

*After the Prestige Oil Spill: Measures Taken by Spain in an Evolving Legal Framework**

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INTRODUCTION

In supporting the freedom of navigation principle, *Grotius* argued in 1609 that navigation was an innocuous activity, causing neither danger nor harm to any State.¹ Further evolution has proven *ad libitum* that, whatever the merits of the said principle might be, *Grotius'* assertion cannot be held true nowadays.

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¹ Huig de Groot, (1609), *De jure praedae commentarius, ex Auctoris Codice descriptis et vulgavit*, H.G. Hamaker, *Hagae Comitum*, 1868, p. 228.

When the United Nations Convention on the Law of the Sea (UNCLOS) was adopted in 1982, it was already evident in practice that maritime transport of oil might have severe adverse effects for the environment and the economic interests of the affected coastal States, as a source of operative and accidental pollution. However, UNCLOS confirmed the paramount rank of the freedom of navigation principle, and the correlative outstanding role of the flag State with respect to its exercise, while trying to strike some balance by upholding the prescriptive and enforcement powers of coastal States and, mostly, port States.²

In the absence of adequate preventive and protective international rules, coastal States have resorted in the past to unilateral measures, such as the ones adopted by Canada in 1975, through the Arctic Waters Pollution Prevention Act,³ by the USA in 1990, through the Oil Pollution Act, and by the European Union in 1995 after the accident of the *Erika* on the French coast. The reaction of coastal States affected by oil spills after a long series of increasingly catastrophic accidents shows that they are no longer willing to suffer similar environmental and economic disasters in the future. The fact that there is no coastal State free from the risk of being polluted by oil resulting from the operation of vessels, as well as the increasing frequency of oil spills with catastrophic environmental and economic dimensions, also support the trend towards the adoption of stricter internationally agreed measures concerning safer navigation of vessels devoted to oil transport.

We shall summarize hereafter the main measures taken by Spain and other coastal States after the accident of the oil tanker *Prestige* and further actions promoted in regional (European Union, EU) and global organizations (International Maritime Organization, IMO), in order to improve the existing international legal framework.

² We do not intend to review here the extent of the powers granted by UNCLOS to the different categories of States concerned with freedom of navigation with respect to pollution from ships; in Spanish legal doctrine this question has been examined *inter alia* by: Juste Ruiz, J., *Derecho internacional del medio ambiente*, Madrid (McGraw-Hill) 1999, pp. 167–175; Bou Franch, V., “Riflessione sulle misure di prevenzione dell’inquinamento marino dopo l’incidente della *Prestige*”. In: M. C. Ciriello (ed.), *La protezione del Mare Mediterraneo dall’inquinamento. Problemi vecchi e nuovi*, 2003, Ed. Scientifica, Napoli, pp. 27–70. See also, with respect to the *Prestige* accident: *Revista Española de Derecho Internacional*, vol. LV-2003, n. 1, with articles by Fernández De Casadevante Román, C.; Fernández Tomás, A.; Juste Ruiz, J.; Pueyo Losa, J./Lirola Delgado, I./Jorge Urbina, J.; Sobrino Heredia, J.M.

³ According to the declaration made by the Canadian Prime Minister, Mr. *Pierre Trudeau* in support of the Act: “Where no law exists, or where law is clearly insufficient, there is no international common law applying to the Arctic Seas, we are saying somebody has to preserve this area for mankind until the international law develops. And we are prepared to help it develop by taking steps on our own and eventually, if there is a conference of nations concerned with the Arctic, we will of course be a very active member in such a conference and try to establish an international regime. But, in the meantime, we had to act now”. *ILM*, 1970, p. 600.

I. RESPONSE TO THE OIL SPILL AND SUBSEQUENT MEASURES

1. Intervention at sea and contingency action

Intervention in the event of an accident at sea which might cause pollution damage to a coastal State, in order “to take and enforce measures”, is permitted by international law only when a maritime casualty has occurred or the threat of it is “imminent” (UNCLOS, Article 221).⁴ This attributive rule has nonetheless serious shortcomings, namely: it leaves to the ship’s Master the power to decide at which moment a “casualty” is declared; it does not provide for preventive notification of the risk to the coastal State; and it only permits the coastal State to intervene once the pollution or threat of pollution “following” upon a maritime casualty may reasonably be expected to result in “major harmful consequences”.

In the case of the *Prestige*, the “Mayday” was given by the Captain on Wednesday 13 November 2002, at 15.30 hours, when the ship was approximately 28 miles off the West Coast of Galicia (Spain) in severe stormy weather conditions. The tanker started listing and leaking significant amounts of heavy fuel oil while it was some 30 km off Cape Finisterre. The ship was in danger of sinking because of a 35 metre crack in the starboard side of the hull. Whatever the term employed for the description of the situation could be (incident, accident, emergency, distress), it does not seem dubious that it constituted a “casualty” empowering the coastal State to adopt prescriptive and enforcement measures under Article 221 of UNCLOS and the 1969 Intervention Convention.

Upon the request of the Captain, the Spanish maritime authorities airlifted off the crew, with the exception of the Master and two other crew members who stayed on board to receive the assistance of a tug, before also being airlifted off. Following instructions from the owner and his insurer, the Dutch salvage company “SMIT” took control of the vessel. The ship was towed to open seas, and while there were on-going discussions about where it could find a safe haven to transfer its cargo to another ship, the situation deteriorated on board. Over the following five days the tanker in distress was towed first to the North-East, until approaching nearly three miles off the coast, then to the North-West departing some 90 miles from the shore and then South and South-West to the outer part of the Spanish EEZ. During its erratic itinerary, in a situation described as “close to sabotage”, the ship released an estimated 25,000 tonnes of its heavy fuel oil cargo, producing a catastrophic impact on the neighbouring west coast of Galicia and on the North Coast of Spain, France, and Portugal.⁵ The *Prestige* sank on 19 November

⁴ See also: International Convention relating to Intervention in the High Seas in Cases of Oil Pollution Casualties, 1969, as amended, and Protocol relating to Intervention in the High Seas in Cases of Pollution by Substances other than Oil, 1973.

⁵ Traces of oil were detected even in the United Kingdom (the Channel Islands, Isle of Wight and Kent).

2002 some 260 km west of the Spanish coast with some 13,800 tonnes of heavy oil in its tanks.

According to the IMO Convention on Oil Pollution Preparedness, Response and Co-operation of 1990 (OPRC Convention),⁶ the ship should have applied its own onboard contingency plan, something that became difficult once the members of the crew were airlifted off immediately after notification of the casualty. Spain applied its own National Contingency Plan on Marine Pollution established, in application of the OPRC Convention and Article 87 of the Spanish Ports and Merchant Shipping Act, by a Ministerial Order of 23 February 2001.

The implementation of the Spanish National Contingency Plan on Marine Pollution in the case at hand has given rise to much controversy, both technical and political, principally concerning the option taken by the Spanish Government to tow the *Prestige* away from the Spanish coasts.⁷ Whereas this type of decision is always open to criticism, several elements should be taken into consideration when legally assessing the option taken by the Spanish authorities. In the first place, the duty of the coastal State to render assistance (Article 98.2 of UNCLOS) does not in any way require it to take one specific course of action such as, for instance, towing a ship in a casualty situation to a place of refuge in or near its coasts. Moreover, at the time of the accident, there were no global, regional or national rules imposing legal obligations with respect to places or ports of refuge⁸ on coastal States. With that in view, given the circumstances of this case,⁹ and considering the consistent international practice in cases such as this,¹⁰ it should not come as a surprise that Spain exerted its right to order the ship far from the Spanish coast. The right to protect “their coastline or related interests, including fishing” from pollution or threat of pollution constitutes the ultimate interest of the coastal State when dealing with maritime casualties, as recognized in Article 221.1 of UNCLOS. If, in the case of the *Prestige*, this right was exerted beyond all rea-

⁶ Spain ratified the OPRC Convention on 3 December 1993 (*Boletín Oficial del Estado*, 5 June 1995).

⁷ For a quite complete legal assessment of the implementation of Spain’s 2001 National Accidental Sea Pollution Contingency Plan in the case of the *Prestige* catastrophe see Meilán Gil, J. L., (Director), *Problemas jurídico-administrativos planteados por el Prestige*, Thomson-Aranzadi, 2005, pp. 121–143.

⁸ As an informative document of IMO recognizes “these provisions (of UNCLOS, SOLAS, and the SALVAGE Conventions) do not themselves give a right to entry into a place of refuge, nor do they explicitly refer to the question of a coastal State’s obligation to establish places of refuge. On the other hand, neither do they preclude such a principle”. See “*Places of refuge*” – *addressing the problem of providing place of refuge to vessels in distress* (available at: <<http://www.imo.org>>).

⁹ That is, mainly: poor navigability of the ship, collapse of the engines, extremely bad weather conditions, increasing risk of sinking, specially noxious character of the cargo, increasing amount of the oil spill, absence of advisable places or ports of refuge, opposition by local authorities and populations, etc.

¹⁰ The action taken by Spain with respect to the casualty of the *Prestige*, directing it far away from the Spanish coastline, constitutes common practice in the field. One

sonable standards,¹¹ this would only be determined, absent any claim for the responsibility of Spain for an international wrongful act, when a final decision is taken in the proceedings pending before national Courts, in Spain and abroad.¹²

The type of oil carried by the *Prestige* was very persistent and difficult to clean up, and it took a massive amount of national and international cooperation, both by Government officials and by civil volunteers, to cope with the pollution caused by the disaster. Major clean-up operations were carried out at sea and on shore in Spain using vessels from Spain and nine other European countries and collecting around 141,000 tonnes of oily waste. After completing these clean up operations on the Spanish coasts, removal of the oil from the wreck was successfully achieved between May and October 2004 by the Spanish oil company Repsol YPF.¹³ The cargo remaining in the wreck was removed using aluminium shuttle containers filled by gravity through holes cut in the tanks. Some 13,000 tonnes of heavy fuel oil were removed from the forepart of the wreck and approximately 700 tonnes were left in the aft section and treated with biological agents aimed at accelerating the degradation of the oil. The estimated cost of this operation was 100 million.

Whatever the final judgement about the efficiency (or inefficiency) of the contingency action developed by the Spanish authorities in executing the National Contingency Plan should be, it should be recognized that two years after the catastrophe, clean up operations have been completed and the remaining fuel on the wreck has been successfully removed and transferred to land. In addition, as we shall see later on,¹⁴ economic aids and other promotional measures to alleviate the situations of those affected have been implemented, and payments for compensations for damages have been anticipated to victims.

2. Unilateral and bilaterally agreed measures concerning certain oil tankers

The first strictly unilateral legal measure adopted by Spain after the accident of the *Prestige* was the enactment of Royal Decree-Act No. 9/2002, of 13 December

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significant case occurred in December 2001–January 2002, when the damaged tanker *Castor* was towed around the Mediterranean Sea for over a month before a place could be found where a successful lightering operation could be carried out. See: “*Places of refuge*” – addressing the problem of providing place of refuge to vessels in distress. *doc. cit.*

¹¹ Art. 300 of UNCLOS provides that States Parties “shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner that would not constitute an abuse of right”.

¹² See *infra*. II, 3.

¹³ The ambitious operation for the recovery of the oil in the wreck was completed on 27 October 2004 “with a degree of success that surprised even those responsible for the extraction”. Lloyd’s List, 15 November 2004 (n. 58788), p. 10.

¹⁴ *Infra*, II, 2.

