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# The EU Maritime Security Strategy and Climate Change: The Case of Maritime Transportation and New Challenges Ahead

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## Abstract

Climate change has become one of the most critical concerns for mankind and urgent action is needed. The European Union (EU) Global Strategy of 2016 also considers climate change as a severe factor that may disrupt economic growth and endanger both citizens and territory. The International Maritime Organization (IMO) sought, but failed to reach, a binding international instrument to regulate shipping pollution. Consequently, the EU decided to act approving Regulation 2015/757 on the monitoring, reporting and verification (MRV) of carbon dioxide emissions from maritime transport. This article analyses the different kinds of jurisdictions foreseen in the United Nations Convention on the Law of the Sea (UNCLOS), the role of current actors and the latest steps taken by the IMO.

**Key Words:** Climate Change, EU Law, International Law of the Sea, Maritime Transportation, International Maritime Organization, Extraterritoriality.

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## 1. Introduction: The Common Concern of Climate Change and the Role of the IMO

CO<sub>2</sub> emissions from ship pollution constitute one of the most important concerns for states and supranational institutions: From 1990 to 2008 emissions from EU-related shipping increased by more than 48%.<sup>1</sup> Worldwide, total ship pollution amounts to more than a billion of CO<sub>2</sub> tons per year<sup>2</sup> and is set to increase from 50% to 250% in 2050. Hence, at the global level these emissions represent 3%<sup>3</sup>

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1 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Integrating maritime transport emissions in the EU's greenhouse gas reduction policies' COM (2013) 479, 2.

2 For further information regarding International Maritime Organization (IMO) 2014 report on greenhouse gases (GHG), see: IMO, 'Third IMO GHG Study 2014' <<http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Greenhouse-Gas-Studies-2014.aspx>> accessed 17 May 2020.

3 COM (2013) 479 (n 1) 3.

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of total emissions and may reach 5% by 2050.<sup>4</sup> Climate-based risks and threats are already evident even if some actors continue to harbour doubts. In light of this, several governments 'securitised' the environment. A key focal point is how pollution has increased the vulnerability of the high seas. The high seas are key for maritime transportation and trade and are part of the 'global commons', a common concern of mankind.

This paper analyses EU Regulation 757/2015,<sup>5</sup> which adopts a system of monitoring and verification to control CO<sub>2</sub> emissions from shipping pollution. Climate change has become a real threat requiring urgent action by regional actors such as the EU. Global actors encounter many obstacles in the quest to adopt a binding norm: discussions to build consensus and develop solutions are critical, but also time-sensitive. This paper will analyse the scope of application of the norm, taking into account the existing norms in force and other international law sources. The paper will also take into account the different actors concerned in order to understand the scope of obligations of each of them.

Climate change has been considered a problem of 'common concern'<sup>6</sup> as it can alter the physical, chemical and biological characteristics of the oceans. Consequently, its effects can jeopardize the lives of human beings, causing social and economic impact and even violating fundamental rights.<sup>7</sup> At the international level, Articles 192, 194 and 204 UNCLOS already acknowledge the problem of maritime pollution. However, in 1982 the perceived problem and profile of climate change was such that it had yet to be included on the international agenda of governments and supranational institutions. In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) was signed and called for the widest possible cooperation from states and different actors to tackle climate change.<sup>8</sup>

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4 European Commission, 'Time for international action on CO<sub>2</sub> emissions from shipping' (2013) <[https://ec.europa.eu/clima/sites/clima/files/transport/shipping/docs/marine\\_transport\\_en.pdf](https://ec.europa.eu/clima/sites/clima/files/transport/shipping/docs/marine_transport_en.pdf)> accessed 17 May 2020.

5 Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC [2015] OJ L 123/55.

6 The United Nations General Assembly (UNGA) acknowledged this in: UNGA Res 43/53 (6 December 1988) UN Doc A/RES/43/53. The 2015 Paris Agreement also considered climate change as a common concern of mankind, see: 'Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015' United Nations Framework Convention on Climate Change (UNFCCC) (26 January 2016) UN Doc CP/2015/10/Add.1, 2.

7 Zlata Drnas-Clément, 'Channelling of the International Responsibility in Case of Damage to the Oceans and Seas as a Result of Climate Change' in Pablo Antonio Fernández Sánchez (ed), *New Approaches to the Law of the Sea - In Honor of Ambassador José Antonio de Yturriaga-Barberán* (Nova science publishers, 2017) 167.

8 Article 2: '[T]he ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system [...].'



Further efforts led to the adoption of the Protocol of Kyoto (1997).<sup>9</sup> Article 4(5) of the Protocol establishes the sharing of burden in connection with climate change commitments. Moreover, in connection with the specific problem of maritime transportation (in relation to the limitation or reduction of emissions of greenhouse gases), Article 2(2) specified that the IMO should pursue this. The organization's scope of functions is set out in Article 2<sup>10</sup> of the 1948 IMO Convention, which is considered to constitute a very broad marine pollution remit. As for the internal structure of the organization, Article 38 of the convention establishes the Marine Environment Protection Committee (MEPC) as the organ in charge of considering any matter in relation to the prevention and control of marine pollution from ships.

Under the IMO's framework, several legal instruments related to technical requirements for maritime safety and pollution prevention have been adopted such as the International Convention for the Prevention of Pollution from Ships (MARPOL),<sup>11</sup> International Convention for the Safety of Life at Sea (SOLAS)<sup>12</sup> and International Convention on Standards of Training, Certification and Watch keeping for Seafarers (STCW).<sup>13</sup> In addition, since 1997 several discussions on climate change and the emissions from shipping have taken place and the IMO has provided periodical reports detailing the organization's progress on this issue. In 2011, the IMO passed binding measures to reduce emissions from international shipping and added a chapter IV to the annex VI of the MARPOL convention.<sup>14</sup> The measures entered into force in January 2013 and introduced a Mandatory Energy Efficiency Design Index (EEDI) for new ships; all ships were also required to have a Ship Energy Efficiency Management Plan (SEEMP). In 2013, the IMO also discussed the use of mechanisms such

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9 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2302 UNTS 148.

