

Conformity of EC Directive 2005/35
with UNCLOS/MARPOL,
with Reference to the Judgment
of the ECJ (Case C-308/06)

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After the disaster of the *Prestige*, which sank off the Spanish coast in November 2002, the European Council called for specific measures for ship-source pollution and a system of sanctions. The European Commission proposed a “Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences” in March 2003, imposing criminal liability for discharges. There were serious concerns that the Commission’s proposal was not in conformity with the MARPOL 73/78 and the UN Convention on the Law of the Sea. Despite these concerns and opposition from the biggest flag States in the EU, namely Greece, Malta and Cyprus, the Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements to strengthen the criminal law framework for enforcement of the law against ship-source pollution were adopted in early 2005. In December 2005, maritime shipping industry organizations applied to the High Court of Justice of England and Wales (Administrative Court) for a judicial review in relation to the implementation of the Directive. In a decision in July 2006, the court decided to refer four questions; whether it is lawful for the European Union to impose criminal liability in respect of discharges from foreign ships, or, whether it is lawful for the EU to legislate for discharges in territorial waters other than in accordance with MARPOL, whether the imposition of criminal liability for discharges caused by “serious negligence” breaches the right of innocent passage recognized in UNCLOS, and whether the use of “serious negligence” as a standard of liability in the Directive infringes the requirement of legal certainty, to the European

Court of Justice for a preliminary ruling. The European Court released its judgment in June 2008 and agreed that the Directive remained valid. In its judgment, the Court accepted UNCLOS as binding on the Community but it determined UNCLOS sets out rights and duties among state and is not capable of being relied on by individuals before a national court, so that the Court did not answer the questions of the English High Court. Uncertainty remains regarding the legality of the Directive 2005/35 in relation to international legal frameworks such as MARPOL and UNCLOS. This article discusses whether Directive 2005/35 is conformity with UNCLOS and/or MARPOL.