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NOTES

GRUPO PROTEXA, S.A. v. ALL AMERICAN MARINE SLIP

Stephen M. De Luca†

INTRODUCTION

In decisions of apparent first impression, the U.S. District Court for the District of New Jersey and the U.S. Court of Appeals for the Third Circuit recently construed provisions of a maritime insurance policy, an order of a port captain under Mexican jurisdiction, Mexican maritime and constitutional law and international law and the United Nations Convention on the Law of the Sea. The background of the case before these courts can be summarized as follows:

On December 14, 1985, a diving support vessel named the *Huichol II* ("Huichol") sank in the watery depths of the Bay of Campeche, about 50 miles off the coast of Mexico and 1.5 miles within the easterly border of the *Petroleos Mexicanos* ("Pemex") oil exploratory zone.¹ More than 27 seamen died on board,² thus prompting a public outcry and the *Procuraduria General de la -Republica* ("PGR")³ in turn to order an investigation.⁴

On December 17, 1985, the Port Captain for Ciudad de Carman, State of Campeche, issued an order that was to be-

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¹ *Grupo Protexa, S.A. v. All American Marine Slip*, 753 F. Supp. 1217, 1218 (D.N.J. 1990).

² *Id.* at 1218.

³ The PGR is similar to the U.S. Department of Justice. *Id.* at 1224 n.7.

⁴ *Id.* at 1218.

come the focus of this maritime insurance case.⁵ The Port Captain, Miguel Angell Rebolledo,⁶ intended it as an order that the owner remove the wreck.⁷ Indeed, he thought that raising the wreck was imperative to allow the PGR to conduct its investigation.⁸

More important for this litigation, the plaintiff, Grupo Protexa, S.A. ("Protexa"),⁹ interpreted it as a removal order¹⁰ which, if it wanted to continue doing business in Carmen and for Pemex, it could not choose to ignore. It chose also to conduct the removal itself, but due to incompetence and some bad luck, the costs skyrocketed.

As a result of this litigation, Protexa learned that it should have ignored the Port Captain's removal order and, even if it chose not to ignore the order, it should have hired a professional salvage company to raise the Huichol. Protexa further learned not to rely upon the opinion of a staff attorney with no maritime law experience that the removal order was legally valid and required removal of the wreck.

The defendants, All American Marine Slip ("AAMS") and Cigna/AFIA,¹¹ refused to pay as excess layer underwriters of a maritime insurance policy written by Energy Insurance International of Houston, Texas ("EII").¹² The policy permitted wreck removal if it were compulsory by law and also required that the owner, when removing the vessel, act as a reasonable uninsured.¹³ These insurers contended that removal of the wreck was not compulsory by law and that Protexa did not act as a reasonable uninsured.¹⁴

⁵ *Id.* at 1223.

⁶ Grupo Protexa, S.A. v. All American Marine Slip, 856 F. Supp. 868, 874 (D.N.J. 1993).

⁷ *Id.* at 875.

⁸ *Id.* at 874.

⁹ Protexa is a Mexican conglomerate engaged in many commercial ventures through separate corporations, one of which, Condux, was the owner of the Huichol when it sank. Grupo Protexa, S.A. v. All American Marine Slip, 753 F. Supp. 1217, 1218 (D.N.J. 1990).

¹⁰ *Id.* at 1221.

¹¹ *Id.* at 1218.

¹² *Id.* at 1219.

¹³ *Id.* at 1219-20.

¹⁴ *Id.* at 1227.

Protexa chose to challenge this denial not in a Mexican forum but in the United States. It commenced suit in the U.S. District Court for the District of New Jersey. That court assumed, without deciding, that the removal order was valid.¹⁵ It then went on to examine other court's definitions of the term "compulsory by law" and chose to decide whether removal of the Huichol was compulsory by law by asking whether a reasonable owner faced with the removal order "would determine that failure to remove the HUICHOL would likely expose it to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal."¹⁶

The court concluded that removal was not compulsory by law.¹⁷ It also found that Protexa had not acted as a prudent uninsured,¹⁸ and that either determination was a basis for granting judgment in favor of the defendants.¹⁹

On appeal, the U.S. Court of Appeals for the Third Circuit held that removal of the Huichol could be found to have been "compulsory by law" if it was either directed by governmental order or statute or was reasonable under a cost-benefit analysis.²⁰ Since the district court had only determined that removal was not reasonable under the latter analysis, the court of appeals remanded the action to the district court to determine whether the removal order was valid.²¹

The court of appeals also found that the district court's finding that Protexa failed to act as a reasonable uninsured was not clearly erroneous. However, it also said that Protexa's failure to act as a reasonable uninsured may not preclude it entirely from any recovery from the insurers pursuant to the policy language because the policy appeared only to require that the insured not take any steps that would interfere with the insurers' efforts to defend their interests; however, the court also found that based on basic contract law an obligation to act

¹⁵ *Id.* at 1228.

