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On the Legality of the Ship-Source Pollution 2005/35/EC Directive – The Intertanko Case and Selected Others

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Abstract

The case is an interesting example of the legal difficulties faced by private parties challenging before a Member State's courts the validity of Community acts in light of the ever proliferating international environmental agreements signed by the Community or the Member States themselves. In this case, a shipping industry coalition challenged in the English High Court the legality of Directive 2005/35/EC on Ship-Source Pollution in light of the International Convention for the Prevention of Pollution from Ships ('Marpol 73/78') and the United Nations Convention on the Law of the Sea (1982 UNCLOS), which in turn referred questions for a preliminary ruling before the European Court of Justice. Predictably, the Directive has been vilified by the shipping industry for imposing higher standards than those established under international law. The case also shows how the concept of serious negligence, which appears in a number of EU/EC acts or proposals establishing an obligation of Member States to introduce criminal sanctions for violations of Community legislation or with the broader object of combating crime in the EU, may be interpreted by the national courts and the legislature of the Member States.

Introduction: Background to the Case

The EU has been accused of regional activism by adopting unilateral measures in order to tackle marine environmental pollution. This regional activism cannot be properly understood however without an appreciation of the political dynamics of the EU

institutions.¹ The political philosophy of such measures revolves around the division of competence between the Member States on the one hand, and the Community institutions on the other. With the ever closer integration being forged among the EU Member States, the European Commission is attempting to establish greater competence to initiate legislation for the Community in the vessel-source pollution arena, where the EU and its Member States share competence, with the correspondent displacement of Member States' competence in such matters².

Against this background and in the aftermath of the *Erika* (1999) and *Prestige* (2002) oil pollution disasters, which caused severe damage to the coasts of Portugal, Spain and France, the European Commission issued two Communications calling for measures to be adopted to strengthen maritime safety: Communication on 'Improving Safety at Sea as a Result of the Prestige Accident'³ and Communication 'Towards a Strategy to Protect and Conserve the Marine Environment'⁴. Some of the measures adopted to enhance maritime safety include stronger rules for the phasing-out single-hull tankers⁵, on classification

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¹ Khee-Jin Tan, Alan. *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*, Cambridge 2006 p. 8

² Some of the EC competences in the law of the sea, which have been transferred by the Member States to the EC, are exclusive – e.g. in relation to fisheries, commercial policy (in case deep seabed mining were to develop). On the other hand, other competences are not exclusive and may be exercised by both the Member States and the EC – for example in relation to environmental protection and maritime transport. Yet the exact borderline of these competences are not fixed – they change in particular in light of the case-law of the ECJ. See Tullio Treves, 'The European Community and the European and the Law of the Sea: Recent Developments' [2008] vol. 48 *IJIL* p. 1-2

³ COM (2002) 681 final

⁴ COM (2002) 539 of 2 October 2002

⁵ Regulation (EC) No 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation EC No 417/2002 on the accelerating of phasing in of double hull or equivalent requirements for single hull oil tankers OJ 01.10.2003 L249/1

societies⁶ and port state control⁷, and the establishment of a European Maritime Safety Agency.⁸

Moreover, the Commission thought it necessary to propose measures to fill the regulatory gaps relating to maritime safety and illegal ship-source pollution relating to both operational (or ‘deliberate’) and accidental discharges. The view that urgent measures in this field was needed was also echoed by the EU Member States who, represented in the Transport and Telecommunications Council on 6 December 2002 and the Justice and Home Affairs Council on 19 December 2002, embraced the need for measures to ensure that ship-source pollution was subject to appropriate sanctions and to “strengthen the protection of the environment, in particular the seas, through criminal law”^{9 10}

Subsequently the Commission proposed on 5 March 2003 (thus less than four months after the Prestige disaster) a Directive on Ship-Source Pollution and on the Introduction of Sanctions, including Criminal Sanctions, for Pollution Offences¹¹ based on Article 80 (2) EC (which deals with the Community common transport policy), with the aim of ensuring that there is appropriate implementation and enforcement of the applicable international rules for prevention and control of vessel-source pollution - enshrined in

⁶ Directive 2001/105/EC of the European Parliament and of the Council of 19 December 2001 of 19 December 2001 amending Council Directive 94/57/EC on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, OJ 22.01.2002 L19/16

⁷ Directive 2001/106/EC (as part of the Erika I package) of the European Parliament and of the Council of 19 December 2001 amending Council Directive 95/21/EC 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 shipboard living and working conditions (port state control) OJ 22.01.2002 L19/17

⁸ Regulation (EC) 1406/2002 of the European Parliament and Council Establishing a European Maritime Agency (EMSA)

⁹ Paragraph 14 of the Transport and Telecommunication Council’s conclusions on Ship Safety and Pollution of 6 December 2002 and the Statement of the Justice Home Affairs Council of 19 December 2002. See Explanatory Memorandum, Proposal for a Directive of the European Council and of the Council on Ship-Source Pollution and on the Introduction of sanctions, including criminal sanctions, for pollution offences COM (2003) 92 final 2003/0037 (COD) pgs. 2-3.

¹⁰ For a discussion of the maritime safety measures taken by the EU following the Erika and Prestige disasters see Wang Hui ‘The EU Marine Oil Pollution Prevention Regime – Recent Developments’ [2004] EELR 292 and Farkhanda Zia-Mansoor, ‘International Regime and the EU Developments for Preventing and Controlling Vessel-Source Oil Pollution’, [2005] EELR 165

¹¹ COM (2003) 92 final 2003/0037 (COD) The proposal follows the request from the December 2002 Copenhagen European Council and the March 2003 Brussels European Council which considered the *Prestige* accident.

particular in the 1973 Marpol Convention as amended by a 1978 Protocol (hereinafter ‘Marpol 73/78’ or ‘MARPOL’). The Commission notes that the existing international and Community legal instruments to eliminate illegal discharges from ships failed to establish specific offences and penalties for the violation of the applicable pollution standards and hence that action to strengthen enforcement by Member States at the Community level was necessary.¹²

The proposal aimed thereby to fill the regulatory gaps in Member States’ law regarding the lack of specific EU discharge standards; the inconsistent and ineffective implementation by Member States of the Marpol 73/78 standards; and the absence of effective enforcement mechanisms under international law¹³. The directive proposal required Member States to introduce in their domestic law the specific offence of illegal discharge of polluting substances - which, according to an Annex to the proposal, included oil and oily and other noxious substances listed in two Annexes to Marpol 73/78 - when committed intentionally or by gross negligence.¹⁴ The proposal also contained rules on port state enforcement¹⁵.

