First questionnaire from the

CMI Mobile Offshore Renewables Unit International Working Group Fall 2024

SPANISH MLA WORKING GROUP:

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Last year, the CMI established a new International Working Group (the "MORU IWG") (combining it with the Ship Nomenclature IWG) to explore legal uncertainties and potential gaps in international maritime law impacting a new and expanding class of offshore mobile units being developed, built, and used for offshore renewable energy projects in the waters of coastal states around the world— mobile offshore renewables units (or "MORU"). The MORU IWG now seeks to understand how the laws of various countries regulate (or would regulate) MORUs in various contexts, in order to determine common ground and best practices for recommendations to be offered to the CMI. In that context, the MORU IWG requests the input of each National Maritime Law Association ("NMLA") about the legal treatment of MORUs in several critical areas. Given the relative novelty of the technology in some jurisdictions, the MORU IWG has chosen to supplement this questionnaire with an attached Annex, which provides each NMLA with further background about MORUs generally, and additional context for the questions in the questionnaire more specifically.

Definition of Mobile Offshore Renewables Unit ("MORU")

For purposes of answering this questionnaire about MORUs, the MORU IWG has defined the term as follows:

> "Mobile Offshore Renewables Unit" or "MORU" means any non-self-propelled, floating offshore unit or facility consisting of:

(i) a ship-shaped hull, SPAR, semi-submersible, tension-leg platform, barge, or other buoyant hull concept; AND

(ii) all internal and topsides equipment permanently attached to that hull, provided that such floating offshore unit or facility:

(a) is primarily designed for the purpose of directly or indirectly generating electric power or other form(s) of renewable energy by conversion of wind, wave, tidal, or solar energy, or differences in water temperatures or salinity, or a combination of any of the

foregoing; OR

(b) is primarily dedicated to the conversion, transformation, conditioning, transmission, distribution, and/or temporary storage and subsequent release of electrical power or other form of renewable energy originally generated by one or more MORUs described in paragraph (a) above; OR

(c) is primarily dedicated to the conversion of any electrical power or other form of renewable energy generated by one or more MORUs described in paragraph (a) above into chemical products; OR

(d) is a hybrid unit combining the functions of two or more of the classes of units described in any of the paragraphs (a), (b), and/or (c) above.

- **Questions related to ownership and other property interests in MORUs**

Treatment of Domestic MORUs as property

1. Would the courts in your jurisdiction, recognize any (or all) of the categories of MORU as a "vessel" or "ship" or other "marine equipment" or other special type of property? If so, please explain with reference to authorities.

   Yes, MORUs could be considered naval artefacts as defined in art. 58 of the Spanish Shipping Act 14/2014 (hereinafter "SSA") (i.e., a floating construction with capacity capable of holding persons or goods, whose intended purposes is not the navigation but to remain situated in a fixed point at the sea). However, it is possible that some kinds of MORUs could be recognized as "vessels", "ships" or "fixed platforms" if they meet the requirements of arts. 56 and 57 or 59, respectively, of the SSA.

   Also, MORUs could be considered to be a "civil vessel" pursuant to art. 9 of the Royal Legislative Decree 2/2011 Of 5 September, approving the Revised Text of The Law On State Ports And Merchant Marine (hereinafter "SPA").

   Whether a MORU falls within any of these categories would depend on the nature and technical characteristics of the MORU itself together with their purpose of being permanently at a fixed point or not.

   a. Would the courts in your jurisdiction recognize any of the categories of MORU as a "vessel" or "ship" if it were equipped with an integrated dynamic positioning or other station-keeping system, (including any automated system, or remotely or autonomously directed system)?

      Being equipped with an integrated dynamic positioning or other station-keeping system is not one of the characteristics to be taken into consideration for defining a

vessel or ship under Spanish law.

2. Is it possible in your jurisdiction to record ownership interests in any (or all) of the categories of MORU in a public register?

   Yes.

   a. If so, would it be registered as a "vessel" or "ship" or other "marine equipment" or other special type of property? If so, please explain with reference to authorities.

