

*European Research Studies,
Volume XIV, Issue (1), 2011*

Areas of Refuge for Ships in Need of Assistance: An Institutional Framework Enhancing Maritime Safety and Protection of the European and Global Marine Environment*

Giorgos Samiotis¹, Vassilios-Stilianos Tselentis²

Abstract:

Shipping has always involved high-risk operations and the accidental loss of a ship, has always been a serious matter for the industry. In addition to ship loss, the international community has always been sensitive to the fact that such accidents may lead to serious environmental damage. Recently, after the Prestige accident (2002), maritime safety and effective protection of the marine environment, in cases where a ship finds itself in serious difficulty or in need of assistance, without presenting a risk to the safety of life of persons onboard, were placed high on the agenda. In response to the above, the international community (IMO) as well as the European Union, have undertaken to develop and implement a series of measures and policies aimed at increasing efficiency when facing incidents as well as serious accidents at sea. The recent debate initiated by the Green paper on EU Maritime Policy is indicative of the need to develop an overall maritime policy that will ensure a sustainable future for the industry. The framework described as “places of refuge” has already supported several countries to develop plans to accommodate ships in distress, in waters under their jurisdiction. Such plans have incorporated the necessary procedures to provide a ship in distress with a network of areas, where adequate means and facilities for assistance, repair, and salvage and pollution response exist, as well as criteria for selecting and designating such areas. This paper discusses issues that inevitably arise when a balance needs to be established between both the prerogative of a ship in need of assistance to seek a place of refuge and the prerogative of a coastal State to protect its coastline, in the context of enhancing maritime safety, as well as preventing and controlling marine pollution from the maritime industry.

Key Words: *Port Safety, Marine Pollution, Environmental Protection, Marine Environment, Environmental Policy and Law, Environmental Business/Economics*

JEL Classification: *K32, O58*

* Part of this paper was presented at the International Conference on Applied Business and Economics (ICABE), 4-6 October 2007, Piraeus, Greece.

¹ Assistant Professor, Department of Maritime Studies, University of Piraeus, email: samiotis@unipi.gr

² Professor, Department of Maritime Studies, University of Piraeus, email: tselenti@unipi.gr

1. Introduction and Basic Definitions

The “places of refuge” concept exists and evolves throughout history, for millennia, within the concept of, and in relation to, global sea transport. In particular, the aforementioned idea is directly related to the high variability and non predictability which characterizes the maritime industry throughout the years and renders it a high risk activity, as we know it today.

Recent discussions and processes concerning “places of refuge” involve not only a specialized legal framework, but also depend on an approved set of definitions and terms. The widely accepted and for long time used term of “port-of-refuge” is being abandoned as it is considered inadequate to address emerging particularities and necessities of maritime transport. Thus, starting from 2001, the term “place-of-refuge” is more widely used as a probationary term to be used in international fora, where discussions are taking place (European Union – EU, International Maritime Organization – IMO, European Sea Port Organization – ESPO, INTERTANKO etc). It is clear that the latter term encompasses a wider range of options for refuge, over and above the limitations set by ports, whether natural or man-made.

As far as the issue pertinent to a definition of a refuge area, the discussions are ongoing and have not, as yet, concluded on a definition that can be precise and widely accepted. Concluding, of course depends on the international community agreeing on the basic legal status of these areas, an issue which is still open to discussion. Any attempts in defining refuge regions thus rely on describing the basic characteristics of the modern version of these areas, or are based on proposals by working groups. Either way, the definition that will finally be adopted will be forthcoming in the near future. Definitions proposed by IMO (IMO Resolution A. 949 (23) 5 December 2003) are of special interest. More specifically according to IMO : a) Ship in need of assistance means a ship in a situation, apart from one requiring rescue of persons on board, that could rise to loss of the vessel or an environmental or navigational hazard. b) Place of refuge means a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation and to protect human life and the environment. c) MAS means a maritime assistance service as defined in resolution A 950 (23), responsible for receiving reports in the event of incidents and serving at the point of contact between the shipmaster and the authorities of the coastal State and the event of an incident.

1.1. The Evolution and Modern Negative Approaches to “Refuge Ports”

“Refuge Ports”, as a practice in sea transport, involves setting emergency status to ships in distress, followed by the prerequisite to provide refuge at the nearest port. For a long time the concept of providing a place of refuge, was widely

accepted since it was a very reasonable follow up to the emergency preparedness plans for ships and port, has a total target approach (i.e. it considers all elements involved such as human life, ship loss, freight loss, environmental damage, etc.). Up to today it has not, however, attained legal commitment regarding the coastline country's obligation to respond positively to a demand to provide a "place of refuge".