1992.¹⁵ According to this Royal Decree-Act, from 1 January 2003 onwards the entering into Spanish ports of single hull oil tankers, flying whatever flag, and carrying heavy fuel oil, tar, bitumen or heavy crude oil is forbidden and, in case of violation of the ban, sanctioned with a fine of up to 3 million. As far as this legal measure concerns exclusively the entering into Spanish ports and does not affect international navigation through other Spanish maritime zones in any other way, its conformity with International Law is not questioned.¹⁶

Yet, before the oil spill caused by the *Prestige* reached the French Atlantic coasts,¹⁷ Spain and France held their fifteenth bilateral summit at Malaga (Spain), on 26 November 2002. On this date, the competent Ministers of the two States issued a Joint *Communiqué*¹⁸ starting with the assertion that both States coincided in considering the “unavoidable necessity” of adopting measures in order to impede in the future the repetition of ecological disasters caused by “substandard” oil tankers such as the *Erika* on the French coasts or the *Prestige* on the Spanish coasts. The agreement reached by both States implied the undertaking to promote different measures that should be adopted by different international organizations, such as the European Union, the IMO or other international fora, as well as the adoption of immediate measures by the two States. The first paragraph of point 4 of this Joint *Communiqué* stated that Spain and France agreed to elaborate proposals, in the field of the International Law of the Sea, allowing Member States acting as coastal States to control on a non-discriminatory basis and, if necessary, to limit the traffic of ships carrying dangerous goods within the exclusive economic zone. Its second paragraph provided for immediate information and intervention measures with respect to certain oil tankers, as it stated the following:

¹⁵ This Royal Decree-Act was published in the Spanish *Boletín Oficial del Estado*, 14 December 2002, No. 299.

¹⁶ Article 112 of the Spanish Act No. 27/1992, of 24 November 1992, concerning National Ports and Merchant Shipping states that: “In order to protect the safety of navigation and prevent pollution of the marine environment in waters over which Spain exercises sovereignty, sovereign rights or jurisdiction, the Ministry of Public Works and Transport, through the ports authorities and the harbour-Masters’ offices, may visit, inspect, search, seize, initiate legal proceedings and, in general, take any steps deemed necessary in respect of ships which infringe or may infringe those legal rights”. Before the *Prestige* accident took place, Spain had never invoked Article 112 of this Act as a legal basis for the expulsion of any oil tanker from its exclusive economic zone. In fact, before the accident of the *Prestige*, Spain had never expelled any foreign vessel from its maritime zones.

¹⁷ On 31 December 2003, the pollution provoked by the *Prestige* oil spill reached the French coasts and the first lumps of oil were washed up on the beaches of the Landes and the Gironde. A week later, more than 200 km of the French Atlantic coastline from the Spanish border to L’Île d’Yeu were affected.

¹⁸ This text has not been officially published in Spain. The authors thank the *Comisionado del Gobierno para las actuaciones derivadas de la catástrofe del buque Prestige* for his readiness to provide them with a copy of this document.

“Spain and France agree to establish a firm control, in their exclusive economic zones, of all ships more than 15 years old, single hull, carrying fuel and tar, when they suppose a risk for the protection of the marine environment. For this aim, Spain and France will establish a system of detailed information at the entrance of their exclusive economic zones allowing, in cases where doubts exist, an exhaustive control of the ship in the sea, the result of which could mean the obligation of leaving the zone. Spain and France will ask the European Union to study the conditions for the generalization of this measure”.¹⁹

In fact, the first news about this agreement was given at the press conference held jointly by the President of the Spanish Government, Mr. *José María Aznar*, and the President of the French Republic, Mr. *Jacques Chirac*, at the end of the fifteenth Spanish-French Summit. At this press conference, the President of the Spanish Government began by declaring that:

“Today Spain and France have wished to take a new step forward, so we will adopt jointly agreed measures in our respective exclusive economic zones. Hence, we have decided that, from tomorrow onwards, ships built more than 15 years ago, with a single hull, carrying fuel or tar, not equipped with mechanisms for measuring the level and pressure of oil and representing a threat for our coasts, will be exhaustively controlled”.

This may give rise to the expulsion of these ships from the exclusive economic zone if they constitute a danger, except if the authorities of these ships give all the complete information about their cargo, their destination, the documents concerning their flag States, the detailed information on all the operators and all the operations affecting the transport that they are carrying out and that there is within those ships. In cases of doubt, the pertinent State’s specialist will carry out an inspection, and of course, if needed, there will be the pertinent consequences if the due securities are not given, including the decision of expulsion from the exclusive economic zones of France or Spain.

All this is based on Article 56 of the United Nations Convention on the Law of the Sea²⁰ and it will enter into force in our exclusive economic zones from tomorrow onwards”.²¹

¹⁹ Private translation.

²⁰ An additional legal argument was introduced on 30 December 2002, when the Spanish Ministry on Transport and Public Works, Mr. *Francisco Álvarez-Cascos*, during his intervention before the Infrastructures Commission of the Spanish Congress, declared that: “the Spanish Government, as well as the French Government, applying Articles 56 and 73 of the Convention of the United Nations on the Law of the Sea, began immediately to impede the entrance in their exclusive economic zones of those ships that, due to their characteristics and cargo, may produce an adverse effect on the marine environment” (emphasis added). Private translation. See the document *Congreso de los Diputados*, (30 December 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras*. Cit.

²¹ Private translation. See *Conferencia de prensa del Presidente del Gobierno, Don José*

At the same press conference, the President of the French Republic, Mr. *Jacques Chirac*, added the following:

“Moreover, we have decided, I wish to remind you, that from tomorrow onwards all ships with doubtful characteristics (single hull, more than 15 years old, carrying heavy fuel or tar) and dangerous for ecosystems can be checked and, in cases of infringement of the rules, excluded from our 200 mile zones. We will propose to Copenhagen (European Council) the extension of these measures to the European countries as a whole, so that they can join us”.²²

It is also interesting to note that during this press conference, a journalist asked whether this new proposal was in conformity with International Law and, if this was the case, why it had not been adopted until that moment. The President of the French Republic, Mr. *Jacques Chirac*, answered this question, saying that:

“A moment ago, the President of Government, Mr. *Aznar*, commented that this decision is based on Article 56. Why was this policy not proposed before? I think that it is, simply, because we have an International Law of the Sea that is a kind of historic monument, conceived for guaranteeing an absolute freedom of navigation through all the seas in the world and that it was difficult to criticize such a monument. Moreover, decisions were in general taken at the International Maritime Organization. As you know, there the corridors are

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María Aznar, y del Presidente de la República Francesa, Jacques Chirac (Málaga, 26 November 2002), 4 pp. The original Spanish document is available at: <<http://www.la-moncloa.es>>.

²² Private translation. *Ibid.* These declarations were published on a widespread basis. Two official notes dated the 26 November 2002 from the Spanish Ministry for the Presidency and from the Spanish First Vice-Presidency of the Government stated, with the same wording, that: “the President of the Government, *José María Aznar*, and the President of the French Republic, Mr. *Jacques Chirac*, have agreed today, during the Spanish-French Summit held at Malaga, to implement from tomorrow onwards exhaustive controls for ships more than 15 years old that navigate through the zone of exclusion of 200 marine miles and carrying dangerous goods such as fuel, tar or of any other type and that represent a threat for the coasts of the two States. This decision, adopted by both countries, could give rise to the expulsion of the ship navigating through this area, except when the authority of the ship offers all the information required, such as the information concerning their cargo, operators and destination. In cases of negative answers, both States will adopt measures against them, which may include the expulsion of these ships from the exclusive economic zones of both countries. The decision adopted today by both States has its legal basis in Article 56 of the United Nations Convention on the Law of the Sea”. Private translation. All declarations and notes issued by the Spanish Ministry for the Presidency are available at <<http://www.mpr.es>>. All declarations and notes issued by the Spanish First Vice-Presidency of the Government are available at <<http://www.la-moncloa.es>>.

shared depending on the tonnes transported and this, of course, gives the responsibility for taking decisions mainly to those States with a flag of convenience.

Today we have decided that what has already taken place is enough. As far as our two countries are concerned, in a way that is in perfect harmony with International Law, we have adopted this initiative and we ask our partners to do so too. As far as we are concerned, this decision is irrevocable”.²³

As the declarations made by the President of the Spanish Government at the press conference following the bilateral Spanish-French Summit reveal, the actions contemplated by France and Spain were directed only against a very particular kind of oil tanker, that is, “ships built more than 15 years ago, with a single hull, carrying fuel or tar, not equipped with mechanisms for measuring the level and pressure of oil and representing a threat for our coasts”. It is interesting to note that these actions were not directed only at vessels flying a flag of convenience (which in fact is what takes place in most of the cases), but against any vessel that meets the envisaged conditions, irrespective of the flag it flies. Unlike in the case of fisheries, in the case of doubtful oil tankers it is not the lack of control of the flag State that causes the environmental risk or threat, but the mere presence of these vessels within the exclusive economic zones. Hence, in the opinion of France and Spain, it is the need to avoid this environmental threat that justifies the expulsion of any oil tanker that meets these conditions from their exclusive economic zones.

Spain and France immediately implemented the decision to expel this particular kind of oil tanker from their exclusive economic zones. Spain expelled from its exclusive economic zone the following tankers: on 30 November 2002, the single hull oil tanker *Moskowsky Festival*, flying the flag of Malta;²⁴ on 4 December, the oil tanker *Evgueny Titov*, also flying the flag of Malta;²⁵ on 9 December, the oil tanker *Teekay Foam*, flying the flag of the Bahamas;²⁶ on 10 December, the oil

²³ Private translation. See *Conferencia de prensa . . . cit.*

²⁴ “The President of the Government, *José María Aznar*, announced today that last night the first expulsion from Spanish territorial waters of a vessel that did not comply with the conditions agreed with France after the oil spill of the *Prestige* took place. It is the *Moskowsky*, an oil tanker flying the flag of Malta, more than 15 years old, single hull, carrying fuel and whose destination was Gibraltar. The Spanish Government has recommended that the Portuguese authorities move it further away from the 200 miles from its coasts, as Spain has done following the bilateral agreement signed with France for the protection of the waters of the two countries against the transport of dangerous goods during the last bilateral summit at Malaga”. Private translation. See the document Vicepresidencia Primera del Gobierno, (1 December 2002): *El Gobierno informa. El barco Moskowsky, de bandera maltesa, fue expulsado de la zona económica exclusiva española*, 6 pp.

²⁵ See the document Vicepresidencia Primera del Gobierno, (4 December 2002): *El Gobierno informa. Nota 49. Más de 8.200 toneladas recogidas ya en el mar*, p. 1.

²⁶ See Ministerio de Defensa, (9 December 2002): *Nota de prensa del Ministerio de*

tanker *South Trader*, flying the flag of Liberia;²⁷ on 11 December, the oil tanker *Byzantio*, flying the flag of Malta;²⁸ on 18 December, the tanker *Néstor C*;²⁹ on 21 December, the oil tanker *Stmichaelis*, flying the flag of Greece and, once again, the *Moskowsky Festival*;³⁰ on 30 December the expulsion of other three oil tankers (the *Majory*, flying the flag of Malta; the *Kriti Filoxenia*, flying the flag of Greece; the *Aquarius*, flying the flag of Belize) was announced;³¹ etc. France reacted in a similar way.³² Only one flag State affected by these measures, Greece, issued a diplomatic protest against these expulsions.

