

2. The maritime safety and anti-pollution legal framework in the U.S.: The quest for optimum safety, the quest for limits to the traditional standard-setting process

2.1. The quest for optimum safety in U.S. waters

The vitality of the maritime sector and the ensuing need for optimum safety is of paramount importance to the U.S. 95% of whose trade tonnage moves by sea²²¹. The U.S. alone imported 455 million tons of crude oil in 2001, which represents 27% of total oil imported worldwide²²²; interestingly, 95% of all passenger and cargo vessels and 75% of all tankers calling on U.S. ports fly foreign flags²²³. The U.S. is also the State with the longest coastline and most extensive exclusive economic zone in the world²²⁴.

The U.S. maritime safety and marine pollution prevention law is principally governed by federal instruments *inter alia* because of the need for uniformity. State competence, in the frame of a cooperative maritime federalism, is subject to important limitations, which have a constitutional justification. However, state regulation over maritime safety issues may exist and may conceptually be grouped into several categories according to purpose; to name the main categories in question²²⁵, a state regulation may be intended to facilitate the enforcement of federal requirements, to fill an actual or perceived gap in the federal regulations by interposition of state standards applicable to a subject for which no federal rules exist or to establish a standard that is different from the federal standard. The inherent police power is very often presented as the foundation of state competence over maritime matters. It is not in the intention of this paper to discuss in depth possible conflicts between state and federal maritime safety policy and regulations.

In the enlightened article of Craig H. Allen on “Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the U.S.”, a certain perception of U.S. maritime safety law and policy as an area marked by unilateralism, is not shared by the author, according to whom: “With few exceptions, the rules and standards that foreign vessels in U.S. ports and waters must meet are prescribed by international conventions”²²⁶.

Yet, the maritime profile of the U.S. as such is far from being monolithic. As expected, some states have strong maritime interests, notably via the importance of their ports or the fragility of their marine environment, while others do not. The legislation of states are likely to reflect such interests. In the state of California,

²²¹ See http://www.state.gov/www/global/oes/oceans/980610_los.html (last visit 17.12.2005).

²²² British Petroleum (BP). *Oil Trade Movements-Table of Oil Imports and Exports 2001*, quoted in Veiga, *supra* note 1, 183.

²²³ See Allen, *supra* note 2, 591.

²²⁴ See http://www.state.gov/www/global/oes/oceans/980610_los.html (last visit 17.12.2005).

²²⁵ See Allen, *supra* note 2, 354.

²²⁶ *Id.* at 590.

the port of Los Angeles for example, founded in 1907, constitutes Americas' busiest port with record volumes of cargo moving through the 7,500-acre harbour²²⁷. Significantly, Congresswoman Lois Capps from the state of California introduced measures in January 2003 in the House of Representatives that would accelerate the phase-out schedule for single hull tankers to 2005, instead of 2015, in the light of relevant developments in the EU legislative framework²²⁸.

The state of Washington, with busy ports such as the New York and New Jersey port, has adopted its own arsenal of provisions over maritime safety, which have been challenged by private operators as going beyond the federal framework. While some substantive elements from the legislation of states will be presented in Part II, special mention deserves to be made at this stage on the issue of preemption of state legislation on maritime safety by federal legislation.

The question of federal preemption of the laws of states in the maritime field has been a source of landmark judicial decisions and theoretical interpretations whose analytical presentation goes beyond the limits of this study²²⁹; the issue revolves around the constitutional balance of powers between the federal and state governments, as it was shaped in a historical context, and the ensuing preemption of state navigational regulations through The Supremacy Clause, The Commerce Clause and international treaties²³⁰; the Supreme Court in an old case dated 1851, *Cooley v. Board of Wardens*²³¹, which related to state regulations requiring local pilots for vessels navigating in state waters, recognized that concurrent state and federal regulation of interstate and international activities may be permissible under certain circumstances²³². Federal preemption was notably addressed in *Ray v. Atlantic Richfield Co*²³³, where the Supreme Court held that the Port and Waterways Safety Act of 1972 (PWSA) and Coast Guard regulations adopted under the Act preempted certain of the state of Washington's pilotage requirements, limitations on tanker sizes, and tanker design and construction rules.