¹⁶ *Id.* at 1230.

¹⁷ *Id.* at 1236.

¹⁸ *Id.* at 1240.

¹⁹ *Id.*

²⁰ *Grupo Protexa, S.A. v. All American Marine Slip*, 954 F.2d 130, 137-38 (3d Cir. 1992).

²¹ *Id.* at 138.

reasonably should be read into the insurance policy.²² The court of appeals therefore remanded the action to the district court for further proceedings to determine whether the policy provisions allowed a partial recovery for Protexa limited to reasonable removal costs.²³

On remand, the district court only addressed the first issue, finding that the Port Captain did not have authority to issue the order under Mexican law and that if the order were interpreted as a removal order it would be inconsistent with Mexico's constitution requiring due process, the principle of legality, and Mexico's obligations under international law. The district court therefore did not need to address the issue whether Protexa would be entitled to reasonable removal costs despite its failure to act reasonably at all times.

On appeal once again, the Third Circuit affirmed the district court's dismissal of the case, finding that removal was not compulsory by law under an objective balancing test, that the act of state doctrine did not bar United States courts from inquiring into the validity of the Port Captain's order, and that the removal order was invalid.²⁴

Underlying these decisions were subsidiary issues that are of interest to international lawyers, if not only to the insurance and maritime industries. Among other things, these courts had to address the impact of the Act of State doctrine on whether United States courts could address the issue of whether the removal order was valid. It also gave rise to calling expert witnesses during the remand proceedings to assist the court in construing Mexican maritime law, international law and the United Nations Convention on the law of the Sea (UNCLOS).

UNCLOS had been adopted by Mexico by the time of these proceedings, but not until after the Huichol sank. Nevertheless, the question arises whether, had it been adopted and come into force before the Huichol sank, UNCLOS would have made a difference for the court in its determination that the Port Captain's order, if validly issued and interpreted as a removal order under the Mexican constitution and Mexican law, would have

²² *Id.* at 140.

²³ *Id.*

²⁴ Grupo Protexa, S.A. v. All American Marine Slip, 20 F.3d 1224 (3d Cir. 1994).

been inconsistent with Mexico's obligations under international law. Now that UNCLOS has been ratified by 60 countries and will come into force in November 1994, that question is now at hand for those maritime entities with interests in Mexican and other waters of countries signatory to the Convention.²⁵

This article looks at these issues as they were addressed by the district court and the court of appeals in *Grupo Protexa* and at what they mean for those now having to decide the same fate of their ships and crew as Protexa had for the Huichol and its crew.

I. CONSTRUING MARITIME INSURANCE POLICY LAW

Protexa at first had a policy that allowed removal not only when it was compulsory by law, but also when deemed necessary by the insured.²⁶ AAMS was unwilling to provide such coverage and thus wrote a policy which allowed removal only when compulsory by law.²⁷ The policy did not define "compulsory by law," so the courts had to look elsewhere for assistance.

A. *The District of New Jersey's Approach*

The district court looked to decisions by the Second, Fifth and Third Circuits, which varied in their construction of that phrase, and tried to fashion one of its own.

According to the district court, the Second Circuit, in *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*,²⁸ denied recovery because it found that the owner and hull underwriter had not abandoned the vessel and that the government had not issued an order directing removal.²⁹ Likewise, the district court in *Protexa* found that the Huichol had not been abandoned and the Port Captain's order did not require removal; instead, it merely required, according to an English translation, the posting of a bond to cover the cost of removal should it take place.³⁰

²⁵ Unfortunately, the world's third worst disaster at sea occurred at the time this article was being written. Richard W. Stevenson, *Investigators Cite Bow Door in Estonian Ferry's Sinking*, N.Y. TIMES, October 1, 1994, at 6.

²⁶ *Grupo Protexa*, 753 F. Supp. at 1219.

²⁷ *Id.* at 1219-20.

²⁸ 461 F.2d 500 (2d Cir. 1972).

²⁹ *Grupo Protexa S.A.*, 753 F. Supp. at 1229 (citing *Seaboard Shipping Corporation*, 461 F.2d at 504.)

³⁰ 753 F. Supp. at 1229.

