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# The European Union and International Maritime Organization: EU's external influence on the prevention of vessel-source pollution

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# *The European Union and the International Maritime Organization: EU's External Influence on the Prevention of Vessel-Source Pollution*

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## I
## INTRODUCTION

The European Union (EU), with its 27 Member States, has a coastline 70, 000 km along two oceans and four seas. Its well-being is therefore inextricably linked with the sea.[1] Europe plays a major role in today's shipping world, 41% of the world's total fleet (in dwt) is beneficially controlled by European companies.[2] Ensuring that the use of the marine environment is genuinely sustainable is a prerequisite for the EU's sea-related industries to be competitive.[3]

Vessel-source pollution is responsible for some 12% of the total marine pollution[4] and is subjected to a rigorous body of rules of international law.[5] The legal regime for preventing vessel-source pollution is aptly described in Part XII on the 'Protection and Preservation of the Marine Environment' of

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[1]COM (2007) 575 final (An Integrated Maritime Policy for the European Union) 3.

[2]COM (2009) 8 final (Strategic goals and recommendations for the EU's maritime transport policy until 2018) 2.

[3]COM (2007) 575 final, 4.

[4]Shipping Facts, www.marisec.org/shippingfacts/environmental/small-contribution-to-overall-marine-pollution.php

[5]For briefly analyzed reasons, see A. Tan, *Vessel-Source Marine Pollution, the Law and Politics of International Regulation* (Cambridge University Press 2006) p. 14.

the United Nations Convention on the Law of the Sea (LOSC). Besides the LOSC, vessel-source pollution is mainly governed by conventions concluded under the auspices of the International Maritime Organization (IMO).

Although the EU has significant power to play an important role in the international decision making process within the IMO, the EU is not a member of the IMO since membership is only open for States.[6] All 27 EU Member States are members of the IMO and they are quite supportive of an international legal regime for preventing vessel-source pollution. After serious oil tanker disasters such as "Erika" (1999) and "Prestige" (2002), vessel-source pollution is particularly addressed by the EU, which adopted a series of directives and regulations to better protect the marine environment of European waters.[7] With the adoption and subsequent implementation of the 3rd Maritime Safety Package, the EU now has one of the world's most comprehensive and advanced regulatory frameworks for shipping.[8] This leads to the outside world opinion that the EU's approach is of a regional or even unilateral character, which potentially could undermine the authority of general international law. However, the EU is fully aware of the fact that shipping is an activity with intensive communication between different States and cannot be handled by any country alone.[9] The increasing effectiveness of the involvement of the EU in IMO is recognized as a strategic goal and is recommended for the EU's maritime transport policy until 2018.[10] This raises the question: which kind of role should the EU play in the IMO for an improved prevention of vessel-source pollution? The paper first pays attention to the current legal framework of the EU's external influence in the IMO, including the legal basis/external competence, institutions and the coordination processes. Then it focuses on the research question and argues that to be a full member of the IMO may not be the best solution for the effectiveness of the EU's external influence in the IMO, especially from an environmental point of view.

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[6]Art.4, Convention on the International Maritime Organization

[7]COM (2000)142 final (Erika I package) and COM (2000) 802 final (Erika II package).

[8]COM (2009) 8 final, 7.

[9]E. J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, (Kluwer Law International 1998) pp. 18 -19.

[10]COM (2009) 8 final, 7.

## II
## CURRENT LEGAL FRAMEWORK

### *A. Legal Basis*

There is no doubt that the EU now can be recognized to enjoy legal personality under international law. Previously, only the European Community (EC) had been granted legal personality by Article 281 of the EC treaty, while the legal personality of the EU was not regulated and thus remained disputed.[11] Since its entry into force, the Treaty of Lisbon provides explicit legal personality to the EU (art.47, Treaty on European Union (TEU)).