In this context, the state of Washington drew attention in the light of the "Best Achievable Protection" (BAP) regulations that impose more stringent safety requirements on tankers than do the Coast Guard regulations. The BAP regulations tackle a range of issues such as drug and alcohol testing and reporting, crew training policies, language proficiency requirements and operating procedures. The adoption of these regulations by the state of Washington was based on the interpretation of Section 1018 of OPA which provides for the imposition of additional liability from states relating to the discharge of oil or other pollution. The Interna-

²²⁷ See <http://www.portoflosangeles.org/factsfigures.htm> (last visit 12.8.2006).

²²⁸ See Lengage and Quentin, *supra* note 37, 72.

²²⁹ See *inter alia* Allen, *supra* note 2, Marva Jo Wyatt, *Navigating the Limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. MAR. L. J. 1 (1995), K. Allen Brooks, *California Oil Spill Laws in the Wake of United States vs. Locke*, 12 U.S.F. MAR. L. J. 227 (1999-2000), Sarah A. Loble, *Intertanko vs. Lowry: An Assessment of Concurrent State and Federal Regulation Over State Waters*, 10 U.S.F. MAR. L. J. 27 (1997).

²³⁰ See Wyatt, *id.*, 16 *seq.*

²³¹ 53 U.S. (12 How.) 299 (1851).

²³² See Wyatt, *supra* note 230, 8.

²³³ See 435 U.S. 151 (1978).

tional Association of Independent Tanker Owners (Intertanko), “primarily concerned that the safety of its members’ crews, their ships and the marine environment are not jeopardised by a patchwork of regulations developed in the individual coastal states of the U.S.”, initiated action against the state of Washington in July 1995, claiming that 16 of the BAP regulations were preempted by federal law²³⁴.

The ensuing judicial battle gave rise to a number of Court decisions. While the district court upheld all of the BAP regulations, on appeal, the Ninth Circuit of the Court of Appeals held that regulations requiring navigation and towing equipment were preempted by federal law, but that regulations that addressed staffing, personnel training and qualifications, and tankers operations were not²³⁵. It is significant that the Ninth Circuit Court believed that the U.S. did not adhere to a policy of international uniformity in tanker regulation, so that international agreements set only minimum standards that could be supplemented by the states²³⁶. In the ensuing appeal *U.S. v. Locke*, the U.S. Supreme Court reversed as it considered that the state of Washington’s regulations regarding navigation watch procedures, crew English language skills and training, and maritime casualty reporting were preempted by the comprehensive federal regulatory scheme governing oil tankers; the decisions in both lower cases were remanded so the validity of other Washington regulations might be assessed in the light of the considerable federal interest at stake²³⁷. It is interesting to note that, with regard to training of seafarers, the Supreme Court considered that this is a field reserved for the federal government and that this is further confirmed by the circumstance that STCW Convention addresses crew “training” and “qualification” requirements.

The effort of the U.S. legislature to address maritime safety and marine pollution prevention has been a long-term task. It was in 1886 when the oil tanker *The Gluckauf* brought about the issue of a potential threat to American waters by an extensive oil spill²³⁸. However, federal regulation of merchant vessel safety began many years ago with Congress’ enactment of the Steamboat Act of 1838²³⁹. The interest of the American legislature in a coherent legal frame on maritime safety and marine pollution prevention is notably revealed in 1871 when Congress re-

²³⁴ See comments of former INTERTANKO Chairman Miles Kulukundis reported at <http://www.intertanko.com/templates/Page.aspx?id=36113> (last visit 12.8.2006).

²³⁵ *International Ass’n of Indep. Tanker Owners v. Lowry*, 947 F. Supp. 1484 (W.D.Wa. 1996); *International Ass’n of Indep. Tanker Owners v. Locke*, 148 F. 3d 1053 (9th Cir. 1998). See brief comment by Mayer, Brown & Platt, in <http://www.appellate.met/doc-ketreports/sc12622030.asp> (last visit 12.8.2006).

²³⁶ 148 F. 3d at 1062-1063.

²³⁷ *United States v. Locke*, 529 U.S. 89. See Daniel G. Rauh, *State Authority Under the OPA: Federalist Elixir or Should the Supreme Court Sink Intertanko v. Locke?*, 24 TUL. MAR. L.J. 323. See also the syllabus (headnote) for *United States v. Locke* by the Reporter of Decisions, available at <http://supct.law.cornell.edu/supct/html/98-1701.ZS.html> (last visit 13.8.2006).

