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**CHALLENGES TO THE UNCLOS  
REGIME: NATIONAL LEGISLATION  
WHICH IS INCOMPATIBLE WITH  
INTERNATIONAL LAW**

**Charlotte Breide**

**ABLOS**

**17 October 2008**

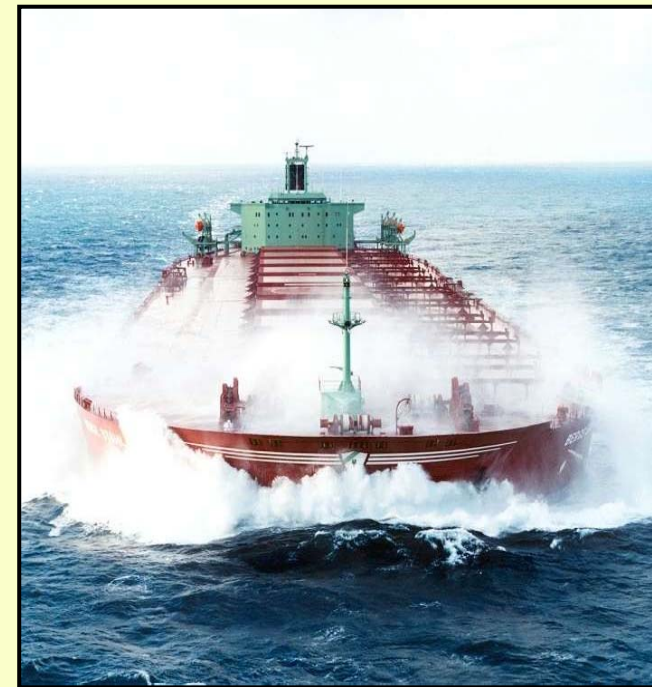
# The UNCLOS Compromise

- UNCLOS a balance between coastal state and maritime interests
  - Geographic expansion (especially EEZ)
  - Complete jurisdiction over resources, economic uses in EEZ
  - Limits over power to regulate in EEZ (and territorial sea)
- Pollution prevention and control jurisdiction over foreign vessels
  - Coastal state jurisdiction limited by UNCLOS
  - Both prescriptive (legislative) and enforcement jurisdiction



# Limits On Legislative Jurisdiction

- Territorial Sea
  - May adopt laws to prevent & control pollution from foreign vessels in innocent passage
  - BUT cannot affect design, manning or equipment (except international standards)
- EEZ
  - Coastal State can regulate re – pollution control
  - BUT must only be “giving effect” to accepted international standards



# Limits on Enforcement Jurisdiction

- Territorial Sea
  - Where “clear grounds” to believe violation of national or international rules during innocent passage
  - May inspect, detain, institute proceedings
  - If “willful and serious” – passage *not innocent*; have full jurisdiction



USCG Inspection of Oil  
Tanker - Boston



- EEZ – *graduated* enforcement powers
  - If “clear grounds” to believe violation of international rules: may *demand information* to determine if violation
  - If “clear grounds” to believe violation with substantial discharge, threat of major pollution: may *inspect if information not provided*
  - If “clear objective evidence” of violation, discharge with major damage to coastal state interests: may *detain, institute proceedings*



## Other safeguards

- Monetary penalties *only* for violations beyond territorial sea
- In many cases of detention; obligation of prompt release on payment of bond
  - Special procedure at International Tribunal for the Law of the Sea (ITLOS)



**ITLOS**  
(Hans Georg Esch)

## Summary: Structure of UNCLOS regime



- Legislative jurisdiction constrained: requirement to apply agreed international rules
- Enforcement jurisdiction is graduated – escalates based on certainty of evidence and severity of incident
- Detention of vessels and crews for investigation is limited; imprisonment for pollution offences prohibited
- Recent years have seen significant derogations from UNCLOS approach



# Departures from MARPOL 73/78

- MARPOL and other IMO agreements: primary international rules on vessel-source pollution
- Public pressure over pollution incidents have led some States to regulate outside MARPOL
- 2005 EU Directive on ship-source pollution
  - Introduced in wake of *Prestige* incident
  - Requires Member States to introduce new measures which are arguably outside UNCLOS and MARPOL



# Essential issues for industry



- MARPOL provides exceptions from liability where discharge caused by damage to equipment and no “intent or recklessness”
- Directive limits application of exceptions:
  - In EEZ, high seas , restricts to owners, masters and crew – applies “serious negligence” standard to others
  - Excludes the application of exceptions in the territorial sea
- In territorial sea, Directive applies standard of “serious negligence” for infringements
  - Conflicts with MARPOL approach (intent or recklessness)
  - Interference with right of innocent passage?
  - Removes distinction between accidental and deliberate discharge
- Possible violation of UNCLOS rules re – application of international standards *only* in EEZ