In looking to the Fifth Circuit, the district court found that that court of appeals rejected the Second Circuit's approach. Instead, in *Progress Marine, Inc. v. Foremost Ins. Co.*,³¹ the Fifth Circuit "concluded that 'where removal was reasonably required by law or where failure to remove would have reasonable[y] exposed an insured to liability imposed by law sufficiently great to justify the expense of removal, then, we believe, such removal could be considered "compulsory by law" for purposes of recovery.'"³²

The Fifth Circuit affirmed its approach in *Continental Oil Co. v. Bonanza Corp.*,³³ concluding, after consulting a lexicographic source,³⁴ that "removal should not be considered compulsory by law only after 'a court has rendered a judgment requiring it or when an official has issued a fiat.'"³⁵ Instead, according to the District of New Jersey, the Fifth Circuit held that removal can be found to be compelled by looking "to the state of affairs as they would appear to a reasonable owner under the circumstances."³⁶

Looking to its own court of appeals, the district court examined *East Coast Tender Service v. Winzinger*.³⁷ There, the Third Circuit rejected the Second Circuit's approach and adopted the Fifth Circuit's in *Progress Marine* and *Continental Oil*. The court of appeals held that protection afforded by an insurance policy should not be restricted to situations where there is an order from an authorized government official expressly directing removal.³⁸

Protexa argued that a mandate from a government official would *ispo facto* constitute legal compulsion, whereas AAMS asserted that a balancing test must be applied, weighing the likelihood of exposure to sanctions for failure to remove the vessel, the sanctions themselves, and removal costs.³⁹

³¹ 642 F.2d 816 (5th Cir. 1981), *cert. denied*, 454 U.S. 860 (1982).

³² *Id.* (quoting *Progress Marine, Inc.*, 642 F.2d at 820).

³³ 706 F.2d 1365 (5th Cir. 1983).

³⁴ THE RANDOM HOUSE DICTIONARY 1369 (8th ed. 1981).

³⁵ 753 F. Supp. at 1229 (quoting *Continental Oil Company*, 706 F.2d at 1369).

³⁶ 753 F. Supp. at 1229-30.

³⁷ 759 F.2d 280 (3d Cir. 1985).

³⁸ *Grupo Protexa*, 753 F. Supp. at 1230.

³⁹ *Id.*

The district court concluded that “compulsory by law” must be decided

by looking to the state of affairs as they would appear to a reasonable owner under the circumstances and examining whether failure to remove a wreck would likely expose such owner to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal.⁴⁰

Thus, the existence of such an order is not dispositive, and neither is the actual validity or invalidity of the order.⁴¹ Therefore, assuming without deciding that the Port Captain’s order was valid, it found that the order did not require removal but only the posting of a bond, and that even if the order were valid and required removal, the sanctions that might have been imposed upon Grupo Protexa for failure to remove the wreck would not outweigh the cost of removal and therefore removal was not reasonable.

B. *The Third Circuit’s Approach*

The court of appeals determined that the district court’s approach was incorrect and that Protexa’s was right.⁴² In the Third Circuit’s view, the Second Circuit in *Seaboard Shipping Corp.* required a governmental order mandating removal for such to be compulsory by law.⁴³ Since one did not exist in that case, the costs of removal were not recoverable under the policy at issue. However, if the order issued by the Port Captain in Ciudad de Carmen is valid and requires removal, the costs of Huichol’s removal would be recoverable under the Second Circuit’s approach.⁴⁴

On the other hand, the court of appeals found that the Fifth Circuit adopted a different interpretation which does not necessarily conflict with the Second Circuit’s. It rejected the Second Circuit’s view that removal can be compulsory by law only where there is a valid order mandating removal. Alternatively, the Fifth Circuit said:

⁴⁰ *Id.*

⁴¹ *Id.* at 1230.

⁴² *Grupo Protexa*, 954 F.2d at 136.

⁴³ *Id.* (citing *Seaboard Shipping Corp.*, 461 F.2d at 504).

⁴⁴ *Id.*

[R]emoval occasioned by an unarticulated or unreasonable apprehension of criminal or civil liability could not be considered "compelled by law." On the other hand, where removal was reasonably required by law, or where failure to remove would have reasonably exposed an insured to liability imposed by law sufficiently great to justify the expense of removal, then, we believe, such removal could be considered "compelled by law" for purposes of recovery.⁴⁵

It further required that the insured have a subjective belief that removal was reasonably necessary.⁴⁶ Thus, removal can be compulsory by law either when there is a valid order requiring it or when removal would be subjectively and objectively reasonable.⁴⁷

In *Continental Oil*, the Fifth Circuit affirmed its approach in *Progress Marine* but eliminated the need to show the insured subjectively believed removal was reasonably necessary.⁴⁸ Hence, the Fifth Circuit requires a two-part analysis: that is, removal can be found to be compulsory by law if removal is either (1) directed by governmental order, statute or regulation, or (2) reasonable under a cost-benefit analysis.⁴⁹