The EU declared as a condition to join the LOSC that maritime transport, safety of shipping and the prevention of marine pollution contained *inter alia* in LOSC Parts II, III, V, VII and XII are considered to be areas of shared competences, but also subject to continuous development.[12] Art.191 of the Treaty on the Functioning of the European Union (TFEU, ex art.174 of the EC Treaty) provides that Union policy on the environment shall contribute to the pursuit of promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular combating climate change. Within their respective spheres of competence the Union and the Member States shall cooperate with third countries and with the competent international organizations. For maritime transport, no specific legal basis can be found in the TEU and TFEU regarding the EU's external competence. However, the European Court of Justice (ECJ) in the leading ERTA/AETR Case clearly states that the Community acquires external competence when it adopts internal legislation on the same subject-matter.[13] Thus, the EU implicitly acquired external competence on the basis of the expansion of its maritime safety legislation during the past decade. It seems that the ERTA/AETR principle is still expanding. One recent case in the ECJ even finds that a unilateral act by a member State (in this case: Greece) initiating a process which may lead to the adoption of new international rules

[11]N. Lavranos, 'The entering into force of the Lisbon Treaty - a European odyssey,' 26 ASIL Insight (2009).

[12]Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982, p. 231. http://untreaty.un.org/unts/120001_144071/27/2/00022247.pdf.

[13]Para. 19, Case C-22/70, Commission v. Council, 1971 ECR.263; See also V. Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level*, (Martinus Nijhoff, 2007) p. 63.

in the IMO is in breach of Community law, although those rules would not be directly binding on the Community.[14]

### *B. Institutions*

As mentioned above, the EU is not a member of the IMO. Only the European Commission (the Commission) holds observer status and participates in IMO meetings based on the Agreement of Mutual Co-operation concluded by the Commission and the IMO Secretary-General in 1974. Within the Commission, DG Mobility and Transport (DG MOVE) created in Feb 2010 when energy was split from the former DG Transport and Energy (DG TREN), is the most relevant DG to deal with maritime safety matters in the IMO.[15] It has a Maritime Safety Unit and a permanent representative on behalf of the EU to the IMO. Besides, DG Environment is also competent in matters such as ballast water management and air pollution from shipping, dealt with in the Marine Environment Protection Committee (MEPC) of the IMO. Although the European Maritime Safety Agency (EMSA), established after the '*Prestige*' disaster to specifically assist the Commission to prevent vessel-source pollution, is playing an increasingly important role,[16] it is not represented separately in the IMO but is part of the EU delegation.

Since the Commission is not entitled to negotiate in the IMO on behalf of Member States, the EU needs to coordinate positions of Member States in order to influence the international decision-making process according to its own policy. This coordination process, which will be discussed below, is chaired by the Commission and the Presidency of the Council of the European Union (the Council). Moreover, the joint positions are presented in relevant IMO meetings by Member States or the Presidency. Although the Treaty of Lisbon for the first time created a President of the European Council elected for two and half years (art.15(5), TEU), the Presidency of most Council configurations, including the Transport, Telecommunications and Energy Council, will continue to be held on a rotational basis (art.16(9), TEU).

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[14]Case C-45/07, Commission v. Hellenic Republic; See also M. Cremona, 'Extending the reach of the AETR principle: comment on Commission v. Greece (C- 45/07),' 34 European Law Review 754-768 (2009).

[15]Commission creates two new Directorates-General for Energy and Climate Action, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/164&format=HTML&aged=0&language=EN&guiLanguage=en.

[16]N. Y. Liu & F. Maes, 'The European Union's role in the prevention of vessel-source pollution and its internal influence,' 15 Journal of International Maritime Law 411-422 (2009).

The European Parliament (the Parliament) is not directly involved in the EU's external influence in the IMO. The Parliament's legislative power is once again firmly increased after the Treaty of Lisbon (art. 14(1) TEU), as the co-decision maker of European legislation. The Parliament, with its green concerns,[17] can decide internally what position EU member States have to take in the IMO. With the right of political initiative, such as requesting the Commission or the Council to achieve certain objectives, the Parliament is not necessarily limited to react internally after oil tanker accidents,[18] but can do more regarding EU's external influence for preventing vessel-source pollution in the future.

Similar to the Parliament, the ECJ is also not directly involved in IMO matters. However, the EU receives its external competence on the prevention of vessel-source pollution from the ECJ case law. The ECJ plays an important role in the development of European law, which may alter the scope of shared competence between the EU and its Member States. The ECJ can pass judgments on the manner and legality of Member States' submissions or positions in the IMO, as it did in the Case C-45/07, Commission v. Greece.

