

IMPLEMENTATION IN TURKISH LAW OF OIL POLLUTION CONVENTIONS – SOME RECENT DEVELOPMENTS

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Introduction

The sinking of M/V Ulla in Mersin Bay¹ not only enflamed once again the heated debate on marine pollution, but also brought to the limelight a recent legislative effort to deal with various aspects of marine pollution by oil or other hazardous substances, namely Law no.5312, which was published in the Turkish Official Gazette on the 11th of March this year² and which took effect on the 11th of June³. This note will attempt to examine the Law's provisions laying down conditions for entry into Turkish ports and for passage through the Turkish Straits.

Law no. 5312 entitled "Law relating to Emergency Response and Compensation of Damages for the Pollution of the Marine Environment by Oil and Other Hazardous Substances" was drawn up by the Ministry of Environment. It is rather ambitious, covering not only liability issues but also response and preparedness issues in cases of marine pollution. As such, it may be said to have many common traits with the US Oil Pollution Act of 1990⁴. However there are also some significant differences between the two

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1 M/V Ulla, flying St. Vincent and Grenadines flag, was impounded by Turkish customs authorities in Iskenderun Isdemir port in 2000. While waiting for the litigation to be resolved, it sank in port on the 6th of September, 2004 (Radikal, 07.09.2004)

2 Turkish Official Gazette, dated 11 March 2005, no.25752. During the debates held on the 3rd of March, 2005 in the National Assembly leading to the adoption of Law no.5312, the Ulla incident was specifically referred to (see for example the speeches of Osman Pepe, Environment and Forestry Minister and Tuncay Ercenk speaking for the main opposition party: available at <http://www.tbmm.gov.tr>)

3 Art. 27 of Law no.5312.

4 Text available at <http://www.uscg.mil/hq/g-m/nmc/response/opawordp.pdf> , last visited on 23.06.2005.

national legislative approaches. While OPA 1990 is promulgated as an exercise of unilateral US State prerogative to legislate for oil pollution, thus rejecting international efforts to combat oil pollution in a concerted fashion,⁵ Law no. 5312 specifically sets its purpose as defining “the basis of fulfilling international obligations” in its art.1.b. This is in line with the Turkish policy of being mindful of multilateral efforts in improving maritime safety. In similar vain, the approval of IMO was sought in the implementation of the Maritime Traffic Safety Regulations for the Turkish Straits and the Marmara Region.

Also, while the US Act applies only to port entry and not to vessels in innocent passage or transiting through the US EEZ,⁶ the Turkish law seems to go further, that is, to apply also to vessels in transit. Hence, the modalities of such an application deserve some attention to assess its compatibility with the jurisdictional principles regarding vessel source pollution.⁷

I. Entry into Turkish Ports

Art.5 of Law no.5312 requires ships proceeding to internal waters, roadsteads or port facilities to carry certificates of compliance with safety of navigation, life, property and environment conditions as required by treaties to which Turkey is a party; and asserts the right to deny entry into Turkish territorial sea for ships which do not carry such certificates. If the ship is already in port or in the territorial sea proceeding to a port, the vessel may be expelled or given 30 days to comply with the relevant standards. Art.8 contains similar provisions with regard to financial responsibility guarantees as required by treaties to which Turkey is a party – namely the Civil Liability for Oil Pollution Convention of 1992.

There is no doubt that “by virtue of its sovereignty ... the coastal State may regulate access to its ports.”⁸ Turkey, as a party to 1973/78 International Convention for the Prevention of Pollution from Ships⁹ (hereinafter MARPOL), 1974 International Convention for the Safety of Life at Sea¹⁰

⁵ See Oya ÖZÇAYIR, *Liability for Oil Pollution and Collisions*, LLP, London, 1998, pp.281-2.

⁶ See the reference to US Congress Hearings in Lindy S. JOHNSON, *Coastal State Regulation of International Shipping*, Oceana, 2004, p.54, fn.177.

⁷ Although the focus of this presentation is pollution from vessels, Law no.5312 in fact also covers pollution from coastal facilities.

