

THE EUROPEAN UNION AND INTERNATIONAL MARITIME LAW – LESSONS FOR THE ASIA-PACIFIC REGION?

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1 Introduction

The European Union (EU) has established itself as a key player in international maritime regulation in a relatively short space of time. In 30 or so years it has proceeded from being a group of states with their own national policies and preferences on maritime matters to a region where shipping is highly regulated and international actions closely coordinated.

The process has not been problem-free, and certainly not unanimously endorsed by its own member state representatives in the maritime sector. The EU's entry into the maritime policy-making arena has sometimes been likened to the infamous bull's entry into the china shop. However, with more than 40 legal acts in place and an impressive constitutional and institutional apparatus to make sure these rules are implemented and enforced, it seems uncontested that the EU by now is a key international player in almost any aspect of maritime regulation.

The EU's role and rules in maritime regulation illustrate that regional rules in shipping need not necessarily be in violation of international law and need not even require a very heavy institutional structure in their support.

In view of this, this article asks whether a similar development towards increased regionalisation could be an option for other maritime regions in the world, in particular the Asia-Pacific region. The focus is purely on the legal and administrative feasibility, rather than the desirability, of such a development.

In order to explore this matter further, the article begins by making some general observations on regional rule-making in shipping and on the EU's regulatory role (section 2). The latter half of the text (section 3) includes a closer examination of five different examples of how the EU maritime policy operates in more detail, in particular as regards their relationship to the IMO rules. The nature of the measures, the applicable restraints and the transferability to the Asia-Pacific region is briefly discussed for each measure, while section 4 offers some concluding remarks of a more general nature.

2 On the EU's shipping policy

2.1 General

The EU, like the Asia-Pacific, is heavily dependent on maritime transport. It consists of 28 Member States, all of which are members of the IMO and most of which have a considerable coastline and/or fleet. Added to these are the three states parties to the European Free Trade Agreement (EFTA) (Norway, Iceland and Lichtenstein) that are linked to the EU internal market through the 'European Economic Area', which are also subject to the shipping rules of the EU.

In terms of numbers, 90 per cent of the EU's external freight, and more than 40 per cent of the internal trade in the region, is seaborne. Around one third of global shipping has an EU port as origin or destination. The EU/EEA states are also significant flag states. 25 per cent of the world tonnage is registered in and flying the flag of an EU/EEA Member State, but the share of the world's tonnage that is controlled by EU interest is estimated to be around 40 per cent and increasing.¹ These figures are not dramatically different from those of the Asia-Pacific region.²

However, it is uncontested that shipping is a highly international business and therefore needs global rules to govern it. Not only is the geographical scope of the activity global, as ships travel the whole world, but operators may also easily choose the jurisdiction of their operations by more or less freely choosing the flag state of their

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¹ See e.g. 'The Economic Value of the EU Shipping Industry', Study prepared by Oxford Economics for the European Community Shipowners' Association, April 2014, available at www.ecsa.eu/images/2014-04-01%20Oxford%20Economics%20ECSA%20Report%20FINAL.pdf

² See e.g. UNCTAD Review of Maritime Transport 2015, pp. 35-37 and 43-44, available at http://unctad.org/en/PublicationsLibrary/rmt2015_en.pdf

ships. In addition, there is a very strong tradition of rule-making at global level, i.e. at the IMO, and correspondingly very little tradition of regional regulation. The privileged status of the IMO is recognized in the ‘Constitution of the oceans’, the 1982 UN Convention on the Law of the Sea (UNCLOS), where the minimum limits of flag state regulation and often also the maximum limitation of coastal state legislation is referenced by means of “generally accepted international rules and standards”,³ often coupled with the specification “adopted by the competent international organization” (in the singular).⁴

This starting point is strongly backed up by political realities. The international maritime community carefully monitors and reacts against what is regarded as ‘unilateral tendencies’ by individual states and regions. Efforts to impose non-global regulatory burdens on international shipping do not pass unnoticed and will generally give rise to controversies.

2.2 The different ‘faces’ of the EU maritime regulator

The characterization of the EU’s role in shipping and its contribution to maritime regulation is complicated by the fact that Union has several, rather different, roles and displays different ‘faces’ under these roles. To simplify, its maritime activities may be divided into two main strands.

The first strand stands closer to the original purpose of the European (Economic) Community, which was about the integration of markets, ensuring the freedom movement of goods, services, persons and capital between member states and the liberalization of markets. Maritime regulation in this field started in the mid-80’s, as part of a general strengthening of the single European market. In this area, the EU generally has acted as a facilitator, a body that assists the shipping industry in liberalizing trade and opening up new markets, both within the Union and abroad through bilateral agreements with selected third countries. In this role, the EU is accordingly a ‘friend’ of the region’s shipping industry; it fights restrictive market practices around the globe and takes measures to ensure a fair competition at home, including by outlawing unduly favourable state aid by EU governments.

