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THE *ERIKA* JUDGMENT—ENVIRONMENTAL LIABILITY AND PLACES OF REFUGE: A SEA CHANGE IN CIVIL AND CRIMINAL RESPONSIBILITY THAT THE MARITIME COMMUNITY MUST HEED

Vincent J. Foley
Christopher R. Nolan

TULANE UNIVERSITY SCHOOL OF LAW

The *Erika* Judgment—Environmental Liability and Places of Refuge: A Sea Change in Civil and Criminal Responsibility that the Maritime Community Must Heed

Vincent J. Foley*
Christopher R. Nolan†

 Partner, Holland & Knight LLP in the Maritime Practice Group. J.D. 1996 *cum laude*, Tulane University School of Law; B.S. 1991 *cum laude*, U.S. Merchant Marine Academy. The opinions expressed in this Article are those of its authors and do not necessarily reflect the opinions of Holland & Knight LLP or its clients.

† Senior Associate, Holland & Knight LLP in the Maritime Practice Group, with emphasis on international legal disputes. J.D. *cum laude*, Hofstra University School of Law; B.A. *cum laude*, Binghamton University. The coauthor would like to thank his wife Kristen for her support, patience, and encouragement. He similarly thanks his parents, Robert and Susan Nolan, and his sister, Vivian Nolan.

Most professionals who went aboard or got close to the oil tanker thought it was in an apparently good condition or observed no major abnormalities which deserved to be reported.[1]

I. INTRODUCTION

The safety chain concept is widely recognized throughout the maritime industry.[2] All entities along the chain must work together in order to prevent casualties resulting in loss of life, loss of property, and debilitating environmental harm. If one of the links in the chain fails, such as the shipowner, the operator and manager, the classification society,[3] the vessel's flag state, the port state, or the insurance

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1. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 11ème ch., Jan. 16, 2008, No. 9934895010, slip op. at 141 (*Erika*), *translated in* The LanguageWorks, Inc., Erika Judgment 141 (Apr. 22, 2008) (unpublished English language translation, on file with authors) (Erika Judgment).

2. Although there is no one person or entity that created the notion of a safety chain in the maritime field, the concept behind it is encompassed in the International Safety Management Code (ISM Code). The purpose of the ISM Code is to "provide an international standard for the safe management and operation of ships and for pollution prevention." INT'L MAR. ORG. [IMO], INTERNATIONAL SAFETY MANAGEMENT CODE pmbl. 1 (2002), *available at* http://www.imo.org/HumanElement/mainframe.asp?topic_id=287 [hereinafter ISM CODE]; *see also* PHIL ANDERSON, ISM CODE: A PRACTICAL GUIDE TO THE LEGAL AND INSURANCE IMPLICATIONS 20 (2d ed. 2005). A copy of the ISM Code may be found at the Web site of the International Maritime Organization (IMO). The IMO is an organization constituted to "develop and maintain a comprehensive regulatory framework for shipping." IMO, About IMO, http://www.imo.org (follow "About IMO" hyperlink) (last visited Sept. 28, 2008). The IMO's objectives include "safety, environmental concerns, legal matters, technical co-operation, maritime security and the efficiency of shipping." *Id.*; *see also* ISM CODE, *supra* note 2. The IMO developed the ISM Code. *See* ANDERSON, at 15-19.

3. While most of the entities in the "chain" are known or self-explanatory, the same may not be said for classification societies.

> A classification society sets standards for the quality and integrity of vessels and performs surveys to determine whether vessels are in compliance with the classification society's rules and regulations, national laws, and international conventions. If a vessel passes inspection, the classification society either issues a certificate attesting to the vessel's conformity with the applicable rules, regulations, laws, and conventions or endorses an existing certificate with a visa reflecting the survey. If the vessel fails to pass the inspection, the classification society either does not issue the certificate or withdraws the existing certificate.

Carbotrade S.p.A. v. Bureau Veritas, 99 F.3d 86, 88, 1997 AMC 98, 99-100 (2d Cir. 1996); *see also* Machale A. Miller, *Liability of Classification Societies from the Perspective of United States Law*, 22 TUL. MAR. L.J. 75, 75 (1997) ("Classification societies serve as the unofficial policemen

underwriter, one of the other links in the chain may theoretically catch the error and be able to correct it.[4] But when multiple links in the chain are weakened, or rusted, or break all at the same time, a "perfect storm" of misfeasance, nonfeasance, and even malfeasance in connection with one vessel can result in enormous far-reaching damage and liability. And, it did—with the ERIKA in December 1999.[5]

The ERIKA was "a nearly twenty-five year old tanker, Flying a Maltese flag" and controlled by two Liberian companies.[6] The technical manager of the ship was an Italian company, and the vessel had been issued a class certificate which was renewed on November 24, 1999.[7] The vessel was time chartered by a Bahamian company to an intermediary company and voyage chartered by the intermediary to a subsidiary of a large French-based oil company.[8] The ERIKA was loaded with a cargo of 30,884.471 metric tons of fuel oil at the port of Dunkirk and was fixed for destination as "per order, in an Italian port."[9]

The ERIKA departed the port of Dunkirk on her final voyage on December 8, 1999.[10] The tanker experienced unfavorable weather conditions almost immediately upon leaving the port and by December 11 issued her first distress message while in the Bay of Biscay heading towards the port of Donges.[11] A little before 6:00 a.m. on December 12, 1999, the ERIKA issued a new distress message that the ship was breaking apart.[12] The crew was safely evacuated.[13] At that time, the

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of the maritime world, using independent verification processes to ensure that seaworthy vessels are in service.").

4. ISM Code refers in many instances to responsibility of the "Company." "Company" is defined as meaning the

> owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the Code.

ISM CODE, *supra* note 2, § 1.1.2. In Dr. Anderson's book, he devotes a chapter to the "key players" in the ISM Code safety process, including the flag state, port state, owners, operators, and the master of the vessel. ANDERSON, *supra* note 2, at 29-92.

5. *See* International Oil Pollution Compensation Funds, http://www.iopcfund.org/erika.htm (last visited Sept. 28, 2008) (addressing the ERIKA casualty, environmental damage, and the litigation arising therefrom).

6. *The Erika*, No. 9934895010 at 86, Erika Judgment at 86.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

product spilled was estimated to be seven to ten thousand tons.[14] Due to the weather conditions,[15] the oil was directed towards the south of the Bay of Biscay and polluted over 400 kilometers of coast.[16]

After eight years of litigation and a four-month trial involving scores of witnesses, voluminous documentary evidence, and testimony from individual experts as well as detailed submissions from judge-appointed boards of inquiry, the *Erika* judgment was rendered on January 16, 2008.[17] In an extraordinary 278-page opinion, the court meticulously reviewed the history of ownership, operation, management, inspections, and trading patterns of the ERIKA and extended criminal and civil liability for oil pollution beyond the traditionally liable shipowner to include the vessel's classification society and her oil company charterer.[18] The court found culpable conduct by each of these maritime safety-chain entities and found that this conduct caused or contributed to the oil pollution.[19] The court's analysis of the repair history further confirmed that the ERIKA's weakened condition prior to departure from the port obviated any consideration of a place of refuge.[20]

The court held the shipowner and classification society were criminally and civilly liable, finding they had deliberately acted together to reduce the amount of steel used for structural repairs in order to save costs at the expense of jeopardizing the safety of the ship, her crew, and the marine environment.[21] The oil company was also liable for its negligence in chartering a vessel far beyond her intended life expectancy to transport the most dangerous and persistent oil products.[22]

The analysis of the legal and proximate causes of the loss of the oil tanker ERIKA was significant.[23] Specifically, the *Erika* court held that the shipowner could not have been unaware that the minimal steel repairs jeopardized the safety of the ship creating the severe risk of an accident at sea.[24] The same criticism was directed at the classification society's inspector, who had directly participated in approving the thickness

14. *Id.*
15. *Id.* at 87. Erika Judgment at 87.
16. *Id.*
17. *Id.* at 1, 3, Erika Judgment at 1, 3.
18. *Id.* at 101-07, 131-38, 186-89, 207, 213, 217, Erika Judgment at 101-07, 131-38, 186-89, 207, 213, 217.
19. *Id.* at 207, 212-13, 217, Erika Judgment at 207, 212-13, 217.
20. *Id.* at 190, Erika Judgment at 190.
21. *Id.* at 205-14, Erika Judgment at 205-14.
22. *Id.* at 214-17, Erika Judgment at 214-17.
23. *Id.* at 205-17, Erika Judgment at 205-17.
24. *Id.* at 207, Erika Judgment at 207.

measurements and retained the sole contractual power to grant a temporary classification certificate.[25] The classification society and shipowner worked hand in hand to obfuscate the true condition of the vessel.[26] Both were held accountable for neglecting their very serious duties to determine, monitor, and approve necessary repairs that would maintain the safety and structural integrity of the vessel.[27]

In a stinging rebuke to classification societies, who have traditionally avoided liability by pointing to the shipowner as having a nondelegable duty to maintain the vessel in a seaworthy condition, the *Erika* court exposed the unscrupulous practice of manipulating steel thickness measurements to reduce structural repairs and save costs on shipyard bills.[28] This critical process was supposed to be closely controlled by the classification society.[29] Notwithstanding "serious anomalies" in the thickness measurements, the classification society's inspector granted a certificate to the ERIKA.[30] The classification society's complicity had given the shipowner wide latitude to manipulate the system of approvals needed for the ERIKA to obtain her classification certificate.[31]

The oil company's voluntary vetting process was also examined at length.[32] While the oil company's vetting inspection system could not detect structural deficiencies, the court held the oil company to be "imprudent" in not recognizing the increased dangers associated with approval and use of an aged ship that had several management, ownership, and classification society changes.[33] The imprudence in ignoring these commercial factors established the necessary causal link between the oil company, the vessel casualty, and the resulting pollution.[34]

The authors consider this case to be a groundbreaking departure from well-entrenched principles of liability that have limited exposure for pollution liabilities to the shipowner and its insurers. Courts have shown a determined reluctance to hold classification societies responsible for

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 204, Erika Judgment at 204.
30. *Id.* at 205, Erika Judgment at 205.
31. *Id.* at 213, Erika Judgment at 213.
32. *Id.* at 122-31, Erika Judgment at 122-31.
33. *Id.* at 217, Erika Judgment at 217.
34. *Id.*

approving deficient repairs to ship structures that allow a ship to continue carrying oil cargos despite a dangerously weakened structural condition.[35] But make no mistake, this narrow view of classification liability has been shattered by the *Erika* court's ruling. This is also the first significant extension of liability to a charterer, an entity that is not involved with any maintenance or repair of the vessel. Charterers are "on notice" that by simply hiring a problem ship, they could be exposed to liability for the wrongful and criminal conduct of others. In particular, the *Erika* court's holding should be considered a stern warning to shipowners, managers, classification societies, and oil companies alike: adhere to safe shipping practices or face criminal charges and potentially limitless civil liability for endangering seafarers and causing harm to the environment.

This Article will examine the legal issues underlying the *Erika* decision from a civil and criminal liability standpoint and examine applicable U.S. law with respect to these issues. It will also examine the reasonableness of the *Erika* court's extension of liability beyond the shipowner to both the vessel's classification society and the oil company charterer in the context of statutes and cases concerning marine-based oil spills in the United States. Finally, this Article will consider place-of-refuge issues addressed by the *Erika* decision and application of this place-of-refuge analysis in the context of applicable guidelines, international conventions, and U.S. law.