Spain also succeeded in getting other European States (Portugal, Italy and Germany) associated with the Spanish-French decisions not to allow the navigation of sub-

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Defensa: La Armada ha expulsado hoy de aguas españolas al petrolero "Teekay Foam", 1 p.; and Vicepresidencia Primera del Gobierno, (9 December 2002): *El Gobierno informa. Nota 63. España expulsa de sus aguas a otro petrolero por no cumplir las normas de seguridad*, 6 pp. All the declarations and notes issued by the Spanish Ministry on Defence are available at <<http://www.la-moncloa.es>>.

²⁷ See the document *Congreso de los Diputados*, (10 December 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras*, p. 12.

²⁸ See the documents *Xunta de Galicia. Oficina Informativa Comisión Seguimiento Prestige*, (11 December 2002): *Nota 68. Se amplía el Real Decreto de ayudas a los afectados a las Comunidades Autónomas de Asturias, Cantabria y País Vasco*, 1 p.; and Vicepresidencia Primera del Gobierno, (13 December 2002): *El Gobierno informa. Nota 75. El Gobierno amplía las ayudas a Asturias, Cantabria y País Vasco*, 4 pp. All the declarations and notes issued by the regional government of Galicia and by the *Oficina Informativa de la Comisión de Seguimiento del Prestige* are available at <<http://www.xunta.es>>.

²⁹ See *Ministerio de Fomento*, (19 December 2002): *El Gobierno informa. Las Autoridades Marítimas españolas prohíben la entrada del buque "Néstor C" en puerto español*, 2 pp.

³⁰ See *Xunta De Galicia. Oficina Informativa Comisión Seguimiento Prestige*, (21 December 2002): *Nota 95. Un patrullero de la Armada impedirá la entrada en aguas españolas a dos buques mercantes monocasco*, 5 pp.

³¹ See the document *Congreso De Los Diputados*, (30 December 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras*, *cit.*

³² For instance, "A destroyer from the French Navy navigates with the *Enalios Titan*, a single hull oil tanker, built in 1978 and carrying 81.185 tonnes of fuel oil in order to abandon the French economic zone. Moreover, the French authorities have informed this tanker that, due to the agreements signed by France and Spain at Malaga, it cannot enter into the Spanish exclusive economic zone. If this tanker does not comply with this order and tries to enter into the Spanish exclusive economic zone, the frigate *Baleares* is ready to force it to retire from the Galician coasts". Private translation. See the documents *Vicepresidencia Primera del Gobierno*, (3 December 2002): *El Gobierno informa. Nota 47. Francia y España expulsan a un buque de bandera de Malta cargado con 81,185 toneladas de fuel-oil*, pp. 1–2; and *Ministerio De Defensa*, (4 December 2002): *Nota de prensa del Ministerio de Defensa: Colaboración de las Fuerzas Armadas en la protección de la costa gallega*, 2 p.

standard oil tankers within the 200 mile limit.³³ A “Joint Spanish-Italian Declaration concerning safety of transport in oil tankers”, signed on 17 March 2003 by the Spanish Ministry on Transport and Public Works, Mr. *Francisco Álvarez-Cascos*, and the Ministry on Infrastructures and Transport of the Italian Republic, Mr. *Pietro Lunardi*, stated that:

“Both countries will help each other in the adoption of measures in conformity with the International Law of the Sea allowing to limit on a non discriminatory basis the traffic of vessels transporting dangerous and polluting goods within the 200 mile limit from their coasts. This initiative pretends to reduce the risk and the consequences of an accident as much as, in average cases, to assist the vessel without danger for the environment, thanks to the remoteness from the coasts of those special transit routes.

To this aim, Spain and Italy will establish a system of detailed information at the entrance of their exclusive economic zones in order to allow, in cases where doubts exist, an exhaustive control of the ship in the sea. Spain and Italy will ask the European Union to study the conditions for the generalization of these measures. (. . .)

The transport of heavy crude oil and fuel oil, as well as bitumen and tar will only be allowed in double hull oil tankers. Spain and Italy reaffirm their aim to ensure, initially through domestic measures, not to allow the entrance of single hull oil tankers carrying cargoes such as the afore-mentioned into their ports, anchorage and transfer places. Both States undertake to work for the quick adoption of these measures by the European Union and jointly or subsequently by the IMO”.³⁴

³³ At the press conference held jointly by the President of the Council of Ministers of the Italian Republic, Mr. *Silvio Berlusconi*, and the President of the Spanish Government, Mr. *José María Aznar*, at the end of the bilateral Italian-Spanish Summit on 28 November 2002, the Spanish President stated that: “President *Berlusconi* knows the letter that I have sent to the President of the (European) Commission and also to all my colleagues in the European Union. President *Berlusconi* has told me that he assumes the contents of this letter as his own and that, moreover, Italy is ready to accede to the agreement between France and Spain, agreement to which Portugal has acceded this morning in a conversation that I have held with the Portuguese Prime Minister”. Private translation. See *Conferencia de prensa del Presidente del Consejo de Ministros de la República Italiana, Silvio Berlusconi, y del Presidente del Gobierno, Don José María Aznar (28 November 2002)*. The Spanish text of this document is available at <<http://www.lamoncloa.es>>.

³⁴ See the document *Ministerio de Fomento, (17 March 2003): El Gobierno informa. El Ministro de Fomento y el Ministro de Infraestructuras y Transportes de Italia firman la “Declaración Hispano-Italiana sobre la seguridad del transporte en buques tanques”*, 4 pp. This document is available at: <<http://www.mfom.es>>.

3. Subsequent action promoted at the EU and the IMO

As announced at the press conference closing the bilateral Summit of Malaga, France and Spain tried to give a larger scope to the bilaterally agreed measures, by seeking the support of the European Union (EU)³⁵ and promoting their adoption by the competent instances of the International Maritime Organization (IMO).

a) *Regional measures: the case for the European Union*

On 21 November 2002, only eight days after the *Prestige* accident took place, the President of the Spanish Government wrote a letter to the President of the European Council, the President of the European Commission and to all Prime Ministers and Heads of State of the European Union proposing the urgent adoption of several measures in order to improve the safety of navigation.³⁶ The European Commission also reacted speedily and on 3 December 2002 adopted a Communication on improving safety at sea in response to the *Prestige* accident,³⁷ which recommended a series of measures for the further development and strengthening of the so called *Erika I* and *Erika II* packages.³⁸

Following these legal initiatives, the Council of Ministers on Transport, Telecommunications and Energy (the “Transport” Council) held at Brussels on 5–6

³⁵ At the press conference closing the bilateral Spanish-French Summit at Malaga, the President of the Spanish Government declared that: “As you know, I have written firstly to the President of the European Council, Mr. *Rasmussen*, and to the President of the European Commission, and in the same way I have written a letter to all the Prime Ministers and Heads of State of the European Union, proposing the urgent adoption of seven points concerning maritime safety: the establishment of the Maritime Safety Agency; the establishment of a European compensation fund; the revision of the calendar for the introduction of the double hull for ships or an equivalent design for single hull oil tankers; a clear improvement on the inspection of vessels; to strengthen the mechanisms for the control of maritime traffic; the abolition inside the European Union of territories where no control is established that act as paradises; and the elaboration of new proposals in the field of International Maritime Law. As you also know, last Sunday, in the meeting I held with the President of the (European) Commission, *Romano Prodi*, the Commission backed these proposals fully”. Private translation. See *Conferencia de prensa del Presidente del Gobierno, Don José María Aznar, y del Presidente de la República Francesa, Jacques Chirac (Málaga, 26 November 2002)*, 4 p. Cit.

³⁶ *Ibid.* See also the document *Congreso de los Diputados*, (10 December 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras*, p. 12.

³⁷ *Commission of the European Communities*, document COM (2002) 681 final (Brussels, 3.12.2002): *Communication from the Commission to the European Parliament and to the Council on improving safety at sea in response to the Prestige accident*, 27 pp. This document is also published in *Bulletin of the European Union*, 12-2002, point 1.4.72. All the European documents are available at <<http://europa.eu.int/eur-lex/en/index.html>>.

³⁸ These EU legislative “packages” were adopted respectively on 21 March 2000 (*Erika I*) and 6 December 2000 (*Erika II*), in response to the accident of the oil tanker *Erika* on 12 December 1999 on the Atlantic coast of France.

December 2002, decided by unanimity of the Ministers from the 15 Member States to implement all the proposals contained in the letter from the President of the Spanish Government, Mr. *José María Aznar*. In particular, conclusions numbers 9 and 11 of this “Transport” Council must be highlighted. They read as follows:

“9. Agrees to reinforce mechanisms for the control of maritime traffic along the coasts of the Member States of the European Union through the establishment by the Member States, where appropriate and in accordance with international law, of a preventive distance for ships on which demonstrated irregularities have been established;

11. Invites Member States to adopt measures, in compliance with international law of the sea, which would permit coastal States to control and possibly to limit, in a non-discriminatory way, the traffic of vessels carrying dangerous and polluting goods, within 200 miles of their coastline, and invites the Commission to examine measures to limit the presence of single-hull tankers of more than 15 years of age carrying heavy grades of oil within the exclusive economic zone of the Member States, or, where appropriate and in accordance with international law, within 200 miles of their coastline”.³⁹

The European Council of Copenhagen (12–13 December 2002) backed all these conclusions unanimously. The Presidency conclusions of this European Council stated the following:

“The European Council expresses its regret and grave concerns with regard to the serious accident of the *Prestige* oil tanker off the north-west coast of Spain. The ensuing damage to the marine and socioeconomic environment and the threat to the livelihood of thousands of persons are intolerable. The European Union expresses its solidarity with the States, regions and populations that have been affected and its support and recognition of the efforts of the affected States, institutions and civil society towards the recovery of the polluted areas.

The European Council recalls its conclusions in Nice in December 2000 concerning the *Erika* measures and acknowledges the determined efforts in the European Community and the IMO since the *Erika* accident to enhance maritime safety and pollution prevention. The Union is determined to take all necessary measures to avoid a repetition of similar catastrophes and welcomes the rapid responses by the Council and the Commission. The Union will also continue to play a leading role in international efforts in pursuit of this objective, in particular within the IMO. The conclusions of the Transport Council on

³⁹ See Document 15121/02 (Presse 380): Council of the European Union, *2472nd Council Meeting – Transport, Telecommunications and Energy – Brussels, 5–6 December 2002*, p. 32. The “Environment” Council on 9 December 2002 also adopted all these same conclusions. See Document 15101/02 (Presse 379), Council of the European Union: *2473rd meeting of the Council (Environment) held in Brussels on 9 December 2002*, p. 22.

6 December 2002 and the Environmental Council on 9 December 2002 should be implemented in all their aspects without delay".⁴⁰

Implementing these conclusions, on 20 December 2002 the European Commission sent to the European Parliament and to the Council a new proposal amending Regulation (EC) No. 417/2002 of the European Parliament and the Council on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No. 2978/94.⁴¹ The proposal contained three relevant amendments. First, considering that heavy oils are the most polluting type of oil and that in view of its relatively low commercial value and comparative small risk of fire or explosion they are regularly carried in older tankers nearing the end of their economic lives, the Regulation bans the transport of heavy oils⁴² in single hull tankers bound for or leaving the ports of European Union Member States. Second, the Regulation sets out a speeded up timetable for the withdrawal of single hull oil tankers.⁴³ Third, the Regulation calls for the strengthening and implementation as soon as possible of the special inspection regime for oil tankers in order to assess the structural condition of single hull oil tankers over 15 years of age. In accordance with the new procedures envisaged, all single hull oil tankers, including the smaller ones that were initially left out of the equation, shall be submitted to the Condition Assessment Scheme (CAS).⁴⁴ The new Regulation was adopted on 22 July 2003 and entered into force on 21 October 2003.⁴⁵

The European Commission also adopted other initiatives concerning a Proposal for a Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences on 5 March 2003⁴⁶ and a

⁴⁰ Conclusions of the European Council (Copenhagen, 12–13 December 2002), *Bulletin of the European Union*, 12-2002, Presidency conclusions, pars. I.11.32–33.

