Environmental Crime and Judicial Rectification of the *Prestige* oil spill: The polluter pays[1]

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Abstract: The enforcement of institutional rules requires a good performance of the judicial system. In the case of oil spills, courts are key actors to determine the allocation of liabilities according to international and national norms. In 2002, the *Prestige* oil spill implied a major environmental disaster on the coasts of Spain, France and Portugal. The limitations of liability, provided by the International Regime of Civil Liability and Compensation for Oil Pollution Damage, prevented the polluters from fully compensating for the damage produced by the spill. In 2013, the Spanish Provincial Court of A Coruña condemned the captain of the tanker for disobedience, but no environmental crime was found and, therefore, no further civil liabilities were sentenced. Nevertheless, in 2016, the Spanish Supreme Court corrected the sentence of the Provincial Court and proclaimed the existence of an environmental crime. This judicial rectification changed the allocation of liabilities, extending the application of the polluter pays principle, and opened a different stage for estimating and covering the costs of the damage. This paper analyses this new situation in a very relevant case study on oil spills and the distribution of liabilities within the current international regime.

Keywords: Oil spill, Environmental crime, Judicial rectification, Polluter pays principle.

1. Introduction

Institutions are comprised of formal rules, informal norms and enforcement mechanisms (North, 1990). Institutional analysis therefore requires the study of not only the formal rules and informal norms that regulate the behaviour of agents but also the de facto performance of the mechanisms that enforce the rules. In the case of oil spills, the application of the complex system of international standards and national legislation may be in the hands of the national judicial systems, and hence, the allocation of liabilities among parties will largely depend on what the courts of justice decide. The

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judicial system can have a multilevel governance structure, and judgements from lower courts can be modified by upper courts in a country.

In November 2002, the sinking of the oil tanker *Prestige* generated a vast oil spill off the coast of Galicia and affected the coasts of Spain, France and Portugal. The disaster caused serious environmental, economic and social consequences. On 16 November 2013, the Provincial Court (Audiencia Provincial) of A Coruña ruled that there was no fault nor environmental crime in the *Prestige* case. Caballero and Fernández (2015) analysed this judicial process, which was "slow, complex and imperfect". According to that sentence, the polluter was not civilly liable (for the damage caused by the oil spill) beyond the limitations provided for in the applicable international conventions. However, on 14 January 2016, the Spanish Supreme Court (Tribunal Supremo) rectified the judgement of the Provincial Court of A Coruña and condemned the captain of the tanker to two years' imprisonment for reckless criminal damage to the environment with catastrophic effects. Therefore, the Supreme Court established a new civil liability for the captain, the vessel owner and the insurer, as well as for the International Oil Pollution Compensation Funds (IOPCF), based on the occurrence of environmental crime. The IOPCF is responsible for compensating the damage above the shipowner's limitation of liability. However, the IOPCF's liability is also limited in accordance with the existing conventions.

This paper analyses the allocation of liabilities for damages in the case of the *Prestige* oil spill after the recent Spanish Supreme Court judgement in 2016, which annulled the previous judgement and established the presence of environmental crime. This paper updates the analysis of Caballero and Fernández (2015) through the new judicial sentence, which substantially changed the allocation of responsibilities in this case. The paper also analyses some of the institutional challenges and difficulties of the process. Section 2 introduces the institutional structure of the International Regime on Liability and Compensation for Oil Pollution Damage, whose basic body of rules is comprised of two international conventions. Section 3 explains the difference between the logics of the polluter pays principle and some efficiency criteria that underlie the existence of the limitation of liability for polluters in this international regime. Section 4 presents the structure of the Spanish judicial system and the role of the Supreme Court. Section 5 analyses the sentence of the Provincial Court of A Coruña, the appeals against that judgement and the new Supreme Court judgement. Section 6 studies the complexity of the process and the difficulties of fully implementing the polluter pays principle. Section 7 draws some conclusions.