10 Article 2: '[I]n order to achieve the purposes set out in Part 4 the Organization shall: (a) Subject to the provisions of Article 3, consider and make recommendations upon matters arising under Article 1 (a), (b) and (c) that may be remitted to it by Members, by any organ or specialized agency of the United Nations or by any other intergovernmental organization or upon matters referred to it under Article 1 (d); (b) Provide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to Governments and to intergovernmental organizations, and convene such conferences as may be necessary; (c) Provide machinery for consultation among Members and the exchange of information among Governments; (d) Perform functions arising in connexion with paragraphs (a), (b) and (c) of the Article, in particular those assigned to it by or under international instruments relating to maritime matters and the effect of shipping on the marine environment; (e) Facilitate as necessary, and in accordance with Part X, technical co-operation within the scope of the Organization.'

11 International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 12 ILM 1319 (MARPOL).

12 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered in force 25 May 1980) 14 ILM 959 (SOLAS).

13 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984) 1361 UNTS 75 (STCW).

14 IMO Resolution MEPC.203(62) (adopted 15 July 2011, entered into force 1 January 2013) 'Amendments to the Annex of the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (Inclusion of regulations on energy efficiency for ships in MARPOL Annex VI)' <[http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-\(MEPC\)/Documents/MEPC.203\(62\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-(MEPC)/Documents/MEPC.203(62).pdf)> accessed 17 May 2020.



as the Emissions Trade Scheme (ETS) regime<sup>15</sup> and in 2016, at the celebration of the 70<sup>th</sup> anniversary of the MEPC, a roadmap was agreed in relation to the global compilation of maritime emissions.<sup>16</sup> Thereafter, the 71<sup>st</sup> intersession meetings (July 2017) and the 2<sup>nd</sup> meeting of the Working Group agreed on an initial strategy regarding reduction of maritime emissions. On 13 April 2018 Resolution MPEC 304(72) was adopted with the aim of establishing an initial strategy regarding greenhouse gas (GHG) emissions from ships. Despite no binding instrument yet having been adopted, it seems that the IMO has taken a relevant step to solve this problem. Nevertheless, certain scholars have criticised the pace of development of IMO treaties;<sup>17</sup> it may take longer than expected to adopt a binding norm or agreement. However, it may be too late to address the emerging and critical concern that is climate change.

## 2. Interrelation Between EU Maritime Security Strategy and Climate Change Action

On the basis of Article 21(1) and (2) of the Treaty on the European Union (TEU),<sup>18</sup> the EU has taken the lead as a global actor promoting action against climate change<sup>19</sup> and, since 2007, in enhancing maritime security. The EU has sought unilateral action to find solutions for maritime transportation and climate change by filling the normative gaps that were not addressed directly by the IMO. In October 2007, the EU Commission passed the maritime security strategy with the aims of horizontally integrating sector-based maritime policies and actions and enhancing Europe's capacity to face challenges of globalization and competitiveness, climate change, degradation of marine environment, marine safety and security, and energy security and sustainability.<sup>20</sup>

Maritime security is a new and unregulated field where the EU is taking additional steps to 'securitise' it. The implementation reports related to the European Security Strategy (2003 and 2008) did

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15 The European Council invited the EU Commission to present by the first quarter of 2019 a proposal for a strategy for long-term EU greenhouse gas emissions reduction in accordance with the Paris Agreement, taking into account the national plans. See: European Council, 'European Council meeting (22 March 2018) – Conclusions' EUCO 1/18, 3.

16 IMO, 'Greenhouse Gas Emissions' <<http://www.imo.org/en/OurWork/environment/pollutionprevention/airpollution/pages/ghg-emissions.aspx>> accessed 17 May 2020.

17 Aoife O' Leary & Jennifer Brown, 'The Legal Bases for IMO Climate Measures' (Sabin Center for Climate Change Law | Columbia Law School, June 2018) 10 <<http://columbiaclimatelaw.com/files/2018/06/OLeary-and-Brown-2018-06-IMO-Climate-Measures.pdf>> accessed 17 May 2020.

18 Articles 21(1) and (2) TEU (excerpts): '[T]he Union [...] shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.... The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (h) promote an international system based on stronger multilateral cooperation and good global governance.'

19 Such leading role was reaffirmed by the European Council during two meetings held in 2017. See: European Council, 'European Council meeting (22 and 23 June 2017) – Conclusions' EUCO 8/17, 6; European Council, 'European Council meeting (14 December 2017) – Conclusions' EUCO 19/17, 4.

20 Basil Germond, *The Maritime Dimension of European Security – Seapower and the European Union* (Palgrave Macmillan, 2015) 109.



not include maritime security in particular.<sup>21</sup> In 2014, the EU approved the Maritime Security Strategy (EUMSS) with the objective of ‘[p]romoting better rules-based maritime governance and make effective use of the EU instruments at hand.’<sup>22</sup> The strategy has different sub dimensions: maritime safety, maritime surveillance (developing global maritime domain awareness at the EU level and monitoring Europe’s maritime borders), good governance at sea, marine environment protection, and energy security. Both the EU Commission and the European External Action Service (EEAS) have played key roles in the adoption of the EUMSS. Finally, the EU adopted its Global Strategy in 2016. In this document, the EU considers that climate change causes further disruption regarding economic growth, endangers the territory and the people and exacerbates conflict.<sup>23</sup>

Once the EU Integrated Maritime Policy was adopted in 2007, the EU Commission established a working programme and considered as projects of particular importance: a strategy to mitigate the effects of climate change on coastal regions and the reduction of CO<sub>2</sub> emissions and pollution by shipping.<sup>24</sup> The EUMSS considers climate change as a strategic security interest<sup>25</sup> and also identifies nine risks and threats;<sup>26</sup> however, the EUMSS only links climate change with the maritime transport system and maritime infrastructure.<sup>27</sup> Why did the EU decide to exclude the other risks involving climate change? Taking into account that environmental threats, inevitably linked to the notion of marine pollution, should also include climate change,<sup>28</sup> it must be noted that the EU Maritime Security Action Plan 2018 considered climate change as ‘potentially destabilising’ and ‘risk multiplier’.<sup>29</sup>

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21 See also: Marianne Riddervold, *The Maritime Turn in EU Foreign and Security Policies: Aims, Actors and Mechanisms of Integration* (Palgrave Macmillan, 2018) 7.

