THE PRESTIGE DISASTER AND THE PROPOSAL FOR A EUROPEAN FUND FOR THE COMPENSATION OF OIL POLLUTION DAMAGE: A MISSED OPPORTUNITY FOR THE EUROPEAN UNION?

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Abstract:
In this paper we analyze the proposal for the creation of a European fund for the compensation of oil pollution damage. We argue that experience from the accident of the Prestige tanker off the Spanish coast in 2002 made it clear that existing international liability and compensation mechanisms were insufficient. The disaster added momentum to the proposal for the creation of an intermediate tier between the national and the international regimes. However, the proposal was dropped in 2004. In this paper we analyze the causes of the proposal demise and whether a similar opportunity is likely to arise in the future.

Keywords: European Union; maritime transport; pollution; oil; IOPC Fund; COPE Fund.

JEL Classification: F51; H87; L98; R42; Q52.

INTRODUCTION

On 19 November 2002, the Prestige tanker, registered in Bahamas, split in two and sank 260 km away from the Spanish port of Vigo. The oil spill was estimated at 25 thousand tons. The oil spilled travelled with the streams for a long time, covering a long distance. The oil polluted the Western coast of Galicia and, to a lesser extent, some coastal areas of Portugal and, eventually, the North of Spain and France. The spill caused important damages and required important cleaning operations at sea and on the coast in the three countries concerned, being Spain the most affected (González Laxe and Martín Palmero, 2009).

The great public opinion and media repercussion of the disaster and the subsequent judicial cases, some of which were not yet resolved several years later, highlight the need to analyze the principles of the financing of damages or negative externalities of maritime pollution.

In this paper we will argue that due to the transnational nature of oil spills, compensation mechanisms can be better dealt with by supranational organizations such as the European Union than by individual member states. We also argue that existing international compensation mechanisms are insufficient. In order to estimate the financial expenses generated by the Prestige disaster, we will use information from the International Oil Pollution Compensation Funds (IOPC Funds).

We will also argue that the Prestige disaster created a window of opportunity to develop such compensation mechanisms at EU level (see Kingdon, 1995). Indeed, there is evidence that financial mechanisms have historically developed as a result of similar environmental disasters, and oil spills have been a paradigm of this trend. Thus, it was not until the accident of the Torrey Canyon oil tanker off the French coast in 1967, and having regard to the insufficiency of existing rules, that the international maritime community took the first steps towards uniform international rules on financial compensation.

The rest of this paper is divided in three sections. In section two, we will analyze the existing international compensation mechanisms at the time of the Prestige disaster and argue that they were insufficient. In section three, we will argue that the prestige disaster created a window of opportunity for the development of financial compensation mechanisms. In section four, we will analyze the actual reaction of the European Union to the Prestige disaster and its attempts to develop a European compensation fund for oil pollution damage. In the last section we will conclude by analyzing the outcome of the reform and the reasons for its failure.

1. THE INSUFFICIENCY OF EXISTING FUNDS

The Prestige disaster raised questions about the effectiveness of existing international regimes for the compensation of oil damages (Faure and Hui, 2003). In this section we will try to show that those mechanisms were insufficient. In order to do so, we will present data on the claims for damages and the payments actually made. One must keep in mind that the real costs, in terms of lucrum cessans, social and environmental costs may be much higher than the figures indicated by the claims, because of the narrow definition of damage (see Mason, 2003). But the measure proposed is useful as an indicator of the relative sufficiency or insufficiency of the funds, as well as the identity of the actors (national or supranational) that have eventually paid for the damages of the oil spill.

As far as Spain is concerned, and in particular the costs considered eligible by the IOPC under the 92 Fund, on 7 May 2007, 839 claims had been received by the IOPC office in A Coruña, which amounted to a total of 610.8 million euros. Among those are nine claims by the Spanish government between October 2003 and October 2006 for a total of 559.4 million euros, which were considered as eligible costs by the IOPC in order to calculate the Spanish participation from the 92 Fund. Those claims related to the cleaning costs, extraction of oil from the vessel, compensations paid on the basis of national legislation, tax benefits offered to firms affected by the spill, administration costs, communication and costs incurred by local administrations and paid by the government.

