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Environmental crime and judicial rectification of the *Prestige* oil spill: The polluter pays☆

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ABSTRACT

The enforcement of institutional rules requires the judicial system to perform well. In the case of oil spills, courts are key actors in determining the allocation of liabilities according to international and national norms. In 2002, the *Prestige* oil spill led to a major environmental disaster on the coasts of Spain, France and Portugal. The limitations of liability provided by the International Regime of Civil Liability and Compensation for Oil Pollution Damage have prevented the polluters from fully compensating injured parties for the damage the spill produced. In 2013, the Spanish Provincial Court of A Coruña condemned the captain of the tanker for disobedience, but no environmental crime was found; therefore, no further civil liabilities were incurred. Nevertheless, in 2016, the Spanish Supreme Court overruled the ruling of the provincial court and proclaimed the existence of an environmental crime. This judicial rectification changed the allocation of liabilities, extended the application of the polluter-pays principle, and opened a different stage for estimating and covering the costs of the damage. This paper presents a highly relevant case study that analyses the new situation involving oil spills and the distribution of liabilities within the current international regime.

1. Introduction

Institutions are composed of formal rules, informal norms and enforcement mechanisms [21]. Institutional analysis, therefore, requires the study of not only the formal rules and informal norms that regulate agents' behaviour but also of the de facto performance of the mechanisms that enforce these rules. In the case of oil spills, national judicial systems can apply the complex system of international standards and national legislation; hence, the allocation of liabilities among parties largely depends on what the courts of justice decide. A judicial system can have a multilevel governance structure, and a country's upper courts can modify judgements from its lower courts.

In November 2002, the sinking of the oil tanker *Prestige* generated a vast oil spill off the coast of Galicia; this spill affected the coasts of Spain, France and Portugal. The disaster had serious environmental, economic and social consequences. On 16 November 2013, the Provincial Court of A Coruña ruled that there was neither fault nor an environmental crime in the *Prestige* case. Caballero and Fernández-González [4] analysed this judicial process, which was "slow, complex and imperfect". According to that decision, the polluter was not civilly liable for the damage that the oil spill caused beyond the limitations that the applicable international conventions provided. However, on 14 January 2016, the Spanish Supreme Court (Tribunal Supremo) overruled the judgement of the Provincial Court of A Coruña and condemned the captain of the tanker to two years' imprisonment for reckless criminal damage to the environment with catastrophic effects. The Supreme Court then established new civil liability for the captain, the vessel owner, the insurer and the International Oil Pollution Compensation Funds (IOPCF) based on the occurrence of this environmental crime. The IOPCF is responsible for compensating for any damage above the shipowner's liability limitation. However, the IOPCF's liability is also limited in accordance with the existing conventions.

This paper analyses the allocation of liabilities for damages in the case of the *Prestige* oil spill after the 2016 Spanish Supreme Court judgement, which annulled the previous judgement and established the presence of an environmental crime. This paper updates the analysis of Caballero and Fernández-González [4] based on the new judicial decision, which substantially changed the allocation of responsibilities in this case. The paper also analyses some of the institutional challenges and difficulties of the process. Section 2 introduces the institutional structure of the International Regime of Liability and Compensation for Oil Pollution Damage, whose basic body of rules comprises two international conventions. Section 3 studies the polluter-pays principle and the efficiency criteria that underlie the existence of the liability

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limitation for polluters in this international regime. Section 4 presents the structure of the Spanish judicial system and the role of the Supreme Court. Section 5 analyses the Provincial Court of A Coruña's decision, the appeals of that judgement, and the new Supreme Court judgement. Section 6 studies the complexity of the process and the difficulties of fully implementing the polluter-pays principle. Section 7 draws some conclusions.

2. The 1992 international regime on liability and compensation for oil pollution damage

Since the mid-nineteenth century, because of the diversity of national laws, international treaties have been instituted to harmonise institutions and behaviours, reduce uncertainty and risk, and distribute responsibilities in accordance with global interests and common notions of justice and law. For laws regarding the sea, the most relevant formal milestones were reached in the second half of the twentieth century, with the Conferences on the Law of the Sea (1956, 1960 and 1967) and the subsequent approval of the United Nations Convention on the Law of the Sea in 1982, one of the most important multilateral treaties. This treaty occurred in a post-war period in which the will for cooperation between nations caused a proliferation of international treaties and conventions for joint regulation that were intended to establish a consensual distribution of rights and the peaceful resolution of conflicts. This convention set out such important issues as rights and freedoms at sea and exclusive economic zones.