The Third Circuit then addressed its own opinion in *East Coast Tender*. There it held that the term "compulsory by law" should not be restricted to situations where a governmental order expressly directs removal.⁵⁰ Therefore, in *Grupo Protexa*, the Third Circuit held that, having examined the approaches of the three circuits, removal can be found to be compulsory if it was either directed by governmental order, statute or regulation, or if it was reasonably perceived as necessary under a cost-benefit analysis.⁵¹

On remand, the district court found the order required removal but that the order was invalid and that therefore removal was not compulsory under an objectively reasonable standard.

On second appeal, Protexa argued that removal was reasonably required "because it believed it had to comply with the

⁴⁵ *Continental Oil Company*, 706 F.2d at 1378.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Grupo Protexa*, 954 F.2d at 138.

⁵⁰ *Id.* (citing *East Coast Tender Serv., Inc.*, 759 F.2d at 286-87).

⁵¹ 954 F.2d at 131.

order.”⁵² The court of appeals noted that the district court had previously rejected Protexa’s claim that removal was necessary under an objective balancing test. The court of appeals thus said, in the second appeal, that

if the objective balancing test is adopted, Protexa can prevail only if it can successfully challenge those findings, or if the removal was compulsory by law because the order was valid, or if the insurance companies are barred by the act of state doctrine from challenging the validity of the order.⁵³

The court of appeals concluded that removal could be compulsory “even in the face of a government order later determined to be invalid, so long as in an objective analysis the reasonable costs of disobeying the removal order and the probable tort liability outweighed the removal expenses.”⁵⁴ It then upheld the district court’s earlier finding that the costs of removal far exceeded the costs of disobedience and potential tort liability, and therefore held that even if the order were valid, removal was not compulsory by law.⁵⁵

II. THE ACT OF STATE DOCTRINE

The district court recognized, prior to the first appeal to the Third Circuit, that

the act of state doctrine generally precludes United States courts from reviewing acts of foreign governments and that is particularly true in respect to a controversy regarding property allegedly located outside of that state’s territorial waters, and whose location is in potential conflict with a provision of a treaty.⁵⁶

It held that as in *Progress Marine*, the absence of governmental authority to issue the order is not dispositive; hence, it assumed without deciding that the Port Captain’s order was valid.⁵⁷

To the court of appeals, the insurers argued, among other things, that the Port Captain’s order was not valid under Mexican law and UNCLOS, whereas Protexa argued that the Act of

⁵² 20 F.3d at 1230.

⁵³ *Id.* at 1231.

⁵⁴ *Id.* at 1234.

⁵⁵ *Id.*

⁵⁶ 754 F. Supp. at 1228.

⁵⁷ *Id.*

State doctrine precluded United States courts from judging the validity of an order issued by a governmental official of a sovereign state.⁵⁸ Since the district court had not had a chance to address these issues, the court of appeals remanded the matter. It said that until the district court rules on whether the order directed Protexa to remove the Huichol,

we should not decide (a) whether the act of state doctrine prohibits an American court from deciding whether the Port Captain possessed the authority to order removal of the wreck or (b) whether the Port Captain possessed such authority.⁵⁹

On remand, the district court found that the policies that underlie the doctrine — “adherence to principles of international comity, respect for sovereign nations on their own territory and deference to the executive branch in the administration of foreign policy”⁶⁰ — were not implicated.⁶¹ It further said that this was simply an insurance coverage dispute between private parties of

no interest of the respective governments of Mexico, the United States or the international community. No Mexican national policy is at stake. Rather, what hangs in the balance is the decision of the Port Captain on a purely local matter that will eventually determine who will pay the bill for the wreck removal. The propriety of the Port Captain’s behavior is ancillary to the real issue before the Court.⁶²

The court further found that since Protexa was seeking to invoke the doctrine as a sword rather than a shield, and because Protexa chose to seek recovery in the United States courts rather than in Mexico, the doctrine should not be applied.⁶³

After having examined the doctrine and its supporting rationale, the court of appeals, in the second appeal, found that, even assuming that Mexico had a substantial interest in the case,

⁵⁸ 954 F.2d at 139.

⁵⁹ *Id.*

⁶⁰ 856 F. Supp. at 883 (citing *Environmental Tectonics Corp. v. W.S. Kirkpatrick & Co., Inc.*, 493 U.S. 400, 419 (1990)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 883-84.

