"NUNCA MÁIS!" HOW CURRENT EUROPEAN ENVIRONMENTAL LIABILITY AND COMPENSATION REGIMES ARE ADDRESSING THE PRESTIGE OIL SPILL OF 2002

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Three years after the public outcry and political pressure that ensued when the single-hulled tanker Erika ran aground off the coast of Brittany, the post-Erika Europe, which legislators had so confidently envisioned in 2000, unraveled at the seams. On November 19, 2002, the single-hulled tanker Prestige broke in half approximately 170 miles off the coast of northwest Spain, leaving a damaging trail of three million gallons of Russian fuel oil. The catastrophic spill revealed the utter failure of the pre-emptive measures enacted post-Erika to ensure that Europe would never again have to face an environmental disaster of such devastating proportions.

The Prestige would become the region's second catastrophic oil spill in less than a decade, almost ten years to the day after the oil tanker Aegean Sea smashed into La Coruña, Spain's main port city.

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1 Eric R. Jaworski, Comment, Developments in Vessel-Based Pollution: Prestige Oil Catastrophe Threatens West European Coastline, Spurs Europe To Take Action Against Aging and Unsafe Tankers, 2002 COLO. J. INT'L ENVTL. L. & POL'Y 101, 101-02.


3 The Greek ship Aegean Sea ran aground in La Coruña harbor on December 1395
in the northwest region of Galicia. Something had gone terribly wrong, and the various European regulatory organizations were left scrambling to understand what had happened amidst the finger pointing that ensued.

The aftermath of the Prestige incident defined the disaster: crippled tourism as beaches along the Galician coast were closed indefinitely, devastated fisheries grounded on shore, panicked unemployment, an expensive clean-up effort, and damages expected to exceed €1 billion. Determining who was at fault appeared to be impossible. The aging, hulled tanker had been manufactured in Japan, but was owned by a Greek company registered in Liberia; it sailed under a Bahamian flag, but was operated by a Greek crew and was transporting Russian oil owned by Swiss-based Russian commodities traders. There were claims that British customs agents and the American classification society hired to determine the tanker's seaworthiness had failed to conduct adequate safety inspections. Many, however, were blaming the Spanish government for their uncoordinated response to the emergency, and for refusing the vessel access to a port where salvage crews may have been able to contain the spill. This was the more sinister backdrop to the victims' cries of "Nunca MÁis!"—never again. But this was exactly what legislators had hoped to ensure after the Erika disaster three years before, and the demand appeared to have fallen on deaf ears.

The European Union ("EU") and its administrative bodies have

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3, 1992. The ship was carrying approximately 80,000 tons of crude oil, most of which was either spilled into the ocean or consumed by the fire that broke out on board after the vessel grounded. Colin De la Rue & Charles B. Anderson, Shipping and the Environment: Law and Practice 72 (1998).


5 See Marc Roche, L'affréteur russe du <Prestige> s'est mis à l'abri des poursuites [The Russian Freighter of the Prestige Has sheltered itself from legal proceedings], Le Monde, Jan. 7, 2003, at 12 (discussing how the Russian conglomerate, Alpha, has separated from its trading subsidiary, Crown Resources, proprietor of the sunken cargo).

6 See John McLaughlin, United States: Houston Go-Ahead to Basque Government for ABS Action, Lloyd's List, Nov. 5, 2003, at 5 (discussing a lawsuit filed by Basque government entities charging the American Bureau of Shipping ("ABS") with "negligence, and gross negligence, alleging that [ABS] breached its duty of care 'by failing to perform an adequate inspection of the Prestige, and by classifying [the Prestige] as seaworthy, when the vessel simply was not.'"), available at LEXIS, News Library, Lloyd's List File.
instituted a series of fairly successful maritime regulations to govern the safety and protection of marine environments in the transport of hazardous cargo. However, stricter liability schemes are needed to identify where best to allocate fault in the event of marine casualties, and to provide greater incentives to force delinquent parties—be they individuals or States—to adhere to current convention standards. The Prestige spill, occurring so soon after the Erika, highlights the relative incompetence of the current liability and compensation regime, which caps the liability of ship owners and industry operators thereby shifting the brunt of economic loss onto affected individuals and coastal states. Moreover, the calculation of damages, which under the current compensation scheme excludes most of the environmental damage caused by oil spills, should incorporate environmental loss. This inclusion is particularly necessary in affected areas where harm to biodiversity can seriously affect the regional economy.

Section 1 of this Comment will recount the events leading up to the demise of the Prestige, taking care to detail the conduct of Spain and Portugal in responding to the emergency. It will also look at the aftermath of the oil spill, focusing on the harm sustained by regional marine and wildlife, as well as the effect of the spill on the Galician economy.

Section 2 of the Comment will detail the various parties involved so as to address their respective potential liabilities.

This analysis will be furthered by the theoretical context provided in Section 3, which will concentrate on the maritime conventions that form the regulatory background of the current liability and compensation regime, paying close attention to the evolution of port state control and post-Erika regulation.

Section 4 of the Comment will consider the current liability and compensation regime, focusing on the availability of compensation funds and the distribution of indemnities.

Finally, Section 5 of the Comment will consider what the international community can do to prevent future Prestige-like incidents. While the focus of the Community’s efforts is now on eliminating these high-risk tankers, it is more important that coastal states increase investment in creating a coordinated plan for emergency response while these high risk single and double-hulled tankers continue to sail through vulnerable coastal zones.
1. THE OIL SPILL AND ITS EFFECTS

1.1. Anatomy of a Disaster: The Saga of the Prestige

On November 13, 2002, the single-hulled oil tanker Prestige, carrying 77,000 tons of fuel oil valued at $10 million, stalled off the coast of northwest Spain and leaked an expanding slick of oil from its badly fractured hull. Two weeks prior, it had left St. Petersburg, Russia where, since July, the twenty-six year old tanker had been serving as a makeshift oil storage facility. After filling up with cargo in Ventspils, Latvia, the Prestige set sail for Singapore. The tanker was making its way south along the Atlantic when the crew noticed that the hull was damaged.

When the crew finally sent a mayday to the Spanish coast guard, the Prestige was only twenty-seven miles from the coast of Galicia, battling twenty-foot waves and gale force winds that were causing the vessel to list precariously. Helicopters evacuated the Prestige’s crew, leaving the tanker’s Greek captain Opostolos Mangouras, the first officer, and the chief mechanic on board as they tried to rescue the failing ship. By the time the Spanish tugboat Ria de Vigo reached the floundering tanker an hour later, the Prestige was already surrounded by an oil slick more than a mile across in diameter.

Meanwhile, in Galicia’s main port city of La Coruña, the Spanish salvage company Technosub International Inc. had learned from its partner in Rotterdam, SMIT Salvage NV (“SMIT”), that it won the contract to attempt a rescue of the Prestige. By the morning of November 14, the Prestige, its engines dead, had drifted within three miles of land. The Ría de Vigo had been unable to keep the tanker out at sea because the cables used to keep the Prestige under control were snapped by the intense pressure of the

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7 De Palacio urge a Quince a aplicar ya las nuevas normas seguridad [De Palacio Urges Member States to Apply the New Security Norms], EFE NEWS SERVICES, Nov. 19, 2002 [hereinafter De Palacio], available at LEXIS, News Library, Spanish Newswire Services File.
8 Bahree, supra note 2, at A1.
9 Id. at A12.
10 Id.
11 If the ship and its cargo could be salvaged, SMIT and Technosub could make millions of dollars. Id.; see PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 381-82 (2d ed. 2002) (noting that salvagers work on speculation and receive “special compensation” for successful salvage operations).
Despite the cable problems, the Prestige was stable enough to allow Spanish coast guard technicians and an inspector from the harbor master’s office in Coruña to board the ship and assess its damage. After listening to their assessment, Jose Luis López Sors, director-general of Spain’s merchant marines, demanded that the vessel be towed at least 120 miles away from the Galician coast. He dispatched the warship Cataluña to ensure his orders would be obeyed. By the time SMIT’s deputy chief executive, Geert Koffeman, arrived in La Coruña, the Prestige had already been towed twenty-five miles out into the Atlantic Ocean leaving an oil slick twenty miles long and 200 yards wide in its wake.

Braving bad weather and twelve-foot-high waves, SMIT’s chief salvage master, Wytse Huismans, and his team of rescuers were lowered onto the Prestige to commence rescue efforts. After assessing the damage, they telephoned Koffeman in Coruña with the message that the only hope of salvaging the tanker involved bringing it into the relatively peaceful water of La Coruña Bay where they could pump its cargo into another vessel. It was an operation that SMIT claimed to have performed many times before. Koffeman knew that the ship would break up if it was towed farther out to sea, so he set up a meeting with Spanish officials to discuss SMITs’ recommendation. The Spaniards flatly rejected the idea. Ultimately, SMIT made the decision to tow the Prestige to the Cape Verde islands, more than 2,000 miles away.

That evening, Mangouras radioed the coast guard that he and the remaining crew had to be evacuated from the ship immediately. When Mangouras arrived at the airport in La Coruña, Spanish authorities arrested him on several charges.

Early on November 16, the oil slick, aided by strong winds, broke through the floating barriers laid out to keep it in check; oil

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12 Bahree, supra note 2, at A12.
13 “France, Britain and the Netherlands sent antipollution equipment, including nearly five miles of floating barriers, to help Spain contain the mess.” Id.
14 Id.
15 See Questions Grow Over Culpability in Tanker Sinking, WALL ST. J., Nov. 21, 2002, at A14 (quoting Koffeman as stating that the tanker would not have broken up if it had not been forced out into the rough waters of the Atlantic).
16 Bahree, supra note 2, at A12.
17 Id.; see also London Club Posts Bail For Prestige Master, MARITIME LONDON, Feb. 17, 2003 (reporting that Mangouras was charged with not cooperating with Spanish authorities). at http://www.maritimelondon.com/london_matters/17february03_main.shtml#new (last visited Oct. 21, 2004).
and poisoned fauna began washing up on La Coruña’s shores.\textsuperscript{18} Moreover, a large piece of the Prestige’s deck plating, forty yards tall and ten yards wide, broke off.\textsuperscript{19} Then, shortly before midnight on November 17, the Portuguese warship João Coutinho approached the salvage team with explicit orders that the tugboats were not to bring the damaged tanker within two hundred miles of the Portuguese coast.\textsuperscript{20} To comply, the salvage team had to change course and head farther west into even rougher seas.\textsuperscript{21} After being battered by fierce waves for another thirty hours, the tanker finally began breaking apart. By 9:30 a.m. on November 19, the tanker’s two parts were at a forty-five degree angle.\textsuperscript{22} The Spanish Minister of Defense, Federico Trillo, considered sending F-18 fighter jets to bomb the tanker and set its cargo on fire so that the oil would be burned off, but he scrapped the idea after deeming the maneuver too risky.\textsuperscript{23} Finally, at 4:15 p.m., the Prestige sank 133 miles west of Spain and Portugal in a marine preserve known as the Galicia Bank.\textsuperscript{24} At the time, the condition of the submerged cargo was unknown, believed to have solidified under extreme pressures and frigid temperatures; but the fear persisted that the tanks would eventually rupture and that the oil would rise to the surface.\textsuperscript{25}

\textsuperscript{18} Bahree, \textit{supra} note 2, at A12.

\textsuperscript{19} Id.