### *C. Coordination Process*

The EU's coordination process is based on a Gentlemen's Agreement adopted in 1994. It was quite informal at that time. After the "*Erika*" and the "*Prestige*" disasters the mechanism is seriously evolved and enhanced following an impressive expansion of European maritime safety legislation. In 2005, the "Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in the IMO" (SEC (2005) 449, Procedural Framework) was drafted by the Council. Although the Procedural framework has not been formally approved, it is voluntarily used in practice.

According to the Procedural Framework, the EU's position in IMO can be divided into three categories: 1) Community position (matters of EU's exclusive competence); 2) coordinated position (matters of Member States' exclusive competence); 3) common position (matters of shared competence

[17]However, according to some recent research, the environmental reputation of the Parliament is greatly challenged. See C. Burns, Research Project: Is the European Parliament an environmental champion? http://www.polis.leeds.ac.uk/research/projects/eu-environmental-champion.php

[18]After the "Erika" oil tanker disaster, the Parliament set up a Temporary Committee on Improving Safety at Sea (the decision of the European Parliament of 6 November 2003) to investigate the accident. The Committee finally adopted a report by MEP Dirk Sterckx, stressing in particular a number of concrete measures called for by the Parliament.

between the EU and Member States). For the preparation of Community positions, technical discussions may be held in relevant technical committees, such as the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) or the Committee on Maritime Security (MARSEC), or, when appropriate, in technical meetings of Member States' experts with the Commission. A staff working document shall be submitted to the Council by the Commission, including a proposed Community position. If the Community position is adopted in the Council by qualified majority, then it will either be included in a written submission to IMO and/or voiced within the IMO either by the Member State exercising the Presidency on behalf of the Union, or by other Member States as well as by the Commission. For the preparation of a common position, the Commission, with the possible assistance of the Member States, shall submit a staff working document to the Council with relevant proposals for adoption of a common position. After it is adopted by the Member States meeting within the Council by consensus, Common positions will either be included in a written submission to IMO and/or introduced by the Member State exercising the Presidency of the Council or "by the 27 Member States and the Commission." Moreover, when necessary, the Presidency organizes EU Co-ordination meetings on the spot. These meetings should allow a flexible response to new situations resulting from the negotiations.[19]

EU member States, especially those with strong shipping interests such as Malta, Cyprus, Greece and Poland, do not always follow the decision adopted at the Coordination process. It seems that no substantial measures can be taken by the EU to deal with this problem since the coordination process is not legally binding.[20] Nevertheless, as developed by the ECJ in Commission v. Greece (Case C-45/07) and recently Commission v. Sweden (Case C-246/07), Member States may be in breach of European law (duty of loyalty) if they act individually in the IMO. This will be discussed later.

## III
## THE EU'S ROLE IN THE IMO

### *A. The EU's accession to the IMO*

Since the "Erika" and "Prestige" disasters, the Commission suggests that a change is in need for the EU's status in the IMO. In a Commission's rec-

[19]SEC (2005) 449, 3-4.

[20]See supra note 13, p. 264.

ommendation to the Council, the Commission states that it is necessary for the EU, as the world's leading commercial power conducting a large part of its trade outside its own borders, to play its role in the adoption of international rules that govern most of maritime transport.[21] Currently, the observer status does not allow the Commission to: 1) negotiate directly, even when issues raised concern matters that are harmonized within the EU; 2) speak for its Member States; 3) use the coordination mechanism effectively in the fields for which the EU is responsible; 4) make a concrete, visible contribution to the EU maritime safety policy; and 5) makes it particularly difficult for the EU to participate in negotiating international conventions since it places an obligation on the EU to be vigilant and to follow more cumbersome procedures, both internally and within the IMO structures, even where the Community could stake a claim to participation.[22] It is believed by the Commission that strengthened EU participation in the IMO will put the EU in a position to meet its obligations as regards external competences and to guarantee consistency between European law and international law.[23] Thus, the current situation needs to be remedied without delay, by having the EU accedes to the IMO so that the 27 members of the enlarged Union not only speak with a single voice but, above all, can influence IMO's activities in the common interest and in support of sustainable development.[24]