⁸ *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment, ICJ Reports, 1986*, p.111. See also, 1982 United Nations Convention on the Law of the Sea (hereinafter UNCLOS) art. 211.3.

⁹ Turkish Official Gazette, dated 24 June 1990, no. 20558.

¹⁰ Turkish Official Gazette, dated 25 May 1980, no.16998.

(hereinafter SOLAS), 1972 Convention on the International Regulations for Preventing Collisions at Sea¹¹ (hereinafter COLREG) and 1992 International Convention for Civil Liability for Oil Pollution Damage¹² (hereinafter CLC), together with 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage¹³ (hereinafter Fund Convention), is not only entitled to request such conditions, but also obligated to do so¹⁴. This holds true regardless of whether the flag State is a party to these Conventions or not.

There is also a requirement of notification of information regarding the vessel and its cargo prior to its entry into port (art.5 para.3). This is anyway the usual practice for entry into a port but what is novel is that the consequence of failure to do so is denial of entry not only into the port but also to the territorial sea. The same is the consequence of not maintaining the appropriate certificates of compliance with maritime safety standards and certificates of financial responsibility guarantees (art.5 para.2 and art.8 para.2)

As the territorial sea is territory of the port State, the right of the port State to impose port entry conditions applicable to a ship while it is transiting the territorial sea on its way to the port is beyond question. In other words, a port State is not obliged to wait for the actual entry in order to be able to enforce the port entry requirements which the vessel would be in violation once it is in port. Moreover, in the words of the UN Convention on Law of the Sea (hereinafter UNCLOS) art.25 para.2 "the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters is subject." Thus the question is whether restrictions on the right of entry to territorial sea are among those "necessary steps". UNCLOS art.211 para.3 on the right of a port State to establish particular requirements for the prevention, reduction and control of marine pollution specifically refers to art.25 para.2, but with the provision that it is "without prejudice to the continued exercise by a vessel of its right of innocent passage". For vessels which do not comply with the requirement of certification regarding safety conditions and financial responsibility, Law no.5312 safeguards the continued exercise of innocent passage by providing that the vessel may be allowed 30 days to comply with these requirements. Thus, the Law is able to strike a reasonable balance between the right of

¹¹ Turkish Official Gazette, dated 29 April 1978, no.16273.

¹² Turkish Official Gazette, dated 24 July 2001, no. 24472.

¹³ Turkish Official Gazette, dated 18 July 2001, no. 24472.

¹⁴ As such, MARPOL art.5(4) explicitly requires port States to impose its requirements on ships of non-parties so that they do not receive more favourable treatment.

innocent passage and the right of the coastal State to enforce its port entry conditions. Moreover, as a point which has relevance in general for innocent passage, State practice does not exclude expulsion from or denial of entry into the territorial sea in cases where vessels are not explicitly alleged to be in non-innocent passage.¹⁵ It is true that the Law does not provide for a similar grace period in case of non-notification of information regarding the vessel and its cargo; but in practice this might not give rise to a situation where an objection would have to be made; vessels which come under the terms of the Law, that is, vessels more than 500 gross tons which carry oil or other hazardous cargo are quite unlikely to pay surprise visits to a port.

II. Passage Through Turkish Territorial Sea and Turkish Straits

The focus of attention will naturally be the practice with regard to the Turkish Straits as it is rather rare that a vessel should have a course to traverse the Turkish territorial sea without passing through the Straits and also without the intention of entry into a Turkish port.

That said, general rules concerning innocent passage are nonetheless still relevant to our assessment. Passage through the Turkish Straits is governed by the Montreux Convention. The "freedom of transit and navigation" regime contained therein is none other than innocent passage which is to be exercised in accordance with the express provisions of the Montreux Convention. Moreover, Turkey consistently asserts that, as the coastal State, it retains its administrative and judicial jurisdiction,¹⁶ and its general right

¹⁵ Erik Jaap MOLENAAR, *Coastal State Jurisdiction Over Vessel-Source Pollution*, Kluwer, 1998, p.265-6. Some examples cited therein are, Ukraine (Art.28.3 of 1991 Statute of Ukraine concerning the State Frontier), Russian Federation (Art.30, 1982 Law on the State Frontier), Canada, Chile, Denmark, Norway (which also applies to violations of construction, design, equipment and manning requirements), Spain and United States (applying also to construction, design and manning requirements violations).

