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The European Union's role in the prevention of vessel-source pollution and its internal influence

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The EU has the institutions and the comprehensive legal regime to regulate the prevention of vessel-source pollution within the Member States and these are reviewed here together with the international conventions. The EU has been much more proactive since the *Erika* and *Prestige* disasters with the adoption of a series of new regulations on the prevention of vessel-source pollution. This legislation also demonstrates an expansion of the competencies of EU institutions towards Member States, and the EU approach, although largely regarded as a success, has also been criticised as tending towards unilateralism.

I Introduction[†]

The sea is a vital resource for Europe. Following the enlargement with Bulgaria and Romania joining in 2007, the 27 Member States of the European Union (EU) now have a 70,000 km coastline along two oceans and four seas: the Atlantic and Arctic Oceans, the Baltic, the North Sea, the Mediterranean and the Black Sea. The EU's maritime regions account for some 40 per cent of its GDP and population.¹ Almost 90 per cent of the EU external freight trade is seaborne, while short sea shipping represents 40 per cent of intra-EU exchanges.² Moreover, Europe has more than 1,000 maritime ports which handle more than 1 billion tons of cargo per year.³ Therefore, maritime transport and protection of the marine environment are both of fundamental importance to Europe.

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[†] This article is based upon the paper presented at the Seventh Annual Colloquium of IUCN Academy of Environmental Law (Session of Marine & Coastal Environmental Governance and Sustainability) 1–5 November 2009 Wuhan, China. The author would like to thank Professor Eduard Somers and Dr Kirstyn Inglis for their constructive comments on an earlier draft of this article.

¹ COM (2007) 575 final, 10.10.2007 p 3.

² 'What do we want to achieve?' Maritime Transport, DG Transport and Energy, European Commission, available at http://ec.europa.eu/transport/maritime/index_en.htm.

³ 'The Sea, a vital EU resource' available at http://ec.europa.eu/fisheries/maritime_affairs/fiche1_en.pdf.

Although maritime transport/vessel-source pollution is only responsible for some 12 per cent of total marine pollution,⁴ it is subject to a rigorous international discipline.⁵ The United Nations Convention on the Law of the Sea (LOSC) and the International Convention for the Prevention of Pollution from Ships 1973 (as modified by the Protocol of 1978 relating thereto or MARPOL) accepted by the International Maritime Organization (IMO) are the principal international conventions that make up the international legal regime for the prevention of vessel-source pollution.

Article 305 LOSC allows international organisations (in accordance with Annex IX) to participate as a contracting party. As an intergovernmental international organisation (more specifically a supranational organisation) constituted by Member States which have transferred competencies to it in matters governed by the LOSC, the EU fully conforms to the conditions set out in Annex IX. On 23 March 1998, the Council decided to accede to the LOSC and the 1994 Implementation Agreement.⁶ Meanwhile, all Member States have independently ratified the LOSC, which makes the LOSC a 'mixed' Convention under Community law.⁷ Besides, the European Court of Justice (ECJ) has confirmed that the provisions of the LOSC accordingly form an integral part of the Community legal order.⁸

According to the LOSC, parties shall implement and enforce 'generally accepted international rules and standards' established through the 'competent international organisation' or 'general diplomatic conference' for the prevention of vessel source pollution.⁹ Clearly the competent international organisation referred to is the IMO, since reference to the 'competent organisation' is in the singular.¹⁰ However, the EU is not a full member of the IMO, nor is it a contracting party to any IMO conventions, because membership of the IMO or any IMO convention is only open to states.¹¹ The EU can only act as an observer within the IMO. Member States of the EU are moreover reluctant to transfer their voting rights in the IMO to the European Commission (the Commission). A formal proposal by the Commission to become a full member of IMO was rejected by the Council of Transport Ministers in 2005.¹²

This raises the question about the EU's role in the international legal regime for the prevention of vessel-source pollution: does the EU also need to implement and to enforce IMO conventions such as MARPOL if it is not a full member? Although it could be argued that it is not necessary for parties to the LOSC to become parties to basic IMO treaties, since the LOSC includes obligations to comply with all generally accepted IMO rules and standards, it is recognised that non-parties are not automatically bound by any IMO conventions although they are parties to the LOSC.¹³ Moreover, the ECJ has confirmed that the EU is not bound by MARPOL.¹⁴

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

⁵ For a brief analysis, see A Tan *Vessel-Source Marine Pollution, the Law and Politics of International Regulation* (Cambridge University Press Cambridge 2006) p 14.

⁶ Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention on the Law of the Sea and the Agreement of 28 July 1994 relating to the Implementation of Part XI thereof 98/392/EC OJ (1998) L 179.

⁷ For details about mixed conventions under EU law, see V Frank *The European Community and Marine Environmental Protection in the International Law of the Sea* (Martinus Nijhoff Publishers Leiden 2007) pp 107–86.

⁸ Judgment of the ECJ (Case C–308/06) para 53.