Protexa has not demonstrated — nor do we find — that this controversy implicates separation of powers concerns of the sort necessary to support invocation of the doctrine.⁶⁴

The court affirmed the reasoning of the district court and further observed that Protexa had failed to offer “evidence suggesting that our rejection of the act of state doctrine would [hinder the conduct of foreign relations by the United States], nor even a basis for believing that diplomatic difficulties could arise in the aftermath of the case.”⁶⁵ Therefore, it held that Protexa could not invoke the act of state doctrine in this maritime insurance case.

III. MEXICAN MARITIME AND CONSTITUTIONAL LAW

Although the courts in the United States found that even if the order required removal and the order were valid, removal was not compulsory by law under an objective balancing test, it is helpful to comparative and international lawyers to evaluate the United States courts’ examination of Mexican maritime and constitutional law and international law and UNCLOS, for validity of an order under those legal provisions is an important factor in evaluating whether compliance with the order is compulsory by law.

On remand, the district court noted that the issue of whether removal of the *Huichol* was “compulsory by law” “cannot be determined solely on a literal reading of the English translation.”⁶⁶ It further said that

the inquiry centers on the interplay between Mexico’s exercise of its sovereign power in relation to the due process rights of its citizens. If the sovereign’s exercise of power is unbridled or authorized by law, then the Port Captain’s order is valid. If the Port Captain’s order is in fact unauthorized by law or is proscribed in the Constitutional sense, then the order is invalid.⁶⁷

Hence, it proceeded to set forth the text of the order at length and to examine the laws upon which the order relied as author-

⁶⁴ 20 F.3d at 1238.

⁶⁵ *Id.*

⁶⁶ 856 F. Supp. at 870 (quoting 954 F.2d at 138).

⁶⁷ *Id.*

ity and testimony by expert witnesses on Mexican law, international law and UNCLOS.

A. *The Port Captain's Order*

The body of the order reads, in its English translation, as follows:

This Maritime Authority is pleased to resolve after analysis of the procedures conducted by it in connection with the sinking of National Motor Vessel ("Buque Motor de Posicionamiento dinamico Nacional") named "HUICHOL" having the following characteristics: 499.83 gross tons, 151.57 net tonnage, registered in this Port under number 2623 and owned by your Company, (to) refer the following procedures to Higher Authority (in order) to request Expert Opinions from technical personnel and reports as to the causes that occasioned the sinking of said Vessel at the following coordinates marked by radar: Latitude 19 degree[s] and Longitude 91 degree[s] 58.5' W., and therefore, based on the Sole Article published in the Official Newspaper ("Diario Oficial") of the Federal Government dated March 28 of this year and on *Articles numbers 86 of the Law of Navigation and Maritime Commerce* ("Ley de Navegacion y Comercio Maritimo") and *262 and 263 of the Law of General Means of Communication* ("Ley de vias Generales de Comunicacion"), *requests that such Company "CONDUX" S.A. de C.V., deposit the sum of Pesos \$ 10,000,000.00 (Ten Million Pesos and 00/100, Mexican Currency) to guarantee the cleaning up of the area and the salvaging of said Vessle, in addition to guaranteeing any damage or loss that may arise in the course of the salvage operations, hereby stating by way of clarification that such sum may be furnished by a Bond or Deposit of Guaranty* ("Billete de Deposito") furnished by an Insurance Company to the name of the Treasury of the Federal Government and for availability to the General Directorate of the Merchant Marine, a term of 25 days from the date of notification of this resolution hereby being granted as provided in the above cited Article 86.⁶⁸

The language emphasized above references the authorities upon which the order was issued and highlights the part that shows that the order merely requires the posting of a bond, as the insurers argued.

⁶⁸ *Id.* at 871 (emphasis added).

Despite the apparent imprecise and more polite than mandatory language used by the Port Captain, the district court accorded it order status.⁶⁹ The court further said:

Captain Rebolledo's intent to issue an order weighs heavily in the balance. Additionally, it is unnecessary for a Port Captain to be a wordsmith in the preparation of a wreck removal order. Here, he recited that the sinking of a ship had occurred, experts had been appointed to determine the course of the sinking, the occurrence fell within the purview of certain statutory articles, the vessel must be salvaged, and that a bond must be posted within twenty-five days to guarantee any damage or loss that may arise from the salvage operation [of the vessel].⁷⁰

In light of Captain Rebolledo's testimony that he intended the order to require removal and in light of the full text of the order, the court found that while it is true "no phrase in the body of the [Port Captain's] Order directed wreck removal,"⁷¹ the order requires that it be done. Hence, the court looked to the next issue, whether the order was valid.

