key provisions. The variation in civil liability legislation for pollution damage from offshore petroleum development, particularly in defining the types of recoverable damage and the eligibility criteria for compensation, as seen in chapter four of this thesis, highlights the complexity of the legal landscape in the region and poses challenges in achieving coherence and consistency in legal proceedings. However, despite these challenges, the shared understanding among Arctic nations regarding factors such as jurisdiction, comity, and reciprocity, as shown in chapter five of the thesis, can pave the way for collaborative efforts towards reaching a regional agreement on private international law matters. By leveraging this shared understanding, Arctic nations can work together to streamline legal proceedings and ensure fair and consistent outcomes across the region concerning cases of transboundary pollution damage from offshore drilling.

b. Balancing regional cooperation and sovereignty

There may also be concerns about potential conflicts between the multilateral private international law agreement and national laws of Arctic states. The agreement would need to strike a delicate balance between promoting regional cooperation and respecting the sovereignty and autonomy of individual states in regulating civil liability within their jurisdictions. Achieving this balance would require extensive cooperation and coordination among Arctic states, as well as careful drafting and negotiation of the provisions of the agreement. One solution could be to incorporate flexibility within the agreement, such as provisions that enable Arctic states to maintain sovereignty and autonomy in regulating civil liability within their jurisdictions while still adhering to the overarching principles of the agreement. Furthermore, the agreement could include dispute resolution mechanisms that allow for alternative methods of resolving conflicts between national laws and the provisions of the agreement.

The Rome II Regulation serves as an exemplary model of a 'flexible' private international law treaty. The Regulation does not replace national substantive tort or delict laws, rather, it only provides a set of uniform rules for determining the applicable law in cross-border tort disputes within the EU. However, the Regulation also offers flexibility in accommodating the diverse legal traditions and practices of member states while promoting harmonisation and cooperation. By allowing parties to choose the law applicable to their dispute in certain cases and providing criteria for determining the applicable law in others,[110] the Rome II Regulation strikes a balance between promoting consistency and respecting the autonomy of the legal system of member states. Similarly, the Brussels I Regulation and the Lugano Convention allow parties to choose the jurisdiction for their disputes in certain cases, promoting flexibility while ensuring legal certainty and predictability in the EU and beyond the EU borders.

Drawing from these examples, a multilateral agreement on private international law for civil liability for petroleum development in the Arctic could incorporate similar flexible mechanisms to address potential conflicts between national laws and promote cooperation among Arctic states. By offering this flexibility, the Arctic states can tailor their participation in the multilateral agreement according to their unique legal frameworks and policy objectives. Although this deviates slightly from strict uniformity, it still promotes a practical and sustainable solution tailored to the complexities of the region. This approach can enhance the effectiveness and enforceability of the multilateral agreement in the Arctic context, without compromising the overarching objective of achieving uniformity regarding civil liability issues arising from petroleum development in the region.

6.4 Conclusion

The absence of a global treaty on liability for offshore petroleum operations is evident, as the CLC and Fund do not apply to such activities. States have yet to fulfil their UNCLOS obligation to collaborate and establish international rules, standards, and regulations concerning liability for offshore oil and gas operations, and the current focus is largely on using preventative measures to address pollution damage from offshore oil drilling. However, just like Murphy's

[110] Where the applicable law is he law of the country where the damage occurs; or the law of the country where both parties were primarily living or had their main place of business when the damage occurred; or if the case is more closely connected with the law of another country, the law of that country; ibid.

Law states that 'anything that can go wrong, will go wrong', both intentional and non-intentional violations of these preventative measures are inevitable.[111]

Though domestic legislation for civil liability from petroleum development is present in each of the Arctic states, significant challenges remain. There are inconsistencies concerning the key features of civil liability legislation and how prompt and adequate compensation for offshore petroleum development in the Arctic is achieved, especially in cases of transboundary pollution damage. By identifying and analysing the key features of civil liability legislation on both domestic and international levels, this thesis identifies the main areas that policymakers should take into consideration.