⁴¹ The Commission Proposal was published as document COM(2002) 780 in the *Bulletin of the European Union*, 12-2002, point 1.4.78.

⁴² The categories of heavy oil concerned are heavy fuel oil, heavy crude oil, waste oils, bitumen and tar.

⁴³ According to the new timetable, the cut-off date for operating Category 1 tankers moves from 2007 to 2005 with an age limit of 23 years; the proposed cut-off date for Category 2 tankers is 2010 and an age limit of 28 years, in line with the US 1990 Oil Pollution Act; and for the Category 3 tankers the age limit is the same as for Category 2 tankers.

⁴⁴ The CAS is an additional reinforced inspection regime specially drawn up to detect the structural weakness of single hull oil tankers; pursuant to this proposal, all single hull oil tankers that do not satisfy the tests of this evaluation system, even if they are relatively recent, may not be allowed to enter into the ports of the European Union and fly the flag of a European Union Member State.

⁴⁵ Regulation (EC) No. 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) No. 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers is published in *Official Journal* L 249, of 1.10.2003, p. 1.

⁴⁶ See document COM(2003) 92 final 2003/0037(COD), (Brussels, 5.3.2003): Commission

Proposal for a Council Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.⁴⁷ Independently of the future adoption of these proposals, the European Commission has recognised that European interests need to be better defended and represented at the international level, making a very clear appeal for a necessary revision of UNCLOS:

“Europe’s coasts, in particular the Atlantic and the Mediterranean seaboard, are extremely vulnerable to the risks of major pollution incidents. The principle of freedom of the seas and impunity of the flag State still holds way in international maritime transport. The Commission considers that robust maritime safety measures should be adopted at the international level, in the form of stricter navigation rules for ships carrying pollutant goods and more stringent controls on flag States. At the same time, a thorough study should be made of the extent to which international law, and in particular the United Nations Convention on the Law of the Sea dating from 1982, is suited to deal with the growing risks inherent in the carriage of pollutant substances by ships that are occasionally substandard. Civil society quite rightly appears to be increasingly less willing to accept the enormous economic and environmental costs of

cont.

of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences*, 27 pp. This document has also been published in *Bulletin of the European Union* 3-2003, point 1.4.47. This proposal concerns two different measures. First, the introduction into Community Law of international rules concerning pollution discharges from oil tankers and other vessels. It also provides for effective implementation mechanisms regulated in detail, including illegal discharges on the high seas. The second measure establishes that infringement of the rules concerning discharges (as set down by the 1973/78 MARPOL Convention, but also pollution resulting from damage to the vessel), will be criminal infringements, and provides indications about the penalties to be imposed. These provisions apply to all persons, i.e. not just ship-owners but also the owner of the cargo, the classification society and any other person concerned by reason of grave negligence. The sanctions will probably often take the form of financial penalties, but where individuals are concerned they may include, in the most serious cases, imprisonment. These penalties will be appropriate, having a dissuasive nature, and will be applied throughout the Community. They will also be justified and not insurable penalties.

⁴⁷ See the document COM(2003) 227 final, 2003/0088 (CNS), (Brussels, 2.5.2003): Commission of the European Communities, *Proposal for a Council Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution*, 16 pp. This document has also been published in *Bulletin of the European Union* 5-2003, point 1.4.55. This proposal for a Framework Decision aims to strengthen the criminal-law measures, to approximate the provisions laid down by law or regulation in the Member States concerning ship-source pollution offences (in particular, establishing common penalties and comparable procedural guarantees in the most serious cases of ship-source pollution) and to facilitate and encourage cooperation between Member States to repress these offences.

pollution on the scale caused by the *Erika* and the *Prestige* in the name of freedom of the seas, and the principles in question should therefore be re-examined with a view to better protecting the legitimate interests of coastal States”.⁴⁸

b) Multilateral measures: the case for the International Maritime Organization

On 25 November 2002, at the opening meeting of the 89th Council of the IMO, the Permanent Spanish Representation made an important intervention on the *Prestige* accident that had taken place only 12 days before.⁴⁹ During this intervention, the Spanish Representative proposed a package of legal measures that should be adopted by the IMO “independently of what will be done at the European Community level”. These measures were the following:

1. To move forward the traffic of vessels with dangerous goods from the current traffic separation scheme at Finisterre and from other maritime corridors. To this aim, Spain will immediately submit a proposal to this Organization;
2. The need of the fastest implementation of an Audit Plan following the IMO model in order to audit flag States with a mandatory character, as was agreed with Spanish support at the last Meeting in Japan;
3. To improve the inspection systems for vessels by the port State, i.e. reducing the terms for inspection, introducing broadened mandatory inspections for vessels that have already shown deficiencies in previous inspections, improving the national mechanisms for the control of maritime traffic;
4. A stricter requirement on the implementation of obligations by the classification societies concerning the minimum prescriptions provided for by the SOLAS Convention, that is, Assembly Resolutions A.739(18) and A.789(19);
5. To control and require new responsibilities for the recognised organizations that act under the name of flag States;
6. To implement the Guidelines on places of refuge without invading the sovereign powers of coastal States concerning the protection of their coasts and related interests, these places of refuge being designated depending on the circumstances of each case, on the capacity of each coastal State to react in cases of emergency and on the guarantees given by the commercial interests on the ship and/or the cargo;

⁴⁸ See European Commission, Directorate-General for Energy and Transport. Memo (21 October 2003): *Safer seas: the fight goes on*, p. 7.

⁴⁹ It must be recalled that, pursuant to Article 211.1 of UNCLOS, a “competent international organization” or a “general diplomatic conference” may establish international rules to prevent pollution of the marine environment from vessels. Moreover, these rules are not limited by any requirement concerning the “design, construction, manning or equipment of ships”. Hence, it is not surprising that, after the *Prestige* accident, the affected coastal States, backed by all European Union Member States, strengthened their efforts to modify the international legal framework at the IMO.

7. An urgent improvement of the international *régime* on compensation for damages resulting from oil pollution, with enough amounts and quick payments, including the contribution by the responsible persons of these traffics to provide coastal States with the means for combating in the most efficient way these catastrophes;
8. The elimination of transitional periods for the phasing-out of single hull oil tankers;
9. To continue the IMO efforts to improve the training and living conditions on board; and
10. The accelerated establishment of safety equipment on board of all vessels, such as automatic identification systems, voyage data recorders, etc.”⁵⁰

On 27 February 2003, Spain submitted its proposal for a new traffic separation scheme, mandatory for all double hull oil tankers, off the coast of Galicia and 33–40 marine miles distant from the coast. This proposal was discussed at the Subcommittee on Safety of Navigation (NAV 49) of the IMO at its meetings from 30 June to 4 July 2003 and was approved by the Maritime Safety Committee in 2004. It must be noted that although UNCLOS does not expressly contemplate the adoption of traffic maritime schemes within the exclusive economic zone, this possibility is in conformity with its Article 211.1.

Another Spanish legal initiative concerned the controversial issue of places and ports of refuge.⁵¹ Although the European Commission was already working on a proposal concerning Draft Guidelines for the establishment of places and ports of refuge for ships in distress, on 24 March 2003, last day for the submission of new proposals, no proposal was submitted to the IMO Subcommittees. Hence, Spain took the initiative and, on that date, presented two proposals in order to avoid a delay of one year in their adoption. The first Spanish proposal concerned the Guidelines for the establishment of places and ports of refuge for ships in distress. According

⁵⁰ Private translation. For the original Spanish text of these proposals, see the document *Ministerio De Fomento*, (25 November 2002): *El Gobierno informa. España ha anunciado hoy en la OMI la inmediata propuesta de un dispositivo de tráfico más alejado de las costas para los buques con mercancías peligrosas*, 4 pp. It is interesting to note that in this very same meeting, the Representations of Algeria, Bahamas, Belize, Denmark, France, Greece, India, Iceland, Morocco, Nigeria, Philippines and Portugal, announced their support for all or some of the Spanish proposals.

⁵¹ The Protocol concerning cooperation in preventing pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea (Valletta, 25 January 2002) refers to this issue in its Article 16, entitled “Reception of ships in distress in ports and places of refuge”, which reads as follows: “The Parties shall define national, sub-regional or regional strategies concerning reception in places of refuge, including ports, of ships in distress presenting a threat to the marine environment. They shall cooperate to this end and inform the Regional Centre of the measures they have adopted”. The text of this Protocol is available at <<http://www.unepmap.org>>.

to this, Spain held that only those ships in distress complying with all the international norms on safety of navigation, with all their data and operators clearly identified and offering an unlimited financial guarantee would be able to enter into places or ports of refuge. The second Spanish proposal concerned the auditing of flag States. Spain held that the audit model that the IMO had to elaborate must be mandatory for all flag States and that there must be public access to the results of any auditing.⁵² After consideration by the competent Committees of IMO, the Assembly of the Organization adopted on 5 December 2003 its Resolution A.949 (23) "Guidelines on places of refuge for ships in need of assistance",⁵³ as well as its Resolution A.950 (23) "Maritime Assistance Services (MAS)".⁵⁴

In parallel with the adoption of European Regulation (EC) No. 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) No. 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, the 15 European Union Member States and the European Commission submitted to the IMO's Marine Environment Protection Committee a proposal for amending the 1973/78 MARPOL Convention in order to ensure that similar measures would apply worldwide. The European Union proposal was examined at the 49th session of the Marine Environment Protection Committee that met during the week from 14 to 18 July 2003. The majority of the delegations present accepted in principle the European Union recommendations concerning the accelerated withdrawal of single hull oil tankers, the reinforcement of the condition assessment scheme (CAS) and the banning of the carriage of heavy oils in single hull tankers. However, no final decision was taken and the negotiations on the final version of the amendments to the 1973/78 MARPOL Convention will continue in the IMO General Assembly during an extraordinary session of the Committee in December 2003.

Additionally, implementing one of the conclusions of the European "Transport" Council,⁵⁵ on 11 April 2003 six European Union Member States (Belgium, France,

⁵² The Spanish texts of both proposals are annexed to the document *Ministerio de Fomento*, (27 March 2003): *El Gobierno informa. El Ministerio de Fomento presenta nuevas propuestas ante la OMI para mejorar la seguridad marítima*, 15 pp.

⁵³ Doc. A/23 Res. 949, 5 March 2004. See Sánchez Ramos, B. "Nuevos avances en el acceso a lugares de refugio: las directrices sobre lugares de refugio para buques en peligro de la Organización Marítima Internacional", *Revista Electrónica de Estudios Internacionales*, 8, 2004, 15 p. (available at <<http://www.reei.org>>).

⁵⁴ Doc. A/23 Res. 950, 5 March 2004.