B. *The Validity of the Removal Order*

The court therefore turned to the authorities cited in the removal order to determine whether the Port Captain had authority to order Protexa to remove the Huichol. It then explained that, given that the Mexican constitution was modeled after that of the United States,

answer to the inquiry centers on the interplay between Mexico's exercise of its sovereign power in relation to the due process rights of its citizens. If the sovereign's exercise of power is unbridled or authorized by law, then the Port Captain's order is valid. If the Port Captain's order is in fact unauthorized by law or is proscribed in the constitutional sense, then the order is invalid.⁷²

First, the court examined the text of Article 86⁷³ and the testimony of experts on its interpretation. The court found that

⁶⁹ 856 F. Supp. at 882.

⁷⁰ *Id.*

⁷¹ *Id.* at 883. (quoting 753 F. Supp. at 1232-33).

⁷² *Id.* at 870.

⁷³ Article 86 reads as follows:

If a ship runs aground or sinks in a port, in an area considered as such in terms of the last paragraph of Article 33, or in a general waterway of com-

the article "is territorially based, limited to the property of Mexico, bounded by a twelve-mile border and limited to a port or in an area considered as such. Furthermore, its application is restricted to an obstacle to navigation or one which affects it."⁷⁴ The Huichol sank outside the territorial sea of Mexico, was not part of the port⁷⁵ and was not an obstacle to navigation. Thus, this article could not be a valid basis for the removal order.

Likewise, with regard to Article 263,⁷⁶ the court found that the language "provided it affects the port" was dispositive. Unlike Article 86, Article 263 does not require a hazard to navigation. However, "affects the port" in an economic sense in no way can be applied to the place where the Huichol sank, 45 miles from the coast. "Because no navigation was interrupted within the port or its vicinity, the Court [found] that the Huichol wreck did not affect the port and that Article 263 was improperly invoked."⁷⁷

As to Article 262,⁷⁸ an occurrence outside a port need not affect the port as long as it affects the crew, as it did with the

munication, in a manner that constitutes a navigational obstacle or that affects navigation, it shall be removed within the period set forth by the Navy Department, by the owner, the ship owner, or by anyone with a legal interest in the ship; all of whom are severally liable for the fulfillment of this obligation. If the ship is not removed within the established period, the Department will make a cost evaluation which will serve as the basis to make, the claim of the corresponding rescue cost pursuant to the administrative execution proceedings established in the Federal Tax Code, and the Navy Department shall proceed by itself, or with the intervention of a third party, to carry out the necessary works to effect the removal.

856 F. Supp. at 871.

⁷⁴ *Id.* at 885.

⁷⁵ Article 33 provides the following with respect to the determination whether a body of water is within a port:

The location of shorelines and of banks of rivers, lakes and estuaries that have not been declared ports, or that are under construction, will be considered ports for the application of the provisions of this Law with respect to vigilance, police and maritime accidents. *Id.* at 872.

⁷⁶ Article 263 provides:

In the event of shipwreck within port, or in the vicinity [proximity] thereof provided it affects the port, the owner or any interested company shall proceed to remove the wreck within the period set forth by the Harbormaster's office; provided, however, that the provisions of Article 47 hereof will apply in the event that there is a refusal to carry out the necessary works.

Id. at 872. Article 47 was not examined by the court.

⁷⁷ *Id.* at 886.

⁷⁸ Article 262 states that:

Huichol's sinking. However, the court found that the language regarding reporting requirements pertains to actions that the ship's Captain, as opposed to the Port Captain, must take.⁷⁹ The Port Captain, acting pursuant to Article 262, may appoint experts to investigate and turn over the results to the PRG; however, the question pivotal to resolving this maritime insurance dispute is whether he may impose the costs of removal upon a private citizen.⁸⁰

The court noted that, unlike Articles 86 and 263, Article 262 is not port centered and could conceivably be applied to the performance of "police functions within [the Port Captain's] jurisdiction as they pertain to health, sanitation and customs."⁸¹ However, given the Mexican constitution⁸² and the principle of legality,⁸³ the court found that because of the absence of a man-

[i]n the event that of shipwreck, fire, collision, running aground, or of any other accident outside a port which affects the cargo, the crew or any other persons aboard, the captain shall proceed to conduct an investigation recording the events in the navigation diary, or binacelle substituting it, with an obligation to inform the maritime authorities upon arrival to port. If the accident occurs in the port, notice will of course be given to the maritime authorities, which will proceed to conduct the corresponding investigation informing the Communications Department as soon as possible. The latter may, if it is deemed appropriate, appoint two experts who will give an opinion on the cause of the accident and on any parties presumed responsible. Once the investigation is terminated the results thereof shall be turned over to the Federal District Attorney within the term of five days.

