

JUDGMENT OF THE COURT (Grand Chamber)

3 June 2008 (*)

(Maritime transport – Ship-source pollution – Directive 2005/35/EC – Validity – United Nations Convention on the Law of the Sea – Marpol 73/78 Convention – Legal effects of the Conventions – Ability to rely on them – Serious negligence – Principle of legal certainty)

In Case C-308/06,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decision of 4 July 2006, received at the Court on 14 July 2006, in the proceedings

The Queen on the application of:

International Association of Independent Tanker Owners (Intertanko),

International Association of Dry Cargo Shipowners (Intercargo),

Greek Shipping Co-operation Committee,

Lloyd's Register,

International Salvage Union,

v

Secretary of State for Transport,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, L. Bay Larsen, Presidents of Chambers, K. Schiemann, J. Makarczyk, P. Kūris, J. Malenovský (Rapporteur), A. Ó Caoimh, P. Lindh and J.-C. Bonichot, Judges,

Advocate General: J. Kokott,

Registrars: L. Hewlett, Principal Administrator, and C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 25 September 2007,

after considering the observations submitted on behalf of:

- the International Association of Independent Tanker Owners (Intertanko), the International Association of Dry Cargo Shipowners (Intercargo), the Greek Shipping Co-operation Committee, Lloyd's Register and the International Salvage Union, by C. Greenwood QC and H. Mercer, barrister,
- the United Kingdom Government, by C. Gibbs, acting as Agent, assisted by C. Lewis and S. Wordsworth, barristers,
- the Danish Government, by J. Bering Liisberg and B. Weis Fogh, acting as Agents,
- the Estonian Government, by L. Uibo, acting as Agent,
- the Greek Government, by A. Samoni-Rantou, S. Khala and G. Karipsiadis, acting as Agents,

- the Spanish Government, by M. Sampol Pucurull, acting as Agent,
- the French Government, by G. de Bergues, L. Butel and C. Jurgensen, acting as Agents,
- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,
- the Cypriot Government, by D. Lisandrou and N. Kharalampidou, acting as Agents,
- the Maltese Government, by S. Camilleri, acting as Agent,
- the Swedish Government, by K. Wistrand and A. Falk, acting as Agents,
- the European Parliament, by M. Gómez-Leal and J. Rodrigues, acting as Agents,
- the Council of the European Union, by E. Karlsson and E. Chaboureau, acting as Agents,
- the Commission of the European Communities, by K. Simonsson, H. Ringbom and F. Hoffmeister, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 November 2007,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the validity of Articles 4 and 5 of Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (OJ 2005 L 255, p. 11; corrigenda at OJ 2006 L 33, p. 87, and OJ 2006 L 105, p. 65).
- 2 The reference was made in the course of proceedings brought by the International Association of Independent Tanker Owners (Intertanko), the International Association of Dry Cargo Shipowners (Intercargo), the Greek Shipping Co-operation Committee, Lloyd’s Register and the International Salvage Union against the Secretary of State for Transport concerning implementation of Directive 2005/35.

Legal context

International law

- 3 The United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982 (‘UNCLOS’), entered into force on 16 November 1994. It was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).
- 4 Article 2 of UNCLOS refers to the legal status of the territorial sea in the following terms:

‘1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

...

3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.’
- 5 Article 17 of UNCLOS provides:

‘Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.’

6 Article 34 of UNCLOS specifies as follows the legal status of waters forming straits used for international navigation:

‘1. The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their airspace, bed and subsoil.

2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.’

7 Article 42 of UNCLOS provides:

‘1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

...

(b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

...’

8 Part V of UNCLOS lays down a specific legal regime governing the exclusive economic zone.

9 In this Part, Article 56(1) provides:

‘1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

...’

10 Article 58(1) provides:

‘In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.’

11 Article 79(1) of UNCLOS states:

‘All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this Article.’

12 Article 89 of UNCLOS provides:

‘No State may validly purport to subject any part of the high seas to its sovereignty.’