⁵⁵ According to Conclusion number 10, the Council "urges the Member States that have common interests in sensitive sea areas to identify and formulate coordinated proposals for the areas to be protected as Particular Sensitive Areas by IMO. Urges the IMO to develop the use of the instrument of designating Sensitive Sea Areas (SSA) and Particularly Sensitive Sea Areas (PSSA)". See Document 15121/02 (Presse 380): Council of the European Union, *2472nd Council Meeting – Transport, Telecommunications and Energy – Brussels, 5–6 December 2002*, p. 32.

Ireland, Portugal, Spain and United Kingdom), with the support of the European Commission, submitted a proposal to the IMO for the designation of a vast Particularly Sensitive Sea Area (PSSA) covering their Atlantic exclusive economic zones and corresponding to most of the European Union Atlantic area.⁵⁶ Under this proposal, this marine area will enjoy special protection as a consequence of the introduction of restrictive measures (including expulsion) for the navigation of single hull oil tankers carrying heavy oils. A preliminary examination in the IMO in July 2003 made it possible to give support to this proposal, which was approved “in principle” at the 49th session of the Marine Environmental Protection Committee (MEPC) of IMO, pending approval of associated protective measures. Also, in October 2003, Spain submitted a proposal for the designation of the waters of the Canary Islands as a PSSA,⁵⁷ which was approved “in principle” by the plenary at MEPC 51 (29 March–2 April 2004),⁵⁸ pending approval of the proposed protective measures by the IMO Subcommittee on Safety of Navigation.

Finally, it must be remembered that the only proposal made by the European Commission included in the “*Erika I and II packages*” that was not adopted as a Community norm consisted in raising the upper limits on the amounts payable as a compensation for the victims of oil spills from EUR 200 million to EUR one billion. The Council of Ministers decided to negotiate this very same proposal at the IMO in order to obtain a similar agreement worldwide. After the European Union Member States supported this proposal at the IMO on 9 May 2003,⁵⁹ the International Diplomatic Conference, convened at London from 12 to 16 May 2003, succeeded in adopting a new Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.⁶⁰ Although other different proposals were submitted and discussed,⁶¹ the firm attitude shown by the European Union Member States and the

⁵⁶ See the document *Ministerio de Fomento* (12 April 2003): *El Gobierno informa. España presenta ante la OMI nuevas iniciativas para la protección del medio ambiente marino*, 2 pp.

⁵⁷ Doc. MEPC 51/8, 24 October 2003.

⁵⁸ In addition to the Canary Islands PSSA, MEPC 51 also approved “in principle” PSSAs for the Baltic Sea and the Galapagos Archipelago, with the opposition of the Russian Federation, Liberia and Panama.

⁵⁹ See the document *Ministerio de Fomento*, (3 May 2003): *El Gobierno informa. España propondrá la ampliación del fondo para daños por hidrocarburos a 1.000 millones de euros*, 2 pp.

⁶⁰ See the 2003 Draft Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 Doc. LEG/CONF.14/DC/2, 16 May 2003; see also the document *Ministerio de Fomento*, (16 May 2003): *El Gobierno informa. La OMI acepta la propuesta del Ministerio de Fomento. La indemnización por daños debidos a la contaminación por hidrocarburos alcanzará los 1,000 millones de euros*, 4 pp.

⁶¹ For instance, Japan presented a proposal to increase the compensation fund up to EUR 500 million.

European Commission⁶² resulted in the adoption of a new Protocol to the 1971 Fund Convention, establishing a new supplementary fund with 750 million DTS/SDR (just over USD 1152 million), that is almost the amount originally proposed by the European Union Member States. Following ratification by Spain on Friday 3 December 2004, the required number of contracting Parties for the entering into force of the 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund was completed, and the new IOPC Supplementary Fund came into existence on 3 March 2005, three months after the date of Spain's ratification.

4. New Spanish legislation concerning vessel traffic monitoring and information

In pursuance of European Union Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002, establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, Spain adopted Royal Decree 210/2004, of 6 February, establishing a system of monitoring and information concerning maritime traffic.⁶³ Previous implementation of Directive 2002/59/EC was partially accomplished by Spanish Act 62/2003, of 30 December, on fiscal, administrative and social measures, whose Article 108 deals with authorizations to enter into places or ports of refuge. Now, Royal Decree 210/2004 completes the transposition of the EU Directive by providing for a more comprehensive and integrated system of vessel traffic monitoring and information.

According to the provisions in Chapter I, this Royal Decree aims at increasing maritime safety, improving the ability of the maritime administration to respond to potentially dangerous situations and better prevent pollution by ships.⁶⁴ It applies to merchant ships over 300 GRT, although its provisions concerning response to accidents and places of refuge (Articles 17–25) also apply to fishing, historical and recreational craft.⁶⁵

Chapter II of the Royal Decree requires prior notification of the information specified in Annex I by all vessels bound for a Spanish port and subsequent monitoring of their compliance with vessel traffic services (VTS) established in execu-

⁶² The European Commission had held that: "In the context of the 1990 Oil Pollution Act, the USA set up their own arrangement, comprising a compensation fund of \$ 1 billion, and decided not to get involved in the international arrangement. In the event of the failure of its proposals at international level, it is clear that, like the USA, the European Union will have to address the question of whether or not it will stay within the FIPOI regime". See European Commission, Directorate-General for Energy and Transport. Memo (21 October 2003): *Safer seas: the fight goes on*, p. 7.

⁶³ BOE of 14 February 2004.

⁶⁴ Art. 1.

⁶⁵ Art. 2.

tion of, or with due consideration for, the relevant IMO rules.⁶⁶ Compliance with vessel traffic organization services is mandatory for all ships in the territorial sea, for ships flying an EU Member State flag or with destination to an EU port in other Spanish waters beyond the territorial sea and, “whenever it is possible”, also for ships flying the flag of non EU Member States or not bound for EU ports.⁶⁷ Ships calling into Spanish ports shall be equipped with an Automatic Identification System (AIS) and a Voyage Data Record (VDR) System.⁶⁸

In accordance with Chapter III, all ships carrying dangerous or polluting goods shall notify all relevant information specified in Annex I to the competent maritime authorities before loading in a Spanish port, or leaving from a Spanish port, or when the ship is bound for a Spanish port. The duty to notify affects the owner, the operator, the agent and the Captain. The Spanish Director General of Merchant Shipping can exempt its application with respect to coasting trade.

Chapter IV deals with monitoring of dangerous ships and intervention in case of problems or accidents at sea. It identifies as “potentially dangerous” ships all vessels having one of the following characteristics: ships involved in incidents or accidents at sea; ships not complying with mandatory notification or information provisions; ships having realized voluntary releases of oil or other violations of MARPOL; and ships whose access to an EU port has been denied. The presence of these ships in Spanish waters shall be notified to the Spanish administrative maritime authorities and to coastal stations of other EU Member States concerned. The Spanish maritime administration shall undertake convenient “inspections or verifications” with respect to those ships and inform all interested EU Member States.⁶⁹

Any “incident or accident” (including “situations” susceptible of producing pollution of an EU coastal Member State and “spots” of polluting substances, containers or bulk) shall be immediately notified to coastal stations. In such a case the Spanish maritime administration can adopt *inter alia* any of the following measures: a) imposing a given route on the ship; b) giving the Captain a term for putting an end to the risk; c) placing on board a team responsible for assessment of risks, assistance to the Master and information to coastal stations; and d) ordering the Captain to direct the ship to a place of refuge.⁷⁰

With respect to this latter option, the Royal Decree calls for the elaboration of plans, accessible at the request of interested parties, aimed at bringing ships in need of assistance into waters under Spanish jurisdiction. Authorization for a requesting ship to enter into a given place of refuge, which is not mandatory for the coastal State, shall be granted when the Administration decides, in view of the

⁶⁶ Namely, rules 10 and 11 of Chapter V of SOLAS.

⁶⁷ Art. 8.

⁶⁸ Arts. 6 and 10, respectively.

⁶⁹ Art. 16.

⁷⁰ Art. 19.

relevant information and other elements available, that the foreseeable resulting damage would be inferior to other alternative measures of assistance; if such is not the case, the authorization shall be denied, in a motivated decision, by the Spanish Maritime Administration. In weighing the elements for its decision, acting on a case by case basis, the competent maritime authority shall apply the specific criteria listed in Article 21 of the Royal Decree, which follows those contained in the IMO guidelines on places of refuge for ships in need of assistance [Resolution A/949 (23)]. The criteria for objective analysis, listed in Article 21 shall be further developed by subsequent more detailed regulatory procedures.⁷¹ However, the authorization to enter into a place of refuge shall be contingent upon the constitution of a financial guarantee for ships carrying particularly dangerous substances.⁷²

The decision-making process shall start at the request of the ship's Captain or a representative of the shipping company, who shall indicate the reasons supporting its request for a place of refuge. The decision as to granting or not the permit requested is taken by the Director General of Merchant Shipping, who may delegate in the Maritime Captain of the circumscription in which the ship is located.⁷³

Although Spain is one of the few Member States that has already transposed into domestic law European Directive 2002/59/EC on places of refuge, criticism against the high amount of the financial guarantees required by this Royal Decree has been voiced from ship-owners and salvors seeking a safe haven for a casualty along the Spanish coastline.⁷⁴

II. LIABILITY, RESPONSIBILITY AND COMPENSATION FOR DAMAGES

The extraordinarily damaging consequences of the oil spill caused by the *Prestige* have given rise to a difficult scenario with respect to issues of liability, responsibility and compensation for damages. As in precedent occasions, criminal proceedings have been instituted against different persons before the competent Spanish Court in Corcubión (La Coruña, Spain). Whatever may be the reasons for it, the criminal nature of the judicial proceedings does not help to facilitate the application of the existing legal regimes on civil liability and compensation for damages. We shall try to summarize the main elements of the complex questions raised in this respect, as they have developed in practice.

⁷¹ The fifth additional provision of the Royal Decree states that: "within a two year delay the Maritime Administration will adapt existing plans and procedures on places of refuge to the IMO guidelines".

⁷² Arts. 22 and 23.

⁷³ Art. 24.

⁷⁴ See: *Lloyd's List*, 18 February 2004 (n. 58598) p. 3; 20 February 2004 (n. 58600) p. 7; 15 April 2004 (n. 58639) p. 14.

1. Criminal prosecution of the Captain

The Captain of the ship, *Apostolos Mangouras*, was arrested on 15 November 2002 and indicted with charges of crimes against natural resources and the environment (Arts. 325 and following of the Spanish Criminal Code) and disobedience to the competent Authority. On 17 November 2002 the Instruction Court number 4 of La Coruña rendered an Order of provisional imprisonment against the Captain, with bail of 3 million, which was confirmed by the Provincial Criminal Court of La Coruña (3rd Section) on 3 January 2003. The implementation of the judicial Order of provisional imprisonment against the Captain of the ship and the quite severe accompanying conditions, raised some criticisms.

The criminal indictment of the Master of the *Prestige* is based on the assumption that the relevant provisions in Articles 73 (more related to violation of fisheries laws and regulations), 226 and 230 of UNCLOS do not preclude his prosecution for disobedience to Spanish authorities and environmental crime, for two different reasons. First, Article 230 provides that “monetary penalties only” may be imposed with respect to violations of applicable national and international law for the prevention, reduction and control of pollution committed by foreign vessels beyond the territorial sea or in the territorial sea, “except in the cases of a wilful and serious act of pollution in the territorial sea”.⁷⁵ In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed”. Actually, Captain *Mangouras* committed the alleged violations both beyond and within the territorial sea, thus producing an (arguably) wilful and serious act of pollution in the territorial sea and the Spanish coast. Second, disobedience to authorities and ecological crime are separate charges not covered under Article 230 of UNCLOS, which refers only to violations of national laws or applicable international rules and standards “for the prevention, reduction and control of pollution”. Arguably, this was not the case with respect to Captain *Mangouras*; at the time of the commission of the alleged crimes he was not exercising normal freedom of navigation or innocent passage, but mastering a vessel affected by a “casualty”, under the authority of the coastal State (Article 221). The crimes allegedly committed by him do not relate to violations of ordinary rules for the prevention, reduction and control of pollution, but rather to violations of orders of the competent Governmental Authorities in view of avoiding an ecological catastrophe. Thus, by disobeying these orders, he allegedly might have contributed to originating such an unwanted result.