22 Council of the European Union, ‘European Union Maritime Security Strategy’ 11205/14, 10.

23 European External Action Service (EEAS), ‘Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union’s Foreign and Security Policy’ (2016) 7, 9, 13 and 27 <[http://eeas.europa.eu/archives/docs/top\\_stories/pdf/eugs\\_review\\_web.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf)> accessed 17 May 2020. On this issue, Claire Dupont asserts that: ‘[C]limate Change can thus be considered a good example of collective securitisation in Europe’, see: Claire Dupont, ‘The EU’s collective securitisation of climate change’ (2019) 42 (2) *West European Politics* 369.

24 European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An Integrated Maritime Policy for the European Union’ COM (2007) 575 final, 3.

25 ‘European Union Maritime Security Strategy’ (n 22) 7; ‘[T]he protection of the environment and the management of the impact of climate change in maritime areas and coastal regions, as well as the conservation and sustainable use of biodiversity to avoid future security risks.’

26 *ibid.*, 7-8. The risks and threats are, e.g. piracy, terrorism at sea or from the sea, criminal activities including drug and human trafficking, weapons of mass destruction (WMD) proliferation, illegal immigration, fisheries protection, and marine environmental protection.

27 *ibid.*, 8.

28 On this issue, see: Pablo Antonio Fernández Sánchez, ‘El Cambio Climático en la Estrategia Europea de Seguridad Marítima’ in Rosa Giles Carnero (ed), *Desafíos de la Acción Jurídica Internacional y Europea frente al Cambio Climático* (Atelier, 2018).

29 Council of the European Union, ‘Council conclusions on the revision of the European Union Maritime Security Strategy (EUMSS) Action Plan (26 June 2018)’ 10494/18, 10.



Since 2007, the EU<sup>30</sup> has developed a strategy to tackle climate change. One of the main results of this action has been the EU ETS<sup>31</sup> which aims to reduce greenhouse emissions and to enhance mitigation efforts at a national, regional and global level. After the entry into force of the Lisbon Treaty in 2009, climate change became ‘institutionalized’. Specifically, Article 191 of the Treaty on the Functioning of the European Union (TFEU) pursues the promotion of measures to combat climate change at the international level. For a better understanding of the EU institutional scope, Article 1 of the Treaty of the EU (TEU) allows member states to transfer ‘competences’ to the EU in order to reach common goals. On the basis of the principle of subsidiarity, competences with respect to environmental matters are shared with member states under Article 4 TFEU. However, the EU may act when member states cannot sufficiently achieve common goals enshrined in EU treaties and norms.<sup>32</sup>

### 3. EU Takes Action Under the Umbrella of ‘Unilateralism’

#### 3.1 EU Regulation 757/2015: Scope of Application and Obligations

The lack of a binding IMO instrument for the reduction of greenhouse emissions from shipping has precipitated EU Regulation 2015/757 of the European Parliament and of the Council on the MRV of carbon dioxide emissions from maritime transports. The norm was adopted in April 2015 and is considered to be one of the main priorities of EU Climate Action.<sup>33</sup> The main aim of the norm is mitigating the effects of climate change in shipping through an annual emission verification report.

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30 European Commission, ‘Commission proposes an integrated energy and climate change package to cut emissions for the 21<sup>st</sup> Century’ (2007) <[http://europa.eu/rapid/press-release\\_IP-07-29\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-07-29_en.htm?locale=en)> accessed 17 May 2020.

31 This regime entered into force in January 2005 and is currently regulated by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32 and Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2008] OJ L 8/3. See also Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol’s project mechanisms [2004] OJ L 338/18 and Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions [2014] OJ L 129/1. Article 2 of the 2003 Directive establish the different sectors where the norm is applicable, as mentioned in Annexes I and II. The EU ETS is going to be implemented in four stages, and the third is currently being set up (2013-2020).

32 To delve into this issue see: Josephine A. W. van Zeben, *The Allocation of Regulatory Competence in the EU Emissions Trading Scheme* (Cambridge University Press, 2014) 41-43.

33 In 2009, the EU Commission urged as a key priority the development of a comprehensive and coherent approach to reducing GHG emissions from international shipping, and also advised on the implementation of a global MRV system as a priority in IMO negotiations in 2013. European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Integrating maritime transport emissions in the EU’s greenhouse gas reduction policies’ COM (2013) 479 final, 5 and 8.



According to Article 2, the norm applies to ships above 5,000 gross tonnages in respect of CO<sub>2</sub> emissions released during their voyages:

- a) From their last port of call to a port of call under the jurisdiction of a member state;
- b) From a port of call under the jurisdiction of a member state to their next port of call;
- c) Within ports of call under the jurisdiction of a member state.

The system MRV shall be applicable to both CO<sub>2</sub> emissions and any other relevant information that may facilitate the calculation of fuel consumption as well as the energetic efficiency of the ship. Annex I of the Regulation establishes the different methods for monitoring CO<sub>2</sub> emissions.<sup>34</sup> Since 2015, several norms have been passed in order to clarify the scope of application of the norm for both companies and member states.<sup>35</sup>

The first stage of the norm has been completed, as companies submitted<sup>36</sup> to the verifiers a monitoring plan for each of their ships indicating the method chosen to monitor and report. CO<sub>2</sub> emissions and other relevant information as can be found in Article 6(3) of the Regulation. From 1 January 2018, companies will, on the basis of the verification report enshrined in Article 13 of the norm, monitor CO<sub>2</sub> emissions for each ship annually by applying the appropriate method to determine CO<sub>2</sub> emissions and following the requirements stated in Articles 9 and 10 (Article 8). From 2019, by 30 April each year, companies will submit to the EU Commission and to the authorities of flag states concerned an emissions report concerning CO<sub>2</sub> emissions and duly verified (Article 11).<sup>37</sup> Where ships and companies fail to comply with these measures (monitoring and reporting) member states may implement the necessary measures to establish a system of penalties (Article 20).

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34 In accordance with Regulation 757/2015 Annex I, the methods of monitoring CO<sub>2</sub> emissions are: (a) Bunker Fuel Delivery Note (BDN) and periodic stocktakes of fuel tanks; (b) bunker fuel tank monitoring on board; (c) flow meters for applicable combustion processes; (d) direct CO<sub>2</sub> emissions measurements.