¹⁶ This interpretation was formulated by Professor Dr. Sevin Toluner as early as 1979 (for her relevant works see: "Boğazlardan Geçişi Düzenleme ve Montreux", *Milliyet*, 3 December 1979; "The Regulation of Passage Through the Turkish Straits and the Montreux Convention", *Annales de la Faculte de Droit D'Istanbul*, No.44, 1981, pp.79-95; *Milletlerarası Hukuk Dersleri*, 2nd Ed., 1979, pp.166-167 (latest edition is reprint of 4th ed., 1996, on pp.166-7); "Boğazlardan Geçiş ve Türkiye'nin Yetkileri", *Boğazlardan Geçiş Güvenliği ve Montreux Sözleşmesi*, MMAUM, 1994, pp.11-14; "Rights and Duties of Turkey Regarding Merchant Vessels Passing Through the Straits", *Turkish Straits, New Problems New Solutions*, ISIS, 1995, pp.28-30). Her interpretation is also acceded to by the judiciary (see the explicit reference to her work in the decision of Yargıtay Hukuk Genel Kurulu (General Board of Civil Chambers of the Court of Appeals), E.2001/4-955, K.2001/1073 concerning the vessel Cape Maleas).

to adopt laws and regulations concerning "safety of navigation and the regulation of maritime traffic", but, to be used within the limits imposed by the Montreux Convention and contemporary international law regarding passage through such straits. What is going to be considered hereon is whether the impositions regarding, especially the maintenance of financial responsibility are in accord with these rules.

A. Article 5 relating to Safety of Navigation

Article 5 of Law no.5312 states that "Responsible parties of all vessels and coastal facilities within the scope of this law shall take all measures relating to obligations on safety of navigation, life, property and environment as provided for by international law, including the prevention of incidents and, preparation and protective measures for the reduction, eradication, control of the damage where an incident occurs." Such a prescription of rules for the safety of navigation and for the protection of the environment in its territorial sea is recognized as within the competence of a coastal State.¹⁷ Moreover, with regard to EEZ, this provision, by way of its reference to "measures relating to obligations provided for by international law" is certainly within the prescriptive competence of a coastal State within its EEZ.¹⁸

As for enforcement of these, the Law contains only that "measures taken for the purpose of safety of navigation, life, property and environment shall be inspected in accordance with the principles and procedures specified by this Law, relevant legislation and international regulations."¹⁹ Thus, even though it is no further elaborated in Law no.5312, Turkey may use its general enforcement powers under international law, as stated in UNCLOS art.220, to the extent that it is incorporated into national legislation. In the territorial sea, a violation of coastal laws regarding safety and pollution will render passage non-innocent only if it results in a "willful and serious pollution"²⁰, thus triggering unrestricted territorial sovereign competences of the coastal State. Otherwise, although the innocence of passage may still be intact, the vessel will still have violated the relevant coastal regulations

¹⁷ 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, art.17, UNCLOS art.21.1a and f. Customary international law is deemed to be in the same line (R.R. CHURCHILL, A.V. LOWE, *The Law of the Sea*, 3rd Ed. 1999, pp.95, 344, 347).

¹⁸ UNCLOS art.211.5 "coastal State ... may adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards".

