

FREEDOM OF NAVIGATION
VERSUS POLLUTION
BY OIL FROM VESSELS :
THE POINT OF VIEW OF COASTAL STATES

PAR

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I. – INTRODUCTION

Among the first supporters of the freedom of navigation principle, *Grotius* defended it arguing that navigation was an innocuous activity, causing neither danger nor harm to any State (2). Although this assertion was true in 1609, it cannot be held nowadays.

However, with the adoption of the United Nations Convention on the Law of the Sea, the freedom of navigation principle became a legal dogma in International Law, despite the fact that in 1982 it was already evident in practice that the maritime transport of oil might have severe adverse effects for the environment and the economic interests of the affected coastal States.

The reaction of the coastal States affected by oil spills after the *Erika* and the *Prestige* accidents, two oil tankers built with a single hull long ago and carrying a cargo of heavy fuel oil, that sank respectively in the French and Spanish exclusive economic zones, shows that coastal States are not longer available 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 fre-

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(2) HUIJ DE GROOT, (1609), *De jure praedae commentarius, ex Auctoris Codice descripsit et vulgavit*, H.G. HAMAKER, Hagae Comitum, 1868, p. 228.

quency of oil spills with catastrophic environmental and economic dimensions also support the trend towards the adoption of stricter measures concerning the safer navigation of vessels devoted to oil transport.

II. – COASTAL STATES AND MEASURES
FOR THE PREVENTION OF MARINE POLLUTION
UNDER CURRENT INTERNATIONAL LAW

If we take into account the international legal framework in force on 13 November 2002 (3), we find that in UNCLOS, if the freedom of navigation, including the navigation of oil tankers, is confronted with the environmental protection powers recognized to coastal States, the final result is highly unsatisfactory. With the only exception concerning the entering into and leaving the ports, freedom of navigation always prevails over the environmental prevention and protection powers of coastal States.

Through the territorial sea, ships of all States, including oil tankers, enjoy the right of innocent passage (Article 17). Oil tankers will only lose this right if they make any act “of wilful and serious pollution contrary to this Convention” (Article 19.2 (h)). It is important to underline that pursuant to this provision, the coastal State must wait for until the pollution takes place in its own territorial sea before reacting against the oil tanker responsible of such concrete pollution. Moreover, the coastal State only has powers to act against these polluting vessels if three conditions are met with an accumulative character (4): (i) it must be a wilful pollution, a condition that in most of the cases is not present; (ii) it must be a “serious” pollution, which is an undetermined concept in practice; and (iii) the wilful and serious pollution must be “contrary to this Convention”, a wording that implies the idea that not all wilful and

(3) This is the date when the *Prestige*, a 26-years-old single hull oil tanker flying the flag of Bahamas and transporting a cargo of 77.033 tonnes of heavy fuel oil, sent a “may day” to the Maritime Salvage Centre at Finisterre, Spain. For a description and comment on this accident, see: Bou, V., “Riflessione sulle misure di prevenzione dell’inquinamento marino dopo l’incidente della *Prestige*”. In: M. C. CICIRIELLO (ed.), *La protezione del Mare Mediterraneo dall’inquinamento: problemi vecchi e nuovo*, 2003 (pending publication), 40 pp.

(4) See SMITH, B., “Innocent Passage as a Rule of Decision: Navigation v. Environmental Protection”, *Columbia Journal of Transnational Law*, 1982, p. 85 et seq.; CATALDI, G., *Il passaggio delle navi straniere nel mare territoriale*, Milano, Giuffrè, 1990, pp. 128-133.

serious acts of marine pollution are “contrary” to UNCLOS and that, therefore, there might be wilful and serious acts of pollution that are “in conformity” with UNCLOS.

The coastal State may suspend the right of innocent passage of oil tankers in its territorial sea with a temporary character, not permanently, and without any discrimination in form or in fact among foreign ships. Moreover, this temporarily suspension can only take place “if such suspension is essential for the protection of its security” (Article 25.3). Ships carrying inherently dangerous or noxious substances, as it is the case with oil tankers, shall carry the security documents (which frequently are issued very liberally by the classification societies) and observe the special precautionary measures established for such ships by international agreements, not by the domestic law of the coastal State concerned (Article 23).

The only particular measure for the preventive protection of the marine environment of its territorial sea enjoyed by the coastal State and expressly provided for by UNCLOS is the power to designate or prescribe sea lanes and traffic separation schemes for the regulation of the passage of ships and the power to require foreign ships exercising their right of innocent passage, expressly including oil tankers, to confine their passage to such lanes. But even in this case UNCLOS tries to dark the environmental character of this particular measure, describing it as a necessary measure “having regard to the safety of navigation” (Article 22), without mentioning its preventive environmental implications. It has been held that these powers recognized to the coastal State also include the power to require the prior notification of passage to the coastal State (5); otherwise the coastal State will not be able either to control the passage of oil tankers through its territorial sea, or to require oil tankers to confine their passage to such sea lanes (6).

(5) SCOVAZZI, T., “Le competenze dello Stato costiero in materia di prevenzione dell'inquinamento da navi”, in: M. C. CICIRIELLO (ed.), *La protezione del Mare Mediterraneo dall'inquinamento: problemi vecchi e nuovo*, 2003 (pending publication).

(6) As the European Commission has observed, each time is more frequent that oil tankers avoid entering into European Union ports in order not to be controlled by the port State, and limit themselves to navigate through European waters. This fact makes more difficult for the coastal State to control the dangers of unsafe navigation, as in most of the cases the coastal State even ignores that a “dangerous” vessel is navigating through its marine areas. See the Document COM(2002) 681 final (3 December 2002): COMMISSION OF THE EUROPEAN COMMUNITIES, *Communication from the Commission to the European Parliament and to the Council on improving safety at sea in response to the Prestige accident*.

In fact, this requirement concerning the prior notification of passage of those vessels carrying an environmental dangerous cargo has already appeared in treaty practice. This is the case, for instance, with Article 6.4 of the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Izmir, 1 October 1996), which states the following :

“The transboundary movement of hazardous wastes through the territorial sea of a State of transit only takes place with the prior notification by the State of export to the State of transit, as specified in Annex IV to this Protocol. After reception of the notification, the State of transit brings to the attention of the State of export all the obligations relating to passage through its territorial sea in application of international law and the relevant provisions of its domestic legislation adopted in compliance with international law to protect the marine environment. Where necessary, the State of transit may take appropriate measures in accordance with international law. This procedure must be complied with within the delays provided for by the Basel Convention” (7).

This requirement on the prior notification to the coastal State has been considered as a “moderate” requirement that fairly balances the interests on international navigation with the necessities of environmental protection of the coastal States (8). In fact, this requirement does not impair international navigation but allows the coastal State to adopt the preventive environmental measures that may be needed (9).

The power recognized to coastal States to designate or prescribe sea lanes and traffic separation schemes and the power to require foreign ships, including oil tankers, to confine their passage to such lanes also comprise the power to sanction those ships, including oil tankers, that do not use these sea lanes and traffic separation

(7) The text of this Mediterranean Protocol is available at <<http://www.unepmap.org>>.

(8) This requirement began to appear in international practice with the adoption of the 1989 Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal. See BOU FRANCH, V., *La navegación por el mar territorial, incluidos los estrechos internacionales y las aguas archipelágicas, en tiempos de paz*, 1994, Colegio de Oficiales de la Marina Mercante Española (COMME), 305 pp.