13 Article 90 provides:

‘Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.’

14 Article 116 provides:

‘All States have the right for their nationals to engage in fishing on the high seas ...’

15 Part XII of UNCLOS is devoted to protection and preservation of the marine environment.

16 In Part XII, Article 211 provides:

‘1. States, acting through the competent international organisation or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimise the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.

2. States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organisation or general diplomatic conference.

...

4. Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.

5. Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones 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 established through the competent international organisation or general diplomatic conference.

...’

17 The International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978 (‘Marpol 73/78’), establishes rules to combat pollution of the marine environment.

18 The regulations for the prevention of pollution by oil are set out in Annex I to Marpol 73/78.

19 Regulation 9 of Annex I states that, subject to the provisions of Regulations 9(2), 10 and 11, any discharge into the sea of oil or oily mixtures from ships to which that annex applies is to be prohibited except when certain exhaustively listed conditions are satisfied.

20 Regulation 10 of Annex I lays down methods for the prevention of oil pollution from ships while operating in special areas.

21 Regulation 11 of that annex, headed ‘Exceptions’, states:

‘Regulations 9 and 10 of this Annex shall not apply to:

- (a) the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or
- (b) the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:
 - (i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimising the

discharge; and

(ii) except if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result; or

(c) the discharge into the sea of substances containing oil, approved by the Administration [of the flag State], when being used for the purpose of combating specific pollution incidents in order to minimise the damage from pollution. Any such discharge shall be subject to the approval of any Government in whose jurisdiction it is contemplated the discharge will occur.'

22 The regulations for the control of pollution by noxious liquid substances are set out in Annex II to Marpol 73/78.

23 Regulation 5 of Annex II prohibits discharge into the sea of the substances covered by that annex, except when certain exhaustively listed conditions are satisfied. Regulation 6(a) to (c) of that annex sets out, in analogous terms, the exceptions provided for in Regulation 11(a) to (c) of Annex I.

Community law

24 Article 3(1) of Directive 2005/35 provides:

'This Directive shall apply, in accordance with international law, to discharges of polluting substances in:

(a) the internal waters, including ports, of a Member State, in so far as the Marpol regime is applicable;

(b) the territorial sea of a Member State;

(c) straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2, of [UNCLOS], to the extent that a Member State exercises jurisdiction over such straits;

(d) the exclusive economic zone or equivalent zone of a Member State, established in accordance with international law; and

(e) the high seas.'

25 Article 4 of Directive 2005/35 provides:

'Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in Article 3(1) are regarded as infringements if committed with intent, recklessly or by serious negligence. These infringements are regarded as criminal offences by, and in the circumstances provided for in, Framework Decision 2005/667/JHA supplementing this Directive.'

26 Article 5 of Directive 2005/35 states:

1. A discharge of polluting substances into any of the areas referred to in Article 3(1) shall not be regarded as an infringement if it satisfies the conditions set out in Annex I, Regulations 9, 10, 11(a) or 11(c) or in Annex II, Regulations 5, 6(a) or 6(c) of Marpol 73/78.

2. A discharge of polluting substances into the areas referred to in Article 3(1)(c), (d) and (e) shall not be regarded as an infringement for the owner, the master or the crew when acting under the master's responsibility if it satisfies the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b) of Marpol 73/78.'

27 Article 8 of Directive 2005/35 provides:

1. Member States shall take the necessary measures to ensure that infringements within the meaning of Article 4 are subject to effective, proportionate and dissuasive penalties, which may

include criminal or administrative penalties.

2. Each Member State shall take the measures necessary to ensure that the penalties referred to in paragraph 1 apply to any person who is found responsible for an infringement within the meaning of Article 4.'

The main proceedings and the questions referred for a preliminary ruling

28 The claimants in the main proceedings comprise a group of organisations within the maritime shipping industry representing substantial proportions of that industry. They applied to the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), for judicial review in relation to the implementation of Directive 2005/35.