2. The 1992 International Regime on Liability and Compensation for Oil Pollution Damage

Given the diversity of national laws, international treaties have been propelled since the mid-19th century to harmonise institutions and behaviour, reduce uncertainty and risk, and distribute responsibilities in accordance with global interests and common notions

of justice and law. Regarding sea order, the most relevant formal milestone was probably reached in the second half of the 20th century with the Conferences on the Law of the Sea (1956, 1960 and 1967) and the subsequent approval of the United Nations Convention on the Law of the Sea in 1982, one of the most important multilateral treaties. This occurred in a post-war period where the will for cooperation between nations propelled the proliferation of international treaties and conventions for joint regulation, with the intention of establishing a consensual distribution of rights and the peaceful resolution of conflicts. This convention set out such important issues as rights and freedoms at sea or exclusive economic zones.

Parallel to the efforts to minimise ecological disasters from oil transport, the International Maritime Organization (United Nations) promoted the implementation of a system that improves the provision of adequate and agile compensation to the victims of oil spills. From this, the first set of conventions emerged, which laid the foundations for the current 1992 International Regime of Liability and Compensation for Oil Pollution Damage. Among other things, this regime determines the distribution of rights and responsibilities among the parties involved in an oil spill (shipowner, oil industry, certifying company, crew, plaintiffs, etc.), the system to measure the damage and the mechanisms to make the compensation effective. This protocol coexists with other systems on liability and compensation on incidents at sea, such as the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (NUCLEAR), the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL), the Convention on Limitation of Liability for Maritime Claims (LLMC), the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) or the Nairobi International Convention on the Removal of Wrecks.

The 1992 International Regime is built from two international conventions: the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention or 1992 FC).

The first convention (1992 CLC) determines the civil liability of the shipowner. The shipowner is responsible under *strict liability* (which means that he/she is liable even in the absence of fault), following the polluter pays principle. However, the shipowner is entitled to limit his/her liability to a certain amount that is linked to the tonnage of the ship. Additionally, no legal action can be taken against any other actor (captain, crew, cargo owner, certifier, civil servants, etc.) under this convention. The convention also provides a system of compulsory liability insurance for ships carrying more than 2000 tons of bulk oil as cargo.

The second convention determines the liability of IOPC Funds, which are funds contributed by the oil industry. It operates when the scope of the damage is higher than the limitation of liability of the shipowner (in accordance with the 1992 CLC). It is

complementary to the previous convention and voluntary. Also, this convention introduces a limitation of liability for the IOPCF[2].

By driving and limiting the liabilities of the shipowner and the oil industry, the system forces what has come to be called the *channelling of liability*. The first tier of liability is assumed by the shipowner up to the liability limitation provided by the 1992 CLC. Above this threshold, in the second tier, the damage is assumed by the IOPC Funds up to the limitation of liability provided by the 1992 Fund Convention. Any remaining damage above these limitations of liability is to be assumed by the victims of the spill themselves. This is not common, but in large disasters, like the *Prestige* oil spill, it may happen.

Another key aspect of this international regime is the establishment of a unified concept for *damage* and the criteria for its measurement. According to Article I.6 of the 1992 CLC, pollution damage means "loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur". Regarding the measurement of this damage, moral damage and purely environmental damage are not considered; only the so-called *economic* damage is taken into account. The CLC states that compensation "shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken". The assumption that all damage can be expressed in economic terms and the meaning of "reasonable measures" are other important issues of contention.

As mentioned in the introduction, we need to recall that a transcendental aspect in these international systems is that they are based on multilateralism and reciprocity. Therefore, the role of all the contracting states becomes fundamental for the enforcement of the rules and the practical functionality of the system in general. In the *Prestige* case, this has been particularly evident. Sections 4–6 will describe the structure of the judicial system and the sequence of events that has occurred since the incident.

