

The European Union's Potential Contribution to Enhanced Governance of Arctic Shipping

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Abstract

This paper establishes what competences the EU has and how the EU can best use these competences to help generate an effective legal system for the governance of Arctic shipping. The first part briefly describes the current international legal regime that is applicable to the prevention of vessel-source pollution in the Arctic. The progress and debating points of adopting a

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mandatory Polar Code in the International Maritime Organization (IMO) are discussed. The second part assesses the EU's institutions, competence and role as flag, coastal and port state in the Arctic. Moreover, it analyses how the EU could make use of its internal and external influence to make concrete contributions to enhanced governance of Arctic shipping.

I. Introduction

The European Union (EU) is inextricably linked to the Arctic region by a unique combination of history, geography, economics and scientific achievements.¹ Three Arctic countries are EU Member States (Denmark, Sweden and Finland) and the EU maintains close relations with Iceland and Norway through the European Economic Area (EEA). Canada, Russia and the United States are also strategic partners of the EU. Within the context of the Arctic region, the European Commission (the Commission) has set out the EU's interests and has proposed action around three main policy objectives: 1) Protecting and preserving the Arctic in unison with its population; 2) Promoting sustainable use of resources; 3) Contributing to enhanced Arctic multilateral governance.² These steps have received the support of the Council of the European Union (the Council)³ and the European Parliament.⁴ In 2012, the Commission and the High Representative of the Union for Foreign Affairs and Security Policy (High Representative) affirmed that the EU shall increase its engagement in Arctic issues to meet the challenge of safeguarding the environment while ensuring the sustainable development of the Arctic region.⁵ These developments evidence the increasingly pro-active stance that the EU is taking with regard to the protection of the Arctic environment.

The impacts of climate change are particularly intense in the Arctic and pose considerable threats to the marine environment in this region. Climate change is by far the most serious threat to Arctic biodiversity and exacerbates all other threats.⁶ The Arctic, together with the Antarctic Peninsula,

¹ The European Union and the Arctic, COM (2008) 763 final, 20.11.2008, 2.

² COM (2008) 763 (note 1).

³ Council conclusions on Arctic issues, 8.12.2009.

⁴ A Sustainable EU Policy for the High North, 2009/2214 (INI), 20.1.2011.

⁵ Joint Communication Developing a European Union Policy towards the Arctic Region: Progress since 2008 and Next Steps, JOIN (2012) 19 final, 26.6.2012 (hereinafter: Joint Communication).

⁶ Arctic Biodiversity Assessment Report of Policy Makers, Conservation of Arctic Flora and Fauna Working Group, Arctic Council, 2013, 9.

experienced the greatest regional warming on earth in recent decades. Average annual temperatures have risen by about 2 to 3 °C since the 1950s and in winter by up to 4 °C.⁷ Arctic sea ice is therefore undergoing an historic transformation – thinning, extent reduction in all seasons and substantial reductions of multi-year ice in the central Arctic Ocean – which has significant implications for longer seasons of navigation and new access to previously difficult to reach coastal regions.⁸ According to the Arctic Report Card Update for 2012, sea ice extent reached the lowest observed level in the satellite record (1979-present), with a related continued decline in the extent of thick multi-year ice that forms in the central Arctic Basin.⁹ The United States National Oceanic and Atmospheric Administration (NOAA) projects that the Arctic could possibly be nearly free of summer sea ice during first half of the 21st century.¹⁰

Climate change is likely to result not only in changes to the Arctic environment, but also increased human activities within this fragile environment, such as shipping. On the one hand, three Arctic shipping routes, the Northern Sea Route (NSR) or Northeast Passage (NEP), the Northwest Passage (NWP) and the Transpolar Sea Route are potentially more attractive for shipping activities. As shipping seasons extend, Arctic shipping costs are reduced and point-to-point demand increases, traffic is expected to increase in future years.¹¹ On the other hand, ships might pose a great threat to the fragile Arctic marine environment. According to the Arctic Marine Shipping Assessment Report, the most significant threat would be the release of oil through accidental or illegal discharge. Additional potential impacts of Arctic ships include ship strikes on marine mammals, the introduction of invasive species, disruption of migratory patterns of marine mammals and anthropogenic noise produced from shipping; black carbon emissions from ships operating in the Arctic may have regional impacts by accelerating ice melt, while other ship emissions such as SO_x and NO_x, may have unintended consequences for the Arctic environment.¹²

⁷ Arctic Climate Impact Assessment Report, Arctic Council and International Arctic Science Committee, 2004, 3.