⁹ See LOSC arts 211, 217, 218 and 220.

¹⁰ S Rosenne 'The International Maritime Organization Interface with the Law of the Sea Convention' in M Nordquist and J Moore (eds) *Current Maritime Issues and the International Maritime Organization*, (Martinus Nijhoff Publishers Leiden 1999) pp 253–54.

¹¹ Convention on the International Maritime Organization, art 4.

¹² Council Meeting of Transport Ministers on 27–28 June 2005, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/fr/trans/85470.pdf.

¹³ For a detailed discussion on the degree of the binding obligations of the LOSC references to IMO conventions, see A Bazan 'IMO Interface with the Law of the Sea Convention' in M Nordquist and J Moore (n 10) pp 278–84. See also 'Final Report of the International Law Association London Conference' in E Franckx (ed) *Vessel-Source Pollution and*

This situation provides disadvantages and advantages as far as the EU's work on the prevention of vessel-source pollution is concerned. On the one hand, the Commission has no jurisdiction under the EC Treaty to take steps to ensure MARPOL provisions are implemented and respected by EU Member States. On the other, it is in an advantageous position to take the initiative at EU level.¹⁵ For example, Regulation (EC) 782/2003 on the prohibition of organotin compounds on ships was to be applied by EU Member States before the entry into force on 17 September 2008 of the International Convention on the Control of Harmful Anti-Fouling Systems on Ships. Traditionally, the EU and its Member States were quite supportive of and relied heavily on international fora to address marine pollution issues. However, in the wake of the oil tankers *Erika* (1999) and the *Prestige* (2002) disasters, there has been a visible political shift by the EU to be more proactive and responsible for the protection of the marine environment rather than waiting for a consensus in international decision making by the IMO.

Although sometimes the EU is accused of unilateralism, there is no doubt that the EU has both the authority and the capacity to act. This article first examines the legal framework for EU action on the prevention of vessel-source pollution, including the legal basis, the competences, the decision-making processes and the compliance mechanisms, from which it emerges that EU institutions are now expanding competences towards Member States. Secondly it analyses both the successes and the difficulties of the EU's proactive approach within its internal sphere of influence on the prevention of vessel-source pollution, in respect of port state control, anti-fouling regulations and criminal sanctions.

2 Legal framework

2.1 Legal basis

The prevention of vessel-source pollution is a cross-sectoral issue involving the protection of the marine environment as well as maritime transport. The EC Treaty contains the commitment to ensure among the EU Member States a high level of protection and improvement of the quality of the environment, including the marine environment.¹⁶ Article 175 provides a proper legal base for EU action to protect the environment and Article 80(2) in Title V: Transport, authorises the Council to decide by a qualified majority, whether, to what extent and by what procedure appropriate provisions can be laid down for sea and air transport. Article 71(1)(c) allows the Council to lay down measures to improve transport safety. These provisions create the legal basis for EU action in the fields of maritime safety and vessel-source pollution, including air pollution from ships and invasive species from ballast water. The identification of the proper legal basis is not merely a theoretical issue, as it also confirms the validity of the EU measures, the level of the involvement of the Community institutions and the nature, whether exclusive or shared, of the Community competence¹⁷ (discussed below).

2.2 Institutions

The European Commission has legislative, administrative, executive, and judicial powers under Article 211 of the EC Treaty. The prevention of vessel-source pollution is mainly dealt with by the Directorate General (DG) Energy and Transport. There is a Maritime Safety Unit in

Coastal State Jurisdiction: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991–2000) (Kluwer Law International The Hague 2000) pp 119–24.

¹⁴ Note 8 para 49.

¹⁵ M Hedemann-Robinson 'Protection of the marine environment and the European Union: some critical reflections on law, policy and practice' (2004) 10 JIML 3 p 270.

¹⁶ Consolidated Version of the Treaty Establishing the European Community OJ 321/E1 of 29.12.2006, art 2,174 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>.

¹⁷ See n 7 above p 60.

the Directorate Maritime Transport of DG Energy and Transport,¹⁸ which is in charge of initiating new EU legislation and supervising the implementation of existing legislation. Meanwhile, the DG Environment is also involved, focusing particularly on air pollution from ships (Unit Clean Air and Transport) and ballast water management (Unit Protection of Water and Marine Environment).¹⁹ This cross-institutional structure can lead to a lack of coordination and calls for integrated management.

Since Commission policy not only directly regulates the shipping and port sectors, but also attempts to harmonise national maritime policy, regulation and enforcement in Member States as part of the continuous process of harmonisation of national legislation, there will arise a demand for a European Maritime Administration.²⁰ In the aftermath of the *Erika* disaster, the European Maritime Safety Agency (EMSA) was established by Regulation (EC) 1406/2002 as a part of the *Erika II* package.²¹ In general terms, the Agency will provide technical and scientific advice to the Commission in the field of maritime safety and prevention of pollution by ships in the continuous process of updating and developing new legislation, monitoring its implementation and evaluating the effectiveness of the measures in place.²² The role of EMSA was, however, considerably expanded by Regulation 724/2004 to include increased emphasis on maritime security alongside the response to pollution by ships.²³ Although EMSA shall 'assist' the Commission and Member States on the prevention of vessel-source pollution, in practice, it is playing an increasingly important role in monitoring the implementation of EU regulation given the Commission's lack of human resources.