Id. at 872.

⁷⁹ *Id.* at 886. The court further noted that it will not consider whether the Port Captain's decision was prudent or whether his investigation could have been performed more economically by divers or remote operated vehicles (ROV's). Nor will the Court's decision second-guess whether the wreck could have remained at its original location or why PEMEX was a disinterested observer to a catastrophe that occurred at or near their oil equipment. To inquire as to those matters are precisely the types of inquiry that intrude on a sister nation's sovereignty and provoke an unnecessary diplomatic incident. Goodwill and comity preclude this inquiry similar to application of the act-of-state doctrine.

Id. (footnote omitted).

⁸⁰ *Id.*

⁸¹ 856 F. Supp. at 886.

⁸² "Article 16 of the Mexican Constitution provides that 'no one may be bothered in his person, family, domicile, papers or possessions, except by means of written order issued by a competent authority providing the basis and the reasons of the legal cause for the proceedings.'" *Id.* at 874.

⁸³ The Mexican Supreme Court has said, with regard to Article 16, that all acts of authority must be properly and sufficiently based and reasoned; the former meaning, that the legal provision applicable to the case must be

date that the private citizen pay for the cost of investigation, including removal costs, the Port Captain lacks authority to order a private citizen to remove the wreck at its own expense.⁸⁴ Further, the district court held that

[b]oth the relevant facts and the law to be invoked are constitutional precepts that must be present to warrant application of a law. Here, there is no law to apply and the facts are marginally stated. The Port Captain's order that directed Protexa to remove the wreck at Protexa's expense under this provision was likewise invalid.⁸⁵

"Because the Port Captain's order was not valid as to Protexa," the court concluded, "the wreck removal engaged in by Protexa was not compulsory by law."⁸⁶

On second appeal, the court of appeals agreed with the district court's reasoning, and further rejected Protexa's argument, in reliance upon the history of the EEZ concept and its enactment into Mexican law, that the plain wording of Article 86 demonstrated the legislature's contemplation of having a "maritime zone of federal jurisdiction distinct from territorial waters," and that it intended Article 86 "to have effect in those waters wherever they may be."⁸⁷

The court of appeals found that in 1963, when the articles were written, the EEZ concept was still in a gestational stage and

mentioned in a precise manner; and the latter meaning, that the special circumstances, particular reasons or immediate causes which were taken into consideration for the issuance of the act of authority, must also be mentioned in a precise manner. . . .

Appendix to *Seminario Judicial de la Federacion* (Weekly Judicial Gazette of the Federation) 1917-1985, Third Part, Second Chamber, Number 373, at pp. 636-37. The Court also said that

the responsible authorities do not comply with the Constitutional obligation of giving the legal foundation and duly reasoning the resolutions which issue by expressing the factual reasons and the legal considerations on which they have [been] based, whenever all of the foregoing appears in a different document.

Id., Eighth Part, Thesis Common to the Plenum and Chambers, Number 153, at pp. 248-49. *Grupo Protexa*, 856 F. Supp. 874.

⁸⁴ 856 F. Supp. 887.

⁸⁵ *Id.* (footnote omitted).

⁸⁶ *Id.* at 889.

⁸⁷ 20 F.3d at 1243 (quoting *Protexa Br.* at 32).

there were no contemplated waters of federal jurisdiction other than those described in Article 1 of the 1940 Means of Communication Law, which provided the definition of "general waterway of communication" and to which explicit reference is made by Article 6 of the Navigation Law.⁸⁸

Therefore, it rejected Protexa's argument that Article 86 applied beyond Mexico's territorial waters.

IV. UNCLOS

Although UNCLOS was not cited as authority for the order and became effective after the *Huichol* sank, the court addressed the testimony given by experts on UNCLOS and Mexico's obligations under international law as they pertain to the removal of the *Huichol*.

One expert testified that local statutes are to be construed consistent with the coastal state's international obligations.⁸⁹

⁸⁸ *Id.*

⁸⁹ The rights and duties of a coastal state are spelled out in Article 56 of UNCLOS:

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and its subsoil

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

. . . .

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

Article 60 provides, in relevant part, that:

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

. . . .