¹⁹ Art.5 para.4

²⁰ UNCLOS art.19.2h.

regarding safety of navigation or protection of marine environment. As such, the coastal State may take enforcement measures, the least of which is inspection and imposition of administrative sanctions such as monetary fines. Even the violations of pollution regulations in the EEZ may call for monetary penalties²¹ and one may expect more severe penalties for violations in the territorial sea. State practice also supports this view as quite severe penalties are indeed inflicted, including the institution of civil proceedings (also safeguarded by UNCLOS art.229) and detention. Provisions for expulsion or denial of entry into the territorial sea in cases of violations which do not render passage non-innocent may be found in state practice, among them two BlackSea riparians, the Russian Federation and Ukraine.²² For Turkey, the enforcement of marine environmental protection regulations is governed by Regulation for Sanctions on Vessels 1987 which provides for imposition of fines or posting of a bond.²³ In case of non-payment, the vessel is detained if it is already in port or if not brought into port for institution of proceedings.²⁴ However if the vessel has already proceeded outside out of the territorial sea or the EEZ, the fine is demanded through diplomatic means, with the option of instituting proceedings in Turkish courts in case of non-payment.²⁵

B. Articles 8 and 9 relating to Financial Responsibility Guarantees

Article 6 declares and allocates *ex post* responsibility – which, along with establishing codes of conduct, also provide the vessel with an incentive towards protecting the safety of navigation and environment.

Then, art.8 states in its first paragraph that “ships carrying oil and/or other hazardous substances which seek entry into the area of application [of this law], shall carry the financial responsibility certificates as required by international treaties to which Turkey is a party, shall notify the relevant authorities of these certificates and produce them on demand”.

Apparently, the mentioned international treaty concerning the maintenance of insurance certificates is the 1992 Convention on Civil Liability for Oil

²¹ UNCLOS art.230.

²² MOLENAAR, (fn.15), pp.265-6.

²³ (*Gemi Ceza Yönetmeliği – Gemi ve Deniz Araçlarına Verilecek Cezalarda Suçun Tespiti ve Cezanın Kesilmesi Usulleriyle Kullanılacak Makbuzlara İlişkin Yönetmelik*) Official Gazette dated 3 November 1987, art.25.

²⁴ *ibid.* art.26.

²⁵ *ibid.* art.28.

Pollution Damage.²⁶ However, ships flying the flag of non-party States are only required to carry such certificates *if they are entering the ports of a CLC party State*. Hence, as far as a vessel in transit flying the flag of a State not party to CLC is concerned, we need to look elsewhere for the justification. As “the coastal State may adopt laws and regulations in conformity with the provisions of [UNCLOS] and *other rules of international law ... in respect of ... (a) the safety of navigation ... and (f) the preservation of the environment*” (art.21), the said “other rules of international law” for vessels of CLC party States include treaties binding upon it. Thus, requiring their vessels to carry these guarantees is in conformity with the obligation of the States parties to the CLC to issue such guarantees (CLC art.VII).²⁷ For vessels of non-party States however, the question becomes how far the powers of the coastal State to prescribe in its territorial sea (including straits subject to innocent passage regime) extend – that is, whether far enough to include a requirement of financial responsibility guarantee.

Admittedly, the terms “safety of navigation” and “preservation of the environment” are quite broad. However such prescription should not “hamper innocent passage” or “have the practical effect of denying or impairing the right of innocent passage.”²⁸ The criterion then may be set as proportionality or reasonableness, that is, in this case, a balance needs to be struck between “(a) the significance of the interest which the coastal state seeks to protect or advance, (b) the threat to such interest in the absence of prescriptive authority and (c) the character and magnitude of the attendant interference with the exercise of innocent passage”²⁹ In fact, this approach is no more than a reflection of the determination made by the International Court of Justice that “the rules of international maritime law have been the product of mutual accommodation, *reasonableness* and co-operation”.³⁰

Applying the above criteria to art.8 of Law no.5312, first I submit that article 8, in effect, is aimed at making sure that the coastal State is adequately

²⁶ Turkish Official Gazette dated 18 July 2001, no.24466.

²⁷ CLC art.VII requires this for ships carrying more than 2000 tons of oil. Law no.5312 sets the limit at 500 gross tons.