⁸ Arctic Marine Shipping Assessment Report, Protection of Arctic Marine Environment Working Group, Arctic Council, 2009, 8.

⁹ Arctic Report Card: Update for 2012, Executive Summary, 21.1.2013, available at <<http://www.arctic.noaa.gov>>.

¹⁰ NOAA, Arctic Nearly Free of Summer Sea Ice During First Half of 21st Century, 21.4.2013, available at <www.noaa.gov>.

¹¹ C. Emmerson/G. Lahn, Chatham House-Lloyd's Risk Insight Report, Arctic Opening: Opportunity and Risk in the High North, 2012, 29.

¹² Arctic Marine Shipping Assessment Report (note 8), 5.

It is not only the Arctic sea ice that is facing a step change. Arctic governance, along with and largely prompted by the natural system changes, is entering into a new dynamic.¹³ In order to meet the challenges of a changing Arctic, an approach that many find appealing features the development of a more comprehensive and legally binding Arctic Treaty,¹⁴ while others insist that there is a comprehensive governance framework based on the United Nations Convention on the Law of the Sea (UNCLOS)¹⁵ in particular, which provides the legal basis for the further development of the mechanisms and instruments.¹⁶ In any case, navigational issues are one of the plethora of governance issues that face a changing Arctic.¹⁷ It is agreed by many scholars that a further development for the regulation of shipping in the Arctic is in urgent need.¹⁸

In the wake of the “*Erika*” (1999) and “*Prestige*” (2002) oil tanker spill disasters, the EU has been successful in playing a lead role in the development of European and international law for preventing vessel-source pollution in the past decade.¹⁹ It is therefore hoped that the EU can make substantial contributions to the changing governance of Arctic shipping as well. The changing regime of Arctic shipping provides an opportunity for the EU to make its concrete contribution. This paper examines the EU’s role in the

¹³ D. French/K. Scott, International Legal Implications of Climate Change for the Polar Regions: Too Much, Too Little, Too Late?, *Melbourne Journal of International Law*, 10 (2009), 631 et seq.

¹⁴ O. Young, The Arctic in Play: Governance in a Time of Rapid Change, *Int’l J. Marine & Coastal L.* 24 (2009), 437. See also L. de La Fayette, Oceans Governance in the Arctic, *Int’l J. Marine & Coastal L.* 23 (2008), 566: “The elaboration of a regional seas agreement for the Arctic is required. It should reiterate the general principles in Part XII of the UNCLOS as well as those in the United Nations Fish Stocks Agreement, including the precautionary approach and the ecosystem approach.”

¹⁵ United Nations Convention on the Law of the Sea, 10.12.1982, UNTS 1833, 3.

¹⁶ A. H. Hoel, Do We Need a New Legal Regime for the Arctic Ocean?, *Int’l J. Marine & Coastal L.* 24 (2009), 455. See also O. S. Stokke, A Legal Regime for the Arctic? Interplay with the Law of the Sea Convention, *Mar. Pol’y* 31 (2007), 408: “Given the political impediments to reaching circumpolar agreement on a single comprehensive legal regime – notably the differing interests of Arctic states on such key issues as shipping and oil and gas activities, and the fact that many of the issues of concern are already regulated in global or regional treaties – the best answer would seem to be a flexible approach to norm-building that seeks productive interplay with existing institutions.”

¹⁷ C. Schofield/T. Potts, Across the Top of the World? Emerging Arctic Navigational Opportunities and Arctic Governance, *Carbon and Climate Change Law Review* 4 (2009), 478.

¹⁸ A. H. Hoel (note 16), 455; E. J. Molenaar, Arctic Marine Shipping: Overview of the International Legal Framework, Gaps and Options, *J. Transnat’l L. & Pol’y* 18 (2008-2009), 289 et seq.; A. Chircop, The Growth of International Shipping in the Arctic: Is a Regulatory Review Timely?, *Int’l J. Marine & Coastal L.* 29 (2009), 355 et seq.