(9) On this Mediterranean Protocol, see: JUSTE RUIZ, J., “Un nuevo instrumento jurídico del sistema de Barcelona para la protección del Mar Mediterráneo: el Protocolo sobre movimientos transfronterizos de desechos peligrosos y su eliminación”, *Revista Española de Derecho Internacional*, 1997; SCOVAZZI, T., “The Mediterranean Hazardous Wastes Protocol”, *International Journal of Marine and Coastal Law*, 13, 1997; BOU FRANCH, V., “Transboundary movements of hazardous wastes and their disposal in the Mediterranean Sea area”, *Institute of International Public Law and International Relations (IIPLIR). Selected Papers on International Law and Policy*, 1, 2000.

schemes. It must be noted that UNCLOS expressly recognizes the coastal State the power to "take the necessary steps" in its territorial sea to prevent passage which is not innocent (Article 25.1).

It is also interesting to remind that, while the innocent passage is taking place, foreign ships must comply with the laws and regulations enacted by the coastal States in the different matters listed in Article 21. This provision enables coastal States to regulate with their own domestic laws and regulations matters such as the safety of navigation and the regulation of maritime traffic (Article 21.1 (a)) and the preservation of the environment of the coastal State and the prevention, reduction and control of marine pollution (Article 21.1 (f)) (10). But this provision has no usefulness for those coastal States willing to forbid the passage of old single hull oil tankers transporting cargos of heavy oils, as it was the case with the *Erika* and the *Prestige*, as Article 21.2 limits its scope of application. Pursuant to this provision, the laws and regulations of the coastal States shall not apply to the design, construction, manning or equipment of foreign ships unless they give effect to generally accepted international rules or standards. Certainly, the call to international rules and standards in this provision is made with the aim to limit or reduce the discretionary powers of coastal States when enacting their domestic laws and regulations.

The legal situation through the straits used for international navigation is similar to the rest of the territorial sea. States bordering straits may adopt laws and regulations relating to transit passage through straits concerning either the safety of navigation and the regulation of maritime traffic, as provided in Article 41 (Article 42.1 (a)) or the prevention, reduction and control of pollution, but once again these laws and regulations must give effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait (Article 42.1 (b)). Moreover, several proposals formulated by Spain during the Third United Nations Conference on the Law of the Sea with the aim of strengthening the environmental powers of States bordering straits were not accepted by the Conference (11). The limited powers recognized to coastal States by Article 42.1 are even

(10) See also Article 211.4 of UNCLOS.

(11) DE YTURRIA & BARBERÁN, J. A., *Ámbitos de soberanía en la Convención de las Naciones Unidas sobre el Derecho del Mar. Una perspectiva española*, Madrid, 1993, pp. 483-486.

reduced by two different ways. First, because they must be in conformity with the limits settled down by Article 42.2 (12). Second, because UNCLOS is not clear on the legal origin of the duties of ships during transit passage. While it might seem that foreign ships exercising the right of transit passage shall comply with the domestic laws and regulations enacted by States bordering straits (Article 42.3), Article 39 which is expressly entitled "Duties of ships and aircraft during transit passage", in its paragraph 2 (b) expressly mentions that ships in transit passage "shall comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships", without mentioning the duty to comply with the domestic legislation enacted by States bordering straits on this same subject.

In the exclusive economic zones the balance of interests between international navigation and marine environmental protection is even worse for the economic and environmental interests of coastal States. In the exclusive economic zone, the ships of all States enjoy the high seas freedom of navigation and the freedom of other internationally lawful uses of the sea related to the freedom of navigation (Article 58.1). There is an important limit to these freedoms, although it is very general and not determined in practice, because these high seas freedoms do not apply in the exclusive economic zones in absolute terms, but only "in so far as they are not incompatible with" Part V of UNCLOS, that is to say, with the particular norms concerning the *régime* of the exclusive economic zone (Article 58.2). Moreover, in exercising their rights in the exclusive economic zone, including the freedom of navigation typical of the high seas, third States shall have due regard to the rights of the coastal State, including its sovereign rights for the purposes of conserving natural resources and its jurisdiction with regard to the protection and preservation of the marine environment, as provided for in Article 56.1, and they shall also comply with the domestic legislation adopted by the coastal State in so far as this legislation is not incompatible with Part V of UNCLOS (Article 58.3). Hence, it is clear that the freedom of navigation in the exclusive economic zone

(12) According to these provision: "Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section".

is not an absolute freedom and that it needs to be harmonized with the rights belonging to the coastal State.

This problem of harmonization between the freedom of navigation of oil tankers of all States and the powers of the coastal State in its exclusive economic zone becomes more complex as, at the same time, the rights belonging to the coastal State in this marine zone, including its sovereign rights for the purposes of conserving natural resources and its jurisdiction with regard to the protection and preservation of the marine environment do not have an absolute character, either. Its sovereign rights for the purposes of conserving natural resources and its jurisdiction with regard to the protection and preservation of the marine environment must be also exercised with due regard to the rights of third States, including the freedom of their oil tankers to navigate, acting in a manner compatible with UNCLOS (Article 56.2).

In order to harmonize these different and opposing interests, UNCLOS fails to establish clear guidelines. The "due regard" clause and the need to act in a manner compatible with UNCLOS, that are valid limits both for the freedom of navigation of third States and for the rights and jurisdiction of the coastal State in its exclusive economic zone, are guidelines that are too general and vague for indicating any particular solution.

The "basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone", as embodied in Article 59, is, despite of its title, not applicable for this kind of conflicts. Applying a literal interpretation, this provision only concerns the negative conflicts regarding the attribution of rights and jurisdiction, that is, in cases where UNCLOS "does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone" and a conflict arises between the interests of both of them. The need to harmonize the freedom of navigation of oil tankers with the economic and environmental interests of the coastal State is a different kind of problem: it implies a positive conflict regarding the attribution of rights and jurisdiction. This conflict affects the rights expressly recognized to third States, in particular the freedom of navigation, and the powers specifically recognized to the coastal State (sovereign rights on natural resources and jurisdiction on the marine environment).

If Article 59 were to apply, *mutatis mutandis*, to this type of positive conflict of attribution of rights and jurisdiction, then “the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties, as well as to the international community as a whole”. The implications of this “basis for the resolution of conflicts” in this particular case would give priority to the interests of the coastal State, always that the freedom of navigation of other ships, including oil tankers safer than old single hull tankers, remains unaffected. The coastal State would be able to assert its interests in conserving and managing the natural resources of its exclusive economic zone and in protecting the marine environment, while the flag State would have to explain why the navigation of an old single hull oil tanker flying its flag must take place through the exclusive economic zone of a third State and not through the high seas or why a safer tanker is not used.

However, on the question concerning the enforcement of measures for the prevention, reduction and control of pollution from vessels beyond the territorial sea of the coastal State, as a general rule, although different exceptions are allowed, UNCLOS prefers the jurisdiction of the flag State rather than the jurisdiction of the coastal State (Article 228). Other considerations, such as the non-rigid character of the rules on the “genuine link” between the ship and its flag State (Article 91) and the practical inexistence of substantive rules concerning international responsibility and liability of States resulting from environmental damage from vessels (Article 235), allow to conclude that when UNCLOS favours the freedom of navigation rather than the marine environmental protection, it also favours the almost absolute impunity of polluting vessels respect of the victims of its pollution, being no coastal State free of the risk to become a victim of this kind of pollution.