29 By decision of 4 July 2006, that court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) In relation to straits used for international navigation, the exclusive economic zone or equivalent zone of a Member State and the high seas, is Article 5(2) of Directive 2005/35/EC invalid in so far as it limits the exceptions in Annex I Regulation 11(b) of [Marpol] 73/78 and in Annex II Regulation (6)(b) of [Marpol] 73/78 to the owners, masters and crew?
- (2) In relation to the territorial sea of a Member State:
 - (a) Is Article 4 of the Directive invalid in so far as it requires Member States to treat serious negligence as a test of liability for discharge of polluting substances; and/or
 - (b) Is Article 5(1) of the Directive invalid in so far as it excludes the application of the exceptions in Annex I Regulation 11(b) of [Marpol] 73/78 and in Annex II Regulation (6) (b) of [Marpol] 73/78?
- (3) Does Article 4 of the Directive, requiring Member States to adopt national legislation which includes serious negligence as a standard of liability and which penalises discharges in territorial sea, breach the right of innocent passage recognised in [UNCLOS], and if so, is Article 4 invalid to that extent?
- (4) Does the use of the phrase "serious negligence" in Article 4 of the Directive infringe the principle of legal certainty, and if so, is Article 4 invalid to that extent?'

Admissibility

30 The French Government questions whether the reference for a preliminary ruling is admissible, the national court having, in its view, failed to set out the circumstances in which the case has been brought before it. The French Government submits that, in contrast to cases such as that giving rise to the judgment in Case C-491/01 *BritishAmerican Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, the order for reference does not state that the claimants in the main proceedings have sought to bring an action contesting the transposition of Directive 2005/35 by the United Kingdom of Great Britain and Northern Ireland.

31 In that regard, it is to be remembered that, when a question on the validity of a measure adopted by the institutions of the European Community is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and, consequently, whether it should request the Court to rule on that question. Accordingly, where the national court's questions relate to the validity of a provision of Community law, the Court is obliged in principle to give a ruling (*BritishAmerican Tobacco (Investments) and Imperial Tobacco*, paragraph 34 and the case-law cited).

32 It is possible for the Court to refuse to give a preliminary ruling on a question submitted by a national court only where, inter alia, it is quite obvious that the ruling sought by that court on the interpretation

or validity of Community law bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (*BritishAmerican Tobacco (Investments) and Imperial Tobacco*, paragraph 35 and the case-law cited).

- 33 In the present case, it is clear from the order for reference that the claimants in the main proceedings have made an application to the High Court for judicial review of implementation of Directive 2005/35 in the United Kingdom and that they may make such an application even though, when the application was made, the period prescribed for implementation of the directive had not yet expired and no national implementing measures had been adopted.
- 34 Nor is it disputed before the Court of Justice that the questions submitted are relevant to the outcome of the main proceedings, as the adoption of national measures designed to transpose a directive into domestic law in the United Kingdom may be subject to the condition that the directive be valid (see *BritishAmerican Tobacco (Investments) and Imperial Tobacco*, paragraph 37).
- 35 It is therefore not obvious that the ruling sought by the national court on the validity of Directive 2005/35 bears no relation to the actual facts of the main action or its purpose or concerns a hypothetical problem.