The second strand of activities, which is the focus of this article, relates to maritime safety (including maritime security and environmental protection). This activity took somewhat longer to emerge as an independent policy objective for the EU, and it was only following some major oil tanker accidents in the region in the early 1990’s that the first policy and detailed action programme for maritime safety could be agreed upon.⁵ Since then the development has been exponential and the EU’s maritime safety policy by now includes more than 50 binding rules (directives and regulations) covering the whole range of maritime safety matters, from port state control, classification societies to crew training and social conditions on board; from special safety requirements for passenger ships and oil tankers to rules on liability and compensation etc.⁶ In addition, a European Maritime Safety Agency (EMSA) has been established to assist the EU and its Member States in the field, while at the international arena the EU is acting as an evermore coordinated region with pre-agreed positions and policy objectives for most regulatory issues in the field.

In these maritime safety-related activities, the EU has tended to side with its (coastal) population and with environment and sustainability values rather than with the interests of shipping companies, despite the very significant flag state interests of its member states. Its activities in this field encountered considerable opposition among industry and member states with large shipping interests, at least in the early phases, but the opposition was not strong enough to withstand political pressure from serious environmental or passenger ship accidents.

Finally, when speaking about the EU, it should be borne in mind that the EU is composed of several different institutions, who have different views, roles and ambitions when it comes to policy and regulation, including shipping regulation. In a simplified format, the setting is the following. Three EU institutions are important in the legislative process. The European Commission is the ‘watchdog’ of the EU, with a responsibility for ensuring that EU rules, once adopted, are effectively implemented by the member states and it has been given broad powers to exercise this function. The Commission has the right of legal initiative and is the body that proposes legislation and undertakes the necessary background work in its support. However, the adoption of the legal act, whether in the form of a directive or a regulation, is done jointly by the other two main institutions, the European Parliament, consisting of 751 directly-elected Members and the Council, where each Member State is represented.⁷

³ E.g. UNCLOS Articles 94, 21(2) and 211(5)

⁴ See e.g. UNCLOS Article 211(5)

⁵ The Common Policy for Safe Seas (COM(93)66 final). The policy was particularly inspired by the *Aegean Sea* accident outside La Coruña, Spain, in 1992 and the *Braer* in the Shetland Islands, UK, in 1993.

⁶ See e.g. H. Ringbom, *The EU Maritime Safety Policy and International Law* (Brill, 2008).

⁷ On the ordinary decision-making procedure, see Article 294 of the Treaty on the Functioning of the European Union (TFEU).

2.3 The Different Tasks

In view of the fact that the emphasis of maritime regulation lies at global level, there are essentially three main types of actions that may be taken by a regional body wishing to establish itself in the domain. All three paths have been explored and utilized by the EU, but not all of them are equally available for other regional organizations or groups of states.

2.3.1 Co-ordination

First, the regional body may co-ordinate its approach at the international level in order to improve its chances to achieve its policy objectives at the international level. This particular approach has been increasingly diligently pursued by the EU in the maritime field. While this practice was much more informal and randomly implemented in the early years of the EU maritime safety policy, it has been significantly strengthened and formalized since the turn of the Millennium. By now, the EU member states spend considerable time in jointly elaborating EU-wide positions for almost any matter of importance prior to almost all IMO committee meetings.

The strong coordination at EU-level ahead of all major IMO meetings creates a dilemma for the member states. They have to choose between the unquestionable benefits in achieving the desired results at IMO that co-ordination among 28+3 states brings about and the limitation of sovereignty that such co-ordination inevitably entails. On the other hand, the EU member states do not have much of a choice in this matter, as the European Court of Justice already in the early 1970's established the so-called ERTA doctrine, under which EU member states lose the competence to negotiate at international level matters which may affect acts of EU legislation or alter their scope.⁸ Once an EU act is adopted, competence for international negotiations in the field covered by that act is hence transferred from individual member states to the EU as such. This principle has been tightly implemented by the ECJ in the maritime field in the past decade.⁹

While any group of states will probably benefit from prior co-ordination of positions ahead of international negotiations in matters that concern them, the EU-model is not easily exported to other regions. A very strong constitutional and institutional backing is probably a condition for the rigid approach that the EU is currently implementing. It may also be questioned whether all the efforts put in the EU coordination today are necessary and worthwhile. It is by no means excluded that a less formal approach focusing the co-ordination on key issues only might be more productive in achieving results, not least as it might free up resources for more discussions with other stakeholders and states outside the EU.

Other maritime regions, such as the Asia-Pacific, therefore have few reasons to copy the EU's way of coordinating its position ahead of and at IMO meetings. They would probably do better limiting any prior co-ordination of matters discussed at IMO to high priority matters of mutual interest and concern, focusing on the potential benefits of co-ordination while ignoring the stick which has been used in the EU to foster discipline among its member states.