III. – UNILATERAL MEASURES ADOPTED
BY THE COASTAL STATE FOR THE PREVENTION
OF MARINE POLLUTION FROM VESSELS
AFTER THE *prestige* ACCIDENT

Perhaps the most interesting lesson learned after the *Prestige* accident is that coastal States do not want to continue suffering the

risk of being polluted by old single hull oil tankers carrying heavy oils. Towards this aim, coastal States have adopted several new legal initiatives at the unilateral, bilateral, regional and multilateral levels.

After the accident of the *Prestige* took place, the measures for the prevention of marine pollution from vessels adopted on a strictly unilateral basis by the coastal States affected by the oil spill, mainly Spain, have been insignificant if its importance is compared with the unilateral measures adopted either by Canada in 1970 or by the United States of America in 1990 (13).

Canada adopted in 1970 the Arctic Waters Pollution Prevention Act (14), claiming both the right to control international navigation and to adopt measures for combating pollution within a distance of 100 marine miles measured from the coasts in the Arctic regions. This Act was adopted not in response to any particular polluting accident taking place in these waters, but against the environmental risk represented by the projects of different United States' companies to open a navigation route for icebreaker oil tankers through the North-West passage, where an accident could have disastrous consequences for the fragile environment of these regions. In order to impede the legal doubts about the conformity of these measures with international norms, Canada accompanied this Act with a modification of its declaration of acceptance of the jurisdiction of the International Court of Justice, excluding all possible future disputes on this point. Although the Canadian Act is previous to the adoption of UNCLOS, the justification of this behaviour remains: the need to protect the marine environment through the limitation of the freedom of navigation "where no law exists, or where law is clearly insufficient" (15).

Even more surprising was the attitude of the United States of America, the most radical supporter of the freedom of navigation principle during the Third United Nations Conference on the Law of the Sea. A State that until now has not yet ratified UNCLOS but, however, has already established the "U.S. Freedom of Navi-

(13) It deserves to be highlighted that during the Third United Nations Conference on the Law of the Sea, the strongest supporters of the freedom of navigation principle were the main maritime powers, that is, the most developed States. However, in contrast with this initial attitude, these are the States that subsequently have adopted in practice unilateral measures to limit the freedom of navigation principle.

(14) Published in UNITED NATIONS, UN.ST/LEG/SER.B/16: *National legislation and treaties relating to the Law of the Sea*, New York, 1974, p. 183.

(15) According to the declaration made by the Canadian Prime Minister, Mr. *Pierre Trudeau*: "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". *International Legal Materials*, 1970, p. 600.

gation Programme” in order to verify that other States comply with the international norms concerning this matter and to issue, if necessary, the pertinent diplomatic protests when it considers that an infringement of this Convention has taken place. After the accident of the *Exxon Valdez* oil tanker in 1988 in the waters of Alaska, the United States reacted with the adoption of important legal measures. Among these measures, it must be noted that the United States unilaterally forbade the navigation of all single hull oil tankers within its 200 miles exclusive economic zone. Only double hull tankers can navigate to or from the United States ports (16).

Although the United States is not yet a State Party in UNCLOS, the unilateral exclusion of single hull oil tankers from its exclusive economic zone did not generate important diplomatic protests and it has had two relevant consequences in the short-term and a definitive legal effect on the medium-term. The first one is that after the *Exxon Valdez* accident took place, there has not been any other accident with oil tankers in the United States marine areas. The second consequence is more dangerous: from 1990 onwards, the safest oil tankers, all of them with double hull, are navigating to and from the United States; while the less safe tankers, which are always single hull tankers like the *Erika* or the *Prestige*, are used for the transport of oil thorough the rest of the world, including all Europe and the Mediterranean Sea. The case of the *Exxon Valdez* oil tanker has been a good example of this assertion. After its accident in Alaska, the navigation of this oil tanker through the United States waters was expressly forbidden. After being restored, this tanker was renamed as the *Mediterranean Star* and, from 1991 onwards, it has been exclusively used for the transport of oil in the Mediterranean Sea, until 15 December 2002, date of its final dismantling.

The definitive legal effect on the medium-term caused by the adoption of the 1990 Oil Pollution Act is that, following the unilateral exclusion of single hull oil tankers established by the United States, the International Maritime Organization (IMO) had to

(16) The United States considered that international rules on the prevention of marine pollution from vessels were insufficient. Hence, the 1990 Oil Pollution Act was adopted. With this Act, the United States unilaterally required the double hull for all oil tankers, including both old and new tankers, navigating through its exclusive economic zone. This Act provided for age limits (from 2005 onwards, between 23 and 30 years old) and a calendar (2010 and 2015) for the progressive dismantling of single hull oil tankers.

accept this measure and, on 6 March 1992, the IMO introduced amendments concerning the double hull in the 1973/1978 MARPOL Convention, entering into force on 6 July 1993. These measures imposed double hull or equivalent design requirements for oil tankers delivered on or after 6 July 1996 aimed at preventing oil pollution in the event of collision or stranding. After this date, no single hull tanker has been built. Within these amendments, a phasing-out scheme for single hull oil tankers delivered before that date took effect from 6 July 1995 requiring tankers delivered before 1 June 1982 to comply with the double hull or equivalent design standards not later than 25 years and, in some cases, 30 years after the date of their delivery. Such existing single hull oil tankers would not be allowed to operate beyond 2007 and, in some cases, 2012, unless they comply with the double hull or equivalent design requirements of Regulation 13F of Annex 1 of the 1973/78 MARPOL Convention. For existing single hull oil tankers delivered after 1 June 1982 or those delivered before 1 June 1982 and which are converted, complying with the requirements of 1973/78 MARPOL Convention on segregated ballast tanks and their protective location, this deadline will be reached at the latest in 2026.

The only strictly unilateral legal measure for the prevention of this kind of pollution adopted by the coastal States affected by the accident of the *Prestige*, mainly Spain, has been the adoption of the Spanish Royal Decree-Act n° 9/2002, of 13 December 1992 (17). 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 transporting heavy fuel oil, tar, bitumen or heavy crude oil as a cargo is forbidden and sanctioned with a bill up to EUR 3 million. As far as this legal measure concerns exclusively the entering into Spanish ports and does not affect in any other way the international navigation through other Spanish maritime zones, its conformity with International Law is not questioned.

However, the conformity of the declaration made by the Spanish Ministry on Promotion, Mr. *Francisco Álvarez-Cascos*, during its intervention before the Infrastructures Commission of the Spanish

(17) This Royal Decree-Act was published in the Spanish *Boletín Oficial del Estado*, 14 December 2002, n° 299.

Congress on 30 December 2002, with International Law is more doubtful. According to his declaration, Article 112 of the Spanish Act n° 27/1992, of 24 November 1992, concerning National Ports and Merchant Shipping could be invoked as an “additional allegation” that would legally justify the expulsion of single hull oil tankers from the Spanish 200 miles exclusive economic zone (18). This provision states the following :

“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” (19).

It is true that UNCLOS recognizes the coastal State jurisdiction concerning the marine environment in its exclusive economic zone, as this Spanish Act provides for, but UNCLOS neither designates the coastal State as the guarantor of safety of international navigation through this maritime area nor it is clear on the question whether the environmental jurisdiction of the coastal State can reduce or eliminate the freedom of navigation of certain kind of foreign tankers. Before the *Prestige* accident took place, Spain had never invoked Article 112 of its Act n° 27/1992, of 24 November 1992, concerning National Ports and Merchant Shipping, 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.