Consideration of the questions referred for a preliminary ruling

Questions 1 to 3

- 36 By its first three questions, the national court essentially requests the Court of Justice to assess the validity of Articles 4 and 5 of Directive 2005/35 in the light of Regulations 9 and 11(b) of Annex I, and Regulations 5 and 6(b) of Annex II, to Marpol 73/78 and in the light of the provisions of UNCLOS which define the conditions under which coastal States may exercise certain of their rights in the various marine zones.
- 37 The claimants in the main proceedings and the Greek, Cypriot and Maltese Governments submit that Articles 4 and 5 of Directive 2005/35 do not comply with Marpol 73/78 or UNCLOS in several respects. In particular, by laying down that liability is to be incurred for serious negligence, those articles establish a stricter liability regime for accidental discharges than that laid down in Article 4 of Marpol 73/78, read in conjunction with Regulations 9 and 11(b) of Annex I, and Regulations 5 and 6(b) of Annex II, to that Convention.
- 38 The claimants in the main proceedings and the abovementioned governments proceed on the basis that the legality of Directive 2005/35 may be assessed in the light of UNCLOS, since the Community is a party thereto and it thus forms an integral part of the Community legal order.
- 39 In their submission, the directive's legality may also be assessed in the light of Marpol 73/78. They state that UNCLOS defines and governs the extent of the jurisdiction of the Contracting Parties in their actions on the high seas, in their exclusive economic zones and in international straits. Thus, the Community lacks the power to adopt legislation applying to discharges from ships not flying the flag of one of the Member States, save to the extent that UNCLOS accords the Community the right to adopt such legislation. Under UNCLOS, the Contracting Parties have the power only to adopt legislation implementing the international rules and standards in such marine areas, that is to say, in the present case, the provisions of Marpol 73/78. This power is specified with regard to the high seas in Article 211(1) and (2) of UNCLOS, with regard to international straits in Articles 42(1)(b) and 45 of that Convention and with regard to the exclusive economic zone in Article 211(5). The same holds for territorial waters, by virtue of Article 2(3) of UNCLOS.
- 40 The claimants in the main proceedings add that the legality of Directive 2005/35 must be assessed in the light of Marpol 73/78 for the further reason that the Community legislature seeks to implement the latter in Community law by means of that directive.
- 41 Furthermore, the field of maritime transport is a field where the Community has assumed the function of regulating the implementation of the international obligations of the Member States. The position is

analogous to that under the General Agreement on Tariffs and Trade of 30 October 1947 ('GATT 1947') before the advent of the Agreement establishing the World Trade Organisation, where the Community, without becoming a party to GATT 1947, succeeded to the obligations of Member States through its actions under the common commercial policy. The field covered by GATT 1947 was thereby brought within the jurisdiction of the Community, its provisions having the effect of binding the Community.

Findings of the Court

- 42 It is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see, to this effect, Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52, and Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25).
- 43 It follows that the validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with such rules of international law. Where that invalidity is pleaded before a national court, the Court of Justice thus reviews, pursuant to Article 234 EC, the validity of the Community measure concerned in the light of all the rules of international law, subject to two conditions.
- 44 First, the Community must be bound by those rules (see Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraph 7).
- 45 Second, the Court can examine the validity of Community legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise (see to this effect, in particular, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 39).
- 46 It must therefore be examined whether Marpol 73/78 and UNCLOS meet those conditions.
- 47 First, with regard to Marpol 73/78, it is to be observed at the outset that the Community is not a party to this Convention.
- 48 Furthermore, as the Court has already held, it does not appear that the Community has assumed, under the EC Treaty, the powers previously exercised by the Member States in the field to which Marpol 73/78 applies, nor that, consequently, its provisions have the effect of binding the Community (Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 16). In this regard, Marpol 73/78 can therefore be distinguished from GATT 1947 within the framework of which the Community progressively assumed powers previously exercised by the Member States, with the consequence that it became bound by the obligations flowing from that agreement (see to this effect, in particular, *International Fruit Company and Others*, paragraphs 10 to 18). Accordingly, this case-law relating to GATT 1947 cannot be applied to MARPOL 73/78.
- 49 It is true that all the Member States of the Community are parties to Marpol 73/78. Nevertheless, in the absence of a full transfer of the powers previously exercised by the Member States to the Community, the latter cannot, simply because all those States are parties to Marpol 73/78, be bound by the rules set out therein, which it has not itself approved.
- 50 Since the Community is not bound by Marpol 73/78, the mere fact that Directive 2005/35 has the objective of incorporating certain rules set out in that Convention into Community law is likewise not sufficient for it to be incumbent upon the Court to review the directive's legality in the light of the Convention.
- 51 Admittedly, as is clear from settled case-law, the powers of the Community must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law (see, to this effect, Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9 and 10; Case C-405/92 *Mondiet* [1993] ECR I-6133, paragraphs 13 to 15; and Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 45). None the

less, it does not appear that Regulations 9 and 11(b) of Annex I to Marpol 73/78 and Regulations 5 and 6(b) of Annex II to that Convention are the expression of customary rules of general international law.