While under the proposal criminal sanctions were clearly targeted at intentional or grossly negligent operational discharges, they also applies to accidents if it can be shown that pollution arose out of damage to the ship or its equipment which can be traced to gross negligence in operation or maintenance. In effect there is no distinction under the Directive between the illicit activities of rogue operators and maritime accidents. However, though recent maritime disasters have focused the attention on accidental oil pollution¹⁶, the main threat still comes from deliberate operational discharges, for

¹² Explanatory Memorandum, noted 3 above, page 4. Recital 3 states that ‘the implementation of Marpol 73/78 shows discrepancies among Member States and there is thus a need to harmonise its implementation at Community level; in particular, the practices of Member States relating to the imposition of penalties for discharges of polluting substances from ships differ significantly.’

¹³ COM (2003) 92, para. 2.1

¹⁴ See Article 6 thereof

¹⁵ Articles 4 and 5 thereof

¹⁶ See generally Wang, H. above note 10 and Faure, Michael and Wang, Hui, ‘Liability for Oil Pollution: Recent Developments’ [2004] vol. 12 Environmental Liability no. 2.

example tank-cleaning operations¹⁷. Moreover, there was division among the EU Member States, Spain for instance supporting measures to cover cases of negligence on the part of the owner and the master, while the UK, Denmark, and particularly Greece, Cyprus and Malta arguing that the EU should not go beyond Marpol 73/78.¹⁸

In addition, the Commission proposed a parallel proposal for a Council Framework Decision to Strengthen the Criminal-Law Framework for the Law Against Ship-Source Pollution¹⁹ on 2 May 2003 based on Title VI of the Treaty on the European Union (Arts. 29, Arts. 31 (1) (e) and 34 (2) (b)). The Framework Decision proposal was founded on the intergovernmental, third pillar of the EU and aimed to complement the Directive by dealing with specific rules on police and judicial cooperation in criminal matters (including detailed rules on penalties and jurisdictional rules).

The proposal for a Directive met with strong resistance from a number of Member States, as there appears to be no consensus that criminal sanctions should be applied and whether they may be prescribed and enforced beyond internal waters and territorial seas against foreign vessels²⁰. Furthermore, it was still unclear whether the Community had competence to lay down criminal sanctions for violations of environmental law.²¹ Thus an agreement between the EU institutions on the adoption of the above measures was not possible unless the criminal-law provisions under the Directive (a first pillar measure) were transferred to the Framework Decision (a third pillar measure).

¹⁷ Veronica Frank 'Consequences of the Prestige Sinking for European and International Law' [2005] 20 The Int J Mar Coast Law 44

¹⁸ Tan, above note 1, p. 153

¹⁹ COM (2003) 227 final 2003/0088

²⁰ Tan, above note 1, p. 153

²¹ Reviewing the legality of a January 2003 Framework Decision on environmental crimes on an action brought by the Commission against the Council in April 2003 (case C-176/03 Commission v Council [2005] E.C.R. I-7879; [2005] 3 C.M.L.R. 20), the ECJ ruled on 13 September 2005 (so only 6 days after the adoption of the Ship-Source Pollution Directive on 7 September 2005) that the Community may prescribe criminal *measures* to be adopted by Member States in order to ensure the effective implementation of a Union policy (paragraph 48). It was not clear from that ruling whether criminal *measures* included the prescription of specific offences and penalties, though from the reading of paragraph 51 of that ruling it appears that the Court recognised at least the Community competence to prescribe criminal offences. See 42nd Report of Session 2005-2006, House of Lords, European Union Committee, 'The Criminal Law Competence of the European Community. Report with Evidence' 28 July 2006, pgs. 21-23

The adoption of Directive 2005/35/EC²² (hereinafter ‘SSP Directive’ or ‘the Directive’) and Framework Decision 2005/667/JHA²³ (hereinafter ‘SSP Framework Decision’ or ‘the Framework Decision’) on 7 September 2005 and 12 July 2005 respectively²⁴ reflects the necessary compromise struck by the EU institutions: the Directive defines specific ‘infringements’ under Art. 4 which, if committed with intent, recklessness or by serious negligence, must be criminalised by Member States under the conditions established under the Framework Decision²⁵. So the Directive itself does not prescribe criminal obligations on Member States, which can in principle be implemented by means of administrative penalties. Moreover, the provision of the original Directive proposal dealing with the types of criminal and non-criminal penalties to be introduced by Member States²⁶ was transferred to Article 4 of the Framework Decision, which also established the levels of those penalties.²⁷ Another point of contention was the fact that the sanctions under the SSP Directive proposal would extend to the participation in and the instigation of illegal discharge of polluting substances by *any* person, so not only the ship-owner but also the cargo-owner, the classification society or any other person involved, yet this provision was transferred to Article 3 of the SSP Framework Decision.

It must be noted that the SSP Directive was adopted despite opposition from some EU flag states, in particular Greece, Malta and Cyprus, which have strong ship-related interests. However, those three states unsupported would not have been able to block the

²² Directive 2005/35/EC of the European Parliament and of the Council on Ship-Source Pollution and on the Introduction of Penalties for Infringements, 2003/0037 (COD)

²³ Council Framework Decision 2005/667/JHA to Strengthen the Criminal-Law Framework for the Enforcement of the Law against Ship-Source Pollution

²⁴ The difference of the dates of adoption of those measures reflects *inter alia* the differences of the procedures for their adoption. The adoption of the Directive based on Article 80(2) EC requires qualified majority voting and co-decision between the Council and the European Parliament, whereas measures adopted under Title VI TEU require unanimity in the Council and the Parliament is merely consulted.

²⁵ Council’s Common Position on the Draft Directive on Ship-Source Pollution (1964/04) 29/09, para. 8. References to criminal sanctions and offences have also been dropped from the Title and Art. 1

²⁶ Article 6 (4) of the Ship-Source Pollution Directive Proposal required Member States to provide for, as regards natural persons, criminal penalties, and deprivation of liberty in the most serious cases. As regards natural and legal persons, the proposal required Member States to provide for fines and confiscation of proceeds. The criminal fines under the proposal cannot be insured and are designed to go beyond the CLC/DUND regime for civil liability, which is regarded as possessing insufficient deterrent value since the ship-owner’s liability can always be capped by his/its right to limitation (Tan, note 1 above, p. 152).

²⁷ Yet Article 8 of the Directive states that “Member States shall take the necessary measures to ensure that infringements within the meaning of Article 4 are subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties”

adoption of the Directive under the qualified majority voting system applicable for the adoption of a transport measure based on Article 80 (2) EC, though any of them would have been able to block the adoption of the SSP Framework Decision, which needed to be adopted by unanimity in the Council.