3. The polluter pays principle and the limitation of liability

The polluter pays principle consists of making those parties who produce pollution liable for it and requiring them to bear the costs of the consequent damage. It is a way of making them internalise the costs of prevention and reparation.

Ronald Coase (1960) considered that under certain circumstances the social optimum could involve letting polluters generate externalities to other actors. Through free ex post agreements in the market, the actors could allocate property rights in the hands of those who value them most, thereby eliciting a Pareto-efficient social outcome.

[2] Since 2005, a third tier for compensation is available, the Supplementary Fund, which, under the same logics of the 1992 Fund Convention, substantially increases the amount available for compensation. However, this was not available at the time of the *Prestige* incident.

However, the most relevant contribution by Coase (1960) on this topic was his statement about the role of transaction costs in disturbing the market mechanisms. Transaction costs prevent free ex post transactions among individuals from obtaining a Pareto-efficient social outcome as a result. This is why institutions matter: the initial distribution of property rights, the laws in force, the enforcement mechanisms, etc. Because free ex post transactions among individuals cannot guarantee social optimality due to the existence of positive transaction costs, the right institutions or governance structures must be designed in order to ensure the best social outcome.

Due to the existence of transaction costs, the international regime of civil liability and compensation for oil pollution damage emerged to cope with this problem and guarantee the best social outcome. The 1992 International Regime, when imposing strict liability on polluters, is applying the polluter pays principle. However, as seen above, this operates only up to a certain amount. The existence of the limitation of liability (along with the channelling of liability) contradicts this polluter pays principle. It follows a different logic. Traditionally, this clause is included in multilateral treaties on maritime regulation. Some reasons usually adduced to justify its presence are oriented towards efficiency matters[3], such as:

a) The will to protect the development of transport activities. These high-risk activities were considered to be unrealisable in the past if they had to fully cover the costs of an incident.
b) Reducing the cost of the ship insurance. It is understood that unlimited liability would make the activity uninsurable or the costs would be excessively high.

This system, as a result, combines both logics (social efficiency and the polluter pays principle). The threshold that represents the top limitation of liability (that of the IOPCF in the 1992 CF) determines the operation of the polluter pays principle or the efficiency logic.

We will see in the following sections that, for the redistribution of the burden towards complete applicability of the polluter pays principle, the claimants need to demonstrate that the damage resulted from the personal act or omission of some actor involved in the incident, "committed with the intent to cause such damage, or recklessly and with knowledge that such would probably result" (Article III.4 of the 1992 CLC). This permits the claimants to overrule the clauses related to the limitation and channelling of liability in national courts. In the *Prestige* process, the national judicial system and the Public Prosecutor's Office are the key elements in the search for full (or the highest possible) coverage under the polluter pays principle. However, seeking compensation

[3] However, some authors consider the current existence of the limitation of liability an "unjustly discriminatory attempt to subsidize the shipping industry at the expense of other interests" (Gauci, 1995) or a "historical mistake" (Faure and Wang, 2008). Though its presence in maritime regulation could have been reasonable at some point in history, for these authors the original circumstances do not seem to hold anymore. In fact, the limitation of liability is often considered to be openly inefficient. According to Faure and Wang (2008), the limitation of liability a) may lead to a situation of underdeterrence of risky decisions by polluters; b) represents an unjustifiable subsidy for the oil and shipping industries from society; c) and, in big disasters, can result in undercompensation for the affected parties.

outside the international regime and beyond the limitation of liability is a hard procedure.

4. Third-Party Enforcement, Multilevel Governance and the Judicial System in Spain

New institutional economics have shown the importance of the enforcement mechanism of the institutional framework and have studied how such mechanisms may fall into the hands of a third party that resolves conflicts. The rule of law and impartial application of the same by independent courts of justice must be guaranteed whenever inclusive political and economic institutions are present (Acemoglu and Robinson, 2012; Arias and Caballero, 2016). In Spain, the civil law legal tradition reduces the level of judicial discretion, and judges are required to apply formal laws and rules. The competences of the high-level courts imply a more centralised judicial rule-making in the civil law tradition than in the common law tradition (Arruñada and Andonova, 2005; Merryman and Pérez-Perdomo, 2007).