Parallel to the efforts to minimise ecological disasters from oil transport, the International Maritime Organization (United Nations) promoted the implementation of a system that would improve the provision of adequate and swift compensation to the victims of oil spills. From this, the first set of conventions (the 1969 Convention on Civil Liability [CLC] and the 1971 Fund Convention [FC]) emerged, laying the foundations for the current 1992 International Regime of Liability and Compensation for Oil Pollution Damage. Among other things, this regime determines the distribution of rights and responsibilities among the parties involved in an oil spill (shipowner, oil industry, certifying company, crew, plaintiffs, etc.), the system to measure the damage a spill causes and the mechanisms to make the compensation effective. This protocol coexists with other systems on liability and compensation regarding incidents at sea, such as the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (NUCLEAR), the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL), the Convention on Limitation of Liability for Maritime Claims (LLMC), the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) and the Nairobi International Convention on the Removal of Wrecks.

The 1992 version of the international regime was built from two international conventions: the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 FC).

The first convention (1992 CLC) determined the civil liability of the shipowner. The shipowner is responsible under *strict liability* (which means that he/she is liable even in the absence of fault) following the polluter-pays principle. However, the shipowner's liability is limited to an amount that is linked to the ship's tonnage. Additionally, according to this convention, no legal action can be taken against any other actor (captain, crew, cargo owner, certifier, civil servants, etc.). The convention also provides a system of compulsory liability insurance for ships carrying more than 2000 t of bulk oil as cargo.

The second convention determined the liability of the IOPCF, which comprises funds that the oil industry contributes. It operates when the scope of the damage is higher than the shipowner's limitation of liability (in accordance with the 1992 CLC). It is voluntary and complementary to the previous convention. This convention also introduced a limitation of compensation for the IOPCF.[1]

By driving and limiting the liabilities of both the shipowner and the oil industry, the system forces what has come to be called the *channelling of liability*. The first liability tier is the shipowner's, which is up to the liability limitation provided in the 1992 CLC. Above this threshold, the IOPCF assumes the second tier, for damage up to the limitation provided in the 1992 FC. The victims of the spill assume any remaining damage above these liability limitations. This is not common, but in large disasters such as the *Prestige* oil spill, it can happen.

Another key aspect of this international regime is the establishment of a unified concept for *damage* and of criteria for measuring it. According to Article I, paragraph 6 of the 1992 CLC, *pollution damage* means “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”. Regarding the measurement of this damage, moral damage and purely environmental damage are not considered; only so-called *economic* damage is taken into account. The CLC states that compensation “shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken”. The assumption that all damage can be expressed in economic terms and the meaning of “reasonable measures” are important issues of contention.

As mentioned in the introduction, a transcendental aspect of these international systems is that they are based on multilateralism and reciprocity. Therefore, the role of each contracting state becomes fundamental for the enforcement of the rules and the practical functionality of the system in general. In the *Prestige* case, this has been particularly evident. Sections 4–6 will describe the structure of the judicial system and the events that have occurred since the incident.

3. The polluter-pays principle and the liability limitation

The polluter-pays principle ensures that the parties who produce pollution are liable for it and requires them to bear the costs of the consequent damage. It is a way of making these parties internalise the costs of prevention and reparation.

Ronald Coase [5] considered that under certain circumstances the social optimum could involve letting polluters generate externalities to other actors. Through free ex post agreements in the market, the actors could allocate property rights in the hands of those who value them most, thereby eliciting a Pareto-efficient social outcome. However, the most relevant contribution by Coase [5] on this topic was his statement about the role of transaction costs in disturbing the market mechanisms. Transaction costs prevent free ex post transactions among individuals from obtaining a Pareto-efficient social outcome as a result. This is why institutions matter: the initial distribution of property rights, the laws in force, the enforcement mechanisms, determines the result. Because free ex post transactions among individuals cannot guarantee social optimality due to the existence of positive transaction costs, right institutions and governance structures should be designed in order to ensure the best social outcome.

The International Regime of Civil Liability and Compensation for Oil Pollution Damage tried to guarantee the best social outcome in a world with high transaction costs. The 1992 international regime, which imposes strict liability on polluters, is applying the polluter-pays principle. However, as seen above, this operates only up to a certain amount. The existence of the liability limitation (along with the channelling of liability) contradicts the polluter-pays principle. It follows a different logic. Traditionally, the liability limitation clause is included

[1] Since 2005, a third tier of compensation has been available: the Supplementary Fund, which, under the same logic as the 1992 FC, substantially increases the amount available for compensation. However, this was not available at the time of the *Prestige* incident.

in multilateral treaties on maritime regulation. The reasons usually adduced to justify its presence are oriented towards efficiency matters,[2] such as

a) the will to protect the development of transport activities, which are high risk and which were considered unrealisable in the past if organisations had to fully cover the costs of an incident.
b) reducing the cost of the ship insurance, as unlimited liability is understood to make insurance for activities impossible or excessively costly.