      From a civil point of view:

      If the MORU is considered to be a naval artefact, a vessel or a ship, it should be registered as such within the Ships Section at the Register of Moveable Assets. If the MORU is deemed to be a fixed platform, it would be an immoveable assets (art. 59 SSA) and, as such, it should be registered in the Property Registry. There are also rules pertaining to Registry Law, that do not address the problems inherent to maritime law, such as art. 146 of the Commercial Registry Regulation of 1956, which considers all of them as "vessels".

      1. From an administrative point of view: SPA regulates the Register of Ships and Shipping Companies which is a public register of an administrative nature that aims to register the vessels flying the flag of Spain. As mentioned above, this legislative body may understand MORUs to be considered as civil ships and therefore, if flying the flag of Spain they need to be registered. This Register of Ships is legally developed by the Royal Decree 1027 / 1989 Of 28 July, Flag, Registration Of Ships And Maritime Registry ("Ships Registration Rules").

   b. If so, would it be registered in your jurisdiction's public register of ships, or in another public register?

      1. From a civil point of view:

         Naval artefacts and vessels to be registered in the Ships Section at the Register of Moveable Assets and Fixed platforms to be registered in the Property Registry.

      2. From an administrative point of view: In accordance with said SPA and the Ships Registration Rules, ships, naval artefacts and fixed platforms need to be registered in one of the Matriculation Records of the Vessels of the Provincial Headquarters of Merchant Marine as stated in art. 2 of Ships Registration Rules to fly the Spanish flag. However, the Ships Registration Rules might need to be amended to accommodate registration of MORUs.

   c. If it is registered in your jurisdiction (whether as a "vessel" or "ship" or other "marine equipment" or other special type of property), would it be entitled to fly the flag of your jurisdiction and be deemed to have that nationality? If so, please explain with reference to authorities.

      See point 2 of the response to the above question. Additionally, please notice that Art. 252 of the SPA states that duly registered vessels in Spain shall have, for all purposes, the Spanish nationality. Individuals or legal entities resident or domiciled in Spain or in other States belonging to the European Economic Area shall be entitled to obtain the registration and the flag of civil vessels provided that, in the latter case, they appoint a representative in Spain. Therefore, if the MORU is deemed to be such a vessel, it would be entitled to fly the Spanish flag and to have Spanish nationality.

3. Assuming that a MORU is the subject of leases, subleases, or charters (including demise charters) or sub-charters in your jurisdiction, is it possible to record such lease interests in any (or all) of the categories of MORU in a public register in your jurisdiction? If so, please describe. If so, please also describe the procedure to file such agreements or notice thereof.

   Yes, in our jurisdiction, lease interests and bareboat charters related to a MORU (Mobile Offshore Resource Unit) can be recorded in a public register, specifically in the Ships Section of the Register of Moveable Assets. According to Article 70 of the SSA the Register of Moveable Assets is intended for the registration or annotation of acts and contracts related to ownership and in rem rights over ships, vessels and naval artefacts must be registered in this section to provide legal security in their relations.

   However, it is important to clarify that while leases and Bareboat Charters are registrable (art.190 SSA), charterparty contracts such as time charters or voyage charters, are not eligible for registration. This is because charter-party contracts do not involve the transfer of possession of the vessel and do not create a lien or encumbrance on it.

   Procedure:

   The procedure for filing such lease agreements or bareboat charters is outlined in Articles 67 to 77 of the SSA. To register a lease or bareboat charter, the relevant documentation must be submitted, typically including the lease or bareboat charter agreement itself. The documentation must comply with the formal requirements established by the SSA, such as notarization and, where required, official translation. First the lease or bareboat charter agreement shall be registered within the administrative Register of Ships and Shipping Companies and then they can be registered at the Register of Moveable Assets.

4. In your jurisdiction, is the acceptance by a registrar or other governmental body of a MORU (or type of MORU) as a “ship” or “vessel” or equivalent term dispositive of its legal status as a “ship” or “vessel” or equivalent term under your law for purposes other than registration under domestic law?

   No, MORUs would be considered as ship or vessel or equivalent term provided that they meet the requirements stated in the applicable law for being considered as such.