II. LIABILITY FOR OIL POLLUTION DAMAGE TO THE ENVIRONMENT CAUSED BY VESSEL CASUALTIES

There are two major oil spill liability and compensation schemes. The Oil Pollution Act of 1990 (OPA),[36] applicable in U.S. waters,[37] is the legislation that created a comprehensive liability and compensation

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35. *See* Hannu Honka, *The Classification System and Its Problems with Special Reference to the Liability of Classification Societies*, 19 TUL. MAR. L.J. 1, 13-30 (1994) (addressing cases in the United States and England that traditionally limited a classification society's liability through "exemption clauses, legislative immunity, general contract law, and tort law").

36. Oil Pollution Act (OPA), 33 U.S.C. §§ 2701-2720 (2000).

37. Section 2701(21) defines "navigable waters" as "the waters of the United States, including the territorial sea." OPA § 2702(a) makes the statute applicable in the United States to "the navigable waters or adjoining shorelines or the exclusive economic zone." The exclusive economic zone begins at the outer limit of the territorial sea and extends 200 miles from the baseline of the coastal state. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, arts. 55, 75 [hereinafter UNCLOS]; Presidential Proclamation 5030, 1983, 48 Fed. Reg. 10,605 (Mar. 10, 1983).

scheme in which a "responsible party" is strictly liable for removal costs and damages caused by an oil spill. "In the case of a vessel," the "responsible party" means "any person owning, operating, or demise chartering the vessel."[38] The second major scheme, the International Convention on Civil Liability for Oil Pollution Damage (CLC), applies in most other nations.[39] Under the CLC, the shipowner and its insurer are responsible for oil pollution damage, though they are entitled to limit their liability for CLC-covered claims.[40] In addition, the CLC excludes claims against certain other maritime entities through channeling provisions[41] to ensure that the shipowner remains solely responsible in the first instance.[42]

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38. 33 U.S.C. § 2701(32).

39. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3,
9 I.L.M. 45, as *amended by* the Protocol of 1992 To Amend the International Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, 1956 U.N.T.S 255, *available at* http://www.iopcfund.org/npdf/conventions%20English.pdf [hereinafter CLC 1992].

40. *Id.* art. III(1); *see also* COLIN DE LA RUE & CHARLES B. ANDERSON, SHIPPING AND THE ENVIRONMENT 96 (1998).

41. The concept of "channeling" is recognized in the CLC in order to protect entities such as the servant and agent of the shipowner, the pilot, charterer, persons performing salvage operations, and persons taking preventative measures (along with certain of their servants and agents) from negligent acts during the course of the casualty in question. *See* CLC 1992, *supra* note 39, art. III(4)(a)-(f); *see also* DE LA RUE & ANDERSON, *supra* note 40, at 98. One of the reasons for channeling liability to the shipowner is to avoid having these entities obtain separate insurance coverage for liability from a casualty. *See* DE LA RUE & ANDERSON, *supra* note 40, at 97.

42. *See* Reino de Espana v. Am. Bureau of Shipping, Inc., 528 F. Supp. 2d 455, 457-60, 2008 AMC 83, 85-89 (S.D.N.Y. 2008) (analyzing the channeling provisions of the 1992 CLC and becoming the first court ever to find them applicable to classification societies in the context of the U.S. litigation arising out of the M.T. PRESTIGE oil spill casualty); *see also In re* Oil Spill by "Amoco Cadiz" off the Coast of Fr. on Mar. 16, 1978, MDL Docket No. 376, 1984 U.S. Dist. LEXIS 17480, at *129, 1984 AMC 2123, 2190 (N.D. Ill. Apr. 18, 1984) (finding that the 1969 CLC was not applicable to the litigation arising out of the AMOCO CADIZ oil spill casualty and that assuming arguendo if it was, numerous entities were not servants or agents of the shipowner and thus not immune from liability). The authors of this Article, along with other colleagues, have appeared as counsel for plaintiff Reino de Espana, the Kingdom of Spain, in the above-referenced *Prestige* litigation against the American Bureau of Shipping, a classification society, and its alter-ego entities. The district court's January 2, 2008, opinion noted above is currently on appeal to the United States Court of Appeals for the Second Circuit. The statements and observations made herein are those of the authors in their individual capacities and not necessarily those of the Kingdom of Spain.

A. *The U.S. Regime—OPA's Oil Spill Liability Compensation Scheme*

OPA was designed to impose a comprehensive regulatory scheme on the maritime industry to address, among other things, liability for cleanup, removal, and damages issues in the aftermath of an oil spill in U.S. waters.[43] In addition to creating a civil liability scheme, OPA strengthened the provisions of related statutes, including the Federal Water Pollution Control Act (FWPCA), the Clean Water Act (CWA),[44] the Deepwater Port Act of 1974 (DWPA),[45] the Intervention on the High Seas Act (IHSA),[46] the Ports and Waterways Safety Act (PWSA),[47] and the Act To Prevent Pollution from Ships (APPS).[48] Pursuant to OPA, a "responsible party" (or parties) is designated to be liable initially for the discharge of oil and resulting cleanup, removal costs, and damages.[49] Responsible parties are jointly and severally liable for cleanup and removal costs.[50]

Under OPA, each responsible party for a vessel or facility from which oil is discharged or which possesses substantial threat of discharge is liable for removal costs and damages.[51] The definition of "responsible party" is intended to include owners, operators, and managers.[52] With regard to the definition of "operator," the United States Coast Guard regulations concerning financial-responsibility requirements provide that traditional time charterers and voyage charterers are not intended to be included in the definition of responsible parties.[53] The liability of classification societies is not directly addressed by OPA. With respect to charterers or classification societies, however, OPA does permit a

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43. Oil Pollution Act (OPA), 33 U.S.C. § 2702(a), (b)(1)-(2); *see also* DE LA RUE & ANDERSON, *supra* note 40, at 60-61.
44. 33 U.S.C. §§ 1251-1387.
45. *Id.* §§ 1501-1524.
46. *Id.* §§ 1471-1481.
47. *Id.* §§ 1221-1236.
48. *Id.* §§ 1901-1912.
49. *Id.* § 2702(a).
50. *Id.* § 2701(17) (referring to section 311 of the CWA); United States v. M/V Big Sam, 681 F.2d 432, 439, 1983 AMC 2730, 2740 (5th Cir. 1982).
51. 33 U.S.C. § 2702(a).
52. *Id.* § 2701(32).
53. Final Rule, 59 Fed. Reg. 34,210, 34,217-18 (July 1, 1994); *see also* Charles Anderson & Colin de la Rue, *Liability of Charterers and Cargo Owners for Pollution from Ships*, 26 TUL. MAR. L.J. 1, 9-10 (2001) (addressing the responsibilities of time and voyage charterers with respect to OPA 90 and the CLC, as well as federal maritime common law).

responsible party to recover contribution from a third party who is liable or potentially liable under OPA or other applicable law.[54]

B. The International Regime—1969 and 1992 CLC and 1971 and 1992 Fund Conventions

The regime adopted by the vast majority of the maritime nations other than the United States is reflected in the CLC.[55] Adopted in 1969 (1969 CLC) with an accompanying fund convention established in 1971 (1971 Fund Convention), the CLC created an international regime by contracting states for payment of certain claims based on oil pollution from ships.[56] When the maritime community recognized that changes to the liability and compensation schemes were necessary, the original regime was amended by the 1992 Civil Liability (1992 CLC) and Fund Conventions (1992 Fund Convention),[57] which entered into force in 1996.[58] Unlike the U.S. regime, the CLC does not address the issue of responsibility for cleanup of a marine pollution incident, leaving that to national and local governments.

The parties to the CLC devised a regime to help cover shipowner liability.[59] Under the CLC, the shipowner is strictly liable for oil pollution damage from an incident and is required to maintain a certain level of

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54. 33 U.S.C. § 2709.

55. *See* Måns Jacobsson, *The International Liability and Compensation Regime for Oil Pollution from Ships*, 32 TUL. MAR. L.J. 1, 2 (2007).

56. *Id.* at 13. The 1969 CLC and 1971 Fund Convention set forth new principles of liability and compensation in the context of a major marine oil spill. The 1969 CLC primarily concerned the liability of shipowners for oil pollution damage, while the 1971 Fund Convention established a new payment regime to provide additional compensation to CLC victims if the compensation under the 1969 CLC was inadequate. *Id.*

57. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 57, 11 I.L.M. 284 (1972), as amended by the Protocol of 1992 To Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1996 U.K.T.S. 87 [hereinafter Fund Convention]. A detailed explanation of the history behind the 1969 and 1992 CLCs and 1971 and 1992 Fund Conventions, along with its purpose, can be found at the Web site for the IOPC Fund 1992, the entity that administers the 1992 Fund Convention. *See* International Oil Pollution Compensation Funds, http://www.iopcfund.org/compensation.htm (last visited Sept. 19, 2008).

58. *See* DE LA RUE & ANDERSON, *supra* note 40, at 71-73. There are actually two versions of the CLC in force. The first, 1969 CLC, has lower liability and compensation limits than does the second version, 1992 CLC. It is anticipated that the few nations presently party to only the 1969 CLC will eventually adopt 1992 CLC, but until then the dual systems are in effect. *Id.* at 73.

59. DAVID W. ABECASSIS & RICHARD L. JARASHOW, OIL POLLUTION FROM SHIPS: INTERNATIONAL, UNITED KINGDOM AND UNITED STATES LAW AND PRACTICE 194 (2d ed. 1985).

insurance in exchange for immunity from further liability.[60] In addition, certain individuals or entities specified in CLC article III(4) who are affiliated with the shipowner in some way in connection with an oil pollution incident have immunity against compensation claims except in cases of recklessness.[61] The close involvement of these article III(4) entities with the oil-laden vessel during the incident voyage allows for their liability to be "channeled" to that of the owner.[62] For example, a pilot or charterer of a ship is entitled to the shipowner's limitation for compensation claims.[63]

Because the goal of the CLC is to expand—not limit—available funds for oil spill relief,[64] there is a well-accepted understanding that suits against persons other than the shipowner, and those persons whose liabilities are channeled to the shipowner under 1992 CLC article III(4), may be brought under any applicable law irrespective of the CLC regime.[65] These non-CLC actions are permitted, moreover, in any state having jurisdiction over the defendant and the causes of action advanced.[66]

The limits of liability under the CLC conventions differ from those found in OPA.[67] The 1976 Protocol to the 1969 CLC set liability at 133 Special Drawing Rights (SDR) per ton, as defined by the International Monetary Fund, with an overall maximum of 14 million SDR per incident.[68] Under CLC 1992 (as changed by the 2003 amendments), the

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60. *See* 1992 CLC, *supra* note 39, art. III(1).

61. *Id.* art. III(4).

62. *See* discussion *supra* note 41 (defining channeling).

63. *See* 1992 CLC, *supra* note 39, art. III(4)(b)-(c).

64. *Id.* art. I.