Nevertheless, the fate of both the SSP Directive and Framework Decision were at stake. As regards the SSP Framework Decision, an annulment action was brought by the Commission against the Council in November 2005 challenging the third pillar legal basis of the Framework Decision.²⁸ In light of the ECJ decision in case C-176/03 *Commission v Council* on 13 September 2005²⁹ ('*Environmental Crimes*'), the Commission submitted in the follow-up *Ship-Source Pollution* case³⁰ that the criminal-law provisions adopted under the third pillar encroached upon the Community's power under the first pillar³¹. Even though the ECJ ultimately annulled the Framework Decision on 23 October 2007 and hence presently there is no criminal-law framework in the EU dealing with vessel-source pollution³², the SSP Directive, which defines discharges of polluting substances as 'infringements' to be prohibited by Member States as well as coastal and port state enforcement rules, entered into force on 1 October 2005 and needed

²⁸ Case C-440/05 *Commission v Council* [2007] n.y.r. thereafter '*Ship-Source Pollution*'

²⁹ See note 13 above. For an analysis of this case and of the proposal(s) for a Directive on environmental crimes see Pereira, Ricardo 'Environmental Criminal Law in the First Pillar: A Positive Development for Environmental Protection in the European Union?' [2007] 16 EELR issue 10, 254.

³⁰ *Ship-Source Pollution*, note 28 above. For an analysis of this case see Peers, Steve 'The European Community's Criminal Law Competence: the Plot Thickens' [2008] ELRev 399.

³¹ See Article 47 of the Treaty on the European Union concerning the delimitation of powers between the pillars. The Court has in subsequent cross-pillar cases also interpreted this provision generously. See Herlin-Karnell, Ester. "'Light Weapons' and the Dynamics of Art 47 EU – The EC's Armoury of Ever Expanding Competences" [2008] 71 (6) M.L.R. 998.

³² Since the date for implementation of the Directive expired in March 2007 and the Framework Decision (which needed to be implemented by 12 January 2007) was only annulled on 23 October 2007, Member States are expected to have introduced criminal sanctions for the discharge of pollutants described in an annex to the Directive. However, the temporal effect of the *Ship-Source Pollution* judgement may have discharged the Member States from the legal obligations under the SSP Framework Decision, so the introduction of administrative penalties would satisfy the requirements of the present SSP Directive. Moreover, there have been suggestions that the directive on environmental crimes may cover some forms of ship-source pollution. See Françoise Comte, European Environmental Criminal Law—Recent Developments. [2005] vol. 4 YEEL 209. I discuss the new directive on environmental crimes (the text of which was agreed on 21 May 2008 and which was formally adopted by the unanimous vote of the Member States represented in the Council on 24 October 2008) in Pereira, Ricardo 'Models of Harmonisation of Environmental Criminal Law: Unification, Approximation, Co-operation or a Mixed Model?' in Andenas and Andersen (ed.) *Theory and Practice of Harmonisation* (forthcoming)

to be implemented by Member States by 1 March 2007³³. Subsequently, the Commission issued reasoned opinions to a number of Member States (including Malta, Cyprus, Estonia, France, Portugal, Finland, Luxembourg and the UK) which have not implemented the Directive under national law by that deadline³⁴. The reasoned opinion, if not complied with, will lead to enforcement proceedings being brought by the Commission against those Member States. Finally, the Commission proposed on 11 March 2008 a directive to amend the Ship-Source Pollution Directive in order *inter alia* to introduce the requirement that the ‘infringement’ under the Directive is considered a criminal offence³⁵. In line with the *Ship-Source Pollution* ruling, this proposal does not contain rules on specific penalties³⁶.

The Legal Action brought by the Shipping Industry before the English High Court

The future of the SSP Directive was also uncertain in light of an administrative action for judicial review brought by a coalition of the shipping industry³⁷ against the Secretary of State for Transport before the English High Court of Justice [Administrative Court]³⁸ on

³³ Art. 16 of the Ship-Source Pollution Directive

³⁴ Jason Chuah ‘Advocate General’s Opinion on the EU Ship-Source Pollution Directive’ (2008) 14 JIML p. 61

³⁵ Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/35/EC on Ship-Source Pollution and on the Introduction of Penalties for Infringements DROIPEN 27 MAR 42 ENV 166)

³⁶ See para. 70 of the *Ship-Source Pollution* ruling which states that the Community may not prescribe the types and levels of criminal penalties. I discuss the possibility of an amendment to the ship-source pollution and environmental crime directives to require Member States to introduce specific criminal penalties in case the Lisbon Treaty is ratified in Pereira, R. ‘Models of Harmonisation of Environmental Criminal Law’ (forthcoming) note 32. For a discussion of the 21 March 2008 proposal for an amendment to the SSP directive see the Twenty-Third Report of the House of Commons Select Committee (29560) 7616/08 COM(08) 134 available at

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16xxi/16xxi10.htm>

³⁷ Those are: the International Association of Independent Tanker Owners (Intertanko); the International Association of Dry Cargo Shipowners (Intercargo); the Greek Shipping Cooperation Committee; Llyod’s Register and the International Salvage Union. They are major associations within the international maritime transport industry, with Intertanko alone representing almost 80 per cent of the world’s tanker fleet.

³⁸ It has been suggested that the English High Court was chosen as the route to the ECJ partly because all coalition members have offices in the UK, and partially because there is established precedent for similar cases being referred to the ECJ by the Courts in London. Moreover, previous cases demonstrate that the High Court is prepared to refer questions relating to the validity of a Community act to the ECJ in proceedings for judicial review of EU law without waiting for implementing legislation to be introduced in the UK. See de la Rue, *infra* note 41 p. 22.

23 December 2005 regarding the *planned implementation* of the Directive in the UK³⁹⁴⁰. The industry coalition contended that the implementation of the Directive would have the effect of putting the Member States in breach of existing international treaty obligations – in particular MARPOL’s provisions imposing an obligation on signatory parties to legislate in accordance with the regulations set out in Annexes I and II to the Convention. Since all EU Member States are parties to MARPOL, they must also adhere to the provisions of these Annexes.⁴¹

The English High Court delivered a ruling on 30 June 2006 staying the proceedings and referring questions on 4 July 2006 to the European Court of Justice (‘ECJ’ or ‘the Court’) for a preliminary ruling regarding the compatibility of the SSP Pollution Directive with international law, leading to the initiation of the proceedings of Case C-308/06 (*Intertanko and others*) (hereinafter ‘*Intertanko*’)⁴² on 14 July 2006. The claimants have therefore shown that they had ‘well founded’ arguments and a ‘reasonable prospect of success’ in order for the reference to a preliminary ruling to be considered admissible.