To some extent, the Commission's recommendation is plausible since the status regime may affect the EU's possibilities of 'speaking with one voice.' The more stringent the rule of participation in the international institution, the less likely is a joint EU representation.[25] However, until now, the Commission's recommendation is still pending in the Council. It is obvious that it will not be supported by Member States in the near future. EU's accession to the IMO also seems to be quite attractive for some recent research: "although it is recognized that lack of legal status does not seem to prevent the EU from participating in IMO with a reasonable degree of success, full membership should still be the final objective," "Given the extensive scope and level of Community legislation in the field of IMO matters, full membership should be granted to the EC."[26] It will be analyzed below

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[21]Recommendation from the Commission to the Council, in order to authorize the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community, SEC(2002)381 final, 2.

[22]SEC(2002)381 final, 37-38.

[23]SEC(2002)381 final, 2.

[24]SEC(2002)381 final, 3.

[25] S. Gstohl, 'Patchwork Power' Europe: The EU's representation in international institutions,' 14 European Foreign Affairs Review 385-403 (2009).

[26]J. Wouters, S. D. Jong, A. Marx, P. D. Man, Study for the assessment of the EU's role in international maritime organizations, Final Report. See http://ec.europa.eu/maritimeaffairs/studies/eu_role_international_organisations_en.pdf

that the EU's accession to the IMO may not be the best idea for preventing vessel-source pollution in European waters.

### *B. The EU as a Non-Member of the IMO*

#### *1. Effective and Successful Practice*

Despite the EU's lack of Membership in the IMO, its coordination process for influencing IMO decision making is generally deemed as quite effective and successful until now. Two cases can be used as examples of the practice.

The First case is about phasing out single hull tankers. Single hull tankers were first banned by the United States as a quick response to the Exxon Valdez oil tanker spill accident (1989). Amendments to the 1973/78 International Convention for the Prevention of Pollution from Ships (MARPOL) imposing double hull or equivalent design requirements for oil tankers delivered on or after 6 July 1996 were adopted by the IMO on 6 March 1992 and entered into force on 6 July 1993. Within these amendments, a phasing-out scheme for single hull oil tankers delivered before that date took effect from 6 July 1995 requiring tankers delivered before 1 June 1982 to comply with the double hull or equivalent design standards not later than 25 years and, in some cases, 30 years after the date of their delivery. Such existing single hull oil tankers would not be allowed to operate beyond 2007 and, in some cases, 2012 unless they comply with the double hull or equivalent design requirements of Regulation 13F of Annex I of MARPOL 73/78. For existing single hull oil tankers delivered after 1 June 1982 or those delivered before 1 June 1982 and which are converted, complying with the requirements of MARPOL 73/78 on segregated ballast tanks and their protective location, this deadline would be reached at the latest in 2026.[27] After the "Erika" disaster it is believed by the EU that the normal framework for international action on maritime safety under the auspices of the International Maritime Organization falls short of what is needed to tackle the causes of such disasters effectively.[28] The EU decided to accelerate phasing out single hull tankers internally. As part of the Erika I package Regulation (EC) No.417/2002 with deadlines for three categories of single hull tankers was adopted (art.3, 4). Meanwhile a joint proposal was submitted by member States to the IMO with the intention to amend MARPOL. Despite facing

[27]Regulation (EC) No 417/2002 (On the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94), O.J. L 64, 7.3.2002, 2.

[28]COM (2000)142 final, 2.

controversial debate, the EU's joint proposal was passed finally and MARPOL was amended in 2001, adopting the same deadlines as the EU for phasing out single hull tankers. In 2003 in the aftermath of the "Prestige" disaster, the EU enacted Regulation (EC) No.1726/2003, which for the second time accelerates the deadlines set by Regulation (EC) No. 417/2002. Subsequently, a joint proposal from EU Member States was on the table of IMO for decision-making. It was extensively discussed in the 50th MEPC and raised great concern from the outside world. Concerns were raised that the EU's unilateral approach undermines the authority of the IMO and creates pressure for other countries, especially developing countries. However, once again the EU Member States' proposal was accepted by the IMO. The MARPOL amendment, with the same deadline as the EU regulation, entered into force based on the tacit acceptance procedure.[29]