65. *See In re* "Amoco Cadiz" Off the Coast of Fr. on Mar. 16, 1978, MDL Docket No. 376, 1981 U.S. Dist. LEXIS 17480, at *129, 1984 AMC 2123, 2190 (N.D. Ill. Apr. 18, 1984).

66. *Id.* The Senate's Foreign Relations Committee Report concerning the 1984 Protocols recognized that the CLC compensation scheme could be grossly inadequate when a "rare and catastrophic" oil pollution casualty occurs. S. REP. NO. 99-28, at 2-4 (1986). Under those circumstances, the Report stated, victims who are not fully compensated under the CLC and Fund Convention should be allowed to also seek monies under any "[f]ederal oil pollution damage liability and compensation statute" and state court relief per "state or common laws." *Id.* It was only with this formal reservation that the Foreign Relations Committee was willing to recommend that the Senate should provide its advice and consent to ratification of the CLC. *Id.* The Senate Report specifically "recognize[d] that the Protocols would form only a small part of a comprehensive regime for oil pollution damage." *Id.* at 3.

67. *See* Jacobsson, *supra* note 55, at 20. "CLC conventions" refers to CLC 1969 and 1992.

68. *See* DE LA RUE & ANDERSON, *supra* note 40, at 101 (citing 1976 Protocol to CLC 1969 article II). Originally, the maximum amount payable under the 1969 CLC and 1971 Fund Convention was fourteen million SDR. *See* Jacobsson, *supra* note 55, at 18.

limit of liability for vessels up to 5000 tons is 4.5 million SDR.[69] The limit of liability increases by 631 SDR per ton above 5000, up to a maximum of 89.77 million SDR.[70] The limits of liability under 1969 CLC do not apply if the incident was the result of the actual fault or privity of the owner.[71] In contrast, the limits under 1992 CLC are more difficult to exceed, namely that the owner shall be entitled to limit his liability unless it is proved that "the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."[72]

Under the CLC conventions, the shipowner is only liable for pollution damage. Pollution damage is defined as "loss or damage caused outside the ship . . . by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur" and includes "the costs of preventive measures and further loss or damage caused by preventive measures."[73] Compensation under the CLC conventions is limited to damages caused by persistent oil that was carried in bulk as cargo.[74] Thus, damages from the release of bunkers[75] or the release of nonpersistent oil[76] are outside the scope of the CLC conventions, as are damages from the release of pollutants other than oil.[77]

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69. *See* Frequently Asked Questions—Compensation: IOPC Funds (Sept. 2008), http://www.iopcfund.org/compensation.htm.

70. CLC 1992, *supra* note 39, art. V.1 (amended 2000). The maximum limit of liability is reached when the tanker is over 140,000 gross tons.

71. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, 9 I.L.M. 45, art. V.2, *available at* http://www.iopcfund.org/npdf/Conventions%20English.pdf [hereinafter CLC 1969].

72. 1992 CLC, *supra* note 39, art. V.2.

73. 1969 CLC, *supra* note 71, art. I.6. 1992 CLC added compensation for impairment of the environment as an element of damage, but only as long as it involved the costs of reasonable measures of reinstatement actually undertaken. 1992 CLC, *supra* note 39, art. I.6.

74. 1992 CLC, *supra* note 39, art. I.1.

75. *See* International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Mar. 23, 2001), http://www.imo.org/conventions/contents.asp?topic_i02568_doc_id=666 (last visited Sept. 21, 2008) (not yet in force) [hereinafter Bunker Convention].

76. Nonpersistent oils are generally considered to include gasoline, kerosene, and distillates such as gas oil and light diesel oils. *See* DE LA RUE & ANDERSON, *supra* note 40, at 86.

77. *See id.*

III. GOVERNMENT INTERVENTION: CRIMINAL LIABILITY AND PLACES OF REFUGE

A. Criminal Liability for Marine Pollution

With respect to potential criminal liability, the United States Department of Justice (DOJ) prosecutes marine pollution and environmental crime statutes.[78] The Coast Guard and Environmental Protection Agency (EPA), together with the DOJ, collectively enforce these statutes. Similar to the civil regime created by OPA, the marine pollution and environmental crime statutes primarily concern the vessel interests' obligations (1) to comply with regulations for the safe carriage of oil cargos and (2) to engage in prompt, truthful, and accurate reporting of an oil spill and cooperation with government officials.[79]

In our experience, a criminal investigation after a vessel casualty and oil spill can usually involve a variety of federal and state law enforcement agencies, including the Coast Guard, the EPA, the Federal Bureau of Investigations (FBI), state police, DOJ (through both the Environmental Crimes Section[80] and the United States Attorney assigned to the district where the incident occurred), and state-level environmental protection agencies and prosecutors. When complying with the reporting and cooperation obligations described above, maritime industry personnel face the ever-present risk that the DOJ will seek to investigate the facts surrounding an oil spill solely for purposes of enforcement of criminal environmental statutes. Federal marine pollution laws provide several bases to file criminal charges against individuals or corporations in the aftermath of an oil spill.[81]

In the analysis set forth in the *Erika* decision, criminal charges were the primary vehicle for attaching liability to the various actors involved with the transportation of oil.[82] Under U.S. law, criminal conduct

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78. *See id.* at 909.

79. *See supra* notes 36-54 and accompanying text.

80. Additional information on the section may be found at U.S. Dep't of Justice, Environment & Natural Resources Division, http://www.usdoj.gov/enrd/About_ENRD.html (last visited Sept. 27, 2008). As noted on the DOJ's Web site, the Environmental Crimes Section "is responsible for prosecuting individuals and corporations that have violated laws designed to protect the environment. It is at the forefront in changing corporate and public awareness to recognize that environmental violations are serious infractions that transgress basic interests and values."

81. *See, e.g.*, Clean Water Act (CWA), 33 U.S.C. § 1319(c)(4) (2000); Act To Prevent Pollution from Ships (APPS), 33 U.S.C. § 1908(a).

82. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 11ème ch., Jan. 16, 2008, No. 9934895010, slip op. at 205-14 (*Erika*), *translated in* The

proscribed in pollution laws may be separated into two main areas: reckless or grossly negligent carriage of oil cargos in violation of existing regulations and false statements or obstruction of justice in responding to an oil spill.[83] Significant maritime environmental crimes involving criminality in the carriage of oil cargos include: (1) discharging oil or a hazardous substance under the CWA,[84] (2) sending a vessel to sea in an unseaworthy condition,[85] (3) discharging oily substances from a vessel in violation of APPS,[86] (4) willfully and knowingly violating requirements for the carriage of dangerous cargos,[87] and (5) operating a vessel in a grossly negligent manner.[88]

With respect to reporting and cooperation requirements, federal or local governments may pursue criminal investigations for violations in the following areas: (1) failing to report a discharge of oil or hazardous substance under the CWA,[89] (2) knowingly making a false statement in a report or document under the CWA,[90] (3) failing to report hazardous conditions that may affect the vessel under the PWSA,[91] (4) obstructing justice or knowingly using false statements or documents, (5) failing to report a discharge under the APPS,[92] and (6) falsifying evidence.[93]

Under the CWA, as enhanced by OPA, a responsible party may be held strictly liable for the discharge of oil for purposes of imposing a civil penalty. Criminal penalties under the CWA are available to prosecutors for "negligent" or "knowing" violations of the Act.[94] Under these criminal penalties provisions, DOJ prosecutors may impose fines of up to one million dollars and imprisonment for up to fifteen years.[95] In addition to their powers under the CWA, DOJ prosecutors have utilized

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LanguageWorks, Inc., Erika Judgment 205-14 (Apr. 22, 2008) (unpublished English language translation, on file with authors) (Erika Judgment).

83. *See* DE LA RUE & ANDERSON, *supra* note 40, at 911-21.
84. 33 U.S.C. § 1319 (c)(2).
85. 46 U.S.C. § 10,908 (2000).
86. 33 U.S.C. §§ 1901-1915.
87. 46 U.S.C. § 3718.
88. *Id.* § 2302(b).
89. 33 U.S.C. § 1321(b)(5).
90. *Id.* § 1319(c)(4).
91. *Id.* § 1232(b).
92. *Id.* § 1906; 18 U.S.C. § 1001 (2000).
93. 46 U.S.C. § 2302(b). For an in-depth discussion and analysis of significant marine pollution crimes, see Alfred J. Kuffler, *Prosecution of Maritime Environmental Crimes Versus OPA 90's Priority for Response and Spill Prevention: A Collision Avoidance Proposal*, 75 TUL. L. REV. 1623, 1628-29 (2001).
94. *See, e.g.*, 33 U.S.C. § 1321(b)(5).
95. *Id.* § 1319(c).

environmental statutes only marginally related to oil spills (if at all), such as the Refuse Act[96] and the Migratory Bird Treaty Act (MBTA),[97] to pursue criminal prosecutions.[98]

It is a well-established principal under U.S. criminal law that a corporation can incur vicarious criminal liability for the actions of its employees acting within the scope of their employment.[99] Under the "Responsible Corporate Officer" doctrine, a corporate officer may be held criminally liable for the violation of a criminal environmental statute even if the officer did not actually commit the illegal conduct.[100] A corporation also may have direct liability for the acts of its directors, officers, or employees.[101] The United States Supreme Court has held that all who have a "responsible share" in the offending transaction may be held personally liable for failing to prevent or correct violations committed by employees.[102] The "responsible share" definition is broad enough so that exposure to criminal prosecution would necessarily include vessel officers, members of the crew, managerial personnel, officers and directors of owners, and managers and operators of a vessel involved in an oil spill.

One of the most significant recent oil spills in the United States occurred in November 2007, when the M/V COSCO BUSAN struck the delta span of the Bay Bridge in San Francisco, causing a release of approximately 58,000 gallons of bunker fuel into an environmentally sensitive and highly politicized geographical location.[103] The government investigation of the casualty resulted in the filing of criminal charges against the vessel's pilot and her manager or operator. Specifically, four months after the incident, the United States Attorneys' Office for the Northern District of California, in conjunction with the DOJ's Environmental Crimes Section, filed criminal charges against the vessel's

96. River and Harbors Appropriation Act of 1899 (RHAA), 33 U.S.C. § 407; Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703-712 (2000).

97. 16 U.S.C. §§ 703-712.

98. *See* DE LA RUE & ANDERSON, *supra* note 40, at 921.

99. *See* United States v. Automated Med. Labs., 770 F.2d 399, 406 (4th Cir. 1985) (citing United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir.), *cert. denied*, 464 U.S. 956 (1983)).