Moreover, there is a fundamental difference between the practice followed by Spain and the other cases of unilateral reaction mentioned above. Unlike the United States, Spain has already ratified UNCLOS. Unlike Canada, Spain adopted the decision to restrict the navigation of a particular kind of oil tankers in its exclusive economic zone once UNCLOS was already in force for Spain. Therefore, this Spanish decision is subject to the compulsory system for the settlement of disputes provided for by UNCLOS. However, as most of the

(18) See the document CONGRESO DE LOS DIPUTADOS, (30 de diciembre de 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras*. All the declarations and notes issued by the Spanish Ministry on Promotion are available at: <<http://www.mfom.es>>.

(19) Published in UNITED NATIONS, *Law of the Sea Bulletin*, n° 24, December 1993, p. 29.

single hull oil tankers usually fly a flag of convenience, it is highly improbable in practice that these States resort to this system.

IV. – BILATERAL MEASURES ADOPTED
BY THE COASTAL STATE FOR THE PREVENTION
OF MARINE POLLUTION FROM VESSELS
AFTER THE *prestige* ACCIDENT

Contrary to the moderate character of the strictly unilateral measures adopted by Spain after the *Prestige* accident, Spain has promoted the adoption of stricter and more radical measures at the bilateral, regional and multilateral levels concerning the navigation of single hull oil tankers as a legal reaction to the *Prestige* accident.

It must be noted that the legal limit consisting in not affecting the “design, construction, manning or equipment of foreign ships” when the coastal State regulates the international navigation through its territorial sea (Article 22.1 of UNCLOS) or even through the special areas within its exclusive economic zone (Article 211.6 (c)), is a legal limit or requirement that only applies to “the laws and regulations adopted by the coastal State” and not to international treaties, either bilateral, regional or multilateral treaties. In fact, Article 197 of UNCLOS calls for international cooperation for protecting and preserving the marine environment.

Before the oil spill caused by the *Prestige* reached the French Atlantic coasts (20), Spain and France held its fifteenth bilateral summit at Malaga (Spain), on 26 November 2002. On this date, the Spanish Ministry on Promotion, Mr. *Francisco Álvarez-Cascos*, and the French Ministry on Infrastructure, Transport and Accommodation, Mr. *Gilles de Robien*, issued a Joint *Communiqué* (21). This

(20) On 13 November 2002, the *Prestige*, a Bahamas-registered, 26-years-old single hull tanker owned by a Liberian company and carrying more than 77.000 tonnes of heavy fuel oil, sprang a leak off the coast of Galicia. It eventually broke apart on 19 November and sank 270 km off the Spanish coast. Thousands of tonnes of heavy fuel oil spilled into the sea, polluting the Galician coastline (near the Spanish border with the north of Portugal). The pollution then spread to the shores of Asturias, Cantabria and the Spanish Basque Country. On 31 December 2003, it 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’Ile d’Yeu were affected.

(21) This text has not been officially published in Spain. The author thanks the *Comisionado del Gobierno para las actuaciones derivadas de la catástrofe del buque Prestige* for its readiness to provide the author with a copy of this document.

Joint *Communiqué* started 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* in the French coasts or the *Prestige* in the Spanish coasts. The agreement reached by both States implied the undertaking to promote different measures that should be adopted by different international fora, such as the European Union, the IMO or other international fora.

The measures announced by Spain and France for their adoption by the European Union concerned the acceleration of the introduction of the double hull requirement for all oil tankers flying the flag of a European State or flying whatever flag but entering into the ports of any European State; to improve the practical application of the Paris Memorandum of Understanding on port State control; to strengthen the mechanisms for the control of the maritime traffic through the maritime areas of the European Union Member States, including both the establishment of a preventive and sufficiently broad distance from the coasts for the shipping routes of oil tankers, entering or not into European ports, and the urgent drafting of contingency plans for the reception of ships in distress presenting a threat to the marine environment within the waters of the Member States and the establishment along the European coasts of places and ports of refuge to be defined in order to allow combating emergencies without risks for the coasts and their inhabitants; the establishment in the short term of a European compensation fund to assist the victims of pollution; the prompt adoption of a work calendar for the European Maritime Safety Agency; and to impulse the efforts of the European Union for the modification of international rules that prevent the assumption of responsibility and liability through the establishment of intermediate companies.

Spain and France also agreed to seek the adoption of all these measures by the IMO, through the collective action of the European Union. At the same time, two of the measures scheduled by Spain and France seem to be devoted exclusively for the IMO: to re-exam the international rules of the Law of the Sea and the Law of the Maritime Transport in order to avoid international responsibility and liability through the use of a flag of convenience; and to propose a system forcing all entities engaged in the exploitation of oil and in its maritime transport to adopt measures not only for the

prevention of pollution, but also for combating accidental pollution by oil. Another scheduled measure concerned the International Labour Organization, as both Spain and France agreed to promote better conditions of work, education and training for the crews of oil tankers.

All these measures had a strong character of a *pactum of contra-hendo*. However, the situation was different with the meaning of the measure provided for in point 4 of this Joint *Communiqué*. Although in the first paragraph of point 4 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 contained a shelf-executing measure, as it states the following :

“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” (22).

In fact, the first new 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 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 opera-

(22) Private translation.

tors and all the operations affecting the transport that they are carrying out and that there is within that ships. In cases of doubts, the pertinent State's specialist will carry out an inspection, and of course, if needed, there will be the pertinent consequences if the duly 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 Sea (23) and it will enter into force in our exclusive economic zones from tomorrow onwards" (24).

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 it, that from tomorrow onwards all the ships with doubtful characteristics (single hull, more than 15 years old, carrying heavy fuel or tar) and dangerous for the ecosystems can be revised and, in cases of infringement of the rules, excluded from our 200 miles zones. We will propose to the Copenhagen (European Council) the extension of these measures to the European countries as a whole, so that they can joint us" (25).

(23) An additional legal argument was introduced on 30 December 2002, when the Spanish Ministry on Promotion, Mr. *Francisco Álvarez-Cascos*, during its 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 produced an adverse effect on the marine environment". Private translation. See the document CONGRESO DE LOS DIPUTADOS, (30 de diciembre de 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras. Cit.*

(24) 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 de noviembre de 2002)*, 4 pp. The original Spanish document is available at : <<http://www.la-moncloa.es>>.

(25) Private translation. *Ibid.* These declarations were widespread. Two official notes dated the same 26 November 2002 from the Spanish Ministry on the Presidency and from the Spanish Ministry on the 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 other type and that they 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 on Article 56 of the United Nations Convention on the Law of the Sea". Private translation. For the Spanish original texts, see MINISTERIO DE LA PRESIDENCIA, (26 de noviembre de 2002): *Nota de Prensa del Ministerio de la Presidencia*, 1 p. and VICE-PRESIDENCIA PRIMERA DEL GOBIERNO, (26 de noviembre de 2002): *El Gobierno informa. Los afectados por los vertidos comenzarán a recibir las ayudas a mediados de diciembre*, 3 pp., All the declarations and notes issued by the Spanish Ministry on the Presidency are available at <<http://www.mpr.es>>. All the declarations and notes issued by the Spanish Ministry on the First Vice-Presidency of the Government are available at <<http://www.la-moncloa.es>>.