2.3.2 Implementation

A second way for a regional body to establish its presence in the regulatory arena is through a joint or harmonized implementation of the international rules in the region. To some extent this is already practiced among maritime regions around the world through regional port state control arrangements.¹⁰

A more far-reaching application of this principle, which has been widely practiced by the EU, is to adopt common implementing legislation for the whole region. In fact the overwhelming majority of maritime safety requirements in EU law are copies of rules that already exist at international level, usually in one of the main IMO conventions such as SOLAS, MARPOL or the STCW.¹¹ The method may not be very interesting from a political or international law point of view, but it is a very powerful and useful method to 'give life' to the IMO conventions.

⁸ Case 22/70, 1971 European Court Reports (ECR) 263.

⁹ In Case C-45/07, 2009 ECR I-701, Greece was deemed to have violated EU law by submitting a document relating to maritime security, even if the content of the document was not as such contrary to an act of EU legislation.

¹⁰ For a list of the current 11 port state control regions, see e.g. www.imo.org/en/OurWork/MSAS/Pages/PortStateControl.aspx. See also section 4.1 below.

¹¹ International Convention for the Safety of Life at Sea (SOLAS), 1974; International Convention on the Prevention of Pollution from Ships, 1973; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978.

Merely copying international rules at EU-level is, in other words, far from a meaningless exercise. First of all, it is a method for harmonizing the rules within the region irrespective of formal adherence to the international rule in question. Secondly, by bringing the substantive rules into the EU legal order, the full power of the EU legal machinery is brought in to help assuring implementation of the international rules. Features such as direct applicability (or direct effect) of EU law and its supremacy over national laws will raise the legal status of the rules concerned and widen the range of persons who may rely on it. This is particularly so as EU rules will normally distribute the obligations concerned directly to the persons addressed in the conventions (such as ship masters, classification societies, companies etc.) without relying – as the IMO conventions do - on the flag state to implement these matters in their national systems. Thirdly, the absence of legal ‘teeth’ of public international law against non-complying states ceases to be a problem if the requirement is also adopted at EU-level. The Commission supervises that rules are complied with and may, if not, bring member states to court. Member states may even face lump-sum penalties for non-compliance with EU law requirements.¹² Finally, based on the ‘ERTA principle’ mentioned above, the adoption of EU rules will also affect the division of competence between member states and the Union and hence the organization of future international negotiations on the topic.

It is obvious that this latter type of regional implementation (by means of common implementing rules for the region) is only an option for regions with a very strong law-making and institutional infrastructure, which seriously limits its potential for being utilized elsewhere than in the EU for the time being.

2.3.4 Regulation

Finally, the region may also decide to be active in the prescriptive field, by adopting its own substantive rules alongside the international ones. If those rules exceed what is agreed at the international level, the regional rules will quickly be confronted with various limitations imposed by international law, and the law of the sea in particular.

It should be noted at the outset that regional organizations or other groupings of states have no legal advantage over individual states in this respect. The jurisdictional limitations for a single state wishing to impose its national rules on foreign ships are the same as those that apply for a region. For the EU, this starting point is not altered by the fact that the EU is a contracting party to UNCLOS in its own right.

The only legal solution which clearly supports legislation that exceeds global standards is for states to adopt the rules in their capacity as flag states. That, however, is likely to prove counter-productive since national rules will negatively affect the competitiveness of the state’s own fleet and may lead to flagging out. States are accordingly generally reluctant to impose requirements of this kind. Only five of the more than 40 EU maritime safety legal instruments are directed exclusively to ships flying the flag of a member state.¹³

In order to be effective, the regulation needs to cover ships irrespective of their flags. Yet, imposing national rules on ships from any nationality that merely navigate in the coastal waters of a state is more or less ruled out by the provisions of UNCLOS. This possibility is foreseen only for ships within the internal waters of the state, which are subject to the sovereignty of the coastal state.¹⁴ Beyond that, national rules are only permissible with respect to rules that do *not* relate to the construction, design, equipment and manning within the territorial sea¹⁵ and even they must not have the practical effect of denying or impairing foreign ships’ right of innocent passage.¹⁶ Beyond the territorial sea, unilateral coastal state legislation is essentially ruled out.¹⁷ Consequently, only very few of the EU rules target ships that merely transit the coastal waters of a member state.

Any regional ambition to regulate shipping will hence inevitably be closely connected with the legal constraints imposed under the law of the sea. The way around such constraints for the EU has been to focus its legislation on ships of any nationality that (voluntarily) enter a port (and internal waters) within the Union. For these situations, UNCLOS is considerably less prohibitive. Apart from certain general indications that confirm a right for port states to impose requirements on foreign ships,¹⁸ the limits of how far a (port) state can go in this respect is left to general international law. While it is widely accepted that international law does *not* include a right of ships to enter foreign ports (and *a fortiori* hence that port states may impose conditions for such access), the limits of such

¹² TFEU Article 260

¹³ A relatively recent example is Directive 2009/21 on compliance with flag state requirements. See also Ringbom, above n 6, chapter 4.