¹⁹ N. Liu/F. Maes, The European Union’s Role in the Prevention of Vessel-Source Pollution and Its Internal Influence, *Journal of International Maritime Law* 15 (5) (2009), 411-422.

governance of Arctic shipping from a public international law perspective. The first part briefly describes the current international legal regime that is applicable to the Arctic shipping. The progress and debatable issues of adopting the mandatory Polar Code in the IMO are discussed. The second part assesses the EU's institutions, competences and roles as flag, coastal and port state in the Arctic. It also analyses how the EU could make use of its internal and external competence to make concrete contributions to the multi-level governance of Arctic shipping, especially on the protection of Arctic marine environment from vessel-source pollution.

II. International Legal Regime

1. United Nations Convention on the Law of the Sea

The Arctic is an ocean surrounded by continents. Maritime safety is an issue of common concern for the Arctic.²⁰ However, to date there is no specific international treaty that deals with shipping activities in the Arctic. As described by the Arctic Marine Shipping Assessment, the governance of Arctic shipping is like a complicated mosaic. The UNCLOS sets out the legal framework for the regulation of shipping according to maritime zones of jurisdiction. Other international agreements adopted by the IMO, such as the International Convention for the Prevention of Pollution from Ships 1973 and its Protocols (MARPOL),²¹ the International Convention for the Safety of Life at Sea (SOLAS),²² address specific elements of shipping.²³

Chapter 12 of the UNCLOS particularly deals with the protection of marine environment, including pollution from shipping. In the UNCLOS, a state's legislative or enforcement jurisdiction in respect of a particular vessel varies depending on whether it is a flag, coastal or port state.²⁴ Art. 211 of UNCLOS requires flag states to enact legislation that "shall at least have the same effect as" that of generally accepted international rules and standards. International standards therefore only form a minimum threshold for legislative jurisdiction of flag states. When it comes to enforcement jurisdiction,

²⁰ MM 8.-15.5.2013, Kiruna, Sweden, Vision for the Arctic, Arctic Council.

²¹ Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, 17.2.1978, UNTS 1340, 61.

²² International Convention for the Safety of Life at Sea, 1.11.1974, UNTS 1184, 278.

²³ Arctic Marine Shipping Assessment Report (note 8), 50.

²⁴ R. Churchill/A. Lowe, *The Law of the Sea*, 3rd ed. 1999, 344.

Art. 217 provides that flag states must enforce violations of pollution laws applying to their ships wherever committed.

Coastal state jurisdiction varies in the different maritime zones set out in the UNCLOS.²⁵ In the territorial sea, the coastal state may adopt laws and regulations without hampering innocent passage of foreign vessels for protecting marine environment (Art. 21 (1)). However, such laws and regulations cannot apply to design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards (Art. 21 (2)). In the Exclusive Economic Zone (EEZ), a coastal state may adopt pollution legislation for its EEZ which conforms and gives effect to “generally accepted international rules and standards established through the competent international organization or general diplomatic conference” (Art. 211 (5)). Art. 234 (Ice-Covered Area) of the UNCLOS²⁶ bolsters coastal state powers to regulate foreign shipping in order to prevent, reduce and control marine pollution in the Arctic.²⁷ Art. 234 was negotiated with regard to the Arctic Ocean with concerns related principally to vessel source oil pollution, be it deliberate or accidental.²⁸

Port state enforcement frequently plays an important part in preventing vessel-source pollution. Ports lie wholly within a state’s territory and therefore fall under its territorial sovereignty. Customary international law acknowledges a port state’s wide discretion in exercising jurisdiction over its port.²⁹ It is generally agreed that a vessel’s right of access to ports is only a presumption, not an obligation for port states.³⁰ This provides a legal basis

²⁵ C. Mooradian, Protecting “Sovereign Rights”: The Case for Increased Coastal State Jurisdiction over Vessel-Source Pollution in the Exclusive Economic Zone, Boston University Law Review 82 (2002), 767 et seq. J. Robert/M. Tsamenyi, The Regulation of Navigation under International Law: A Tool for Protecting Sensitive Marine Environments, in: T. M. Ndiaye/R. Wolfrum (eds.), Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah, 2007, 787 et seq.