\textsuperscript{20} See \textit{Naufragio del 'Prestige'/La Catástrofe Medioambiental: "Aun hay fugas," dice Francia} [\textit{The Prestige Shipwreck/The Environmental Catastrophe: "There Are Still Leaks," Says France}], \textit{EL MUNDO}, Nov. 28, 2002, at 9 ("Los remolcadores holandeses... fueron obligados a cambiar de dirección de manera brusca siguiendo ordenes del buque de guerra luso João Coutinho.... Por este motivo... el Prestige tuvo que navegar en sentido perpendicular a las olas y quedo atrapado entre dos corrientes."). ["The Dutch salvage crew... was forced to change direction brusquely by order of the Portuguese warship João Coutinho.... Because of this... the Prestige had to navigate perpendicular to the waves and became trapped between two currents."]).

\textsuperscript{21} Id. But see Begoña Perez, \textit{Naufragio del 'Prestige': Portugal desmiente a 'Stern'} [\textit{The Prestige Disaster: Portugal Denies Stern’s Allegations}], \textit{EL MUNDO}, Nov. 29, 2002, at 16 (denying allegations that Portugal was responsible for the demise of the Prestige by forcing it to make an abrupt turn out to rougher seas).

\textsuperscript{22} Bahree, \textit{supra} note 2, at A12.

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} See \textit{Sucesos-Petrolero: Fomento Preve Que el Fuel Contiene Buque Hundido se Solidificara} [\textit{Events-Tanker: Department of Promotion Predicts That Fuel Contained in Sunken Ship Will Solidify}], EFE NEWS SERVICES, Nov. 19, 2002 [hereinafter \textit{Sucesos-Petrolero}], available at LEXIS, News Library, Spanish News Services File ("El Ministerio de Fomento... apunto que... el fuel que [el Prestige] contiene podría solidificarse debido a la baja temperatura del agua."). ["The Department of Promotion... noted that... the fuel contained in [the Prestige] may solidify due to the..."].

\url{https://scholarship.law.upenn.edu/jil/vol25/iss4/4}
While salvage crews relinquished responsibility and the Spanish government scrambled to sift through the morass of parties involved to determine who was liable—and more importantly, who would pay for damages—four large oil slicks made their way towards the Spanish coast.

1.2. The Aftermath of a Disaster

1.2.1. Amount of Oil Spilled

The six days of the Prestige crisis paled in comparison to the public outrage that followed as more accurate data was made available and the extent of the oil spill was more readily perceived. The tanker carried 77,000 tons of fuel oil, roughly double the amount the Exxon-Valdez was carrying in 1989.\(^\text{26}\) The initial cleanup costs were estimated at €42-43 million.\(^\text{27}\) Some estimates put the total cost of the disaster at €350 million.\(^\text{28}\) Efforts at containing the spread of the oil slick were only marginally successful, with tests confirming the presence of Prestige oil on French beaches in early January 2003.\(^\text{29}\)

With well over half of the tanker's cargo having gone down with the ship, the environmental impact of the spilled oil has been considerable. The vessel initially spilled 1.3 million gallons of oil that has washed ashore the environmentally fragile region of Galicia.\(^\text{30}\) One week after the disaster, 240 tons were scraped off an eighty kilometer stretch of coastline.\(^\text{31}\) At first, environmentalists

\(^{26}\) The Exxon-Valdez leaked forty-two million liters of oil and created a black tide 250 square kilometers wide. Vertido Afecta 295km. Costa, a la que se Destinan 42 Millones [Oil Spill Affects 295km. of Coastline, for which 42 Million is Expected], EFE NEWS SERVICES, Nov. 20, 2002 [hereinafter Vertido], available at LEXIS, News Library, Spanish Newswire Services File.

\(^{27}\) These costs supersede those of the Aegean Sea spill, when the Greek tanker crashed into the rocky coast of La Coruña on December 3, 1992. La Crisis del Vertido de Petroleo: El Impacto Económico [The Crisis of the Oil Spill: The Economic Impact], RECOLETOS CIA EDITORIAL EXPANSIÓN, Nov. 27, 2002 [hereinafter La Crisis], available at LEXIS, News Library, Spanish Newswire Services File.

\(^{28}\) Id.

\(^{29}\) Jaworski, supra note 1, at 103.

\(^{30}\) It is believed that between 1.3 million and 2.6 million gallons of fuel oil leaked on November 13, 2002. European Space Agency, Galicia (Spain) Oil Spill, from November 2002 to April 2003, at http://earth.esa.int/ew/oil_slicks/galicia_sp_02 (last visited Nov. 8, 2004).

believed that the stern compartments holding the remaining oil were intact when the tanker sank to the bottom of the Atlantic Ocean, and that the highly viscous cargo would solidify and stay in the tanks, temporarily assuaging fears of further ecological disaster.\textsuperscript{32} When the single-hulled tanker \textit{Erika} sank off the coast of Brittany in 1999, she took most of her oil cargo to the bottom of the sea and her tanks seem to have stayed intact.\textsuperscript{33} But only a few weeks after the \textit{Prestige} sank, the French submarine \textit{Nautil}e\textsuperscript{34} discovered oil leaking from fourteen cracks in the tanks, estimated to be discharging 125 tons\textsuperscript{35} each day. The \textit{Nautil}e's mission to plug the holes was only a temporary solution, however, since the primary concern was the long-term effects of the spill which will multiply in magnitude as the ship rusts through and the oil is released.\textsuperscript{36} Ships have been known to cause pollution years after they have sunk,\textsuperscript{37} prodding SMIT spokesperson Daniel Yates to comment: "[w]e don't know if it's a dripping tap or a time bomb."\textsuperscript{38}

\subsection*{1.2.2. The Effect on the Environment}

The Spanish Costa da Morte\textsuperscript{39} is one of Spain's important fish-

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\item \textsuperscript{32} \textit{Sucosos-Petrolero}, supra note 25.
\item \textsuperscript{33} Whitfield, supra note 31.
\item \textsuperscript{34} The \textit{Nautil}e miniature submarine, famous for diving to the sunken \textit{Titanic}, is owned by the French marine research institute Ifremer. It has been instrumental in assessing damage sustained by the sunken tanker. \textit{See Nautil}e: \textit{Miniature Submarine}, \textit{BBC NEWS WORLD EDITION, Dec. 2, 2002} (detailing the activities of the submarine on the \textit{Prestige}), at \url{http://news.bbc.co.uk/2/hi/europe/2536339.stm} (last visited Oct. 21, 2004).
\item \textsuperscript{36} SMIT Salvage has submitted a report to the European Commission outlining the options for the \textit{Prestige}, among which is using remote-controlled equipment to pump the oil out of the ship, which is located 2,600 meters beneath the sea and 210 kilometers out to sea. \textit{Id.}
\item \textsuperscript{37} For example, in 2001 a series of "mystery" oil slicks that had been washing up on the California coastline during the 1990s was traced back to a freighter that sank in 1953. Whitfield, supra note 31.
\item \textsuperscript{38} Whitfield, supra note 35. "Even if the cargo stays on the seabed, compressed and turned into a heavy, waxy substance by the cold and extreme pressures . . . heavy metals will still leach into the water and enter the food chain." \textit{Oil Tanker Disaster Destroys Livelihoods in Spain, 7 DRILLBITS \& TAILINGS 10} (Dec. 2002) [hereinafter DRILLBITS], at \url{http://www.moles.org/ProjectUnderground/drillbits/7_10/2.html} (last visited Oct. 21, 2004).
\item \textsuperscript{39} The "Coast of Death" is the name given to the northern coast of Galicia. Historically, the name derives from the fact that, before the discovery of the
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ing areas, boasting "thirteen ecosystem types according to the EU's habitats directive." The rocky coast of Galicia is home to large communities of shellfish and fish, including sea barnacles, which are important to the regional fishing industry. The area of the oil spill is also part of the wintering zone for many species of birds, including the Balearic shearwater and the endangered Iberian guillemot. The sea here is so rich in fish that it serves as the feeding ground for many seabirds and sea mammals, such as whales and dolphins. Whereas light oil particularly affects fish, heavier oil like the type transported on the Prestige poses a serious threat to shellfish, seabirds, and sea mammals. Moreover, leaked oil can cause a chain of contamination that is difficult to contain. Since plankton are at the base of the marine food chain, any drop in their numbers will adversely affect other marine creatures. Consequently, it is impossible to predict the full extent of the damage, and some experts claim that environmental monitoring of the Prestige incident will be necessary for the next five to ten years.

One month after the disaster, 3,000 dead or oil covered birds had been found, but ornithologists warn that for every bird recovered, usually ten more have been damaged or killed at sea. Due to this unsettling fact, the Spanish Ornithological Society has

Americas, it was known to many Medieval Europeans as Finisterra, literally "the end of the Earth." However, the area has since earned its unfortunate moniker for being the site of countless shipwrecks. See Deputación da Coruña, Historia y Tradiciones: Los Naufragios ("La mayoría de los estudiosos defienden que el origen de este topónimo hace alusión a las numerosas catástrofes marinas que aquí se produjeron." ["The majority of studies espouse the belief that the origin of the name alludes to the numerous marine catastrophes that have occurred here."]), at http://www.dicoruna.es/neria/naufragios-p1.html (last visited Nov. 7, 2004).

40 Jaworski, supra note 1, at 103.


43 Fish will also consume the toxic oil and pass it on to porpoises, dolphins, birds, and even humans. Whitfield, supra note 31.

44 While some scientists believe that the ecosystem will have recovered when all the parts are functioning again, others argue that the impact will last for decades. See Höfer, supra note 42 (describing the repercussions of the Prestige oil spill, including the economic cost and social effects).

claimed that one endangered species, the Iberian guillemot, should be considered extinct.\textsuperscript{46} Rescue efforts of these and other birds are hampered by the rugged Galician coastline, with its numerous inaccessible beaches, making it difficult to find birds and accurately determine how large the effect has been on marine wildlife.\textsuperscript{47}

1.2.3. The Effect on Galician Economy

In assessing the damage done to the environmental economy, all losses to the region's welfare are considered. This includes the obvious costs of cleaning and restoration of areas affected by the spill, which are typically paid with public funds. But the people who make their living directly from the contaminated resource—namely, the sectors of fishing, shellfish harvesting, agriculture and tourism—suffer the more substantial damage.\textsuperscript{48}

When it was discovered that oil was leaking out of the tanker, the Spanish authorities ordered a temporary halt to fishing in an area that was enlarged within the following weeks. This required thousands of fishing vessels to stay in harbor, affecting a workforce of up to 6,000 fisherman and shellfish harvest personnel\textsuperscript{49} and an enterprise worth more than $300 million per year.\textsuperscript{50} "This coastline is also home to one of the world's largest aquaculture of mussels," making it a prime area to fisheries of many nations.\textsuperscript{51}

The fishing industry is regarded as the key motor of the Galician economy, generating profits of more than €2.4 billion yearly, and upon which over seventy other sectors of the Galician economy directly depend. It employs approximately 30,000 laborers, which represents forty percent of the Spanish labor force.\textsuperscript{52}

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\item \textsuperscript{46} Only twenty-five pairs of the birds live on the now oil-slick Galician coast, leading ornithologists to believe that if any survive, it is doubtful they will find nesting sites and food in the upcoming years. Jaworski, \textit{supra} note 1, at 103-04.
\item \textsuperscript{47} Whitfield, \textit{supra} note 31.
\item \textsuperscript{48} Tourism is considered to be a key developing industry in the region, attracting approximately 4,778,000 tourists in 2001 and reaping profits of €2.7 billion. \textit{See} Xunta de Galicia, \textit{Galicia 2003: Turismo [Galicia 2003: Tourism]} (detailing the year in review for Galician tourism), \textit{at} http://www.xunta.es/galicia2003/es/15_01.htm (last visited Nov. 10, 2004).
\item \textsuperscript{49} Höfer, \textit{supra} note 42, at 2.
\item \textsuperscript{50} DRILLBITS, \textit{supra} note 38, para. 2.
\item \textsuperscript{51} Höfer explains that hazards of the oil spill include not only the chemical contamination of seafood, but also the tainting of the fuel oil, which strongly influences the taste and smell of fish. Höfer, \textit{supra} note 42, at 2.
\item \textsuperscript{52} \textit{See} Xunta de Galicia, \textit{Galicia 2003: Política Pesquera [Galicia 2003: Fishing Industry]} (detailing the year in review for the Galician fishing industry), \textit{at} http://www.xunta.es/galicia2003/es/15_01.htm (last visited Nov. 10, 2004). \textit{at}
\end{itemize}
Facing rampant unemployment and economic disaster in a region that was already among the poorest in Europe, the Spanish Congress unanimously approved a monthly indemnity of €1,200 for six months to be made available to the affected fishermen and fishery owners. The Royal Decree granting the allowances also included a reduction in taxes for the economic activities and rents assumed by the affected fishermen and shellfish harvesters. On June 5, 2004, the new Socialist government announced that it would approve the creation of a €160 million relief fund for the affected fishermen and that the Cabinet would alter Royal Decree 4/2003, which indemnified fishermen in exchange for foregoing future lawsuits. Additionally, the government made aid available to affected coastal municipalities that demonstrated substantial damages to their local economies.