Three alternative approaches are examined in considering how best to address civil liability issues in the Arctic region going forward: modifying existing international law, the creation of a regional treaty focusing on civil liability, and the establishment of a multilateral private international law agreement as an interim solution. The first option involves modifying existing international law, notably the CLC and Fund regime. However, there is likely to be challenges around the political will required for amendment, achieving consensus among state parties on provisions, and ultimately, whether this option would ensure all 'gaps' are sufficiently closed. It is also unlikely that modifications to an international agreement could be tailored to the Arctic. The second option involves negotiating a regional treaty on civil liability, which would require ratification and enforcement by participating states. However, challenges such as opposition from stakeholders, sovereignty concerns, and liability issues may hinder its establishment, at least in the short-term. There is a risk of ineffective management of offshore risks without international cooperation. The third approach entails creating a multilateral private international law agreement aimed at providing clarity and predictability in legal standards, facilitating efficient resolution of disputes and enhancing access to justice. However, there may still be some challenges, such as reconciling divergent legal traditions among Arctic states and ensuring the agreement respects national laws and sovereignty while promoting international cooperation.

All three options have their merits and challenges, requiring careful consideration of feasibility, effectiveness, and the willingness of Arctic states to cooperate and compromise. However, the third option may be more feasible in the short-term, as foreign judgments concerning the matter

[111] Ludwig Kramer, 'The Implementation of Environmental Laws by the European Economic Communities' (1992) 34 German Yearbook of International Law 9; Aline de Bièvre, 'Civil Liability and Compensation for Damages caused by certain Hazardous and Noxious Substances (HNS) during their Carriage by Sea…

of civil liability from pollution damage are predominantly compensatory rather than punitive in nature. It may be quicker to achieve consensus on procedural matters rather than substantive ones, and so could provide a good interim solution for any transboundary claims that may arise. Even so, a regional civil liability treaty remains the most ideal long-term solution for Arctic offshore petroleum activities, offering tailored regulations, enhanced cooperation, and streamlined procedures. By engaging with stakeholders, identifying existing areas of agreement as done in this thesis, and through commitment from Arctic states, a regional treaty holds promise for significantly improving civil liability management and ensuring the sustainable development of petroleum resources in the Arctic region.

Overall, this thesis demonstrates the advantages of a regional-level approach to civil liability regulation in the Arctic region, emphasising the benefits of cooperation and coordination among Arctic states; this proves the hypothesis. By proposing practical solutions grounded in regional cooperation, this thesis seeks to pave the way for a more effective and comprehensive civil liability regime that safeguards the Arctic environment while facilitating responsible offshore petroleum development activities. This thesis contributes to an area where further learning and awareness is much needed, since there have been years of inaction on the subject on an international level. Given the ecological significance of the Arctic region on a global scale, the insights presented in this thesis hold potential for broader application at an international level and in other regional sea areas where offshore drilling is prevalent. By replicating the findings and recommendations outlined in this thesis, a robust framework can be established to enhance the civil liability regime for offshore petroleum development in the Arctic region and beyond.

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APPENDIX 1: COMPARING THE CIVIL LIABILITY REGIMES OF CANADA, USA, NORWAY GREENLAND (DENMARK) AND THE RUSSIAN FEDERATION FOR POLLUTION DAMAGE FROM OFFSHORE PETROLEUM DEVELOPMENT

Table 1: Summary of the provisions of the domestic civil liability regime of the five subject Arctic states using the key features of a civil liability regime.