²⁶ It reads: “Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.”

²⁷ Arctic Marine Shipping Assessment Report (note 8), 53.

²⁸ K. Bartenstein, The “Arctic Exception” in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?, ODIL 42 (2011), 24.

²⁹ E. J. Molenaar, Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage, ODIL 38 (2007), 227.

³⁰ L. de La Fayette, Access to Ports in International Law, Int’l J. Marine & Coastal L. 11 (1996), 1 et seq.

for port state jurisdiction. The international legal principle is that, within a port, the host state has absolute jurisdiction over visiting vessels in the same manner as if the visiting vessel was a foreign citizen vacationing or doing business in the host country.³¹ Under Art. 218 of the UNCLOS, the port state has jurisdiction (optional, not mandatory) over any discharge/offence from a vessel, even if it occurs outside its internal waters, territorial sea or EEZ. In practice, control of foreign vessels by port states is based on non-binding Memoranda of Understanding (MOUs) in different regions of the world, such as the Paris MOU (European Union & North America)³² and the Tokyo MOU (Asia-Pacific)³³.

2. IMO Conventions

For the governance of shipping, the UNCLOS provisions should be read together with international conventions adopted under the auspices of IMO: MARPOL, SOLAS, the International Convention on the Control of Harmful Anti-Fouling Systems on Ships (Anti-Fouling Convention)³⁴ and the International Convention for the Control and Management of Ships' Ballast Water and Sediments (Ballast Water Management Convention)³⁵. MARPOL and its amendments cover all technical aspects relating to the prevention and reduction of pollution from ships, except the disposal of waste into the sea by dumping. SOLAS Regulations establishes navigational systems such as ships' routing, ship reporting and vessel traffic services.

Ships operating in the Arctic are indeed exposed to a number of unique risks. As described by the IMO, "poor weather conditions and the relative lack of good charts, communication systems and other navigational aids pose challenges for mariners. The remoteness of the areas makes rescue or clean-up operations difficult and costly. Cold temperature may reduce the effectiveness of numerous components of the ship, ranging from deck machinery and emergency equipment to sea suction. When ice is present, it can

³¹ *T. McDorman*, Regional Port State Control Agreements: Some Issues of International Law, *Ocean & Coastal L. J.* 5 (2000), 210.

³² Paris MOU, available at <<http://www.parismou.org>>.

³³ Tokyo MOU, available at <<http://www.tokyo-mou.org>>.

³⁴ International Convention on the Control of Harmful Anti-Fouling Systems for Ships, 5.10.2001, IMO documents: Final Act AFS/CONF 25 and Resolutions 1, 2, 3, 4 (E/F/S).

³⁵ International Convention on Ballast Water Management for Ships, 6.2.2004, IMO documents: Final Act BWM/CONF/37 (not yet in force).

impose additional loads on the hull, propulsion system and appendages”.³⁶ Moreover, the IMO has developed various requirements for ships operating in the Arctic concerning matters such as stability, life-saving appliance, navigation, special area status, carriage requirements for heavy grade fuel oil and certification of ice navigators.³⁷

Regulation 6 of Chapter V SOLAS provides that: “The Contracting Governments undertake to continue an ice patrol and a service for study and observation of ice conditions in the North Atlantic. During the whole of the ice season, i. e. for the period from February 15th through July 1st of each year, the south-eastern, southern and south-western limits of the region of icebergs in the vicinity of the Grand Banks of Newfoundland shall be guarded for the purpose of informing passing ships of the extent of this dangerous region; for the study of ice conditions in general; and for the purpose of affording assistance to ships and crews requiring aid within the limits of operation of the patrol ships and aircraft. During the rest of the year the study and observation of ice conditions shall be maintained as advisable.”³⁸ Other Regulations, such as Regulation 31 (Dangerous messages) and Regulation 32 (Information required in dangerous messages), also touch shipping activities in the Arctic by obliging ship masters to communicate the ice information by all means at their disposal to ships in the vicinity, and also to the competent authorities.

Special mandatory requirements for certain areas (special areas) regarding the prevention of operational discharges of harmful substances are contained in Annexes I, II and V of MARPOL. A special area is a sea area where for recognized technical reasons in relation to its oceanographical and ecological conditions and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution by oil, noxious liquid substances, or garbage, as applicable, is required.³⁹ The Antarctic area was designated as a special area under MARPOL Annexes I and V by resolution MEPC 42 (30). Nevertheless, so far the Arctic is not considered as a special area under MARPOL.