Initial clean-up costs were estimated to be €42 million. But in the 1999 Erika case, the damage amounted to €840 million, and the fishery and shellfish sector of the area where the tanker floundered is not comparable to that of Galicia. Nearly two months after the


53 The national funds offered credits totaling €100 million. Höfer, supra note 42, at 2; see also Pilar Marcos, El Gobierno Extiende las Ayudas Directas y los Beneficios Fiscales a Nuevos Afectados [The Government Extends Direct Aid and Economic Benefits to New Victims], El País (Andalucia), Dec. 6, 2002, at 22 (listing the types of aid made available to affected fishermen, fishing boat owners, shellfish harvestors, and ancillary industries), available at LEXIS, News Library, El País File.

54 The Xunta, Galicia’s regional autonomous government, also demanded the extension of similar aid to the canning industry, which is responsible for the employment of approximately 18,000 Gallegos, many of whom are women. See La Industria Conservera Reclama a Aznar ser Incluida en el Paquete de Ayudas [Canning Industry Demands That They Be Included in Aid Package], RECEITOS CIA EDITORIAL EXPANSIÓN (Madrid), Dec. 12, 2002 (recounting the demands made by the National Association of Preserve Manufacturers of Fish and Shellfish to extend government aid to correlative sectors of the fishing industry in Galicia), available at LEXIS, News Library, Spanish Newswire File.


56 By December 1, 2002, there were seventy affected municipalities which the Spanish government had pledged to help. Id.

57 See Crece Preocupación Por Avance Vertidos Que Afectan 295 kilometros [Worry Grows Over Oil Spill That Affects 295 Kilometers], EFE NEWS SERVICES, Nov. 20, 2002 (basing estimated damages on the 295 kilometers long affected coastline, home to forty beaches, which totals an area of approximately 1.5 million square meters in need of regeneration), available at LEXIS, News Library, Spanish Newswire Services File.

58 See María Xosé Vázquez et al., Economic Effects of the Catastrophe of the Prestige: An Advance (Jan. 2003), at 3 (comparing the economic harm sustained by the
Prestige disaster, some experts recalculated the cost of the clean-up to be €1 billion. On December 11, the Minister of the Environment, Jaume Matas, announced that Spain would include estimated monetary damages caused to its ecosystems in its demands for indemnity to responsible parties. As it stands, the International Fund for Compensation of Damages Caused by Hydrocarbon Contamination (“FIDAC”) limits biodiversity damages to two years.

2. UNRAVELING THE PRESTIGE: WHO IS LIABLE?

The sinking of the Prestige and consequent oil spill were nothing compared to the truly messy task of determining who was to blame, and, more importantly, who was to pay. The Prestige case, in this sense, is a truly international affair. The tanker was built in 1976 by a Japanese shipbuilding company. The oil tanker itself was owned by the Greek company Mare Shipping, a limited liability company registered in Liberia, and managed by Universe Maritime Ltd., which is controlled by Efi Moulopoulos-Coulouthros, heiress to the Greek shipping dynasty. It was pi-
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Loted by a Greek crew and under the command of a Greek captain. It was inspected by the classification society American Bureau of Shipping ("ABS"), a non-profit, self-regulating agency headquartered in Houston, Texas. Additionally, the tanker was registered under the flag of the Bahamas, well known as a "flag of convenience" because of the Bahamas' lax registration requirements. The Prestige was insured by the London Steamship Owners' Mutual Association, also known as the London Protection and Indemnity ("P&I") Club. Crown Resources, a Russian owned commodities trading company based in Switzerland, owned the Prestige's fuel oil cargo. Crown Resources subsequently separated from Alfa, its Russian parent company, and reorganized under the name ERC Trading.

How does one determine liability under this web of ownership and responsibility? Some argue that the ship owner should be held personally liable, or at the very least, the ship's crew should be blamed. In fact, it was the tanker's insurers, the London P&I Club, which posted the €3 million bail to free Captain Mangouras from a Spanish jail detaining him on charges of failing to cooperate with Spanish authorities during the casualty. The Spanish government is actively pursuing claims against all three parties, and has also...
pursued ABS in the U.S. court system.\textsuperscript{72} Other groups, in turn, are claiming that the Spanish and Portuguese governments are at fault for acting recklessly in failing to aid the salvage efforts.\textsuperscript{73}

Under current international agreements, an internationally managed compensation scheme governs civil liability. The International Oil Pollution Compensation Fund ("IOPC")\textsuperscript{74}, in conjunction with the ship's insurers, can pay up to €180 million.\textsuperscript{75} If the costs or compensation claims exceed that figure, then claimants have to resort to legal action to recover damages. But before delving into the liability compensation scheme, it would be helpful to look at the relevant maritime law and conventions that provide the theoretical framework for such a liability regime.

3. BEGINNING TO ASSESS RESPONSIBILITY: RELEVANT LAW

In order to adequately discuss liability regimes, it is helpful to consider the relevant law that guides the protection of marine environments. The 1972 Stockholm Conference on the Human Environment and the 1992 Rio Conference on Environment and Development were substantial impetus for developing new law in the regulation of marine environments.\textsuperscript{76} Recommendations from the Stockholm Conference directly led to the adoption of the 1973 MARPOL Convention for the Prevention of Pollution from Ships ("MARPOL").\textsuperscript{77}

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\textsuperscript{72} See McLaughlin, \textit{supra} note 6 (describing a U.S. federal court's decision to hear Basque entities' $50 million case against ABS for negligence and gross negligence in classifying the \textit{Prestige} as seaworthy without an adequate inspection); Michael Grey, \textit{Giant Stakes for Shipping in Spain's Fight with ABS}, \textit{LLOYD'S LIST INT'L}, July 7, 2003, at 7 (commenting that the lawsuits ensuing from the \textit{Prestige} disaster are a battle that "ABS and the wider world of classification cannot afford to lose"), available at LEXIS, News Library, Lloyd's List File.


\textsuperscript{74} See discussion \textit{infra} Section 4.3.

\textsuperscript{75} See Fleming, \textit{supra} note 67, at A10 (suggesting that obtaining up to €180 million from the insurers and the oil fund is feasible).

\textsuperscript{76} BIRNIE \& BOYLE, \textit{supra} note 11, at 348.

\textsuperscript{77} Id.
The 1982 U.N. Convention on the Law of the Sea ("UNCLOS III")\textsuperscript{78} was intended to be a comprehensive restatement of all the aspects of maritime law. The convention codified the most important provision of maritime laws in Article 192, which establishes that "States have the obligation to protect and preserve the marine environment."\textsuperscript{79} The articles of the UNCLOS III have effected a number of fundamental changes in the international law of the sea. Namely, these changes are that pollution can no longer be regarded as an implicit freedom of the seas, that the balance of power between flag states and coastal states must be readjusted, and perhaps, the most problematic in the case of the\textit{ Prestige}, that emphasis is no longer placed on responsibility or liability for environmental damage.\textsuperscript{80} Instead, the emphasis rests primarily on international regulation and cooperation for the protection of the marine environment.\textsuperscript{81}

The purpose of regulating pollution from ships is to minimize risk and give coastal states adequate means of protecting themselves and securing compensation for spill damage. A main theme of UNCLOS III was "the failure of the traditional structure of jurisdiction over ships and maritime areas to protect the interests of the coastal states whose proximity to shipping routes made them particularly vulnerable."\textsuperscript{82} While the duty of the flag state to adopt and enforce safety regulations was inadequately defined and rarely observed, the authority of the coastal state to regulate activities off its coast was entirely too restricted.\textsuperscript{83} MARPOL and UNCLOS III responded to these problems by increasing the power of coastal and port states and by redefining and heightening flag states' responsibilities to safeguard the marine environment.\textsuperscript{84}


\textsuperscript{80} BIRNIE \& BOYLE, supra note 11, at 360.

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id. For example, even when a ship is within the territorial jurisdiction of
Flag state responsibility has been the subject of more specific international agreements to provide internationally recognized common standards for flag states and coastal states in regulating the safety of shipping. For example, an important 1974 Convention of Safety of Life at Sea ("SOLAS") amendment that came into force in 1998 made it mandatory for all oil and chemical tankers to comply with the International Maritime Organization's ("IMO") Code on International Safety Management ("ISM Code"). Thus, the IMO acts as the main regulatory and supervisory institution that enforces these agreements, which results in a form of international regulation on environmental risk.

3.1. The 1973/78 MARPOL Convention

MARPOL effectively replaced the 1954 London Convention, which was the first effective attempt at international oversight of oil pollution from tankers.\(^8\)\(^8\) The convention articles\(^8\)\(^9\) mainly concern jurisdiction, powers of enforcement, and inspection, while the more detailed anti-pollution regulations are contained in the annexes.\(^8\)\(^7\) The parties to MARPOL in 2000 comprised over ninety-four percent of merchant tonnage, which makes Annexes I and II of the convention\(^9\)\(^1\) part of the generally accepted standards pre-
scribed by Article 211 of UNCLOS III as the minimum requirement of the flag state’s duty to exercise diligent control of its vessels.\footnote{For more on the annexes of MARPOL 73/78, see Rüdiger Wolfrum et al., *Preservation of the Marine Environment*, in *INTERNATIONAL, REGIONAL AND NATIONAL ENVIRONMENTAL LAW* 225, 260-61 (Fred L. Morrison & Rüdiger Wolfrum eds., 2000) (describing how the five annexes cover pollution by oil, various harmful substances, and sewage from ships).} MARPOL also set new stringent construction, design, equipment, and manning ("CDEM")\footnote{Construction, design, equipment, and manning ("CDEM") standards are prescribed and most easily enforced by flag states as requirements for all vessels seeking registration in their state. *SMITH*, supra note 84, at 150.} standards, which were amended in 1992 to require double hulls after the *Exxon-Valdez* disaster.\footnote{International Maritime Organization, *MARPOL 73/78*, available at http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258 #25 (last visited Oct. 31, 2004); see also infra note 138 and accompanying text.}

Additionally, MARPOL instituted a more effective scheme of enforcement in response to pressure from dissatisfied coastal states. The new scheme involved the "cooperation of coastal states, port states, and flag states in a system of certification, inspection, and reporting."\footnote{*BIRNIE & BOYLE*, supra note 11, at 363.} The scheme aimed to make the operation of defective vessels difficult or impossible, and to aid the performance of flag states in prosecuting and enforcing applicable laws.\footnote{*Id.* at 363-64.} The scheme aimed to make the operation of defective vessels difficult or impossible, and to aid the performance of flag states in prosecuting and enforcing applicable laws.