5. Is it possible in your jurisdiction to record liens, maritime liens, claims, encumbrances (e.g. mortgages or hypotheques) against any such category of MORU in a public register? If so, please explain details and limitations on such register.

   Yes, provided that the MORU is deemed to be a vessel, ship or naval artefact, it is possible in the Spanish legal system to register with the Register of Moveable Assets security rights or similar rights in so far as they are documented as required to have access to the Register of Moveable Assets. Generally, a public deed executed between the parties or a public document, such as a court resolution, is required. For mortgages, a private contract is sufficient. In fact, when it comes to MORUs that have the status of ships, boats or naval artefacts, article 126 expressly recognizes the possibility to contract a Naval Mortgage against naval artefacts, being one of the few cases of constitutive registration (arts. 126 to 128 of SSA).

6. Is there any priority given to a registered creditor in such property in your jurisdiction? If so, please explain.

   Yes, to the extent such creditor has been granted with security over the registered asset (e.g.,

a mortgage), as the content of the Registry is presumed to be exact and valid and the legal principle of "*prior in tempore potior in iure*" (first in time, better in right) is of application in the Spanish registry laws and regulations. Also, Spanish insolvency law establishes that there are credits with special privilege, such as, among others, credits guaranteed with a registered mortgage.

Treatment of Foreign MORUs as property

7. Does your jurisdiction recognize ownership of any such property (i.e. any category of MORU) as evidenced by an entry in a public register of another jurisdiction?

   Yes, but subject to compliance with legalization of foreign the document of entry in a public register for the validity of foreign public documents.

8. If:

   (i) a MORU (or any type thereof) is categorized as a "vessel" or "ship" or other "marine equipment" or other special type of property in another jurisdiction and is registered and/or flagged as such in that jurisdiction, BUT

   (ii) the MORU would not be considered a "vessel" or "ship" under the domestic laws of your jurisdiction,

   would the courts or relevant authorities in your jurisdiction nonetheless treat the foreign- registered MORU as a "vessel" or "ship" for:

   a. purposes of arrest of the MORU? See below responses to questions related to arrest of MORU.

   b. purposes of foreclosure on a mortgage / hypothecation of the MORU?

      Art. 10 of Spanish Civil Code (hereinafter "CCiv") establishes that "Possession, ownership, and other rights over real estate, as well as its advertising, will be governed by the law of the place where they are located"; that "The same law will be applicable to movable property", and finally that "Vessels, aircraft and means of railway transport, as well as all rights established over them, will be subject to the law of the place of their flag and registration. Automobiles and other means of road transport will be subject to the law of the place where they are located...". This is a conflict rule that must be taken into account: Question "b" can be considered as referring to aspects that have directly to do with the real status of the MORUs, so it will be affected by the provisions of art. 10 CCiv. So, in the case of MORUs that are movable property, the determining factor will be the possibility that they may have a nationality, as they are objects that can be registered in a "ship's registry". For MORUs that have the status of "fixed platform", the determining factor will be the possibility that they may have -or may not- a nationality, as they are objects that can be registered in a "ship's registry".

   c. purposes of enforcement of maritime liens on the MORU?

      See answer to question 9 (a) below.

   d. any or all other purposes?

      No

   In the alternative, would your courts in such cases decline to enforce an asserted

claim or mortgage if the (foreign) MORU is not recognized as a vessel or ship in your jurisdiction?

Question "c" is more complex, as the answer could be found oscillating between belonging to the royal statute, or pertinent to the procedural field. In the first case, it would also be affected by the provisions of art. 10 CCiv. If, on the other hand, it is regaerded as a procedural issue, it will be necessary to take into account the provisions of Law No. 29/2015, of July 30, 2015, on International Legal Cooperation in Civil Matters, beginning with its art. 2nd, regarding the system of sources applicable to these procedural issues. The rules of the European Union and possible existing bilateral treaties will also have to be taken into account.

9. Would your jurisdiction accord the same priority of lienors and recorded creditors of a foreign- registered MORU as such lienors and creditors would have in the jurisdiction where the MORU was originally recorded or registered?