The three first questions referred to the Court relate to the validity of the SSP Directive under international law as embodied in the 1982 UNCLOS and Marpol 73/78. The English High Court thus required a pronouncement of the ECJ on whether the application of stricter standards under the Directive than under those international treaties was a violation of Marpol 73/78 and the 1982 UNCLOS.

Before examining the questions and the answers provided to them by the ECJ and the Opinion of the Advocate General in the case, it is necessary that an overview is provided

³⁹ Case no. CO/10651/2005, 30 June 2006 [2006] EWHC 1577 Admin per Mr Justice Hodge.

⁴⁰ In light of its previous case-law, the ECJ did not uphold in *Intertanko* the submission that the legal action was inadmissible on the grounds that the action dealt with a hypothetical problem, as when the application for judicial review was made, the period prescribed for implementation of the directive had not yet expired and no national implementing measures had been adopted. See paras. 30-35 of the judgement.

⁴¹ See Colin de la Rue ‘Pollution from Ships: EU Directive on criminal sanctions for ship-source pollution’ in Thomas, Rhidian D. *Liability Regimes in Contemporary Maritime Law*. Informa, London (2007) p. 21.

⁴² Case C-308/06 *The Queen on the Application of: International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd’s Register, International Salvage Union v Secretary of State for Transport*, 3 June 2008 n.y.r.

of the legal framework relating to two areas which are central to the understanding of the case: a) the limits of the legislative (or ‘prescriptive’) jurisdiction of coastal states under international law; and b) the legal effect of international agreements signed by the Community or the Member States with third parties in the Community legal order.

a) The limits of the legislative jurisdiction of coastal states under international law

The law of the sea has developed in recent decades in an attempt to strike a balance between the interests of the coastal states⁴³ and flag states⁴⁴ - with the former emphasising the need to protect their internal security and consequently to have jurisdictional discretion to prescribe and enforce effective rules against foreign vessels, while the latter put the emphasis on the need to give effect to the right of innocent passage and freedom of navigation. However, international law may not be able to constrain coastal states’ ability to adopt unilateral anti-pollution measures which go beyond international standards - despite the potential conflict of such measures with the traditional rights of freedom of navigation and innocent passage under international law. The adoption of those unilateral measures has been largely justified by the failure of flag states to enforce their anti-pollution regulations against the ships flying their flag. According to Tan, the fundamental weakness of flag state jurisdiction is the fact that most flag states – whose vessels rarely venture into their own waters – have never had the incentive to regulate the activities of vessels which cause harm to or affect the interests of other states⁴⁵. Moreover, the doctrines of freedom of navigation and flag state control date from an age when environmental problems were negligible.

While on the one hand the corollary of the principle of flag state primacy is that flag states generally enjoy unlimited competence to prescribe rules and standards for their vessels,⁴⁶ on the other hand it is suggested that coastal states can only enact or prescribe

⁴³ The State on the waters of which the vessels lies

⁴⁴ The State whose flag the vessel flies

⁴⁵ Tan, above note 1, p. 157

⁴⁶ Yet flag state rules and standards must at least be as stringent as internationally accepted rules (*Ibid* p. 23)

laws which give effect to internationally accepted rules and standards.⁴⁷ Only in very limited circumstances would the coastal state be allowed limited authority to prescribe more stringent national rules than internationally accepted standards.⁴⁸ Hence ‘internationally accepted measures represent the minimum and maximum allowable levels for flag and coastal state jurisdiction respectively.’⁴⁹ The international regulatory system seeks a balance which maintains flag state accountability while restraining coastal state exuberance for regulating foreign vessels – thereby seeking to ensure the uniformity and reasonableness of national pollution control standards worldwide. In that sense, the SSP Directive is a reflection of coastal states (or regional groupings of such states) either resorting to unilateral measures going beyond those standards permitted by international law or dictating the development of new international regulations which accord them greater powers to deal with pollution and safety safeguards.

The unilateralism pursued by the EU in the aftermath of the sinking of the *Erika* and *Prestige* is explained partially by its failure to achieve progress within the International Maritime Organisation (‘IMO’) – to which the EU is still not a party and some Conventions adopted under the auspices of which (e.g. MARPOL) only allow the participation of *States*. Moreover, there is an argument that stringent regulatory measures in the US must be accompanied by equally strong regulatory measures in Europe, in particular as sub-standardised ships could move their operations from the US to European waters.⁵⁰ It is suggested that the European states are developing a ‘pro-coastal’ Community posture, while states with large shipping interests (such as Greece, Cyprus and Malta) being compelled to go along with the stricter regulation over ships⁵¹.

Prior to the UNCLOS, customary international law and the existing Territorial Sea Convention did not impose any clear limits on the types of pollution regulations that the coastal state might prescribe for its territorial sea. The legislative competence of coastal States has been restricted by the 1982 Law of the Sea Convention in respect of the kind

⁴⁷ Tan, above note 1, p. 24. Traditional coastal states include Canada and Australia (p. 68).

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ R. Churchill and A. Lowe, *The Law of the Sea*, (third ed., 1999) p. 89

⁵¹ Tan, above note 1.

of pollution regulations which may be adopted, but increased as regards the geographical area to which such regulation may be applied (it includes the EEZ).

The coastal state may in the territorial sea prescribe pollution regulations for foreign vessels in innocent passage, provided such regulations, according to Article 21 (2) of the UNCLOS, do not '*apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards*' Furthermore, such regulations must not hamper the right of innocent passage of foreign vessels⁵² and must be duly publicised and non-discriminatory.⁵³ Thus Article 21 (2) of the UNCLOS does not restrict every aspect of the legislative competence of coastal states, but it focuses on which *technical standards* may be adopted by vessels. Indeed, the variation of technical standards in different jurisdictions could indeed hinder the freedom of navigation in the seas.

On the other hand, UNCLOS has increased the geographical scope of the legislative competence of coastal states by giving them certain powers to legislate for marine pollution from foreign vessels in their Exclusive Economic Zone (EEZ), extending to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured⁵⁴. Thus under Article 211 (5) a coastal state may adopt pollution legislation for its EEZ which conforms and gives effect to '*generally accepted international rules and standards established through the competent international organisation or general diplomatic conference*' It is suggested that by virtue of Article 211 (5) UNCLOS, MARPOL 73/78 and possibly other international standards represent the limit of coastal states' legislative jurisdiction and work as a restraint where there is evident potential for excessive interference with shipping.⁵⁵

The 1982 UNCLOS can best be seen as serving the interests of maritime states within the EEZ, although the extension of jurisdiction does give a wider area of control to coastal

⁵² Art 211 (4) UNCLOS. According to para. 4 of Article 21 '[f]oreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.'