There are also several non-legally binding guidelines that specifically deal with Arctic shipping. These include the 2008 International Code on Intact

³⁶ P-1.1. IMO Resolution A. 1024 (26), Guidelines for Ships Operating in Polar Waters, 18.1.2010, A26/Res.1024.

³⁷ H. Deggim, Ensuring Safe, Secure and Reliable Shipping in the Arctic Ocean, in: P. A. Berkman/A. Vylegzhanin (eds.), Environmental Security in the Arctic Ocean, 2013, 242.

³⁸ 2 Regulation 6 (Ice Patrol Service), Chapter V (Safety of Navigation), SOLAS.

³⁹ Guidelines for the Designation of Special Areas under MARPOL 73/78, 29.11.2001, IMO Documents: A 22/Res 927.

Stability,⁴⁰ the 2012 Guide for Cold Water Survival,⁴¹ the 2006 Enhanced Contingency Planning Guidance for Passenger Ships Operating in Areas Remote from SAR Facilities,⁴² and the 2007 Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas.⁴³ Moreover, the International Association of Classification Societies (IACS) has adopted the IACS Unified Requirements Concerning Polar Class Ships. The IACS requirements for Polar Class Ships (UR-I) are not IMO requirements, however, they are referred to in IMO Guidelines for Ships Operating in Polar Waters.⁴⁴

3. Polar Code

A new legal regime for ice-navigation began to emerge on the international agenda in the 1990s. Mindful of the disaster of the oil tanker *Exxon Valdez* off the coast of Alaska in 1989, Germany proposed the inclusion of the following rule in Chapter II of SOLAS: "Ships intended for service in polar waters should have suitable ice strengthening for polar conditions in accordance with the rules of a recognized classification society."⁴⁵ The IMO recognized the need for Arctic-specific provisions additional to the requirements contained in the existing IMO instruments. In 2002, IMO approved non-mandatory Guidelines for Ships Operating in Arctic Ice-Covered Waters.⁴⁶ Member States were invited to bring the guidelines to the attention of ship-owners and other parties concerned with the operation of ships in Arctic ice-covered waters. In 2009 the IMO adopted the Guidelines for Ships Operating in Polar Waters,⁴⁷ covering both Arctic and Antarctic waters.

⁴⁰ International Code on Intact Stability, 4.12.2008, Resolution MSC.267 (85), IMO documents: MSC/85/26-Add-1.

⁴¹ Guide for Cold Water Survival, 30.11.2012, IMO document: MSC.1/Circ.1185/Rev.1.

⁴² 2006 Enhanced Contingency Planning Guidance for Passenger Ships Operating in Areas Remote from SAR Facilities, 31.5.2006, IMO documents: MSC.1/Circ.1184.

⁴³ Guidelines on Voyage Planning for Passenger Ships Operating in Remote Areas, 3.1.2008, IMO documents: A 25/Res. 999.

⁴⁴ G-3.19, Guidelines for Ships Operating in Polar Waters, Resolution A.1024 (26), 18.1.2010, IMO documents: A 26/Res.1024.

⁴⁵ Ø. Jensen, Arctic Shipping Guidelines: Towards a Legal Regime for Navigation Safety and Environmental Protection?, Polar Record 44 (2008), 108.

⁴⁶ Guidelines for Ships Operating in Arctic Ice-Covered Waters, 23.12.2002, IMO documents: MSC/Circ.1056, MEPC/Circ.399.

⁴⁷ Guidelines for Ships Operating in Polar Waters, Resolution A. (1024) 26, 18.1.2010, IMO documents: A 26/Res.1024.