	CANADA	**USA**	**NORWAY**	**GREENLAND**	**RUSSIA**
APPLICABLE REGIME	Common Law tort rules (Canadian) and statutory regime of COGOA, AWPPA/AWPPR, IFA, Fisheries Act)	Common Law tort rules (found in general maritime law) and statutory regime of OPA and OSLTF, Clean Water Act 1972, LLA 1851 and legislation of different states	Delict rules, the Petroleum Activities Act, the Pollution Control Act. Signatory country to OPOL (voluntary for licensees and operators)	Danish tort rules, Greenlandic customary law, the statutory regime of Mineral Resources Act, the Danish Administration of Justice Act, and OPOL (mandatory for licensees and operators)	Statutory regime of Russian Civil Code and the EPL
TYPE OF LIABILITY AND CHANNELING OF LIABILITY	Absolute liability with no exculpatory provisions, channelled to the holder of the operating licence and authorised person (both referred to as operator) under COGOA. Operator has joint and several liability with contractors and sub-contractors who have fault-based liability.	Strict liability channelled to lessee and permittee/ owner and operator as the responsible parties. With the defence of act of God, act of war and act of an unrelated third party, gross negligence or wilful misconduct of the aggrieved.	Strict liability to licensee and operator, with defences of an inevitable event of nature (act of God), act of war, exercise of public authority, and other similar force majeure events that are beyond the control of the liable parties. Licensee is jointly and severally	Strict liability channelled to the licensee and operator with the defence of showing the intent or negligence of the injured person contributing towards the damage, and if the act was done under the indispensable directions of a public authority.	Strict liability channelled to the owner and operator, with only the defences of force majeure and when the injured party contributed to their injury. Joint liability of owner and operator where multiple parties contribute to the polluting incident. Fault liability when injury is

	Absolute liability channelled to 'any person' engaged in petroleum development activity, with only the defence of when the conduct of the claimant contributes to polluting incident under the AWPPA/AWPPR. Absolute liability under the IFA channelled to the operator. Absolute liability channelled to the operator with exculpatory provisions under the Fisheries Act for deleterious substance deposited. Operator has joint and several liability with contractors and sub-contractors who have fault-based liability.	Joint and several strict liability of lessee and permittee/ owner and operator where multiple parties contribute to the polluting incident.	liable with third party's liability. Fault liability channelled to third parties working for the employee who owe recourse liability to the licensee (only when licensee fails to compensate within the time stipulated by the court)		caused by the actions of the aggrieved.
TYPES OF RECOVERABLE DAMAGES	COGOA claims can be made by private persons for loss of income, including future income, and, with respect to any Aboriginal peoples of Canada, loss of hunting, fishing and gathering opportunities.	Under the OPA, removal costs can be claimed by the government or persons designated by the government.	Claims can be made under the PAA for damages (unspecified damages), damage or loss caused to fishermen as a result of reduced possibilities	Claims can be made under the MRA for personal injury or loss of dependency, damage to property, other financial losses not specified, compensation of reasonable costs of	Claims can be made under the EPL for harm to citizen's health and property damage. Compensation for environmental damage, cost of restoring the environment, and

	Claims can be made by the government for non-use value of public resources (environmental damage) caused by spill or measures taken in relation to curtail spill. Under AWPPA/AWPPR, claims can be made by private persons for actual loss or damage from deposit of waste (spill). Under IFA, claims can be made only by an Inuvialuit for loss of actual or future wildlife harvest that forms part of an aggrieved gross income or for sustenance, and claims for clean-up costs in the Inuvialuit region. Under the Fisheries Act, claims for loss of income by any licensed commercial fisherman and claims can be made by the government for costs and expenses for clean-up or	Damages can be claimed by the government or government entities designated by the OPA for damage to natural resources and cost of assessing the damage, loss of tax or revenues resulting from damage to real or personal property, and costs of providing additional public services as a result of the incident. Owner or lessee of real or personal property can claim damages under the OPA for injury to or economic loss from destruction of the property. A user of natural resources for subsistence can claim damages under the OPA for loss	for fishing, costs of measures used to prevent or limit damage or loss, as well loss or damage arising from such measures. Licensee will be liable to the State when registered Norwegian fishermen are compensated by the State for financial losses suffered due impeded fishing caused by the placement for the facility in a fishing area. Licensee will be liable for financial losses caused by pollution or waste suffered by registered Norwegian fishermen. Licensee will be liable for removal costs, costs for preventive or	measures to prevent damage or injury, mitigate pollution and restore the environment.	consequential losses caused by the environmental damage, including loss of profits, loss of hunting opportunities, damage to endangered species, and damage to aquatic resources. Claims can also be made for costs of response measures in responding to an oil spill incident.