⁷⁵ Art. 230 of UNCLOS, entitled “Monetary penalties and the observance of recognized rights of the accused”, reads as follows:

“1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.

On the other hand, the severe economic and personal conditions of the bail imposed on the Captain have given rise to persistent objections. In the view of the Spanish Courts, the unusually high amount of the bail is justified by the extraordinary foreseeable amount of the damages caused by the *Prestige*, as well as linked to the fact that, in Spanish criminal law, the person guilty of a crime bears the civil liability for damages resulting from its criminal conduct (Criminal Code, Article 2). However, after several appeals to review the 3 million bail had been rejected, the lawyers acting for the Captain filed a case before the European Court of Human Rights, in a bid to have his strict bail conditions eased.⁷⁶ Other announced claims concerning the “excessive” amount of the bail and the severe restrictions of the freedom of movements imposed on the Captain have not resulted in a formal application before the International Tribunal for the Law of the Sea (UNCLOS, Annex VI). In this latter case, it seems also doubtful whether the provisions concerning prompt release of vessels and crews of UNCLOS (Article 292), would have granted the exercise of jurisdiction by ITLOS in the matter.⁷⁷

Be as it may, after the failure of the judicial appeals filed by the Master’s lawyers to relax the bail conditions imposed on him, the Greek Ambassador in Spain notified the Court, on 10 August 2004, of the pledge of its Government to secure the implementation of the obligations of Captain *Mangouras*. As a result, by an Order issued on 15 November 2004, the Court in Corcubi6n, while not accepting a reduction of the amount of the bail imposed, allowed the Captain to travel to Greece and await judgement there.

2. Financial assistance to victims and advance payments of compensations

At the time of the accident, Spain was a Contracting Party to most IMO Conventions concerning marine safety, including both the International Convention

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2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.
3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed”.

⁷⁶ *Lloyd’s List*, 29 March 2004 (No. 58626), p. 1, and 2 April 2004 (No. 58630), p. 7.

⁷⁷ Art. 292 of UNCLOS should be read in connection both with Art. 73.2, concerning the exercise of the coastal States’ sovereign rights over living resources in the EEZ, and Art. 226.1 b), applicable to the present case, which reads as follows: “If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security”.

on Civil Liability for Oil Pollution Damage 1969 (and its Protocols of 1976 and 1992) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (and its Protocols of 1976 and 1992).

Immediately after the accident, Spain adopted a series of legislative measures oriented at reducing the economic and social consequences of the accident. Royal Decree-Act 7/2002, of 22 November, concerning compensatory measures regarding the *Prestige* accident, provided for a series of promotional measures for immediate financial assistance consisting in: payment of 40 per day to all those directly affected by the fishing bans; a 100% waiver of Social Security payments and tax relief exemptions in the fishing, shell harvesting and aquaculture sectors. A series of preferential lines of credit, totalling 100 million,⁷⁸ were also made available to affected individuals and companies through the State controlled Spanish Official Credit Institute. On 13 December 2002, Spain passed a new Royal Decree-Act 8/2002, extending the above measures to the affected sectors in Asturias, Cantabria and the Basque Country and expanding their application to other sectors with a high dependence on the closed fisheries, such as fish vendors, fishing net repairers, and employees of fishing co-operatives, fish markets and ice factories. In addition, Spain approved Order APU/3289/2002, of 23 December, establishing procedures for the granting of financial aids aimed at restoring damages to public installations caused by the accident.

However, in the light of the foreseeable length of the proceedings on compensation for damages under the CLC and FUND Conventions 1992 and its inherent quantitative limitations (171,5 million whereas estimated damages could rise above 1.000 million),⁷⁹ the Spanish Government introduced a new mechanism to fully compensate the victims of the pollution. It is relevant to note in this respect, that unlike in previous cases the *Prestige* insurer (the London Club) decided not to make individual compensation payments up to the ship-owner's limitation amount. The decision was allegedly adopted following legal advice that if the Club were to make payments to claimants in line with past practice, it was likely that those payments would not be taken into account by the Spanish Courts when the ship-owner set up the limitation fund, with the result that the Club could end up paying twice the limitation amount. However, after several meetings between lawyers of both parties, on 28 May 2003 the ship-owner deposited 22,771,986 before the Criminal Court in Corcubión for the purpose of constituting the limitation fund.⁸⁰

⁷⁸ See Doc. 92/FUND/EXC.22/8, 7 October 2003, par. 8,3.

⁷⁹ Approximately 23.5 million compensation is available from the ship-owner's liability insurer (the London P&I Club). Additional compensation of up to approximately 148 million is available from the 1992 Fund. In other words, a total of 171.5 million is available. As estimated at the Executive Committee's May 2004 session, this available sum will be distributed to compensate victims of pollution, in Spain (834.8 million), France (176 million) and Portugal (3.3 million).

⁸⁰ See Doc. 92/FUND/EXC.22/8, 7 October 2003, par. 9.

On the other hand, at its May 2003 session the Executive Committee decided that the 1992 Fund's payments should for the time being be limited to 15% of the loss or damage actually suffered by the respective claimants as assessed by the experts engaged by the London Club and the Fund. In spite of the deep concern expressed by both the Spanish and French delegations at the IOPC, the Executive Committee maintained the 15% limitation level of payments, the lowest in the Fund's history, at its October 2004 session in view of the remaining uncertainties as to the level of admissible claims.

Confronted with that situation, an innovative regime was established by Royal Decree-Act 4/2003, of 30 June, regarding payment of compensation for damages caused by the accident of the vessel *Prestige*, and subsequent regulations contained in Royal Decree 1053/2003, of 1 August. The overriding aim of the system is to provide rapid compensation for damages and save the victims from protracted processes of recognising their rights to compensation. The system for advance compensation is applicable to individuals or legal entities,⁸¹ be they Spanish or not, who have incurred damages in Spain as a result of the accident of the *Prestige*, and not to those affected in other countries. The system will only apply to those victims who expressly state their will to adhere to it by subscribing a transactional agreement with the Spanish Government destined to the payment of an amount in compensation for the damages incurred as a result of pollution. The initial limit of the sum available for the payment of indemnities, for claims submitted before 31 December 2003, was 160 million, but a new Royal Decree-Act 4/2004, of 3 July, increased the funds available for compensation to 249.5 million. In addition, the Decree extended the period in which victims could claim for losses suffered directly as a result of the incident to include 2004. The funds available for compensation of losses occurring during 2004 were limited by the Decree to 3 million and claimants were required to submit claims by 31 March 2005.

The celebration of each individual agreement implies:⁸²

- a) That the victim has the right to receive from the Spanish Government the stipulated amount as compensation.
- b) That the victim thereby declares all claims to be satisfied, and thus renounces any national or international claims outstanding.
- c) That the Spanish Government thereby assumes any rights or actions that may correspond to the victims who subscribed the agreement.

⁸¹ Public bodies other than the Spanish Government (i.e. Governments of Autonomous Regions, municipalities and local authorities) can also adhere to the advance compensation system, by subscribing Agreements of Collaboration with the Spanish Government, which in such case will also subrogate in all rights and actions for compensation that may correspond to these bodies as a result of the disaster.

⁸² See Vázquez Guillén, A., "Prestige and the Law: Regulations and compensations", *17th Annual Oil Pollution Conference (London 15-16 March 2004)*, *Lloyd's List Events*, 2004.

- d) That the fact of subscribing this agreement in no way supposes the recognition of responsibility by the Spanish Government.

The sum paid in compensation to each claimant is to be determined according to the damages actually incurred, following the same assessment criteria used by the 1992 CLC and Fund Conventions. All payments will be channelled through a single public financial institution, the Official Credit Institute (*Instituto de Crédito Oficial*, ICO). The Spanish Government will subsequently take all legal and extra legal actions necessary, both in Spain and abroad, to obtain compensation for damages directly incurred by the State (costs and expenses of clean up operations, compensation payments to fishermen and shellfish harvesters, tax relief for businesses affected by the spill, administration costs and costs relating to publicity campaigns). It will also take the same actions with respect to the recovery of damages arising from the compensation to other public and private persons to whom the State subrogates as a result of transactional agreements made in application of Royal Decree-Act 4/2003 and Royal Decree-Act 4/2004.⁸³ The question as to whether this subrogation also applies to future damages appearing after the advance payoff is made has been considered and eventually rejected by legal doctrine.⁸⁴

In implementing the above-summarized system, the Spanish delegation at the Fund Executive Committee session in October 2003 proposed that the Fund should, subject to certain safeguards, make advance payments on account of the final amount that will eventually correspond to Spain. The matter was referred to the IMO Assembly which authorized the IOPC Fund Director to make a payment of 15% of the amount of the claims submitted, subject to the Spanish Government providing a guarantee from a financial institution, not from the Spanish State, having the financial standing required by the 1992 Fund's Internal Investment Guidelines. On that basis, as authorized by the Assembly, an advance payment fixed at a total sum of 57.5 million, was granted at the IOPC Fund Executive Committee session in October 2003, on the basis of the initial study of the invoices already presented by the Spanish Government and the overall assessment of the total admissible damages for Spain.⁸⁵ The whole of this advance sum, which

⁸³ The subrogation by the Spanish authorities in those claims is made pursuant to Art. 9.3 of the 1992 Fund Convention: "Without prejudice to any other rights of subrogation or recourse against the Fund which may exist, a Contracting State or agency thereof which has paid compensation for pollution damage in accordance with provisions of national law shall acquire by subrogation the rights that the person so compensated would have enjoyed under this Convention".

⁸⁴ See: Meilan Gil, J. L., (Director), *Problemas jurídico-administrativos planteados por el Prestige*, Thomson-Aranzadi, 2005.

⁸⁵ The first claim received from the Spanish Government had been assessed by the Director on an interim basis at 107 million and a payment of 16,050,000, corresponding to 15% of the assessed amount, had been made in December 2003. The Director had made a general assessment of the total of the admissible damage in Spain at 303 million and,

was transferred to the Spanish Government on 17 December 2003 against a Bank guarantee from ICO and an undertaking by the Spanish Government to repay it if the Executive Committee so decided, was made available by the Spanish authorities for the payment of compensation to the victims.

By February 2004 the Spanish Government had received almost 29,000 claims for compensation, most of them related to workers in the fisheries sector, from victims of the *Prestige* accident who wished to use the payment mechanism set out in the Royal Decree-Acts. On 18 February 2004, 15 months after the accident, in execution of agreements passed by the Government with affected claimants, approximately 12,000 victims in the fisheries sector had already received compensation, for a total sum of 51 million. In August 2004, agreements were reached with the great majority of the workers in that sector and payments totalling 71 million were made to them under the Royal Law-Decrees.⁸⁶

In July 2004 the Spanish Government submitted a request to the Court in Corcubión for the release to it of the 22,777,986 deposited with the Court by the ship-owner for the purpose of constituting the limitation fund. In its request, the Spanish Government argued that the Court should release this amount to it, since it was paying compensation to the victims of the spill. The 1992 Fund and other parties in the legal proceedings before the Court in Corcubión submitted pleadings opposing this request and in July 2004 the Court rejected the Spanish Government's request on procedural grounds. The Spanish Government appealed against this decision but on 4 October 2004 the appeal was withdrawn.