²³⁸ See http://fr.wikipedia.org/wiki/P%C3%A9trolier#La_r.C3.A9volution_du_Gluckhau (last visit 6.10.2007).

²³⁹ 5 Stat. 304 (1383).

pealed all previous vessel safety statutes and enacted a new comprehensive code of navigation and inspections law²⁴⁰. In 1885, Congress extended the U.S. steamboat inspection laws to cover foreign vessels carrying passengers to or from U.S. ports²⁴¹. It is not in our intention however to present the historical background of the U.S. legislation on maritime safety and marine environment protection²⁴².

2.2. The regulatory framework: Brief overview

At the federal level, both the maritime safety and anti-pollution legal frameworks are addressed in Title 46 of the U.S. Code and the implementing regulations promulgated in Title 46 of the Code of Federal Regulations, as well as by Title 33 of the U.S. Code and the Code of Federal Regulations.

Title 46 requires the U.S. Secretary of the Department of Transportation to establish regulations governing the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tank vessels²⁴³; in promulgating regulations the Secretary may prescribe provisions that exceed standards set internationally²⁴⁴.

In addition to this, a number of statutes deserve special mention that they constitute the basic legislative framework of maritime safety and marine pollution prevention:

The Federal Water Pollution Control Act, commonly known as the Clean Water Act of 1972 (CWA)²⁴⁵, was the principal piece of oil pollution legislation prior to the adoption of OPA 1990; it provides for pollution prevention and response requirements, contingency planning at the national level, spiller liability, financial responsibility, discharge prohibitions, including penalties for violations. The Act tackles the discharge of oil, hazardous substances, sewage and thermal pollutants.

The Ports and Waterways Safety Act of 1972 (PWSA)²⁴⁶ is also a statute of prime importance with regard to maritime safety and marine pollution prevention. Its purpose consisted of the protection from damage or destruction of vessels, bridges, and waterfront structures on or immediately adjacent to the navigable waters of the U.S. and the protection of the waters and the resources therein from environmental harm, resulting from accidents involving those vessels and waterfronts facilities²⁴⁷. PWSA tackles port and waterfront safety, vessel navigation safety, operating requirements, traffic control, tanker design and construction

²⁴⁰ 16 Stat. 440 (1871).

²⁴¹ 22 Stat. 346 (1885).

²⁴² On the evolution of Federal Maritime Environmental Legislation with the emphasis placed on liability issues, see Kiern, *supra* note 22, 502-507.

²⁴³ See 46 U.S.C. § 3703(a).

²⁴⁴ *Id.*

²⁴⁵ 33 U.S.C. §§ 1251-1387 (1988). See MANGONE, *supra* note 43, 271.

²⁴⁶ Pub. L. No 92-340, 86 Stat. 424 (1972). It is to be noted that the Act has been subject to numerous amendments.

²⁴⁷ § 101, 86 Stat. at 424.

standards. A major amendment to be noted is the Port and Tanker Safety Act (PTSA)²⁴⁸ which amended the PWSA in 1978.

On the basis of the provisions of PWSA, the Coast Guard promulgated a number of navigation safety regulations (NSRs) which apply to non-public vessels over 1,600 gross tons while operating on the navigable waters of the U.S., with the exception of foreign vessels that are transiting through the navigable waters but are not destined for or departing from a U.S. port²⁴⁹. The Act also required the Coast Guard to promulgate regulations on standards related to construction, design, equipment, and manning ("CDEM" standards) of tank vessels, including foreign tank vessels entering U.S. waters. It is to be noted however that the rules in question do not apply to foreign vessels having on board valid inspection certificates recognized under laws or treaties of the U.S.. The Act granted the Secretary authority to deny entry into U.S. navigable waters to any vessel not in compliance with the Act or any regulations promulgated under the authority of the Act²⁵⁰.

Water pollution resulting solely from discharge of hazardous substances other than petroleum, natural gas and related products is addressed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund)²⁵¹. CERCLA preempts CWA and OPA to the extent that they are inconsistent with CERCLA²⁵².