The flag state has two main responsibilities under MARPOL: 1) it must inspect the vessel at periodic intervals to ensure seaworthiness; and 2) it must issue an international oil pollution certificate ensuring that the ship complies with the requirements of MARPOL. Port states may inspect ships holding these certificates.\footnote{Inspections may be carried out to confirm the possession of a valid certificate or to determine the condition of the ship. *Id.* at 364; see also discussion infra Section 3.2.} Where noncompliance with a MARPOL certificate is revealed, port states must not allow such ships to sail. An efficient scheme of port state inspection and control is therefore a more practical means of deterring substandard vessels than flag state enforcement of international rules and standards, since these vessels will more often come in contact with port states.\footnote{Additionally, inspections can be conducted on vessels whose flag states are non-parties to MARPOL 73/78 or SOLAS as a condition of port entry. *BIRNIE & BOYLE*, supra note 11, at 365.} The cumulative effect of MARPOL and SOLAS is that in a given year over 10,000...
ships sailing through Western Europe are inspected. 99

But as the Prestige case and prior oil spill disasters indicate, the problem of flag state implementation is a broader one than compliance with MARPOL alone. 100 While the IMO has been an active regulatory body in securing acceptance for safety and environmental standards 101 and in keeping abreast of new developments, its supervisory role is nonetheless very weak. While the IMO can set standards for flag states, "it has little power or incentive to police them." 102

3.2. Coastal State Control under MARPOL

The coastal state’s jurisdiction to regulate vessels depends on its sovereignty over maritime zones contiguous to its coasts. Under MARPOL, any violation by a vessel within the jurisdiction of a coastal state is punishable by the law of that state. 103 But beyond that, coastal states are quite limited in their ability to enforce international safety and marine protection standards. A coastal state cannot close its territorial waters to foreign ships in innocent passage even when their cargo poses significant environmental risk, as in the case of oil tankers. 104 At most, coastal states are entitled to take certain precautionary measures to minimize the risk of pollution. These include observing special measures provided by MARPOL or confining passage to specific sea lanes in the interests of safety and the protection of environmentally sensitive areas. Following the 1993 Braer spill off the Shetland Islands, 105 the IMO amended SOLAS to permit coastal states to obligate ships to report their arrival to coastal authorities when entering designated zones. 106

99 Id.
100 See generally FOC Report, supra note 66 (detailing the status of flags-of-convenience states in relation to the world’s largest operating fleets).
101 BIRNIE & BOYLE, supra note 11, at 367.
102 Id.
103 BIRNIE & BOYLE, supra note 11, at 367.
104 Only prejudicial activities deny a vessel the right of innocent passage, not passive characteristics such as CDEM. SMITH, supra note 84, at 201–02.
105 For more information on the Braer oil spill, see generally THE IMPACT OF AN OIL SPILL IN TURBULENT WATERS: THE BRAER (J.M. Davies & G. Topping eds., 1997) (providing a “description of the impact of the Braer oil spill on both marine and terrestrial life”) and DE LA RUÉ & ANDERSON, supra note 3, at 72 (describing the Braer oil spill and its environmental and economic impacts).
106 BIRNIE & BOYLE, supra note 11, at 371.
However, coastal states are not bestowed with full jurisdiction to enforce international regulations against ships that pass through their exclusive economic zones ("EEZ").\(^{107}\) While customary law permits coastal states to arrest ships engaged in illegal pollution or dumping in the territorial sea, the practical exercise of the right poses serious dangers to navigation and is therefore rarely used as a means of enforcing anti-pollution regulations. Under the terms of the 1969 IMO Convention Relating to Intervention on the High Seas,\(^{108}\) states are empowered to act against the ships of other countries which have been damaged if they pose a grave risk of oil pollution as a result.\(^{109}\) The convention affirms the right of the coastal state to take any measure that may be necessary to prevent, mitigate, or eliminate the danger to its coastline.\(^{110}\) However, the coastal state can only take action as is necessary,\(^{111}\) and any measures beyond those permitted by the convention may make the state liable for any damages those measures might cause to the vessel.\(^{112}\) This could explain the Spanish government’s ultimate decision not to bomb the *Prestige* and burn its cargo. The strongest aspect of the

\(^{107}\) Id. at 375.


\(^{109}\) Wolfrum, *supra* note 92, at 266.

\(^{110}\) But see *Smith, supra* note 84, at 244 ("EEZ prescriptive and enforcement jurisdiction over [polluting conduct other than the dumping of wastes] . . . is quite restricted."); *De La Rue & Anderson, supra* note 3, at 903 ("The sole exception . . . lies in the designation and control of special areas, but even here the coastal state does not enjoy unrestricted freedom to enact unilateral laws.").

\(^{111}\) Yet, after the *Amoco Cadiz* spill in 1978, some states argued that the language of the 1969 Convention was too restrictive, and that intervention should be allowed at an earlier stage. See *Birnie & Boyle, supra* note 11, at 380 (noting that while the 1969 Convention remains unchanged, Article 221 of UNCLOS III was altered to allow coastal states the right of intervention when there is merely "actual or threatened damage").

\(^{112}\) See, e.g., *Birnie & Boyle, supra* note 11, at 380 (pointing out that in the *Torrey Canyon* disaster of 1967, military aircrafts were employed to destroy the ship and ignite the oil, and that these measures would likely not be considered justified in handling present shipping casualties); see also *Smith, supra* note 84, at 244 ("The limited capacity to prevent afforded the coastal state seems to dictate the propriety of the simple due diligence standard in assessing coastal responsibility for vessel conduct in the EEZ.").
right of intervention provided by the convention is that it allows coastal states, such as Spain and Portugal, to override the shipmaster's discretion in seeking salvage assistance and may permit them to order damaged vessels away from their shores.\textsuperscript{113}

3.3. Port State Control

In short, the safer, more economic solution is to rely on port states for the enforcement of international safety and environmental standards.

3.3.1. The 1982 Paris Memorandum of Understanding

In the EU, the regime governing port state control is based on the 1982 Paris Memorandum of Understanding ("Paris MOU") and the EC Directive on Port State Control of 1995 ("PSC-Directive").\textsuperscript{114} The Paris MOU\textsuperscript{115} is not an international treaty, but rather an agreement between participating states in order to effectively enforce international safety and environmental standards. In order to do this, participating states commit themselves to: maintain an effective system of port state control; inspect at least twenty-five percent of all foreign merchant ships which enter their ports; and lastly to "consult, cooperate and exchange information" with the marine authorities of participating states.\textsuperscript{116}

The main achievement of the Paris MOU is the introduction of innovative practices to enforce safety standards. These practices include the targeting of certain ships with poor safety records or that fly flags of convenience\textsuperscript{117} in order to give priority to their inspection, and the publishing of "black lists" which identify high risk flag states. Evidence from port state inspections demonstrates that the greatest percentage of vessel deficiencies are represented

\textsuperscript{113} Birnie & Boyle, supra note 11, at 380.

\textsuperscript{114} Doris König, Port State Control: An Assessment of European Practice, in Marine Issues: From a Scientific, Political and Legal Perspective 37, 39 (Peter Ehlers et al. eds., 2002).


\textsuperscript{116} König, supra note 114, at 40.

\textsuperscript{117} These are the flags of states that impose limited or no requirements in nationals' participation in ownership or manning of registered vessels. Their notoriously lax registration requirements make vessels flying these flags high risk due to a lack of supervision. See Smith, supra note 84, at 149 (discussing the call for a "genuine link" between the state and the ship when controversial flags of convenience emerged after World War II).
by ships flying under flags of convenience from countries like the Bahamas, Liberia,118 Cyprus, and Malta.119 The Paris MOU attempts to circumvent the problem of limited manpower for inspection by focusing inspections on high risk ships registered in these countries.

3.3.2. Directive 95/21/EC

In the early 1990s, the European Commission and the European Council decided that the EU should adopt a “Common Policy on Safe Seas.”120 Accordingly, the European Community (“EC”) enacted several directives on the promotion of maritime safety and the prevention of marine pollution. Among these, the PSC-Directive121 makes many of the provisions of the Paris MOU legally binding on all EU member states. It also includes IMO Codes such as the ISM Code.122

However, while the relationship between the Paris MOU and the PSC-Directive is one of mutual influence, and the European Court of Justice (“ECJ”) can sanction noncompliance,123 there are significant weaknesses in both laws which increase the chances that a damaged ship can “slip through the cracks.” To begin with, the Paris MOU permits a ship with a satisfactory inspection in the previous six months to forgo inspection.124 Selection criteria for the inspection of ships is not standardized under either law, so each port authority remains free to decide which vessels it will in-

118 See, e.g., Liberian Maritime Law, LIBERIAN CODE OF LAWS, tit. 22, § 51 (1973) (making eligible to be documented in Liberia any vessel, “regardless of tonnage,” owned by a citizen or national of Liberia, or any other country).
119 See BIRNIE & BOYLE, supra note 11, at 367-68 (noting that flag of convenience vessels from Cyprus and Malta have substandard vessels in North American, Latin American, and Western European ports); see also FOC Report, supra note 66 (listing these countries as flags of convenience).
120 Communication from the Commission of a Common Policy on Safe Seas, COM(93)66 final.
123 See, e.g., Case C-315/98, Commission v. Italian Republic, 1999 E.C.R. I-8001 (holding that Italy failed to fulfill its obligations under the PSC-Directive by failing to adopt the laws, regulations, and administrative provisions necessary to implement the Directive within the prescribed period).
124 König, supra note 114, at 41.
spect. Moreover, inspection does not include a full survey of the ship’s condition, but is largely document based. It was these and other inherent weaknesses in the regulatory system that contributed to the unprecedented disaster of the Erika in 1999.

3.4. The Aftermath of ERIKA: ERIKA I and ERIKA II Proposals

On December 12, 1999, the twenty-four-year-old tanker Erika broke in two approximately sixty miles off the French coast of Brittany. Like the Prestige, the Erika was an old single-hulled tanker nearing the end of its thirty-year lifespan and also flying a flag of convenience. The tanker spilled 31,000 tons of heavy fuel oil, damaging nearly 400 kilometers of the Breton coastline. Like the Prestige, the Erika had been subjected to numerous port inspections since 1997 that did not indicate any major structural problems. In December 1999, the Erika had been approved by most major oil companies, including Texaco, Repsol, Shell, the Exxon subsidiary Standard Marine, and TotalFina, whose cargo it was carrying when it floundered. But the accident investigation concluded that the Erika had indeed suffered major structural failure. The oil spill

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125 Member states merely have to reach their twenty-five percent target. Selection criteria is not mandatory. *Id.* at 42.