However, in a politically decentralised country such as Spain, the justice administration is comprised of several judicial levels (municipal, judicial district, provincial, regional and national), and in this multilevel judicial governance one can appeal decisions by lower courts in higher-level courts. The higher courts can rectify errors made by lower courts when resolving conflicts concerning the enforcement of law. This is a part of the institutional matrix for granting the rule of law in the civil law tradition.

Article 123 of the Spanish Constitution of 1978 states the following: a) The Supreme Court is the highest judicial body in civil, criminal, administrative and social processes (except regarding provisions concerning constitutional guarantees) and has jurisdiction over all of Spain. 2) The president of the Supreme Court is proposed by the General Council of the Judiciary, which is the highest body of the government of judges.

According to the Spanish Constitution, the Judiciary Act determines the creation, operation and control of the courts and tribunals.

In accordance with Basic Law 6/1985 of 1 July 1985 on the judiciary, Spain has magistrates' courts, courts of first instance and preliminary investigations, courts for administrative-contentious proceedings, labour courts, courts for prison supervision and minors, provincial courts and regional high courts of justice. The National High Court and the Supreme Court are higher-level courts that have jurisdiction over the entire national territory. There is a Provincial Court in every province's capital city with competence in its province on several matters, including criminal ones. The Constitutional Court lies outside the ordinary courts of justice, at another level, and works as the ultimate guarantor of order and constitutional rights

The Supreme Court is the apex of the appeals system and is the maximum body for interpreting case law in Spain. Its responsibilities include decisions in the following

cases: final appeals to the Supreme Court, appeals for judicial review and other appeals reserved to the Supreme Court, the prosecution of members from higher state bodies and the processes for outlawing political parties.

The Supreme Court is composed of several standard chambers of the court. The Second Chamber for Criminal Matters of the Supreme Court deals with final appeals made to the Supreme Court, appeals for judicial review and other appeals reserved to the Supreme Court in criminal matters as prescribed by law and maintains an intense activity. Officially, 1,078 judgements were issued by the Supreme Court in 2012, 1,057 in 2013 and 910 in 2014, and there were 2,855, 2,577 and 2,155 "rejection decisions", respectively, from other appeals in those years (Tribunal Supremo, 2012, 2013, 2014). This chamber is responsible for resolving appeals in criminal matters relating to judgements from provincial courts, and has a technical office at its disposal that conducts studies and reports for the Supreme Court.

<< Insert Table 1 here >>

5. The resolution of the Spanish judicial process on the *Prestige* oil spill

In 2002, the *Prestige*, a single-hull tanker flying the Bahamas flag, suffered hull damage during a storm about 50 km off the coast of Finisterre (Spain) and ended up splitting in two and sinking some 260 km from the coast of Vigo. It was carrying 77,972 tons of fuel oil, of which it spilled approximately 63,000 tons that affected more than 200 km of coastline, mainly in Spain but also in Portugal and France (Loureiro et al., 2006). The claims received by the IOPCF office in Spain amounted to the sum of €1.04 billion, but the IOPCF only considered €304.1 million admissible damage.

<< Insert Table 2 here >>

By 2002, Spain, France and Portugal had already ratified the 1992 International Convention on Civil Liability for Oil Pollution Damage as well as the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. As shown in Figure 2, the conventions allowed the shipowner to limit his liability to SDR 18.9 million (about €22.8 million at the time) and the 1992 IOPCF to SDR 135 million (about €171.5 million). The amount of damage exceeding the latter figure would be left uncompensated and would be consequently assumed by the victims themselves or their states. These so-called limitation and channelling of liability (when no party can make a claim against other

actors involved besides the shipowner or the Fund) provided in Articles V and III of the 1992 CLC, respectively, come into effect except when "the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result". If this were the case, a judicial body could overrule the clauses on channelling and limitation of liability. Hence, this would open up the possibility for a claimant to legally act against other actors involved in the disaster and demand a higher compensation than that laid down in the financial caps (i.e., limitations of liability).