²⁸ UNCLOS art.24

²⁹ B.D. SMITH, *State Responsibility and the Marine Environment*, Oxford, 1988, p.196. Tütüncü also adopts the same criterion (Ayşe Nur TÜTÜNCÜ, *Gemi Kaynaklı Deniz Kirlenmesinin Önlenmesi, Azaltılması ve Kontrol Altına Alınmasında Devletin Yetkisi*, 2nd Ed. 2001, p.66-7). The criterion of “reasonableness” is used by Prof. Dr. Toluner in assessing the legality of the use of coastal State jurisdiction in innocent passage; see, TOLUNER, *Milletlerarası Hukuk Dersleri*, reprint of 4th Ed., 1996, p121.

³⁰ *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, ICJ Reports, p.3, at p.23, emphasis added.

compensated for any violation of safety rules resulting in actual damage to the environment, thus may be viewed as an *indirect* safety regulation.³¹ Secondly, the maintenance of financial responsibility guarantee is also an implementation of the 'polluter pays' principle which is "primarily intended to ensure that the costs of dealing with pollution are not borne by public authorities but are directed to the polluter".³²

In view of the significant endorsement of the 'polluter pays' principle in international environmental law³³, the imposition of a requirement of financial responsibility guarantee should be seen as a reasonable exercise of coastal State prescriptive jurisdiction, "complementing the more obvious regulatory measures"³⁴.

Moreover, this requirement does not "impair" the right of innocent passage. What is critical is not the impairment of the "passage of the ship, but the very *right* of innocent passage".³⁵ The test used by McDougal and Burke is whether the regulation has the effect of being so "stringent that either access becomes impossible or that passage becomes too burdensome to be practical."³⁶ Asking ship owners or operators to assume their responsibility to be able to fully pay for possible damages, which is not an uncommon practice for those anyway, should not be considered as unreasonable or an impairment of the *right* of innocent passage.

The case for vessels transiting through the Turkish Straits is more complex

³¹ Compulsory responsibility insurance is not accident prevention measure *per se* (Rayegan KENDER, contribution to discussions in *Boğazlardan Geçiş Güvenliği ve Montreux Sözleşmesi*, (fn.16, p.55) but it may bolster the safety of environment and navigation by inducing the ship owner or other responsible parties to take the necessary precautions. Naturally, for this to work, the insurance policy will need to be carefully drafted in a manner to allow for the monitoring of the insured's behaviour, to suit this end of internalization (see on this matter called "the moral hazard problem", Mark SEIDENFELD, *Microeconomic Predicates to Law and Economics*, Anderson, 1996, p.74; Thomas J. MICELI, *The Economic Approach to Law*, Stanford, 2004, p.34-6).

³² Patricia BIRNIE & Alan BOYLE, *International Law and the Environment*, Oxford, 1992, p.292.

³³ 1990 Convention on Oil Pollution Preparedness, Response and Co-operation which is one of the relevant international instruments and which Turkey is a party to (see. Turkish Official Gazette dated 18 September 2003, no. 25233) that Law no.5312 intends to implement, also endorses the principle in its Preamble.

³⁴ BIRNIE & BOYLE, (fn.32), p.111.

³⁵ JOHNSON, (fn.6), p.81.

³⁶ McDOUGAL & BURKE, *Public Order of the Oceans*, p.255, referred to in JOHNSON (fn.6) p.81.

in view of art.2 of the Montreux Convention which provides for passage without any formalities and charges other than those set in the Convention. Mandatory insurance is definitely such an extra burden. However, this problem is much less pressing than it initially seems: Commercial traffic through the Turkish Straits means that vessels will either go in or out of a port of a BlackSea riparian State; among them only Ukraine is not a party to CLC³⁷ and thus only vessels of other non-parties to CLC calling at a port only in Ukraine might not be carrying the necessary insurance. Moreover, considering that under contemporary international law, even high seas freedoms, such as fishing, are no longer totally restriction free³⁸ one may still make a strong claim for certain reasonable restrictions on the use of a waterway which is territorial in nature and has common traits with non-renewable resources rather than renewable fisheries resources.³⁹

All this being said on prescription, Law no.5312 nonetheless keeps its provisions strictly within the limits of international law on account of its enforcement aspects.