126 However, vessels under flags of convenience are subject to the "No More Favorable Treatment Clauses" in the Paris MOU and the PSC-Directive. Paris MOU, *supra* note 115, § 2.4; Council Directive 95/21/EC, *supra* note 121, art. 3, para. 3. Since these ships usually cannot supply the required documents, they usually undergo detailed inspections. König, *supra* note 114, at 42.


128 "The 24-year-old tanker sailed under the Maltese flag and was owned by the Savarase family of Sorrento in Italy through the Tevere Shipping Company of Valletta. It was operated by Panship Management & Services of Italy." *Id.* at 231.

129 König, *supra* note 114, at 45.

130 Since November 1998, the Prestige had undergone six port inspections and two surveys, none of which revealed any major structural problems that would classify the vessel as unseaworthy. ABS Press Release, Nov. 20, 2002, *supra* note 62. However, in the investigation of the Erika spill, it was discovered that “four out of the eight ships built in the same series [as the Erika] had suffered serious structural damage involving cracking or buckling of the deck.” Özçayir, *supra* note 127, at 231.

131 Özçayir, *supra* note 127, at 231.

received a great amount of public attention and generated political pressure to act. It became clear to the European Commission that the normal regulatory framework on maritime safety and efforts to increase port state control were ineffective. The *Erika* was carrying the required certificates, was under class, and had been inspected by numerous port states, flag states, and industry agents.\(^{133}\) The *Erika* disaster made it clear that the EU needed to tighten its regulatory framework beyond the level of IMO standards.\(^ {134}\)

The *Erika* incident brought to the forefront many long-standing issues of debate—namely age, class, flag, and the "polyglot nature of the tanker industry" generally. Additionally, the oil pollution compensation system had been criticized for merely concerning itself with how to distribute the maximum limit of compensation. The 1969/1992 International Convention on Civil Liability for Oil Pollution Damage ("CLC" and "1992 CLC," respectively)\(^ {136}\) and the 1971/1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage ("IOPC" and "IOPC Fund," respectively)\(^ {137}\) conventions provided for distribution between the ship interests and the cargo interests, without addressing whether the cap on compensation funds was inadequate. Moreover, the oil pollution compensation system did not consider increasing available funds. At the time, the maximum amount the IOPC Fund could pay was SDR135 million, or $186 million, which included the sum actually paid by the ship owner and his insurer, the P&I club.\(^ {138}\) In the case of the *Erika*, the French Tribunal de Commerce determined the ship owner’s liability to be £8.4 million, or $13.6 million, which they derived from the tanker’s tonnage of 19,666 gross tonnage.\(^ {139}\) At its July 2000 session, the Executive Committee of the IOPC Fund decided to limit compensation from the Fund to fifty percent of the loss or damage claimants actually suffered. This was driven by uncertainty about the total

\(^{133}\) Özçayır, *supra* note 127, at 231.

\(^{134}\) "This is an approach the [United States] followed after the ‘Exxon Valdez’ catastrophe in 1989 by enacting the Oil Pollution Act of 1990 which contains more rigorous standards than those of international conventions . . . ." König, *supra* note 114, at 45.

\(^{135}\) Özçayır, *supra* note 127, at 230.

\(^{136}\) *See discussion infra* Sections 4.1., 4.3.

\(^{137}\) *See discussion infra* Sections 4.2., 4.3.

\(^{138}\) Özçayır, *supra* note 127, at 231.

\(^{139}\) *International Oil Pollution Compensation Fund 1992*, Executive Committee, 9th Sess., 92FUND/EXC.9/7, Item 3.

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number of claims. It was clear that under this system, the cargo owner and flag state had no incentive to act responsibly as liability was automatically attributed to the ship owner. Moreover, insurers often bailed out the ship owners, immunizing them beyond paying over a certain amount.

To address these concerns, the European Commission presented two packages of measures. The first package, ERIKA I, adopted new legislative measures strengthening existing provisions on classification societies and port state control, and it enacted new regulation aimed towards the process of phasing out single-hulled oil tankers to be accomplished by 2015. The second package, ERIKA II, contained a proposal on the establishment of a European Maritime Safety Agency to "give technical support to the maritime authorities of member states, collect information on the implementation of [EC] legislation, and evaluate the effectiveness of existing measures." Additionally, the second set of proposals adopted measures to clarify the civil liability scheme for oil pollution and to establish a new compensation fund, the

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140 Özçayir, supra note 127, at 231. This limit was eventually raised to 100% for claimants other than the French government and TotalFinaElf. International Oil Pollution Compensation Funds, The Erika Incident – France, 12 December 1999, at http://www.iopcfund.org/erika.htm (last visited Oct. 26, 2004).

141 For more on strict liability under the current compensation regime, see discussion infra Sections 4.2, 4.3.


145 Vázquez, supra note 58, at 6; König, supra note 114, at 46; Özçayir, supra note 127.

Compensation Fund for Oil Pollution Damage ("COPE"), endowing it with €1 billion. While the EU adopted ERIKA I, the ERIKA II measures and the creation of the EU's own system of liability and compensation were still being considered.

The ERIKA II proposals were directed towards increasing the efficiency of port state controls. The Erika incident had demonstrated that both the Paris MOU and the PSC-Directive were delinquent in safeguarding coastal states and their marine environments. Under ERIKA I and II, member states would now be obligated to inspect ships with a high "target factor," those ships that pose a high risk due to their age, flag, or previous detentions. Accordingly, oil tankers of a certain age would be subject to a mandatory expanded inspection whenever such a vessel would enter an EU port after a period of twelve months, and the age limit for high risk ships would be reduced from twenty to twenty-five to fifteen years. The most important measure in the proposal, however, is the banning of single-hulled oil tankers from all EC ports. The ban applied to ships that were more than fifteen years old, were past offenders, or sailed under a flag of convenience from a black listed country. The gradual phase out of

147 Vázquez, supra note 58, at 6.
150 Id. at 4.
151 König, supra note 114, at 48.
152 Id. For a more detailed outline of ERIKA I measures, see Henrik Ringbom, The Erika Accident and Its Effects on EU Maritime Regulation, CURRENT MARINE ENVIRONMENTAL ISSUES AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 265-90 (Myron H. Nordquist & John Norton Moore eds., 2001) (examining the Erika incident's scale and the reach of its effects) and Özçayır, supra note 127 (investigating the Erika incident and its consequences).
153 This measure has already been imposed under U.S. law. The Oil Pollution Act of 1990 establishes that vessels can be denied entry into U.S. regional ports if they do not comply with applicable CDEM standards or if they have a history of accidents, pollution, or serious repair problems. König, supra note 114, at 49.
154 Id.
single-hulled tankers was originally contemplated by MARPOL, but the 46th session of the Maritime Environment Protection Committee ("MEPC") of the IMO in April 2001 adopted an acceleration of the phase out period by draft agreement to the MARPOL 73/78 Regulation 13G of Annex I.\textsuperscript{155}

In adopting the Commission proposal on February 26, 2001, the European Council kept out more draconian proposals from the final legislation.\textsuperscript{156} Some member states feared that more stringent legislation might lead to competitive disadvantages for European ports, or that a stricter practice would trigger retaliatory measures against member state ships in non-European ports.\textsuperscript{157} Accordingly, member states were slow to implement these measures,\textsuperscript{158} and "the Council introduced several flexibility clauses that allow the member states to exempt certain ships from the mandatory annual expanded inspection and to gradually reinforce their inspection services until 1 January 2003."\textsuperscript{159} Though the ERIKA I and ERIKA II proposals remained at the forefront of maritime law and carrier liability schemes, the immediacy of their approval and implementation became apparent when the \textit{Prestige} mimicked the \textit{Erika}'s watery demise three years later.

4. LIABILITY CLAIMS CONCERNING THE PRESTIGE: WHO PAYS?

Now that the relevant law has been set out, it is possible to make a more nuanced analysis of civil liability and compensation regimes. Problems arising from jurisdiction, choice of law, standard of liability, and enforcement of judgment that typically plague cross-boundary pollution claims are multiplied in the cases of ships. This often results in protracted litigation and delayed payment of damages.

Prior to 1969, virtually no liability was placed on ships that caused marine pollution. The offending ship's liability was generally limited to its liability tonnage, with amounts restricted by the 1957 International Convention Relating to the Limitation of Liabil-

\textsuperscript{155} Özçayır, \textit{supra} note 127, at 234.

\textsuperscript{156} For example, the European Parliament wanted to add that high risk ships also be refused access to the territorial waters of member states, which would violate the principle of right of innocent passage. König, \textit{supra} note 114, at 49-50.

\textsuperscript{157} \textit{Id.} at 52.

\textsuperscript{158} This is largely attributed to the increase in workload for port state control officers and the need for rapid recruitment and training of additional personnel. \textit{Id.} at 51.

\textsuperscript{159} \textit{Id.}
ity of Owners of Sea-going Ships ("the 1957 Limited Liability Convention"); in non-party countries, liability was limited to the total value of ship and cargo. But the 1967 Torrey Canyon disaster demonstrated that the existing rules for limitation of liability were inadequate to address a major oil spill accident. Specifically, the old liability regime failed to address the growing role of the maritime insurance industry. In response, the IMO produced CLC and IOPC. These two conventions became the basis of the marine pollution liability system. In conjunction with their respective 1992 protocols, the IMO conventions represent one approach to establishing a more satisfactory regime for oil pollution liability. Both conventions enable claims for damages to be brought in the courts of the party state where the damage occurs, regardless of where the ship is registered. As in port state enforcement of the MARPOL Convention, the vessel does not have to be registered under a flag state that is party to the conventions.

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161 For more on the Torrey Canyon, see generally 'TORREY CANYON': POLLUTION AND MARINE LIFE (J.E. Smith ed., 1968) (departing on data concerning the Torrey Canyon oil spill) and De La Rue & Anderson, supra note 3, at 11-21 (recounting the Torrey Canyon oil spill).


163 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 57 [hereinafter IOPC], reprinted in Benedict, supra note 162, at Doc. 6-8, as amended by Protocol to the IOPC, Dec. 2, 1992 [hereinafter IOPC Fund], reprinted in Benedict, supra note 162, at Doc. 6-9B. The shipping and oil industry, in turn, produced two of their own agreements, the TOVALOP in 1969 and CRISTAL in 1971, which both ended on February 20, 1997. Özçayir, supra note 160. For more information on the TOVALOP and CRISTAL agreements, see generally De La Rue & Anderson, supra note 3, 229-61 (analyzing and explaining the TOVALOP and CRISTAL schemes) and I.C. White, The Voluntary Oil Spill Compensation Agreements—TOVALOP and CRISTAL, in LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT 57-69 (Colin M. De La Rue ed., 1993) (explaining the voluntary funding regimes for Torrey Canyon).

164 See Birnie & Boyle, supra note 11, at 385 (describing how the oil pollution conventions address the liability for oil pollution from ships).

165 Id.
4.1. The 1969 International Convention on Civil Liability for Oil Pollution Damage

The aim of the CLC is to ensure that adequate compensation is made available to persons who suffer damage resulting from oil pollution involving oil-carrying ships. The convention places liability for such damage on the owner of the ship, which in the Prestige case, is Mare Shipping. However, if the owner is not guilty of actual fault, he may limit his liability. The convention requires ships to maintain insurance or security in sums equivalent to the owner's liability for one incident.