35 European Commission, 'Commission Delegated Regulation (EU) 2016/2071 of 22 September 2016 amending Regulation (EU) 2015/757 of the European Parliament and of the Council as regards the methods for monitoring carbon dioxide emissions and the rules for monitoring other relevant information' OJ L 320/1; European Commission, 'Commission Implementing Regulation (EU) 2016/1927 of 4 November 2016 on templates for monitoring plans, emissions reports and documents of compliance pursuant to Regulation (EU) 2015/757 of the European Parliament and of the Council on monitoring, reporting and verification of carbon dioxide emissions from maritime transport' OJ L 299/1; European Commission, 'Commission Implementing Regulation (EU) 2016/1928 of 4 November 2016 on determination of cargo carried for categories of ships other than passenger, ro-ro and container ships pursuant to Regulation (EU) 2015/757 of the European Parliament and of the Council on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport' OJ L 299/22.

36 European Commission, 'Report from the Commission to the European Parliament and the Council Two years after Paris – Progress towards meeting the EU's climate commitments' COM (2017) 646 final, 17-18.

37 On 30 June 2019, the European Commission published for the first time information on the CO<sub>2</sub> emitted by ships over 5000 gross tonnage when performing maritime transport activities related to the European Economic Area (EEA). European Commission, 'Commission publishes information on CO<sub>2</sub> emissions from maritime transport' <[https://ec.europa.eu/clima/news/commission-publishes-information-co2-emissions-maritime-transport\\_en](https://ec.europa.eu/clima/news/commission-publishes-information-co2-emissions-maritime-transport_en)> accessed 17 May 2020.



As the EU has filled in the gaps that the IMO did not directly address, the latter has taken further action. The IMO<sup>38</sup> adopted the Fuel Oil Data Collection System (DCS) for international shipping, requiring ships of 5,000 gross tonnage or above to start collecting and reporting to their flag state the consumption data for each type of fuel oil they use. As prescribed by Rule 22, the flag state must transfer this data to the IMO Ship Fuel Oil Consumption Database and the SEEMP shall include a description of the methodology that will be used to collect the data and the processes that will be used to report the data to the ship's flag state.<sup>39</sup>

### 3.2 The Global Reach of EU Law: Unilateralism and Territorial Extension

Why did the EU decide to take unilateral action? First of all, the EU is fulfilling a customary obligation of due diligence in international environmental law.<sup>40</sup> In international environmental law, unilateral measures<sup>41</sup> fill a lacuna where an international norm is not discernible. These unilateral norms consist of amendments or annexes to existing treaties. Richard Bilder identified 5 different forms of unilateral environmental action: a) Those which face domestic problems; b) those which protect the territory of other states or other people present there from environmental threats that may arise in the territory of the regulating state; c) those directed to protect common spaces, such as aerial space or the high seas from those threats that may arise in the regulating state; d) those addressed to protect the population and the territory of the regulating state from those threats coming from abroad; and e) those threats directed to protect states from threats coming from abroad.<sup>42</sup> In relation to the International Law of the Sea, André Nollkaemper notes that that:

[a] multilateral framework does not entirely exclude unilateral action here either, as evidenced by unilateral extensions of jurisdiction and unilateral standards (even if these are compatible with international standards) and unilateral enforcement, for instance regarding fisheries conservation and environmental protection.<sup>43</sup>

38 IMO Resolution MEPC.278(70) (adopted 28 October 2016, entered into force 1 March 2018) 'Amendments to the Annex of the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto - Amendments to MARPOL Annex VI (Data collection system for fuel oil consumption of ships)' <[http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-\(MEPC\)/Documents/MEPC.278\(70\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Marine-Environment-Protection-Committee-(MEPC)/Documents/MEPC.278(70).pdf)> accessed 18 May 2020.

39 See also IMO, 'Data collection system for fuel oil consumption of ships' <<http://www.imo.org/en/ourwork/environment/pollutionprevention/airpollution/pages/data-collection-system.aspx>> accessed 17 May 2020.

40 Such obligation was admitted by the International Court of Justice (ICJ) in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, para 29; On similar grounds, see: *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, [2010] ICJ Reports 2010, 14, para 101. The ICJ said that a state is obliged to use all means at its disposal to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another state.

41 Unilateralism shall be defined as the pursuit of international goals without cooperating with other actors involved.

42 Richard Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury' (1981) 14 (1) *Vanderbilt Journal of Transnational Law* 51, 59-60.

43 André Nollkaemper, 'Unilateralism/Multilateralism', *Max Planck Encyclopedia of Public International Law* (March 2011) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1682>> accessed 17 May 2020.



Although some scholars<sup>44</sup> defend unilateral measures in environmental law, several declarations issued at multilateral summits have not been very supportive.<sup>45</sup> Therefore, states (in this case the EU) may decide to turn to unilateral measures and soften the jurisdictional boundaries that limit extraterritorial action.<sup>46</sup> As per Article 191(1) TFEU<sup>47</sup> the EU has taken the lead in tackling climate change. The EU institutions, member states and other actors involved have tried to offer leadership in EU and international climate change politics.<sup>48</sup> In light of this, the EU has been performing the role of ‘contingent unilateralism’. According to scholars,<sup>49</sup> such a ‘contingent’ character is based on the geographical extension of EU ETS and, consequently, EU climate change norms. The extension of such norms depends on the existence of an international agreement or further action undertaken by third states. Therefore, unilateral action will be avoided where goods or services are subject to an adequate protection that includes the same safeguards. This was also explicitly affirmed by Directive 2008/101/EC regarding the reduction of greenhouse emissions from aviation:

[...]bilateral arrangements on linking the Community scheme with other trading schemes to form a common scheme or taking account of equivalent measures to avoid double regulation could constitute a step towards global agreement.<sup>50</sup>

On these grounds, can this Regulation be considered to have an ‘extraterritorial’ dimension? In order to consider a measure as territorial or extraterritorial, several factors must be taken into account such as the nature of the conduct and where it took place. The extraterritoriality of a norm entails the

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44 Radka Sedlackova, ‘Legal obstacles to EU leadership on climate change’ (2012-2013) 17 (2) *Eastern & Central European Journal on Environmental Law* 37, 45; According to Radka Sedlackova, the unilateral action has contributed to the development of customary international law. Therefore, it is preferred unilateral action, instead of no action; see: Henrik Ringbom, ‘Global Problem—Regional Solution? International Law Reflections on an EU CO<sub>2</sub> Emissions Trading Scheme for Ships’ (2011) 26 (4) *The International Journal of Marine and Coastal Law* 613, 634-635. Following Ringbom, unilateral measures are possible: (i) if there is a strong link between the regulating state and environmental threat in question; (ii) if there is sufficient strong link between the measure and the environmental risk in question.