A lot of ink has been spent on the OPA 1990 which has constituted a remarkable stage in the evolution of U.S. maritime safety and marine environment protection law²⁵³. Broadly speaking, the preexisting federal legislation, including the CWA, remains in effect except for the imposition of liability which is now governed by OPA 1990²⁵⁴.

According to Kiern, "upon reflection, it appears that it was not the Exxon Valdez incident alone, but rather this series of major oil spills, along with other lesser incidents in mid-1989 in our nations' waterways, that repeatedly prodded Congress through 1989-90 to enact the Oil pollution Act of 1990"²⁵⁵. The OPA is built on the basic framework of environmental legislation Congress enacted during the 1970s and 1980s; it aimed at addressing the major deficiencies in the preexisting legislation. OPA 1990 mainly tackles liability, compensation and financial responsibility issues; it also established a phased-in requirement for double hulls on tankers operating in U.S. waters or the U.S. exclusive economic zone²⁵⁶, which anticipated relevant international requirements and thus provoked a conflict in the international shipping community as to its expediency. In addition to this, OPA established new drug and alcohol testing requirements for licensed or documented

²⁴⁸ Pub. L. No. 95-474, 92 Stat. 1471 (1978).

²⁴⁹ See 33 C.F.R. § 164.01.

²⁵⁰ See Allen, *supra* note 2, 596.

²⁵¹ 42 U.S.C. §§ 9601-9675 (1988). On CERCLA see MANGONE, *supra* note 22, 277.

²⁵² See Rodriguez and Jaffe, *supra* note 43, 6.

²⁵³ See *supra* note 43.

²⁵⁴ Rodriguez and Jaffe, *supra* note 43, 1.

²⁵⁵ See Kiern, *supra* note 43, 482.

²⁵⁶ Oil Pollution Act § 4115 (adding new Section 3703a to 46 U.S.C.).

mariners²⁵⁷, alterations to manning standards for foreign tank vessels²⁵⁸, changes to vessel communications equipments requirements²⁵⁹ and special provisions regarding navigation and facilities in Prince William Sound²⁶⁰, where the Exxon Valdez had grounded. A small number of amendments to OPA 1990 are of rather minor importance, with the exception of oil pollution liability limits which were raised in the 109th Congress by the Delaware River Protection Act of 2006 (DRPA) passed as title VI of Coast Guard and Maritime Transportation Act of 2006 (CGMTA)²⁶¹.

In addition to the above, the American legislator adopted a number of activity-based federal measures on pollution in certain areas or resulting from specific activities²⁶². We will confine ourselves to mentioning the Outer Continental Shelf Lands Amendments of 1978²⁶³, the Trans-Alaska Pipeline Authorization Act²⁶⁴, and the Deepwater Port Act²⁶⁵.

It is noticeable that the U.S. neither participates in any regional agreement on port state control nor has a related agreement or memorandum of understanding with that connection²⁶⁶; the U.S. is engaged in its own port state control system, commonly known as port state control initiative, which is conducted on an individual basis²⁶⁷. The 1994 Port State Control Initiative aims at identifying high-risk foreign merchant vessels on the basis of the performance records of their owners, operators, classification societies and flag States. The port state control is carried out by the U.S. Coast Guard. We will have the opportunity to explore port state control in the U.S. from a substantive point of view in Part II.

Emphasis should be placed on the special role and contribution of the U.S. Coast Guard²⁶⁸, which is the unquestionable protagonist of the enforcement of the legislative arsenal on maritime safety and marine pollution prevention. The Coast Guard was authorized by OPA 1990 to implement regulations on the standards of compliance of double-hull requirements. However, it was authorized to regulate tanker standards, including design and construction of vessels, since 1972 on the

²⁵⁷ Oil Pollution Act § 4101 (amending 46 U.S.C. § 7101).

²⁵⁸ Oil Pollution Act § 4106 (amending 46 U.S.C. § 9101(a), 46 U.S.C. § 6101, and 33 U.S.C. § 1228(a)).

²⁵⁹ Oil Pollution Act § 4118.

²⁶⁰ Oil Pollution Act §§ 5001-5007.

²⁶¹ See Pub. L. No. 109-241, 120 Stat. 516, 553-54 (2006). On minor amendments, see Kiern, *supra* note 22, 579. The new measures on oil pollution liability limits not only increased the existing limits, but for the first time they also distinguished financial responsibility between single and double-hull vessels-establishing higher liability limits for single hull tank vessels, and thus legislating a financial incentive for the use of double hull tank vessels. See Constantine Papavizas and Laurence I. Kiern, *2005-2006 U.S. Maritime Legislative Developments*, 38 J. MAR. L. & COM. 267 (2007).