Yes.

a. If your jurisdiction is party to the International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages 1926 or the International Convention on Maritime Liens and Mortgages 1993, would your jurisdiction recognize a MORU as a “vessel” or “sea-going vessel” (respectively) for purposes of that Convention?

Yes. Spain is part of the International Convention on Maritime Liens and Mortgages 1993 (MLM 1993). As per art. 122 of the SSA MLM 1993 regime shall be applicable to ships, vessels and naval artefacts. Hence, MORUS would be treated as a “vessel” or “sea-going vessel” for the purposes of MLM 1993.

This is an imperative regulation and therefore, in Spain the legal regime of the MLM 1993 would be of application in respect of MORUs whether registered in Spain or at a foreign Register as a vessel, ship or otherwise (art. 13 of the MLM 1993).

10. What law would your jurisdiction apply to, or what law would it consider governing, a sale or a change of ownership of a foreign-registered MORU which is operated in the EEZ of your jurisdiction?

As explained below in the responses to the questions regarding innocent passage, the provisions of UNCLOS referring to "vessels" should also be understood as applying to "naval artefacts", hence to MORUS.

Therefore, in principle, jurisdiction over the sale of a MORU in the waters of the EEZ will lie with the Courts of a flag State, which will apply its domestic law (Art. 94.2.(b) UNCLOS).

Alternatively, if the MORU is deemed to be a vessel, a ship or a naval artefact, the sale would be regulated in Spain in articles 117 to 121 of the SSA. It is a dispositive regulation, not a mandatory one, and therefore, it will be necessary to abide by what has been agreed by the parties, including the possibility of the existence of an applicable law clause, the validity of which will be subject to analysis by the courts. In case no agreement between the parties has been reached, the sale should be analyzed to see whether there is any international convention to be applied such as the Rome Convention on the Law applicable to contractual obligations dated 19th June 1980 to which Spain is part of. According to art. 4 of said Convention stating that “To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be

governed by the law of the country with which it is most closely connected".

Would your answer vary (and if so, how would it vary) if the MORU was:

a. Foreign owned but not registered, or

b. operated in the territorial sea of your jurisdiction?

No.

11. Are there any reported decisions in your jurisdiction which address the legal classification (as "ship", "vessel" or other "marine equipment" or other special type of property) of:

a. MORUs (of any type);

b. Offshore wind turbines (fixed or floating);

c. Mobile Offshore Drilling Units ("MODUs");

d. FSUs and FPSOs

If so, please attach copies.

We are not aware of any reported decisions in our jurisdiction in this respect.

Questions related to arrest

1. Would it be possible to arrest, seize, detain, or otherwise proceed *in rem* or otherwise against a MORU for a maritime claim in your jurisdiction (whether under domestic law or binding convention)?

a. If so, on what grounds?

If the MORU is considered a vessel, then the 1999 International Convention and Arrests of Ships together with articles 470 to 486 of the SSA would apply. Whether the claim has a maritime lien attached to it will depend on whether the claim falls within the list of article 4 of the 1993 International Convention on Maritime Liens and Mortgages.

If the MORU is not considered to be a vessel, then arrest is only possible pursuant to the general domestic legislation on cautionary measures which allows, pursuant to article 727.1ª of our Procedural Act, to arrest any moveable property within the jurisdiction belonging to the debtor.

In this latter case, the claimant needs to show both the existence of a prima facie case on the merits (*fumus boni iuris*) and a risk that the potential judgment will be unable to be enforced (*periculum in mora*). This action is an action *in personam* and therefore requires that the debtor is the owner of the naval artefact.

b. Is the answer to this question determined by flag state law or the domestic maritime law of your jurisdiction?

Whether the MORU can be arrested and, if so, the applicable regime to that arrest falls to be determined by Spanish domestic legislation.

2. Is it possible to arrest, seize, detain, or otherwise proceed against a MORU for ***non***-maritime claims in your jurisdiction?

Pursuant to article 473 of the SSA a vessel flying a flag of a state that is not a party to the 1999 International Convention on Arrest of Ships can be arrested for any type of claim whether

maritime or not. If the vessel flies the flag of a Contracting State the vessel can only be arrest for maritime claims within the meaning of Article 1.