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*, has commented that (this decision) is based on Article 56. Why this policy was 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 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 already has 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 take it too. As far as we are concerned, this decision is irrevocable” (26).

Spain and France implemented immediately this decision to expulse this particular kind of oil tankers 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 (27); on 4 December, the oil tanker *Evgueny Titov*, also flying the flag of Malta (28); on 9 December, the oil tanker *Teekay Foam*, flying the flag of Bahamas (29); on 10 December, the oil tanker *South Trader*, flying

(26) 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 de noviembre de 2002)*, 4 pp., *Cit.*

(27) “The President of the Government, *José María Aznar*, announced today that last night took place the first expulsion from the Spanish territorial waters of a vessel, flying the flag of Malta, which did not comply with the conditions agreed with France after the oil spill of the *Prestige*. 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 the Portuguese authorities to 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 de diciembre de 2002) : *El Gobierno informa. El barco Moskowsky, de bandera maltesa, fue expulsado de la zona económica exclusiva española*, 6 pp.

(28) See the document VICEPRESIDENCIA PRIMERA DEL GOBIERNO, (4 de diciembre de 2002) : *El Gobierno informa. Nota 49. Más de 8.200 toneladas recogidas ya en el mar*, p. 1.

(29) See MINISTERIO DE DEFENSA, (9 de diciembre de 2002) : *Nota de prensa del Ministerio de Defensa : La Armada ha expulsado hoy de aguas españolas al petrolero “Teekay Foam”*, 1 p.; and VICEPRESIDENCIA PRIMERA DEL GOBIERNO, (9 de diciembre de 2002) : *E*

the flag of Liberia (30); on 11 December, the oil tanker *Byzantio*, flying the flag of Malta (31); on 18 December, the tanker *Néstor C* (32); on 21 December, the oil tanker *Stmichaelis*, flying the flag of Greece and, once again, the *Moskowsky Festival* (33); 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 (34); etc. France reacted in a similar way (35). Only one flag State affected by these measures, Greece, issued a diplomatic protest against these expulsions.

As the declarations made by the President of the Spanish Government at the press conference following the bilateral Spanish-French Summit reveals, the actions carried out by France and Spain are directed against a very particular kind of oil tankers: only the “ships built more than 15 years ago, with a single hull, car-

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>>.

(30) See the document CONGRESO DE LOS DIPUTADOS, (10 de diciembre de 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras*, p. 12.

(31) See the documents XUNTA DE GALICIA. OFICINA INFORMATIVA COMISIÓN SEGUIMIENTO *PRESTIGE*, (11 de diciembre de 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 de diciembre de 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>>.

(32) See MINISTERIO DE FOMENTO, (19 de diciembre de 2002): *El Gobierno informa. Las Autoridades Marítimas españolas prohíben la entrada del buque “Néstor C” en puerto español*, 2 pp.

(33) See XUNTA DE GALICIA. OFICINA INFORMATIVA COMISIÓN SEGUIMIENTO *PRESTIGE*, (21 de diciembre de 2002): *Nota 95. Un patrullero de la Armada impedirá la entrada en aguas españolas a dos buques mercantes monocasco*, 5 pp.

(34) See the document CONGRESO DE LOS DIPUTADOS, (30 de diciembre de 2002): *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras*, *cit.*

(35) 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 de diciembre de 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 the MINISTERIO DE DEFENSA, (4 de diciembre de 2002): *Nota de prensa del Ministerio de Defensa: Colaboración de las Fuerzas Armadas en la protección de la costa gallega*, 2 pp.

rying fuel or tar, not equipped with mechanisms for measuring the level and pressure of oil and representing a threat for our coasts" have been affected by this bilateral agreement. It is interesting to note that, unlike fisheries, these actions are not directed to vessels flying a flag of convenience (which in fact is what takes place in most of the cases), but against any vessel, irrespective of the flag it flies, that meets those conditions. Unlike fisheries, in these cases it is not the lack of control of the flag State what causes the environmental risk or threat, but the mere presence of these vessels within the exclusive economic zones. Hence, it is the need to avoid this environmental threat what justifies, in the opinion of France and Spain, the expulsion of whatever oil tanker that meets these conditions from their exclusive economic zones.

The fact that the measures adopted by Spain and France have not been limited to oil tankers of these characteristics flying a flag of convenience may explain the diplomatic protest issued by Greece. However, it must be remembered that on 13 November 2002, the date when the accident of the *Prestige* took place, all the compensations that ought to be paid resulting from the accident of the *Aegean Sea*, an oil tanker meeting these characteristics and flying the flag of Greece that caused an oil spill ten years before in the very same place as the *Prestige*, were not yet paid. Hence, the possibility of another oil spill in the future from a tanker meeting these characteristics and not flying a flag of convenience cannot be eliminated. This fact justifies the non discriminatory basis that inspires the Spanish and French agreed measures.

The foreign policy of Spain on this subject was not limited to this bilateral agreement with France. Spain, as the President of the French Republic also announced at the press conference closing the bilateral Summit of Malaga, also tried to give a regional scope to all these measures, seeking the support of the European Union (36), who backed these proposals at the Copenhagen Euro-

(36) 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;

pean Council held on 13 December 2002. But Spain, without waiting for the Copenhagen European Council, succeeded in getting other European States (Portugal, Italy and Germany) associated with the Spanish-French decisions not allowing the navigation of substandard oil tankers within the 200 miles limit (37). In this line of bilateral agreements, the “Joint Spanish-Italian Declaration concerning safety of transport in oil tankers”, signed on 17 March 2003 by the Spanish Ministry on Promotion, Mr. *Francisco Álvarez-Cascos*, and the Ministry on Infrastructures and Transport of the Italian Republic, Mr. *Pietro Lunardi*, must be pointed out. According to this Joint Declaration :

“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 miles limit from their coasts. This initiative pretends to reduce the risk and the consequences of an accident as much as, in cases of average, 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 as those mentioned before into their ports, anchorage and transfer places. Both States undertake to work for the quick

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 fully these proposals”. 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 de noviembre de 2002)*, 4 pp., *Cit.*

(37) 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 as his own the contents of this letter 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 de noviembre de 2002)*. The Spanish text of this document is available at <<http://www.la-moncloa.es>>.

adoption of these measures by the European Union and jointly or subsequently by the IMO" (38).

V. – REGIONAL MEASURES : THE CASE FOR THE EUROPEAN UNION

After the disaster caused by the *Amoco Cadiz* in 1978, the European Council asked the Commission to present proposals on the control and reduction of pollution resulting from oil spills. Despite the initial efforts made by the Commission, no important measure was adopted at the European level. Only the introduction of the qualified majority during the 90's allowed the Council to take the first steps towards a common policy on maritime safety. These initial measures (39) established a system for the implementation of norms stricter than the provided for by international conventions and they introduced specific community norms in sectors where the IMO rules were inexistent or insufficient.

VI. – *European measures adopted after the Erika accident*

Only after the *Erika* oil tanker accident on 12 December 1999, the European Union reinforced its legislative arsenal to combat flags of convenience and give Europe a better protection against the risk of accidental oil spills (40). The European Commission prepared

(38) See the document MINISTERIO DE FOMENTO, (17 de marzo de 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>>.