The Spanish state tried to undertake possible legal actions in order to obtain a higher compensation for the damage caused by the spill. Diverse actions were carried out in different countries. First, in the United States, Spain filed a lawsuit against the certification company, American Bureau of Shipping (ABS), but the court sentenced in favour of the company. In the words of the court, Spain "failed to adduce sufficient evidence to create a genuine dispute of material fact as to whether Defendants recklessly breached that duty such that their actions constituted a proximate cause of the wreck of the *Prestige*" (US Court of Appeals, 2011). Therefore, Spain could not demonstrate neither recklessness nor negligence by ABS, which is a different situation from that in France with RINA in the case of the spill of the *Erika* vessel. Second, France filed a lawsuit against ABS, but the company also won the trial in the French courts. Third, in Spain, the Provincial Court of A Coruña tried the captain, the chief engineer and the general director of the merchant navy (Caballero and Fernandez, 2015). The Spanish judicial process is analysed and updated in the next three subsections.

5.1. The sentence of the Provincial Court of A Coruña in 2013

Domestically, the case was the subject of enormous media coverage, and all the actors were highly exposed to public opinion. This influenced the attitude of the Spanish government, which, as a result, became highly vehement against the polluters, and this was channelised in the judicial processes through the Public Prosecutor's Office.

In the Provincial Court of A Coruña, a criminal lawsuit was presented against the captain, the chief engineer and the general director of the merchant navy, who had been involved in the decision not to allow the ship into a place of refuge in Spain. In the sentence of 16 November 2013, none of them were found criminally liable for damages to the environment. Only the captain was found guilty of disobedience, for which he was sentenced to nine months in prison. Because there was not an environmental crime in the sentence of the Provincial Court of A Coruña, civil liabilities for the damage caused by the oil spill were limited and the polluters were not made fully liable for the serious damages. Consequently, the insurer of the vessel (London P&I Club) was released from further responsibilities in this case (Caballero and Fernández, 2015).

5.2. The appeals against the sentence of the Provincial Court

The sentence of the Provincial Court of A Coruña could be appealed before the Supreme Court of Spain. The probability of success of the appeal was not high because the accused had been acquitted of the crime, and the facts proven in the Provincial Court were not going to be questioned in the Supreme Court. Nevertheless, the sentence of the Provincial Court of A Coruña was appealed by several actors who argued in different directions. If the Supreme Court considered that the same proven facts could imply an environmental crime, then the allocation of liabilities would considerably change.

An appeal against the judgement of the Provincial Court was filed before the Spanish Supreme Court by the following agents: the Xunta de Galicia (Regional Government of Galicia), the public prosecutor, the captain of the vessel, the chief engineer, the Conseil Régional de Bretagne (Regional Government of Brittany), Isidro de la Cal Fresco S.L., Luso-Hispana de Acuicultura S.L., Caltran Sau, Pasteurizados del Mar S.L., Promotora Industrial Sadense S.A. Unipersonal (PROINSA), Mr. Juan Cipriano Fernández Arévalo, Depuradora de Mariscos del Lorbe S.A., Administración General del Estado, Asociación Ecologista y Pacifista "Arco Iris", Amegrove Sociedad Cooperativa Grovense de Mejillones S.A.., Patrarcis S.L., Plataforma Ciudadana Nunca Máis and the French State.

The public prosecutor and the legal service of the Spanish state argued during appeals before the Supreme Court that the captain of the *Prestige* was aware of the structural defects and the problems of the oil tanker. They felt the Provincial Court had not adequately assessed the existing evidence on the defects of the vessel.