Article 8 stipulates that all vessels are required to maintain financial responsibility guarantees in order to enter into the area of application, and to produce the documents to that effect when requested. The mere inquiry of the presence of insurance by no means hampers or impedes innocent passage, so it may be considered to be a legitimate exercise of enforcement jurisdiction. However there are no further sanctions stated in the article in case of non-maintenance. Thus relevant rules of law of the sea which were mentioned in the previous section will come into play: The infringement of Law no.5312 in this sense would not make passage through the territorial sea non-innocent; but imposition of administrative sanctions, including monetary penalties, (to be served upon the agent of the vessel) is possible.

With regard to passage through the Turkish Straits, the Law refers to the Maritime Traffic Safety Regulations for the Turkish Straits and the Marmara Region in article 9. Paragraph 2 reads: "The notification [of the financial responsibility guarantee] requirements of vessels entering into Turkish territorial sea for the purpose of transiting the Turkish Straits

³⁷ <http://www.iopcfund.org/92members.htm> , last visited on 23.06.2005.

³⁸ See for example 1995 Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

³⁹ Turgut TARHANLI, "Türk Boğazları'nda Trafik Düzeni ve 1936 Montreux Sözleşmesi" in *Uluslararası Politikada Yeni Alanlar, Yeni Bakışlar*, Faruk Sönmezoğlu (ed.), Der, 1998, p.86.

without calling at a port are governed by the Maritime Traffic Safety Regulations for the Turkish Straits and the Marmara Region.”⁴⁰ Merely requiring information on whether the ship is in compliance with relevant legislation certainly does not in anyway hamper the passage of the vessel – let alone the *right* of innocent passage – and; is nothing more than the implementation of Turkey’s policing or executive enforcement jurisdiction – which is not prejudiced by the Montreux Convention – in so far as it is necessary for the healthy operation of the safety of navigation measures in the Straits (which would include the complementary aspects of code of conduct rules in the form of financial responsibility guarantees). Indeed, it is reported that only 4 of 4039 ships passing through the Turkish Straits in the year 2003 have failed to submit Sailing Plan 1 (SP1) as required by the 1998 Regulations⁴¹, evidencing a strong acquiescence in such enforcement.

Article 9 does not specify what enforcement action will be taken in case of non-compliance with the notification requirement. Again, this violation alone would not render passage non-innocent, therefore the appropriate sanction would be the imposition of administrative fines.

As Law no.5312 does not include a sanction of denial of entry to the Turkish Straits or territorial sea, it contravenes neither general international law of the sea, nor the Montreux Convention.

Conclusion

Law no.5312 seeks to bring together an ambitious list of (both *ante hoc* and *post facto*) measures to prevent and respond to marine pollution from both land-based and vessel-source pollution. This study sought to examine only the preventive stipulations of this Law as it applies to vessels. Some of those requirements under Law no.5312 may at first sight seem to contradict Turkey’s obligations under international law, especially under the Montreux Convention. However it has to be conceded that by interpreting those obligations by taking into account applicable relevant rules of international law (ranging from mutually binding contractual obligations stemming from treaties, to principles of international environmental law such as the polluter pays principle) and thanks to the references to the already established practice of the Maritime Traffic Safety Regulations for the Turkish Straits and the Marmara Region on some enforcement issues, Law no.5312 remains within the bounds of Turkey’s international obligations.

⁴⁰ Sailing Plan I which is required to be submitted by article 6 of the Regulations already includes P&I information (see, *Turkish Straits Vessel Traffic Service, User’s Guide*, available at <http://www.denizcilik.gov.tr> last visited on 23.06.2005.

⁴¹ Declaration of Okay KILIC (Undersecretariat of Maritime Affairs, Maritime Safety Division Chief) in *Deniz Hukuku Sempozyumu*, 21-22 June 2004, Ankara, p.5.31.