So, at the end of 2004, Spain had only received an advance sum of 57.5 million from the 1992 Fund whereas costs incurred by the Government in response to the damages resulting from the accident amount to not less than 1,000 million.

3. Court actions in Spain and abroad

Given that the foreseeable amounts of compensations to be covered by the CLC and IOPC Fund regimes (171.5 million) lie far below the actual amount of claims submitted by public and private victims in Spain,⁸⁷ several initiatives have been

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as authorised by the Assembly, in December 2003 he had also made a further payment of 41,505,000 against a bank guarantee provided by a Spanish bank, bringing the total amount paid by the 1992 Fund to the Spanish Government to 57,555,000.

⁸⁶ The remaining claims formulated by 3,638 persons under the Decrees would be subject to individual assessments by the *Consorcio de Compensación de Seguros*, a State-owned insurance organization set up to pay claims for damage not normally covered by commercial insurance policies, such as damage due to terrorist activity or natural disasters. As at May 2005, payments made to 19,500 workers of the fisheries sector amounted to some 88 million (see: Doc. 92/FUND/EXC.29/4, 9 June 2005, par. 5.6).

⁸⁷ Claims for damages incurred in Spain were estimated at the Executive Committee's May 2004 session at 834.8 million.

made in order to pursue legal actions against other possible responsible individuals or legal persons involved with the *Prestige* accident. Some 2020 claimants have joined the legal proceedings before the criminal Court in Corcubi3n, of whom 208 have also submitted claims to the IOPC Fund's Claims Handling Office in La Coru3a. It is expected that some of these claimants who had settled with the Spanish Government under the Royal Decrees will withdraw their claims from court proceedings.⁸⁸

In addition to the criminal prosecution of the Captain of the *Prestige*, in 2003 the Court in Corcubi3n also accepted the criminal indictment of the Spanish Director General of Merchant Shipping, *Jos3 Luis L3pez Sors*, on charges of reckless conduct. If successful, this indictment might have important consequences not only for the concerned person, but also for the Spanish State which, on a subsidiary basis, will bear the civil liability resulting from his criminal offence. The Court in Corcubi3n also admitted the imputation of the Greek citizen *Michael Magretis*, as manager of the operator of the ship, the Greek established Liberian corporation Universe Maritime Ltd, however Mr. *Magretis* regretfully died soon after his indictment.

On the other hand, in May 2005 the Criminal Court in Corcubi3n, in its role of investigating the cause of the incident and potential liabilities, following a request by the Public Prosecutor, had declared that the ship-owner might be directly liable for the damage caused by the incident. In its decision the Court held that, under Spanish law, any person who had incurred in criminal liability also has civil liability for the damage arising from the criminal action. In the Court's decision it was stated that the Master of the *Prestige*, who had had the control and had commanded the ship, might have criminal liability arising from the event and that the ship-owner might be directly liable for the damage caused. Once the investigation had been concluded, the Court file would be passed on to a Criminal Court judge who would render a judgement on the criminal and civil liabilities arising out of the incident. The Court, taking into account that the Spanish Government had paid compensation to victims as a result of the incident for 87,774,614.59, had ordered the ship-owner to provide the Court security in that amount in addition to the limitation amount applicable to the *Prestige*, which the ship-owner had deposited with the limitation Court.⁸⁹

However, as this Court decision raised criticisms by the Director and several delegations at the June 2005 session of the Fund's Executive Committee,⁹⁰ the Court in Corcubi3n moved to link the liability of Universe Maritime Ltd to the prosecution of the Captain, in view of the "contractual relationship" existing

⁸⁸ See Doc. 92/FUND/EXC.29/4, 9 June 2005, par. 11.1.

⁸⁹ See Doc. 92/FUND/EXC.29/6, 28 June 2005, par. 3.2.29–3.2.30.

⁹⁰ See Doc. 92/FUND/EXC.29/6, 28 June 2005, par. 3.2.31–3.2.35.

between the operator company and the said Captain. Thus, on 5 July 2005, the Court of Corcubión ordered the operator Universe Maritime to attach 87.7 million to cover the sum already paid by the Spanish Administration to the victims of the accident.⁹¹

The question may be raised as to how those judicial proceedings are compatible with the provisions of the CLC, channelling the liability for any pollution damage caused by the ship as a result of an accident exclusively to the owner of the ship.⁹² In answering that question, it should be kept in mind that Article III, paragraph 4, of the CLC affirms that “no claim for compensation for pollution damage may be made” against the owner and other expressly excluded persons (including the operator of the ship), “unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result”. One permissible reading of this provision is that it does not preclude the competent national Court to entertain criminal or civil actions against individuals or legal persons listed in Article III, paragraph 4 of the 1992 CLC, either for wilful acts or omissions or reckless conduct resulting in pollution damages. In any case, the provision under consideration does not prevent the competent national Court to entertain civil liability or criminal claims against any other individuals or legal persons not expressly excluded by Article III, paragraph 4, of the 1992 CLC.⁹³ Moreover, damaged parties could eventually seek compensation against any liable parties before the Courts of a third State not being a party to the CLC and Fund Conventions.

Under these assumptions, both the Kingdom of Spain and certain constituents of the Basque Country (*Comunidad Autónoma del País Vasco et al.*) have brought claims against other possible holders of legal responsibilities or liabilities before the Courts of the United States of America. The rationale of these legal actions stands on the assumption that the application of the objective civil liability regime

⁹¹ *El País*, 6 July 2005.

⁹² In June 2005, at the 29th session of the Executive Committee, “The Director stated that the investigating Criminal Court had appeared to have based its decision on Spanish criminal law without taking into account the relevant provisions of the 1992 Civil Liability Convention, which formed part of Spanish law. He drew attention to the fact that Article III.4 of the 1992 Civil Liability Convention prohibited claims for compensation against the ship-owner otherwise than in accordance with the Convention and also prohibited (other than in certain circumstances set out in the Convention) claims for compensation for pollution damage, under the Convention or otherwise, against the members of the crew or the charterer, manager and operator of the ship. The Director expressed the view that the decision by the Court did not respect these provisions. He stated that the Fund was not party to these proceedings and could not appeal against the decision”. Doc. 92/FUND/EXC.29/6, 28 June 2005, par. 3.2.31.

⁹³ For instance, the classification society. See Camarda, G. “Natura e responsabilità delle società di classificazione delle navi”, in *Mare, porti e reti infrastrutturali: per una nuova politica dei trasporti*”, Messina, 2002, pp. 339–374.

provided for by the CLC and Fund Conventions does not preclude the introduction of separate tort actions based on fault or negligence against other responsible physical or legal persons involved in the accident of the oil tanker *Prestige*. The judicial claims introduced affect, in a first step, the classification company acting in the case of the *Prestige*, that is, the US Corporation American Bureau of Shipping Inc. (ABS).

The Government of the Basque Country has sued ABS before the United States District Court for the Southern District of Texas. The lawsuit introduced by the Basque Government before the US Federal Court in Houston charges ABS with negligence and gross negligence, alleging that it breached its duty of care “by failing to perform an adequate inspection of the *Prestige*, and by classifying it as seaworthy, when the vessel simply was not”.⁹⁴ The Texas action was later transferred to the United States Federal Court of New York where it is pending as *Comunidad Autónoma del País Vasco et al. v. ABS*.⁹⁵

The Kingdom of Spain is also pursuing legal actions before the same United States Federal Court of New York, on its own behalf and as a trustee, against the involved US Classification Corporation (American Bureau of Shipping Inc. ABS). In its complaint, the Plaintiff State alleges that ABS was negligent in classifying the *Prestige* as fit to carry fuel cargo. In particular the plaintiff claims that, although the vessel was listed in the “ABS Record” and it issued documents certifying its classification, structural details of the *Prestige* did not satisfy relevant ABS fatigue and other requirements for steel vessels⁹⁶ and that the ABS surveyor failed to comply with the ballast tank requirement in effect at the time of the May 2002 annual survey of the ship.⁹⁷

The Defendant ABS filed a counterclaim seeking a declaratory judgement that Spain is obliged to indemnify ABS and/or contribute to payments because of Spain’s alleged negligence in responding to the *Prestige* disaster. By a Memorandum Order of 3 August 2004, the competent US District Court for the Southern District of New York dismissed the defendant ABS’ counterclaim,⁹⁸ accepting the plaintiff’s contention that the Court lacks subject matter jurisdiction for ABS’ counterclaims because the Foreign Sovereignty Immunities Act (FSIA) bars them.⁹⁹ In discussing ABS’ counterclaim the Court has determined that ABS has failed to

⁹⁴ *Lloyd’s List*, 14 May 2003, p. 3.

⁹⁵ 04 Civ. 671 (LTS) (RLE).

⁹⁶ In completing its 1973 “Rules for Building and Classing Steel Vessels”, in 1993 ABS developed the ABS “Safe Hull” program that assessed the “fatigue life” and structural strength of steel vessels in light of certain fatigue criteria (Complaint, par. 33).

⁹⁷ ABS conducted an “annual class survey” of the *Prestige* in Dubai, United Arab Emirates from 15 to 26 May 2002. (*Ibid.*, par. 37).

⁹⁸ Pursuant to Rule 12(b)(1) of the Federal Rules on Civil Procedure for lack of subject matter jurisdiction.

⁹⁹ 28 U.S.C. par. 1602–1611 (“FSIA”).

fulfil its burden of evidence that immunity shall not be granted under the statutory exceptions of the FSIA which require that the counterclaims arose from the same “transaction or occurrence that is the subject matter of the claim of the foreign State” at the time the pleading is served. Thus, in applying the identity and maturity test, the Court found that:

“Plaintiffs’ claims in the instant action concern alleged breaches by ABS of its duty to exercise care in inspecting and classifying the *Prestige*, namely, whether ABS inspections of the *Prestige* failed to identify the fatal structural weaknesses that led to the ship’s disintegration, and/or whether ABS certified the *Prestige* for duty for which it was not in fact fit. ABS’ counterclaims, however, relate to whether ABS is entitled to indemnification or contribution by Spain for any judgement ABS incurs “anywhere in the world” in connection with the *Prestige*-related litigation against it. Although both sets of claims relate to the *Prestige* oil spill, the relationship between the “core issues” presented by them is not sufficiently logical for them to arise from the same transaction within the meaning of the statutory exception. The issues presented by ABS’ claims involve Spain’s duties, if any, to ABS or others in connection with vessels in distress. Spain’s claims, by contrast, involve whether ABS deviated from the proper practices of classification societies in its continuing certification of the *Prestige*. Those sets of issues are . . . unrelated . . . Moreover, ABS’ counterclaims suffer from an even greater deficiency arising from the fact that it seeks indemnification and contribution for judgements it has not yet incurred, in favour of parties not yet identified, on the basis of claims not yet pleaded”.

For these reasons, the *Memorandum Order* issued by the Court on 3 August 2004, granted Spain’s motion to dismiss the ABS counterclaim, thus leaving the way open for the follow up of the proceedings as they were initially formulated. In the current phase of the pleadings before the New York Federal Court, Spain has expanded the reach of its action so as also to include ABS Group and ABS Consulting, to prevent that in case of being found guilty, the mother Corporation ABS could allege its insolvency as a “non profit” entity.