⁵³ Churchill and Lowe, above note 50, p. 347

⁵⁴ UNCLOS Article 57

⁵⁵ P. Birnie, and A. Boyle, *International Law & the Environment* (second ed., 2002) OUP p. 374

states if they choose to use it⁵⁶. Freedom of navigation is largely protected by ensuring uniformity of applicable pollution standards, and by preserving the rights of maritime states to influence the formulation of those standards within the IMO.⁵⁷

Moreover, as regards certain special areas such as the polar regions, these rules may be inadequate to provide sufficient ecological protection and the coastal State may adopt regulations implementing international rules and standards or additional regulations of its own provided that they do not impose higher design, construction, manning or equipment standards than generally accepted at the international level on foreign ships.

b) The Legal Effect of International Agreements in the Community Legal Order

Another crucial issue stemming from this case is the legal effect of international agreements in the Community. Community acts may themselves be in conflict with provisions of an international agreement binding on the Community. The question that arises is whether the violation of the international agreement can be invoked to challenge the validity of the Community act. This question is of great practical significance in light of the scale of the Community's internal legislative activity and its participation in international treaty-making, and in light of the increasing interconnectedness of those two dimensions of Community action⁵⁸.

The legality of a Community act may be challenged if not in conformity with the Community's international commitments.⁵⁹ International agreements which are binding on the Community, and therefore part of the Community legal order, have to be applied by national courts if they are directly effective. In such cases, they will override inconsistent national law⁶⁰ - which might include national implementing legislation which transposes Community legal obligations under national law. In the third

⁵⁶ *Ibid* p. 375

⁵⁷ *Ibid* p. 374

⁵⁸ Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (2004) OUP p. 246. See also Phoebe Okowa, 'The European Community and International Environmental Agreements' [2005] vol. 15 YEL.

⁵⁹ Hartley, *The Foundations of European Community Law*, (sixth ed., 2007) OUP, p. 186

⁶⁰ *Ibid*.

International Fruit Company case⁶¹ the ECJ held that, before the compatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision⁶². Further, the ECJ added that the legal challenge regarding the compatibility of a Community act with an international agreement is only possible if the latter is directly effective.⁶³ Moreover, the Court added that before invalidity can be relied upon in national courts, the provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before national courts.⁶⁴

The conditions for an international agreement to have direct effect in the Community legal order are similar to those relating to direct effect of Directives as upheld in the Court's case law, i.e. the nature and the broad logic of the relevant international treaty do not preclude the examination of validity of the Community measure and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise.⁶⁵ Hence in order for individuals to rely on the provisions of an international agreement, they must be unconditional and sufficiently precise and the nature and broad logic of the international agreement does not preclude the examination of the Community measure aimed at implementing the agreement into the domestic law. However, there are exceptions to this rule: where the Community act was intended to give effect to an obligation under the international agreement⁶⁶ or where the Community act expressly refers to the agreement.⁶⁷

⁶¹ Joined Cases 21 to 24/72 *International Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219 Cases 21-4/72

⁶² *Ibid*, para 7.

⁶³ Hartley, above note 59, p. 186

⁶⁴ *International Fruit Company*, supra, para. 8 Even though the Court did not elaborate on the grounds upon which it introduced this second condition, it has clearly followed the Opinion of Mayras AG, who argued that before regulations could be held invalid under the provisions of the law of an international agreement, which was outside the legal system of the Community, the applicants had to be able to rely on rights deriving from those provisions. See Hartley, Trevor, *European Union Law in a Global Context: Text, Cases and Materials* (2004) Cambridge.

⁶⁵ *Intertanko*, para. 45. See Case C-344/04 *IATA and ELFAA* [2006] I-403, para. 39

⁶⁶ Case C-69/89 *Nakajima v Council* [1991] ECR I-2069.

⁶⁷ Case 70/87 *Fediol v Commission* [1989] ECR 1781. See also Case C-280/93 *Germany v Council* [1994] ECR I-4973)

The questions referred for a preliminary ruling

The SSP Directive could be in conflict with MARPOL 73/78 and 1982 UNCLOS in two main ways. According to Regulation 11 of Annex I to MARPOL⁶⁸, the regulations relating to the prohibition and prevention of pollution discharges shall not apply to:

- b) the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:
 - i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimising the discharge [this is essentially a defence of due diligence]; and
 - ii) except if the owner or the master acted either with intent to cause damage, or recklessly and with the knowledge that damage would probably result.

The objective of those provisions is primarily to establish the standard of care to be met in order to avoid accidental pollution. On the other hand, Article 5 (2) of the SSP Directive provides the following exception to the use of the defence of ‘due diligence’ for similar discharges:

‘A discharge of polluting substances into the [straits, EEZ and the high seas] shall not be regarded as an infringement for the owner, the master or the crew when acting under the master’s responsibility if it satisfies the conditions set out in Annex I, Regulation 11 (b) (...) (see above)’

Therefore MARPOL 73/78 contains an exception for discharges resulting from damage to a ship or its equipment (e.g. following a collision), so that the owner or the master is to be held accountable only if he or she acted with intent to cause damage to the ship or with recklessness with the knowledge that damage would probably result. The Directive

⁶⁸ Those provisions are equivalent to those under Regulation 6, Annex II to MARPOL (which however deals with noxious liquid substances in bulk, rather than oil or oily mixtures)

contains a similar exception but which applies only in international straits, the EEZ of a Member State or the high seas. Therefore, by making the defence of ‘due diligence’ unavailable in the case of ‘accidental’⁶⁹ discharges in the territorial sea, the Directive could be in conflict with MARPOL. Moreover, under the Directive acts of all persons (so not only the master or owner) could give rise to liability for accidental discharges, whereas the liability for similar discharges under MARPOL is limited to the master or owner.

The SSP could also be in conflict with the UNCLOS, in particular with the right of innocent passage enshrined therein. Paragraph 1 of the Article 19 of the 1982 UNCLOS defines the right of innocent passage as:

‘passage of a foreign ship shall be considered to be prejudicial to peace, good order or security of the coastal state if in the territorial sea it engages in any of the following activities: (...) h) ‘any act of *wilful* and serious pollution contrary to [the] Convention’ (emphasis added).

On the other hand, Article 4 of the SSP Directive states that:

‘Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in Article 3 (1) are regarded as infringements of committed with intent, recklessly or by *serious negligence*. These infringements are regarded as criminal offences by, and in the conditions provided for in, Framework Decision 2005/667/JHA supplementing this directive.’