The 1992 CLC widened the scope of the convention to cover pollution damage caused in the EEZ of a state party. As before, the protocol covers pollution damage, but environmental damage compensation is limited to costs incurred by reasonable measures taken to reinstate the contaminated environment. While the CLC only applied to damage caused by measures taken after the oil had escaped, the 1992 protocols cover expenses incurred for preventive measures, provided that it can be demonstrated that there was a grave and imminent threat of pollution damage. Additionally, under the CLC, a ship owner could not limit his liability if the claimant proved that the incident occurred as a result of the owner's personal fault. However, under the 1992 protocols a ship owner loses the right to limit liability only if it is proved that the pollution resulted from his personal act or omission, and was committed with the intent to cause such damage, or was committed recklessly and with knowledge that such damage would result. The Spanish Government is pursuing its claims against Mare Shipping in the Spanish courts under this last prong. Spain is arguing that because the ship owners were directly responsible for the poor condition and unseaworthiness of the ship, they acted recklessly in allowing it to sail with hazardous cargo into high seas.

166 Wolfrum, supra note 92, at 268.  
167 Id. at 268-69.  
168 Id.  
169 Birnie & Boyle, supra note 11, at 385-86; see also discussion infra Section 4.3.  
170 Özcayir, supra note 160.  
171 Wolfrum, supra note 92, at 269; Özcayir, supra note 160.  
172 Under this rationale, it can be argued that the flag state of the Bahamas is directly liable since it issues seaworthy certificates. However, it is usually more practical to go after ship owners than flag states. See discussion infra Section 4.4.
4.2. The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

The purpose of the IOPC is to compensate states and persons who suffer pollution damage when they are unable to obtain any or sufficient compensation from the owner of the polluting ship.\textsuperscript{173} Under the IOPC, victims of oil pollution may be compensated in an amount beyond that of the ship owner's liability.\textsuperscript{174} The IOPC is not obligated to indemnify the owner if damage is caused by his willful misconduct or if the accident was caused, in any way, by the vessel's noncompliance with current maritime safety and environmental protection conventions.\textsuperscript{175} Contributions to the IOPC are made by all parties receiving oil transported by sea in contracting states. Furthermore, the IOPC Fund increased compensation amounts in line with the 1992 CLC, including, for the first time, costs for preventive measures.\textsuperscript{176}

4.3. The 1992 Protocols

The old regime was amended in 1992, and the amended conventions became known as the 1992 CLC\textsuperscript{177} and the IOPC Fund.\textsuperscript{178} These amended conventions provide higher limits on compensation and a broader scope of application. The 1992 CLC is based on the principle of the ship owners' strict liability, creating a system of compulsory liability insurance.\textsuperscript{179} The IOPC Fund, which supplements the 1992 CLC, provides additional compensation to injured parties when the compensation under the CLC is inadequate.\textsuperscript{180} By becoming a member of the CLC, a state becomes eligible to share in the corresponding IOPC Fund. In October 2000, the IMO adopted two resolutions increasing the limits contained in the 1992 CLC.
and IOPC Fund by fifty percent. These amendments brought the total amount available under the conventions to approximately €250 million.

The ability of charterers to limit their liability under the IOPC Fund was not tested until the *Aegean Sea* case in 1998. The British court was asked whether charterers were entitled to limit their liability with respect to spill claims brought against them by the ship owners. The court held that the IOPC Fund gave the charterers no right to limit their liability in such unsafe port claims brought against them by the ship owners. If the oil pollution claims had been brought directly against the charterer, then limitation would have been possible under the IOPC Fund; however, “if the claims are brought against the owner first and the owner seeks to recover from charterers as damages then limitation is not possible.”

Under the current compensation regime, it is believed that insurers and the existing compensation fund will cover the first €180 million of damage resulting from the *Prestige* oil spill. The first tier of compensation is provided by the CLC and 1992 CLC. The CLC makes the ship owner responsible for damage caused by oil spills only to a limited amount. Paying indemnity on a scale according to the wrecked ship’s tonnage, the London P&I Club will cover the ship owner’s liability for approximately €22 million, much less than the originally estimated €42 million clean-up bill.

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181 The amendments entered into force on Nov. 1, 2003. *Id.* at 4.
182 *Id.* at 5.
183 The owners sought to recover from the charterers, amounts representing the value of claims made against them as well as the value of the vessel, its bunkers, and its freight. The owners claimed that they were entitled to implied indemnity because the tanker had been sent to an unsafe port and the loss was sustained as a consequence of complying with the charterers’ orders. *Aegean Sea Traders Corp. v. Repsol Petroleo S.A.*, 2 Lloyd’s Rep. 39, 42-43 (Q.B. 1998).
184 *Id.* at 49.
185 Özçayir, *supra* note 160; see also *Aegean Sea Traders*, 2 Lloyd’s Rep. at 49 (stating that the Fund Convention does not subject claims by ship owners against charterer to limitations). For a more general overview of the liability of charterers, see generally *DE LA RUE & ANDERSON*, *supra* note 3, 613-53 (detailing the liabilities of charterers and cargo owners).
In addition to this modest amount, the IOPC and IOPC Fund provide a second tier of compensation and will contribute as much as €155 million, bringing the total available funds to meet victims' claims\(^{189}\) to approximately €180 million.\(^{190}\) Under the terms of the IOPC Fund, no claim can be filed against the ship owner or the cargo company above the maximum amount of liability set by the convention, unless it is demonstrated that the accident was caused by the owner's gross negligence.\(^{191}\) However, there are additional ways of circumventing IOPC and IOPC Fund limits. Claims could be brought against ABS or against the cargo interests if it can be shown that the tanker was improperly loaded. At times, even the IOPC has sued on behalf of the victims to obtain additional compensation when filed claims exceeded the limit of designated compensation.\(^{192}\) The EU is waiting for the IOPC Fund to increase its current liability limit. In the event that this increase does not meet expected objectives, the EU is planning to create its own system of liability and compensation—the COPE.\(^{193}\)

4.4. Other Potential Sources of Compensation: A Consideration of the "Polluter Pays" Principle

The 1992 CLC channels liability not to the ship's operator nor to its cargo owner, but to the ship owner, who may be sued only in accordance with the convention. The 1992 CLC prohibits claims to be made in excess of certain limits, unless it can be shown that the damage resulted from some negligent act on the ship owner's

\(^{189}\) The fund acknowledges that there is still some uncertainty about the extent of admissible claims. *IOPC Sets Compensation Level at $178m to Be Able to Meet Compensation Claims, LLOYD'S LIST, Nov. 20, 2002, available at 2002 WL 26531552.*

\(^{190}\) Some sources estimate that available funds are less than €180 million, and closer to €172 million. *See IOPC Prestige Report, supra note 4 (calculating that €22 million is available from ship owners' insurance and €150 million from the 1992 Fund).*

\(^{191}\) Fleming, *supra* note 67.

\(^{192}\) This was the case in 1992, when the *Aegean Sea* ran aground in La Coruña Bay provoking claims of €278.7 million. *Id.*

part. The purpose of the 1992 protocols was to increase the owner's liability for damage to a minimum of approximately €60 million for the very largest tankers. This is the amount the Spanish Government is requesting from the London P&I Club, the Prestige owner's insurer.

Numerous critics have argued that with regard to ultra hazardous activities at sea, such as the operation of large oil tankers, both the ship owner and the flag state should be held strictly liable. A regime rarely has held flag states or ship owners absolutely liable. There are very few cases where flag states have paid compensation for pollution from unseaworthy oil tankers. Moreover, pollution from oil tankers has generally not been the subject of interstate claims, even in the cases of large oil spills such as the 1978 Amoco Cadiz. Most claims are, instead, dealt with under national law or civil liability and compensation schemes believed to be swifter and more efficient than litigation.

Other critics endorse adopting the "polluter pays" principle articulated in the preamble of the 1990 Oil Pollution Response Convention. The principle is primarily intended to ensure that the costs of dealing with pollution are not borne by the public authorities, but rather, directed at the polluter. The result of adopting this policy could mean that liability would not be limited to direct injury, but potentially encompass environmental damages as well.

Despite a general endorsement of the "polluter pays" principle, there are distinct limitations to the concept. To begin with, the identity of the polluter is not self-evident in the complex industry of shipping. For example, in the case of the Prestige, Captain Mangouras and his crew could be deemed the polluters since it can be argued that their negligence in some way caused the ship to

194 BIRNIE & BOYLE, supra note 11, at 386.
195 Id.
196 See Fleming, supra note 67 (noting that the Spanish government's Development Ministry demanded a deposit of €60 million from the company as a guarantee that could compensate the government in its suit against the company).
197 BIRNIE & BOYLE, supra note 11, at 382-83.
198 Id. at 383.
199 Id.
200 Id. at 384.
201 BIRNIE & BOYLE, supra note 11, at 383.
202 See, e.g., Höfer, supra note 42, at 4 ("A very strict regime, providing the removal of the ceilings on maritime liabilities, could bring about a greater sense of responsibility among operators.").
sink. But it can also be said that the cargo is the element that directly caused the pollution, and therefore Crown Resources is the real polluter. Alternatively, it can be argued that Mare Shipping is most responsible for ensuring the seaworthiness of its vessel, as it has the strongest interest in insuring the vessel, and therefore it should be held liable as the polluter.\textsuperscript{203} Additionally, in the present case, there are still others like ABS who argue that Spain and Portugal’s interference in the salvage efforts were directly linked to the damage, making both governments possible polluters.\textsuperscript{204}

The party that is made liable is ultimately a policy choice, since no one possibility is easily resolved by the “polluter pays” concept. Therefore, many prefer the current liability and compensation regime which divides responsibility between the ship owner and the cargo owner, while excluding the liability of any other potential defendant in order to facilitate easy recovery by plaintiffs.

Another problem evolving out of the “polluter pays” principle is that it is unrealistic for the polluter to pay the full extent of the damages. In the shipping industry, insurance is the main source in the case of a ship owner’s liability. Industry funds and maritime treaties limit this liability.\textsuperscript{205} When compensation is limited, there may not be enough to meet all claims for economic loss and environmental harm. When this occurs, losses are often prioritized, or, in the case of IOPC funds, paid pro rata.\textsuperscript{206} This, again, is usually a policy choice.\textsuperscript{207} Nonetheless, the short time that elapsed between the \textit{Erika} and the \textit{Prestige} disasters and the magnitude of the damage they both caused demonstrate that perhaps the current liability scheme is inadequate, and that implementing the “polluter pays” principle into the contemporary liability and compensation schemes is warranted.\textsuperscript{208}

\textsuperscript{203} \textit{BIRNIE & BOYLE, supra} note 11, at 384.

\textsuperscript{204} \textit{See} ABS Press Release, June 30, 2003, \textit{supra} note 73 (claiming that the extensive pollution is directly attributable to Spain’s failure to properly activate an oil spill contingency plan as required by Spanish law).

\textsuperscript{205} \textit{BIRNIE & BoYLE, supra} note 11, at 384-85.

\textsuperscript{206} \textit{Id.}

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} Though the European Parliament, Commission, and member states finalized a deal on February 20, 2004, which institutes the “polluter pays” principle as the foundation of EU environmental liability legislation, the legislation will not apply to damage caused by oil tanker spills. Joe Kirwin, \textit{EU States, Parliament Reach Agreement on Law Instituting ‘Polluter Pays’ Principle}, 27 Int’l Env’t Rep. (BNA) No. 4, at 127 (Feb. 25, 2004).
4.5. What is Wrong With the Current Regime?