Another case is about the designation of the Western European Particular Sensitive Sea Areas (WE PSSA). A PSSA is defined by IMO Resolution A.927 (22) "Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas" as "an area that needs special protection through action by IMO because of significance for recognized ecological, socio-economic or scientific reasons and because it may be vulnerable to be damaged by international shipping activities." A PSSA itself is like an "empty vessel" as it entails no inherent protective mechanisms,[30] but needs to be accompanied by specific Associated Protective Measures (APM). After the "Prestige" disaster, which seriously threatened coastal areas of Portugal, Spain, France and Belgium, the EU, through those member States together with the UK and Ireland, submitted a proposal to the MEPC asking for the designation of Western European Waters as a PSSA. The proposal covers a vast area from the Shetland Islands north of Scotland to the southern Portuguese-Spanish border in the respective States' EEZ and territorial seas. Four kinds of APMs are included in the PSSA proposal: 1) fourteen traffic-separation schemes; 2) two deepwater routes; 3) seven areas to be avoided; 4) four mandatory ship-reporting systems.[31] A ban of single hull tankers over 600 dwt carrying heavy grade oil was also mentioned in the original submission but withdrawn during the 49th MEPC. The proposal created concerns about its potential violation of the LOSC for hampering

[29]For details about EU's initiatives and response in the IMO, see V. Frank, 'Consequences of the Prestige sinking for European and international law,' 20 International Journal of Marine and Coastal Law 18-21 (2005).

[30]M. Detjen, 'The Western European PSSA – testing a unique international concept to protect imperiled marine ecosystems,' 30 Marine Policy 442-453 (2006).

[31]J. Robers, M. Tsamenyi, T. Workman and L. Johnson, 'The Western European PSSA proposal: a "politically sensitive sea area,"' 29 Marine Policy 431-440 (2005).

freedom of navigation in such a large sea area, which is traditionally a busy shipping traffic area, e.g. English Channel.[32] However, the WE PSSA was designated by the IMO on 15 October 2004.[33] The EU again successfully intervened in the IMO on the issue of preventing vessel-source pollution.

Generally speaking, the EU's success is due to the fact that it is a significant economic force with a consumer base exceeding even that of the US. Ship owners rely heavily on the Western European trade and can scarcely afford the costs of European unilateralism.[34] It is true that European Member States have great power in the IMO decision making process. Nevertheless, without an effective coordination process, it is hard to imagine that proposals such as WE PSSA, will be supported in the IMO by EU member States with great shipping interest, e.g. Malta and Greece. Reportedly, there are of course different ideas about the EU's proposal during coordination meetings. But Member States which are neither in favor of nor seriously affected by the proposal are asked to keep a low profile or silent during IMO meetings. Although the 1994 Gentlemen's Agreement does not provide a legal basis for the EU's coordination process, it seems that Member States behave quite well to follow the final coordination document when acting in the IMO.

### 2. *Duty of Loyalty*

From a public international law perspective, EU Member States can act individually in the IMO since they are members of the IMO and the EU is not. Meanwhile, the Procedural Framework currently used for the coordination process within the EU is only voluntary. However, based on recent case law in the ECJ it is a trend that the coordination process is reinforced, while Member States' competence to act individually in international organizations is drastically limited.

> As stated by Article 4(3) TEU (ex Art.10 EC): "pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure

[32]This paper will not address the legal implications of WE PSSA. For details, see supra note 30, 449-450.