45 ‘Rio Declaration on Environment and Development’ Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) UN Doc A/CONF.151/26 (Vol. I), principle 12: ‘[...] Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided [...]’.

46 Nico Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108 (1) *American Journal of International Law* 1, 8.

47 Article 191(1) TFEU: ‘1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change’.

48 Rüdiger K.W. Wurzel, James Connelly & Duncan Liefferink (eds), *The European Union in International Climate Change Politics, Still taking a lead?* (Routledge, 2017) 3.

49 To delve into this issue see: Joanne Scott and Lavanya Rajamani, ‘EU Climate Change Unilateralism’ (2012) 23 (2) *European Journal of International Law* 469.

50 Directive 2008/101/EC (n 31), para 17.



‘extension’ of its effects and application beyond its borders under the principles for extraterritorial jurisdiction in public international law: the active personality principle, the passive personality principle, the protective principle, or the universality principle.<sup>51</sup>

Scholars like Joanne Scott differentiate between two kinds of extraterritoriality: a) Direct application of EU Law to parties or activities that take place in third states, without any territorial link to the EU; and b) territorial extension, which entails EU governance in activities not situated on its territory. However, the application of EU Law shall be based on any territorial connection.<sup>52</sup> Such ‘territorial extension’ was partially studied by some scholars in relation to the extension of certain laws to certain persons (foreigners in foreign ships in territorial waters) beyond its waters: ‘[I]nternational law might allow for an extension of certain laws to such persons, but this could not happen automatically, and would require legislation. In the absence of such legislation, the ordinary law of the local state would not extend over the waters in question [...]’<sup>53</sup>

The ‘territorial extension’ modality was partially admitted by the Court of Justice of the European Union (CJEU). In its judgment on the inclusion of aviation activities into the EU ETS cap and trade system, the CJEU concluded that the directives concerned did not entail an extraterritorial application: ‘that directive is not intended to apply as such to international flights flying over the territory of the member states of the EU or of third states when such flights do not arrive at or depart from an aerodrome situated in the territory of a member state.’<sup>54</sup> In other words, this norm did not intend to regulate greenhouse emissions beyond its territorial limits. The ‘extension’ or territorial link is justified because the flights analysed took off from or landed at an airport situated in EU territory.

If the EU starts promoting these standards and acts as a global actor to tackle climate change, third states (some of them underdeveloped) must comply with them. However, several underdeveloped

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51 As a remarkable example on this controversial area, the European Court of Human Rights (ECtHR) has pronounced several judgments regarding the possible application of the European Convention on Human Rights (ECHR) beyond its borders: The judgment *Bankovic* showed a strict approach to jurisdiction and admitted that the Convention would only apply to those areas under the effective territorial control of a contracting party. However, in another remarkable case, *Al-Skeini*, the ECtHR stated that the personal model of jurisdiction (‘exercise of sovereign powers’) shall enable the ECHR to be applied beyond its *legal space*. See: *Bankovic and others v Belgium and others* App no 52207/99, (ECtHR [GC], 12 December 2001), para 80; *Al-Skeini and others v UK* App no 55721/07 (ECtHR [GC] 7 July 2011), paras 134-136.

52 Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62 (1) *American Journal of Comparative Law* 87, 89-90 and 115. Although such distinction is not currently recognized in international law, Scott considers that both the territorial principle and the territorial extension are compatible. In addition, the CJEU has acknowledged the conformity of such distinction with customary international law, see: Case C-366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change* [2011] ECLI:EU:C:2011:864, para 129: ‘[...] the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied upon in the main proceedings, the full applicability of European Union law in that territory [...]’.

53 D. P. O’Connell & I. A. Shearer, *The International Law of the Sea: Volume II* (1st edn, Clarendon Press, Oxford University Press, 1984) 741.

54 Case C-366/10 (n 52), para 117.



states do not have the necessary means to comply with EU norms and have no choice but to apply less stringent standards.<sup>55</sup> The setting of differential standards or obligations entails treating states differently, in accordance with their special circumstances.<sup>56</sup> Usually, these kinds of differential standards appear in instruments such as the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and Article 2 of the Paris Agreement.<sup>57</sup> Further, EU norms, such as the Aviation Directive, are not in contradiction with the Principle of Common But Differentiated Responsibilities (CBDR) because an implicit example can be observed in the directive regarding the inclusion of aviation activities into the EU ETS cap and trade system. These norms will not be applied to those states that do not belong to the European Economic Space until 31 December 2023.<sup>58</sup> Therefore, the EU has set a precedent in order to respect environmental standards from developing countries which should be referenced in other areas such as data protection, for example. In relation to the specific field of maritime transportation, the Regulation should also respect the principle: the IMO has recently recognized the CBDR principle to be considered as a guiding principle and take into account the current capabilities in light of different circumstances.<sup>59</sup>

#### 4. Applicable Jurisdiction: Port State Jurisdiction v Flag State Jurisdiction v Coastal State Jurisdiction

Article 2 of the Regulation refers to ports outside the territory of the EU. Can we consider this norm to be 'extraterritorial' or does it amount to a case where the norm 'territorially extends'? The analysis of CO<sub>2</sub> emissions comprises the complete trip made by the ship, including the emissions produced

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55 Incidentally, in some other areas (such as the inclusion of climate change in the concept of 'national security') some underdeveloped states are reluctant to take further action, see: Rosa Giles Carnero, 'El cambio climático como riesgo y amenaza para la seguridad: derivaciones en el desarrollo del régimen jurídico internacional en materia de clima' (2016) 36 *Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades* 315, 325.

56 Peter H. Sand, 'Lessons Learned in Global Environmental Governance' (1991) 18 (2) *Boston College Environmental Affairs Law Review* 213, 224.

57 'Adoption of the Paris Agreement' (adopted 12 December 2015, entered into force 4 November 2016) United Nations Framework Convention on Climate Change (UNFCCC) UN Doc CP/2015/L.9/Rev.1. Article 2(2): '[T]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.'

58 Both Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions (2014) OJ L 129/1 and Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021 OJ L 350/7 have modified Article 28 of EU Directive 2003/87/EC with the aim of postpone its application beyond 2023. Article 1(6)(b) of 2017 Regulation amends Article 28(1) as follows: '[a]ll emissions from flights to and from aerodromes located in countries outside the EEA in each calendar year from 1 January 2013 to 31 December 2023, subject to the review referred to in article 28b.'