Economic and technological progress in the maritime sector during the 20th century, especially after the 1950s, had decisively affected emergency preparedness plans and the provision of "refuge areas". However, for the majority of large capacity ship categories and a variety of dangerous and toxic cargos (chemicals, explosives, waste etc), providing "refuge areas" is, as a rule, prohibited by coastline countries. This negative development is based on and legally supported by, a multitude of international and national laws, which provide the coastal state with the complete discretion to deny a refuge area, if it judges that such an act clashes with its interests (safety, environmental protection etc).

2. Refusal to Provide Refuge Facilities and the Likely Repercussions: Cases of Devastating Ship Accidents, Consequences and Reflections

During the 20th century many occasions have been reported whereby a refuge area has been refused by coastal states, which, unfortunately have led to serious accidents and pollution incidents. Four, relatively recent cases, are mentioned below. These cases received wide publicity and provided the basis for serious discussions involving governments, international organisations, shipping firms and the maritime industry in general, as to how such complex matters involving the salvation of ship and cargo and the protection of the coastal environment could be faced and resolved. These involve the cases of oil tankers: "Sea Empress" (1979), "Erika" (1999), "Castor" (2001) and "Prestige" (2002).

The above were serious incidents with significant economic, social, and environmental repercussions, each one involving a set of factors pertinent to the incident itself. Especially the accidents involving "Erika", "Castor" and "Prestige" were a powerful shock to the EU putting into question the adequacy and effectiveness of maritime policies especially in the areas of safety of navigation and marine environmental protection. The analysis of the above incidents highlights, not only, the unique conditions and particular characteristics of the incident, but also common elements to all these cases. In all cases, for example, a long time interval intervened between the identification of the problem and the final loss of the vessel. These facts lead researchers to the conclusion that if such incidents are handled responsibly by the coastal state involved, that is if a well thought out and practiced emergency preparedness plan is in place, and a suitable refuge area is provided

within a reasonable time frame, a high probability that the loss of the vessel and cargo, as well as the deterioration of environmental quality, can be prevented.

3. The International and EU Institutional Framework for Refuge Areas

At the international level, the following Conventions and Protocols are in force and constitute, *inter alia*, the legal context within which coastal States and ships act in the case whereby a refuge area is necessary for the safety of the ship and the crew. It must be noted however, that there is at present no international requirement for a State to provide a place of refuge for vessels in need of assistance: United Nations Convention on the Law of the Sea (UNCLOS, 1982), in particular article 221 thereof; International Convention relating to Intervention on High Seas in Cases of Oil Pollution Casualties (the Intervention Convention), 1969, as amended; Protocol relating to Intervention on High Seas in Cases of Pollution by substances other than Oil, 1973; International Convention for Safety of Life at Sea, 1974 (SOLAS 1974), as amended in particular chapter V thereof; International Convention on Salvage 1989 (the Salvage Convention); International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (the OPRC Convention); International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78); International Convention on Maritime Search and Rescue 1979 (SAR 1979), as amended; Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 1972; Convention relating to Civil Liability in the Field of Maritime Carriage by Nuclear Material, 1971; Convention on Limitation of Liability for Maritime Claims (LLMC), 1976; International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969; International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992, (see IMO Resolution A. 949 (23) 5 December 2003).

The afore mentioned international documents as a whole, but also as separate entities, set the institutional framework for refuge areas. This framework, however, is considered ineffective for the following reasons. The first involves the ship in need of assistance for which there are no clear, general and legally binding procedures and criteria to request the provision of a refuge area. The second reason concerns the coastal state that is on the receiving end of the ship's request. This proves to be more important than the first reason, as these countries by taking advantage of the legal inadequacies, as well as invoking on sovereignty clauses from international law; keep the provision of refuge to their absolute discretion. It is obvious that under these circumstances, refusal is often the easy, but not the responsible, response. There is no better case study to highlight how the "easy way

out” approach, proved both environmentally and economically catastrophic, than the «Prestige» accident in 2002. Whatever the case, it is important to mention the fact that in instances where refuge is sought because of human life at risk, an unreasonable refusal by a coastal State can lead to lawsuits and claims, based on the alleged abuse of its rights to provide an area for refuge. As a result of the above serious incidents (“Erika” etc.), as well as the inefficiencies of the institutional framework described above, a wide discussion has been initiated at both governmental and non governmental levels (IMO, EU, ESPO, INTERTANCO etc.), during the last 20 years, concerning the further refinement of conditions and relevant criteria pertinent to areas of refuge and their operational incorporation within the emergency preparedness plans required by law.