By how much has Freightliner's business grown recently?  
(see Logistics and Ports)  
**Freightliner**

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Monday August 9 2004



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### Luxembourg must clear muddy waters of pollution directive

In this second part of an article on the legal action brought by the shipping industry to challenge the European Union Directive on Ship-source Pollution, Colin de la Rue and John Fawcett-Ellis outline the issues which the English High Court has referred to the European Court of Justice

THE first of the four questions referred to the European Court of Justice in Luxembourg concerns the effectiveness of a ship-source pollution directive outside territorial waters.

Under the United Nations Convention on the Law of the Sea (LOLOS) a state has jurisdiction over discharges of the high seas only when these come from vessels which are flying its flag or where its legislation implements international rules. With in the Exclusive Economic Zone (EEZ) of a state, its competence to legislate is limited to giving effect to general international standards.

The claimants argued that the relevant international standards are those set out in Marpol Annexes I and II, which prohibit Pollution from Ships, and that the directive goes beyond them inasmuch as it imposes liability for discharge in case of serious negligence by persons other than the owner, master or crew. The judge agreed with the claimants that all persons associated with a ship – not only the owner, master and crew – would normally be entitled to rely on provisions in Marpol Annexes I and II which restrict liability to



### yers announce to finalise pollute autumn debate, writes Nigel L

THE High Court in London has handed down an important decision in the proceedings brought by a coalition of shipping industry organisations, led by Intertanko, to test the validity of the European Union Directive on Criminal Sanctions for Ship-source Pollution. In a two-part article published today and next week, the case is explained by the coalition's solicitor, Colin de la Rue of Ince & Co., and by Intertanko's general counsel, John Fawcett-Ellis

ON FRIDAY Mr Justice Hodge delivered a reserved judgment in which he held that the industry coalition had well-founded arguments for challenging the legal validity of the directive on four different grounds. Three of these relate to conflict with international law while the fourth concerns lack of legal certainty.

"Starting with the first, the judge decided that each of the four questions relating to the validity of the directive should be referred to the European Court of Justice in Luxembourg, which may be expected to hear the matter next year.

This is of course an unusual lawsuit without direct precedent in the maritime sector, and a serious doubt therefore has been cast on the ability of the claimant to win the case.

Accidental discharge, on the other hand, raises different issues and are treated differently in Marpol. A discharge does not constitute a breach of international law when it results from damage to a ship or its equipment – for example, as a result of a collision or grounding. In such a case, a violation of Marpol is committed only if there has been a failure to react reasonably to the

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Reproduced from the Law Page, July 5 2006.

### How shipping took on the EU legislators

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Representatives of the industry coalition outside the British High Court. (From left) John Fawcett-Ellis (Intertanko), George Anagnostou (ISCC), Jim Hamilton (LMA), Konrad Komayrath (ISCC), Peter Swift (Intertanko), Hans van Rooij (ISU), Colin de la Rue (Ince & Co.), Hans van Rooij (ISU chairman), Antjie Bishop (ISU), Roger Holt (Intertanko) and Charlotte Bylock (Ince & Co.)

The background is well known. In November 2002 the single-hull tanker Prestige got into difficulties off Spain but was refueled across territorial waters and sank six days later some 230 km west of Portugal. A tank of fuel cargo of heavier fuel oil was released as polluted loggetroter or coastline in France as well as on the Iberian peninsula.

Repealing laws in Spain from the Regula Sea in oil spill in 1992 and in France from the Erika disaster of 1999, the Prestige has caused great political pressure in Europe for new law designed, as the European Commission put it, "to tighten the net".

Existing laws in Europe, as in many other parts of the world, are based on the main international treaty in this area, the International Convention for the Prevention of Pollution from Ships (Marpol). This was adopted in 1973, modified by a Protocol of 1978, and came into force in 1983. Marpol has been amended many times under the auspices of the International Maritime Organization and it is in force in all EU states.

Marpol differentiates between pollution caused by "operational" discharge and spill resulting from maritime accidents. Operational discharges involve deliberate releases of oily wastes in circumstances which may vary but will be permitted under international law. Marpol requires that ships need to dispose of oily wastes which accumulate on board, and it encourages states to install reception facilities enabling this to be done ashore. It also recognises that there are any ports where reception facilities are not available, it therefore allows oily wastes to be discharged into the sea provided certain stringent conditions are met, relating to stock matters as the distance from land, the oil content of the effluent, the rate of discharge and the effective international standards.