[33]MEPC Res. 121 (52), 'Designation of the Western European Waters as a Particularly Sensitive Sea Area,' 15 Oct 2004. http://www.imo.org/includes/blastDataOnly.asp/data_id%3D15724/121%2852%29.pdf

[34]See supra note 5, p. 88.

which could jeopardize the attainment of the Union's objectives." In Case C-45/07, the Greek Government submitted a proposal to the IMO Maritime Safety Committee for monitoring compliance of ships and port facilities with the requirements of the International Convention for the Safety of Life at Sea (SOLAS) and the International Ship and Port Facility Security Code (ISPS Code). Before acting individually in the IMO, the Greek Government had already put the proposal in the EC MARSEC Committee but it was not discussed at that moment. The Commission argued that the Community has enjoyed exclusive competence to assume international obligations in that area. It follows that the Community alone is competent to ensure that the standards are properly applied at Community level and to discuss with other IMO Contracting States the correct implementation of or subsequent developments in those standards, in accordance with the two measures referred to. The Member States therefore no longer have competence to submit to the IMO national positions on matters falling within the exclusive competence of the Community, unless expressly authorized to do so by the Community.[35] The ECJ follows the Commission's arguments and provides that: "The mere fact that the Community is not a member of an international organization in no way authorizes a Member State, acting individually in the context of its participation in an international organization, to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty. Moreover, the fact that the Community is not a member of an international organization does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest."[36] Finally, it is found by the ECJ that Greece had failed to fulfill its obligations under arts.10, 71 and 80(2) EC. This case shows a significant trend that the Community interest, especially where the Community is not able to represent itself directly, does not merely require that the Member States conform their unilateral positions to Community policy. It requires them to act together to formulate and present a Community position.[37] It also confirms that the duty of loyalty, which provides the basis of exclusivity, expresses an obligation both of result and of conduct, consisting in the Member States' abstention from international action.[38]

Moreover, this trend is reaffirmed by the ECJ judgment of Commission v. Sweden (Case C-246/07). In this case Sweden submitted in its name and on its own behalf a proposal to list a substance, perfluoroctane sulfonate (PFOS), to be added to Annex A to the Stockholm Convention on Persistent Organic Pollutants (the Stockholm Convention). However, before the Swedish submission, a proposal for a Decision (COM(2004) 537 final) was presented by the Commission, seeking authorization to submit, on behalf of

[35]Para. 14, Judgment of Case C-45/07.

[36]Para. 30, 31, Judgment of Case C-45/07.

[37]See supra note 14, 768.

[38]E. Neframi, 'The duty of loyalty: rethinking scope through its application in the field of EU external relations,' 47 Common Market Law Review, 323-360 (2010).

the Community and the Member States which were parties, proposals to have a certain number of chemicals included in the relevant Annexes to the Aarhus Protocol and/or the Stockholm Convention. The Commission argued that the unilateral action on the part of Sweden resulted in splitting the international representation of the Community as regards the listing of PFOS under the Stockholm Convention, which is contrary to the obligation of unity in international representation of the Community arising from the duty of cooperation in good faith in Article 10 EC.[39] Different from the Commission v. Greece judgment, it must be assumed that competence is shared in this case. However, the Court has held that Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action.[40] The unilateral submission of Sweden is likely to compromise the principle of unity in the international representation of the Union and its Member States and weaken their negotiating power with regard to the other parties to the Convention concerned.[41] Thus, the ECJ concludes that Sweden is in breach of Article 10 EC.

Therefore, the duty of loyalty, which is a general principle of EU law, has been developed and used by the ECJ as a legal basis to limit Member States' unilateral action at international level. Consequently, the coordination process within the EU for IMO issues, voluntary as it is, has been greatly reinforced.

### *3. Flexibility under Public International Law*

It is generally agreed that there are several systemic deficiencies within the IMO. These are: the reactive, 'knee-jerk' approach to rule-making at IMO; the slow entry into force of IMO conventions once these are adopted; the inadequate implementation of these conventions even after entry into force; and the overall impotence of IMO in enforcing compliance with the relevant rules.[42] Flag States still dominate the IMO, not only during the decision making, but also, more importantly, for the entry into force, implementation and enforcement of international conventions. IMO conventions often use a specific formula imposing a certain standard for entry into force (x member States with y% of the world tonnage). This can be considered as the main obstacle for IMO conventions to enter into force promptly. All these

[39]Para. 55, Judgment of Case C-246/07.

[40]Para. 74, Judgment of Case C-246/07.

[41]Para. 104, Judgment of Case C-246/07.