(39) See the Council Directive 95/21/EC of 19 June 1995, concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and ship-board living and working conditions (port State control), published in *Official Journal L 157*, of 7.7.1995, p. 1. This Directive provided for the inspection of all vessels, introducing particular measures for the inspection of oil tankers; Council Directive 94/57/EC of 22 November 1994, on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, published in *Official Journal L 319*, of 12.12.1994, p. 20; Council Regulation (EC) n° 2978/94 of 21 November 1994, on the implementation of IMO Resolution A.747(18) on the application of tonnage measurement of ballast spaces in segregated ballast oil tankers, published in *Official Journal L 319*, of 12.12.1994, p. 1; and Council Directive 93/75/EEC of 13 September 1993, concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods, published in *Official Journal L 247*, 5.10.1993, p. 19. By this Directive, vessels entering into or leaving from the Community maritime ports must provide detailed information on the nature of their cargo.

(40) See the more detailed contribution by SOBRINO HEREDIA to this workshop.

two sets of legislative proposals, known as the “*Erika I package*” (21 March 2000) and the “*Erika II package*” (6 December 2000).

The European Parliament and the Council adopted in December 2001 the measures contained in the “*Erika I package*”, which are basically three measures (41). First, they modified the existing Directive 95/21/EC on port State control, in order to strengthen it. Now this Directive settles down the duty to inspect at least 25 % of the vessels entering into European ports (42) and it establishes a “black-list” of oil tankers that cannot enter into any European port. This means that, under the new measures, over 4.000 “hazardous” vessels out of an average of 11.000 inspected every year will undergo rigorous inspection, compared with only 700 at present. In addition, vessels that have been inspected and declared substandard on several occasions will be blacklisted and refused access to European ports. Moreover, the control of all vessels must be strengthened depending on the age of each vessel and the inspections must always systematically include one of the ballast tanks. Before entering into European ports, vessels must send information in order to enable the preparation of efficient inspections.

Second, they modified the existing Directive 94/57/EC on classification societies, which conduct structural safety checks of vessels on behalf of flag States. These classification societies must comply with several quality requirements in order to obtain and retain their recognition by the European Union. These quality requirements for classification societies have been raised and the authorization to operate within the European Union will be conditional on meeting these requirements. The Commission will strictly monitor the performance of classification societies, and failure to meet the standards required (concerning safety of navigation, prevention of pollution, ...) may result in penalties, i.e. temporary or permanent

(41) By 22 July 2003, the time limit for incorporating into national law the new measures concerning port State control and classification of societies, only a small number of Member States had informed the Commission on their national implementing measures. Consequently, on 23 July the European Commission decided to initiate procedures *vis-à-vis* the ten Member States concerned.

(42) When this Directive was adopted, the inspections carried out in the ports of European States represented very different percentages. During the year 2001, Belgium inspected the 26,01 % of the ships calling into its ports; Denmark, the 25,08 %; Finland, the 39,36 %; France, the 16,63 %; Germany, the 26,11 %; Greece, the 33,48 %; Iceland, the 26,32 %; Ireland, the 21,05 %; Italy, the 41,74 %; Netherlands, the 24,69 %; Norway, the 25,50 %; Portugal, the 28,73 %; Spain, the 32,09 %; Sweden, the 26,98 %; and United Kingdom, the 27,26 %. Italy and France represented the maximum and minimum percentages, respectively.

withdrawal of their Community authorization. For the first time, this modified Directive introduces the civil liability of these classification societies. Liability that can have no limits if the vessel has an accident and it is proved that the classification society had a grave and negligent behaviour. This new element may be important in the future : in the case of the *Erika*, its safety was certified by a classification society from Turin (Italy) and in the case of the *Prestige* its safety was certified by the *American Bureau of Shipping*, from the United States of America.

Third, on 18 February 2002, the Regulation (EC) N° 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) n° 2978/94 was adopted (43). Given the differences between the United States 1990 Oil Pollution Act and the 1973/78 MARPOL Convention on the dates for the introduction of the double hull or equivalent design requirements, there was a major risk that, as of 2005, single hull tankers banned from American waters on account of their age would operate in European Union waters, increasing the risk of marine pollution. Hence, the European Commission proposed to speed up, within the Community waters, the replacement of single hull tankers by double hull tankers. This measure would also serve to reverse the tendency towards the ageing of the tanker fleet, with new double hull tonnage replacing old single hull tonnage. The Commission's proposal followed the amendments to the 1973/78 MARPOL Convention by distinguishing three categories of tankers. However, for each of these categories the Commission's proposal followed the stricter age limits and cut-off dates established by the 1990 Oil Pollution Act. Hence, for Category 1 tankers (44) the proposal was for a single age limit of 23 years and a cut-off date of 2005. For Category 2 tankers (45), the age limit was 28 years and

(43) Published in *Official Journal L 64*, of 7.3.2002, p. 1.

(44) Category 1 (or pre-MARPOL) tankers are those single hull tankers with a deadweight tonnage of 20.000 tonnes or more (crude carriers) or 30.000 tonnes or more (refined oil products), without protective ballast tanks around the cargo tanks. These tankers were generally built before 1982.

(45) Category 2 tankers are those single hull tankers with the same deadweight tonnage as Category 1 tankers but whose cargo tank area is partially protected by segregated ballast tanks. These tanks were generally built between 1982 and 1996.

the cut-off date 1 January 2010. Lastly, for Category 3 tankers (46), the age limit was 30 years and the cut-off date 1 January 2015.

Following the Council's decision to negotiate the Commission's proposal with the IMO with a view to amending the MARPOL Convention, Regulation (EC) n° 417/2002 finally adopted by the European Parliament and the Council on 18 February 2002 contained a timetable different from the Commission's original proposal. The single hull tanker phase-out programme introduced under this Regulation involved the following cut-off dates for the operation of tankers entering ports or sea terminals coming under the jurisdiction of a Member State and tankers flying the flag of a Member State: 2007 for Category 1 tankers and 2015 for Category 2 and Category 3 tankers. In addition, the Regulation imposed age limits for the various categories of single hull tankers according to their category and year of construction. These age limits are generally between 26 and 30 years. However, the *Prestige* accident revealed that, for a long segment of the coastlines of Spain, France and Portugal, a so generous calendar has not been useful and, once again, polluters rather than victims of their pollution have been favoured by it (47).

It results interesting to note that, after the *Prestige* accident, Spain has implemented the first measure as contained in the modified Directive 95/21/EC on port State control in a genuine way. From 1 January 2003 onwards, Spain inspects not the 25 % but the 35 % of all vessels entering into Spanish ports. Spain also forbids the entering into Spanish ports not only of those vessels included in the oil tankers "black-list" annexed to this European Directive, but also of all single hull oil tankers with a deadweight tonnage of

(46) Category 3 tankers are those single hull tankers below the MARPOL size limit. These smaller tankers are often used in regional traffic.