Table no. 1. Claims for compensation of eligible costs under the IOPC 92 Fund

Category	Number of claims	Amount claimed (in million euros)
Material damages	232	2.1
Cleaning	17	3.9
Aquaculture	14	19.1
Fisheries	180	3.6
Tourism	14	0.7
Fish processing and commercialization	299	20.2
Other	74	1.8
Spanish government	9	559.4
Total	839	610.8

Source: IOPC.

As shown by the categories included in Table no. 1, eligible costs under the 92 Fund do not include other costs of more complex valuation (see Carson et al., 2003). Alternative ways to quantify the costs of the Prestige disaster from different perspectives can be found in Garza-Gil et al. (2006a), Garza-Gil et al. (2006b), Loureiro et al. (2006) and Surís-Regueiro et al. (2007). Indeed, the 92 Fund has been criticized for its lack of a social dimension. The Spanish government incurred in a total of 374.6 million euros in costs that were not eligible by the 92 Fund. By adding the eligible and non-eligible costs we obtain a total of 985.3 million euros in damages.

Table no. 2. Eligibility of costs under the IOPC 92 Fund, by member state

Country	*Eligible cost*		*Non eligigle cost*		*Total*	
Spain	610,8	(61,99)	374,6	(38,01)	985,3	(100,00)
France	118,5	(79,48)	30,6	(20,52)	149,1	(100,00)
Portugal	4,0	(93,02)	0,3	(6,98)	4,3	(100,00)
Total	733,3	(64,40)	405,5	(35,60)	1138,7	(100,00)

Amounts in million euros (percentages within parentheses).

Source: IOPC, European Commission and public administrations.

The situation was similar in other EU member states affected by the oil spill such as France or Portugal. As

Table no. 2 shows, non eligible costs represented an important share of the total costs incurred by the governments. In France, non eligible costs amounted to 30.6 million (20.5% of the total). In Portugal, they were 0.3 million (nearly 7% of the total).

Table no. 3. Origin of funds for compensation costs of the Prestige disaster in Spain

Country	*IOPC 92 Fund*		*European Commission*		*State*		*Total*	
España	113,8	(11,55)	85,3	(8,66)	786,2	(79,79)	985,3	(100,00)
Francia	18,1	(12,14)	8,0	(5,37)	123,0	(82,49)	149,1	(100,00)
Portugal	0,7	(16,28)	0	(0,00)	3,6	(83,72)	4,3	(100,00)
Total	132,6	(11,64)	93,3	(8,19)	902,8	(79,28)	1138,7	(100,00)

Amounts in million euros (percentages within parentheses).
Source: IOPC, European Commission and public administrations.

As far as the origin of funds is concerned, Table no. 3 shows the distribution of agents that participated in the funding of the compensation payments. In Spain, the 92 Fund paid 113.8 million (11.6%), the European Commission 85 million (8.6%) and the remaining 786.2 million (79.8%) were paid by the Spanish government. In France, the 92 Fund paid 18.1 million (12%), the European Commission paid 8 million (5%) and the French government the remaining 123 million (82%). Finally, in Portugal it was only the 92 Fund and the government that paid the compensations, with 0.7 million paid for by the 92 Fund (16.28%) and the remaining 3.6 million (83%) paid by the government.

All in all, the 92 Fund has been insufficient to cover the compensation costs of the Prestige disaster, as it has paid only 11.64% of the 1138.7 million euros spent in the three countries affected. The amount awarded by the European Commission 93.3 million covered only 8%. The remaining 79.28 percent had to be covered by national governments. Moreover, the supplementary fund of 750 million DEG (around 850 million euros) would also be insufficient to cover the cost of a similar disaster nowadays, especially if we take into account that the overall estimate given above of 1138.7 million euros is a modest one that only covers part of the real costs of the disaster, which extend beyond the people more directly affected.

2. THE PRESTIGE DISASTER AND PROPOSAL FOR A EUROPEAN COMPENSATION FUND FOR OIL POLLUTION

The magnitude of the Prestige oil spill and the social mobilization that it unfolded put maritime transport of hydrocarbons in the headlines of a great number of media in Spain and worldwide. The existing international compensation mechanisms, as shown on the previous section, also proved to be insufficient. In this paper, we argue that the Prestige disaster created a window of opportunity to develop such compensation mechanisms at EU level (see Kingdon, 1995).