¹⁴ UNCLOS Article 2(1).

¹⁵ UNCLOS Article 21(2).

¹⁶ UNCLOS Article 24(1)(a).

¹⁷ UNCLOS Article 211(5), (6).

¹⁸ UNCLOS Articles 25(2), 211(3) and 255.

requirements are not very clear. Subject to specific treaty limitations that may place limitations on the port states' liberties in this respect, general international law only offers certain general reasonableness criteria as limitations. Port entry requirements may, for example not be discriminatory or constitute an abuse of right.¹⁹ They must be adopted in good faith and shall be proportional to the objective they seek to achieve. However, apart from this kind of general considerations, there are few concrete limits, which means that port states have considerable latitude in deciding on the content of such requirements. This latitude has been widely utilized by the EU and the clear majority of maritime safety rules that include some form of unilateral requirements are in the form of port entry requirements.²⁰

The real difference between an individual state and a regional grouping seeking unilateral solutions has to do with size, rather than law. A small state that adopts strict conditions on ships entering its ports will be very vulnerable to the result that ships avoid that port and start using one in more lenient a neighbouring state instead. If the state is very big, or several states act in concert that risk will be reduced, which is probably the key explanation to why it is so far mainly the USA and the EU that have been active in exercising port state jurisdiction over foreign ships. In the Asia-Pacific region, it is primarily Australia that has occasionally implemented this type of requirements.²¹

2.4 Content of the EU rules

A second general parameter which is relevant to assess when discussing the EU rules relates to their relationship to the global (IMO) rules. Shipping is highly regulated at the global level and only very few of the EU's maritime safety rules introduce entirely new substantive issues. Rather, as was already noted, the main part of the EU rules represent different applications of global rules that have already been adopted.

Apart from that, the EU rules sometimes extend beyond the substantive requirements of the IMO rules and it is these parts, however small the divergence might be, that have received most attention. The way of exceeding the international rules may vary, and it is possible to discern a pattern towards greater independence from the global requirements over time. While in the 1990's it was still controversial to implement international rules that were not yet in force²² or were only adopted in a non-binding format,²³ some other rules begun to improve perceived gaps in the international rules. Around the turn of the Millennium, following important accidents such as the *Erika* and the *Prestige*, the EU rules began to represent more direct challenges of the IMO rules. The main example is the accelerated phasing out of single-hulled tankers,²⁴ other controversial examples include the introduction of EU-based (criminal) penalties for violations of ship-source pollution.²⁵

Similarly, the enforcement measures have become more harsh over time. While early sanctions for non-compliance included the detention of the ship, later measures include the banning of a particular ship from all EU ports, even on a permanent basis.

It should be observed, however, that in the past decade, the EU rules have not continued to challenge their global counterparts. On the contrary, most EU rules that have been adopted in this period, including the so-called 'third maritime safety package' in 2009, have not challenged IMO rules and have not raised major controversies from the point of view of international law. The most recent example relating to greenhouse gases from 2014 may signify an end to this trend, however.

The reasons for such a slowdown in legislative activism are to be found at many areas, but the following three development seem particularly relevant. Firstly, there have been no major shipping accidents or pollution incidents in EU waters in the past decade and hence not the same type of political pressure to act as in the early years of the Millennium. Secondly, the rapid enlargement of the EU along with a variety of other more pressing concerns for the Union has promoted moderation in the EU's legislative activity more generally, which is clearly visible also in shipping. Thirdly, the EU's substantive competence in maritime matters has grown considerably in

¹⁹ UNCLOS Article 300.

²⁰ Generally, see B. Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer, 2014); E.J. Molenaar, 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage' (2007) *Ocean Development & International Law* 225-257 and Ringbom, above n 6, section 5.1.

²¹ Examples include Australian Maritime Employment Legislation, Ballast Water Management requirements and the rules on mandatory pilotage in the Torres Strait. See also Marten, above n 20, 100, 105 and 161ff. with further references.

²² E.g. Regulation 3051/95 on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries).

²³ E.g. Directive 2001/96 establishing harmonised requirements and procedures for the safe loading and unloading of bulk carriers.

²⁴ Regulations 417/2002 and 1726/2003 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers.

²⁵ Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements as amended by Directive 2009/123.

the past decade, notably through the establishment of the European Maritime Safety Agency with more than 200 employees to assist the Commission and member states in technical matters. Through this a more technical dialogue with member states has been established, which by its nature is likely to prevent legislative initiatives which are completely at odds with IMO policies.

3 Five Examples

3.1 Port State Control

The EU Directive on port state control (PSC), which was originally adopted in 1995²⁶ and has since been amended a number of times, is probably the single most important EU regulatory measure in terms of affecting the standards of ships visiting the region. In substantive terms, the directive has always followed closely the provisions of the Paris MOU, which is the collaborative framework by a number of mostly European maritime administrations.²⁷ The focus is on the implementation of international (IMO and ILO) maritime safety rules, which neutralises much of the potential political sensitivities linked to regional controls.