	mitigating measures.	of subsistence use of natural resources without regard to the ownership or management of the resources. Any claimant can seek damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources (pure economic loss). Under the CWA, citizen suit can be made for personal injury, injury to property or the environment, but damages payable to government in the form of civil fines. Claims can be made under the CWA to recover	mitigative measures regarding the incident, and damage that arises from the preventive and mitigative measures.		

		attorney fees spent by the aggrieved. An aggrieved can seek injunction under the CWA against the responsible parties to mitigate effect of spill incident. Claims can be made under the CWA for losses caused as a result of the government or their authorised person in carrying out response or mitigative measures. Claimants are not precluded from bringing other claims for civil remedies not provided for under the legislative regimes, for example, damages for physical injury.			
LIMITS ON LIABILITY	Absolute liability under COGOA limited to	Strict liability of responsible	Unlimited strict liability.	No guidance towards how much	Strict liability to be compensated in full or in kind;

	$1billion, including spill response measures. No cap on damages and costs for spill response measures when fault liability is proven. No cap on fault liability that arises when government authorised persons appointed to manage spill incident cause further damage. AWPPA/AWPPR absolute liability limited to $40million. No cap on fault liability. No limits on liability for absolute liability under IFA. No limits on absolute and fault liability under the Fisheries Act.	party under the OPA can be limited to $134 million. No limit on fault liability. Settlement of claims out of the OSLTF is limited to $1 billion or the fund balance. Liability under the CWA is up to $25,000 per day of violation or an amount up to three times the costs incurred by the OSLTF, and liability for the claimants attorney fees as determined reasonable by the courts. Responsible party may limit liability under federal general maritime laws (Jones Act and LLA regime) to the post accident value of the MODU or FPSO.	Fault liability may be limited to the extent that is considered reasonable when a licensee's right to recourse against negligent third parties pass to an aggrieved if the licensee fails to settle the aggrieved within stipulated time.	compensation will be paid in strict and fault liability cases.	however, court may discretionarily order that liability be limited. Fault liability to the extent of the injured party's contribution to the injury.
ASSURANCE OF FINANCIAL RESPONSIBILITY	Holder of operating licence and any person	The OPA requires that the potential	The licensee is required to show proof of	The licensee may be required to	The operator is required to show financial

	authorised to carry out work in relation to the petroleum development activity are required to show proof of financial responsibility under the COGOA. Operator should show proof via a letter of credit, guarantee, or indemnity bond, which is set at $100 million (CAD), or if necessary, an amount greater as determined by the CER. Proof can also be shown by participating in an oil industry established fund maintained at a minimum amount of $250 million (CAD). No cap on the amount of financial responsibility that the CER may require from other authorised persons. Proof of financial responsibility is also required under the AWPPA/AWPPR, and the amount is determined by the Governor in Council and evidenced in the form of insurance	responsible party presents financial assurance in the form of an insurance policy, surety bond (issued by a company in the USA), guarantee, letter of credit, self-insurance qualification, or other evidence of financial responsibility that is approved by the President, at an amount set between $35 million (USD) to $150 million (USD). No requirement to maintain the amount for the duration of petroleum development.	financial responsibility in the form of an insurance cover, or another form approved by the MPE. Financial cover must be reasonable enough to cover the risks of petroleum development.	show proof of financial responsibility as part of the licensing conditions. The amount is determined by the MLSA and evidenced by insurance or in another manner approved by the MLSA.	guarantee in form of a bank guarantee, an insurance contract, or proof of the operator's reserve fund. The amount of financial guarantee is determined by the Rosendra and Rosprirodnadzor.