²⁶² See Rodriguez and Jaffe, *supra* note 43, 7 *seq.*

²⁶³ See 43 U.S.C. §§ 1811-1824 (1988).

²⁶⁴ See 43 U.S.C. §§ 1651-1655 (1988).

²⁶⁵ See 33 U.S.C. §§ 1501-1524 (1988).

²⁶⁶ See United States Coast Guard Home Page, <http://www.uscg.mil/>. See also *inter alia* Özçayir, *supra* note 99, 154.

²⁶⁷ *Id.*

²⁶⁸ See BOISSON, *supra* note 2, 189.

basis of PWSA. From 1972 to 1990, the Coast Guard proposed the enactment of such requirements, but “for a variety of reasons ranging from international economy to domestic politics, such attempts to impose requirements being largely unsuccessful”²⁶⁹. The Coast Guard has also been provided with the task of periodically examining regulations applied by foreign States, particularly those relating to manning, crew training and qualification, and watchkeeping. Interestingly, the responsibilities of the Coast Guard have inspired the most fervent supporters of the European integration process who have an active interest in maritime issues to suggest the creation within the frame of the EU of a body which would be analogous to the U.S. Coast Guard²⁷⁰.

Last but not least, the U.S. Environmental Protection Agency (EPA) should be noted. Statutes defining the EPA’s emergency response program notably include CWA, CERCLA and OPA 1990²⁷¹.

2.3. The quest for unilateralism: The U.S. legislature’s approach and method

We will have the opportunity under Part II to explore possible convergence or divergence of U.S. substantive law with EC law, as far as vessel construction requirements, port State control and human element requirements are concerned. Let us just at this stage consider the general approach of the U.S. legislature.

The question of the accession of the U.S. to the international private maritime law regime which notably includes liability, compensation and response issues has given rise to controversial discussions on U.S. maritime unilateralism, due to the choice of the U.S. not to join UNCLOS 1982 and CLC/FUND Conventions, and consequently to isolate itself from the vast majority of the world which applies this regime²⁷². It would be a hasty and probably inexact conclusion, however, to automatically extend this comment to the international public maritime law regime, which addresses maritime safety and marine pollution prevention, princi-

²⁶⁹ See Cicala, *supra* note 24, 881.

²⁷⁰ See BELLAYER-ROILLE, *supra* note 2.

²⁷¹ See U.S. Environmental Protection Agency. *Emergency Management* (2008). <http://www.epa.gov/emergencies/> (last visit 21.2.2008).

²⁷² See *inter alia* Rodriguez and Jaffe, *supra* note 43, 24, according to whom: “One of the greatest disappointments of the Oil Pollution Act is the failure of Congress to make provisions for the U.S. to adopt the International Convention on Civil Liability for Oil Pollution Damage (CLC) Convention, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), and their 1984 protocols. The Act does contain a provision stating that it is in the best interest of the U.S. to participate in an international oil pollution regime that is at least as effective as U.S. law. As a practical matter, however, ratification of these conventions is impossible. Ratification would have been possible only if the amount of the vessel owner’s liability under the OPA would not have exceeded the amount imposed by the 1984 Protocol to the CLC Convention. The Act’s higher limits and the potential for unlimited liability under state law render ratification impossible”.

pally on the basis of the most publicized provisions of U.S. law, e.g. on unilateral construction and design standards.

As pointed out by Allen in the above-mentioned article, “Examination of U.S. acceptance of international conventions on maritime matters demonstrates that the nation has been quite selective in its decisions whether to become party to any given international regime. Although the U.S. has been criticized for its reluctance to become party to some of the major international conventions relating to the sea and to pollution liability, the U.S. has been an outspoken supporter of international conventions which set international standards for vessels’ safety and pollution prevention”²⁷³. Let us briefly explore certain parameters of the situation.