The main added value of EU legislation in this field is that the more solid legal basis of an EU directive strengthens the legal obligation and the commitment and permits the EU to introduce stronger enforcement measures with respect to non-complying ships or member states. For example, already in 1995, the possibility to (temporarily) ban ships from accessing any EU port was introduced as a sanction for ships that had been ordered to go to a repair yard but had failed to do so.²⁸ Since then, the enforcement measures have been gradually strengthened and banning is now almost routinely employed against non-complying ships with a poor inspection record and may in extreme cases even be imposed on a permanent basis.²⁹

Member states that do not meet their inspection obligations will be subject to legal proceedings in the EU legal system. Up to now the Commission has already initiated a series of infringement proceedings against member states that have not implemented the PSC Directive properly,³⁰ some of which have resulted in judgments against the member states.³¹

Another important consequence of the EU's involvement in PSC is that significant resources have been invested in maintaining and modernizing the regime in terms of data bases and other supporting systems such as training programmes for inspection officials. The introduction of the new database THETIS in 2011³² paved the way for an entirely new inspection regime, which is based on an 100% EU-wide inspection commitment, rather than a national commitment to inspect 25% of the visiting ships. The new inspection regime targets high-risk ships, based on statistics of the ship and its operator, and accordingly provides less liberty for member states in selecting the ships for inspection.³³

In the Asia-Pacific region, port state control is based on the Tokyo MOU, which is another well-established PSC region based on decades of close co-operation among maritime administrations in the region. However, the Tokyo MOU regime has not developed as much as the EU system in terms of enforcement, inspection obligations and support infrastructure, which can at least in part be explained by the absence of a firm legal framework to support the implementation of such developments. On the other hand, a legal framework alone, such as a formal PSC convention in the region may reduce flexibility of the process without clear benefits. The EU experience suggests that it is the overall institutional structure and legal apparatus – together with the financial resources - which has created the internal discipline and incentives necessary for taking PSC to another level. In the absence of such institutional backing, the present form of administrative cooperation might very well be the optimal for the Asia-Pacific region.

²⁶ Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control).

²⁷ See www.parismou.org. Some non-EU states, such as notably Canada and the Russian Federation, participate in this regional PSC scheme.

²⁸ Directive 95/21, Article 11(4).

²⁹ Directive 2009/16 on port state control, Article 16.

³⁰ See e.g. http://europa.eu/rapid/press-release_IP-09-178_en.htm. For an overview, see http://ec.europa.eu/transport/media/infringements/proceedings/maritime_en.htm

³¹ See e.g. Case C-315/98, Commission v. Italy 1999 ECR I-8001.

³² See <https://portal.emsa.europa.eu/web/thetis/home>

³³ Directive 2009/16 on port state control. See also the list of currently banned ships at <https://portal.emsa.europa.eu/web/thetis/refusal-of-access>

3.2 Double Hull Tankers

The second example of EU activities in maritime safety is the construction requirements for oil tankers. The EU very suddenly became active in this field following the sinking of the tanker *Erika* outside France in 1999. In a period of unprecedented political and public pressure on the EU to regulate this matter in the early years of the Millennium, it was proposed - and eventually approved - that only double-hulled tankers should be allowed to enter EU ports from a certain date, on the basis of a specific phasing-out scheme for single-hulled tankers. The crucial issue from a political and legal point of view relates to the relationship between these rules and the IMO's scheme for phasing-out single-hulled oil tankers that had been agreed in the Convention for the Prevention of Pollution from Ships (Marpol) earlier.

Following the *Erika* accident, the EU introduced a phasing-out timetable that corresponded closely to that applying in the USA under the 1990 Oil Pollution Act³⁴ and was, hence, faster than the corresponding IMO regime.³⁵ Unlike the US scheme, however, the EU maintained the international technical rules and definitions on the construction of oil tankers as laid down in Marpol. This 'unilateral' European schedule was potentially very controversial. However, in the end the rules did not give rise to a conflict with the international rules, since Marpol was amended at IMO in parallel to incorporate the EU requirements, subject to some minor compromises which were eventually accepted by the EU. Once EU Regulation 417/2002 entered into force, it therefore corresponded to the amended international rules.

Not long after the entry into force of that Regulation, however, the next major oil tanker incident involving an ageing single-hull tanker occurred in EU coastal waters. The sinking of the *Prestige* prompted the Community to revisit its phasing-out scheme in order to match it more closely with that originally proposed by the Commission. The revised EU Regulation 1726/2003 included a tighter phasing-out schedule than its predecessor and also introduced construction requirements for ships carrying heavy grades of oil. This time, the adoption of the EU Regulation was not linked to a corresponding amendment of Marpol. It entered into force while international negotiations to re-amend Marpol were still on-going and the two phasing-out schemes remained at odds until the Marpol amendments entered into force on 5 April 2005, some 18 months after the entry into force of EU Regulation 1726/2003.