100. United States v. Ming Hong, 242 F.3d 528, 531 (4th Cir. 2001).

101. *Id.*

102. United States v. Park, 421 U.S. 658, 672-74 (1975).

103. For a detailed discussion of the oil spill and the government's reaction to it, see Incident Specific Preparedness Review, M/V *Cosco Busan* Oil Spill in San Francisco Bay, Report on Initial Response Phase (Jan. 11, 2008), www.uscg.mil/foia/CoscoBuscan/CoscoBusanISPR Final.pdf; Incident Specific Preparedness Review, M/V *Cosco Busan* Oil Spill in San Francisco Bay, Part II and Final Report (May 7, 2008), http://www.uscg.mil/foia/CoscoBuscan/part2.pdf.

pilot.[104] The indictment addressed the CWA and OPA, along with the MBTA.[105] The pilot was charged with violations under the CWA[106] and the MBTA.[107] A month later, a superseding indictment was filed by the government wherein charges under the CWA and MBTA remained, while charges concerning the false statements that the pilot provided regarding his Merchant Mariner Physical Examination Report were added.[108] In July 2008, the vessel manager was charged with falsifying documents after the incident, obstruction of justice, and several misdemeanor crimes for violating the CWA (as amended by OPA) and the MBTA.[109]

As demonstrated by the recent COSCO BUSAN incident, multiple parties will be investigated[110] and exposed to criminal liability in the aftermath of an oil spill in the United States. Criminal prosecution of maritime actors appears to be the primary driver in developing and expanding civil liability from oil spills. The *Erika* decision's reliance on criminal law to extend principles of civil liability to formerly immune actors in the maritime safety chain should be anticipated in almost any significant vessel pollution event in the United States.

B. Places or Ports of Refuge—Recent Guidelines and Governing Rules of International Law

A place or port of refuge has been difficult to define because it can mean different things under different circumstances and will invariably involve conflicting interests.[111] Generally, a vessel that is under distress

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104. *See* DOJ Charges, Doc. 1, United States v. Cota, Case 3:08-cr-00160-SI (N.D.C.A. Mar. 17, 2008)

105. *Id.*

106. 33 U.S.C. §§ 1319(c)(1), 1321(b)(3) (2000).

107. 16 U.S.C. §§ 703, 707(a) (2000).

108. *See* DOJ Charges, Doc. 18, United States v. Cota, Case 3:08-cr-00160-SI (N.D.C.A. Apr. 22, 2008). The false statements were alleged to have violated 18 U.S.C. § 1001(a)(2) (2000).

109. *See* Dep't of Justice, Company That Managed COSCO BUSAN Indicted on New Charges (July 23, 2008), http://www.justice.gov/opa/pr/2008/July/08-enrd-642.html.

110. For example, on October 23, 2008, the Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisun (the entity that licenses and regulates pilots in said areas) issued their Incident Review Committee Report into the actions of the COSCO BUSAN pilot. The report found that pilot error was a significant factor resulting in the vessel oil spill. BD. OF PILOT COMM'RS FOR THE BAYS OF SAN FRANCISCO, SAN PABLO AND SUISUN, INCIDENT REVIEW COMMITTEE REPORT: NOVEMBER 7, 2007 ALLISION WITH THE SAN FRANCISCO-OAKLAND BAY BRIDGE (Oct. 23, 2008), http://www.pilotcommission.org/notices/Cota%20IRC%20Report.pdf.

111. International Maritime Organization Resolution A.949(23) defines the term "place of refuge" as follows: "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." IMO, *Guidelines on Places of Refuge for Ships in Need of*

from an act of God, mechanical or structural failure, or adverse weather conditions will seek shelter in a nearby coastal state.[112] A coastal state responding to a distress call from an oil-laden vessel that is damaged and leaking oil will assist in seeking to prevent or minimize the loss of life while at the same time protecting its valuable natural resources and the security and well-being of its own coastal communities.[113] But the traditional notion that a coastal state is obliged to accept a damaged vessel in distress, as a practical matter, has little or no application in the present social and political climate into which a distressed vessel is thrust when she approaches a modern coastal state presenting a threat of significant environmental pollution.[114]

This change can be seen in the *Erika* decision's review and analysis of the place of refuge issues. The court rejected the place-of-refuge arguments on the basis of insufficient evidence that these issues caused the oil spill.[115] Proper consideration of a vessel's request for a place of refuge from a damaged and polluting vessel requires a complex, multiparticipant, stakeholder analysis of its condition and pollution risks involved.[116] This has been recognized by development of guidelines by the IMO and implementation of those guidelines by coastal state governmental agencies such as the Coast Guard.[117]

Pursuant to Resolution A.949 (23), the IMO adopted a document titled "Guidelines on Places of Refuge for Ships in Need of Assistance" as of December 5, 2003.[118] This policy recognized "the need to balance 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."[119]

Assistance, Res. A.949(23), § 1.19, IMO Doc. (Mar. 5, 2004), *available at* http://www.imo.org/includes/blastDataOnly.asp/data_id%3D9042/949.pdf [hereinafter IMO Res. A.949(23)].

112. *Id.*

113. *Id.*

114. *See* DE LA RUE & ANDERSON, *supra* note 40, at 823-26 (addressing vessel incidents where admittance to ports were an issue, including when a vessel is leaking oil). The commentators noted, while addressing a number of port-of-refuge incidents in the late 1970s, that "it was accepted that no tanker leaking large quantities of oil should be taken into port in that condition." *Id.* at 824.

115. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 11ème ch., Jan. 16, 2008, No. 9934895010, slip op. at 223 (*Erika*), *translated in* The LanguageWorks, Inc., Erika Judgment 223 (Apr. 22, 2008) (unpublished English language translation, on file with author) (Erika Judgment).

116. U.S. Coast Guard, U.S. Dep't of Homeland Sec., U.S. Coast Guard Commandant Instruction 16451.9, ¶¶ 4-5 (2007), http://www.uscg.mil/directives/ci/16000-16999/CI_16451_9.pdf.

117. *Id.*; IMO Res. A.949(23), *supra* note 111.

118. IMO Res. A.949(23), *supra* note 111.

119. *Id.* pmbl.

The IMO adopted guidelines for coastal states to consider when faced with the very difficult decision of how to respond to a damaged and polluting vessel's request to enter a port or place of refuge.[120] The guidelines are designed to allow a coastal state to develop and implement a framework for assessing the situation of a vessel in distress in order to arrive at an optimal solution.[121] The framework creates a process to appraise the situation of the distressed vessel, identify hazards and risks, and undertake an informed decision-making process overall.[122] The guidelines are clear with respect to the obligation of the coastal state: "When permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible."[123]

In response to the 2003 IMO guidelines, the Coast Guard issued an instruction on July 17, 2007, which provided "policy guidance, a sample checklist, and a risk assessment job aid to field commanders, Area Committees, and Regional Response Teams (RRTs) to aid in preparing for and responding to a vessel requesting a place of refuge."[124] The instruction is intended to be used as a tool by the government agencies responding to a request from a vessel in distress to establish "a process to support risk based planning and decision making."[125] The government agencies include the Coast Guard (Captain of the Port) or Federal On-Scene Commander, as well as the local stakeholder interests such as state and local emergency response units, including departments of environmental protection representing the interests of the local citizens, natural resources, and the economy.[126] The instruction provides a methodology by which these organizations can assess the probability of different courses of action (place of refuge, denial of entry, or otherwise), along with the anticipated consequences and environmental impacts of such actions.[127] The result is a combined risk score intended to provide advice to the Federal On-Scene Commander who is charged with responsibility for selecting the least risky alternative.[128]

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120. *See generally id.*
121. *Id.* § 1.12.
122. *Id.* § 2.
123. *Id.* § 3.12.
124. U.S. Coast Guard, *supra* note 116, ¶ 1.
125. *Id.* ¶ 4(c).
126. *Id.* ¶ 5(a).
127. *Id.* ¶ 5(d).
128. *Id.*

Both the IMO guidelines and Coast Guard instructions were issued after, and in many respects as a result of,[129] the casualty involving the M/T PRESTIGE, a single-hull, twenty-six-year-old oil tanker carrying more than 77,000 tons of heavy fuel oil when she suffered structural failure, broke in two, and sank off the northwest coast of Spain.[130] The PRESTIGE spill inflicted over $1 billion of damage on Spain's nationals and resources.[131] Before these pronouncements were made concerning the emerging view of places of refuge, the majority of nations around the world adopted the United Nations Convention on the Law of the Seas (UNCLOS), which included, among many maritime issues, articles concerning coastal states' obligations and rights when vessels in distress seek refuge.[132]

UNCLOS is considered customary international law to which the United States adheres.[133] UNCLOS, which created a new legal regime

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129. *Id.* ¶ 4(a).

130. Amended Complaint ¶¶ 26, 71-72, 75, Reino de España v. Am. Bureau of Shipping, 328 F. Supp. 2d 489 (S.D.N.Y. July 30, 2004) (No. 03 Civ. 3573) (on file with authors).

131. Reino de Espana v. Am. Bureau of Shipping, 328 F. Supp. 2d 489, 490 (S.D.N.Y. 2004) (addressing the allegations in the complaint and dismissing counterclaims of the defendant on Foreign Sovereign Immunities Act grounds). The IOPCF Web site also provides a full statement concerning the PRESTIGE casualty, environmental damage, the response from coastal states, the compensation process, and ongoing litigation. *See* Int'l Oil Pollution Comp. Funds, Prestige, http://www.iopcfund.org/prestige.htm (last visited Sept. 20, 2008). For a detailed analysis of the environmental damage caused by the PRESTIGE casualty, see WORLD WILDLIFE FUND, THE PRESTIGE: ONE YEAR ON, A CONTINUING DISASTER (Nov. 2003), http://assets.panda.org/downloads/finalprestige.pdf; GREENPEACE, THE PRESTIGE: ONE YEAR ON (Nov. 2003), http://www.greenpeace.org/raw/content/international/press/reports/the-prestige-disaster-one-yea.pdf.

132. UNCLOS, *supra* note 37. One hundred and fifty-seven nations are parties to UNCLOS. Division for Ocean Affairs and Law of the Sea, Office of Legal Affairs, United Nations, *Status of the United Nations Convention on the Law of the Sea, of the Agreement Relating to the Implementation of Part XI of the Convention and of the Agreement for Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* 8 (Sept. 26, 2008), *available at* http://www.un.org/Depts/los/reference_files/status2008.pdf. UNCLOS entered into force on November 16, 1994. *Id.* at 8. The Senate Foreign Relations Committee held hearings and on October 31, 2007, voted 17-4 to send UNCLOS to the full Senate for a vote. Michael A. Becker, *International Law of the Sea*, 42 INT'L LAW. 797, 799 (2008). Interestingly, President-elect Barack Obama and Vice President-elect Joseph Biden both voted in favor of sending UNCLOS to the full Senate for a vote. *Id.* While it is still too soon to know how much a priority it will be in the Obama Administration to seek ratification of UNCLOS, Vice President-elect Biden, when Chair of the Senate Foreign Relations Committee, expressed his strong support for the Convention in his opening remarks at the hearings held on October 31, 2007. *Id.* At the time of the publication of this Article, it has yet to come up for a vote before Congress.