This system, as a result, combines both logics (efficiency and the polluter-pays principle). The threshold representing the top liability limitation (that of the IOPCF in the 1992 CF) determines which (the polluter-pays principle or efficiency logic) applies.

We will see in the following sections that, for the redistribution of the burden towards the complete applicability of the polluter-pays principle, the claimants need to demonstrate that the damage resulted from a personal act or omission of some actor involved in the incident, "committed with the intent to cause such damage, or recklessly and with knowledge that such would probably result" (Article III, paragraph 4, of the 1992 CLC). This permits the national courts to override the clauses related to the limitation and channelling of liability. In the *Prestige* process, the national judicial system and the Public Prosecutor's Office were the key elements in the search for full (or the highest possible) coverage under the polluter-pays principle. However, seeking compensation outside the international regime and beyond the limitation of liability is difficult.

4. Third-party enforcement, multilevel governance and Spain's judicial system

The New Institutional Economics has shown the importance of enforcement mechanisms in an institutional framework and has included studies on how such mechanisms can fall into the hands of a third party that resolves conflicts. The rule of law—and independent courts' impartial application of it—must be guaranteed whenever inclusive political and economic institutions are present [1,2]. In Spain, the civil law tradition reduces judicial discretion, and judges are required to apply formal laws and rules. The competences of the high-level courts indicate a more centralised judicial rule-making in the civil law tradition than in the common law tradition [20,3].

However, in a politically decentralised country such as Spain, justice administration comprises several judicial levels (municipal, district, provincial, regional and national), and in this multilevel judicial governance, lower courts' decisions can be appealed in higher courts, which can rectify decisions made by lower courts when resolving conflicts concerning the enforcement of laws. This is part of the institutional matrix for granting the rule of law in the civil law tradition Table 1.

Article 123 of the Spanish Constitution of 1978 states the following: a) The Supreme Court is the highest judicial body in civil, criminal, administrative and social processes (except regarding provisions concerning constitutional guarantees) and has jurisdiction over all of Spain. b) The president of the Supreme Court is proposed by the General Council of the Judiciary, which is the highest body of the government of judges.

Table 1
The Spanish Judicial System: different bodies and levels.

National jurisdiction	Constitutional Court (Tribunal Constitucional) General Council of the Judiciary (CGPJ: Consejo General del Poder Judicial) Supreme Court (Tribunal Supremo) National Court (Audiencia Nacional)
Regional jurisdiction	High Courts of Justice (Tribunal Superior de Justicia)
Provincial jurisdiction	Provincial Courts (Audiencia Provincial)
Judicial District	Court of first instance (Juzgado de Primera Instancia e Instrucción)

According to the Spanish Constitution, the Judiciary Act determines the creation, operation and control of the courts and tribunals.

In accordance with Basic Law 6/1985 on the Judiciary (1 July 1985), Spain has magistrates' courts, courts of first instance and preliminary investigations, courts for administrative-contentious proceedings, labour courts, courts for prison supervision and minors, provincial courts and regional high courts of justice. The National High Court and the Supreme Court are higher-level courts that have jurisdiction over the entire national territory. Each province has a provincial court in its capital city with jurisdiction in its province over criminal and other matters. The Constitutional Court lies outside the ordinary courts of justice, at another level, and works as the ultimate guarantor of order and constitutional rights

The Supreme Court is the apex of the appeals system and is the ultimate body for interpreting case law in Spain. Its responsibilities include decisions in the following cases: final appeals to the Supreme Court, appeals for judicial review and other appeals reserved for the Supreme Court, the prosecution of members from higher state bodies, and the processes for outlawing political parties.

The Supreme Court is composed of several standard chambers of the court. The Second Chamber for Criminal Matters of the Supreme Court deals with final appeals made to the Supreme Court, appeals for judicial review, and other criminal appeals reserved for the Supreme Court as prescribed by law. This chamber maintains intense activity. The Supreme Court issued 1078 judgements in 2012, 1057 in 2013, and 910 in 2014; it also issued 2855, 2577 and 2155 "rejection decisions", respectively, regarding other appeals in those years [23–25]. This chamber is responsible for resolving appeals in criminal matters relating to judgements from Provincial Courts, and its Technical Office conducts studies and reports for the Supreme Court.