The EU’s response to oil spill accidents is “much less firm than that of the United States, giving up a unilateral strategy that affects the polluter’s liability.”\(^\text{209}\) Under no circumstances is liability for marine casualties unlimited, although it has been substantially increased in recent international conventions; nor is unlimited liability a viable possibility in future EC initiatives.\(^\text{210}\) Instead the current liability and compensation scheme continues to dilute liability in a joint fund, with the only difference being that it will be funded internationally if IOPC funds are used, or by European oil companies if COPE is adopted by the EU.\(^\text{211}\) Moreover, the European Commission itself has acknowledged\(^\text{212}\) that the established liability of the fund is in conflict with the “polluter pays” principle and fails to create efficient incentives for prevention.\(^\text{213}\) The safety packages and increased compensation schemes resulting from the Erika legislation reflect the EU’s hesitancy to upset the powerful oil lobbies and companies connected with hydrocarbon traffic. While the IMO seems to be working towards increasing the fund to meet the demands of affected parties, it, nonetheless, does not perceive it critical to enact more stringent liability standards that would teach oil companies not to regard oil spills as the acceptable market costs of their ultra hazardous activities.\(^\text{214}\)

The maze of offshore ownership, flag-of-convenience registry, limited insurance, and legal liability operate as a “corporate veil”\(^\text{215}\) under which corporations hide their liabilities, eschew accountability through subsidiaries, and, generally, “pass the buck.”\(^\text{216}\) As a result, too much of the risk and consequent loss is borne by public authorities and individual victims who must usually wait years to receive any remuneration.\(^\text{217}\) Liability should be concentrated on

\(^\text{209}\) Vázquez, supra note 58, at 7.
\(^\text{210}\) Id.
\(^\text{211}\) Id.
\(^\text{212}\) See White Paper on Environmental Liability, COM(00)66 final at 24 (stating that limited liability for natural resource damage erodes the effectiveness of the “polluter pays” principle).
\(^\text{213}\) Vázquez, supra note 58, at 7.
\(^\text{214}\) Id.
\(^\text{215}\) Friends of the Earth Briefing, supra note 187, at 2.
\(^\text{216}\) Id.
\(^\text{217}\) See Joaquín Prieto, El ‘Erika’ Aún Está Pendiente de Juicio [The Erika Is Still Involved in Judicial Proceedings], El PAIS, Nov. 20, 2002, at 20 (drawing comparisons between the Erika indemnification process and the Prestige case; emphasizing the
the oil industry that profits most from the transport of hazardous cargo.

An additional weakness of the current compensation regime is the exclusion of recovery for environmental damage. The IOPC Fund does not cover environmental damage, only compensation for the cost of clean up and the loss of income by those directly affected by the spill.218 Governments can claim compensation for the cost of removing oil from coastal areas, cleaning marine wildlife, and even “loss of wages” to entire sectors of their economy, such as fishing or tourism.219 However, compensation does not cover damage to marine and bird habitats or extinction of endangered species.220 This is a critical point of issue with the current compensation regime, especially for affected areas where biodiversity is integral to regional economy.221

Finally, the current compensation scheme under the IOPC Fund “is hopelessly inadequate to deal with large oil spills.”222 The fund’s reserves are built up over time so that a series of oil spills such as the 1992 Aegean Sea, 1999 Erika, and 2002 Prestige could ex-

218 “Compensation for environmental damage (other than economic loss resulting from impairment of the environment) is restricted to costs for reasonable measures to reinstate the contaminated environment. Claims for damage to the ecosystem are not admissible.” International Oil Pollution Compensation Funds, Frequently Asked Questions, at http://www.iopcfund.org/FAQs.htm#c8 (last visited Oct. 12, 2004).

219 See De La Rue & Anderson, supra note 3, at 472–502 (demonstrating that the IOPC has generally accepted claims in a variety of sectors claiming economic loss due to oil pollution, save claims by public bodies for loss of tax revenue, and certain shipping claims).

220 Friends of the Earth Briefing, supra note 187, at 2; see also De La Rue & Anderson, supra note 3, at 504 (“Claims for the costs of restoration . . . are concerned with measures taken after clean-up has been completed. These involve human intervention in natural processes by steps designed to encourage or accelerate natural recovery . . . .”).

221 See White Paper on Environmental Liability, supra note 212, at 18–20 (proposing a potential European Community liability regime that begins to cover biodiversity damage within the limits of existing European Community biodiversity legislation).

222 Friends of the Earth Briefing, supra note 187, at 1.
haust the Fund quickly. While creating another joint liability fund to increase the availability of funds for indemnification will ameliorate this problem, environmentalists argue that a better solution would mirror the one envisioned by the 1990 U.S. Oil Pollution Act, which assigns unlimited liability to negligent "deep pockets" that profit most from the transport of oil.

To make matters worse, "[t]he IOPC Fund has a reputation for disputing compensation claims from oil spills in order to reduce payouts from the Fund." Claims take a long time to process and payments do not materialize until years later, which offers little remedy to disadvantaged victims. Moreover, payments can be further delayed if criminal actions are initiated against any of the parties involved, which both disincentivizes the development of effective criminal sanctions in environmental regulation and unrealistically postpones monetary relief.

5. CONCLUSION: PRESTIGE ... NUNCA MAÍS?

Nearly two and a half years after the Prestige sank to the bottom of the Atlantic, the cries of "Nunca mais!" have grown fainter, and their angry tone and air of urgency has quieted significantly. While the slogan that came to epitomize the Spanish and greater European frustration with the international community's inability

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223 Id.

224 Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701-20 (2000). It should be noted, however, that OPA modified the terms of the Oil Pollution Trust Fund by capping the maximum to be paid out from the Fund at US $1 billion per incident, with a cap of US $50 million with regards to contaminated natural resources. However, it is not clear whether this amount includes the sums paid by the responsible party; the IOPC Fund’s ceiling of compensation does include reparations by the responsible party. Moreover, if the US $1 billion is insufficient to compensate for all damages, it will not be reduced pro rata like IOPC Fund payments, but will be reimbursed in full by the order in which claims were presented to the Trust Fund. WU CHAO, POLLUTION FROM THE CARRIAGE OF OIL BY SEA: LIABILITY AND COMPENSATION 248 (Kluwer Law International 1997).

225 Friends of the Earth Briefing, supra note 187, at 2.

226 See Petrolero-Gobierno Michavila: responsables responderán Justicia en vías penal y civil [Oil Tanker – Government Michavila: responsible parties will answer to Justice by criminal and civil proceedings], EFE NEWS SERVICES, Dec. 10, 2002 (describing how criminal actions are being taken against the captain and the ship owner of the Prestige), available at LEXIS, News Library, Spanish News Services File; El naufragio del 'Prestige' Desata una Batalla Legal por las Indemnizaciones [The 'Prestige' Shipwreck Unleashes a Legal Battle over Compensation], RECOLETOS CIA EDITORIAL EXPANSION (Madrid), Nov. 21, 2002 ("Todo sera sencillo si se resuelve por la via civil." ["Everything will be easy if it is resolved by civil proceedings."]), available at LEXIS, News Library, Spanish News Services File.
to effectively regulate marine environmental safety can still be seen affixed to car bumpers and street signs in northern Spanish and French fishing villages, concern over whether another Prestige could happen has largely dissipated. The fickle compass of popular attention is presently occupied by European politics and recent national traumas, while the pressing immediacy of the Prestige incident fades further into the recesses of collective memory. "Basta Yal!" ['Enough!'] has replaced "Nunca Mais!" as Spain reels from its most recent national tragedy—a series of terrorist bombs set off in numerous commuter trains during the mad Madrid rush hour, killing over 200 people and injuring more than 1,400 others.227 It is understandable that that the Prestige and its victims should take a backseat on the national and European agendas for the moment. However, it is essential to prevent the presence of one disaster from obliterating the memory of the other.

One could argue that it was such "forgetfulness," or rather complacency, that was the real tragedy of the Erika spill five years ago. While it remained long enough on the European conscience to spur new and stricter standards for marine transport regulation, legislators were so pleased with the design of the new plan that they forgot that the true herculean task was to implement their new design and ensure that it actually functioned. Unfortunately, it would take another devastating oil spill and countless other victims to show European legislators that the increasingly unregulated "race to the bottom" among cargo owners, seeking cheap means of transporting their hazardous goods, remains a real and pressing problem that requires drastic overhauling of the current regulation and a serious reconsideration of generally accepted liability and compensation regimes.

That the Prestige occurred so soon after Europe had implemented a stricter regulatory framework to address the Erika spill highlights the inadequacy of the current system. Though single-hulled tankers were in the process of officially being phased out, aging single-hulled tankers like the Prestige would continue to sail precariously close to the European coastline in innocent passage.228

227 See Spain Mourns Train Attack Victims, BBC NEWS U.K. EDITION, Mar. 12, 2004 ("Spain is beginning three days of mourning for the deaths of at least 198 people in bomb attacks in Madrid . . . . More than 1400 people were injured as 10 bombs ripped through commuter trains . . . ."), available at http://news.bbc.co.uk/1/hi/world/europe/3504046.stm (last visited Oct. 21, 2004).

228 On July 22, 2003, the European Parliament and the Council of the European Union amended Regulation 417/2002. This was a measure to accelerate the
Defective tankers could sail in and out of port states and emerge from routine inspections both by port states and classification societies without so much as a blemish on their records. Flag states eschew responsibility as they continue collecting hefty registration fees from non-national ship owners who register ships in places like Panama, Liberia, and the Bahamas, while port states strain to finance more sophisticated systems of inspection in port state control. Moreover, when accidents do occur, liability regimes shield those actors in the best position to protect the marine environment by ensuring the seaworthiness of their vessels. Multi-tier joint compensation funds are ineffective in covering damage beyond the limited liability of ship owners and cargo owners, as oil spills become more damaging and clean up costs become more exorbitant. The current *Prestige* claims of over €676 million grossly exceed the available compensation funds, which will only pay out up to €180 million to affected claimants. This means that victims will receive pro rata payments equaling a fraction of the actual loss suffered. Any claims exceeding available funds need to be sought in court, which means increased delay in victim indemnification as well as expensive litigation fees.


229 See FOC Report, supra note 66 (detailing the current state of the world’s flag of convenience registered vessels).

230 The largest claim is made by the Spanish Government, totaling €384 million in clean-up costs, and payments made to businesses and individuals that were affected by the spill. Additionally, there is a €131 million claim by a group of 13,600 affected fishermen and shellfish harvesters. IOPC Prestige Report, supra note 4.

231 The *Amoco Cadiz* litigation in the United States finally concluded in January of 1992, fourteen years after the incident, “with an award to claimants of some US $61 million, plus interest.” However, the incident occurred before France ratified the Fund Conventions and thus, compensation was not governed by them. De La Rue & Anderson, supra note 3, at 32-33. While the damages awarded may have satisfied the French State, many Breton communities which had invested heavily in the trial received barely one tenth of the amount claimed. Emmanuel Fontaine, *The French Experience: 'Tanio' and 'Amoco Cadiz' Incidents Compared, in Liability For Damage To The Marine Environment* 101, 105 (Colin M. De La Rue, ed., 1993). See generally *In re* Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992) (adjudicating jurisdictional, liability, and damages issues surrounding 1978 *Amoco Cadiz* disaster).
owners, and their respective agents to have unlimited liability in cases where negligence or gross negligence is demonstrated to have been a significant factor in the resulting environmental damage.232 This is perhaps the most important measure that the IMO should adopt to address the inadequacy of the current system. Although the phasing out of "rust bucket"233 single-hulled tankers has been accelerated,234 more immediately effective reforms are needed while single and double-hulled tankers transporting ultra hazardous cargos continue to sail through particularly sensitive marine areas.235 The absolute phasing-out of single-hulled tankers in the EU is not expected to be complete until 2010,236 and the measure is being met with strong opposition by lobbying groups like Intertanko,237 and a lukewarm response by the IMO.238 By imposing unlimited liability on ship owners, cargo owners, and their agents, the international community will incentivize actors who are in the best position by their control over the operation of the vessel, to ensure that the vessel meets current IMO convention standards.