133. *See* President's Ocean Policy Statement, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983); United States v. Alaska, 503 U.S. 569, 588 n.10 (1992); United States v. Royal Caribbean Cruises, Ltd., 24 F. Supp. 2d 155, 159, 1998 AMC 1841, 1845 (D.P.R. 1997) ("The submission of

for the oceans, is a codification of prior customary international law, and its terms rule out later agreements and claims of customary international law inconsistent with the convention.[134] The treaty defines the meaning of innocent passage[135] and authorizes a coastal state to take "*any*" measures necessary to prevent a ship not in innocent passage from entering or to remove her from the state's territorial seas.[136] Any exception to this rule must be demonstrated by the clear, intentional assent of the states involved.[137]

Although it is not a party to UNCLOS, the United States has generally adopted UNCLOS's scheme of coastal state jurisdiction as a matter of policy.[138] U.S. maritime jurisdiction includes the territorial sea extending seaward from the baseline of the coastal state to a distance of twelve miles.[139] The next area is the contiguous zone, which extends seaward from the baseline of the coastal state to a distance of twenty-four miles.[140] In the contiguous zone, a coastal state may enforce its customs, fiscal, immigration, and sanitary laws and regulations.[141] The third area is the exclusive economic zone, which begins at the outer limit of the territorial sea and extends 200 miles from the baseline of the coastal state.[142] Beyond the exclusive economic zone is the high seas—open to all states and subject to the sovereignty of none.[143] Typically, jurisdiction over a vessel operating on the high seas falls to the flag state.[144] The flag state thus has a duty to assure vessel compliance with international conventions concerning protection of the marine environment.[145]

A request for entry to a U.S. port would be considered by the Coast Guard under applicable regulations. Concerning the vessel's request,

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the treaty to the Senate expresses to the international community the United States' ultimate intention to be bound by the pact.").

134. *See* WILLIAM TETLEY, INTERNATIONAL MARITIME AND ADMIRALTY LAW 644 (2002); Statute of the International Court of Justice art. 38(1)(a), June 26, 1945, 59 Stat. 1055, 156 U.N.T.S. 77.

135. UNCLOS, *supra* note 37, arts. 19(1), (2)(h)(l); *see also* Vern Clark & Thomas R. Pickering, *A Treaty That Lifts All Boats*, N.Y. TIMES, July 14, 2007, at A11.

136. UNCLOS, *supra* note 37, art. 25(1).

137. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 817 (D.C. Cir. 1984) (Bork, J., concurring), *cert denied*, 470 U.S. 1003 (1985).

138. *See* sources cited *supra* note 133.

139. UNCLOS, *supra* note 37, art. 3.

140. *Id.* art. 33(2).

141. *Id.* art. 33(1).

142. *Id.* arts. 55, 57; Presidential Proclamation 5030, 1983, 48 Fed. Reg. 10,609 (Mar. 10, 1983).

143. UNCLOS, *supra* note 37, arts. 87, 89.

144. *Id.* art. 82.

145. *Id.* arts. 94, 96.

under these circumstances it is clear the Coast Guard has authority to deny entry:

> Each District Commander or Captain of the Port subject to recognized principles of international law, may deny entry into the navigable waters of the United States or to any part or place under the jurisdiction of the United States, and within the district or zone of that District Commander or Captain of the Port, to any vessel not in compliance with the provisions of the Port and Tanker Safety Act (33 U.S.C. §§ 1221-1232) or the regulations issued thereunder.[146]

A vessel requesting entry under these circumstances may contend that the denied entry violates the right of innocent passage as recognized by customary international law and codified in UNCLOS articles 17 through 19. However, to be "innocent," the passage must be "continuous and expeditious,"[147] and the passage cannot be prejudicial to the "peace, good order or security" of the coastal state.[148] Further, if a vessel is engaging in "willful and serious pollution," she will be deemed to be acting to the prejudice of the coastal state.[149] As such, the ability of the Coast Guard to deny entry under these circumstances is established and consistent with recognized principles of international law.

C. The U.S. Government's Authority To Act

The active intervention by the U.S. government in pollution incidents on the high seas is established by statute, namely, the Intervention on the High Seas Act.[150] This statute represents the domestic codification of the 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (IHS Convention)[151] and its 1973 Protocol to which the United States is a signatory.[152] The IHS Convention is a result of the TORREY CANYON incident in 1967, and its purpose is to clarify the actions that could be taken by a coastal state on the high seas when confronted with casualties of that nature.[153]

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146. 33 C.F.R. §§ 160.107 (2007).
147. UNCLOS, *supra* note 37, art. 18(2).
148. *Id.* art. 19(1).
149. *Id.* art. 19(2)(h).
150. 33 U.S.C. §§ 1471-1481 (2000).
151. Nov. 29, 1969, 970 U.N.T.S. 211, 26 U.S.T. 765.
152. Marine Pollution: Intervention on the High Seas in Cases of Pollution by Substances Other Then Oil, Mar. 30, 1983, 34 U.S.T. 3407, 1393 U.N.T.S. 3.
153. International Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties (1969), http://www.imo.org/Conventions/contents.asp?topic_id=258&doc_id=680 (last visited Sept. 20, 2008). The TORREY CANYON was also a driving factor in the drafting and ratification of the 1969 CLC. *See* Jacobsson, *supra* note 55, at 2.

Initially, U.S. authorities must make a determination that there is a "grave and imminent danger" to the coastline of the United States due to an oil pollution incident.[154] If that finding is made, then the government may take measures on the high seas to "prevent, mitigate or eliminate" that damage.[155] Possible measures include: first, coordinating and directing all public and private efforts to remove or eliminate the threatened damage; second, undertaking the salvage efforts, directly or indirectly; and third, removing, and if necessary, destroying the ship and her cargo.[156]

In determining whether measures should be taken and the extent of those measures, U.S. authorities need to consider the extent of damage if no action is taken, as well as the possible effectiveness of the measures and the extent of damage such measures might cause.[157] Similarly, the U.S. government must take into consideration the goal of avoiding unnecessary interference with the rights of others, including the flag state and "persons otherwise concerned," which would presumably include the vessel's owner.[158] If possible, government authorities must consult with the vessel's flag state,[159] but the ability to consult is obviated in situations of "extreme urgency."[160]

It also is important to note that all of these government actions must be implemented without incurring liability to the vessel interests.[161] However, vessel interests would have the right to assert a claim for compensation should the measures taken by the U.S. government exceed "those reasonably necessary" to achieve the goal of avoiding harm to the coastline.[162]

The case of the ARGO MERCHANT is illustrative of these principles.[163] That vessel, laden with 8.5 million gallons of residual fuel oil, grounded twenty-seven miles off Nantucket Island, Massachusetts in 1976.[164] After the vessel's request to the Coast Guard to release oil in order to lift the vessel was denied, heavy weather broke the vessel "in two; one part sank on its own accord and the other section . . . [sank] as a

154. IHSA, 33 U.S.C. § 1472.
155. *Id.*
156. *Id.* § 1474.
157. *Id.* § 1477.
158. *Id.* § 1478.
159. *Id.* § 1475.
160. *Id.* § 1476.
161. *Id.* § 1472.
162. *Id.* § 1479.
163. *In re* Thebes Shipping Co., 486 F. Supp. 436, 1980 AMC 1686 (S.D.N.Y. 1980).
164. *See* DE LA RUE & ANDERSON, *supra* note 40, at 53-54.

result of Coast Guard naval gunfire," releasing some 8.5 million gallons of fuel oil.[165] Although some civil litigation resulted from this casualty (e.g., the owner's limitation of liability action, *In re Thebes Shipping Inc.*), no reported claim was asserted against the U.S. government for compensation.[166] Indeed, no case has been found where claims were made against the U.S. government under this statute, nor indeed against any other government under the IHS convention itself.

IV. THE *ERIKA* JUDGMENT CASTS A WIDE NET

The *Erika* court assessed four types of criminal offenses against various individuals and companies involved in the operation and management of the vessel, including the shipowner, her technical manager, her classification society, and the oil company involved with the cargo carried on the final voyage: (1) unintentional fault for failure to comply with an obligation of prudence or safety provided for by law or regulation; (2) endangerment to others or directly exposing others to immediate risk of death or injury; (3) willfully omitting or failing to fight a disaster; and (4) complicity in endangerment of others, knowingly aiding or assisting another in the principal offense of endangerment of others.[167] With the exception of the third offense, the criminal offenses involved unintentional negligent conduct against the persons or entities that either caused the oil spill or "did not take the necessary actions to avoid it."[168] The court rejected arguments that the French criminal laws for pollution offenses did not extend to actors in maritime transportation.[169]

With respect to the civil aspect of the action, the *Erika* court recognized that the 1992 CLC created a legal regime for victims of oil pollution, but expressly held that the CLC did not deprive the French court of its jurisdiction to hear actions for damages usually open to civil parties, because none of the parties before the court was immune under

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165. James H. Hohenstein, Holland & Knight LLP, *Post Collision Challenges: Seeking Safe Berth* (Dec. 1, 2006), http://www.hklaw.com/id24660/PublicationId3/ReturnId33/ServiceID131/contentid46308/.

166. 486 F. Supp. 436 (S.D.N.Y. 1980).

167. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 11ème ch., Jan. 16, 2008, No. 9934895010, slip op. at 90 (*Erika*), *translated in* The LanguageWorks, Inc., Erika Judgment 90 (Apr. 22, 2008) (unpublished English language translation, on file with author) (Erika Judgment).

168. *Id.* at 89, Erika Judgment at 89.

169. *Id.* at 90, Erika Judgment at 90.

the convention.[170] This finding is in contrast to the holding in the *Reino de España v. American Bureau of Shipping* (*Prestige*) where a U.S. district court found that the CLC deprived it of jurisdiction to adjudicate Spain's claims against PRESTIGE's classification society.[171] But the *Prestige* decision itself was inconsistent with *In re Amoco Cadiz*, the first decision to consider the scope of the CLC in the United States.[172] In *In re Amoco Cadiz*, the court recognized that the CLC is not the law of the United States because the United States is not a contracting state party to the 1969 CLC, and thus, the CLC could not deprive the federal court of its jurisdiction over the U.S.-based companies.[173]

The *Erika* court's holdings with respect to shipowner, classification society, and charterer liability—including place-of-refuge issues—merit careful consideration. Below we explain the rationale for the *Erika* court's sweeping conclusions and discuss their application in the context of U.S. jurisprudence.

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170. *Id.* at 100, Erika Judgment at 100.

171. Reino de España v. Am. Bureau of Shipping, Inc., 528 F. Supp. 2d 455, 459-60, 2008 AMC 83, 89 (S.D.N.Y. 2008). The decision interpreted the CLC channeling provisions to extend to the class society because it was a "person" that performed services to the vessel within the meaning of 1992 CLC article III(4). *Id.* The district court also read the 1992 CLC article IX forum provision to be akin to a contractual forum selection clause, relying on *M/S Bremen v. Zapata Offshore, Co.*, 407 U.S. 1, 1972 AMC 1407 (1972) (upholding the validity of a forum selection clause in a towing contract as binding on the parties to said contract), and held that Spain must pursue its claims for oil pollution damage in its own courts or in courts of other nations where oil pollution damage was suffered. *Reino de España*, 528 F. Supp. 2d at 460-61, 2008 AMC at 89-91.

172. *See In re* "Amoco Cadiz" Off the Coast of Fr. on Mar. 16, 1978, MDL Docket No. 376, 1984 U.S. Dist. LEXIS 17480, at *129, 1984 AMC 2123, 2190 (N.D. Ill. Apr. 18, 1984) (considering the 1969 CLC, which was only slightly revised in the 1992 CLC with respect to the venue provision, article IX). Moreover, even if it were to consider the 1969 CLC, the *Cadiz* court recognized that actions against nonimmune parties under the CLC may be brought independent of the 1969 CLC.

> The CLC is not the exclusive remedy available to victims of oil pollution damage and does not prohibit such victims from bringing an action in tort outside the CLC against anyone other than the registered owner of the vessel or its mandataires or preposes ("agents" and "servants" in the English text of the CLC). All other parties may be sued and held liable, without limitation, independent of the CLC.