5. The resolution of the Spanish judicial process regarding the *Prestige* oil spill

In 2002, the *Prestige*, a single-hull tanker flying the Bahamas flag, suffered hull damage during a storm when it was about 50 km off the coast of Finisterre (Spain), and it ended up splitting in two and sinking some 260 km from the coast of Vigo. It was carrying 77,972 t of fuel oil, of which approximately 63,000 t were spilled, affecting more than 200 km of coastline—mainly in Spain but also in Portugal and France [18]. There were several estimations of the economic effects of the oil spill [12,15,16,17]. The claims that the IOPCF office in Spain received totalled €1037 million, but the IOPCF only considered €304.1 million of this to be admissible for compensation (Table 2).

By 2002, Spain, France and Portugal had ratified the 1992 CLC and the 1992 FC. As shown in Table 2, the conventions limited the shipowner's liability to SDR 18.9 million (about €22.8 million at the time) and the Fund's liability to SDR 135 million (about €171.5 million). The amount exceeding the latter figure would be left uncompensated and would thus be assumed by the victims or by their states. These limitations and the channelling of liability (preventing any party from making a claim against actors aside from the shipowner) provided in Articles V and III of the 1992 CLC, respectively, come into effect except when "the

[2] However, some authors consider the current existence of the limitation of liability an "unjustly discriminatory attempt to subsidize the shipping industry at the expense of other interests" [7] or a "historical mistake" [6]. Though its presence in maritime regulation could have been reasonable at some point in history, for these authors, the original circumstances no longer seem to hold. In fact, the liability limitation is often considered to be openly inefficient. According to Faure and Wang [6], it a) may lead to a situation of underdeterrence of polluters' risky decisions; b) represents an unjustifiable subsidy for the oil and shipping industries; and c) in large disasters, can result in inadequate compensation for the affected parties.

Table 2
Available and required amounts to compensate the damage.

Actor	Amounts
Shipowner's limitation of liability	22.8 million euros (18.9 million SDR)
1992 IOPC Fund's limitation of liability	171.5 million euros (135 million SDR)
Estimated damage by IOPCF	304.1 million euros
Vessel's insurance policy	898 million euros ($1000 million)
Estimated damage by the Spanish Prosecution	4.33 billion euros

damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result". In this case, a judicial body could overrule the clauses on channelling and limitation of liability, which would open up the possibility for a claimant to legally act against other actors who were involved in the disaster and to thus demand a higher compensation than that laid down in the financial caps (i.e. limitations of liability).

The Spanish state tried to undertake legal actions to obtain greater compensation for the damage that the spill caused; it carried out diverse actions in various countries. First, in the United States, Spain filed a lawsuit against the certification company, American Bureau of Shipping (ABS), but the court ruled in favour of the company. In the words of the court, Spain "failed to adduce sufficient evidence to create a genuine dispute of material fact as to whether Defendants recklessly breached that duty such that their actions constituted a proximate cause of the wreck of the *Prestige*" [26]. Therefore, Spain could not demonstrate that ABS exhibited either recklessness or negligence, which is a different from what occurred in France regarding RINA and the oil spill caused by the *Erika*. Second, France filed a lawsuit against ABS in its own courts, but the company also won in that case. Third, in Spain, the Provincial Court of A Coruña tried the captain, the chief engineer and the general director of the merchant navy [4]. We analyse the Spanish judicial process in the next three subsections.

5.1. The ruling of the Provincial Court of A Coruña in 2013

Domestically, this case was the subject of extensive media coverage, and all the actors were highly exposed to public opinion. This influenced the attitude of the Spanish government, which, as a result, became vehemently against the polluters. Moreover, this attitude against the polluters was incorporated in the motivations of the Public Prosecutor's Office.

In the Provincial Court of A Coruña, a criminal lawsuit was presented against the captain, the chief engineer and the general director of the merchant navy (who had been involved in the decision not to allow the ship to take refuge in Spain). In the ruling of 16 November 2013, none of these parties were found criminally liable for damage to the environment. The captain was, however, found guilty of disobedience, for which he was sentenced to nine months in prison. Because there was no environmental crime in this ruling, civil liabilities for the damage that the oil spill caused were limited, and the polluters were not made fully liable. Consequently, the insurer of the vessel (London P & I Club) was released from any further responsibilities in this case [4].

5.2. The appeals of the provincial court's ruling

The Provincial Court of A Coruña's ruling could be appealed to Spain's Supreme Court. The probability of the appeal's success was not high because the accused had been acquitted of the crime and because the facts proven in the provincial court were not going to be questioned in the Supreme Court. Nevertheless, several actors (who argued in different directions) appealed the ruling of the Provincial Court of A Coruña. If the Supreme Court considered the previously proven facts to indicate an environmental crime, the allocation of liabilities would considerably change.