By introducing the standard of liability of serious negligence under Article 4, the SSP Directive could be in conflict with the right of innocent passage enshrined in UNCLOS. This Convention states that passage is no longer innocent *inter alia* when ‘*wilful* and serious pollution’ is caused. It could be argued that, if the pollution is caused by a

⁶⁹ The phrase ‘accidental discharges’ in this context is used to refer to discharges arising from damage to the ship or its equipment (e.g. following a collision), *not* to the degree of means *rea* of the defendant.

seriously negligent act, the passage is still innocent and the coastal state might not exercise its enforcement jurisdiction against the vessel (e.g. apprehension).

In this connection, the English High Court referred the following four questions to the Luxembourg Court:

(1) Whether the EU was entitled to impose liability on foreign flag ships on the high seas or in the EEZ, and to limit the defences available under Marpol 73/78 which would ordinarily apply in such cases;

(2) Whether it is possible for the Directive to restrict MARPOL defences for discharges in the territorial sea and to apply serious negligence as a test of liability in that marine zone;

(3) Whether the liability for discharges caused by ‘serious negligence’ in the territorial sea breaches the international law principle of innocent passage.

(4) Whether the standard of liability under the Directive of ‘serious negligence’ satisfies the requirement of legal certainty, which is a general principle law/EU law.

The first of the four questions referred to the ECJ relate to the effect of the Directive outside territorial waters. It is contended that the UNCLOS defined the extent of the jurisdiction of the Member States in the high seas, in their EEZ and in international straits, and hence that the Community lacked legislative jurisdiction to lay down rules on discharges from ships not flying the flag of one of the Member States, unless permitted by the 1982 UNCLOS⁷⁰. Under that Convention a State has jurisdiction over discharges on the high seas only when these come from vessels which are flying its flag, or where its legislation implements international rules. Hence according to UNCLOS, within the EEZ of a state its competence to legislate is limited to giving effect to general international

⁷⁰ de la Rue, above note 41 p. 22

rules and standards, such as Marpol 73/78⁷¹. Thus the claimants contended that the relevant international standards are those set out in MARPOL, and that the Directive goes beyond them in so far as it imposes liability for discharges in cases of serious negligence by persons other than the owner, master or the crew.

The second question related to the effect of the SSP Directive in the territorial waters, where it imposes liability for all discharges caused by serious negligence, and where it precludes any defendant – even the owner, the master or the crew – from raising the defences available under the MARPOL Regulations. The claimants contended that Marpol Annexes I and II provide a uniform set of rules from which contracting parties cannot depart without denouncing the Convention, unless it is amended.⁷² On the other hand, the Secretary of State argued in the case before the English High Court that under Article 9 (2) of MARPOL, nothing in that Convention is to prejudice the ‘codification and development of the Law of the Sea by the United Nations Conference’ and moreover that under UNCLOS coastal states retain sovereign power to legislate within their territorial sea, subject to the right of innocent passage. On this basis it is suggested that in the territorial sea MARPOL only imposes minimum standards, and that it did not preclude states from imposing more stringent requirements.⁷³

As regards the third question, the industry coalition argued that the effect of the Directive in territorial seas is not only incompatible with MARPOL but also contravenes UNCLOS on the grounds that it hampers the right of innocent passage. It is suggested that under UNCLOS only ‘wilful and serious’ pollution should affect the right of innocent passage which is thereby hampered if the coastal state lowers the standard of liability to one of serious negligence. As the English High Court held ‘there are differing obligations (...) under the Directive and under the international regimes provided for in MARPOL and UNCLOS’,⁷⁴ thus creating potential difficult legal problems in the relationship between

⁷¹ On the legislative jurisdiction of coastal States see the overview provided above.

⁷² de la Rue, above note 41 p. 23. Despite the procedure available for speedy amendment of MARPOL by tacit acceptance, no proposals have been made by any European or other Marpol States for the relevant regulations to be amended.

⁷³ *Ibid.*

⁷⁴ Quoted in de la Rue, above note 41, p. 24

the parties to the international instruments who are not members of the EU and a state which implements the Directive.

The fourth question is whether the standard of liability of serious negligence is consistent with requirement in EU law of legal certainty. It is contended that the term is not clearly defined and that there is a risk that this may influence the decision whether or not to prosecute and that the EU states will implement the Directive in a different manner. The maritime industry has expressed concern that ‘*serious negligence*’ may be interpreted to cover acts of ‘ordinary negligence’ which have *serious* consequences (for example large oil spills).

The Opinion of the Advocate General

Advocate General Kokott delivered her opinion on 20 November 2007. On the first question regarding the liability of foreign flag ships in the EEZ and on the limitation of the defences available under Marpol 73/78 in such cases, the Advocate General submitted that the EU was not bound by Marpol 73/78. She suggests that although the EU would normally be bound by customary international law, MARPOL is not customary international law but an international convention which could not be said to have incorporated customary international law⁷⁵. The validity of a Community act could not depend on an international agreement of which the EU was not a party⁷⁶ and in relation to which the Community has not assumed the powers of the Member States⁷⁷. Moreover, she suggested that coastal states have the right to impose penalties for the discharge of pollutants into the high seas and the EEZ as guaranteed by UNCLOS, since the right of innocent passage is not an absolute right.

On the other hand, she suggests that UNCLOS – to which the Community is a party - could be said to have incorporated the standards and concepts in MARPOL as regards the rights of innocent passage in the high seas and the EEZ. She argues that the nature and

⁷⁵ *Kokott AG*, Points 36 - 45

⁷⁶ *Kokott AG*, Point 37

⁷⁷ *Kokott AG*, Point 45

the broad logic of the UNCLOS do not preclude examination by the Court of the legality of Community acts in light of that Convention⁷⁸. Therefore although coastal states may adopt anti-pollution rules in relation to those marine areas, those measures must be consistent with MARPOL and the adoption of more extensive rules in relation to the EEZ and the high seas is not permitted.⁷⁹In that regard, the concept of serious negligence present in the SSP Directive should be interpreted narrowly so as to conform with MARPOL. Kokott AG suggested that the concept of serious negligence could be interpreted to mean ‘recklessness in the knowledge that damage will probably occur’ (which is in line with the German concept of *bewusste grosse Fahrlässigkeit*)⁸⁰. This narrow interpretation would thereby avoid the conflict between the Directive and international law as embodied in MARPOL 73/78⁸¹. However, it could be argued that this narrow interpretation is disadvantageous since no real distinction between recklessness and serious negligence would exist – a solution which must not have been behind the intention of the drafters of the Directive.

Regarding questions 2 and 3 referred for a preliminary ruling, the Advocate General suggested that the concept of serious negligence should be given a wider meaning. She argues that as regards the territorial sea, UNCLOS does not incorporate MARPOL standards, unlike in the case of the high seas and EEZ⁸². Furthermore, she concluded that under UNCLOS States were allowed to adopt stricter standards in the territorial sea than the international standards which are applicable in the high seas or EEZ. Moreover, the Advocate General suggested that even if MARPOL standards were to be adopted in the territorial sea, the provisions of the Directive establishing ‘serious negligence’ as a ground of liability could be interpreted to mean ‘recklessness in the knowledge that damage will probably occur’ and hence no conflict between that Convention and the Directive would arise⁸³.