5.3. The sentence of the Spanish Supreme Court in 2016

On 26 January 2016, the Spanish Supreme Court issued a decision correcting the judgement of the Provincial Court of A Coruña of 16 November 2013. The Supreme Court determined the presence of an environmental crime even though the Provincial Court had only ruled on a disobedience crime. The Spanish Supreme Court sentenced the captain of the vessel to two years' imprisonment for reckless criminal damage to the environment with catastrophic effects and affirmed the civil liability of the captain of the vessel, the vessel owner (Mare Shipping Inc.) and the insurer (London P&I Club), as well as the 1992 International Fund. On the other hand, the Spanish Supreme Court confirmed the acquittal of the chief engineer and the director general of the merchant navy[4].

[4] The lawyers of the captain of the vessel requested annulment of the Supreme Court decision for not having heard the captain, arguing that it contravened Article 24 of the Spanish Constitution. This application for annulment was dismissed by the Supreme Court on 11 April 2016. The lawyers of the captain have since been engaged in proceedings before the Constitutional Court and the European Court of Human Rights in order to force annulment of the judgement.

In the Spanish legal system, the 1978 Constitution, in its Article 45, establishes that 1) every person has the right to enjoy an environment suitable for the development of that person and has the duty to preserve it; 2) the public authorities shall ensure rational use of all natural resources in order to protect and improve the quality of life and defend and restore the environment, relying on the indispensable collective solidarity; and 3) those violating the provisions of the preceding paragraph, in the terms established by the law, will be subject to criminal or administrative sanctions and will be obliged to repair the damage caused. The Constitution thus establishes the concept of crimes against the environment, and whenever existing, there are implications of civil liability and payment for the damage caused. There is no limit on civil liabilities claims to insurance companies for the resultant public expenditure and the economic and environmental damages (Prada, 2016).

In accordance with the Spanish legal system, the Supreme Court accepted the facts considered proven in the Provincial Court but changed the legal qualification of these facts; that is, the Supreme Court felt the events called for a different punitive legal consideration for the captain's behaviour.

In the Spanish system of Civil Law, the degree of judicial conviction required for condemn in a criminal proceeding and that necessary to estimate the claim in a civil proceeding require a probative process that evidences the crime or civil offense before the court. The Spanish guarantor law system assumes the presumption of innocence that implies that the burden of proof is on the one who declares, not on one who denies. But while the burden of proof in the civil process is in the hands of the parties, in criminal proceedings the prosecutor plays a key role to present proofs. The decision of the environmental crime (which in this case could be considered the most important, since it opens the door to the overruling of the Conventions) had to face a strict standard of proof.

The Supreme Court's judgement deemed that there was negligence and environmental crime in the case of the *Prestige* and, hence, annulled the application of the 1992 CLC Convention, which in Article V.2 states that "[t]he owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result". In this manner, the shipowner lost the protection that the 1992 CLC provides in its Article III.4 for the captain and other agents hired by him, and therefore, the civil liability for damages caused by the oil spill became unlimited. In this sense, the Supreme Court declared that the captain is directly responsible for the civil liability of all damage caused and that the shipowner has subsidiary liability, which means he is no longer entitled to any liability limitation. It is upheld that the shipowner was aware of the condition of the vessel and acted negligently (recklessly) by permitting its navigation.

Likewise, the vessel's insurer, the London Steamship Owners Mutual Insurance Association (London P&I Club), was found to be directly liable by the Supreme Court

for the maximum amount of the insurance policy. This insurance policy covered civil liability up to US$1 billion.

The Supreme Court's judgement held the IOPCF responsible for the civil liability but respected the limitation of liability of the 1992 FC.

Likewise, this judgement incorporated significant strides in maritime law, such as the concept of "seaworthiness" (which goes beyond the fact that the vessel had a certificate of classification) and new perspectives on the allocation of responsibilities (García-Pita, 2016).