[42]See supra note 5, p. 348.

defects may fuel developed countries like the Member States of the EU as well as the US to be impatient with the IMO and hence act unilaterally. Nevertheless, the question is whether the situation will be changed after the EU's accession to the IMO. There is no doubt that the EU has both adequate financial and human resources to influence IMO's work. But it is not feasible for the EU to change the IMO systematically, especially when it comes to implementation and enforcement.

Meanwhile, if the EU joins the IMO as a full member, it will be at risk losing its flexibility under public international law. According to the LOSC, parties shall implement and enforce 'generally accepted international rules and standards' established through the 'competent international organization' (IMO) or 'general diplomatic conference' for the prevention of vessel-source pollution.[43] Thus, the point is whether the EU also needs to implement and enforce IMO conventions even if it is not a full member. It is broadly supported that non-parties are not automatically bound by any IMO conventions although they are parties to the LOSC.[44] Furthermore, it is declared by the ECJ in Case C-308/06 that powers of the Union 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. The ECJ does not recognize MARPOL as customary international law.[45] The ECJ stated that EU will not be bound by MARPOL[46] because it is not a party to the convention. This is a reason why according to the judgment in Case C-308/06, the EU criminal sanction Directive 2005/35/EC is not in conflict with MARPOL. Since the Directive 2005/35/EC and the relevant cases are criticized by the shipping world for its unilateralism, it may not be a good example to show the EU's flexibility under international law to prevent vessel-source pollution. Moreover, it is true that the overactive EU may put its Member States in a dilemma under both international law and European law. Since the European Member States must implement and enforce European Law, even if it is not fully compatible with international law, they may face the risk of being sued by third countries in the International Court of Justice or the International Tribunal for the Law of the Sea.

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[43]Art. 211, 217, 218 and 220 of LOSC.

[44]E. Franckx (ed), *Vessel-Source Pollution and Coastal State Jurisdiction: the Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)*, (Kluwer Law International; 2000) pp. 119-124.

[45]Case C-308/06, International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport; For comments, see E. Denza, 'A note on Intertanko,' 33 European Law Review 870-879 (2008).

[46]Para. 49, Judgment Case C-308/06.

However, in practice the EU normally makes use of its legal tools to adopt a series of Directives and Regulations with the aim of better implementing and harmonizing MARPOL within member States. The point is that the EU's current practice is not based on binding international legal obligations but can be seen as a policy choice to appease the anger of public opinion after the "Erika" and "Prestige" disasters. Furthermore, it displays the EU as a regional frontrunner with strong environmental concerns. It is important to bear in mind that the impact of European and international law is reciprocal, and both systems may be inspired by solutions provided in the order.[47] The practice of the EU harmonized member States' implementation of IMO conventions shows the EU's leading role to prevent vessel-source pollution, regardless of the EU being a member of IMO or a party to IMO Conventions. With its great economic power and effective coordination process, the EU's initiatives, however controversial they may be at the beginning, should lead to the improvement of IMO decisions and consequently international law. It is doubtful that if the EU should accede to the IMO and the IMO Conventions, the EU's initiatives would have a greater effect and more influence on a more environmentally friendly IMO decision-making than is the case now.

## IV
## CONCLUSIONS

Nowadays, the EU is neither an outsider nor a frontrunner in the multilateral arena. It turns into a respected actor in international organizations and treaty bodies with the same speed as the law develops.[48] Although the EU is not a full member of the IMO, this does not hamper a successful practice of the EU in the international decision making process for preventing vessel-source pollution. Moreover, through the duty of loyalty, Member States have already been drastically constrained in their individual action in the IMO. Significantly, the EU's accession to the IMO may result in losing its flexibility under international law to prevent vessel-source pollution. Therefore, a reinforced coordination process seems the most realistic way for the EU to improve the effectiveness of its involvement in the IMO as well as better preventing vessel-source pollution in the future.

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[47]M. Szabo, 'The EU under public international law: challenging prospects,' 10 Cambridge Yearbook of European Legal Studies 303-344 (2007-2008).

[48]F. Hoffmeister, 'Outsider or frontrunner? Recent developments under international and European law on the status of the European Union in international organizations and treaty bodies,' 44 Common Market Law Review 41-68 (2007).