U.S. maritime safety and marine environment protection law contains of federal statutes and regulations in view of the implementation of the international instruments. The U.S. has ratified SOLAS 1974 and its two subsequent protocols (1978 and 1988). The contribution of the U.S. to the elaboration and entry into force of SOLAS, in its first versions, was characterized by dynamism but also prudence. On the one hand, the U.S. was exercising its influence in view of the advancement of SOLAS’ provisions; on the other hand, it refrained from ratifying at once the instrument in question. Moreover, a number of national provisions were adopted at different stages, which usually led to their incorporation at the international level. In this context, it should be noted that SOLAS Convention 1929 was not ratified by the U.S. until 1936, in the aftermath of the 1934 fire on the passenger ship *Morro Castle* off the coast of New Jersey and the ensuing public outcry; however, the ratification was accompanied by reservations²⁷⁴. In 1936, the U.S. amended its regulations for the construction of passenger vessels on the basis of the principle of passive fire protection, which places emphasis on the nature of vessel construction and on the confinement of the fire to the space in which it originated, while eliminating possible reliance on any automatic or manual “active” systems of control²⁷⁵. At the third SOLAS Convention (1948) these requirements were adopted internationally. In 1968, the U.S. unilaterally required all passenger vessels operating from U.S. ports, with overnight accommodations for 50 or more passengers, to meet the 1966 Fire Safety Amendments²⁷⁶ or U.S. passenger vessel requirements. Subsequent developments in SOLAS Convention 1974, incorporated the 1966 and the 1967 Amendments for fire safety. In 1992 the U.S. introduced a work item at the IMO on international approval of lifesaving appliances in view of the standardization of testing procedures²⁷⁷.

²⁷³ See Allen, *supra* note 2, 578.

²⁷⁴ See United States Coast Guard, <http://www.uscg.mil/hq/g-m/mse4/solas.htm> (last visit 22.3.2008).

²⁷⁵ *Id.*

²⁷⁶ See <http://www.uscg.mil/hq/g-m/mse4/solas.htm> (last visit 23.3.2006). The 1966 amendments proposed additional fire protection standards for existing passenger vessels.

²⁷⁷ See ACEBI. *SOLAS Requirements* (2003). See <http://www.acebi.com/Solas.htm> (last visit 21.2.2008).

Titles 33 and 46 of the U.S. Code and a multitude of Coast Guard regulations make applicable SOLAS Convention in the U.S. legal order²⁷⁸. As far as Chapter XI of SOLAS Convention on International Ship and Port Facility Security (ISPS) Code is concerned, in the wake of the September 11 attacks, Congress passed the Maritime Transportation Security Act of 2002 (MTSA)²⁷⁹ to implement the ISPS Code in the U.S.. It is noteworthy however that the MTSA and its implementing regulations apply to a much wider range of vessels than the ISPS Code²⁸⁰ and that unlike SOLAS Chapter XI-2 and the ISPS Code²⁸¹, the MTSA is not limited to vessels engaged on international voyages²⁸².

With regard to MARPOL 73/78, which is implemented by several statutes and regulations including the PTSA 1978, the Act to Prevent Pollution by Ships (APPS), the CWA, the Marine Plastic Pollution Research and Control Act (MPPRCA)²⁸³ and the Regulations Relating to Tank Vessels Carrying Oil in Bulk²⁸⁴, the U.S. deposited its ratification to MARPOL on 2 July 1980, and Congress passed implementing legislation²⁸⁵. The U.S. has also joined Annexes I, II which are mandatory and Annexes III and V²⁸⁶. The U.S. executive branch is in the process of finalizing the ratification package for MARPOL Annex VI on the issue of air emissions from marine vessels²⁸⁷.

²⁷⁸ See Allen, *supra* note 2, 589.

²⁷⁹ See Pub. L. No. 107-295, 116 Stat. 2064 (2002) (currently codified at 46 U.S.C. §§ 70101-70117 (2004)). Implementation regulations of the MTSA are set forth at 33 C.F.R. Chapter I (2007), 33 C.F.R. § 101.115 (2003). On MTSA and the ISPS Code see Antonio J. Rodriguez, *When Your Ship is in the Bull's Eye: the Maritime Transportation Security Act and Potential Vessel Owner Liability to Third Parties Resulting from a Terrorist Attack*, 17 U.S.F. MAR. L. J. 241, 250 (2004-05), Robert G. Clyne, *Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries*, 77 TUL. L. REV. 1183 (2003), Thomas J. Schoenbaum/Jessica C. Langston, *An All Hands Evolution: Port Security in the Wake of September 11th*, 77 TUL. L. REV. 1333-1370 (2003). It should be noted that The Security and Accountability for Every Port Act of 2006 (or SAFE Port Act) (Pub. L. No. 109-347) complements the MTSA. See Papavizas and Kiern, *supra* note 262, 268 *seq*.