Although the IMO guidelines aim at enhancing effectiveness of Arctic shipping governance through national and international mechanisms, in a non-binding form, the guidelines' contribution to maritime safety in the Arctic seems rather limited, simply because the guidelines are not implemented by countries.⁴⁸ Moreover, shipping is an activity with intensive communication between different states and individuals and should be regulated by uniform/international conventions.⁴⁹ The adoption of a mandatory International Code of Safety for Ships Operating in Polar Waters (Polar Code) has been discussed within the IMO's Sub-Committee on Ship Design and Equipment for years. The progress seems to be quite slow. In 2009, the foreign ministers of the eight Member States of the Arctic Council approved the Arctic Marine Shipping Assessment Report and called upon the IMO to formulate and adopt mandatory international standards for ships operating in Arctic waters.⁵⁰ Then three Arctic states, Denmark, Norway and the United States, proposed that a new work programme item be added to the agendas of the Sub-Committee as a high priority item to consider and develop mandatory requirements for the Polar regions. The target completion date for the Sub-Committee was originally 2012. It was, however, postponed to 2014 due to unsolved issues as discussed below.

There are two issues that lack an agreement regarding the adoption of a mandatory Polar Code.⁵¹ The first issue is ice strengthening standards and requirements for Polar class ships. There are different sets of ice strengthening standards (e. g. Finnish/Swedish and Russian ice classes) that would need to be harmonised. There are also different views under which ice conditions which ice strengthening requirements are needed, in particular whether ships sailing in areas with less than 10 % (young) ice need ice strengthening. The second issue is about additional environmental protection requirements for shipping activities in the Polar Regions. There is strong pressure from the environmental NGOs to apply a maximum level of envi-

⁴⁸ Ø. Jensen (note 45), 111.

⁴⁹ E. J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (1998), 18 et seq.

⁵⁰ Tromsø Declaration on the Occasion of the Sixth Ministerial Meeting of Arctic Council, 4. It reads: "Urge that the ongoing work in the IMO to update the Guidelines for Ships Operating in Arctic Ice-Covered Waters be completed, application of its relevant parts be made mandatory, and global IMO ship safety and pollution prevention conventions be augmented with specific mandatory requirements or other provisions for ship construction, design, equipment, crewing, training, and operations, aimed at safety and protection of the Arctic environment."

⁵¹ The analysis is based on interviews with the European Maritime Safety Agency (EMSA) representative to the IMO.

ronmental protection to Arctic shipping activities.⁵² This is supported by countries such as Norway, Australia and New Zealand, but strongly opposed by shipping industry and large flag states such as Russia and China. Russia also has a particular concern in respect to a ban proposed by NGOs for the carriage of heavy grade oil in the Arctic, similar to the ban that already exists in the Antarctic.⁵³ This is because there is a need for Russia to transport heavy grade oil to supply settlements/local communities in the Arctic (e. g. the northern edge of Siberia).

Furthermore, several other issues might need to be considered in a Mandatory Polar Code. These include 1) clear definitions of ice-covered waters, open waters and ice-free waters; 2) whether and how the Polar Code could be applied to existing vessels; 3) implementation of an ecosystem-based management approach for the protection of the Arctic marine environment from shipping.⁵⁴

4. Arctic Council

One body appears to have the potential capacity to address Arctic shipping – the Arctic Council. The Arctic Council was established in 1996 as a high-level forum by the Declaration on the Establishment of the Arctic Council (Ottawa Declaration). The choice of a non-legally binding instrument is a clear indication that the Arctic Council was not intended to be an international organization.⁵⁵ It is, however, an important forum for discussion and cooperation among the eight Arctic States (United States, Canada, Russia, Norway, Sweden, Denmark, Finland and Iceland) and non-Arctic States. The Arctic Council does provide some oversight through, e. g. the Protection of Arctic Marine Environment and the Conservation of Arctic

⁵² See comments and response to IMO Polar Hazard Identification Workshop draft output by Clean Shipping Coalition, Friends of the Earth International, International Fund for Animal Welfare, in: Polar Code Hazard Identification Workshop Report, 29-36, 24.11.2011, DE 56/INF.3, Annex 3, IMO.

⁵³ Regulation 43, MARPOL Annex I. Regulation 43 prohibits both the carriage in bulk as cargo and the carriage and use as fuel, of: crude oils having a density, at 15 °C, higher than 900 kg/m³; oils, other than crude oils, having a density, at 15 °C, higher than 900 kg/m³ or a kinematic viscosity, at 50 °C, higher than 180 mm²/s; or bitumen, tar and their emulsions.