The following agents filed an appeal of the provincial court's judgement before the Spanish Supreme Court: the Xunta de Galicia (Regional Government of Galicia), the public prosecutor, the captain of the vessel, the chief engineer, the Conseil Régional de Bretagne (Regional Government of Brittany), Isidro de la Cal Fresco S.L., Luso-Hispana de Acuicultura S.L., Caltran Sau, Pasteurizados del Mar S.L., Promotora Industrial Sadense S.A. Unipersonal, Mr. Juan Cipriano Fernández Arévalo, Depuradora de Mariscos del Lorbe S.A., Administración General del Estado, Asociación Ecologista y Pacifista "Arco Iris", Amegrove Sociedad Cooperativa Grovense de Mejillones S.A., Patrarcis S.L., Plataforma Ciudadana Nunca Máis, and the French state.

The Spanish state's public prosecutor and legal service argued during the appeals before the Supreme Court that the captain of the *Prestige* was aware of the oil tanker's structural defects. They felt that the provincial court had not adequately assessed the existing evidence regarding the vessel's defects.

5.3. The Spanish Supreme Court's 2016 ruling

On 26 January 2016, the Spanish Supreme Court issued a decision correcting the judgement of the Provincial Court of A Coruña of 16 November 2013. The Supreme Court determined the presence of an environmental crime even though the provincial court had only ruled on the crime of disobedience. The Spanish Supreme Court sentenced the captain of the vessel to two years' imprisonment for reckless criminal damage to the environment with catastrophic effects and affirmed the civil liability of the captain of the vessel, the vessel owner (Mare Shipping Inc.) and the insurer (London P & I Club), as well as the 1992 International Fund. On the other hand, the Spanish Supreme Court confirmed the acquittal of the chief engineer and the director general of the merchant navy, who had already been acquitted by the provincial court.[3]

In the Spanish legal system, Article 45 of the 1978 Constitution establishes that 1) everyone has the right to enjoy an environment suitable for that person's development and has the duty to preserve it; 2) the public authorities shall ensure rational use of all natural resources to protect and improve the quality of life and to defend and restore the environment by relying on indispensable collective solidarity; and 3) those violating the provisions of the preceding paragraph, in the terms established by the law, will be subject to criminal or administrative sanctions and will be obliged to repair the damage caused. The Constitution thus establishes the concept of crimes against the environment; such crimes have implications regarding civil liability and payment for the damage caused. There is no limit on civil liability claims to insurance companies for the resultant public expenditures or for economic and environmental damages [22].

In accordance with the Spanish legal system, the Supreme Court accepted the facts that were proven in the provincial court but changed the legal interpretation of these facts; that is, the Supreme Court felt that the events called for a different punitive legal consideration for the captain's behaviour.

In the Spanish civil law tradition system, the degree of judicial conviction required for condemn in a criminal proceeding and that necessary to estimate the claim in a civil proceeding require a probative

[3] The lawyers for the vessel's captain requested annulment of the Supreme Court's decision because it did not hear the captain, arguing that this contravened Article 24 of the Spanish Constitution. The Supreme Court dismissed this application for annulment on 11 April 2016. The captain's lawyers have since been engaged in proceedings before the Constitutional Court and the European Court of Human Rights in an attempt to force an annulment of the judgement.

process that evidences the crime or civil offense before the court. The Spanish guarantor law system assumes the presumption of innocence that implies that the burden of proof is on the one who declares, not on one who denies. But while the burden of proof in the civil process is in the hands of the parties, in criminal proceedings the prosecutor plays a key role to present proofs. The decision of the environmental crime (which in this case could be considered the most important, since it opens the door to the overruling of the Conventions) had to face a strict standard of proof.

The Supreme Court deemed that there was negligence and an environmental crime in the case of the *Prestige*; hence, it annulled the application of the 1992 CLC, which in Article V, paragraph 2, states that "[t]he owner shall not be entitled to limit his liability under this Convention if 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". In this manner, the shipowner lost the protection provided in Article III, paragraph 4, of the 1992 CLC for captains and the agents they hire; therefore, the civil liability for damages that the oil spill caused became unlimited. In this sense, the Supreme Court declared that the captain was directly responsible for the civil liability related to all the damage caused and that the shipowner had subsidiary liability, which means he was no longer entitled to any liability limitation. The Supreme Court upheld that the shipowner was aware of the vessel's condition and acted negligently by permitting its navigation.

Likewise, the Supreme Court found the vessel's insurer, the London P & I Club, to be directly liable for the maximum amount of the insurance policy. This insurance policy covered civil liability up to US$1 billion.

The Supreme Court's judgement held the IOPCF responsible for the civil liability but respected the liability limitation of the 1992 FC.