Final decisions are of course taken by the Council of European Union and the European Parliament. Moreover, the Community's increasing clout over internal and external marine and maritime-related affairs has also been reflected in the case law of the European Court of Justice (ECJ).²⁴ The court plays an important part in promoting the EU's internal influence/compliance regime on the prevention of vessel-source pollution, and enhancing the effectiveness of Community law and its integration into national legal systems.

2.3 Decision-making processes

It was in the wake of the *Erika* and *Prestige* accidents that the Commission became much more active, since public opinion was no longer prepared to tolerate such accidents and there were calls for rigorous action at Community level, not least from the European Parliament and the Council of Ministers.²⁵ In 2000 the 'Communication on the Safety of the Seaborne Oil Trade' and 'Communication on a Second Set of Community Measures on Maritime Safety following the Sinking of the oil tanker *Erika*' were issued by the Commission, proposing a series of legislative measures (*Erika I* and *II* packages) such as strengthening port state control and governance of classification societies, bringing forward the timetable for phasing-out single hull oil tankers, and establishing EMSA etc. After the *Prestige* accident another Communication was produced to bring forward implementation of the *Erika I* and

¹⁸ Maritime Transport, DG Energy and Transport, available at http://ec.europa.eu/transport/maritime/index_en.htm.

¹⁹ DG Environment, available at http://ec.europa.eu/environment/index_en.htm.

²⁰ U Jenisch 'The European Union as an Actor in the Law of the Sea: The Emergence of Regionalism in Maritime Safety, Transportation and Ports' in *German Yearbook of International Law* (2005) p 253.

²¹ Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency OJ L 208 of 05.08.2002, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:208:0001:0009:EN:PDF>.

²² The European Maritime Safety Agency: its origin and its tasks, available at <http://www.emsa.europa.eu/end179d002.html>.

²³ Regulation (EC) No 724/2004 of the European Parliament and of the Council of 31 March 2004 amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency art 2 OJ L129/1 of 29.4.2004 available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_129/l_12920040429en00010005.pdf.

²⁴ S Suominen, 'The European Community, the European Court of Justice and the Law of the Sea' (2008) 23 *International Journal of Marine and Coastal Law* 4 p 646.

²⁵ COM (2000) 142 final, 21.3.2000 p 4.

Erika II packages and to introduce specific measures for the carriage of heavy fuel oil, and for liability, compensation and penal sanctions.²⁶

Concerned with 'greening' legislation, the Parliament also took a leading role after the *Prestige* oil spill disaster in the process of preventing of vessel-source pollution.²⁷ Although it has no power to initiate legislation, the Parliament can provide political initiatives such as asking the Commission to present legislative proposals to the Council. Following the disaster, Parliament set up a Temporary Committee on Improving Safety at Sea (MARE) to investigate this incident and other disasters at sea, including the wrecking of the *Erika*.²⁸ The Committee reached its final conclusions when it adopted a report by MEP Dirk Sterckx,²⁹ sending an important signal to all parties involved with maritime safety. The report stresses in particular a number of concrete measures called for by the Parliament with a view to improving maritime safety at international and European level.

The Council and the Parliament are real decision makers in the EU. Since each revision of the EC Treaty has seen an increase in the power of the Parliament in relation to other institutions, the Parliament is no doubt a co-legislator for legislation on the prevention of vessel-source pollution, meaning that Commission proposals are usually examined under the 'co-decision' procedure (Article 252 EC Treaty). Based on the idea of better regulation and being more proactive to prevent vessel-source pollution in European waters,³⁰ the newly adopted Third Maritime Safety (Erika III) package can be seen as a typical example to illustrate this procedure.³¹ The Erika III package includes directives and regulations on flag state requirements, classification societies, port state control, traffic monitoring, accident investigation, insurance and so on. Unlike the Erika I and II packages, which were adopted as an urgent response to oil spill disasters, the Erika III package was fully discussed since there was no new serious accident in European waters. Accordingly, it took four years with three readings in the Council and the Parliament before it was finally approved.

2.4 Compliance regime

With the adoption and subsequent implementation of the Third Maritime Safety package, the EU now has one of the world's most comprehensive and advanced regulatory frameworks for ships and shipping. The EU and the Member States are giving priority to the enforcement of existing EU and international rules and the speedy implementation of measures introduced by the three Erika packages.³²

The interplay in the areas of shipping between the Commission, the Member States and the ECJ is unique in the EU compliance regime. It is well-known that the proper implementation and enforcement of EU environmental law is important in upholding the credibility of the EU with its citizens.³³ The Commission, as the guardian of the EC Treaty, is responsible for the implementation of EU law.³⁴

²⁶ COM (2002) 681 final 3.12.2002.