Operational discharges which contravene these restrictions are violations of international law and contracting states are required to impose penalties on offenders which are adequate in severity to discourage them.

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# ECJ Proceedings: Decision of June 2008

- EC not a party to MARPOL
  - Conflict with MARPOL does not render Directive invalid
- EC is bound by UNCLOS
  - But UNCLOS does not confer rights on individuals, only on States
  - Would require claim by a Flag State (non-EU member)



# Concerns arising from judgment

- Scope of criminal liability regime left undefined: domestic courts to interpret; no criteria provided
- Relationship to MARPOL: should national courts attempt to harmonize MARPOL and Directive?
- Relationship between EU law and international law (UNCLOS): how to resolve conflicts?
- Uncertainty for industry as to applicable regime





# Canadian Migratory Birds Legislation



- Problems with oily bilge dumping
  - Amendments to Migratory Birds Convention Act (2005)
- Offence to deposit substances harmful to migratory birds
  - MARPOL-compliant exempted
  - But broad provision – regulation of discharges beyond international standards
- Allows for liability without intent or recklessness
- Allows for imprisonment for some offences



**Vessel with trailing slick  
in Canadian EEZ**

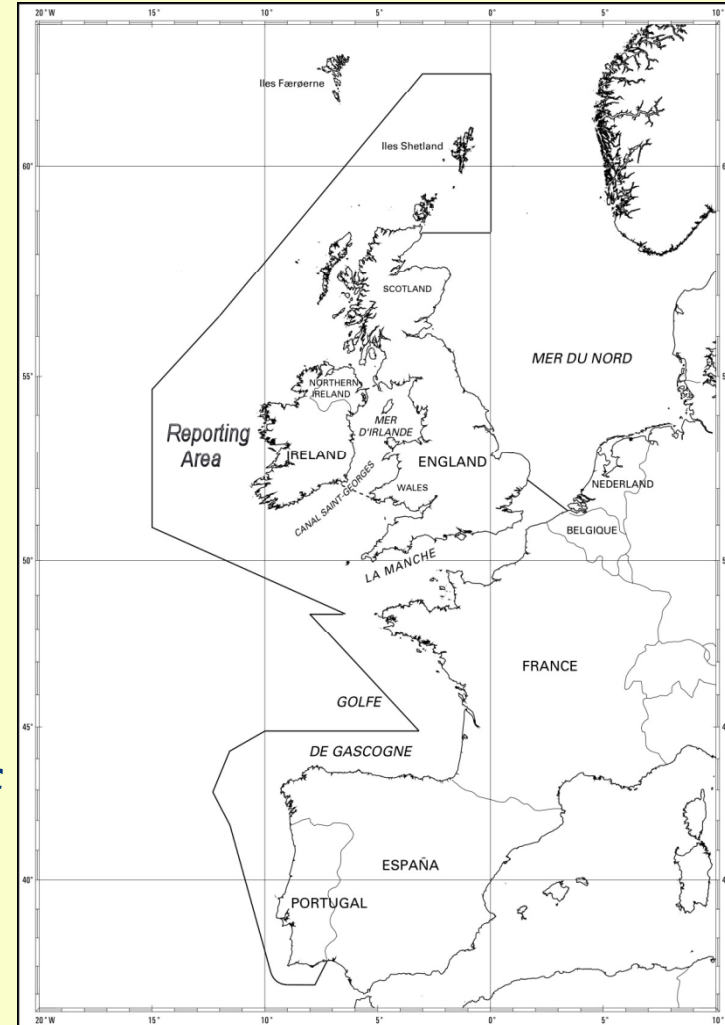
# Criminalisation and detention of seafarers

- The *Prestige* (2002)
  - Captain held in prison 3 months, then in Spain for further period
- The *Erika* (1999)
  - Captain detained, then held in France (released)
- Others: *Tasman Spirit* (Pakistan) and *Hebei Spirit* (South Korea)
- Potential scapegoating of mariners; violation of “non-monetary” penalty rule