⁷⁸ *Kokott AG*, Points 48. She also suggests that some provisions of UNCLOS are directed precisely at individuals involved in maritime transport (Point 56)

⁷⁹ *Kokott AG*, Point 68

⁸⁰ *Kokott AG*, Point 109

⁸¹ *Kokott AG*, Points 102 - 112

⁸² *Kokott AG*, Points 113 -138

⁸³ *Kokott AG*, Point 136.

Finally, regarding the question of whether the concept of ‘serious negligence’ breached the principle of legal certainty,⁸⁴ the Advocate General suggested that the Directive could not be invalidated on that ground as it is not the Directive itself but the national implementing legislation that entails individual liability.⁸⁵ On the other hand, it has been suggested that the distinction drawn by the Advocate General may prove to be artificial since the national laws frequently follow the terms applied the Community legislation.⁸⁶ However, the point raised by the Advocate General is clearly relevant since the Directive would require a national implementing measure before it can create obligations on individuals. Furthermore, the Directive only lays down minimum standards. In case there is legal uncertainty as to the content of the minimum standard, questions could be referred to the ECJ for clarification.⁸⁷

Hence Advocate General Kokott concluded that the examination of the questions referred for a preliminary ruling revealed no factor of such a kind as to question the legality of the SSP Directive.⁸⁸

The judgement of the ECJ on 3 June 2008

The ECJ held, as it did in *Peralta*⁸⁹, that the Community itself was not bound directly by Marpol 73/78, as the Community is not a signatory party to that Convention, despite the fact that all Member States are signatories to it. Consequently, the ECJ could not review the legality of the SSP Directive in light of Marpol 73/78⁹⁰. The Court further noted that although the Community is bound by customary international law, the MARPOL rules in

⁸⁴ In fact, in English criminal law the concept of *serious* negligence does not exist. The standard of criminal liability for negligent acts is ‘*gross* negligence.’ It remains to be seen which term will be applied in the national implementing legislation of the SSP Directive in England & Wales.

⁸⁵ *Kokott AG*, Point 144

⁸⁶ Jason Chuah, above note 33, p. 61

⁸⁷ *Ibid.*, p. 63

⁸⁸ *Kokott AG*, Point 157

⁸⁹ Case C-379/92 *Peralta* [1994] ECR I-3453, para. 16.

⁹⁰ *Intertanko*, para. 50: “Since the Community is not bound by Marpol 73/78, the mere fact that Directive 2005/35 has the objective of incorporating certain rules set out in that Convention into Community law is likewise not sufficient for it to be incumbent upon the Court to review the directive’s legality in the light of the Convention”

question are not part of customary international law, and hence the Directive could not be considered to be inconsistent with customary international law.⁹¹

As regards the legality of the Directive in light of the 1982 UNCLOS – to which the Community is a party - the ECJ held that the Community is bound by that Convention and that it forms an integral part of the Community legal order⁹². However, the Court needed to establish whether the nature and broad logic of UNCLOS precluded the examination of the validity of Community measures in light of its provisions. The Court found that UNCLOS does not establish rules intended to apply directly on individuals or to confer rights on individuals (such as ship-owners) capable of being relied upon against States⁹³. Hence the Court considered that the rules relating to the jurisdiction of coastal states in the high seas, their EEZ and territorial waters deal principally with the sovereign rights and interests of States, which does not extend to the protection of rights and interests of individuals. So, despite the fact that there are provisions under UNCLOS dealing with ships directly (for example 17, 110 (3) and III (8) UNCLOS), ships only have certain rights because of their affiliation to their flag state⁹⁴. The Court thus takes a narrow view that the Directive deals with the liability of natural and legal persons (including ship-owners) and not the right of innocent passage guaranteed under international law⁹⁵. Therefore, the Court ruled that the legality of the SSP Directive could not be assessed in light of neither UNCLOS or MARPOL,⁹⁶ departing from the advice of the Advocate General, who as above suggested that the legality of the SSP Directive could be assessed in light of the 1982 UNCLOS and, by implication, also MARPOL.

The Court appeared to view the right of innocent passage as a right that only states can enforce, rather than a direct or personal right as such. Hence the liability of private parties and the right of the state must be regarded as distinct matters. Yet regardless of the right of innocent passage being a derivative right, this finding does not as such overcome the

⁹¹ *Intertanko*, para. 51. See also J. Chuah 'ECJ Approves Directive on Ship-Source Pollution' [2008] 14 JIML p. 181

⁹² *Intertanko*, para. 53

⁹³ *Intertanko*, paras. 59 - 64

⁹⁴ *Intertanko*, para. 60

⁹⁵ Chuah, note 86 above, p. 181

⁹⁶ *Intertanko*, para. 66

practical implications of the conflict between the Directive and the principle of innocent passage.

Even though it has been suggested that the Court may have deliberately avoided making this assessment,⁹⁷ the decision is not necessarily inconsistent with its earlier case law relating to the legal effect of international agreements in the Community legal order.⁹⁸ As has been seen above, in order for a provision of an international agreement to be directly effective in the Community, it must be unconditional and sufficiently precise and it must confer rights on individuals. There are however possible exceptions to this rule, for example when the Community act aims at giving effect to an international agreement⁹⁹ or where the Community act expressly refers to the agreement.¹⁰⁰ Since the SSP Directive aims at giving effect to Marpol 73/78 and there is express reference to it in the Directive,¹⁰¹ it could be argued that the ‘standard’ test to establish direct effect of international agreements would not be required in this case. Yet the Court appears to make its assessment of direct effect of an international agreement only *after* it has established whether or not the Community *is bound by* the provisions of an international agreement, which the Court held at the outset was not the case with Marpol 73/78¹⁰². On the other hand, as regards UNCLOS - by which the Community is bound - it is regrettable that the Court does not assess the references to that Convention in the SSP Directive¹⁰³ in order to establish whether it was necessary to apply the test of direct effect of international agreements or not. In other words, the Court might have been able to assess the legality of the SSP Directive in light of UNCLOS given the references in the former to the latter, regardless of whether or not UNCLOS confers rights on individuals. However, it is important to note that there are no references to UNCLOS in the

⁹⁷ Chuah, *supra*.

⁹⁸ See overview above of the relevant case-law under the heading ‘the legal effect of international agreements in the Community legal order’

⁹⁹ See Case C-69/89 *Nakajima v Council* [1991] ECR I-2069.