²⁷ V Frank 'Consequences of the *Prestige* Sinking for European and International Law' (2005) 20 International Journal of Marine and Coastal Law 1 p 5.

²⁸ Temporary Committee on Improving Safety at Sea (further to the decision of the European Parliament of 6 November 2003) available at http://www.europarl.europa.eu/comparl/tempcom/mare/default_en.htm.

²⁹ For details of final conclusions, see Temporary Committee on improving safety at sea (MARE) adopted report, available at http://www.europarl.europa.eu/comparl/tempcom/mare/pdf/news10_en.pdf.

³⁰ Presentation of the Third Maritime Safety Package, available at http://ec.europa.eu/transport/maritime/safety/doc/2009_03_11_package_3/2009_3rd_msp.pdf.

³¹ For details see Maritime Safety, Milestones, available at <http://www.euractiv.com/en/transport/maritime-safety/article-157042>.

³² COM (2009) 8 final 21.01.2009 p 7.

³³ E Hattan 'The Implementation of EU Environmental Law' (2003) 15 Journal of Environmental Law 3 p 273.

³⁴ EC Treaty art 211 'In order to ensure the proper functioning and development of the common market, the Commission Shall ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied'.

Assisted by the EMSA or sometimes by the European Environment Agency (EEA), the Commission frequently issues several reasoned opinions to Member States,³⁵ and does not hesitate to take Member States to the ECJ when necessary. For example, in 2004, the Commission took Belgium, Greece, France, Italy, the Netherlands, Austria, Finland and the United Kingdom to the ECJ because they failed to implement EU legislation by the due date on vessel traffic monitoring and information systems adopted by the EU in the wake of the *Erika* accident.³⁶

Although the compliance regime of the EU is well designed, it cannot really be said that Member States' performance on implementing EU law has improved substantially. The infringement proceedings have their own defects in that they are not proactive, are time consuming and costly. It is also doubtful whether they are sufficiently effective since the EU is much more diverse since enlargement.³⁷ In order to demonstrate how the new approaches set out in the Communication 'A Europe of Results – Applying EU Law'³⁸ will be applied in the area of environment, the Commission issued a Communication in 2008 which emphasised failings of Member States in implementing EC environmental law: (1) insufficient attention being paid to deadlines and completeness during the adoption of national and regional legislation; (2) shortcomings in knowledge and awareness in national and regional administrations; (3) shortcomings in administrative capacities; (4) weak national and regional enforcement policies and practices; (5) under-investment and delayed investment in necessary pollution-abatement infrastructure.³⁹ These criticisms are also applicable to the implementation of EU law on the prevention of vessel-source pollution.

2.5 Using internal competence to expand external competence

Although the EU has powerful institutions, it only has powers or competences which are attributed to it explicitly or implicitly, by the Treaty on European Union.⁴⁰ The EU competences are normally divided into internal and external competence.⁴¹ As a contribution to the President's conclusions of the 2001 Laeken meeting, the MEP Elmar Brok advocated a division of competencies into three categories: exclusive competences (exclusive to EU), shared competences (shared between EU and Member States), and supporting competences.⁴² The ECJ ruled in the European Agreement on Road Transport,⁴³ that once the Community, with a view to implementing a common policy envisaged by the Treaty, adopts proposals for a new regulation, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. This is known as 'pre-emption' under secondary law. The transfer of power results implicitly from the exercise by the Community of its internal competence.⁴⁴

³⁵ Infringement proceedings of maritime transport from 2005 to 2009, available at http://ec.europa.eu/transport/infringements/proceedings/maritime_en.htm.

³⁶ 'Maritime safety traffic: Commission takes eight Member States to the European Court of Justice' available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/1488&format=HTML&aged=0&language=EN&guiLanguage=en>.

³⁷ R Munoz 'The Monitoring of the Application of Community Law: A Need to Improve the Current Tools and an Obligation to Innovate' in P Eeckhout and T Tridimas (eds) *The Yearbook of European Law* (Oxford University Press Oxford 2006) pp 402, 403.

³⁸ COM (2007) 502.

³⁹ COM (2008) 773/4 p 3.

⁴⁰ See Treaty of Lisbon art 3 OJ C306/10, 17.12.2007.

⁴¹ For details see n 7 pp 56–64; also P Craig and G Burca *EU Law, Texts, Cases, and Materials* (3rd edn Oxford University Press Oxford 2003) pp 122–31.

⁴² P Orebech 'The EU Competency Confusion: Limits, "Extension Mechanisms", Split Power, Subsidiarity, and "Institutional Clashes"' (2003) 13 *Journal of Transnational Law & Policy* 1 p 107.

⁴³ *Commission v Council Case 22/70* (1971) ECR 263, 274 §17.

⁴⁴ Note 7 p 65.