⁵⁴ Developing a Mandatory Polar Code, Progress and Gaps, Paper Presented by Antarctica and Southern Ocean Coalition (ASOC), XXXIV Antarctica Treaty Consultative Meeting, 1.7.2011, available at <<http://www.asoc.org>>. The suggestions from ASOC focused on the Antarctica. However, it is interesting for governance of Arctic shipping as well.

⁵⁵ *E. J. Molenaar*, Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea, *Int'l J. Marine & Coastal L.* 27 (2012), 659.

Fauna and Flora programme. The Arctic Council has already sponsored numerous scientific studies that have been instrumental in alerting the world to the transboundary pollution and climate change challenges facing the Arctic.⁵⁶ Moreover, in the 2011 Nuuk Ministerial Meeting, the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic was adopted.⁵⁷ An Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic was adopted during the 2013 Kiruna Ministerial Meeting.⁵⁸ They are both binding agreements among eight Arctic States.

It seems fairly clear that before the full realisation of the rapidity of climate change consequences in the region, especially the receding and thinning sea ice, the work that the Arctic Council did in the field of shipping was marginal.⁵⁹ Nevertheless, by welcoming China, India, Italy, Japan, the Republic of Korea and Singapore as new Observer States in the Eighth Ministerial Meeting,⁶⁰ it is anticipated that the Arctic Council will play a more important role in the future Arctic governance. The Arctic Council is uniquely positioned to make recommendations regarding Arctic policies based on the information gained from their scientific assessments.⁶¹ For example, the Arctic Marine Shipping Assessment Report was produced in 2009 by the Arctic Council, which is a unique work that no other intergovernmental organization could do.⁶² This shows that the Arctic Council could possibly act as a catalyst for governance actions and/or take initiatives for the development of international and regional legal regimes on Arctic shipping. The Arctic Council is maybe particularly well-suited for projects requiring the communal efforts of the Arctic states, such as gaining Particular Sensitive Sea Areas (PSSA) designation or collaborating with the IMO.⁶³ Furthermore, the Arctic Council does have a potential to foster the adoption of international agreements with a focus on Arctic shipping.

⁵⁶ *T. Koivurova/D. VanderZwaag*, The Arctic Council at 10 Years: Retrospect and Prospects, U. B. C. L. Rev. 40 (2007), 121 et seq.

⁵⁷ Available at <<http://www.arctic-council.org>>.

⁵⁸ Available at <<http://www.arctic-council.org>>.

⁵⁹ *T. Koivurova*, Governing Arctic Shipping: Finding a Role for the Arctic Council, Yearbook of Polar Law 2 (2010), 137.

⁶⁰ MM 08.-15.5.2013-Kiruna, Sweden, Kiruna Declaration, 6.

⁶¹ *S. Dresser*, Safeguard the Arctic from Accidental Oil Pollution: The Need for a Binding, Region-Specific Shipping Regime, Southwestern Journal of International Law 16 (2010), 546.

⁶² *T. Koivurova* (note 59), 138.

⁶³ *S. Dresser* (note 61), 546.

5. Gaps

It is suggested that a systematic review of international maritime safety instruments with reference to increased international shipping in the Arctic as a result of new routes is timely.⁶⁴ It has been well identified by *Molenaar* that the international legal regime on the governance of Arctic Shipping has several gaps. These include: 1) no special IMO discharge, emission or ballast water exchange standards for the Arctic marine area; 2) no comprehensive mandatory or voluntary IMO ships' routeing for the Arctic marine area in its entirety or a large part thereof; 3) no legally binding special construction, design, equipment and manning (CDEM) requirements as well as fuel content and ballast water treatment standards.⁶⁵ In the author's opinion, the changing regime of Arctic Shipping provides an opportunity for the EU to make its concrete contribution. The EU could take initiatives at both internal and external level to fill in the gaps of the governance of Arctic shipping. The EU's potential contribution will be analysed in detail in the following part.

III. European Union and Arctic Shipping

1. Competences

The EU is a relative newcomer in Arctic affairs. This stems in part from the fact that Arctic governance has so far been heavily dominated by geographical notions of who counts as a relevant Arctic policy actor.⁶⁶ It is true that none of the EU Member States are coastal states of the Arctic Ocean (both the Faroe Islands and Greenland, as self-governing entities of Denmark, are not part of the EU). The EU, however, does have competences to deal with issues in the Arctic, such as shipping.