The *a priori* banning of certain categories of ships from access to ports is a relatively simple measure in administrative terms. It does not require much monitoring and enforcement infrastructure by the port states and it is fairly easy to control. It is also a very effective measure in terms of impact since a ship that is barred from entering the ports of a whole region is in practice largely prevented from sailing in that region altogether.

However, a mismatch between the IMO rules and regional requirements is problematic from a political and a legal point of view. In terms of international law, the key issue is how far port states may go in placing access conditions on foreign ships. While conditions relating to 'static' aspects of the ship, such as its construction or design are the most disruptive to trade, since the ship cannot easily change those features, they are – paradoxically – fairly easy to justify in jurisdictional terms.³⁶ As the requirements will be breached while the ship is in port or within the internal waters of the port state, where jurisdiction is complete, there is a fairly clear prescriptive jurisdictional basis for the access requirement. Moreover, simply refusing a ship access to the port is – again paradoxically – easier to justify in jurisdictional terms than letting it in and issuing other types of sanctions, such as fines. As was noted above, it is widely acknowledged that ships do not have a right of access to foreign ports under international law and, save in the case of specific treaty obligations to the contrary, a state's right to refuse – or place conditions on – access for foreign ships to its ports is mainly limited by general principles linked to the reasonableness of the action.

In view of this, it would seem legally and practically feasible for the Asia-Pacific region to agree on a similar joint access conditions for certain categories of ship, should a need for that arise. The measure could be applied within the region as a whole or by a selected group of states only. However, the policy implications of regional rules on shipping should not be under-estimated. The international protests and concerns expressed against the EU double hull rules suggest that any such measure should be handled with care. Moreover, as is evidenced by WTO case law, the efforts made to achieve global rules before adopting unilateral rules may very well play a role also for the lawfulness of the unilateral measure.³⁷

³⁴ The Oil Pollution Act of 1990 (33 U.S.C. 2701-2761), section 4115.

³⁵ See regulations referred to in note 24 above.

³⁶ See Ringbom, above n 6, 328-341.

³⁷ See e.g. the report of the Appellate Body of the WTO Dispute Settlement Body in the *US-Shrimp Implementation*, WTO Doc. WT/DS58/AB/RW, at [134].

3.3 Passenger ships – inventing the notion of a ‘host state’

A third example of EU measures in the field of maritime safety that may be of interest for other regions relates to the concept of the ‘host state’, which the EU introduced for the safety of passenger ships following a series of high-profile passenger ship accidents in Europe in the mid 1990’s.

The term ‘host state’ is intended to bridge the gap between the flag state’s strong regulatory control over ships and the port state’s much weaker control, when it comes to shipping services of particular importance for the port state. The carriage of passengers on regular routes to or from a member state, in particular, has been considered too important to be left only to be controlled by a flag state, which may be only very remotely linked to the ship, and the sporadic controls by the port state. The main example of an instrument making use of this term is the Directive 1999/35 which applies to ro-ro passenger ships in regular services to or from an EU port.³⁸ Broadly speaking, the directive equates the rights and obligations of a host state with those of a flag state for the particular ship services concerned. Among other things, it introduces a mandatory annual in-depth inspection of the ship by the port state as a *sine qua non* for the permission to trade on a regular basis to and from EU ports.³⁹ The prescriptive rules to be complied with include both IMO and certain regional rules relating to safety, accident investigations etc.

Interestingly, the Directive also calls for certain commitments to be made directly by the ship’s operating company. In this way the role of the operator of the ship is emphasized and that of the flag state is correspondingly reduced. This also serves to de-emphasize the law of the sea elements of the rules and rather points towards a scheme where the state licenses parties to operate the service, along the lines which is used in internal ‘cabotage’ trade in many countries.

The term ‘host state’ does not exist in the law of the sea at all, but features in certain other fields of international law, such as international investment law or in relation to headquarter agreements for international institutions. From a law of the sea point of view, it is clear that the introduction of a new term will not as such change the jurisdictional balance between states. The justification of the measures must therefore be based on the existing jurisdictional framework, i.e. port state jurisdiction which is quite sparingly regulated in UNCLOS. In view of the strong substantive interest and link of between the port state and regular passenger services, requirements of this type have not – perhaps surprisingly – been considered to be legally problematic in the EU and there have been very few if any legal protests against the host state requirements by flag or other states.