Indeed, there is evidence that legislation has historically developed as a result of similar environmental disasters, and oil spills have been a paradigm of this trend. Besides the Torrey Canyon accident mentioned in the introduction, the American Oil Pollution Act of 1990 (OPA90) was established as a response to public opinion and media pressure generated by the Exxon Valdez disaster in Alaska in 1989 (Kim, 2002; Kurtz, 2004). The Act established its own compensation fund, the double hull requirement for tankers and the requirement for vessels operating on American waters to hold a certificate of financial liability showing that they have sufficient funds to assume potential liabilities. The act also showed that it was possible to upgrade the regulation by the International Maritime Organization (IMO) and its financial compensation mechanisms. In this way, it was a precedent for European regulation in the field following the Prestige disaster.

European legislation has also evolved in response to similar accidents, such as the Amoco Cadiz and the Erika accidents off the Frencho coast, in 1978 and 1999, respectively. However, it

has never developed legislation of its own in the line of the American Oil Pollution Act. Instead, it has relied on international conventions (Faure and Wang, 2004).

The Prestige disaster added to the pressure for more stringent regulation at EU level, which had already become apparent with the Erika accident off the coast of France in 1999. Zero-risk is not an option in the field of maritime transport, but it was clear the there was room to improve the existing prevention and compensation mechanisms. EU institutions such as the European Commission or the European Parliament were aware of this pressure, so the issue re-emerged with force on their agendas immediately after the Prestige disaster.

One of the most important initiatives in this direction aimed at the establishment of a fund for the compensation of oil pollution damage in European waters and related measures, the so-called COPE Fund. The measure was contained in a European Commission proposal for a Regulation of 6 December 2000, under the codecisión procedure. The proposal was part of the second set of Community measures on maritime safety following the sinking of the oil tanker Erika (the first set of measures was adopted by the Commission on 21 March 2000). In this section we will present the main events in the life of this proposal based on data from the European Parliament's Legislative Observatory (OEIL).

2.1. Original Commission proposal

The Commission's proposal aimed to complement the existing international two-tier regime on liability and compensation for oil pollution damage by tankers by creating a European supplementary fund, the COPE Fund, to compensate victims of oil spills in European waters. The COPE Fund would only compensate victims whose claims have been considered justified, but who have nevertheless been unable to obtain full compensation under the international regime, owing to insufficient compensation limits. The current ceiling is EUR 200 million.

Compensation from the COPE Fund would thus be based on the same principles and rules as the current international fund system, but subject to a ceiling which was deemed to be sufficient for any foreseeable disaster, i.e. EUR 1 000 million. The COPE Fund could also be used to speed up the payment of full compensation of victims.

The COPE Fund was to be financed by European oil receivers. Any person in a Member State who received more than 150 000 tonnes of crude oil and/or heavy fuel oil per year would have to pay its contribution to the COPE Fund, in a proportion which corresponded to the amounts of oil received.

The COPE Fund would only be activated once an accident that exceeded, or threatened to exceed, the maximum limit provided by the IOPC Fund had occurred in EU waters.

The proposed regulation, in addition to the provisions on liability, included an article introducing financial penalties for grossly negligent behaviour by any person involved in the transport of oil by sea. This penalty would be imposed by Member States outside the scope of liability and compensation and would thus not be affected by any limitation of liability.

2.2. Council opinion

On 20 December 2000, under French Presidency and at the end of a wide-ranging discussion, the Council took note of the Commission's submission of its "second ERIKA package" and of delegations' comments on it.

At the end of its discussions on maritime safety, the Council emphasised the need to properly implement and enforce Port State Control obligations and the need to harmonise such controls at a high level in the Community. It welcomed the prospect of being able to ban sub-standard ships from Community ports as from the entry into force of the necessary legal instrument. It also called on Member States to pursue their joint cooperation efforts with a view to increasing the quality and availability of information on maritime traffic by submitting appropriate proposals to the IMO and by setting up a regional information system between their processing centres in order to make as effective as possible the procedures for maritime traffic surveillance and for the prevention of risks to shipping and the environment. The Council also invited the Commission to

draw up regularly an inventory of the international and Community provisions of maritime social legislation applied by Member States. The relative importance of these issues seems to indicate that the creation of a COPE Fund was not a priority for a majority of member state governments.
Finally, and most importantly, the Council underlined the need to ensure a proper and, as far as possible, global regime for liability and compensation in cases of pollution damage resulting from contamination by petroleum products or other noxious and hazardous substances transported by ship. This was an early indication that the Council was not determined to the creation of an intermediate tier of regulation of liability and compensation for oil damage at European level, preferring instead that these issues remained at the level of international conventions.