Since the EU cannot become a full Member of the IMO nor a Contracting Party to the IMO treaties such as MARPOL, it is up to the EU Member States to ratify and implement IMO conventions. However, the EU declared as a condition to joining 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 competencies,⁴⁵ but that 'the scope and the exercise of such Community competences are, by their nature, subject to continuous development'.

Theoretically, in areas which do not fall within its exclusive competence, the Community can take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community.⁴⁶ More procedural issues are sorted out in Protocol No 30 to the Amsterdam Treaty on the Application of the Principles of Subsidiarity and Proportionality.⁴⁷ The problem is that the criteria of subsidiarity are so broadly formulated and based on such relative notions ('sufficiently' and 'better') as to give the EC institutions a great deal of discretion in deciding when to act.⁴⁸

One example is the ratification of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (the HNS Convention). Only sovereign states can be parties to it, but the EU considers that Articles 38, 39 and 40 affect Community secondary legislation on jurisdiction and the recognition and enforcement of judgments,⁴⁹ so a Council Decision was adopted to authorise Member States to ratify or accede to the HNS Convention in the interests of the Community, under the conditions set out in that Decision.⁵⁰ It is thus possible that in the future Member States may need EU approval before ratifying an international convention, in whatever field.

Traditionally, EC shipping law has been constrained by political intransigence and protection of weighty economic interests.⁵¹ However, in the aftermath of the *Erika* and *Prestige* disasters, the Commission decided that the normal framework for international action on maritime safety under the auspices of the IMO fell short of what was needed to tackle the causes of such disasters effectively. Furthermore, there was a need to tighten up the existing Community regulatory framework, which Member States were not applying properly.⁵² The EU wanted to acquire the means to monitor and control more effectively the traffic off its coasts and to take more immediate action in the event of critical situations arising at sea.⁵³ The Commission, as a supranational institution, is ever aware of promoting the 'creeping expansion' of EU power. Moreover, the qualified majority voting in the Council severely limits the capacity of Member States to block adoption of EU regulations. Thus the way was clear for

⁴⁵ 'The Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing minimum standards, the Member States have competence, without prejudice to the competence of the Community, to act in this field. Otherwise competence rests with the Member States'. See 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, available at http://untreaty.un.org/unts/120001_144071/27/2/00022247.pdf.

⁴⁶ Treaty of Lisbon art 36.

⁴⁷ Amsterdam Treaty, November 10, 1997 OJ (C340) 1.

⁴⁸ See n 7 p 67.

⁴⁹ As laid down in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 012, 16/01/2001.

⁵⁰ Council Decision of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the HNS Convention 1996 (the HNS Convention) (2002/971/EC) OJ L337/55 of 13.12.2002 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:337:0055:0055:EN:PDF>.

⁵¹ V Power and D Casey 'The *Prestige*: the European Union Legal Dimension' (2003) 9 JIML 4 p 342.

⁵² Note 25.

⁵³ COM (2000) 802 final, 6.12.2000, p 3.

the swift adoption of the three legislative packages.⁵⁴ Traditionally, it is up to Member States to implement international conventions such as MARPOL, since the EU is not allowed to be a full member of IMO or any IMO conventions. However, the discretion of Member States to implement MARPOL is drastically constrained by the EU law within the first pillar of the EU, although they may still be able to implement more stringent measures.⁵⁵

3 Successes and problems

3.1 Success

Port state control (PSC) in the EU is one of most successful examples of the EU's internal influence in preventing vessel-source pollution. Port state enforcement jurisdiction (PSJ) in the LOSC is an innovative expansion of jurisdiction in international law.⁵⁶ Port state control is a 'safety net' and in an ideal world would not be necessary.⁵⁷ Owing to the unwillingness of some flag states to enforce the law, as well as the cost and difficulties of enforcement at sea, port state enforcement frequently plays an important part in preventing vessel-source pollution.

Nowadays, control of foreign vessels by port states is based on non-binding Memoranda of Understanding (MOUs) in different regions of the world. Among them, the Paris MOU is the earliest as well as the most advanced, consisting of 27 participating maritime administrations from the waters of the European coastal states. The Paris MOU works closely with port state control in the US and Canada,⁵⁸ and was set up in 1982 as a reaction to a Commission proposal, as the Member States preferred to try and keep Brussels away from the maritime scene.⁵⁹ However, finding that some Member States did not apply port state control correctly, the EU made use of its competence by adopting Directive 95/21/EC⁶⁰ which pre-empted national law and upgraded the commitments of the MOU making them binding and uniform.⁶¹ Subsequently amended⁶² the Directive constituted the main pillar of Community action in its battle against ships that fall short of international safety standards.⁶³

Maritime casualties act as catalysts for the creation of international and regional legislation,⁶⁴ and the *Erika* disaster revealed certain shortcomings in the way port state control was working, particularly with regard to the inspection of ships that statistically present greater

⁵⁴ For details of the three Erika packages see A Mandaraka Sheppard 'Maritime Safety (EU-IMO legislation): Recent Developments' (2006) 12 JIML 4 p 252-62.