	or an indemnity bond. Amount is required to be maintained for the duration of petroleum development.				
ORDER OF CLAIMS	The COGOA and AWPPA/AWPPR gives priority to claims brought by any person for actual loss and damage before claims brought for costs and expenses for response and mitigation by the government. No priority indicated under the IFA and Fisheries Act.	Priority of claims only when compensation is being sought from the OSLTF—priority is given to claims for costs incurred by the State as a spill response measure before claims for damages brought by private persons. When the OSLTF is insufficient to pay all strict liability claims, it will prioritise claims for personal injury (or death) brought under the general maritime laws.	No provision for order of claims mentioned in the PAA.	No provision for order of claims mentioned in the MRA.	No provision for priority of claims in the RCC or EPL.
FORUM OF DISPUTE RESOLUTION	The Federal court and CER (in a quasi-judicial capacity) have original jurisdiction to	Claims can only be heard in any US district courts where the discharge or damage occurred, or	Claims to be heard in the courts in the district where the discharge has taken place or where the	No provision regarding competent forum for dispute resolution.	Claims are to be settled only through the courts.

	hear COGOA claims. AWPPA/AWPPR claims and claims under the Fisheries Act can be heard only in a Federal court of competent jurisdiction. Claims sought pursuant to the IFA can only be settled through mediation first and binding arbitration when mediation fails.	where the responsible party resides or have their principal place of business.	damage has occurred. Claims can also be heard elsewhere as decided by the PSA if the discharge of oil or damage has taken place in a location where there are no court districts, or if it is unclear which court has the jurisdiction to hear the action, or if the location of the damage is different from the location of discharge, or if damage has occurred in multiple court districts. Chapter 8 claims sought by licensed Norwegian fishermen to be settled in a commission set up by the King.		
LIMITATION PERIOD	The limitation period under COGOA is within three years from the date when the loss, damage, costs, or expenses	The limitation period for recovery of removal costs is within six years after	No limitation period contained in the PAA for compensation generally.	No provision regarding limitation period.	Only limitation period provided is in relation to claims for only damage to the environment.

	occurred and no longer than six years from when the spill first occurred. Limitation period under the AWPPA/AWPPR is two years from when the spill first occurred or could reasonably be expected to have become known to those affected. Claims sought under the Fisheries Act have a limitation period of no longer than two years from when the spill occurred. IFA claims have a three year limitation period from when the damage first occurred.	the date of completion of all removal actions and for all other claims for damages, claims can be made within three years from the day the injury and its connection with the incident was reasonably discovered.	Limitation period for loss contained in chapter 8—in relation to licensed Norwegian fishermen—within seven years after the occupation of such facility.		Whether or not other claims sought is time barred is to be determined by the courts.

APPENDIX 2: COMPARING THE PRIVATE INTERNATIONAL LAW REGIMES OF CANADA, USA, NORWAY GREENLAND (DENMARK) AND THE RUSSIAN FEDERATION

Table 2: Summary of the provisions of the domestic private international law regime of the five subject Arctic states based on jurisdiction, choice of law, and the recognition and enforcement of foreign judgments.