Therefore, if MORU is considered a vessel, the above would apply. Otherwise, pursuant to the general regime on precautionary measure the MORU would be subject to arrest for maritime and non-maritime claims.

3. If a MORU were arrested, seized, detained, etc. in your jurisdiction, would it be possible to obtain a release of the MORU from such arrest/detention on posting of an adequate security?

Both pursuant to the specific regime of arrest of vessels and the general regime on precautionary measures a vessel (or MORU, as the case may be) can be released against posting the security ordered by the Court, which can take the form of deposit by bank transfer into the Court or a bank guarantee of surety bond from a bank or Spanish Institution based in Spain.

a. If so, please provide authority.

Questions related to limitations of liability

1. Assuming that a MORU was <u>not</u> used for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof (cf. Art. 15(5) of Convention on Limitations of Liability for Maritime Claims, 1976), would the owner or salvor of a MORU benefit in your jurisdiction from the limitations of liability found in the Limitations of Liability for Maritime Claims, 1976 and/or its Protocols ("LLMC 1976/1996/2012?")?

In respect of the limitation of liability rights, Article 392 of the SSA generally submits to the provisions of the LLMC 1976 and its Protocol of 1996, along with the reservations made by the Kingdom of Spain, without prejudice to the specific provisions on this matter set out in Articles 392 through 405 of the SSA.

Article 394.2 of the SSA states that liability relating to (i) naval artefacts or (ii) fixed platforms built for exploring or exploiting the natural resources of the sea-bed or the subsoil, shall not benefit from limitations of liability. On that basis, if the MORU is considered a naval artefact or a fixed platform, the exclusion set out in Article 394.2 of the SSA will apply.

If the MORU is to be considered a vessel, and provided the other requirements from the limitation of liability right to apply (both at national and international law level) are met, then the owner of the MORU will benefit from limitation of liability right. Same conclusion applies in respect of salvors.

2. Assuming that a MORU is used to provide electrical power to *other* types of floating units or fixed or subsea facilities which were themselves exploring or exploiting the natural resources of the sea-bed or the subsoil thereof (cf. Art. 15(5) of LLMC), would the owner or salvor of that MORU benefit in your jurisdiction from the limitations of liability found in LLMC 1976/1996/2012?

We are not aware of any restriction to the limitation of liability right in that regard.

3. Would a MORU benefit from any other (non-LLMC based) forms of limitations of liability under the domestic law of your jurisdiction? If so, please explain with reference to authorities.

As stated in question 1 of this section, the limitation of liability for maritime claims is regulated under Spanish law by reference to the LLMC, its Protocol of 1996, along with the reservations

made by the Kingdom of Spain and Articles 392 through 405 of the SSA.

There is other limitation of liability rights (e.g., international convention on civil liability for oil pollution damage [CLC] or the international convention on civil liability for bunker oil pollution damage [Bunkers 2001]) which are also applicable in Spain but which are less likely to be relevant in respect of MORU-related activities. Whether a MORU will benefit from any such other non-LLMC based limitation rights will very much depend, among other factors, on the relevant basis and nature of the liability (i.e., whether it falls within the scope of application of the relevant piece of legislation setting out any such limitation rights) and, presumably, on the nature of the MORU itself (e.g., whether it is considered to be an eligible asset for the purposes of the relevant applicable law).

Questions related to innocent passage and transit

Prior to addressing all issues related to innocent passage and transit of MORUs through waters where Spain exercises sovereignty and jurisdiction, it is pertinent to note that the Spanish legislator, as early as 2014, opted to equate "naval artefacts" with "ships" for the purposes of applying the rules on navigation in Spanish waters (Article 6 of the SSA).

Thus, when those rules refer to "vessels," it must be understood that they also encompass "naval artefacts." In this regard, as already explained in another section of this questionnaire, under Spanish law, MORUs, as defined by the MORU IWG, could fall under the category of naval artefacts (Article 58 of the SSA). Consequently, the rules governing navigation in Spanish waters applicable to vessels equally apply to MORUs which are deemed to be naval artefacts.