The relative discussion concerns the following thematic areas: a) Conceptual redefinition of refuge ports and the adoption of a modern term like refuge areas (International Naval Chamber) or place of refuge (IMO). The new terms, compared to the previously used, must imply an extended list of candidate refuge areas for vessels in danger. b) Selection criteria for refuge areas (land use, ecological, technical, economic, social, etc). c) Incentives and guarantees for the provision of refuge areas. d) Adoption of soft and hard legal framework to promote the provision of refuge areas at both international and national/domestic level (international and domestic legislation). The legal framework is now at a stage where serious negotiations are striving to reach a final form, prompted especially by the recent accident of oil tanker “Prestige” in 2002. This framework includes a series of provisions, proposals and actions at international and governmental level (IMO, EU), but also interesting proposals at not governmental level (INTERTANCO).

The most important recent legal regulatory initiatives on the issue of refuge areas include: a) on behalf of IMO: 1. Resolution A. 949(23), adopted on 5 December 2003 concerning “Guidelines on Places of Refuge for Ships in Need of Assistance; 2. Resolution A. 950(23), adopted on 5 December 2003 concerning Maritime Assistance Service (MAS); β) On the EU level: 1. “The Erika I Package”: a) Directive 2001/106/EC (Port State Control), b) Regulation 417/2002/EC (double hull), c) Directive 2001/105/EC (on classification societies). 2. “The Erika II Package”: a) Regulation 1406/2002/EC (EMSA), b) Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 concerning the establishment of a Community vessel traffic monitoring and an information system and a repealing of the Council Directive 93/75/EEC; etc. 3. “The Erica III Package”: The Maritime Safety Package, as published by the Commission on 23 November 2005, consists of the following seven proposals:

- A proposal for a Directive on the conformity requirements of flag States;
- Amendment of the Directive on classification societies;
- Amendment of the Port State Control Directive;
- An amendment of the Traffic Monitoring Directive;
- A proposal for a Directive on accident investigations;

- A Regulation on liability and compensation for damage to passengers in the event of a maritime accident;
- A Directive on the extra-contractual liability of ship owners.

It is obvious that the above mentioned legally-binding texts, as well as similar documents proposed aim at improving the level of maritime safety and the prevention of accidental pollution by ships. The provision described here as “refuge areas” is an important instrument serving the above cause. The most successful response to the above problem came from the EU which, moving in harmony with relevant initiatives of the IMO, adopted the abovementioned ERIKA I, the II and III packages and measures in a more general context for maritime safety. The full enforcement of all EU’s measures is set by specific timetables and deadlines. Unfortunately despite the very important initiatives described above and other serious actions taken on a national level, an integrated and effective solution to the problem of refuge area provision, has not as yet, been accomplished. It is true to say that this issue has not been solved comprehensively neither by the IMO nor the EU. In addition, the serious question concerning issues of legal obligingness, have not been addressed, since relevant IMO clauses are at present considered non binding, a situation similar to EU Acts, that have limited territorial applicability only within the 27 member States.

4. The Case of the Sea Diamond Cruise Ship Wreckage (Santorini, the Aegean Sea) and the Issue of Refuge Areas in Greece

The recent (2007) accident and the final sinking of the cruise ship "Sea Diamond" in Santorini reinstated the necessity of applying and concretising international and EU regulations concerning the provision of refuge areas. An analysis of the characteristics of the above accident highlights the necessity of defining, allocating and finally operating refuge areas in the Aegean Sea. It is also clear, that a well thought out and fully integrated modern and effective network of refuge areas would have deterred the final immersion of the vessel and minimised any subsequent environmental consequences.

5. Conclusions/ Proposals

During the 20th century many incidents have been recorded whereby coastal states have shown reluctance to assist ships in distress, fearing a breach in safety, pollution and environmental damage along their coast line. This reluctance arises and follows international treaties and agreements, whereby national sovereignty is guaranteed in so far as the coastal state has absolute discretion whether to accept or reject a demand by a ship in distress, to approach the coast so as to weather out bad