Id.

173. With the *Reino de España* matter currently under appeal before the United States Court of Appeals for the Second Circuit, the jurisdiction issue and the applicability of the CLC itself in a U.S. court will likely be determined. Reino de España v. Am. Bureau of Shipping, 528 F. Supp. 2d 455 (S.D.N.Y.), *appeal docketed*, No. 08-0579 (2d Cir. Mar. 1, 2008).

A. *Shipowner Fault in the Management and Operation of the ERIKA*

The Tribunal de Grande Instance harshly criticized the ERIKA's shipowner for derogating the well-accepted duties of managing a vessel within its fleet to meet or exceed international safety standards.[174] In addition to a review of the process used to determine and complete repairs, the court engaged in an analysis of the debt problems of the shipowner.[175] Demonstrating the symbiotic relationship between the shipowner and its classification society, the court criticized the classification society for not suspending its certificates when the shipowner failed to comply with financial commitments.[176] The court noted that the owner's debt problems "were also telling of the conditions in which the repairs had been anticipated, performed and finally, paid."[177] According to the court-appointed experts, "[i]t was in reality, the insufficiency of maintenance and correlatively, the quick development of the corrosion that were the original causes and the decisive factors of the weakening of the structure of layer 2 of the ERIKA, that brought about a series of ruptures up to the total ruin of the ship, to the point that the other circumstances can be considered as relatively secondary."[178]

The court considered the shipowner's liquidity problems to be a clear warning that should have served as notice to the classification society that the shipowner could not meet the maintenance expenses required to keep the vessel in a condition warranting continued issuance of a classification certificate.[179] Instead, this fact was ignored by the classification society, which continued to support the shipowner by issuing certificates validating the condition of the vessel, despite the substandard repairs, thus declaring the vessel suitable to carry petroleum-based cargos.[180]

As to the reduction of the shipyard's invoice, the court found that the shipowner and technical manager "deliberately and jointly decided, for reasons of cost, to reduce the work done . . . to such an extent that they could not be unaware that this would jeopardize the safety of the

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174. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 11ème ch., Jan. 16, 2008, No. 9934895010, slip op. at 205-07 (*Erika*), *translated in* The LanguageWorks, Inc., Erika Judgment 205-07 (Apr. 22, 2008) (unpublished English language translation, on file with authors) (Erika Judgment).

175. *Id.*

176. *Id.*

177. *Id.* at 205, Erika Judgment at 205.

178. *Id.* at 188-90, Erika Judgment at 188-90.

179. *Id.* at 207, Erika Judgment at 207.

180. *Id.* at 207, 213, Erika Judgment at 207, 213.

ship."[181] This specific fault (which was equally attributed to the classification society) exposed the crew, the ship, and the environment to a particularly severe risk, which resulted in the accident that occurred on the ERIKA and the oil pollution damage that followed.[182]

To put the shipowner's misdeeds in the context of liability in the United States, it is important to again consider OPA. Under OPA, the shipowner, including its operator and manager, is typically the responsible party held liable for removal costs and damages.[183] OPA provides a limitation of liability for damages based on the gross tonnage of the polluting vessel.[184] The statute holds responsible parties strictly liable for cleanup costs and other damages and may subject a responsible party to civil and criminal sanctions.[185] OPA limitations of liability do not apply if the incident was proximately caused by the gross negligence of a responsible party or for failure of the responsible party to comply with an applicable federal safety, construction, or operating regulation.[186] Although ordinary negligence can result in the imposition of criminal penalties under U.S. law,[187] the oil pollution statutes generally require a showing of gross negligence or reckless conduct by a responsible party before denying a responsible party the benefits of limited liability.

The findings by the *Erika* court that the shipowner purposely reduced structural repairs to save costs and knowingly jeopardized the safety of the ship would meet, in our view, even the more stringent reckless and knowing standards of the marine criminal pollution statutes. With respect to civil liability, the shipowner's purposeful conduct would also meet the requirements under OPA to deprive a responsible party the benefits of limited liability.

B. Criminal and Civil Liability for Wrongful Conduct by Classification Societies

The acts of the shipowner's representative and classification society inspector, beginning sixteen months prior to the vessel's departure from her berth on her final voyage, were held to be the cause of the sinking and oil pollution. The court noted that it was incumbent on the

181. *Id.* at 207, Erika Judgment at 207.
182. *Id.*
183. *See* OPA, 33 U.S.C. § 2702(32)(A) (2000).
184. *Id.* § 2704(a)(1), (c)(1).
185. *See* Jacobsson, *supra* note 55, at 20; DE LA RUE & ANDERSON, *supra* note 40, at 67-68.
186. 33 U.S.C. § 2704(c)(1)(A)-(B).
187. *See* United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).

classification society's inspector to determine the work and approve it in accordance with the rules established for each type of survey and to verify that the defects affecting the ship's class had indeed been repaired.[188] The court acknowledged that the shipowner's technical manager was to prepare the list of repairs and the contract with the shipyard, but found that the classification society had taken a "preponderant role" in the determination of the work required on the vessel in order to complete the special survey.[189]

In view of the time needed for serious corrosion to develop in the vessel's steel structure, the court concluded that the weakened structure could only have developed well prior to the shipwreck.[190] Accordingly, the court stated that the situation of "generalized corrosion at the place where the damage occurred resulted from the conditions present during the special survey performed once every five years and the repair work that had been carried out" at the last classification society special survey.[191]

Based on an analysis of a small number of structural members recovered from the wreck of the ERIKA, the court concluded that the cause of the loss of the ERIKA first occurred in her starboard side in ballast tank No. 2.[192] The measurements taken on the wreck showed general and high levels of corrosion that significantly exceeded the limit values accepted by the classification society rules.[193] The court noted corrosion values from twenty-eight percent to fifty-six percent and up to seventy-one percent.[194] The classification society rules only admitted, at most, twenty-five percent corrosion.[195]

The court engaged in an in-depth study of the process for taking thickness measurements of ERIKA's steel structures during the last special survey by the classification society inspector.[196] There were many serious "anomalies" in the thickness measurements taken during the special survey: (1) reported thickness measurements, allegedly taken using rafts, could not have been done because the vessel was in a floating

188. *Erika*, No. 9934895010 at 118, Erika Judgment at 118.
189. *Id.* at 203, Erika Judgment at 203.
190. *Id.* at 212-13, Erika Judgment at 212-13; *see also id.* at 189, Erika Judgment at 189 ("[I]t was the actual state of corrosion of the ERIKA that was the cause for [t]he disaster.").
191. *Id.* at 201, 212-13, Erika Judgment at 201, 212-13 (citation omitted).
192. *Id.* at 200, Erika Judgment at 200.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 203, Erika Judgment at 203.

dock, which prevented movement of weights on board (i.e., the filling of tanks) for rafting purposes; (2) there were thickness measurements of structures that did not physically exist on the ERIKA; (3) there was an absence of thickness measurements for structural elements that did exist on the ERIKA; and (4) there were thickness measurements with values higher than the thickness of the ship when she was brand-new, in certain cases by six to nine millimeters.[197]

The court also noted that the thickness measurements taken by the gauging company during the special survey were practically always higher than those taken from the pieces removed from the wreck, regardless of the nature of the structural component.[198] The classification society was responsible for verifying thickness measurements, making visual controls (otherwise termed "close surveys"), and giving instructions so that additional thickness measurements could be made.[199] The classification society inspector acknowledged this role and rejected thickness measurements that were not made in his presence initially, but then in contradiction of his own ruling, the same classification society inspector accepted thickness measurements made outside of his presence.[200] This appeared to be yet another glaring example of "business constraints" taking precedence over safety and quality classification surveying work.[201]

Only days before the final voyage of the ERIKA, a second classification society inspector had identified serious corrosion issues and "suspicious" repair work that should not have existed sixteen months after the special survey.[202] Again, a permissive attitude from the classification society allowed an extension of the required examination of this serious corrosion and allowed the vessel to continue her highly risky trade carrying black products such as No. 2 fuel oil.[203] The court found that the substantial corrosion and "suspicious" repairs observed by the class inspector only sixteen months after the special survey were clear signs of the "worrisome" state of the structures.[204]

197. *Id.* at 203-04, Erika Judgment at 203-04.
198. *Id.* at 204, Erika Judgment at 204.
199. *Id.* at 201, Erika Judgment at 201.
200. *Id.* at 203, Erika Judgment at 203.
201. *Id.* at 213, Erika Judgment at 213.
202. *Id.*
203. *Id.* at 213, 215, 217, Erika Judgment at 213, 215, 217.
204. *Id.*

The court considered this neglect by the classification society inspector a "fault of imprudence" that caused the accident at sea.[205] The court even openly questioned why the classification inspector had not been criminally charged.[206] The court concluded that without repair work, the class certificate could not have been renewed and the ERIKA would not have been chartered a few days after the inspection.[207] In view of the willful violation of several safety obligations that were incumbent upon it under the International Convention for the Safety of Life at Sea (SOLAS) and the International Safety Management Code (ISM Code),[208] the classification society was held to have directly exposed the crew to an immediate risk of death by "shipwreck or drowning" and was held to have committed the offense of endangerment.[209]

In the light of the *Erika* court's analysis of the ship repair process, the traditional defenses to liability raised by classification societies would seem to be abrogated by the active role of the classification society in hiding the vessel's deficiencies. Classification societies have typically relied upon the following rationales to avoid liability for their negligence[210] in surveys and classification of vessels: (1) they have immunity under the law of the vessel's flag state;[211] (2) contractual

205. *Id.*

206. *Id.* at 207, 213, Erika Judgment at 207, 213.

207. *Id.* at 213, Erika Judgment at 213.

208. Enforcement of ISM regulations, or the myriad others set forth by the IMO, is a critical obligation of a classification society, and when the class society fails to do its job properly, problems ranging anywhere from structural failures to piracy and terrorism can ensue. *See* William Langeweiseche, *Anarchy at Sea*, ATLANTIC MONTHLY, Sept. 2003, at 63.

209. *Erika*, No. 9934895010 at 228, Erika Judgment at 228.

210. The ERIKA's classification society argued that corrosion was not the cause of the accident at sea, offering instead the theory of a hidden defect or "invisible crack" in the side shell plating. *Id.* at 194-95, Erika Judgment at 194-95. The court considered this theory improbable and criticized it for largely ignoring the facts. *Id.* at 196, Erika Judgment at 196.