232 The hesitancy in doing this arises from the fact that the CLC strictly limits liability even in cases where negligence can be shown; permitting unlimited liability would require member states to formally withdraw from the CLC Conventions. See Ringbom, supra note 152, at 277 (discussing the limitations of the international regime with respect to outside compensation claims).


234 The EU measure banning single-hulled ships carrying heavy fuel oil took effect on October 21, 2003. The new law forbids "the use of single-hulled ships aged twenty-three years or older as of 2005 instead of the previous commitment to 2007." Additionally, "all other single-hulled ships must be phased out completely by 2010" instead of the previous commitment to 2015 under the ERIKA I package. Joe Kirwin, EU Ban on Single-Hull Tankers Takes Effect, Officials Vow to Seek Worldwide Prohibition, 26 Int'l Env't Rep. (BNA) No. 23, at 1077 (Nov. 5, 2003).

235 In December, 2003, the IMO's Marine Environment Protection Committee approved designating Europe's western coastline a particularly sensitive sea area, subject to special protection. See Patrick Tracey, Special Report: EU Backs Wider Use of Sensitive Areas; Tanker Owners Fear Patchwork Regulation, 27 Int'l Env't Rep. (BNA) No. 5, at 207 (Mar. 10, 2004).

236 Kirwin, supra note 234.

237 Intertanko claims that the costs of the new EU rules far outweigh the benefits, costing member states an estimated US $4 billion due to the loss of use of single-hulled ships. Id.

238 Additionally, IMO Secretary-General William O'Neil noted that the IMO was the appropriate forum for consideration of such measures and that there was "no room for unilateral measures." See Patrick Tracey, Single-Hull Tanker Phase Out Accelerated, Heavy Grades of Oil Restricted from Shipping, 26 Int'l Env't Rep. (BNA) No. 26, at 1240, 1241 (Dec. 3, 2003).
In keeping with the preventative approach, delinquent flag states should be penalized financially for failure to regulate vessels with unseaworthy CDEM sailing under their flags. These penalty awards can be distributed among port states to help them fund the hiring and management of more vessel inspectors. Port state control has been a successful instrument of vessel regulation, but it is expensive for states to maintain these systems as they require more sophisticated technology and international coordination. Port states should have the right to refuse entry to tankers wishing to enter the port that do not meet current IMO standards, as well as the right to detain vessels that are egregious violators of those standards. Many of the proposals contained under ERIKA II are dedicated to strengthening the regulatory role of port state control. 239

Swift implementation of the ERIKA II proposals is also favorable because it would grant member states broader intervention rights when a vessel's passage through their EEZ poses a serious environmental threat to their coastline or offshore economic interests, as in the case of the Galician fisheries. Member states would be permitted "to order re-routing of a ship posing a threat to their coasts, to instruct the ship's master to stop a pollution risk, to put an assessment team on board, or to impose mandatory pilotage or towage of the ship." 240 While intervention on the high seas is risky and vehemently opposed by the marine shipping industry, a more coordinated and regulated system of intervention could have saved the Prestige. 241

In granting member states broader intervention rights, the IMO could also compel "Member States to take measures to receive ships in distress in ports of refuge, and prohibit ships from leaving

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239 See Özçayır, supra note 127 (detailing the second phase of the Erika Proposals, including establishing a stronger system for community monitoring, control, information system for maritime traffic, instituting mandatory reporting systems, and requiring ships calling at European Community ports to carry black boxes in order to facilitate the investigation of accidents).

240 Id.

241 Absent guidance from the IMO, some member states have already taken the initiative; contracting parties to the Barcelona Convention agreed to petition their national legislatures to "develop a checklist to determine the best course of action for distressed ships" floundering in their waters. "Steps that may be included in the list [are]: identifying nearby ports where superior emergency facilities are available; developing protocols for towing at-risk vessels; and forming rapid-response teams . . . ." Eric J. Lyman, Parties to Barcelona Conventiona Call for Ban On Single-Hull Tankers by End of 2005, 26 Int'l Env't Rep. (BNA) No. 24, at 1131, 1132 (Nov. 19, 2003).
ports in exceptional weather conditions involving a serious threat to safety or the environment." 242 The proposals in ERIKA II "aim to make it easier to seek a port of refuge in the event of trouble at sea, and also to prevent the risk of accident by prohibiting ships from leaving ports of call in the community if particularly bad weather and sea conditions increase the risk of an accident." 243 However, it is necessary for the international community to design a coordinated plan of oil spill response in order to respond quickly and efficiently when these disasters happen. Proactive steps have been taken, in this respect, by expanding the authority of the European Maritime Safety Agency ("EMSA") to tackle pollution emergencies. 244 The progressive widening of EMSA responsibilities may evolve into the creation of a full-fledged European coast guard, although whether the agency will maintain a permanent fleet is pending advice from an ongoing independent study. 245

Moving beyond prevention, legislators must embrace the rising approach towards environmental law in which courts have broad discretion to determine what kinds of damage to biodiversity and the environment qualify as compensable "pollution damage." As of May 2004, as many as 300 locations in Galicia and the adjoining Bay of Biscay continue to be affected by the oil contamination, including a number of areas designated for habitat protection. 246 The current system only recognizes damage that is pure economic loss or loss of earnings due to the impairment of the environment. Moreover, it only allows compensation "for the cost of measures to reinstate the environment contaminated by oil." 247 The current trend is to move away from the mindset that damage to the marine environment cannot be expressed as quantifiable economic loss.

242 Özçayır, supra note 127. Spanish Royal Decree No. 210/2004, effective on February 15, 2004, allows Spain's Maritime Administration to establish ports of safety to give safe haven to ships in danger, although the maritime authority retains the discretion to authorize access to these sites. See Brett Allan King, Spanish Decrees Require Contingency Plans For Oil Spills, Set Up Vessel Tracking System, 27 Int't Env't Rep. (BNA) No. 4, at 135, 136 (Feb. 25, 2004).

243 Id.


245 Id.


247 CHAO, supra note 224, at 370.
worthy of monetary compensation. In fact, the recent cases of the second Antonio Gramsci, the Patmos, and the Haven indicate that national courts are growing increasingly receptive to reading purely environmental pollution damage well within the ambit of "pollution damage" and recognizing such damage as admissible claims. "As long as the Conventions exclude environmental damage from the notion of 'pollution damage,' the lacunae will naturally be filled by domestic laws," and efforts to unify international law on the subject will be futile. Efforts to recognize damage to the environment and biodiversity as quantifiable pollution damage will likely be furthered by expanded access to European courts to challenge alleged violations of EU environmental law.

248 This is the position taken by the IOPC Fund Assembly in adopting Resolution No. 3 after assessing the admissibility of claims in Soviet Courts for compensation for ecological damage made by the U.S.S.R. Government following the 1979 Antonio Gramsci incident. Resolution No. 3 declared that "the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models." Id. at 362 (quoting Resolution No. 3 "Pollution Damage" (Oct. 1980) (F.D., FUND/A/ES/1/13)). See also Måns Jacobsson, The International Conventions on Liability and Compensation for Oil Pollution Damage and the Activities of the International Oil Pollution Compensation Fund, in LIABILITY FOR DAMAGE TO THE MARINE ENVIRONMENT 39, 53 (Colin M. De La Rue ed., 1993) (stating "[any calculation of the damage suffered [by the marine environment] in monetary terms will by necessity be arbitrary").

249 The "U.S.S.R.-registered tanker, went aground on February 6, 1987 off the southern coast of Finland." CHAO, supra note 224, at 365-66. The Soviet claim included ecological damages measured by a "metodika" formula, which the Court of Riga may have entertained, but the IOPC refrained from intervening and the matter was settled out of court. Id.

250 The Greek tanker collided on March 21, 1985 with an unladen tanker in the Straits of Messina, Italy. The Court of Appeal "granted the Italian State compensation of Lit. 2,100 million for damage to the marine environment . . . ," which included damage to plankton and benthos as the claim was for "damage to the environment in terms of loss of enjoyment suffered by the community." Id. at 367.

251 The Cypriot-registered tanker caught fire and sank near the Italian coastline after a series of explosions. "[A]pproximately 1,300 Italian claimants, including the Italian Government and the Region of Liguria . . . claimed an amount of £93 million under the head of damage to the marine environment." Id. at 368.

252 Id. at 371.

253 The European Commission has proposed giving EU citizens and environmental organizations the right to file legal cases in the European Court of Justice and national courts to challenge alleged violations of EU environmental law. See Joe Kirwin, Proposed EU Law to Expand Access to Courts on Environmental Issues, 26 Int'l Env't Rep. (BNA) No. 23, at 1075, 1076 (Nov. 5, 2003) ("Environmental Commissioner Margot Wallström told reporters . . . that the legislation would help . . . improve enforcement of EU environmental law.")
Finally, it is absolutely imperative that the available compensation funds be increased, and that a third tier of compensation is added to the current compensation scheme. The European Commission has proposed increasing available funds fifty percent, providing a total of SDR300 million, and creating a third tier fund, COPE, with a €1 billion ceiling. Both the Erika and the Prestige have demonstrated that such disasters can be very costly, often exceeding the available compensation funds. If the international community continues to resist adopting ERIKA II and its proposal for an additional compensation fund, then it is probably advisable that the EC consider creating and implementing its own European liability and compensation regulatory regime for its member states.

In the interests of protecting the marine environment, member state economies, and the well-being of all its citizens, the EC must learn from its past mistakes to become a tough regulatory actor willing to upset the oil shipping industry and opponents, who fear oil shortages and retaliatory measures. Until then, the cry of "Nunca Mais!" wherever it is heard, will remain nothing but an empty slogan of passionate frustration, naive hope, and, ultimately, justified fear.

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254 This would bring the international compensation fund more in line with the Oil Spill Liability Trust Fund established under federal laws in the United States. Id. Cf. Oil Spill Liability Trust Fund, 26 U.S.C. § 9509 (2002) (setting the maximum amount to be paid from the Fund to $1 billion per single incident). The European Parliament authorized member states to ratify a 2003 agreement increasing the maximum amount payable from the IOPC Fund for any one incident to SDR750 million, or just over $1.14 billion. See Rogers, supra note 244.

255 For a more detailed look at the European Parliament's proposal, see Proposal for a Directive of the European Parliament and of the Council on Environmental Liability with regard to the Prevention and Remedy of Environmental Damage, 2002 O.J. (C 151 E) 132 (suggesting a "polluter pays" principle and setting out definitions of compensable environmental damage); COPE Resolution, supra note 193 (calling for an additional European compensation fund).

256 The European Parliament and the European Council have adopted the creation of such a fund, entitled The European Union Solidarity Fund ("EU Fund"), to show financial solidarity with European regions struck by disasters. The EU Fund will have an annual ceiling of €1 billion. See Decision of the European Parliament and of the Council of 9 October 2003, 2003 O.J. (L 290) 40 (mobilizing the European Union Solidarity Fund for environmental damages including those of the Prestige oil tanker).