6. The polluter pays—but who, how and how much?

The judicial rectification made by the Spanish Supreme Court implied that an environmental crime had been committed and required the polluters to assume all the consequences of the spill (figure 2). The captain, the owner of the tanker, the insurer and the IOPCF are involved in this allocation of liabilities. Nevertheless, the judicial process is incomplete, the liabilities and payments are still immersed in a complex stage of estimation and allocation. In any case, the sentence of the Supreme Court has changed the previous status quo situation, and a new scenario has been opened. Some key elements are interesting to understand the passage from the general polluter pays principle to the real and concrete distribution of liabilities and payments. This section presents these issues about the final quantification of the required compensation according to the sentence and the way in which the sentence will be executed, including the risks and difficulties of the process.

On the other hand, the judicial decision not only seeks to leave without effect the clauses of channelling and limitation of liability but also applies criteria from the national regulation to measure the damage that is not admissible by the international system. Article I.6 of the 1992 CLC textually establishes that the compensation "shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken" or "the costs of preventive measures and further loss or damage caused by preventive measures". This controversial conception of damage has been considered too narrow (see Mason, 2003) and often contradicts national legislations. The quantification of the total sum of damage is still pending the implementation phase of the Supreme Court's judgement. However, this judgement already includes compensation not only for objective economic damage (repair costs and loss of profits) but also for moral and purely environmental damages. The Public Prosecutor's Office is demanding an amount of €1.21 million for environmental damage (IOPCF, 2015b), and according to the sentence, the acknowledged moral damage cannot be more than 30% of the material damage (Spanish Supreme Court, 2016). Section 1 of the Provincial Court of A Coruña is responsible for the valuation of damage after the Supreme Court's judgement in 2016, and it must also be borne in mind that the public prosecutor quantified such damage for Spain at €4,328 million during the trial at the Provincial Court.

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An essential issue for the extension of the polluter pays principle (versus the limitation of liability logic) is making the insurer pay the US$1 billion (€898 million) for the insurance policy. To do this, the legal service of the Spanish state has to ensure the judgement is enforced in the United Kingdom, as the insurer is from London. Here there are two legal routes: (a) send letters rogatory to the British justice for assistance in the execution of the Spanish Supreme Court's judgement or (b) hire a law firm to file the claim in London against the insurer of the *Prestige* (i.e., file an "executory proceeding" before the British justice to enforce the Spanish Supreme Court's judgement regarding the payment for damages by the insurer). This executory proceeding will have to confront the insurance company's lawyers, who may use an earlier civil judgement from a British court. This British ruling stated that the UK insurer was only obliged to pay the shipowner if he had previously paid for the damage caused and did not have to pay any other agent. We must bear in mind that in the case of the *Prestige* it was the Spanish state that paid the compensation to those affected by the oil spill.

Although these two legal avenues may be chosen simultaneously, they both have clear implementation difficulties, and it is quite likely that the resolution of the conflict to determine the obligations of the insurer will imply the need for arbitration between the two parties. Moreover, the insurance company is of the view that the €22.8 million it deposited prior to the Supreme Court's judgement already covered its responsibility and will try to defend its position before the British courts.

Furthermore, it should be noted that the IOPCF has very critically assessed the Supreme Court's judgement. In a note pronounced of 30 March 2016, the Secretariat stated that this decision is actually a breach of the CLC because, under the convention, "the insurer may avail itself of the right to limitation of liability, even if the owner is not entitled to do so" (IOPCF, 2016a, p.9). Therefore, the IOPCF insists on the application of the convention in the judicial proceedings. The IOPCF also regrets that the judgement admits compensation for concepts ineligible according to the convention, such as those for purely environmental or moral damages.