²⁸⁰ See Rodriguez, *Id.*, 250.

²⁸¹ See SOLAS, Chapter XI-2, Regulations 2.1.1.

²⁸² See 33 C.F.R. § 104.105(a) (2007). However, foreign vessels making innocent passage through U.S. territorial waters or transiting international straits through U.S. waters are not affected by the MTSA, 33 C.F.R. § 104.105(d) (2007).

²⁸³ See 33 U.S.C. §§ 1901-1915. The Marine Plastic Pollution Research and Control Act of 1987 amended the Act to Prevent Pollution from Ships in view of the implementation of the provisions of Annex V of the MARPOL 73/78 Convention relating to garbage and plastics.

²⁸⁴ See 33 C.F.R. pt.157.

²⁸⁵ See SCHOENBAUM, *supra* note 2, 877.

²⁸⁶ The U.S. ratified Annex III on 25 June 1991, which entered into force internationally on 1 June 1992. See Martin R. Lee, Oceans & Coastal Resources: A Briefing Book-Marine Pollution, available at <http://ncseonline.org/nle/crsreports/briefingbooks/oceans/r.cfm> (last visit 20.08.2005).

²⁸⁷ See Chamber of Shipping of America Home Page, <http://www.knowships.org/report.php> (last visit 21.2.2008).

The U.S. became party to the STCW Convention in 1991. It seems that between 1984 and 1992, significant limitations to the 1978 STCW Convention became apparent to the U.S.. The latter had deferred ratification efforts and worked for almost a decade to effect necessary changes to U.S. licensing regulations. The 1995 amendments to the STCW Convention, adopted by the U.S., entered into force in February 1997; as a result, steps necessary to implement the revised requirements were taken by the Coast Guard. It is worth noting that the U.S. had submitted a proposal to the IMO in view of a comprehensive review of the 1978 Convention. In its proposal the U.S. suggested that the review should specifically consider criteria used for insuring fitness of watchstanders and the role of the human element in maritime casualties²⁸⁸.

The U.S. is also a party to the 1972 International Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, commonly known as the London Dumping Convention (LDC). This instrument is implemented through Title I of the 1972 Marine Protection, Research and Sanctuaries Act²⁸⁹, which is also known as the Ocean Dumping Act.

The U.S. ratified the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), which was adopted by the IMO on 30 November 1990. The ratification of this instrument took place on 13 May 1995²⁹⁰.

However, the above mentioned legal framework did not prevent the U.S. legislature from adopting its own approach to certain issues, taking the risk of acting unilaterally or being perceived by the international community as having acted alone. The PTSA 1978 constituted, for example, the response of the U.S. legislature to a number of maritime casualties involving tankers in the late 1970s as well as to the “backdrop of slowly developing international rules”²⁹¹. Section 9 of the Act provided for the first time²⁹², authority for the Coast Guard to establish conditions of entry into U.S. ports. The PTSA also authorized the President to enter into international agreements relating to port and vessel safety²⁹³.

In addition to the above, foreign tank vessels operating in U.S. waters are required not only to meet international requirements but also to obtain a certificate attesting to their compliance with Chapter 37, on carriage of liquid, bulk and dangerous goods, of Title 46 of the U.S. Code. The internationally accepted practice of control of the compliance of foreign vessels to maritime safety requirements consists of the visual control of the certificates of compliance issued by the flag State on the basis of the international conventions, unless there are clear grounds

²⁸⁸ See United States Coast Guard *Merchant Mariner Licensing & Documentation*, <http://www.uscg.mil/stcw/stcw-history.htm> (last visit 21.2.2008).

²⁸⁹ *Id.*, Pub. L. No. 92-532.

²⁹⁰ *Id.*

²⁹¹ Allen, *supra* note 2, 598.

²⁹² *Id.* at 599.