(47) The Commission has regretted on several times that the timetable it originally proposed was not accepted, as it could have prevented the *Prestige* accident. "Under the Regulation finally adopted by the European Parliament and the Council, the *Prestige* was to have ceased operating from 15 March 2005 at the latest. Had the timetable proposed by the Commission been upheld, the *Prestige* would have had to be taken out of service on 1 September 2002. The Commission initially proposed that Category 1 single hull tankers such as the *Erika* or the *Prestige* should be phased out at the age of 23. Had this provision been in force, the *Prestige* would have been prohibited from entering a European Union port after 1 September 2002, as it was over 23 years old on that date". See EUROPEAN COMMISSION, Directorate-General for Energy and Transport. Memo (21st October 2003): *Safer seas: the fight goes on*, pp. 2-3. However, this assertion is doubtful, as far as this Regulation bans such ships only from entering into Member State's ports, but cannot prevent them from navigating off European's shores under current International Law.

more than 5.000 tonnes (48). Even on 2 December 2002, Spain adopted a Ministerial Order establishing an integrated procedure for the stopover of vessels in (Spanish) ports of general interest. This Ministerial Order seeks that, even before a vessel enters into a Spanish port, the port authority receives all the necessary information to programme the inspections and to control the tankers with the idea to focus the inspections on the most dangerous vessels. If the vessel does not provide this information, its entering into an Spanish port will be denied. An important aspect of this Ministerial Order is that it has conceived a single integrated model of document for all stopovers of vessels, which can be electronically transmitted to the port authorities. This document requires all the information concerning each vessel, including the classification society that audited the vessel, the kind of goods carried, the insurance company, the date and port of the last inspection,... (49). This Ministerial Order was implemented immediately (50).

The European Commission proposed other three additional legal measures in order to make safer the international navigation in European waters. These new measures formed the "*Erika II package*" (6 December 2000). The first measure was the creation of the European Maritime Safety Agency. Regulation (EC) n° 1406/2002 of the European Parliament and the Council establishing a European Maritime Safety Agency was adopted on 27 June 2002 (51). This Agency shall provide the Member States and the Commission with the technical and scientific assistance needed (i.e. improvement of Community norms) and with a high level of expertise, in order to

(48) See the documents MINISTERIO DE FOMENTO, (30 de noviembre de 2003): *El Gobierno informa. El Gobierno inicia anticipadamente la tramitación de dos Directivas sobre Seguridad Marítima*, p. 1; and *ibid.*, (6 de diciembre de 2002): *La Administración española ya inició la transposición de la directiva 2001/106 de la UE que podrá entrar en vigor en enero de 2003*, 2 pp.

(49) See the document MINISTERIO DE FOMENTO, (2 de diciembre de 2002): *El Gobierno informa. Se refuerzan los mecanismos para planificar de forma efectiva las inspecciones y controles de los buques*, 2 pp.

(50) At the Tarragona port, the *Black Sea* tanker, flying the flag of Malta, was inspected on 17 December; the *Okio*, flying the flag of the Marshall Islands, was inspected on 21 December; the *Valery Chaklov*, under Malta's flag, was inspected on 24 December; the *Buldury*, under Cyprus flag, on 25 December;... At the Bilbao port, the *Zoja II*, under Cyprus flag, on 22 December;... At the Algeciras port, the *Moon Trader*, under Bahamas flag, on 17 December;... At the Santa Cruz de Tenerife port, the *Billan*, under Sweden's flag, on 24 December;... At the Huelva port, the *Tito Tapias*, under Spanish flag, on 25 December;...

(51) Published in *Official Journal L 208*, of 5.8.2002, p. 1. This Regulation entered into force in August 2002 and the European Commission has already put in place the appropriate administrative mechanisms for the Agency to be operational in 2003. Pending a decision on its final location, this Agency is provisionally located in Brussels.

help them to apply Community legislation properly in the field of maritime safety and prevention of pollution by ships, to monitor its implementation (i.e. to monitor the overall functioning of the Community port State control regime) and to evaluate the effectiveness of the measures in place (52). This Agency will work with the Member States to organise relevant training activities in fields that are under the responsibility of the port State and the flag State. This Agency will also facilitate cooperation between the Member States and the European Commission in the development of a common methodology for investigating maritime accidents and in carrying out these investigations (53).

The second measure was concreted with the adoption of 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 93/73/EC (54). This Directive gives Member States increased powers to intervene in the event of an accident or pollution risk. Ships sailing in European Union waters will be required to fit identification systems that automatically communicate with the coastal authorities, as well as voyage data recorders (black boxes) to facilitate accident investigations. This Directive improves procedures for the sharing of data on dangerous cargoes and allows the competent authorities to prevent the departure of ships in very bad weather. This Directive also requires each maritime Member State to draw up emergency plans for hosting ships in distress in places of refuge.

The third measure proposed by the European Commission consisted in a mechanism for improving the compensation for victims of oil spills (COPE Fund) and, in particular, the raising of the upper limits on the amounts payable in the event of major oil spills in

(52) Such tasks shall include the collection, recording and evaluation of technical data in the fields of maritime safety and maritime traffic, as well as in the field of marine pollution, both accidental and deliberate, the systematic exploitation of existing databases, including their cross-fertilisation and the development of new databases. On the basis of the data collected, the Agency shall assist the European Commission in the publication, every six months, of information relating to ships that have been refused access to Community ports. The Agency will also assist the European Commission and the Member States in their activities to improve the identification and pursuit of ships making unlawful discharges.

(53) In the course of negotiations with States applying for accession, the European Maritime Safety Agency will provide technical assistance as regards the implementation of European legislation in the field of maritime safety and prevention of pollution by ships.

(54) Published in the *Official Journal L 208*, of 5.8.2002, p. 10. This Directive has to be implemented by the Member States by February 2004.

European waters to EUR one billion from the current ceiling of EUR 200 million. This was the only proposal of the European Commission included in the “*Erika I and II packages*” not adopted by the European Community. The Council of Ministers preferred to refer the discussion to the IMO in order to negotiate a similar agreement applicable worldwide.

V2. – *European measures adopted
after the Prestige accident*

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

(55) See *supra*, note 35. See also the document CONGRESO DE LOS DIPUTADOS, (10 de diciembre de 2002) : *Comparecencia del Ministro de Fomento, Francisco Álvarez-Cascos, ante la Comisión de Infraestructuras*, p. 12.

(56) 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://ue.eu.int>>.

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" (57).

The European Council of Copenhagen (12-13 December 2002) backed all these conclusions by unanimity. 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 6 December 2002 and the Environmental Council on 9 December 2002 should be implemented in all their aspects without delay" (58).

Implementing these conclusions, on 20 December 2002 the European Commission sent to the European Parliament and to the Council a new proposal amending the Regulation (EC) n° 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) n° 2978/94 (59). This has been the first concrete legal initiative adopted by the Commission after the *Prestige* accident. This proposal consisted

(57) See the 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 the 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.

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

(59) The Commission Proposal for a European Parliament and Council regulation on the accelerated phasing-in of design standards for single hull oil tankers is published as document COM(2002) 780 in the *Bulletin of the European Union 12-2002*, point 1.4.78.

on three different amendments. First, considering that heavy oils (60) are the most polluting types 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 Commission proposed banning the transport of heavy oils in single hull tankers bound for or leaving the ports of European Union Member States. Second, the Commission proposed to speed up the timetable for the withdrawal of single hull oil tankers (61). Third, the Commission proposed to strengthen and to implement as soon as possible the special inspection regime for oil tankers in order to assess the structural condition of single hull oil tankers over 15 years of age. All the single hull oil tankers, including the smaller ones that initially were put out of the equation, will now be subject to the Condition Assessment Scheme (CAS) from the age of 15. The CAS is an additional reinforced inspection regime specially drawn up to detect the structural weakness of single hull oil tankers (62). The Council and the European Parliament examined these proposals as a matter of urgency. The Transport Council reached political agreement on 27 March 2003 and the European Parliament gave the go-ahead for the adoption of the regulation on first reading at its meeting on 4 June 2003. The new Regulation entered into force on 21 October 2003 (63).