1. Would a right of innocent passage be recognized in your jurisdiction for a foreign-registered MORU being towed through your jurisdiction's internal waters (cf. UNCLOS Art. 8(2))?

   Foreign MORUs may traverse Spanish maritime spaces, including internal waters, whether for lateral passage or for entering or exiting ports or terminals along the national coastline, in accordance with the provisions of the UNCLOS. This shall apply unless, for reasons justified under legislation concerning security, defense, customs, health, immigration, or due to maritime security and protection considerations, the Administration restricts or conditions their passage. Entering or sailing from a Spanish port will require authorization from Spanish Maritime Administration. Equally, a MORU being towed through Spanish Internal Waters would require authorization from maritime Administration irrespective of its flag.

2. Would a right of innocent passage be recognized in your jurisdiction for a foreign-registered MORU being towed through your jurisdiction's territorial sea (cf. UNCLOS Art. 17, 24(1))?

   Yes, foreign-registered MORUs, like foreign vessels, have the right of innocent passage through Spanish Territorial waters.

   a. Would your jurisdiction recognize its own criminal jurisdiction on board a foreign-registered MORU passing through your jurisdiction's territorial sea other than in accordance with UNCLOS Art. 27?

      Criminal jurisdiction shall primarily be exercised on board foreign-registered MORUs traversing Spanish Territorial waters in accordance with the provisions of UNCLOS. However, Spanish criminal jurisdiction may also be exercised on board a foreign-registered MORU traversing Spanish Territorial waters if so provided by the Organic Law of the

Judiciary as well as to exercise hot pursuit outside the territorial waters under the terms of the same UNCLOS and the European Union Regulations and the Spanish Criminal Code should the MORU be used in illegal activities (such as, for instance, smuggling).

b. Would your jurisdiction recognize its own civil jurisdiction on board a foreign-registered MORU passing through your jurisdiction's territorial sea other than in accordance with UNCLOS Art. 28?

No.

3. If there are straits used for international navigation in the waters adjacent to your jurisdiction, would a right of transit passage (or innocent passage) be recognized in your jurisdiction for a foreign-registered MORU being towed through that strait (cf. UNCLOS Art. 38, 45)?

Yes, in Spain, we have the Strait of Gibraltar, where foreign-registered MORUs have the right of transit or innocent passage as regulated in Part III of UNCLOS.

4. If your jurisdiction is an archipelagic State (within the meaning of UNCLOS Art. 46), would a right of innocent passage be recognized in your jurisdiction for a foreign-registered MORU being towed through your jurisdiction's archipelagic waters (cf. UNCLOS Art. 52))?

N/A

Question related to sovereign immunity and rights of owners or creditors to remove property from established MORU operations

1. In your jurisdiction, does the sovereign prohibit by law the arrest, repossession or seizure by a creditor of property under lease or contract with an organ of the state (such as a public utility)?

The business activity of production, distribution and marketing of energy is free market based. It is not performed by the State nor by any private or public legal entity. It is a regulated activity, though, with strong financial requisites to private operators for access to the licence.

The law does not expressly prohibit the seizure of property deployed in private-owned energy production sites, but that situation could have an impact to the operator's licence and bring penalties if it affected the continuity and security of the power supply.

Energy production is acknowledged as "public utility" only for the purpose of compulsory expropriation of third party owned property (usually, real estate) when such property is needed for commissioning the site or for upgrading or substituting an existing installation (Art. 54 and 55 of Act 24/2013 on Power Industry). The need for expropriation should be justified by the operator in the construction project and approved by the authorities after hearing from the owners of such property. In our view, this privilege on property would not affect assets which are itself object of economic exploitation, such as MORUs.

2. In your jurisdiction, may the sovereign/state waive immunity by contract for the benefit of creditors or lienors seeking to recover leased property (e.g. a leased MORU) or damages in the event of a default by the sovereign or another responsible party under a contract or lease to produce or supply energy to a sovereign- or state- owned entity?

Not applicable. As advised above, production of power energy is left to private operators and privileges on third party property would not include MORUs.