59 IMO Resolution MEPC.304(72) (adopted 13 April 2018) 'Initial IMO strategy on reduction of GHG emissions from ships', para 3.2 <<http://www.imo.org/en/OurWork/Documents/Resolution%20MEPC.304%2872%29%20on%20Initial%20IMO%20Strategy%20on%20reduction%20of%20GHG%20emissions%20from%20ships.pdf>> accessed 19 May 2020.



in journeys from or to ports in third states. Parameters such as total distance travelled, total time spent at sea, total transport work or average energy efficiency<sup>60</sup> feature in data regarding the annual monitoring plan foreseen in the Regulation.

Therefore, it seems that this norm may meet the requirements to become 'extraterritorial' and, consequently, may contradict flag state jurisdiction (Article 92 UNCLOS). However, some EU environmental norms have been considered as unilateral and scholars have questioned whether these norms can be 'extended' or not to avoid its qualification as 'extraterritorial'. Excessive definitions of territoriality may lead to misunderstanding with extraterritorial measures,<sup>61</sup> meanwhile an overly expansive interpretation of the territorial principle may lead to the doctrine of effects<sup>62</sup> for those facts that have taken place beyond a state's jurisdiction but it may suffer its negative consequences. Such events may justify a legitimate exercise of jurisdiction by the state affected.<sup>63</sup>

EU Regulation 757/2015 should be best considered as a norm that 'territorially extends'. Such territorialisation of the conduct can be confirmed by the fact that ports impose conditions to have access to domestic territory and markets if an economic operator satisfies certain standards.<sup>64</sup> Taking into account that Customary International Law (CIL) does not explicitly acknowledge the right of foreign ships to enter ports,<sup>65</sup> the measures applied by ports have a clear 'territorial' character.<sup>66</sup> The main measure to 'punish' those that do not meet the agreed standards should be the denial of entry into

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60 Article 10(g), (h), (i) and (j) EU Regulation 757/2015.

61 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford University Press, 1995) 76.

62 The 'effects principle' refers to the (civil) jurisdiction a state may exercise when foreign conduct produces substantial effects on its territory. See: Menno T Kamminga, 'Extraterritoriality', *Max Planck Encyclopedia of Public International Law* (November 2012) <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=S5B-2M5&result=1&prd=MPIIL>> accessed 17 May 2020.

63 Thomas Schultz, 'Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface' (2008) 19 (4) *European Journal of International Law* 799, 812; D. W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1982) 53 (1) *British Yearbook of International Law* 1, 7.

64 Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press, 2015) 95. If shipping is finally included in the ETS system, on similar grounds regarding the activity of aviation, some scholars asserted that the ETS system is no longer based on the physical presence of an aircraft, but rather on the exploitation of services provided by aerodromes in EU territory, which would justify the territorial extension of EU ETS. See: Christine Bakker & Francesco Francioni, *The EU, the US and Global Climate Governance* (Routledge, 2016).

65 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, [1986] ICJ Reports 1986, 14, para 213; See also: A. V. Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 (3) *San Diego Law Review* 597. On page 610, the author asserts that: '[P]ractice suggesting that a right of entry exists is rare.'

66 Robin Churchill, 'Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships—What Degree of Extra-territoriality?' (2016) 31 (3) *The International Journal of Marine and Coastal Law* 442, 444; It must be noticed that the 'extraterritoriality' or extension of the norm was not acknowledged by the IMO in the 1990's decade: the legal committee of the IMO considered that ship reports could refer to the territorial sea and exclusive economic zone but not to the high seas, see: IMO, 'Legal Issues Regarding Mandatory Ship Reporting Systems and Vessel Traffic Services' IMO Legal Committee Note by the Secretariat (12 August 1992) Doc LEG 67/8/1 + Add. 1, 2, 3 4, Annex paras 44–46.



the port, as is foreseen in Article 20(3) of the Regulation<sup>67</sup> and Article 211(3) UNCLOS.<sup>68</sup> A port may introduce laws that may arise *en route* to port<sup>69</sup> and also can impose clear territorial measures that can prevent common goods being endangered. According to Article 7(2) of the 2000 Directive on port reception facilities for ship-generated waste and cargo residues, a member state can require a ship to deliver its waste before departure from its port if there are good reasons to believe that there will not be adequate facilities at the intended port of delivery. Such measures will be taken with the aim of preventing marine pollution.<sup>70</sup>

In order to cope with greenhouse emissions from shipping the scope of application of this norm should have been the coastal zones of EU member states, i.e., coastal state jurisdiction, as Articles 211(4)<sup>71</sup> and 220(3)<sup>72</sup> UNCLOS are the key norms to be applied. In addition, coastal state jurisdiction<sup>73</sup> deals with key interest questions such as maritime security or environmental protection<sup>74</sup> in its

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67 EU Regulation 757/2015, Article 20(3): '3. In the case of ships that have failed to comply with the monitoring and reporting requirements for two or more consecutive reporting periods and where other enforcement measures have failed to ensure compliance, the competent authority of the Member State of the port of entry may issue an expulsion order which shall be notified to the Commission, EMSA, the other member states and the flag state concerned [...].'

68 Article 211(3) UNCLOS: '[S]tates which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. Whenever such requirements are established in identical form by two or more coastal States in an endeavour to harmonize policy, the communication shall indicate which States are participating in such cooperative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State participating in such cooperative arrangements, to furnish, upon the request of that State, information as to whether it is proceeding to a State of the same region participating in such cooperative arrangements and, if so, to indicate whether it complies with the port entry requirements of that State. This article is without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2.'

69 Bevan Marten, 'Port State Jurisdiction over Vessel Information: Territoriality, Extra-territoriality and the Future of Shipping Regulation' (2016) 31 (3) *The International Journal of Marine and Coastal Law* 470, 487.

70 Article 7(2) of the Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship generated waste and cargo residues [2000] OJ L 332/81.

71 Article 211(4) UNCLOS: '[C]oastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.'

72 Article 220(3) UNCLOS: '[W]here there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.'

73 Coastal states have their 'territorial' jurisdiction over demarcated zones in UNCLOS: (a) Internal waters-article 8; (b) territorial sea-article 2 and (c) exclusive economic zone-article 45.