4. State responsibility

With respect to issues regarding State responsibility the *Prestige* case has followed the usual trend in situations of environmental disasters, with some particular features. No claims for State responsibility have been formally presented, in spite of expressed concerns regarding the wrongfulness of certain governmental conducts. And, as in other similar cases, legal claims arising from damages suffered as a consequence of the accident have followed only international civil liability procedures.

However, most surprisingly, the wrongfulness of the conduct of the victim State has occasionally been evoked in international fora, perhaps as a reflection of the strong political criticism voiced in domestic affairs. The most significant concern about the action taken by Spain in its intervention with respect to the *Prestige*

casualty have been expressed by the Bahamas, the flag State, at the 21st session of the IOPC Fund Executive Committee, held from 7 to 9 May 2003. Following the Spanish delegation's presentation on the Spanish authorities' response to the incident,¹⁰⁰ which was received with gratitude by a number of delegations:

"The observer delegation of the Bahamas, the flag state of the *Prestige*, expressed concern regarding the late submission of the document by the Spanish delegation and stated that the information contained in the document was counter to its own understanding of events. That delegation, whilst commending the action of the Spanish rescue services in saving the lives of the crew of the *Prestige*, stated that in its view, had the authorities allowed the vessel to enter a port of refuge this would most likely have prevented the sinking of the vessel and reduced the amount of oil spilled. The Bahamas delegation stated that, despite a number of official requests, it had had difficulty obtaining information from the Spanish authorities for their own investigation into the cause of the incident".¹⁰¹

The Spanish delegation expressed its deep dissatisfaction in respect of the intervention by the Bahamas delegation and this delegation in turn expressed its deep dissatisfaction in respect of the intervention by the Spanish delegation and reiterated its strong disagreement with the description of the incident put forward by the Spanish authorities.¹⁰²

Although confrontation between the Bahamas and Spain has continued after the presentation of their respective investigations into the cause of the accident in 2005,¹⁰³ it is unlikely that the responsibility of the victim State could be formally

¹⁰⁰ See: Doc. 92.FUND/EXC.21/5, 9 May 2003, *Record of Decisions of the Twenty-First Session of the Executive Committee*: "The Spanish delegation mentioned that in managing the crisis the Spanish authorities had pursued the following objectives: the saving of human life, combating the pollution, preventing the tanker from running aground and minimising the risks to the Spanish coast and its local population (par. 3.2.6). The Spanish delegation further mentioned that once the first three objectives had been successfully executed, the authorities had considered three possibilities for minimising the risks to the coast and its population, namely allowing the vessel entry into a port or other place of refuge, removal of part of the cargo at sea, or towing the tanker away from the coast to calm waters where a cargo transfer could take place. It was stated that after taking into account all the circumstances, including the risk posed by the structurally damaged ship, the hazards posed by the rocky and dangerous coastline and adverse weather conditions and the risks to the rich fisheries in the Galician estuaries, the authorities had decided to order the vessel to be towed away from the coast to calm waters to enable a lightering operation to be carried out. It was remarked that the decision taken was in accordance with Spanish and EU legislation and was consistent with decisions taken in respect of previous major casualties" (par. 3.2.7).

¹⁰¹ *Ibid.*, par. 3.2.12.

¹⁰² *Ibid.*, pars. 3.2.13–3.2.14.

¹⁰³ The Bahamas Maritime Authority (BMA), the authority of the flag State, carried out an

engaged with respect to international wrongful acts allegedly committed by Spain in responding to the *Prestige* casualty. After much debate about the Spanish authorities' decision to tow the *Prestige* away from its coasts, it is quite doubtful that its decision violated any specific international legal norms applicable to the case at hand. It is also doubtful that Spain's intervention could be considered as contravening the proportionality and reasonability criteria established with respect to its right to take and enforce measures following upon a maritime casualty in accordance with international law, both customary and conventional.¹⁰⁴

It is, in contrast, all the more surprising that the responsibility of the flag State has not been questioned given the vast array of specific rules of international law binding on it with respect of ships flying its flag, particularly in cases of ships carrying dangerous or noxious substances such as heavy oil. These international obligations also apply to States such as the Bahamas, considered as one of the examples of the States having "open registers" which are used to obtain "flags of convenience". As two distinguished international law scholars have written:

"The more convincing proposition is not that international law prohibits flags of convenience, but that once a state has conferred the right to fly its flag, international law requires it to exercise effective jurisdiction and control over the ship in administrative, technical, and social matters. Thus it is the flag state which is responsible for regulating safety at sea and the prevention of collisions, the manning of ships and the competence of their crews, and for setting standards of construction, design, equipment, and seaworthiness. These responsibilities also include taking measures to prevent pollution".¹⁰⁵

Among the obligations binding on all flag States particular mention can be made of the following duties: a) "to take such measures for ships flying its flag as are

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investigation into the cause of the accident. A brief summary of the report on the investigation was presented to the Executive Committee at its March 2005 session (document 92FUND/EXC.28/5, section 13.1). The discussion of the report at the session is reflected in the Record of Decisions (document 92FUND/EXC.28/8, paragraphs 3.4.52–3.4.60). The Spanish Ministry of Promotion has carried out an investigation into the cause of the incident through the Permanent Commission on the Investigation of Maritime Casualties (the Commission) that has the task of determining the technical causes of maritime accidents. The report of the investigation, which was made available to the 1992 Fund in April 2005, extends to some 420 pages and contains a narrative of events, an analysis of the evidence, conclusions, recommendations and appendices. The report does not address blame or liability. See Doc. 92/FUND/EXC.29/4, 9 June 2005, par. 13.1–13.3. and Doc. 92/FUND/EXC.29/6, 28 June 2005, *Record of Decisions of the Twenty-Ninth Session of the Executive Committee*, pars. 3.2.79–3.2.85.

¹⁰⁴ UNCLOS, Art. 221 and 1969 Intervention Convention.

¹⁰⁵ Birnie, P.; Boyle, A., *International Law and the Environment*, (Clarendon Press – Oxford), 1992, p. 264.

necessary to ensure safety at sea” with regard, *inter alia*, to its seaworthiness;¹⁰⁶ b) to adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag;¹⁰⁷ and c) to ensure compliance by vessels flying their flag with applicable international rules and standards and provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.¹⁰⁸ In this respect, Article 217.2 of UNCLOS affirms that:

“States shall, in particular, take appropriate measures in order to ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards referred to in paragraph 1, including requirements in respect of design, construction, equipment and manning of vessels”.

Moreover, the draft Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the UN International Law Commission in 2001,¹⁰⁹ provide for a series of special rules which also bind upon flag States with respect to their ships carrying dangerous substances.¹¹⁰ And it should be also recalled that, as pointed out by *Birmie and Boyle*, “(a) number of authors have argued that in respect to ultrahazardous activities at sea, such as the operation of large oil tankers, the liability of the flag State is strict . . .”.¹¹¹

As provided for in Article 235 of UNCLOS, regarding responsibility and liability, “States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law”. However, once again, in the case

¹⁰⁶ UNCLOS, Art. 94.3, a).

¹⁰⁷ UNCLOS, Art. 211.2.

¹⁰⁸ UNCLOS, Art. 217.1.

¹⁰⁹ See: Report of the International Law Commission on the work of its Fifty-third session, *Official records of the General Assembly, Fifty-sixth session, Supplement no. 10 (A/56/10)*, Chapter V, pp. 337–436.

¹¹⁰ As explained in the commentary of the draft Articles, “the prime example of such a situation is innocent passage of a foreign ship through the territorial sea. In such situations, if the activity leading to significant transboundary harm emanates from the foreign ship, the flag State and not the territorial State must comply with the provisions of the present articles” (Report of the International Law Commission . . . *cit.*, p. 384 (8)). One of the special rules contained in the draft articles affirms that: “The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information” (Article 17).

¹¹¹ *Birmie, P.; Boyle, A., op. cit.*, p. 264, quoting Smith, B. D., *State Responsibility and the Marine Environment. The Rules of Decision*, Oxford, 1988, pp. 114–118; 160–163; 210–213 and Handle, G. “State Liability for Accidental Transnational Environmental Damage by Private Persons”, *American Journal of International Law*, 74, 1980, p. 547.

of the *Prestige* no claims have been made by affected States with respect to other States' accountability for marine pollution.

CONCLUSION

To face an oil spill is not a new problem in international law. However, the intensity and the increasing frequency of oil spills all over the world, as well as their catastrophic environmental and economic consequences for the coastal States affected, make evident the need to reconsider some of the most deeply rooted norms of international law, such as the dogma of freedom of navigation. The phenomenon of oil spills also questions other norms, such as the pre-eminent jurisdiction of the flag State over the design, construction, manning and equipment of their ships until stricter development of generally accepted international rules or standards take place. The same can be said with respect to the persistent limitation of liability of the polluter until it is lifted to a new ceiling, still allowing the polluter not to compensate for all the damages caused. Other tolerated practices, such as the existence of flags of convenience or the utilization of substandard tankers for the carriage of dangerous and ultrahazardous substances or goods reflect the need to revise a complex set of norms in order to enjoy safer navigation.

Accidents like the *Prestige* always generate some pressure for the development of new norms aimed at preventing the repetition of the same type of disaster. The emerging right of coastal States not to tolerate irresponsible navigation of dangerous ships through their waters, the development of stricter monitoring and inspection procedures, the establishment of places or ports of refuge, the institution of Particularly Sensitive Sea Areas or the accelerated withdrawal of single hull oil tankers are some of the most important legal developments that are taking place after the *Prestige* accident. Obviously, if these new legal developments are correctly implemented, they will contribute to safer navigation.

But questions still arise. Are these measures sufficient? Is the international community able to impose and require responsible navigation? The answers seem mostly in the negative. Even after the *Prestige* accident, the flag State maintains most of its legal privileges, still living in a golden paradise. No one has asked for the international responsibility of a flag State not ensuring the safety of their tanks; the limited compensation for damages is channelled through private liability systems not affecting the flag State; private insurance companies and the IOPC fund will have to pay for its negligence, never the flag State. As one author put it "As the ship goes down, flag State jurisdiction goes down with it. And it is left to others to clean the mess".¹¹²

¹¹² Fleischer, K. A. "Implementation of the Convention in the Light of Customary International Law, Prior Treaty Regimes and Domestic Law" in Vidas, D. and Ostreng, W. (editors) *Order for the Oceans at the Turn of the Century*, 1999, p. 529.

Even the situation of the victim State has not significantly improved. Although a new IOPC Supplementary Fund has been created as a consequence of the *Prestige* accident, this fund will not apply retroactively to the case at hand. In fact, Spain still faces two main risks for its diligent reaction to an environmental disaster caused by a foreign tanker. First, having spent more than 1,000 million in response to the damages resulting from the accident, it has only received an advance sum of 57.5 million from the 1992 Fund, and it seems clear that Spain will be reimbursed only in a small part for the costs already incurred. Second, although currently trial is still pending, there is the possibility of Spain being condemned, on a subsidiary basis, if the Court accepts the charges of reckless conduct formulated against the Director General of Merchant Shipping in office at the time of the accident. None of these risks are for the flag State, the Bahamas, or the polluting vessels, but for the victim State. In these circumstances, it can be held that nowadays to pollute is still a good business not adequately sanctioned by international law.