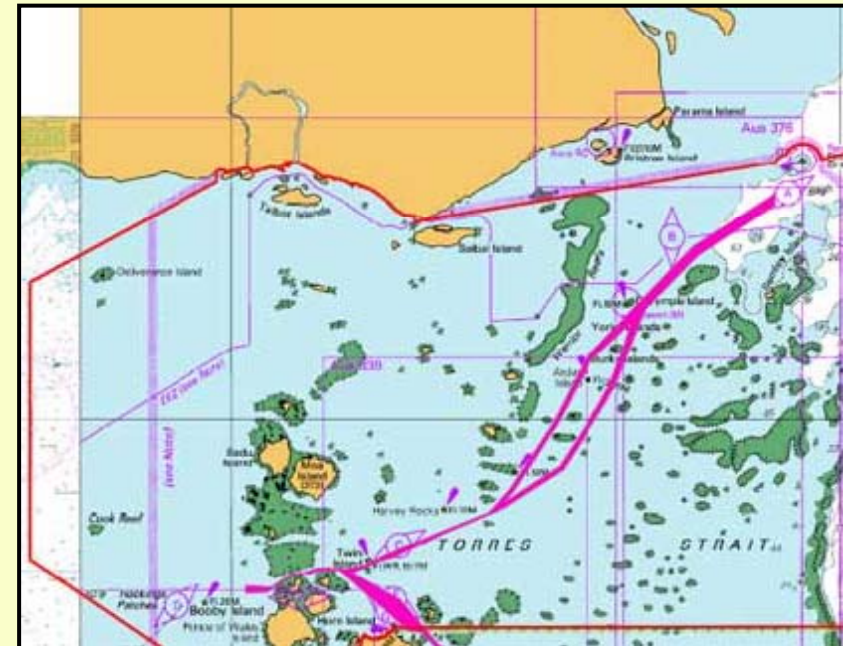
# Particularly Sensitive Sea Areas (PSSAs)

- PSSAs: sea areas identified as vulnerable to impact of shipping
  - Subject to special measures under MARPOL
  - Routing requirements, strict application of standards etc
- Western European Waters PSSA (2004)
  - From Portugal to Hebrides
  - Is this really within purpose of PSSA?
  - Or a back door to bypassing usual MARPOL rules?



Western European PSSA (IMO)

- Torres Strait Compulsory Pilotage Scheme
  - Pursuant to expansion of Barrier Reef PSSA
  - Protested by US, Singapore
  - Issue – was it specifically authorized as part of PSSA?
- Issue for industry
  - PSSAs intended to protect specific areas
  - Will they be used to expand coastal state regulation

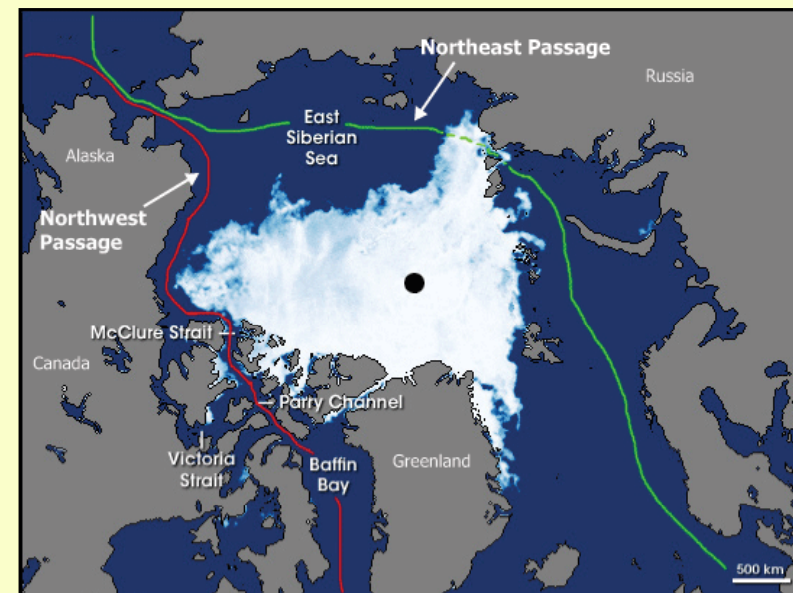


Torres Strait PSSA and Shipping Routes  
(Semaphore: RAN)



## Arctic Issues

- Status of Northwest Passage
  - Canadian claim to straight baselines, internal waters
  - Historic waters, internal waters with innocent passage or international strait?
- Proposed extension of Arctic Waters Pollution Prevention Act
  - 100 naut. miles to 200
  - Expanded control over shipping: design & construction, reporting





## Summary and Conclusions

- Major concerns of industry
  - Detention and criminalisation of seafarers, contrary to UNCLOS
  - Departures from uniform international standards (MARPOL)
  - Over-use of specialized local measures
- Shipping inherently global and relies on mobility
  - Cannot operate effectively with patchwork of regional and national standards



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