74 Article 211(5) UNCLOS: '[C]oastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.'



affected maritime zones.<sup>75</sup> In addition, Regulation 11 of the Annex to the SOLAS Convention 1974 focuses on the subject of mandatory ship reporting systems. Coastal states are also entitled to establish unilaterally such a reporting system in the territorial sea on the condition that the operation does not result in undue interference with the innocent passage of foreign ships,<sup>76</sup> as regulated in Article 19 UNCLOS.

However, the EU Regulation is a clear example of the extension of the limits of the port state jurisdiction. Despite the lack of international practice on this provision, Article 218 UNCLOS<sup>77</sup> is key as it enables ports to prosecute offences committed in ports or coastal maritime zones. Given that Article 92 UNCLOS establishes close ties between a state and those ships that fly its flag (flag state jurisdiction), it is useful to consider what their role might be. In recent decades, international maritime regulations have considered that flag states have the primary responsibility over their ships,<sup>78</sup> as flag states must ensure that ships waving their flag comply with technical requirements regulated by the IMO and EU. MARPOL 73/78 and UNCLOS (Article 94) have enabled flag states to exercise prescriptive and enforcement jurisdiction to prevent vessel source pollution, including greenhouse emissions. On the other hand, some scholars concede that flag states may be unwilling or unable to adopt norms in this field or to enforce them due to several causes such as flags of convenience or the 'open registration' of ships.<sup>79</sup> In other words, port states can significantly complement the work of flag states in addressing substandard ships.<sup>80</sup> In this respect, the MEPC, in its 74<sup>th</sup> session held from 13 to 17 May 2019, adopted a resolution encouraging cooperation with ports to reduce emission from shipping.<sup>81</sup>

Therefore, port states' jurisdictions can develop an important task regarding the application of dif-

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75 Bevan Marten (n 69) 495.

76 Rüdiger Wolfrum, 'The Freedom of Navigation: Modern Challenges Seen from a Historical Perspective' in Lilian del Castillo (ed) *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea Liber Amicorum Judge Hugo Caminos* (Brill Nijhoff, 2015), 96.

77 Article 218(3) UNCLOS: '[W]hen a vessel is voluntarily within a port or at an off-shore terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag state for investigation of such a violation, irrespective of where the violation occurred.'

78 There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag, as stated by Article 5 of Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) [450 UNTS 11] and articles 91-92 UNCLOS. Similarly, see: *S. S. Lotus (France v Turkey)* [1927] PCIJ Series A No. 10, 22: '[I]nternational law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.'

79 Yubing Shi, *Climate Change and International Shipping: The Regulatory Framework for the Reduction of Greenhouse Gas Emissions* (Brill, 2016) 289.

80 Ho-Sam 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 (4) *The International Journal of Marine and Coastal Law*, 715.

81 IMO, 'Marine Environment Protection Committee (MEPC), 74th session, 13-17 May 2019' <[www.imo.org/en/Media-Centre/MeetingSummaries/MEPC/Pages/MEPC-74th-session.aspx](http://www.imo.org/en/Media-Centre/MeetingSummaries/MEPC/Pages/MEPC-74th-session.aspx)> accessed 17 May 2020.



ferent norms, as can be seen in Part XII of UNCLOS (Protection and Preservation of the Marine Environment). This jurisdiction has been relevant to fill in the gaps generated by the lack of jurisdiction in the high seas, the inefficiency of flag state jurisdiction and the lack of agreed international norms. In addition, Article 220(1) UNCLOS clearly expands the territorial jurisdiction of the port for those violations that take place in the maritime zones where it exercises sovereignty and certain sovereign rights in the 200 nautical miles exclusive economic zone. Therefore, port state jurisdiction must distinguish clearly those maritime zones where a state exercises its sovereign powers from those where it only exercises limited jurisdiction, such as the Exclusive Economic Zone (EEZ) and contiguous zones.<sup>82</sup> In order to support this kind of jurisdiction, some scholars assert that port state jurisdiction represents a compromise between coastal state jurisdiction and flag state jurisdiction: a) As ports are more prone to apply environmental standards than flag states; and b) port state jurisdiction is preferred to coastal state jurisdiction because it has less impact on the freedom of navigation and is safer.<sup>83</sup>

It must be noted that EU Regulation 757/2015 does not give full and exclusive jurisdiction to ports in order to monitor CO<sub>2</sub> emissions as Article 19 states that the flag state, on the basis of information collected enshrined in Article 21 and published by the EU Commission, shall adopt the necessary measures to ensure compliance with the monitoring and reporting requirements (as established in Articles 8-12 of the norm) to ships flying its flag. Therefore, a concurrent jurisdiction exists between the port and the flag state on this aspect. On this issue, Henrik Ringbom<sup>84</sup> cites the EU Directive 2009/16/EC in order to consider the EU as an active actor in turning certain jurisdictional rights of coastal and port states into obligations for its member states. However, he does not think that states' obligations relating to ship-source pollution can be shared. As the primary obligations are usually centred on the flag state, coastal and port states shall share obligations in relation to a pollution incident, but only when they take positive enforcement measures against a ship. As the Regulation does not give so much room to coastal state jurisdiction, perhaps the exercise of coercion to enforce norms can justify the exercise of jurisdiction and the 'territorialisation' of the facts through the port state. In case of normative gaps, the role of the port state may be strengthened in any European or international norm including an exclusion clause in order to enable ports to exercise their prescriptive jurisdiction as coastal states have more limited rights over foreign-flagged vessels. A coastal state that seeks to exercise control beyond the territorial sea and into the EEZ, must work directly with the flag state to fulfil both flag state and coastal state obligations, or to develop and exercise port state jurisdiction.

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82 Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* Hamburg Studies on Maritime Affairs 26 (Springer International Publishing Switzerland, 2014), 15. As stated by Article 33 UNCLOS, in a contiguous zone to the territorial sea, the coastal state is entitled to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulation and to punish such infringements from 12 to 24 nautical miles; Meanwhile in the EEZ the coastal state is entitled to explore and exploit, conserve and manage the natural resources superjacent to the seabed and of the seabed and its subsoil up to 200 nautical miles (Articles 56-57 UNCLOS).

83 Daniel Bodansky, 'Protecting the Marine Environment from Vessel Source Pollution: UNCLOS III and Beyond' (1991) 18 (4) *Ecology Law Quarterly* 719, 739.