	USA	**CANADA**	**NORWAY**	**GREENLAND**	**RUSSIA**
JURISDICTION OVER PARTIES AND MATTERS WITH INTERNATIONAL ELEMENT	i. Alien Tort Statute (ATS) – under certain conditions ii. Jurisdiction will also be decided at the discretion of the court. iii. Transboundary Pollution Reciprocal Access Act (TPRA) 1982, between states in the USA and provinces in Canada who have enacted the Act into law. iv. Will consider reciprocal agreements.	i. Common law territories – courts will assume jurisdiction if a real and substantial connection of the defendant to the court is proved by the claimant. The *Mocambique* local action rule may apply as an exception in cases that has to deal with damage to property and proving title to property. ii. Transboundary Pollution Reciprocal Access Act (TPRA) 1982, between states in the USA and provinces in Canada who have enacted the Act into law.	i. The Norwegian Dispute Act (NDA) if the facts of the case have a sufficiently strong connection to Norway. 'Strong connection to Norway' is determined at the court's discretion. ii. Insurer of polluter can be sued directly if the insurer's business is domiciled in Norway. iii. Written agreement between parties for the court to have jurisdiction over such matter.	i. Determined at the discretion of the court under the 2008 Danish Act on Administration of Justice in Greenland (AJAG). ii. Will consider reciprocal agreements.	i. Determined at the discretion of the court, under the Civil Procedure Code (CPC) and the Russian Civil Code (RCC), if the source of the damage originates from Russia. ii. Will consider reciprocal agreements.

		iii. In Quebec Civil Code (QCC), court will assume jurisdiction in any instance proved in articles 3148(1)-(3). iv. In the provinces and territories where the Uniform Court Jurisdiction and Proceedings Transfer Act (CJPTA) applies, the courts will assume jurisdiction if an alleged tort has been committed in its province or territory. v. Will consider reciprocal agreements.	iv. Will consider reciprocal agreements.		
CHOICE OF LAW (PLACE OF ORIGIN VERSUS PLACE OF EFFECT)	i. Based on the legislation of the state where the court has jurisdiction. ii. Absent a legislation, discretion of the	i. In the common law provinces, courts employ the law of the place where the wrongful activity happens (while relying on the rationale	i. Norwegian PAA to applies to Greenland (by virtue of Denmark being party to the NEPC).	No law addressing the subject. Uncertain if the courts will consider	i. Under the RCC, the law of the country with which a civil legal relation complicated by a foreign factor is most closely

	court will be exercised based on any of the factors listed in the *Restatement on Conflict of Laws*. iii. Will consider reciprocal agreements.	in the *Tolofson* case). ii. in RCA enacting states, the law of the enacting states would apply to the substantive matters of transboundary pollution damage. iii. In Quebec, the law of where the harm occurs will apply. Subject to exceptions. iv. Will consider reciprocal agreements.	ii. Norwegians in adjacent sea areas will be governed by the PAA. iii. Choice of law to be relied on by a non-Norwegian from other Arctic countries is at the discretion of the court. iv. Will consider reciprocal agreements.	reciprocal agreements.	related shall apply. Also, when a word is not provided for in Russia, then an interpretation used in a foreign law may be applied. ii. Will consider reciprocal agreements.
RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENT	i. A foreign judgement can be recognised and enforced in the USA, as far as it is established that the conditions of hearing the case abroad are on par with what is applicable in the USA, based on the *Hilton* and the *Restatement (fourth) of the*	i. Each Canadian province and territory will recognise or enforce a foreign judgement according to its own on rules, in addition to the common law rules. ii. The provisions of	i. The provisions of the Norwegian Enforcement Act and the Norwegian Dispute Act (NDA) are to be considered before a foreign judgement can be recognised and enforced in Norway.	I. Will rely on the provisions of the AJAG for the reciprocal enforcement of a compensatory judgment made outside Greenland and Denmark. ii. Will consider	i. The provisions of the Civil procedural Code (CPC) on the recognition and enforcement of a civil judgement of a foreign court in Russia.

	Foreign Relations Law. ii. The 1962 Uniform Foreign Money Judgments Recognition Act or the 2005 Uniform Foreign-Country Money Judgments Recognition Act, only for monetary judgements and if enacted by a state. The 1962 Uniform Foreign Money Judgments Recognition Act is applicable in the state of Alaska. iii. Will consider reciprocal agreements.	the Foreign Judgment Act (FJA) in New Brunswick. iii. The provisions of the QCC in Quebec regarding recognition and enforcement. iv. Will consider reciprocal agreements.	ii. Will consider reciprocal agreements.	reciprocal agreements.	ii. Will consider reciprocal agreements.