⁵⁵ For example, art 2(1) Directive 2005/35/EC on ship source pollution and on the introduction of penalties for infringements states: 'This Directive does not prevent Member States from taking more stringent measures against ship-source pollution in conformity with international law'.

⁵⁶ There is a difference between port state control and port state jurisdiction, in that the port state is limited to taking administrative control, such as detaining a ship in port until various corrective measures have been taken or ordering it to proceed to the nearest shipyard for repairs; whereas under PSJ the port state can prosecute ships and impose fines for violation of international rules and standards. The port state can even prosecute offences committed beyond the maritime zones of the coastal state. See H Bang 'Is Port State Control an Effective Means to Combat Vessel-Source Pollution? An Empirical Survey of the Practical Exercise by Port States of Their Powers of Control' (2008) 23 International Journal of Marine and Coastal Law 4 p 717.

⁵⁷ The safety net has been created to prevent substandard ships from trading on the high seas. It consists of six main elements: international conventions of the IMO; the conventions of the ILO; flag state control; classification societies; the marine insurance industry and port state control. See Z Özçayır *Port State Control* (LLP London 2001) p 93.

⁵⁸ Paris MOU available at <http://www.parismou.org/> (accessed 12 August 2009).

⁵⁹ R Salvarini 'The EC Directive on Port State Control: A Policy Statement' (1996) 11 International Journal of Marine and Coastal Law 2 p 228.

⁶⁰ OJ L 157 of 7.7.1995.

⁶¹ Salvarini (n 59) p 228.

⁶² By Directive 98/25/EC (OJ L 133 of 7.5.1998), Directive 98/42/EC OJ L 184 of 27.6.1998 and Directive 1999/97/EC OJ L 331 of 23.12.1999.

⁶³ Note 25.

⁶⁴ I Varotsi 'Recent Developments in the EC Legal Framework on Ship-Source Pollution: the Ambivalence of the EC's Penal Approach' vol 33 (2006) 33 Transportation Law Journal 3 p 372.

risks, by virtue either of their age or the pollutant nature of their cargo. It was also clear in the Commission's view that the current lack of transparency of the shipping community and the lack of synergy between the actors (shipowners, cargo owners, port inspectors, classification societies, etc) considerably reduced the efficiency of port state control.⁶⁵ Directive 2001/106/EC⁶⁶ was enacted as a part of the Erika I package in order to make compulsory rather than discretionary the inspection system of certain potentially dangerous ships, tighten up regulations relating to manifestly substandard ships and ensure more effective implementation of Directive 95/21/EC. In the aftermath of the *Prestige*, the new EU Regulation 1726/2003 introduced an immediate ban on the transport of heavy-grade oil (HGO) in single-hulled tankers and laid down that in future only double hulled vessels would be allowed to carry HGO within or from the EU.⁶⁷ A more ambitious regime was established by Directive 2009/16/EC⁶⁸ in the newly adopted Erika III package, increasing pressure on high-risk ships, reforming the control mechanisms in port states to make them more efficient and creating a new collective target for Europe as a whole to check all ships, with more frequent inspections of high-risk ships.⁶⁹

These regulations improved the quality of port state control in the Member States by harmonising the standards and information exchange for port state controllers and by its compliance regime,⁷⁰ which contributes to uniform practices in the region and eliminates potential EU ports of 'convenience'. Furthermore, port state control in the EU equally applies to Member States acting as flag states as to vessels sailing a foreign flag, while maintaining the competitiveness of the EU fleet.

EU influence is also seen with the regulation of anti-fouling systems. The International Convention on the Control of Harmful Anti-fouling Systems on Ships (AFS Convention) was adopted by the IMO on 5 October 2001, and aims at prohibiting the use of harmful organotins in anti-fouling paints used on ships and preventing the potential future use of other harmful substances in anti-fouling systems.⁷¹ The AFS Convention is a framework Convention; 1 January 2003 was the implementation date for the prohibition of the use of organotin compounds on ships and 1 January 2008 for organotin compounds on ships if in direct contact with sea water.⁷² The AFS Convention finally entered into force on 17 September 2008.

However, the EU was seriously concerned by the harmful environmental effects of organotin compounds (in particular of tributyltin (TBT) coatings) and with due regard for the precautionary principle⁷³ the EU enacted the Regulation on the Prohibition of Organotin Compounds on Ships which entered into force on 9 May 2003, well before the AFS Convention.⁷⁴ The Regulation applies to (a) all ships flying the flag of a Member State, (b) ships not flying the flag of a Member State but operating under the authority of a Member

⁶⁵ Note 25.

⁶⁶ OJ L 19 of 22.1.2002.

⁶⁷ Regulation 1726/2003 amending Regulation (EC) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, OJ L249/1 of 1.10.2003, Article 1(4)(b), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:249:000:0004:EN:PDF>.