If such measures can be introduced in one region, they can of course be adopted elsewhere as well, even on a national basis. For this type of requirement, the institutional infrastructure needed for their implementation is quite limited and they might therefore be well-suited as a regulatory option also for regions which lack a strong EU-type institutional backing. The EU experience further suggests that the political controversy of this type of measure is quite limited as long as the measures focus on passenger ships, in particular when on a regular route to or from the ‘host’ state. On the other hand, it should be also noted that emphasising the role of host state requirements in regulating a right for ships to perform a specific maritime service (rather than a right for them to navigate) will make the requirements more vulnerable to challenges under international trade law and, in particular, under the General Agreement on Trade in Services (GATS).⁴⁰

3.4 Greenhouse gas emissions

One of the few almost unregulated areas in shipping are the emission of greenhouse gases.⁴¹ In the EU, by contrast, reduction of greenhouse gases has been a top priority more generally for decades and the absence of emission reduction rules for shipping has repeatedly been indicated as a concern for the Union.⁴² Warnings have occasionally been made that EU rules may be introduced in this area if satisfactory global rules cannot be established at IMO,⁴³ but so far this has not materialised.

³⁸ Directive 1999/35 on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high-speed passenger craft services.

³⁹ It may be noted, though, that in some later measures for passenger ship safety the EU also introduced the host state concept for ships on non-regulatory voyages.

⁴⁰ Relevant case law has not yet developed at the WTO Dispute Settlement Body.

⁴¹ But note Regulations 19-21 of Marpol Annex VI, adopted in 2011, on the ‘energy efficiency design index’ concerning (future) reduction requirements through the design of new-built ships.

⁴² See e.g. third recital of Directive 2009/29 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community.

⁴³ *Ibid.*

A precondition for any type of rules that aim at reducing operational CO₂ emissions (i.e. fuel consumption) from ships is reliable information on the fuel consumption. Based on corresponding rules for the aviation industry,⁴⁴ the EU in 2015 adopted a regulation for monitoring, reporting and verification of CO₂ emissions by ships entering EU ports.⁴⁵ Even if the Regulation does not impose any reduction obligation, fee or other operational obligations for ships, it has proven to be quite controversial, *inter alia* as it disregards the parallel but less advanced discussions at IMO.

Regulation 2015/757 gradually introduces obligations for ship owners to plan and to monitor and to report to the EU their estimated CO₂ emissions and includes strong enforcement measures for non-compliers (including – as a measure of last resort – the banning of the ship in question from all EU ports⁴⁶). Critics have pointed at the associated administrative burden, the effects of the plans to make public the reported figures and questioned the feasibility in terms of international law. The main concern, however, relates to what all this information is going to be used for in the longer run. It is commonly considered to be a first step of a future regional market-based regulatory regime for GHGs in shipping, which also raises several difficult questions of international law.⁴⁷

There is no immediate policy reason for the Asia-Pacific region, or any other maritime region, to follow EU's determination to make regional rules in this field. Any measure inevitably will require a lot of political, administrative and financial resources before it can be put in place. The Asia-Pacific region has been considerably more cautious (and divided) than the EU about regulating GHGs more generally, and this certainly applies to maritime regulation as well.

The matter is only worth mentioning here because of the possibility that individual states in the Asia-Pacific region might decide to join a regional regime established elsewhere. If the IMO failed to regulate operational CO₂ emissions from ships and if the EU were to lead the creation of a regional scheme in its place, nothing prevents other states from joining that scheme. On the contrary, a broader participation in such an alternative scheme would no doubt strengthen its legal legitimacy under international law.

3.5 EU and Maritime Liability

Finally, some words should be said about the EU's regulatory activities in the field of civil liability in maritime transport, which started around the turn of the Millennium. This area of maritime law is particularly sensitive, not only because it so directly deals with the financial consequences of events for ship operators and insurers, but also because the whole premise of the current international regulation on liability, particularly environmental liability, is based on global participation. Thanks to constructions such as exclusive jurisdiction, channelling of liability and compensation funds based on imports in receiving states,⁴⁸ regional initiatives in this field pose a real threat to the very survival of the global schemes.

The EU appears to have accepted this premise and has not – despite some signals to the contrary in the early 2000's – proposed to create a regional maritime liability regime of its own. Its activities in the field build upon the existing IMO conventions and regimes, and in many cases EU activities have been aimed at speeding up international rules or implementing them jointly within the EU. However, this starting point has not prevented the EU from initiating various measures to complement or 'improve' the international rules by regional additions where the global rules have been deemed to be unsatisfactory.

For example, the maritime liability rules have been complemented by EU rules for compensating environmental damage where the IMO conventions do not apply;⁴⁹ civil liability rules have been complemented by criminal liability rules in case of pollution damage;⁵⁰ and certain minor substantive additions have been made to pollution and passenger liability rules.⁵¹ In addition, non-maritime EU policies in fields that are related to civil liability have

⁴⁴ Commission Regulation No 601/2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC.

⁴⁵ Regulation 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport.

⁴⁶ *Ibid.*, Article 20(3).

⁴⁷ See Ringbom Regional solution.

⁴⁸ All these elements feature in the international oil pollution liability regime, as established by the International Convention on Civil Liability for Oil Pollution Damage, 1992, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992., but also in the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, which has yet to enter into force.

⁴⁹ Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, Article 4.