¹⁰⁰ Case 70/87 *Fediol v Commission* [1989] ECR 1781. See also Case C-280/93 *Germany v Council* [1994] ECR I-4973)

¹⁰¹ See recitals 2 and 3 of preamble to the SSP Directive.

¹⁰² See para. 50 of *Intertanko*

¹⁰³ See Art. 3 (1) (c), Art. 7 (2) and Art. 9 of the SSP Directive.

provisions of the SSP Directive which were contested in this legal action (namely Article 4 and 5 (2)); and the main objective of the SSP Directive appears to be to implement *MARPOL*, rather than UNCLOS, standards.

The fourth question referred for a preliminary ruling relate to the potential conflict between the principle of legal certainty and the term ‘serious negligence’ under Article 4 of the SSP Directive. The principle of legality (*nullum crimen, nulla poena sine lege*) which underlines the constitutional traditions of the Member States, is a specific expression of the principle of legal certainty, and requires criminal offences and penalties to be clearly defined.¹⁰⁴ Legal certainty requires that the effect of Community legislation must be clear and predictable¹⁰⁵ with the aim of ‘ensur[ing] that situations and legal relationships governed by Community law remain foreseeable’¹⁰⁶

The ECJ dismissed the argument that the use of the term ‘serious negligence’ under Article 4 of the Directive breached that principle, since common features relating to the term could be found in the legal systems of all Member States. The Court has found that serious negligence is to be taken to mean an unintentional action or omission by which the person responsible commits a *patent* breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation¹⁰⁷.

The Court added a ‘subjective’ element to the definition of serious negligence, in that the personal characteristics of the defendant and individual situation could be taken into account. Moreover, the Court referred to a ‘patent’ breach of a duty of care, which is consistent with though perhaps not the same as an ‘obvious’ breach of a duty of care as required by the English Courts in order to establish gross negligence¹⁰⁸. It will be interesting to see the extent to national courts may adapt their own definitions and interpretation of ‘serious negligence’ in line with this decision – even though there is no

¹⁰⁴ See Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, para. 49 and 50

¹⁰⁵ Case C-316/93 *Vaneetveld v SA Le Foyer* [1994] ECR I-763

¹⁰⁶ Takis Tridimas *The General Principles of EU law* (second ed. 2007) OUP p. 242

¹⁰⁷ *Intertanko*, para. 74-76

¹⁰⁸ See e.g. *Adomako* [1994] UKHL 6

suggestion in it that the definition of serious negligence provided by the Court aims at harmonising the law of the Member States. Rather, the Court appeared simply to be pointing out to common features of the law on (criminal) negligence of the Member States and to show that no conflict with the principle of legal certainty existed. Thus, unlike the Advocate General who tried to construe the concept of serious negligence as ‘recklessness in the knowledge that damage would probably result’ as regards accidental discharges outside the territorial sea so as to avoid conflict with Marpol 73/78, the Court did not see the need to follow this narrow interpretation of the term - perhaps because it had found that the legality of the SSP Directive could not be assessed in light of UNCLOS or Marpol 73/78.

Conclusion

By ruling that the Community is not bound by MARPOL 73/78 and that UNCLOS is not directly effective in the Community legal order, the ECJ was able to avoid the difficult question of establishing the compatibility of the SSP Directive with international law. Thus it is possible that the extent to which the Community is entitled to adopt more stringent rules than international law in the area of maritime pollution may be a question for *international law* to decide - even though there is no statement to this effect in the judgement. Hence it is possible that the legality of the Directive may be tested in other international forums.

It must be noted though that international law (as embodied in particular in UNCLOS) does not clearly constrain the *legislative* jurisdiction of coastal states (or a regional group of such states) in the territorial sea. Contrary to the situation with the EEZ, the only provisions in the UNCLOS constraining the ability of coastal states to prescribe more stringent *liability* standards than under international law in their territorial waters are those relating to the right of innocent passage. It is questionable though whether the right of innocent passage is an absolute right¹⁰⁹ and whether it may constrain the legislative

¹⁰⁹ In fact, the provisions of Marpol 73/78 raised by the claimants in this case to contest the validity of the SSP Directive (i.e. that the owner or master may be liable for *reckless* acts arising from accidental

discretion of coastal states to lay down their own liability standards in their territorial waters, so long as this discretion does not fall below the international standards. In the case of specific technical standards (e.g. ship design) however, also within the territorial sea coastal states are expected to apply internationally recognised standards and they may not adopt rules which go beyond those standards.

Another more difficult question is whether States could go beyond international standards as far as their *enforcement* jurisdiction (e.g. apprehending a foreign vessel outside the territorial sea) is concerned. Nevertheless this issue has not arisen in the *Intertanko* case and there were no suggestions that the rules on port and coastal state's jurisdiction under the SSP Directive¹¹⁰ significantly departed from the international rules in those areas¹¹¹.

In this author's view, it would be difficult to achieve *total harmonisation* of liability regimes in order to uphold the principle freedom of navigation. Perhaps one analogy could be made with the free movement of goods and persons in the EU – different liability regimes apply in different Member States. Even though there is scope for *minimum* harmonisation of liability regimes in order to ensure that those freedoms are not impaired, *total harmonisation* of liability regimes is largely considered to be undesirable¹¹². Moreover, it is not only sea transport which faces divergent regulatory regimes in different States – this also applies for example to land based transport. Hence it is suggested that it is in the area of technical (and perhaps 'emissions') standards that the scope for total harmonisation of anti ship-source pollution measures should lie.

discharges) are themselves an exception to the principle of innocent passage as defined in UNCLOS as acts prejudicial to peace, good order or security of the coastal state in the territorial sea including *wilful* and serious acts of pollution.

¹¹⁰ See Arts. 6 and 7 thereof

¹¹¹ Yet as regards port state enforcement measures, Article 6 of the SSP establishes that the port state 'shall' undertake an appropriate inspection, which sets a higher obligation than the equivalent provision of MARPOL which states that port states 'may' undertake the relevant inspections.

¹¹² See also Daniel Bodansky 'What's So Bad about Unilateral Action to Protect the Environment?' EJIL 11, 339 (2000). However such national rules may be in conflict with other international commitments of the Member States (e.g. under WTO law).

Whilst it is unfortunate that the judgement does not address those issues, the judgement is still significant in that it has established a precedent that constrains the right of private parties to challenge before national courts the legality of Community acts in light of UNCLOS and MARPOL. Even if true that those Conventions do not create *rights* for individuals, they certainly have the effect of ultimately creating *obligations* for individuals. This then begs the question of whether it might have been appropriate for an effective remedy to be available for private parties to challenge before national courts the legality of Community acts giving effect to those agreements.