52 In those circumstances, it is clear that the validity of Directive 2005/35 cannot be assessed in the light of Marpol 73/78, even though it binds the Member States. The latter fact is, however, liable to have consequences for the interpretation of, first, UNCLOS and, second, the provisions of secondary law which fall within the field of application of Marpol 73/78. In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78.

53 Second, UNCLOS was signed by the Community and approved by Decision 98/392, thereby binding the Community, and the provisions of that Convention accordingly form an integral part of the Community legal order (see Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 82).

54 It must therefore be determined whether the nature and the broad logic of UNCLOS, as disclosed in particular by its aim, preamble and terms, preclude examination of the validity of Community measures in the light of its provisions.

55 UNCLOS's main objective is to codify, clarify and develop the rules of general international law relating to the peaceful cooperation of the international community when exploring, using and exploiting marine areas.

56 According to the preamble to UNCLOS, the Contracting Parties agreed to that end to establish through UNCLOS a legal order for the seas and oceans which would facilitate international navigation, which would take into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, and which would strengthen peace, security, cooperation and friendly relations among all nations.

57 From this viewpoint, UNCLOS lays down legal regimes governing the territorial sea (Articles 2 to 33), waters forming straits used for international navigation (Articles 34 to 45), archipelagic waters (Articles 46 to 54), the exclusive economic zone (Articles 55 to 75), the continental shelf (Articles 76 to 85) and the high seas (Articles 86 to 120).

58 For all those marine areas, UNCLOS seeks to strike a fair balance between the interests of States as coastal States and the interests of States as flag States, which may conflict. In this connection, as is apparent from numerous provisions of the Convention, such as Articles 2, 33, 34(2), 56 and 89, the Contracting Parties provide for the establishment of the substantive and territorial limits to their respective sovereign rights.

59 On the other hand, individuals are in principle not granted independent rights and freedoms by virtue of UNCLOS. In particular, they can enjoy the freedom of navigation only if they establish a close connection between their ship and a State which grants its nationality to the ship and becomes the ship's flag State. This connection must be formed under that State's domestic law. Article 91 of UNCLOS states in this regard that every State is to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag, and that there must exist a genuine link between the State and the ship. Under Article 92(1) of UNCLOS, ships are to sail under the flag of one State only and may not change their flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

60 If a ship is not attached to a State, neither the ship nor the persons on board enjoy the freedom of navigation. In this connection, UNCLOS provides inter alia, in Article 110(1), that a warship which encounters a foreign ship on the high seas is justified in boarding it if there is reasonable ground for suspecting that the ship is without nationality.

61 It is true that the wording of certain provisions of UNCLOS, such as Articles 17, 110(3) and 111(8), appears to attach rights to ships. It does not, however, follow that those rights are thereby conferred on the individuals linked to those ships, such as their owners, because a ship's international legal status is dependent on the flag State and not on the fact that it belongs to certain natural or legal persons.

- 62 Likewise, it is the flag State which, under the Convention, must take such measures as are necessary to ensure safety at sea and, therefore, to protect the interests of other States. The flag State may thus also be held liable, vis-à-vis other States, for harm caused by a ship flying its flag to marine areas placed under those States' sovereignty, where that harm results from a failure of the flag State to fulfil its obligations.
- 63 Doubt is not cast on the foregoing analysis by the fact that Part XI of UNCLOS involves natural and legal persons in the exploration, use and exploitation of the sea-bed and ocean floor, and subsoil thereof, beyond the limits of national jurisdiction, since the present case does not in any way concern the provisions of Part XI.
- 64 In those circumstances, it must be found that UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State.
- 65 It follows that the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a Community measure in the light of that Convention.
- 66 Consequently, the answer to the first three questions must be that the validity of Directive 2005/35 cannot be assessed:
- either in the light of Marpol 73/78,
 - or in the light of UNCLOS.