Likewise, this judgement incorporated significant strides in maritime law, such as the concept of "seaworthiness" (which goes beyond the fact that the vessel had a certificate of classification) and new perspectives on the allocation of responsibilities [14].

6. The polluter pays—but who, how and how much?

The Supreme Court's judicial rectification indicated that an environmental crime had been committed and required the polluters to assume all the consequences of the spill (see Table 2). The captain, the owner of the tanker, the insurer and the IOPCF are involved in this allocation of liabilities. Nevertheless, the judicial process is incomplete, as the liabilities and payments are still immersed in the complex stage of estimation and allocation. In any case, the Supreme Court's ruling has changed the previous status quo situation, and a new scenario has been created. Some key elements aid in understanding the transition from the general polluter-pays principle to the real and concrete distribution of liabilities and payments. This section presents these issues and how they relate to the final quantification of the required compensation according to the ruling and the way that it will be executed, including the risks and difficulties of the process (Table 3).

The judicial decision not only seeks to abandon the clauses regarding the channelling and limitation of liability but also applies criteria from national regulations to measure damage that are not admissible in the international system. Article I, paragraph 6, of the 1992 CLC textually establishes that the compensation "shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken" or "the costs of preventive measures and further loss or damage caused by preventive measures". Such a conception of damage is controversial, has been considered too narrow (see [19]) and often contradicts national legislation. The quantification of the total damage is still pending the implementation phase of the Supreme Court's judgement. However, this judgement already includes compensation not only for objective economic damage (repair costs and loss of profits) but also for moral and purely environmental damages. The Public Prosecutor's Office is demanding an amount of €1214 million for environmental damage [8,9], and according to the sentence, the acknowledged moral damage cannot be more than 30% of the material damage (Spanish Supreme Court, 2016: 144). Section 1 of the Provincial Court of A Coruña is responsible for the valuation of damage after the Supreme Court's 2016 judgement; notably, the public prosecutor quantified the damage to Spain at €4328 million during the trial in the provincial court.

An essential issue for the extension of the polluter-pays principle (versus the liability-limitation logic) is making the insurer pay the US$1 billion (€898 million) owed in the insurance policy. To do this, the Spanish state's legal service has to ensure that the judgement is enforced in the United Kingdom, as the insurer is from London. Here, there are two legal routes: a) send letters rogatory to the British courts to seek assistance in the execution of the Spanish Supreme Court's judgement or b) hire a law firm to file a claim in London against the insurer of the *Prestige* (i.e., file an "executory proceeding" before the British courts to enforce the Spanish Supreme Court's judgement regarding the insurer's payment for damages). Such an executory proceeding would involve confronting the insurance company's lawyers, who may use an earlier civil judgement from a British court that stated that the UK insurer was only obliged to pay the shipowner (and only if he had previously paid for the damage caused) and that it did not have to pay any other agent. We must bear in mind that, in the case of the *Prestige*, it was the Spanish state that paid the compensation to those whom the oil spill affected.

Although these legal avenues can be chosen simultaneously, each has clear implementation difficulties, and it is quite likely that resolving the conflict regarding the insurer's obligations will require arbitration between the two parties. Moreover, the insurance company is of the view that the €22.8 million it deposited prior to the Supreme Court's judgement has already covered its responsibility, and it will try to defend its position before the British courts.

Furthermore, the IOPCF has very critically assessed the Supreme Court's judgement. In a note pronounced on 30 March 2016, the

Table 3
Judicial Rectification in the case of the Prestige Oil Spill in Spain.

	Sentence of the Provincial Court, 2013	Sentence of the Spanish Supreme Court, 2016
Captain of the tanker	Guilty of disobedience 9 months in Prison No direct civil liability	Guilty of Environmental Crime 2 years in Prison Direct Civil Liable without limits
Chief Engineer	Acquitted	Acquitted
General Director of the Merchant Navy	Acquitted	Acquitted
Owner of the vessel	Civil liable under the limits of the 1992 CLC: Strict liability, but only until 22.8 million euros	Subsidiary Civil Liable without limits
Insurer of the Vessel	The same liability of the shipowner	Direct civil liable to the maximum amount in the shipowner's insurance policy ($1000 million)
IOPCF	Civil liable under the limits of the 1992 FC: Strict liability from 22.8 million to 171.5 million euros	Civil liable under the limits of the 1992 FC: Strict liability from 22.8 million to 171.5 million euros

Secretariat of the IOPCF stated that this decision is actually a breach of the CLC because, under the convention, “the insurer may avail itself of the right to limitation of liability, even if the owner is not entitled to do so” ([10]: 9). Therefore, the IOPCF insists on the application of the convention in the judicial proceedings. The IOPCF also complains that the judgement admits compensation for concepts that are ineligible in the convention, such as those for purely environmental or moral damages.

