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United States Department of State

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Washington, D.C. 20520

July 13, 1989

MEMORANDUM

TO: L - Mary Mochary

FROM: L/OES - David Small *DS*

SUBJECT: Immunity of Uruguayan Oil Tanker Presidente Rivera

Summary

According to Jane's Fighting Ships 1988-89 (see attached), the Presidente Rivera is an auxiliary ship of the Uruguayan Navy, one of its two oil tankers that operate under charter to the state-owned oil company (ANCAP).

I understand that at the time of the grounding on June 25, 1989, in United States internal waters off Marcus Hook in the Delaware River, the ship was preparing to off load Brazilian fuel oil at a Sun Oil terminal, and the balance was to be delivered to ANCAP.

Consequently, it is apparent that at the time of the oil spill, the Presidente Rivera, although a government vessel, was on commercial service, is not entitled to the sovereign immunity of a warship or other ship owned or operated by a State and used, for the time being, only on government non-commercial purposes, and should therefore be subject to the international and domestic U.S. law applicable to merchant ships and other government ships operated for commercial purposes and engaged in commercial activity.

Thus, there are no special obstacles to law enforcement personnel boarding the ship. However, under the Foreign Sovereign Immunities Act (FSIA), civil suits are subject to special rules that are more restrictive than those that apply to privately owned vessels.

AnalysisSovereign immunity of government vessels

Both the United States and Uruguay accept the restrictive theory of sovereign immunity for government vessels, i.e., the immunity of a government vessel, under international law, from the enforcement jurisdiction of the coastal state depends on

the nature of the activities engaged in by the vessel at the time of the incident. Only warships and other government ships operated for non-commercial purposes and not engaged in commercial activity are entitled to sovereign immunity. Under international law government ships operated for commercial purposes are treated in the same fashion as merchant ships.

This rule appears in the International Convention for the Unification of Certain Rules regarding the Immunity of State Owned Vessels, Brussels, 1926, 26 Am. J. Int'l L. Supp. 566 (1932), entered into force in 1937, to which Uruguay but not the United States is a party, and in articles 34 and 35 of the Treaty on the Law of International Commercial Navigation, Montevideo, March 19, 1940, 37 Am. J. Int'l L. Supp. 109, 114 (1943), not in force, which Uruguay has ratified but which the United States has not signed. Both conventions provide that, except for men-of-war, supply vessels, and other vessels "which are the property of the State, or operated by it, and which are employed, at the time when the claim arises, in some public service outside the field of commerce," vessels which are the property of the contracting States or operated by them are subject to the laws and rules of responsibility applicable to private vessels.

This rule later appeared in treaties of more general acceptance, the 1958 Geneva Conventions on the Territorial Sea and the Contiguous Zone (article 21) and on the High Seas (article 9), after the Socialist States failed to achieve sovereign immunity for merchant vessels engaged in commercial service which had been nationalized and were now owned or operated by the State for those purposes. While the United States is a party to both of these 1958 Geneva Conventions, Uruguay is not a party to either one. Nevertheless, Uruguay made no comments on the International Law Commission's reports which included these provisions in its draft law of the sea convention. Further, the 1958 High Seas Convention is expressly a codification of customary international law.

This rule is also reflected in the 1982 UN Convention on the Law of the Sea, articles 32 and 236 (regarding sovereign immunity) and subsection B of Section 3 of Part II (regarding merchant ships). While the United States has not signed the 1982 Law of the Sea Convention, the United States considers the non-seabed provisions to be declarative of customary international law. We are unaware of any objections by Uruguay during the negotiations to the restrictive immunity provisions. Uruguay has signed but not ratified the LOS Convention.

Although a government-owned vessel may not be entitled to sovereign immunity under international law, U.S. law imposes other limits on civil suits involving foreign government-owned vessels. In particular, under the FSIA, 28 U.S. Code sec. 1605(b) and (c), a foreign state-owned vessel may not be arrested as a means of enforcing a maritime lien against the vessel or its cargo. Rather, these subsections of the FSIA permit an in personam proceeding against the government-owner but otherwise uses in rem rules and procedures.

Presidente Rivera is not entitled to sovereign immunity

The Presidente Rivera is properly characterized, at the time of its grounding, as a government ship operated for commercial purposes and engaged in commercial activity, and not as a warship. The vessel does not meet all the criteria set out in the LOS Convention's definition of a warship, article 29. While the ship belongs to the armed forces of Uruguay, under the command of an officer duly commissioned by that government and whose name appears in the appropriate service list, and is manned by a crew under regular armed forces discipline, it does not bear the external marks distinguishing warships of its nationality. The ship's name and home port appear on the stern, and the ship's name appears on the bow, traditional markings of merchant ships. The ship bears no hull number or other marking characteristic of a warship or other government vessel on non-commercial service. It appears to be operating in civilian colors: red hull, white upperworks. Further the ship is carrying SOLAS (Safety of Life at Sea) and COFR (certificate of financial responsibility) papers required of merchant ships. Further the oil is documented in a bill of lading originally destined for Consolidated Edison and New Jersey Power and Light Companies. The vessel is clearly a government tanker, on commercial service, chartered to the Uruguayan state oil company (ANCAP).

Although the Presidente Rivera is not entitled to sovereign immunity under international law (because the Presidente Rivera was engaged in commercial activity when the accident occurred), the commercial activity exception of the FSIA would permit civil suit against the Government of Uruguay only in accordance with its terms. (Even if the ship had not been engaged in commercial activity, the FSIA would permit suits in tort against the Government of Uruguay.) Any such case would have to comply with the FSIA's service of process provisions. To avoid a default judgment, the Government of Uruguay would need to respond to the suit by appearing in court.

Environmental protection

The law of the sea imposes few restraints on a State acting against government vessels, which are not entitled to sovereign immunity, that pollute its internal waters.

Part XII of the 1982 Law of the Sea Convention provides relevant rules for the protection and preservation of the marine environment of the waters seaward of the inner boundary of the territorial sea. Under article 218, enforcement by port States, a port State may institute investigation of a discharge violation believed to have occurred in, caused or threatened damage to the internal waters of that State. Under article 220, enforcement by coastal States, when a vessel is voluntarily within a port of a State, that State may institute proceedings in respect of any violation of its laws and regulations adopted in accordance with the Convention or applicable international rules and standards for the prevention, reduction, and control of pollution from vessels, may undertake physical inspection of the vessel, and detain the vessel. Certain safeguards are established in section 7. Article 226 sets out rules for the investigation of foreign vessels. Article 230 limits penalties for violations occurring in or seaward of the territorial sea, but does not limit them for violations occurring in internal waters. Article 227 requires States not to discriminate in form or fact against vessels of any other State in exercising its rights and performing its duties to protect and preserve the marine environment.

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