⁶⁸ OJ L 131/57 of 28.5.2009.

⁶⁹ Summary of the Port State Control Directive of the Third Maritime Safety Package, available at http://ec.europa.eu/transport/maritime/safety/doc/2009_03_11_package_3/fiche03_en.pdf.

⁷⁰ For example, in Case C-315/98 the ECJ ruled against Italy for failing to comply with Directive 95/21/EC which requires a Member State to formulate common rules and standards for ship inspections, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:327:0009:0010:EN:PDF>.

⁷¹ Anti-fouling systems, available at <http://www.imo.org/>.

⁷² Annex I AFS Convention, available at <http://www.environment.gov.au/coasts/pollution/antifouling/pubs/convention.pdf>.

⁷³ Regulation (EC) No 782/2003 on the Prohibition of Organotin Compounds on Ships OJ L 115/1 of 09.05.2003 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:115:0001:0011:EN:PDF>. Moreover, the precautionary principle is also the guiding principle of EC environmental policy (Article 174(2) of the EC Treaty).

⁷⁴ Regulation (EC) No 782/2003 art 5.

State, (c) and ships that enter a port or offshore terminal of a Member State but do not fall within (a) and (b).⁷⁵ Because EU Regulations are binding in their entirety and are directly applicable to all Member States without the need to be transposed into national law, Member States, no matter whether they are parties to the AFS Convention or not, have to apply this Regulation. It introduces the same obligations and dates as the AFS Convention and is enforced through port state control.⁷⁶ However, since it has no external effects outside the EU, it sets an interim period, within which the prohibition on applying TBT coatings should be suspended for ships sailing under the flag of a third state.⁷⁷

3.2 Problems

These developments of EC maritime law in the area of maritime safety are sometimes interpreted as policies of 'unilateralism' or 'regionalism'.⁷⁸ Since shipping is a global industry, the EU's internal influence may also have wider effects and cause problems for countries outside Europe and friction in international decision-making.

A prime example is the EU's effort to phase out single hull tankers. As part of the Erika I package, Regulation 417/2002 on the accelerated phasing-in of double hull tankers set progressive dates for the decommissioning of single hulled tankers in Europe before 2015.⁷⁹ Following the *Erika* disaster the IMO in April 2001 also adopted a revised phase-out schedule for single hull tankers, which entered into force on 1 September 2003 (the 2001 amendments to MARPOL). However, as a quick response to the *Prestige*, the EU adopted Regulation 1726/2003, which brought the final date forward to 2010. Concerned that the EU's actions might disrupt international decision-making, the IMO revised the 2001 Amendments to MARPOL (the 2003 Amendments, which entered into force in 2005) to provide the same deadline globally as the EU.⁸⁰

The EU's ban on single hull tankers is based on the port state control, (the US Oil Pollution Act 1990 did the same thing), and rests on no novel jurisdictional claims, violates no rights of third parties, contravenes no article of the LOSC, and is consistent with the object and purpose of the Convention according to Boyle.⁸¹ However, the EU's regional approach was considered to be damaging to the concept of uniformity of shipping regulations as well as undermining the authority of the IMO.⁸² Moreover, it increased pressure on other regions and potentially 'exported' substandard ships to the rest of the world, especially to Asia and the Middle East which have less strict port state control than the EU and the US in the run up to the 2010 global deadline to phase out single hull tankers.

Another more controversial example of the EU's unilateral practice is the Criminal Sanction Directive (Directive 2005/35/EC). After the *Erika* and *Prestige* disasters, the Commission was of the opinion that the introduction of adequate sanctions for pollution offences was important in relation to pollution by shipping, as the international civil liability regimes for vessel-source

⁷⁵ *ibid* art 3.

⁷⁶ *ibid* art 7.

⁷⁷ However, if the AFS Convention did not enter into force by 1 January 2007, the Commission, in accordance with the procedure referred to in art 9(2), could adopt appropriate measures to allow ships flying the flag of a third state to demonstrate their compliance with art 5 (art 6(3)). This can be seen as an incentive created by the EU for flag states to ratify the AFS Convention. Since the AFS Convention did not enter into force on 1 January 2007, the Regulation was adopted on 13 June 2008. See Regulation (EC) No 536/2008 giving effect to Article 6(3) and Article 7 of Regulation (EC) No 782/2003, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:156:0010:0011:EN:PDF>.

⁷⁸ Note 64 p 375.

⁷⁹ Article 4, Regulation 417/2002, OJ L64/1 of 7.3.2002, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:064:0001:0005:EN:PDF>.

⁸⁰ MARPOL, available at http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#2001.

⁸¹ A Boyle 'EU Unilateralism and the Law of the Sea' (2006) 21 *International Journal of Marine and Coastal Law* 1 p 20.