Question 4

- 67 By this question, the national court essentially asks whether Article 4 of Directive 2005/35 is invalid on the ground that, by using the term 'serious negligence', it infringes the general principle of legal certainty.
- 68 The claimants in the main proceedings and the Greek Government consider that Article 4 of Directive 2005/35 breaches the general principle of legal certainty which requires that rules should be clear and precise so that individuals may ascertain unequivocally what their rights and obligations are. They submit that, under this provision, liability of persons causing discharges of polluting substances is subject to the test of serious negligence, which is not defined at all by Directive 2005/35 and which consequently lacks clarity. Thus, the persons concerned are unable to ascertain the degree of severity of the rules to which they are subject.

Findings of the Court

- 69 The general principle of legal certainty, which is a fundamental principle of Community law, requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly (see Case C-110/03 *Belgium v Commission* [2005] ECR I-2801, paragraph 30, and *IATA and ELFAA*, paragraph 68).
- 70 Furthermore, in obliging the Member States to regard certain conduct as infringements and to punish it, Article 4 of Directive 2005/35, read in conjunction with Article 8 thereof, must also observe the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), which is one of the general legal principles underlying the constitutional traditions common to the Member States (Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 49) and is a specific expression of the general principle of legal certainty.
- 71 The principle of the legality of criminal offences and penalties implies that Community rules must define clearly offences and the penalties which they attract. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see, in particular, *Advocaten voor de Wereld*, paragraph 50, and the judgment of the European Court of Human

Rights in *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, *Reports of Judgments and Decisions* 2000-VII, § 145).

72 It is true that Article 4 of Directive 2005/35, read in conjunction with Article 8 thereof, obliges the Member States to punish ship-source discharges of polluting substances if committed ‘with intent, recklessly or by serious negligence’, without defining those concepts.

73 It is, however, to be pointed out, first of all, that those various concepts, in particular that of ‘serious negligence’ referred to by the national court’s questions, correspond to tests for the incurring of liability which are to apply to an indeterminate number of situations that it is impossible to envisage in advance and not to specific conduct capable of being set out in detail in a legislative measure, of Community or of national law.

74 Next, those concepts are fully integrated into, and used in, the Member States’ respective legal systems.

75 In particular, all those systems have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care.

76 Also, as provided by many national legal systems, the concept of ‘serious’ negligence can only refer to a patent breach of such a duty of care.

77 Accordingly, ‘serious negligence’ within the meaning of Article 4 of Directive 2005/35 must be understood as entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation.

78 Finally, in accordance with Article 249 EC, Directive 2005/35 must be transposed by each of the Member States into national law. Thus, the actual definition of the infringements referred to in Article 4 of that directive and the applicable penalties are those which result from the rules laid down by the Member States.

79 In view of the foregoing, Article 4 of Directive 2005/35, read in conjunction with Article 8 thereof, does not infringe the general principle of legal certainty in so far as it requires the Member States to punish ship-source discharges of polluting substances committed by ‘serious negligence’, without defining that concept.

80 It follows that examination of the fourth question has revealed nothing capable of affecting the validity of Article 4 of Directive 2005/35 in the light of the general principle of legal certainty.

Costs

81 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. The validity of Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements cannot be assessed:

- **either in the light of the International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978,**
- **or in the light of the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982.**

2. Examination of the fourth question has revealed nothing capable of affecting the validity of Article 4 of Directive 2005/35 in the light of the general principle of legal certainty.

[Signatures]

* Language of the case: English.