The International Group of P & I delivered a letter to the IOPCF in March 2016 that expressed its discontent with the judgement and even declared its “significant concerns for the future viability of the compensation system as a whole and the pressures faced by insurers and their reinsurers) in light of this judgement” ([11]: 1). The group considers the Supreme Court to have “exceeded its powers by undertaking a wide-ranging re-evaluation of the facts of the case; by substituting its own view of the facts for the trial court's assessment of the evidence; and by reversing the master's acquittal without re-hearing his evidence” ([11]: 4). The letter added that the group hopes that the captain succeeds in some of the actions he has taken before the Supreme Court, the Constitutional Court and the European Court of Human Rights and that the judgement is annulled.

In addition to the above-mentioned elements, the temporal dimension must also be taken into account. The *Prestige* sank in 2002, and the Spanish Supreme Court pronounced its judgement in 2016. Now, there are new proceedings to enforce this judgement. This process may be lengthy (depending on several circumstances), and 15 years have already passed since the vessel sank.

7. Conclusions

Unlike the judgement of the Provincial Court of A Coruña, the Spanish Supreme Court's 2016 judgement considers the captain of the *Prestige* to be responsible for a crime against natural resources and the environment, with the aggravating circumstances of generating a catastrophic deterioration and of committing gross negligence, in accordance with Articles 325 and 327 of the Spanish Criminal Code. The Supreme Court concluded that the captain's imprudence and disobedience generated a serious risk because he was navigating a 26-year-old vessel with several deficiencies that he was aware of. The captain's gross negligence indicates a responsibility regarding the probability that damage will occur, so the Supreme Court ruled the captain is responsible for civil liability for the damage caused. Based on the 1992 CLC and Article 120.4 of the Spanish Criminal Code, the Supreme Court ruled that the shipowner is subsidiarily liable.

With regards to the insurance company's liability, the Supreme Court stated that the insurer is responsible for direct civil liability up to the amount established in the insurance policy. To this end, the Supreme Court applied Article 117 of the Spanish Criminal Code, which states that “insurers that have taken on the risk of pecuniary liability deriving from the use of any asset, company, industry or activity, when, as a result of a circumstance provided for in this Code, an event occurs that produces the insured risk, they shall hold direct civil liability up to the legally established or generally agreed compensation limit, without prejudice to the right of recourse against the concerned party”. This is a key point in the enforcement of the judgement, as the insurance company is litigating to limit its payments to €22.8 million, which would be the financial cap if the 1992 CLC were applicable. The enforcement of this judgement in the British justice system has obvious difficulties: On the one hand, the lawyers representing the Spanish state will defend the criminal judgement of the Spanish Supreme Court, which has concluded that an environmental crime exists and that the insurance company has civil liability; on the other hand, the lawyers of the insurance company will argue that the British civil court judgement shields the company from paying out the full US$1 billion from the insurance policy. An arbitration mechanism may be needed to resolve the issue, and this process may be complicated if it coincides with the United Kingdom's exit from the EU (Brexit), which could affect certain judicial cooperation conventions. Furthermore, Brexit means that the guarantees that the United Kingdom previously provided due to valid EU laws may change from 2017 onwards. In the international arena, Britain will be subject to international standards, but it will no longer have to comply with EU standards and instructions from the European Commission. Therefore, the role of the British courts may be crucial in the enforcement of civil liability in this case.

After the *Prestige* sank, the Spanish state covered third-party damages and compensated for the damage caused in the most affected sectors. In this way, it ensured that “those suffering damage from pollution get compensated”, at least for certain minimum amounts [13]. The 2016 Supreme Court judgement allows for the extension of the polluter-pays principle beyond the liability limitation set forth in the conventions.

However, although this sentence and the collection of the insurance policy extend the polluter-pays principle, the damage is not yet completely covered. The insurance policy is also limited to a certain amount. The shipowner and the captain are regarded as insolvent, and legal actions have already been taken against the certification company, without success. It is likely that the Spanish state will assume much of the cost, as the liability limitation of the IOPCF (representing the oil industry) has been judicially respected.

This article sheds new light on the allocation of responsibilities in the case of oil spills from the perspective of institutional analysis, and the information provided is of interest for comparative analysis of liability for damages.

References

[1] D. Acemoglu, J. Robinson, Why nations fail. The Origins of Power, Prosperity, and Poverty. Crown Business, 2012.