In the letter delivered by the International Group of P&I to the IOPCF last March, this group expressed their discontent with the judgement and even declared to have "significant concerns for the future viability of the compensation system as a whole and the pressures faced by insurers (and their reinsurers) in light of this judgement" (IOPCF, 2016b, p. 1). The group considers that the Supreme Court "exceeded its powers by undertaking a wide-ranging re-evaluation of the facts of the case; by substituting its own view of the facts for the trial court's assessment of the evidence; and by reversing the master's acquittal without re-hearing his evidence" (IOPCF, 2016b: 4). The letter added that the group hopes some of the actions taken by the captain before the Supreme Court,

the Constitutional Court or the European Court of Human Rights prosper and the judgement is annulled.

In addition to the above-mentioned elements, one needs to also take into account the temporal dimension. The *Prestige* sank in 2002, and the Spanish Supreme Court pronounced its judgement in 2016. Now there are new proceedings to enforce this judgement. This process may be lengthy depending on several circumstances, and 15 years have already passed since the vessel sank.

7. Conclusions

Unlike the judgement of the Provincial Court of A Coruña, the Spanish Supreme Court judgement of 2016 considers that the captain of the *Prestige* is responsible for a crime against natural resources and the environment, with the aggravating circumstance of generating a catastrophic deterioration and committing gross negligence, in accordance with Articles 325 and 327 of the Spanish Criminal Code. The Supreme Court concluded that the captain's imprudence and disobedience generated a serious risk because he was navigating a 26-year-old vessel with several deficiencies, of which he was aware. The gross negligence of the captain implies a responsibility towards the probability that damage will occur, and hence the Supreme Court ruled the captain is responsible for the civil liability for damage caused. Based on the 1992 CLC and Article 120.4 of the Spanish Criminal Code, it ruled that the shipowner is subsidiarily liable.

With regards to the liability of the insurance company, the Supreme Court judgement states that the insurer is responsible for direct civil liability up to the amount established in the insurance policy. To this end, the Supreme Court applied Article 117 of the Spanish Criminal Code, which states that "insurers that have taken on the risk of pecuniary liability deriving from the use of any asset, company, industry or activity, when, as a result of a circumstance provided for in this Code, an event occurs that produces the insured risk, they shall hold direct civil liability up to the legally established or generally agreed compensation limit, without prejudice to the right of recourse against the concerned party". This is a key point in the enforcement of the judgement, as the insurance company would litigate to limit its payments to €22.8 million, which would be the financial cap if the 1992 CLC were applicable. The enforcement of this judgement in the British justice system has obvious difficulties: On the one hand, the lawyers representing the Spanish state will defend the criminal judgement of the Spanish Supreme Court, which has concluded the existence of an environmental crime and civil liability of the insurance company; on the other hand, the lawyers of the insurance company will argue that there is a British civil court judgement that shields the company from the full US$1 billion insurance policy. An arbitration mechanism may be needed to resolve the issue, and this process may be complicated if it coincides with the process of abandonment of the United Kingdom from the EU (Brexit), which could affect certain judicial cooperation conventions. Furthermore, Brexit means that the guarantees in the United Kingdom provided by valid EU law in

the past years may change from 2017 onwards. In the international arena, Britain will be subject to international standards, but it will no longer have to comply with EU standards and instructions from the European Commission. Therefore, the role of the British courts may be crucial for the enforcement of civil liability in this case.

After the *Prestige* sank, the Spanish state covered third-party damages and compensated damage caused to the most affected sectors. In this way, it ensured that those suffering damage from pollution get compensated, at least for certain minimum amounts (García-Pita, 2013). The 2016 Supreme Court judgement allows the extension of the polluter pays principle beyond the liability limitation set forth in the conventions.

However, although this sentence and the collection of the insurance policy extend the polluter pays principle, the damage is not completely covered. The insurance policy is also limited to a certain amount. The shipowner and the captain are regarded as insolvent, and legal actions against the certification company have already been taken without success. It is likely that much of the cost will finally be assumed by the Spanish state, as the liability limitation of the IOPCF (oil industry) has been judicially respected.

This article sheds new light on the allocation of responsibilities in the case of oil spills from the perspective of institutional analysis, and the information provided is of interest for comparative analysis of liability for damages.

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