(b) Installations and structures for the purposes provided for in article 56 and for other economic purposes;

(c) Installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

3. Due notice must be given of the construction of such artificial islands, installations or structures and permanent means for giving warning

If the court construes the statutes as not requiring removal, the Mexican legislature would have to enact legislation to meet its international obligations. If the statutes are applied to the exclusive economic zone (EEZ),⁹⁰ they would not violate international law "unless it interfered with another state's rights."⁹¹ Another expert testified that to apply territorial statutes to the EEZ would violate international law and further that "simply because international law does not explicitly prohibit Mexico to perform certain acts, it does not mean certain actions taken are necessarily legal."⁹²

According to one expert's testimony, the "designation of the anchorage prohibited zone, the lack of statutory authority to order wreck removal in the EEZ, and the failure to consult Panama [the flag state of the *Huichol*] are occurrences that trespass the spirit of UNCLOS."⁹³ Although another expert said that the order was consistent with Mexico's obligations under international law, the court found that "none of the recited obligations was relevant in regard to the *Huichol*."⁹⁴ The court explained:

The *Huichol* was a maintenance vessel that supported PEMEX operations. The wreck rested 1.3 nautical miles outside the eastern boundary of the anchorage prohibited area. The nearest oil pipeline was 2.5 nautical miles from the wreck of the *Huichol*. Finally, the development trend of oil platform structures was in a westward direction, away from the *Huichol* wreck. Because of the

of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. . . .

4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measure to ensure the safety both of navigation and of the artificial islands, installations and structures. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), *in* 21 I.L.M. 1261 (1982).

⁹⁰ Article 55 of UNCLOS provides that:

[t]he exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant Provisions of this Convention. *See supra* note 89.

⁹¹ 856 F. Supp 888.

⁹² *Id.*

⁹³ 856 F. Supp. 888.

⁹⁴ *Id.* at 889.

depth of the water, [an expert] testified that the wreck was not a hazard to navigation in international waters. According to [other experts], the Gulf of Mexico is littered with sunken vessels that have never been raised from their initial place of rest. Furthermore, the Huichol was resunk at a much shallower location.⁹⁵

Thus, the court concluded that even if the order cited to UNCLOS and UNCLLOS had been brought into force before the Huichol sank, it would not be applicable.⁹⁶

V. CONCLUSION

The lessons learned in *Protexa* can be applied in other maritime disasters. First, before an accident happens, one must be sure that the insurance policy provides coverage in the event that removal is determined to be necessary by the owner of the vessel. One can only guess whether Protexa's insurance broker obtained a lower premium for Protexa to pay the insurers in return for the insurers' refusal to continue such coverage provided until 1985. However, it may also be asked whether the objectively reasonable test applied by the Third and Fifth Circuits effectively inserts such a provision into every policy and nullifies reliance merely upon an order or statute requiring removal. One may wonder whether this could only lead to problems in international relations arising from noncompliance with lawful orders issued by an arm of a sovereign country. If so, did the courts give too little weight to the concern for comity?

Second it may be best to exhaust remedies available in the forum provided at the situs of the accident. Although Protexa's staff attorney thought that doing so in an Amparo proceeding would be futile because he considered the removal order validly issued and because there was no legal basis for bringing an Amparo,⁹⁷ the Court found that

Protexa should have met with the Mexican marine authorities and demonstrated that the wreck of the [Huichol], as it lay immediately after its sinking, presented no hazard to navigation, the

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 753 F. Supp. at 1226. He further concluded that seeking a stay or suspension of the order pending the outcome of an Amparo proceeding was not likely to be granted because Protexa would be unlikely to prevail on the merits and would not be able to prove irreparable harm from the failure to suspend the order. *Id.*

marine environment or to offshore activity in the Pemex oil field. Such a request, when accompanied by a well-prepared presentation by professional marine consultants, would have at least resulted in the government[']s recognizing the need to allow Protexa sufficient time to secure bids from professional salvors and very well may have resulted in a complete retraction of the Order.⁹⁸

Thus, when evaluating whether removal is "compulsory by law," it is risky not to have an experienced maritime insurance lawyer examine the decree, statute or governmental regulation and the laws cited in support so that challenges to a port captain as to the validity of the order can be made competently. Nevertheless, the *Protexa* case also demonstrates that even if this is done by a so-called expert, experts disagree and there is no assurance that a decision to go ahead with removal will be supported upon review by a United States court.

Third, resort to UNCLOS, now that it has come into force, may not be of any help to show that a sovereign's exercise of police powers over its exclusive economic zone is consistent with its international obligations, unless it can be shown that its exercise of such power is pursuant to one or more of the duties identified in Article 56 of UNCLOS. Yet, the *Protexa* case leads one to ponder whether sovereign states have authority to take actions beyond those required of them by UNCLOS and other agreements despite their interest in promoting behavior that protects the maritime environment and removes hazards to navigation, which are both in the interest of the coastal state and all those with maritime interests that transit those waters. Further evaluation by international maritime bodies of the issues addressed in *Protexa* is needed and perhaps inevitable.

⁹⁸ *Id.* at 1235.