[2] X.C. Arias, G. Caballero, Calidad institucional y competitividad de la economía española: perspectiva comparada, Pap. De. Econ. Esp. 150 (2016) 127–144.

[3] B. Arruñada, V. Andonova, Market institutions and Judicial Rulemaking, in: C. Menard, M.M. Shirley (Eds.), Handbook of New Institutional Economics, Springer, 2005, pp. 229–250.

[4] G. Caballero, R. Fernández-González, Institutional analysis, allocation of liabilities and third-party enforcement via courts: the case of the Prestige oil spill, Mar. Policy 55 (2015) 90–101.

[5] Ronald H. Coase, The problem of social cost, J. Law Econ. 3 (1960) 1–44.

[6] M. Faure, H. Wang, Financial caps for oil pollution damage: a historical mistake? Mar. Policy 32 (4) (2008) 592–606.

[7] G. Gauci, Limitation of liability in maritime law: an anachronism? Mar. Policy 19 (1) (1995) 65–74.

[8] IOPCF, Incidents involving the IOPC Funds −1992 Fund: Prestige (IOPC/APR15/3/2). London: IOPC FUNDS, 2015a.

[9] IOPCF, Record of decisions of the October 2014 sessions of the IOPC Funds' governing bodies. London: IOPC Funds, 2015b.

[10] IOPCF, IOPC/APR16/3/2: Incidents Involving the IOPC Funds-1992 Fund: Prestige (Note by the Secretariat). IOPC Funds Document Services. [URL: 〈http://documentservices.iopcfunds.org/meeting-documents/download/docs/4028/lang/en/]〉.

[11] IOPCF, IOPC/APR16/3/2: Incidents Involving the IOPC Funds-1992 Fund: Prestige - Judgment of Spanish Supreme Court (Submitted by the International Group of P & I Associations). IOPC Funds Document Services. [URL: 〈http://documentservices.iopcfunds.org/meeting-documents/download/docs/4028/lang/en/]〉.

[12] M.C. García Negro, S. Villasante, A. Carballo Penela, G. Rodríguez Rodríguez, Estimating the economic effect of the Prestige oil spill on the Death Coast (NW Spain) fisheries, Mar. Policy 33 (1) (2009) 8–23.

[13] J.L. García-Pita y Lastres, Las sentencias Prestige: el otoño de nuestro descontento, E-Dictum, N. 24 (2013) 1–3.

[14] J.L. García-Pita y Lastres, Las sentencias “Prestige”: último acto (¿Una gloriosa primavera, un breve estío o el invierno de nuestro conocimiento?), Rev. De. Derecho Del. Transp., N° 17 (2016) 1–57.

[15] M.D. Garza-Gil, J.C. Surís-Regueiro, M.M. Varela-Lafuente, Assessment of economic damages from the Prestige oil spill, Mar. Policy 30 (2006) 544–551.

[16] M.D. Garza-Gil, A. Prada-Blanco, M.X. Vazquez-Rodriguez, Estimating the short-term economic damages from the Prestige oil spill in the Galician fisheries and tourism, Ecol. Econ., V. 58 (4) (2006) 842–849.

[17] F. González Laxe, (dir): El impacto del Prestige: análisis y evaluación de los daños causados por el accidente del Prestige y dispositivos para la regeneración medioambiental y recuperación económica de Galicia. Instituto de Estudios Económicos. Fundación Pedro Barrié de la Maza, 2003.

[18] M.L. Loureiro, A. Ribas, E. López, E. Ojea, Estimated costs and admissible claims

linked to the Prestige oil spill, Ecol. Econ. 59 (2006) 48–63.
[19] M. Mason, Civil liability for oil pollution damage: examining the evolving scope for environmental compensation in the international regime, Mar. Policy 27 (1) (2003) 1–12.
[20] J.H. Merryman, R. Pérez-Perdomo, Civil Law Tradition: An introduction to the Legal Systems of Europe and Latin America, Stanford University Press, 2007.
[21] D.C. North, Institutions, Institutional Change and Economic Performance, Cambridge University Press, Cambridge, 1990.
[22] A. Prada, Lecciones del Supremo sobre el Prestige, Opinión, La Voz de Galicia, 12/02/12106, 2016.
[23] TRIBUNAL SUPREMO, Memoria Anual de 2012. Tribunal Supremo. Madrid, 2012.
[24] TRIBUNAL SUPREMO, Memoria Anual de 2013. Tribunal Supremo. Madrid, 2013.
[25] TRIBUNAL SUPREMO, Memoria Anual de 2014. Tribunal Supremo. Madrid, 2014.
[26] US Court of Appeals, Second Circuit: Reino de España v. American Bureau of Shipping (No. 10-3518), 2011.