⁵⁰ Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements.

⁵¹ See e.g. Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents, which implements the 2002 Athens Convention, but adds certain EU features, such as the obligation of the ship operator to make an advance payment to cover the immediate economic needs of a passenger who is killed or injured in a shipping incident.

at times had important incidental effects on maritime liability matters. Examples include the EU rules on jurisdiction and recognition of judgment,⁵² choice of law⁵³ and waste legislation.⁵⁴

This type of regulation can probably not be achieved without a very solid legal institutional structure to back it up and a common court to ensure consistency in application. It is therefore not an example that can be easily followed by other regions. The EU development in maritime liability regulation does, however, illustrate that even given the starting point that the international conventions shall apply, there is considerable scope for rules and principles to fill gaps or to harmonize their application and interpretation. Such initiatives need not even be in the form of binding legal texts. Regional guidelines on ratification or interpretation may very well serve the intended purpose at regional level.

4 Concluding observations

The brief – and far from exhaustive – review of EU maritime legislation above give rise to certain observations that could be interesting for other marine regions with policy ambitions in the maritime field.

The *first* observation is that even if the law of the sea is generally based on a very strong jurisdictional presumption in favour of the flag state, it does not rule out complementary regulatory measures by maritime states or regions, in particular when acting collectively in the capacity of port states. The evolution of the EU's maritime safety measures over the past two decades illustrates a clear gradual development towards more independence from IMO rules. This trend has not been linear, however, and since 2005 or so EU has introduced very few rules challenging the international regulatory regime.

The *second* observation is that many of the rules discussed here do not require an EU-type powerful constitutional, institutional or financial framework to be put in place. Some of the examples listed above (notably construction requirements of ships in ports and 'host state' inspections) are available through relatively minor legislative means and do not require a very sophisticated enforcement apparatus. In many areas the main function of the EU's institutional structure is to foster internal discipline to implement the agreed rules. If the incentives for complying are strong, that function might not be necessary.

It was noted above the jurisdictional rights of a regional body or a group of states are not different from those of an individual state. The *third* observation is that the real difference between regional and national 'unilateralism' has to do with weight, size and effect and this is particularly the case with respect to port state requirements. A single port state in Europe could, for example, hardly have introduced drastic port state entry requirements, such as the phasing out of single-hulled tankers on its own. Ship operators and flag states that disapproved of the rules could easily have opted to call at another port in a neighbouring state where more lenient rules apply. That option is significantly curtailed if the scheme covers a whole region. Irrespective of what region is concerned, it is therefore obvious that a coordinated policy on port state measures, be it on PSC or more drastic regulatory requirements, will significantly strengthen the effect of the action.

The *fourth* observation is based on a cursory comparison between the Asia-Pacific and the EU as regions. As was noted in the introductory section, the two regions have a number of similarities in terms of size, interest and traditions in the maritime field. Both regions also include civil and common law traditions (the accommodation of which has not been a problem in EU). It is obvious therefore that many interests are shared and that a very strong alliance could be reached if the two groups were to coordinate more closely in matters of mutual concern. It seems true, however, that the Asia-Pacific region houses an even wider variety of maritime interests and cultures, encompassing very important flag and port states (some of which are single port states, with a muddled borderline between the – mainly private – interests of the port and those – mainly public – of the government), and very vulnerable small island states, some of which, such as the Marshall Islands, are also very important shipping registers. It may therefore be challenging to find agreement on the internal policy line for the region as a whole. Yet, in view of what has been said above there is nothing to exclude sub-regional solutions where consensus does exist, such as measures by the ASEAN group of states or other combinations of states.

Finally, the principal purpose of this text has been to illustrate, by using the EU as an example, that should there be a desire by the states in the Asia-Pacific region to adopt a more harmonised shipping policy, international law offers several opportunities for translating that policy into regulatory initiatives. While many of the EU's shipping laws are not suitable for an organization without a very solid constitutional and institutional structure to support

⁵² Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁵³ Regulation 864/2007 on the law applicable to non-contractual obligations.

⁵⁴ See notably Case C-188/07 (*Commune de Mesquer*), 2008 ECR I-4501.

it, others are not dependent on that. On the basis of the examples considered above, it might even seem as if the most powerful regulatory measures are the once that require least infrastructural backing to be put in place.

Whether it is a good idea for the Asia-Pacific region to build up a joint regulatory policy in the maritime field is an entirely different question, which is not discussed here. Suffice it to note that in the EU there was a lot of opposition against such moves, mainly from its own member states, in the early days of its maritime policy. Today, most people are probably prepared to accept that the entry of the EU into the scene of maritime regulation has not only complicated the regulatory process (which is no doubt true), but has also had a number of benefits. Many (though not all) EU measures adopted in the past two decades are recognized as having had advantageous consequences for maritime safety and environmental protection. Generally speaking, the bull has entered the china ship without any serious casualties. It has found its place there and is not planning to go anywhere.