⁸² See n 27 p 22.

pollution accidents have significant shortcomings.⁸³ The EU agreed that although MARPOL has detailed standards and strict conditions for discharge of pollution substances at sea, it lacks appropriate implementation and enforcement measures. Moreover, the EU noted that the violation of MARPOL is not fully covered by EU law, and that the implementation of MARPOL by Member States is variable, both in practice and in law.⁸⁴ Hence, it is believed by the EU that a specific Directive on sanctions for vessel-source pollution discharges would have the dual benefit of completing and clarifying Community law in this area, and harmonising the enforcement of the rules.⁸⁵ Directive 2005/35/EC and Framework Decision 2005/667/JHA thus created a legal framework for imposing criminal sanctions in the event of discharges of oil and other noxious substances from ships in Community waters.

Article 4 of the Directive states that vessel-source discharges of polluting substances into any of the areas referred to in Article 3(1) are regarded as infringements and criminal offences if committed with intent, recklessly or with serious negligence. However, as the chairman of the Greek Shipping Co-operation Committee remarked, the term 'serious negligence' is vague, subjective and ill defined.⁸⁶ An impartial, but severe analysis of the compatibility of the Directive with MARPOL and the LOSC was provided by Judge Thomas Mensah:⁸⁷

The LOSC permitted a coastal state to impose more stringent requirements regarding pollution only for vessels flying its own flag, since imposing such requirements on other vessels would have the effect of hindering innocent passage of foreign ships through its territorial sea. Article 19 of LOSC permitting the coastal state to deny passage to a foreign ship if in the territorial sea it is engaged in activities prejudicial to the peace, good order or security of the coastal state, covered any act of willful and serious pollution contrary to this Convention, but did not cover discharges resulting from 'serious negligence'. The Directive, by imposing liability for such discharges in the territorial sea – a lower criteria not contained in the LOSC or the MARPOL – would therefore hamper passage of foreign vessels through the territorial sea of states applying it.⁸⁸

The shipping industry strongly criticised the Directive and even sued the Commission in the ECJ over the validity of the Directive under international law. However, unwilling to challenge the Commission's leading role and efforts to deal with vessel-source pollution, the ECJ upheld the Directive with explanations such as 'the Community itself (unlike its Member States) is not a party to MARPOL, it is not bound by the Convention'⁸⁹ and 'although the Community is a party to the LOSC, the Convention does not give individuals rights or freedoms on which they can rely against states'.⁹⁰ Finally Directive 2009/123/EC amended Directive 2005/35/EC and still requires EU States to impose criminal charges for intentional, reckless or seriously negligent polluting discharges by ships.⁹¹ But it does not specify penalty levels based on the judgment of the ECJ in Case C-440/05 *Commission v Council*, which annulled Framework Decision 2005/667/JHA setting a specific range and level of criminal sanctions on vessel-source pollution.

⁸³ COM (2003) 92 final 5.3.2003, p 6.

⁸⁴ *ibid* p 4.

⁸⁵ O G Anthony 'Criminalization of Seafarers for Accidental Discharge of Oil: Is there justification in International Law for Criminal Sanction for Negligent or Accidental Pollution of the Sea?' (2006) 37 *Journal of Maritime Law and Commerce* p 226.

⁸⁶ Epaminondas Embiricos 'The Extra-Territorial Jurisdiction in Criminalization Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry' p 6. Available at <http://www.london-shipping-law.com/pdfs/Presentation-MrEmbiricos.pdf>.

⁸⁷ Formerly Presiding Judge of the International Tribunal on the Law of the Sea, in his Cadwallader Lecture of 2005 on 'Sovereign Rights in Legislation of Member States under LOSC and MARPOL'.

⁸⁸ The full text of the lecture by Thomas Mensah is available at <http://www.london-shipping-law.com/pdfs/Eighth%20Cadwallader%20Transcriptm.pdf>. See also E Denza 'A note on Intertanko' (2008) 33 *European Law Review* p 877.

⁸⁹ Judgment of the ECJ 3.6.08 (Case C-308/06) paras 47, 48, 49.

⁹⁰ *ibid* para 59.

⁹¹ OJ L 280/52 of 27.10.2009.

4 Conclusions

In his address to the Parliament of Ghana on 11 July 2009 US President Barack Obama stated: 'Africa does not need strong men, it needs strong institutions',⁹² and strong institutions are clearly necessary to prevent vessel-source pollution. The EU has the institutions and the comprehensive legal regime to prevent vessel-source pollution within the Member States. Although previously relying largely on the international fora, the EU has been much more proactive since the *Erika* and *Prestige* disasters with the adoption of a series of new regulations on the prevention of vessel-source pollution; at the same time the EU institutions are expanding their competences towards Member States.

The EU's proactive approach has been largely counted a success, as can be seen from the improvements to the port state control and anti-fouling regimes within the Member States. However, the EU's practice tends towards unilateralism, which has been noted by the rest of the world. In regulating for a global industry, such as shipping, the EU will need to be careful about the balance between strict legal regimes and international obligations.

⁹² Full text of the speech is available at <http://allafrica.com/stories/200907110013.html>.