211. In the context of third-party liability with classification societies, one author suggests that U.S. conflicts of law rules mandate that the law of the ship's flag should always govern tort claims against classification societies. *See* B.D. Daniel, *Potential Liability of Marine Classification Societies to Non-Contracting Parties*, 19 U.S.F. MAR. L.J. 183, 295 (2007). This conclusion, however, is inconsistent with the United States Supreme Court's seminal maritime choice of law decision, *Lauritzen v. Larsen*, 345 U.S. 571, 592, 1953 AMC 1210, 1226-27 (1953) (considering between the law of the place of the seaman's injury (Cuba) and the law of the seaman's nationality and of the ship's flag, and choosing the latter), and its progeny, which established a detailed, multifactored analysis to determine which country's law has the most significant interest in the dispute. The ship's flag is only one of eight factors traditionally considered, and in the context of vessel owner's use of flags of convenience to try and avoid more stringent certification requirements, it cannot be treated as the critical factor as the author suggests. *See* Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 160, 1980 AMC 309, 329-30 (2d Cir. 1980) (Van Graafeiland, J., dissenting). In the context of third-party actions, the Second Circuit has for some time recognized that the law of the ship's flag is not determinative, starting

limitations in their agreement with the shipowner preclude liability because the amount of fees charged do not justify imposition of liability for the loss of the vessel; (3) the shipowner has exclusive responsibility and control over the vessel and cannot delegate this responsibility to the classification society; and (4) the purpose of classification certificates is limited to allowing the shipowner to take advantage of favorable insurance rates and should not form the basis of more extensive liability.[212]

The *Erika* court's analysis squarely rejected flag state immunity as grounds for protection of the classification society.[213] The court also denied the classification society any protection under article III(4)(b) of 1992 CLC because it did not participate in the navigational or nautical operation of the ERIKA on the incident voyage.[214] Importantly, this is the first interpretation of the channeling provisions of 1992 CLC by a court

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with noting the distinction in *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1084, 1984 AMC 1, 11 (2d Cir. 1993) ("This case must be distinguished from a suit brought by an injured third party who relied on the classification or safety certificates."), and actually subsequently recognizing it in the context of a third-party action. *See* Carbotrade S.p.A. v. Bureau Veritas, 99 F.3d 86, 92-93, 1997 AMC 98, 106-08 (2d Cir. 1996); Sealord Marine Co. v. Am. Bureau of Shipping, 220 F. Supp. 2d 260, 268-69, 2002 AMC 2817, 2825-26 (S.D.N.Y. 2002); *see also* Mark Schapiro, *Introduction* to Ctr. for Investigating Reporting, Hiding Behind the Flag, http://www.pbs.org/frontlineworld/stories/spain/flags1.html (last visited Nov. 10, 2008) (addressing flags of convenience problems generally in the maritime industry and specifically within the context of his report on the third-party action with the *Prestige*).

212. *See* Daniel, *supra* note 211, at 295; *Sundance Cruises*, 7 F.3d at 1084, 1984 AMC at 11 (finding that the shipowner was not damaged by the classification society's errors in issuing a classification certificate because a shipowner is not entitled to rely on the certificate as a guarantee that the vessel is soundly constructed and that the classification society was immune from suit under Bahamian law, the law of the ship's flag); Great Am. Ins. Co. v. Bureau Veritas, 478 F.2d 235, 1973 AMC 1755 (2d Cir. 1973) (dismissing complaint against classification society for failure to prove the classification society had negligently conducted surveys and failure to establish a causal connection between the vessel sinking and the alleged unseaworthy conditions that should have been discovered by the classification society surveyors). In both *Sundance Cruises* and *Great American*, the law firm of Haight Gardner, Poor & Havens represented the plaintiffs. Haight Gardner merged with the authors' law firm, Holland & Knight LLP, in 1997. Although it was not disclosed in Mr. Daniel's published article noted above, Mr. Daniel and his law firm have appeared on the record on behalf of classification society ABS in the *Prestige* litigation, where ABS took the position that the law of the ship's flag is determinative and that it is immune from suit. *See* Comunidad Autonoma v. Am. Bureau of Shipping No. H-03-CV-1555 (S.D. Tex. filed May 8, 2003).

213. No. 9934895010 at 176, Erika Judgment at 176.

214. *Id.* at 235, Erika Judgment at 235 ("This is why, by generically referring to the pilots or any other person who while not being a member of the crew, performs services for the ship, the exclusion provided by b) of paragraph 4 of Article III *can only be understood* as that related to persons who, without being a crew member, *provide services for the ship directly participating in the nautical operation*, a situation that was not that of the RINA society with regard to the ERIKA." (emphasis added)).

of a contracting state to the CLC. As noted above, the district court in the *Prestige* litigation—a noncontracting state court—reached a contrary result interpreting the same language under almost identical facts.[215]

The *Erika* court's finding that the classification society, through its surveyor, acted in concert with the shipowner's representative to jeopardize deliberately the safety of the ship, and thereby endanger third parties, is a sound basis on which to hold classification societies liable for creating unreasonably dangerous conditions. As a result of the *Erika* court's analysis, for the first time, classification society negligence has been declared to be the legal and proximate cause of the environmental harm caused by a structural failure on a vessel at sea. In our view, it will not be the last.

While classification societies have been generally successful in avoiding contractual liability when the shipowner is suing its own classification society,[216] classification societies have not had the same success against noncontracting parties suing them for negligence. The United States Court of Appeals for the Second Circuit has recognized that "'[c]lassification' . . . refers to the process by which a ship is inspected to make sure it is seaworthy and complies with various safety regulations."[217] Thus, like shipowners, courts have acknowledged that classification societies play a critical role in assessing the condition of a vessel and ensuring she is fit for her intended purpose.[218] And while the court in *Sundance Cruises Corp.* found that a classification society does not guarantee the seaworthiness of the ship, the court did not address all

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215. Reino de Espana v. Am. Bureau of Shipping, Inc., 528 F. Supp. 2d 455, 458, 2008 AMC 83, 86-88 (S.D.N.Y. 2008). The court's rationale and ultimate holding was inconsistent with noted legal scholars who, well before the PRESTIGE casualty, had concluded that classification societies were not immune under the 1992 CLC. *See* DE LA RUE & ANDERSON, *supra* note 40, at 98 (stating that ship builders and classification societies are not immune under article III(4)); ABECASSIS & JARASHOW, *supra* note 59, at 233 ("The list [in 1992 CLC Article III(4)] does not cover quite a number of those who may become liable under general principles of law, such as the builder, repairer and *classification society* of the ship, those who recruit personnel for the ship (unless they are managers or operators as well), the owner of the radar and other hired equipment aboard ship, the shipper of goods aboard the ship (unless he is also the charterer) and, last but not least, those concerned in any vessel which collides with the ship; but the Conference rejected a proposal which would have protected everyone except the owner." (emphasis added)).

216. *See Sundance Cruises*, 7 F.3d at 1077, 1984 AMC at 1; *Great American*, 478 F.2d at 235, 1973 AMC at 1755.

217. Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 351, 1999 AMC 1858, 1859 (2d Cir. 1999) (citation omitted) (emphasis added).

218. *Id.*

the aspects of classification and distinguished a shipowner's claim from a claim brought by an innocent third party.[219]

The *Erika* court's finding of classification society fault is most significant in this innocent-victim, third-party context. One such example can be found in *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*, in which the United States Court of Appeals for the Fifth Circuit affirmed a district court's finding that a classification society could be held liable to the purchaser of a vessel for negligent misrepresentation based on statements made in a vessel classification survey prior to the plaintiff's purchase of the vessel.[220] It did so after reviewing the law concerning claims against classification societies and noted that the "general maritime law cautiously recognizes the tort of negligent misrepresentation as applied to classification societies."[221]

In all, the *Erika* decision provides compelling and persuasive authority for U.S. courts to continue to build upon existing precedent to hold classification societies liable for the damages caused to third parties[222] due to negligent and reckless conduct in condoning substandard repair practices and issuing classification certificates to substandard ships.[223] By doing so, courts will send a message to classification societies that they are obligated to require the shipowner to effect repairs according to established classification rules and industry standards. Classification societies also must require high ethical standards from

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219. *See Sundance Cruises*, 7 F.3d at 1084, 1984 AMC at 11 ("This case must be distinguished from a suit brought by an injured third party who relied on the classification or safety certificates.").

220. 346 F.3d 530, 535-37, 2003 AMC 2409, 2413-17 (5th Cir. 2003), *cert. denied*, 541 U.S. 1009.

221. *Id.* at 532; *see also* Psarianos v. Standard Marine, Ltd., 728 F. Supp. 438, 443, 1990 AMC 139, 144 (E.D. Tex. 1989) (finding at the end of an eight-day trial that third-party crew members and the survivors of the deceased crew members of a vessel, who filed suit against the vessel's owner and ABS (the classification society that surveyed the vessel), should prevail against both defendants for $22 million, holding both parties fifty percent liable for plaintiffs' injuries and damages sustained by the decedent's representatives). *But see In re* Complaint of Eternity Shipping Ltd., 444 F. Supp. 2d 347, 361-63, 2006 AMC 2034, 2051-54 (D. Md. 2006) (rejecting inter alia a negligent misrepresentation claim against a classification society where the injured third party could not show it relied on the classification society's representations with respect to a ship's cargo gear); Cargill Inc. v. Bureau Veritas, 902 F. Supp. 49 (S.D.N.Y. 1995) (same).

222. For the most in-depth consideration of classification society liability in the third-party context, both in the United States and abroad, see JÜRGEN BASEDOW, THIRD-PARTY LIABILITY OF CLASSIFICATION SOCIETIES, A COMPARATIVE PERSPECTIVE (2005).

223. We do not suggest that classification societies should be absolved in the context of suits between them and shipowners. In this context, however, contractual obligations and requirements traditionally dictate liability issues—whether it be indemnification or immunity under the law of the ship's flag. *See Sundance Cruises*, 7 F.3d 1077, 1984 AMC 1.

their surveyors actively to prevent succumbing to the pressure of financially based shipowner demands. This is entirely appropriate when considering that it is the classification society that has the most historical knowledge of a ship's structural condition and the personnel with highly specialized expertise to determine the structural well-being of a vessel.

C. *Oil Company Improper Use of High-Risk Vessels*

The process of controls or "vetting" applied to the ERIKA by the oil company included a review of the vessel certifications and confirming whether the documentation was consistent with international conventions in terms of safety, pollution prevention, and classification rules, as well as the rules of the flag state.[224] The purpose of the vetting inspection was to insure the quality of the ship and her crew in terms of safety and prevention of accidents or pollution risks.[225] The vetting service was not required by any international convention, community regulation, or national law.[226] The *Erika* court recognized that the vetting process by the various oil companies "could not be as thorough as the classification societies' inspections nor replace the class certification."[227] The vetting inspector had "neither the resources nor the skills of the classification societies' inspectors."[228] Unlike the classification surveyor, the vetting inspector could not interfere with loading or unloading, and if he wanted to survey the structures, specifically the cargo and ballast tanks, he had to do it safely, which was "fairly uncommon" considering the ongoing commercial operations.[229]

The result of the vetting process was a standardized ship inspection report (SIRE) database.[230] The vetting department was systematically consulted each time any entity of the oil company intervened in a cargo transportation.[231] Application for approval was to be submitted to the vetting department before the ship could be the subject of a charter or transportation contract signed by the oil company.[232] Any ship reviewed

224. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 11ème ch., Jan. 16, 2008, No. 9934895010, slip op. at 123-25 (*Erika*), *translated in* The LanguageWorks, Inc., Erika Judgment 123-25 (Apr. 22, 2008) (unpublished English language translation, on file with author) (Erika Judgment).

225. *Id.* at 124, Erika Judgment at 124.

226. *Id.* at 123, Erika Judgment at 123.

227. *Id.* at 122, Erika Judgment at 122.

228. *Id.*

229. *Id.*

230. *Id.* at 123, Erika Judgment at 123.

231. *Id.* at 124, Erika Judgment at 124.