The second legal concrete initiative after the *Prestige* accident was the adoption by the Commission of a Proposal for a Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences on 5 March 2003 (64). This

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

(61) 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.

(62) Pursuant to this proposal, all single hull oil tankers, even if they are relatively recent, which do not satisfy the tests of this evaluation system, may not be allowed to enter into the ports of the European Union and fly the flag of a European Union Member State.

(63) The Regulation (EC) n° 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) n° 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.

(64) See the document COM(2003) 92 final 2003/0037(COD), (Brussels, 5.3.2003) : COMMISSION 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.

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 (65). The second measure establishes that infringement to the rules concerning discharges (as settled 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.

The third legal initiative, supplementing the previous one, is that on 2 May 2003 the Commission adopted a proposal for a Council Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution (66). 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

(65) As the Commission rightly observed, the main part of these discharges are illegal, as they are in contravention of the rules laid down in the 1973/78 MARPOL Convention. However, only a fraction of the offenders are brought to justice. The Commission explained the reasons for failing to implement these rules as follows: "There are a number of reasons for this. First, the occurrence of illegal discharges is promoted by lack of adequate waste reception facilities in ports. Second, the enforcement of the Marpol 73/78 rules is not consistent in the world, or even within the European Union. Third, discharges are not always detected in time. Fourth, even if the discharge is detected and traced to a particular ship, the offence is rarely brought to justice and if it is, there is frequently lack of sufficient evidence for convicting the offender. Finally, even where an offender is convicted, many States implement rather light penalties for this kind of offences, sometimes only imposed on the master of the ships, rather than the ship owning company, whose instructions the master may follow". *Ibid.*

(66) 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.

pollution) and to facilitate and encourage cooperation between Member States to repress these offences.

Independently of the future adoption of these proposals, the same European Commission has recognised that European interests need to be better defended and represented at the international level, making a very clear appeal to 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 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” (67).

VI. – MULTILATERAL MEASURES : THE CASE FOR THE INTERNATIONAL MARITIME ORGANIZATION

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 headquarters.

On 25 November 2002, at the opening meeting of the 89th Council of the IMO, the Permanent Spanish Representation made an

(67) See EUROPEAN COMMISSION, Directorate-General for Energy and Transport. Memo (21st October 2003): *Safer seas: the fight goes on*, p. 7.

important intervention on the *Prestige* accident that had taken place only 12 days before. 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, being these places of refuge 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;

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 automatically identification systems, voyage data recorders, etc.” (68).

(68) Private translation. For the original Spanish text of these proposals, see the document MINISTERIO DE FOMENTO, (25 de noviembre de 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

On 27 February 2003, Spain submitted its proposal for a new traffic separation scheme, mandatory for all double hull oil tankers, in front of the coasts of Galicia and distant 33-40 marine miles from their coasts. This proposal was discussed at the Subcommittee on Safety Navigation (NAV 49) of the IMO in its meeting from 30 June to 4 July 2003 and its approval by the Committee of Maritime Safety is expected during the first trimester of 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 new legal initiative concerns the establishment of places and ports of refuge. This measure was applied for the first time by Italy after the accident of the *Heaven* oil tanker. Then it was included in the Protocol concerning cooperation in preventing pollution from ships and, in cases of emergency, combating pollution of the Mediterranean Sea (Valletta, 25 January 2002) (69). Although the European Commission was already working on a proposal concerning a Draft Guidelines for the establishment of places and ports of refuge for ships in distress, on 24 March 2003 no proposal was submitted to the IMO Subcommittees. This was the last day for the submission of new proposals to IMO. Hence, Spain took the initiative and, on that date, Spain 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 to it, 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 will 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 has to elaborate must be man-

same meeting, the Representations of Algeria, Bahamas, Belize, Denmark, France, Greece, India, Island, Morocco, Nigeria, Philippines and Portugal, announced their support to all or some of the Spanish proposals.

(69) Article 16 of this Protocol, entitled "Reception of ships in distress in ports and places of refuge", reads as follows: "The Parties shall define national, subregional 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.unep-map.org>>.

datory for all flag States and that there must be public access to the results of whatever auditing (70).

In parallel with the adoption of the European Regulation (EC) n° 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) n° 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 amend the 1973/78 MARPOL Convention to ensure that similar measures apply worldwide. The European Union proposal was examined at the 49th session of the Marine Environment Protection Committee that met during the week of 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 (71), on 11 April 2003 six European Union Member States (Belgium, France, 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 covering their Atlantic exclusive economic zones and corresponding to most of the European Union Atlantic area (72). Under this proposal, this marine area will enjoy

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

(71) According to the 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 the Document 15121/02 (Presse 380): COUNCIL OF THE EUROPEAN UNION, 2472nd Council Meeting – Transport, Telecommunications and Energy – Brussels, 5-6 December 2002, p. 32.

(72) See the document MINISTERIO DE FOMENTO (12 de abril de 2003): *El Gobierno informa. España presenta ante la OMI nuevas iniciativas para la protección del medio ambiente marino*, 2 pp.

a 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 in principle to this proposal, whose adoption is scheduled by the end of 2004 (73).

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. The European Union Member States supported this proposal at the IMO on 9 May 2003 (74). The International Diplomatic Conference (London, 12-16 May 2003) succeeded in adopting a new Protocol to the FIPOL Convention (75). Although other different proposals were submitted and discussed (76), the firm attitude shown by the European Union Member States and the European Commission (77) resulted in the establishment, by the new Protocol to the FIPOL Convention, of a new fund with 750 million DTS/SDR (approximately, EUR 920 million), that is almost the amount originally proposed by the European Union Member States. In accordance with the commitments entered into at the European Summits in December 2002 and March 2003, the Member States will need to ratify this new Protocol as soon as possible, in order to make it operational before the end of the year 2003.

(73) There have been preliminary talks to make similar proposals including either the Atlantic exclusive economic zone of Morocco or even all the Mediterranean waters.

(74) See the document MINISTERIO DE FOMENTO, (3 de mayo de 2003): *El Gobierno informa. España propondrá la ampliación del fondo para daños por hidrocarburos a 1.000 millones de euros*, 2 pp.

(75) See the document MINISTERIO DE FOMENTO, (16 de mayo de 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.

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

(77) 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 FIPOL regime”. See EUROPEAN COMMISSION, Directorate-General for Energy and Transport. Memo (21st October 2003): *Safer seas: the fight goes on*, p. 7.

VII. - FINAL CONSIDERATIONS

The accidents of the *Erika* and the *Prestige* oil tankers show that the coastal States affected by their oil spills are not longer available to be polluted once again in the name of the ancient freedom of navigation principle as applied to substandard and dangerous tankers. Their claim is easy to understand: the freedom of navigation principle must apply only to those vessels that represent the safest navigation and the minimum risks for the coastal States.

The catastrophic dimensions that these two accidents have represented for the economic and environmental interests of the coastal States polluted by them, as well as the fact that no single coastal State is free from the risk of suffering a similar polluting accident nearby their coasts, has gained for this cause the support of most of the coastal States. At all levels (unilateral, bilateral, regional and multilateral) new norms are emerging. These norms are aimed at seeking the safest navigation and the highest degree of protection for coastal States. In order to reach these aims, an international agreement to reduce, and even to eliminate, the freedom of navigation principle for the most dangerous kind of vessels seems to have appeared with no return.