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Environmental crime and judicial rectification of the *Prestige* oil spill: The polluter pays☆

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ABSTRACT

The enforcement of institutional rules requires the judicial system to perform well. In the case of oil spills, courts are key actors in determining the allocation of liabilities according to international and national norms. In 2002, the *Prestige* oil spill led to 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 have prevented the polluters from fully compensating injured parties for the damage the spill produced. In 2013, the Spanish Provincial Court of A Coruña condemned the captain of the tanker for disobedience, but no environmental crime was found; therefore, no further civil liabilities were incurred. Nevertheless, in 2016, the Spanish Supreme Court overruled the ruling of the provincial court and proclaimed the existence of an environmental crime. This judicial rectification changed the allocation of liabilities, extended the application of the polluter-pays principle, and opened a different stage for estimating and covering the costs of the damage. This paper presents a highly relevant case study that analyses the new situation involving oil spills and the distribution of liabilities within the current international regime.

1. Introduction

Institutions are composed of formal rules, informal norms and enforcement mechanisms [21]. Institutional analysis, therefore, requires the study of not only the formal rules and informal norms that regulate agents' behaviour but also of the de facto performance of the mechanisms that enforce these rules. In the case of oil spills, national judicial systems can apply the complex system of international standards and national legislation; hence, the allocation of liabilities among parties largely depends on what the courts of justice decide. A judicial system can have a multilevel governance structure, and a country's upper courts can modify judgements from its lower courts.

In November 2002, the sinking of the oil tanker *Prestige* generated a vast oil spill off the coast of Galicia; this spill affected the coasts of Spain, France and Portugal. The disaster had serious environmental, economic and social consequences. On 16 November 2013, the Provincial Court of A Coruña ruled that there was neither fault nor an environmental crime in the *Prestige* case. Caballero and Fernández-González [4] analysed this judicial process, which was "slow, complex and imperfect". According to that decision, the polluter was not civilly liable for the damage that the oil spill caused beyond the limitations that the applicable international conventions provided. However, on 14 January 2016, the Spanish Supreme Court (Tribunal Supremo) overruled 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. The Supreme Court then established new civil liability for the captain, the vessel owner, the insurer and the International Oil Pollution Compensation Funds (IOPCF) based on the occurrence of this environmental crime. The IOPCF is responsible for compensating for any damage above the shipowner's liability limitation. 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 2016 Spanish Supreme Court judgement, which annulled the previous judgement and established the presence of an environmental crime. This paper updates the analysis of Caballero and Fernández-González [4] based on the new judicial decision, 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 of Liability and Compensation for Oil Pollution Damage, whose basic body of rules comprises two international conventions. Section 3 studies the polluter-pays principle and the efficiency criteria that underlie the existence of the liability

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limitation 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 Provincial Court of A Coruña's decision, the appeals of 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

Since the mid-nineteenth century, because of the diversity of national laws, international treaties have been instituted to harmonise institutions and behaviours, reduce uncertainty and risk, and distribute responsibilities in accordance with global interests and common notions of justice and law. For laws regarding the sea, the most relevant formal milestones were reached in the second half of the twentieth 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 treaty occurred in a post-war period in which the will for cooperation between nations caused a proliferation of international treaties and conventions for joint regulation that were intended to establish a consensual distribution of rights and the peaceful resolution of conflicts. This convention set out such important issues as rights and freedoms at sea and 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 would improve the provision of adequate and swift compensation to the victims of oil spills. From this, the first set of conventions (the 1969 Convention on Civil Liability [CLC] and the 1971 Fund Convention [FC]) emerged, laying 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 a spill causes and the mechanisms to make the compensation effective. This protocol coexists with other systems on liability and compensation regarding 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) and the Nairobi International Convention on the Removal of Wrecks.

The 1992 version of the international regime was 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 FC).

The first convention (1992 CLC) determined 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's liability is limited to an amount that is linked to the ship's tonnage. Additionally, according to this convention, no legal action can be taken against any other actor (captain, crew, cargo owner, certifier, civil servants, etc.). The convention also provides a system of compulsory liability insurance for ships carrying more than 2000 t of bulk oil as cargo.

The second convention determined the liability of the IOPCF, which comprises funds that the oil industry contributes. It operates when the scope of the damage is higher than the shipowner's limitation of liability (in accordance with the 1992 CLC). It is voluntary and complementary to the previous convention. This convention also introduced a limitation of compensation for the IOPCF.[1]

By driving and limiting the liabilities of both the shipowner and the oil industry, the system forces what has come to be called the *channelling of liability*. The first liability tier is the shipowner's, which is up to the liability limitation provided in the 1992 CLC. Above this threshold, the IOPCF assumes the second tier, for damage up to the limitation provided in the 1992 FC. The victims of the spill assume any remaining damage above these liability limitations. This is not common, but in large disasters such as the *Prestige* oil spill, it can happen.

Another key aspect of this international regime is the establishment of a unified concept for *damage* and of criteria for measuring it. According to Article I, paragraph 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 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 important issues of contention.

As mentioned in the introduction, a transcendental aspect of these international systems is that they are based on multilateralism and reciprocity. Therefore, the role of each contracting state 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 events that have occurred since the incident.

3. The polluter-pays principle and the liability limitation

The polluter-pays principle ensures that the parties who produce pollution are liable for it and requires them to bear the costs of the consequent damage. It is a way of making these parties internalise the costs of prevention and reparation.

Ronald Coase [5] 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. However, the most relevant contribution by Coase [5] 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, determines the result. Because free ex post transactions among individuals cannot guarantee social optimality due to the existence of positive transaction costs, right institutions and governance structures should be designed in order to ensure the best social outcome.

The International Regime of Civil Liability and Compensation for Oil Pollution Damage tried to guarantee the best social outcome in a world with high transaction costs. The 1992 international regime, which imposes 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 liability limitation (along with the channelling of liability) contradicts the polluter-pays principle. It follows a different logic. Traditionally, the liability limitation clause is included

[1] Since 2005, a third tier of compensation has been available: the Supplementary Fund, which, under the same logic as the 1992 FC, substantially increases the amount available for compensation. However, this was not available at the time of the *Prestige* incident.