84 Henrik Ringbom, 'Ship-Source Marine Pollution' in André Nollkaemper, Ilias Plakokefalos & Jessica Schechinger (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017) 265, 271-272.



## 5. Conclusion

The Regulation will be applied gradually in accordance with the deadlines foreseen in the norm. In regard to its specific impacts, the introduction of MRV may decrease fuel consumption up to 2% which will entail a reduction of fuel cost of €9.4 billion up to 2030. In addition, the total administrative costs (including verification) for the entire sector may amount to €80 million per year.<sup>85</sup>

Both the EU Maritime Security Strategy and the EU Global Strategy have acknowledged that climate change should be considered a security threat. The most worrying concerns could be the acidification of oceans or even climate refugees. Climate change will necessitate a reconceptualization of the international concept of security and new definitions of current threats must be sought in order to better tackle the challenges. It is true that these strategies mainly depend on the Common Foreign and Security Policy. But, at the time of writing, this Regulation has just been adopted by the EU Commission because it only foresees in the monitoring and verification systems. However, if new amendments are required and new suggestions (such as the inclusion of 'coercion' to compel third parties to comply with the norms) arise, the Council of the EU may participate as Common Security and Defence Policy (CSDP) issues need to be dealt with at an intergovernmental level. If this were to occur, the response of the EU may be slowed down as is currently the case with the IMO.

In relation to the scope of application of the norm, it does not have a clear 'extraterritorial character'. Flag states, port states and coastal states are stakeholders in this issue due to their prescriptive and enforcement jurisdiction foreseen in UNCLOS. Articles 52 TEU and 355 TFEU regulate the territorial scope of the EU treaties and EU secondary law. Moreover, as the CJEU noted, taking into account Article 227 of the former Treaty establishing the European Community (EC Treaty), this provision did not preclude EU rules from having effects outside its territory.<sup>86</sup> However, such a territorial extension of EU Law may clash with its prevalence over international norms in certain situations: As observed in connection with the *Kadi* decision,<sup>87</sup> EU law autonomy may sometimes prevail in cases of conflict, even concerning international agreements.

EU environmental norms have been considered as 'contingent' by several scholars and the EU has taken the lead on several occasions to combat various threats and common concerns in areas such as the protection of human rights, food standards, environmental law and, recently, data protection

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85 European Commission, 'Revision of Regulation of the European Parliament and the Council amending Regulation (EU) 2015/757 on monitoring, reporting and verification of carbon dioxide emissions from maritime transport, in view of an alignment with the IMO data collection system' (21 June 2017) <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=pi\\_com%3AAres%282017%293112662](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=pi_com%3AAres%282017%293112662)> accessed 17 May 2020.

86 Case C-214/94 *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR 1996/4-5/I-2253, para 14.

87 Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:2008:461, para 285: '[I]t follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty'.



(through the new General Data Protection Regulation (GDPR)). Sometimes the EU has attempted to influence third parties during bilateral or multilateral negotiations or even including human rights clauses in different agreements. These facts point to the conclusion that if EU policies on climate change protection and shipping are widely adopted, a crystallization of CIL will take place in order to develop and strengthen public international law. Such 'adoptions' may entail 'practice', which will be attributed to both states and international organizations that could create new international law rules.<sup>88</sup>

However, this norm tries to fill in the gap that has hitherto eluded the IMO (due to the lengthy procedures to adopt binding norms) and does so through a territorial institution like a port. Taking into account the EU Maritime Security Action Plan 2018, duplication of work strands is aimed to be avoided by the parties involved and initiatives to reduce greenhouse emissions must be sought in accordance with the IMO's initial strategy on the reduction of greenhouse gas emissions from ships.<sup>89</sup> Therefore, it should be considered that this measure is provisional until the time consensus is reached at the IMO for a binding norm. As example of the spirit of cooperation between the EU and the IMO in this field, the EU Commission recently proposed an amendment to the EU Regulation 757/2015 in order to take appropriate account of the IMO DCS with the aim to enable companies and administrators to streamline and reduce administrative efforts as well as to preserve the objectives of the Regulation.<sup>90</sup>

Although the right of entrance to a port cannot be taken for granted, all ships shall enter on a voluntary basis. Therefore, ships must comply with the requirements established in the Regulation. This prominent role of the port state jurisdiction analysed in this paper may create contradictions between European and international norms regarding the actors involved in mitigating greenhouse emissions.<sup>91</sup> Should the other UNCLOS jurisdictions take part in this controversy? Exchange of information between flag states with port states is key in ensuring reliability of data and ascertaining which steps have been taken. However, the enforcement jurisdiction for both flag state (Article 217 UNCLOS) and port state jurisdictions (Article 218 UNCLOS) will be key in strengthening the flow of data and allocating responsibilities between the states concerned (flag state and port state). As the coastal state also has competences over the maritime zones foreseen in UNCLOS, if further action cannot be taken by a coastal state against foreign-flagged vessels that are not complying with the environmental regulations on ship pollution, the port can play a complementary key role in enforcing environmental measures.

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88 Olivier Corten, *Méthodologie du droit international public* (Editions de l'Université Libre de Bruxelles, 2017) 153.

89 'Council conclusions on the revision of the European Union Maritime Security Strategy (EUMSS) Action Plan' (n 29) 10.

90 European Commission 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2015/757 in order to take appropriate account of the global data collection system for ship fuel oil consumption data' COM (2019) 38 final, 2.

91 It must be recalled that the EU is bound by international law, including customary international law, when exercising its powers, as stated by the CJEU in: C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECLI:EU:C:1992:453, para 9; C-162/96 A. *Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293, para 45; C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECLI:EU:C:2010:91, paras 40-43.



The EU Commission's obligations, as foreseen in the Regulation, may not be circumvented because this EU body is the main safeguard with a supervisory mandate in relation to the applications of EU treaties and norms. On the other hand, the IMO's role should be enhanced as well in order to reach a binding global norm on this urgent matter. In any case, EU Regulation 757/2015 foresees that an international norm will be adopted in the short term as Article 22(3) states that:

'[I]n the event that an international agreement on a global monitoring, reporting and verification system for greenhouse gas emissions or on global measures to reduce greenhouse gas emissions from maritime transport is reached, the Commission shall review this Regulation and shall, if appropriate, propose amendments to this Regulation in order to ensure alignment with that international agreement.'