²⁹³ See 33 U.S.C. § 1230. However, PTSA facilitates consistency with later-enacted international developments by authorizing the Secretary of the Department of Transportation to modify any regulation or standard prescribed under PWSA to conform to the provisions of an international treaty, convention, agreements or an amendment that is ratified by the US. See Allen, *supra* note 2, 601.

for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of the certificate²⁹⁴.

Section 3711 of Chapter 37 prohibits any foreign vessel from operating on U.S. navigable waters, unless it is granted a certificate of compliance issued by the Secretary of the Department of Transportation, indicating that the vessel was subject to examination and was found in compliance with the requirements of applicable provisions. The Secretary is authorized to accept, in whole or in part, a foreign certificate issued according to an international instrument to which the U.S. is a party, as a basis for the issue of certificate of compliance. However, it is noticeable that the Secretary does not have to accept foreign certificates as evidence of compliance, but may make additional action to ensure compliance with applicable domestic laws and regulations and international treaty provisions²⁹⁵.

In our opinion, the requirement provided for in Section 3711 on a U.S. certificate of compliance as a systematic form of control functioning in addition to the international requirements is likely to reflect a different methodology than the one provided by the international instruments, in the sense that it constitutes a second tier of formality/control, which is not provided as such by the international conventions.

The other provision which may give rise to some discussion is Section 3703 of Chapter 37 (Title 46). The latter requires the Secretary of the Department of Transportation to issue regulations for the design, construction, maintenance, etc. of vessels in view of increased protection of the marine environment. While the Secretary may prescribe different regulations applicable to vessels engaged in the domestic trade, it may also provide for regulations that "exceed standards set internationally". Exceeding international standards would presumably mean establishing higher standards than the existing ones or differentiated standards. However, higher standards may be synonymous to differentiated standards, as was the case with the double hull requirement on oil tankers, which we will examine in Part II.

It follows from the above that schematically there seems to be a dichotomy concerning the attitude of the U.S. legislature on the adoption of the international instruments on maritime safety and marine pollution prevention.

On the one hand, the U.S. has not joined UNCLOS 1982, which is the most comprehensive legally binding international instrument on the uses of the oceans²⁹⁶. Additionally, the U.S. has opted for unilateral criteria in paramount areas of shipping such as the construction and design of vessels and the entry of for-

²⁹⁴ See e.g. Regulation 19 of SOLAS Convention (1974) and Article 5 of MARPOL.

²⁹⁵ See 46 U.S.C. 3711, <http://www.law.cornell.edu/uscode/> (last visit 8.3.2006).

²⁹⁶ It seems, however, that the Agreement Relating to the Implementation of Part XI of UNCLOS 1982 which incorporates legally binding changes in the deep sea-bed mining provisions of the said convention "satisfactorily addresses the objections of the U.S. and other industrialized countries"; thus, it could make possible the accession of the U.S. to this instrument. See http://www.state.gov/www/global/oes/oceans/980610_lo.html (last visit 15.8.2006).

eign vessels in U.S. ports, as dictated by the above-mentioned PTSA 1978 and OPA 1990.

On the other hand, the U.S. is a party to the vast majority of the IMO instruments on maritime safety and marine pollution prevention such as, to name but a few, MARPOL 73/78, SOLAS, OPRC, LDC, and STCW (including the 1995 amendments for the elaboration of which the U.S. was a protagonist) and its attitude has constituted a pacesetter for the adoption of important international maritime safety rules.

This policy, which resulted in an amalgam of uniform and differentiated provisions, has exercised an unquestionable influence on EC maritime safety law and policy.

In above-mentioned Part I, our viewpoint was the presentation of U.S. and EC maritime safety and marine pollution prevention law principally through the scope of the international norms, as a point of reference, which inevitably led to the search for unilateralism. In the Part that follows (Part II), we will adopt a substantive yet selective approach to the respective legal systems, in search of possible convergence or divergence between them.

At this stage, however, a first remark which may be made is that the EU has borrowed a number of elements from the U.S. maritime legislator. However, while the latter was shaping its policy and law in a context of the actual delay of the international system to react promptly towards urgent needs, especially in the 70s, the EU is sometimes inclined to reshape international requirements in a differentiated context: the international system is more energetic nowadays than in the past in its capacity to address the needs of the maritime industry at the global level; this would ideally result in qualifying the temptation of both powers to “act alone”.

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