2.3. European Parliament opinion

On 29 May 2001, the committee responsible in the European Parliament adopted the report by Alain ESCLOPE (EDD, F) broadly approving the proposal subject to a number of amendments (codecision procedure, 1st reading). While it welcomed the proposal in principle, the committee wanted to make the rules stricter. For example, it felt that all operators involved in the transport of oil - and not only oil receivers as the Commission had proposed - should be required to make financial contributions. In particular, it believed that ship owners, who bore primary responsibility for the condition of their vessels, should also be made liable. To this end, it specified that every ship sailing in European territorial waters or marine economic interest zones should be able to prove that it held a financial guarantee or else pay a heavy financial penalty.

On 14 June 2001, the European Parliament endorsed the report and adopted a number of amendments to tighten the legislation. Despite strong resistance by Commissioner Loyola de PALACIO, MEPs voted for the regulation to cover bunker oil and hazardous and noxious substances, as the Bunker Convention 2001 and the Hazardous and Noxious Substances Convention 1996 had not been ratified or implemented. In addition, Parliament wanted the COPE Fund to provide for advance provisional payments within six months because victims were often left in difficult circumstances whilst waiting for the first payments to come through. Moreover, not only oil receivers but all operators involved in the transport of oil, including ship owners, should contribute to the compensation fund, according to the House.

2.4. Modified Commission proposal

On 12 June 2002, the Commission agreed to a number of amendments which would either clarify the text or the scope of the regulation or otherwise constitute editorial improvements. Similarly, it accepted several amendments that would provide useful additions to the text. These concerned the clarification of the nature and activities of the COPE fund, its link to the IOPC Fund, the facility to provide advance payment and the preparation of a progress report on the developments in maritime liability and compensation at the international level.

The Commission did however not accept the amendments seeking to extend the scope of the COPE Fund to cover other forms of pollution than oil pollution by tankers. While the improvement in itself of the compensation regime for pollution damage caused by hazardous and noxious substances was an objective which was supported, the Commission considered that the regulation under consideration was inappropriate to serve that function. The purpose of the COPE Fund was to place an additional compensation layer on the existing international compensation regime, and in this way to ensure compensation for expensive accidents in EU waters. It complemented and built upon the international regime by creating a third layer which was closely linked to the two existing ones (CLC and IOPC Fund). The Commission did, however, agree that there is a need to put in place a regime ensuring proper compensation for marine pollution caused by other substances than oil as soon as possible.

The Commission did not agree to the amendments aiming at introducing an obligation for ship owners to pay at part of the compensation. These amendments raised problems of international law. The existing international legal regime (the CLC convention) did not allow additional compensation claims to be placed on the ship owner. While the Commission agreed with the longer

term aim that owners should make a more substantial contribution in the payment, in particular if the accident was due to their gross negligence, requiring ship owners to participate in the compensation of damage would be in conflict with the international rules as they stood at the moment. The Commission proposed to address this issue at the revision of the international system. In order to make ship owners more responsible and subject to penalties in case of negligence, the Commission's proposal included a financial penalty to be placed on any party which has caused or contributed to the accident by gross negligence.

The Commission also rejected the amendment aiming at extending compensation of environmental damage and the one proposing to limit the period of collection of the funds to the COPE Fund from one year to six months.

2.5. Council conclusions

On 9 December 2004, following an exchange of views on civil liability and compensation for victims in the event of oil pollution at sea, the Presidency reiterated its former conclusions on maritime safety, most particularly those adopted in the aftermath of the Prestige accident both by the TTE Council and the European Council.