sea conditions or repair damage to its hull or machinery. The erroneous or even abusive use of the above discretion, has led to naval accidents usually with harmful repercussions to the marine environment. Initiatives have taken place in order to improve and redefine the institutional framework providing refuge areas. Both the IMO and the EU are active and focused in this effort. These attempts nevertheless, confront a number of problems within the context of modern marine transport. The most important ones are summarised below: a) serious economic, social, and environmental costs derived from the allocation of equipment and the operation of a network of refuge ports or areas at a national, regional and international level. b) Incentives and guarantees for the coastal state, in order to balance possible negative consequences arising from the provision and operation of refuge ports or areas. c) Finding the balance at the institutional level, whereby a firm and at the same time, equitable legal framework, which includes well defined and thought out conditions and processes, will support and oblige coastal states to offer refuge facilities to ships in distress, will disallow arbitrary refusal by coastal states to provide areas of refuge. Suggestions that coastal states refusing to participate in such a scheme may face sanctions and negative repercussions (compensations, negative reciprocity etc), have also been considered.

Finally, at the institutional level, there are proposals that aim at strengthening the global framework concerning refuge areas using international conventions or protocols, in order that a global and effective application can be guaranteed mainly within the IMO's organs and infrastructure. In addition, at a national level the coastal States par excellence will have to adapt their policies and practices concerning the provision of refuge areas in order to address modern transport conditions and needs, as it has become apparent beyond any doubt, that this aspect of contingency planning ensures coastal and marine environmental protection to a significant extent

References:

- Selected bibliography

1. Chircop Aldo and Olof Liden (Ed.) (2005) Places of Refuge for Ships. Emerging Environmental Concerns of a Maritime Custom. Martinus Nijhoff Publishers/Brill.
2. Holloway P. (2004) Civil liability arising from oil pollution in South Africa and this country's attempts at prevention, including the policy on ports of refuge. In Piraeus Bar Association, Marine Pollution: The Problem of Damages and Penalties. Ant. N. Sakkoulas Publishers, Athens.
3. Mathiopoulou S. (2004) Places of refuge: indemnification and sanctions. In Piraeus Bar Association.
4. Nordquist Myron et al. (Ed.) (2008) Legal Challenges in Maritime Security. Martinus Nijhoff Publishers/Brill.

5. Pazarzis M. and G. Samiotis (2008) Safety of navigation and the protection of marine environment from wrecks: The institutional framework and the role of the law of marine insurance. In Gr. Tsaltas (Ed.) *Environment and Maritime Transportations – In Search of a Sustainable Mobility*. I. Sideris Publications, Athens (in Greek).
6. Piraeus Bar Association (2004) *Marine Pollution: The Problem of Damages and Penalties*. Ant. N. Sakkoulas Publishers, Athens.
7. Ringbakken Svein A., (2002) “Prestige accident- current developments”, Corbett & Holt Maritime Symposium, INTERTANKO, London.
8. San Simon L. (2004) Ports of refuge. Recent Legislations enacted in Spain after the disaster of “Prestige”. In Piraeus Bar Association.
9. Tellarini G. (2004) International regulation on places of refuge. In Piraeus Bar Association.
10. Tselentis V.S., “The Injured Ship – International Initiatives to Face the Consequences”, *Naftika Xronika*, 58, 3, (in Greek), 2003.
11. Van Hooydonk Eric, (2003) “Places of refuge: The Legal Context”, Workshop on Places of Refuge, Antwerp.

- Sources

1. Directive 2002/59/EC of the European Parliament and of the Council, establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, 27 June 2002, Luxembourg.
2. European Commission Energy and Transport Directorate – General Information & Communication Unit, “The Prestige Accident: What is the European Commission doing about it?”, Brussels, 21 November 2002.
3. European Maritime Pilots’ Association (EMPA), “Future Maritime Policy for the European Union, Position of the European Maritime Pilots’ Association”, Antwerp, Belgium, 27 October 2005.
4. European Sea Ports Organisation (ESPO), “ESPO Statement on ports of refuge”, Brussels, 30/ 5/ 2001.
5. IMO, Maritime Safety Committee- 74th session: 30 May-8 June 2001.
6. IMO, Maritime Safety Committee, 75th session: 15-24 May 2002.
7. IMO, Sub-Committee on Safety of Navigation - 48th session: 8-12 July 2002.
8. IMO, Sub-Committee on Safety of Navigation - 49th session: 30 June-4 July 2003.
9. IMO, The Fourth International Marine Salvage Conference, International Salvage Union, London, 19 March 2003.
10. IMO, Resolution A. 949(23), adopted on 5 December 2003 (Assembly, 23rd session, Agenda Item 17).
11. IMO, Resolution A. 950(23), adopted on 5 December 2003 (Assembly, 23rd session, Agenda Item 17).