232. *Id.*

negatively by the vetting department was to be refused by the oil company's traders, charterers, operating departments, and terminals.[233] Notwithstanding these control procedures, the oil company's charter subsidiary entered the voyage charter with the ERIKA five days *after* her vetting approval had officially expired.[234]

According to the court, even aside from the expiration of the ERIKA's vetting approval, the following operational factors should have raised concerns prohibiting use of the ERIKA by the oil company: (1) changes in ownership seven times, (2) changes in classification society repeatedly between four different classification societies, and (3) change in her flag state three times from Panama to Liberia to Malta.[235]

The court noted that the oil company's vetting organization was attached to its legal affairs department.[236] The oil company subsidiary was also criticized for executing a contract with a shell company "known to have little concern for the ship's condition."[237] The charterer failed "to make sure that the operating company had the required skills" to manage the vessel.[238] Because the oil company entered the charter party despite its control process, and with knowledge that this was a high-risk vessel, the court found that it had failed to act to avoid the accident and was criminally responsible for causing the pollution at sea.[239] Because a subsidiary of the oil company was the named entity on the charter party, the parent oil company that actually did the vetting was not entitled to any protection or benefits under the 1992 CLC of being the charterer.[240]

Long before the *Erika* court extended liability to the oil company charterer, legal commentators in the maritime community were sounding warning bells over the ERIKA's vetting and the vetting process generally in the context of an oil-laden tanker. For example, in Charles Anderson & Colin de la Rue's article, *Liability of Charterers and Cargo Owners for Pollution from Ships*,[241] the authors noted that because of an aging vessel fleet and the EXXON VALDEZ oil spill, voluntary vessel inspection

233. *Id.*
234. *Id.* at 137, Erika Judgment at 137.
235. *Id.* at 103, Erika Judgment at 103.
236. *Id.* at 137, Erika Judgment at 137.
237. *Id.* at 95, Erika Judgment at 95.
238. *Id.* at 95.
239. *Id.* at 217, Erika Judgment at 217.
240. *Id.* at 133, 135, 227, Erika Judgment at 133, 135, 227.
241. *See* Anderson & De la Rue, *supra* note 53, at 9-10.

programs were being undertaken by more and more charterers,[242] and that "[t]he existence of such a vetting program may itself be a source of liability to charterers."[243] In discussing an effect of the ERIKA casualty, the authors noted that "[s]uggestions have now been made that oil companies should bear greater responsibility for pollution if their vetting standards have not been sufficiently rigorous."[244] The authors were prescient.

The *Erika* court's rebuke of the oil company focused on the company's lack of thoroughness.[245] Although not privy to the detailed information regarding the weakened and corroded structure of the ERIKA, the oil company took an unacceptable risk by selecting the ERIKA to carry its cargo.[246] Several "high risk" factors prohibited use of the ERIKA by the oil company, including her peculiar history of multiple changes in managers, ownership, and classification societies.[247] This error in judgment was compounded by the oil company's vetting approval for the ERIKA having, in fact, expired five days before the vessel was chartered for her final voyage.[248] Clearly, when an oil company undertakes the voluntary vetting of a ship (which it most certainly should), it must contribute significant resources to ensure that the vetting process "conform[s] to prevailing industry standards or to such higher standards as a court deems prudent."[249]

Charterers who analyze the *Erika* ruling may be disturbed because under a traditional time charter situation, their responsibility for the vessel is limited to giving voyage instructions. Indeed, it is well settled that "[u]nder the time charter, the [ship]owner bears continuing responsibility for the seaworthiness of the vessel."[250] But that does not absolve a charterer of any duty of care. Courts have recognized that a time charterer "has some responsibilities. It designates the cargo that the chartered vessel will carry, and if, for example, it carelessly chooses an unsafe combination of cargo to share the same hold, it could be liable for resulting damages."[251] The Fifth Circuit has now gone even further in

242. *Id.* at 40.
243. *Id.* at 41.
244. *Id.* at 56.
245. No. 9934895010 at 214-17, Erika Judgment at 214-17.
246. *Id.*
247. *Id.* at 215, Erika Judgment at 215.
248. *Id.* at 137, 217, Erika Judgment at 137, 217.
249. Anderson & De la Rue, *supra* note 53, at 42.
250. Nichimen Co. v. M.V. Farland, 462 F.2d 319, 331, 1972 AMC 1573, 1589 (2d Cir. 1972).
251. Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc., 830 F.2d 1332, 1341 (5th Cir. 1987).

Hodgen v. Forest Oil Corp. in describing a charterer's duty: "[A] time charterer owes a hybrid duty arising from tort and contract law to exercise the control the charter affords it over the timing, route, and cargo of a vessel's journey in a reasonably prudent manner."[252] In light of the *Erika* decision, one may now add to that list tort obligations for negligent vetting of a substandard vessel within an international law context.[253]

So what are oil company charterers to do after the *Erika* ruling? Treat it as an aberration? Retreat from issuing vetting approvals and eliminate their vetting departments? Hardly. As noted by Anderson and de la Rue, "[i]t is . . . important that the vetting program be properly reviewed, implemented and administered."[254] Vetting programs have developed significantly since the ERIKA incident. Companies are retaining outside counsel and expert consultants to assess their vetting programs critically and to assist in training employees properly. If the review of the vetting process is undertaken in-house, the oil company typically has internal reports reviewed by outside counsel and expert consultants for an independent assessment. Either way, in the event of a casualty, a court is more likely to consider favorably the company that has undertaken preventative measures in a professional and thorough manner consistent with industry standards.[255]

The other advisable point for socially responsible and risk-averse oil companies is to avoid using aged, high-risk ships to transport the most damaging oil cargos like heavy fuel oil. "The European Commission has stated that one of the criteria for considering whether a civil liability and compensation system is fully satisfactory is that it should discourage ship operators and cargo interests from transporting oil in anything other than tankers of an impeccable quality."[256] Newer oil tankers are preferred for safe transportation of oil cargos because there is less wear and tear on the hull, but also because there is a double-hull shell intended to minimize the environmental damage in case of a structural failure or accident at sea. While older, single-hull tankers continue to operate, and can surely

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252. 87 F.3d 1512, 1517, 1997 AMC 140, 145 (5th Cir. 1996).

253. Anderson and De La Rue address one case, *Keller v. United States*, 38 F.3d 16, 1995 AMC 397 (1st Cir. 1994), as an example of where "voluntary [vetting] standards may be used to establish a standard of reasonable care." Anderson & De la Rue, *supra* note 53, at 41.

254. Anderson & De la Rue, *supra* note 53, at 42.

255. One public resource that companies and coastal states alike may use is the Equasis database, which provides "quality and safety-related information on the world's merchant fleet." *See* Equasis, About, http://www.equasis.org/EquasisWeb/public/About?fs=HomePage#main Objectives (last visited Sept. 20, 2008).

256. ANDERSON & DE LA RUE, *supra* note 40, at 56.

be chartered for less, oil companies and charterers must carefully consider the exposure to liability associated with use of these vessels until 2010 when the last of the single-hull fleet is phased out.[257] Even double-hulls, however, do not remove the risk of structural failures at sea that cause environmental harm and jeopardize the lives of seafarers. The avoidance of these casualties is grounded in the efficient operation of the maritime safety chain and the responsibility of each actor to fulfill its respective obligation to require vessels be maintained consistent with industry standards enforced by ethically minded class surveyors with the full support and encouragement of their classification society.

The charterer vetting process is voluntary, as opposed to the mandatory rules and regulations enforced by classification societies pursuant to international conventions. As such, the charterer's role is more limited and subservient to that of a classification society. This should not change after the *Erika* decision. While a charterer must be required to exercise due diligence in selecting a vessel, in our view, the *Erika* court could be said to have gone too far in holding a charterer responsible at the same level as that of the shipowner and classification society.

D. The Condition of the ERIKA Precluded a Port of Refuge

The *Erika* court found that "[n]either the port states, during their inspections, nor the oil companies, during the vetting operation or at the time of chartering the vessel, were in a position to detect the state of corrosion of the structures of the ERIKA."[258] As such, while the court addressed the notion of possible places or ports of refuge for the ERIKA before she sank, it ultimately concluded that in hindsight it was not possible for the court to determine if alternative courses or maneuvers by the ship master as to the route to take towards a port were causative of the oil spill.[259] The vessel's corroded state did not permit time for an analysis

257. The IMO Web site contains specific information on single-hull oil tanker phase-outs. *See* IMO, Revised Phase-Out Schedule for Single-Hull Tankers Enters into Force, http://www.imo.org/dynamic/mainframe.asp?topic_id=1018&doc_id=4801 (last visited Sept. 20, 20008). The phase-out process has continued to hasten as a result of the ERIKA casualty, followed by the PRESTIGE casualty a few years later. *Id.* Presently, single-hull tankers delivered in 1982 or earlier are to be phased out by 2010, the last year they are allowed to ply their trade carrying oil. *Id.*

258. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 11ème ch., Jan. 16, 2008, No. 9934895010, slip op. at 188 (*Erika*), *translated in* The LanguageWorks, Inc., Erika Judgment 188 (Apr. 22, 2008) (unpublished English language translation, on file with author) (Erika Judgment).

259. *Id.* at 223, Erika Judgment at 223.

of port-of-refuge issues.[260] The court acknowledged that the ship master and her manager had treated the coastal state with "nonchalance"[261] and that there were failures in the implementation of the "Shipboard Oil Pollution Emergency Program" or "SOPEP."[262] However, the court could not be certain that these failures had a causal role in the sinking and resulting pollution.[263] After a very thorough review, the court found that there was insufficient evidence that "during the last days of navigation, a different management of the crisis would have prevented the outcome that it experienced."[264]

This conclusion effectively mooted further consideration of whether the government had acted properly in response to the ERIKA casualty with respect to a port of refuge or otherwise.[265] As previously discussed, in the United States, the Coast Guard would have the authority and the right, as expressed in the IMO guidelines, its own instructions, and UNCLOS, to reject vessels such as the ERIKA or the PRESTIGE when granting the request would seriously jeopardize coastal natural resources and local communities. The *Erika* decision is consistent with the prerogative of the coastal state to assess the condition of such vessels and make an informed decision on a case-by-case basis.

V. CONCLUSION

Because of the depth of detail and length of the trial proceedings in France, the industry must take heed of the *Erika* court's findings concerning the 1992 CLC, charterer liability, and classification responsibilities in particular. U.S. courts certainly will recognize the importance of this extension of liability and have already been asked to consider the *Erika* court's findings with respect to interpretation of the CLC in the appeal of the district court order dismissing the complaint in the *Prestige* litigation. All entities in the maritime safety chain must reevaluate their own control processes in order to avoid or minimize the risks of being involved with transporting oil cargos. While the state of the law is in flux after the *Erika* decision, maritime safety chain actors must be aware that more will be demanded of them; the failure to act

260. *Id.* at 189-90, 223, Erika Judgment at 189-90, 223.
261. *Id.* at 224, Erika Judgment at 224.
262. *Id.* at 225, Erika Judgment at 225.
263. *Id.*
264. *Id.* at 226, Erika Judgment at 226.
265. *Id.* at 223, Erika Judgment at 223.

prudently will result not only in substantial civil exposure, but criminal liability as well.