It also stressed, in the interest of victims, the need to ensure appropriate compensation for damage caused by oil pollution from ships by actively working to ensure that effective financial responsibility is exercised on the part of those involved in transportation of oil by sea, and the need for appropriate revision of the relevant provisions of the 1992 Civil Liability (CLC) and 1992 International Oil Pollution Compensation Fund (IOPCF) Conventions. It also welcomed the ongoing talks on burden sharing and encourages industry to pursue these in the interest of all. Finally, the Council urged all Member States to ratify the IOPCF Supplementary Fund Protocol of May 2003, if they had not yet done so and to seek a common EU approach ahead of the forthcoming intersessional IOPCF Working Group meeting in February 2005.

3. A MISSED OPPORTUNITY FOR THE EU?

In this paper we have analyzed the international regime for oil pollution liability and compensation, and we have come to the conclusion that the system is improvable. As the figures in section two have shown, international liability and compensation amounts are blatantly insufficient. The experience from the Prestige disaster shows us that, because of the isufficiency of the system, it is national governments that end up paying for the damages, which is in contrast with the polluter-pays principle.

At the time of the Prestige disaster, the EU was already working on a set of measures related to oil pollution, the so-called Erika packages. Those packages included the creation of a European fund for compensation for oil pollution damage by tankers. The Prestige disaster made it apparent that there was a need for a firm commitment, inexistent until that time, by member state to apply the Erika packages urgently and without exhausting the previously specified deadlines.

Two years after the Prestige disaster, the initiative lost momentum and the efforts were redirected towards the expansion of the existing international liability and compensation regime. Thus, the EU gave up its ambition to create an intermediate tear or regulation between the international and the member state level in the lines of the American Oil Pollution Act.

Amongst the factors that contributed to the failure of the proposal were the direct influence and indirect political pressure of important lobbies and sectoral interest groups, which succeeded in weakening the most important and innovative elements of the proposal for a COPE fund. As far as the maritime sector is concerned, of special relevance were a number of ship operator groups such as INTERTANKO and BIMCO, and oil companies with an interest in the shipment and terminalling of crude oil, such as OCIMF. These groups were particularly critical of the initiatives, which they qualified as disproportionate, impulsive and out of touch with the reality of the sector.

Another factor that may have influenced the demise of the proposal for the creation of a European fund is the end of tenure of Spanish politicial Loyola de Palacio as vice-president of the

European Commission in charge for transport. She was one of the main supporters of the proposals immediately after the Erika disaster in 1999, and she was proved right then the Prestige sank off the Galician coast three years later, in 2002.

But the main reason for the failure of the proposals was the lack of support in the Council of the EU, which was evident from its first opinion on the proposals on 20 December 2000. The interest of European commissioner Loyola de Palacio and the added momentum from the Prestige disaster were not enough to change this. The main reason is that the creation of a European fund financed from contributions by recipients of oil has a heavy redistributive component, from EU oil consumers to the member states potentially affected by accidents. The result of this is that although there will be a small number of member states in favour of the fund, headed by France and Spain, there will also be a majority of member states that are reluctant to pay the bill of a proposal from which they have little to gain. The requirement from an oversized majority of votes in the Council (over 70%) makes things even more difficult.

Given the fact that the benefits will be concentrated in a few member states, whereas the costs will be more thinly spread, the only way for the proposal to succeed would be to include it in a broader package deal. Horse trading or logrolling though package deals are a known way of ugrading the European interest beyond the lowest common denominator of the member state governments (see Moravcsik, 1991; Lodge, 1998; Crombez, 2000). But the Erika II package was not broad enough, as it was too focused on maritime safety to be able to gather the support needed for the proposal to succeed.

A missed opportunity for such a package was the enlargement of the EU in 2004 and 2007. Such enlargement also means that the gathering of the necessary majority for similar measures will be even more difficult in the future, not only because of the increase in the number of member states, but also because the center of gravity of the Union moves eastward and away from the coast. The new members are less interested about ocean pollution.

The upgrade of the international and compensation mechanisms, particularly the expansion of the IOPC fund, will also make it more difficult for similar proposals to succeed in the future. The reason is that it shifts the status quo closer to the member state preferences, thereby reducing the margin of manoeuvre of the agenda setter, be it the European Commission or the Council Presidency. The Erika and Prestige disasters created a window of opportunity for the creation of a European compensation fund, and it is possible that a similar catastrophe will put the issue back on the agenda. But the options for success are likely to be fewer next time.

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