The EU declared as a condition to join the UNCLOS that maritime transport, safety of shipping and the prevention of marine pollution contained *inter alia* in UNCLOS Parts II, III, V, VII and XII are considered to be areas of shared competences between the EU and Member States, but also subject to continuous development.⁶⁷ Moreover, Art. 191 of the Treaty on

⁶⁴ *A. Chircop* (note 18), 374.

⁶⁵ *E. J. Molenaar* (note 18), 318.

⁶⁶ *T. Koivurova/K. Kokko/S. Duyck/N. Sellheim/A. Stepien*, The Present and Future Competence of the European Union in the Arctic, *Polar Record* 48 (2012), 361.

⁶⁷ Declaration Concerning the Competence of the European Community with regard to Matters Governed by the United Nations Convention on the Law of the Sea of 10 December

the Functioning of the European Union (TFEU,⁶⁸ ex Art. 174 of the EC Treaty) provides that Union policy on the environment shall contribute to the pursuit of promoting measures at the international level to deal with regional or worldwide environmental problems, in particular combating climate change. Therefore, the EU is competent to develop both internal and external legislation with respect to shipping in the Arctic.

Internally, European law is applicable to the Arctic with regard to the northernmost regions of Sweden and Finland. When it comes to Arctic shipping, the EU has not only competence to regulate ships under EU Member States' flags but also to legislate in the area of port state control and ships utilising any EU port.⁶⁹ The European Court of Justice (ECJ) in the leading *ERTA/AETR* Case clearly stated that the Community acquires external competence when it adopts internal legislation on the same subject-matter.⁷⁰ The EU therefore implicitly acquired external competence on the basis of the expansion of its maritime safety legislation during the past decade. The *ERTA/AETR* principle is still expanding. In Case C-45/07 (*Commission v. Greece*), the ECJ provides that: "The mere fact that the Community is not a member of an international organization in no way authorises a Member State, acting individually in the context of its participation in an international organization, to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty. Moreover, the fact that the Community is not a member of an international organization does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest."⁷¹ This case shows a significant trend that in the EU's interest, especially where the EU is not able to represent itself directly, does not merely require that the Member States conform their unilateral positions to the EU policy. It requires them to act together to formulate and present an EU position.⁷² The EU is then capable to act through its Member States in the decision making process of the IMO and the Arctic Council.

1982 and the Agreement of 28 July 1994 Relating to the Implementation of Part XI of the Convention, Council Decision of 23.3.1998, OJ L179 of 23.06.1998, 1.

⁶⁸ Treaty on the Functioning of the European Union, OJ C 83/47 of 30.3.2010.

⁶⁹ *T. Koivurova/K. Kokko/S. Duyck/N. Sellheim/A. Stepien*, EU Competencies Affecting the Arctic, DG for External Policies Policy Department, European Parliament, 2010, 21.

⁷⁰ ECJ, Case C-22/70, *Commission v. Council*, para. 19, 1971 ECR.263; See also *V. Frank*, The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level, 2007, 63.

⁷¹ ECJ, Case C-45/07, *Commission v. Hellenic Republic*, paras. 30, 31.

⁷² *M. Cremona*, Extending the Reach of the AETR Principle: Comment on *Commission v. Greece* (C- 45/07), E.L.Rev. 34 (2009), 768.

The Agreement on the European Economic Area (EEA Agreement)⁷³ is signed by the EU and the European Free Trade Association (EFTA: Norway, Iceland and Liechtenstein), and covers two Arctic states (Norway and Iceland). The EEA Agreement reaffirms the high priority attached to the privileged relationship between the EU, its Member States and the EFTA States, which is based on proximity, long-standing common values and European identity.⁷⁴ The EEA Agreement aims at promoting a continuous and balanced strengthening of trade and economic relations between Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area.⁷⁵ The non EU members of the EEA (Iceland, Liechtenstein and Norway) have agreed to enact legislation similar to that passed in the EU in relation to four fundamental freedoms (free movement of goods, services, capital and persons).⁷⁶ In the field of maritime transport, the Contracting Parties of the EEA Agreement will coordinate their actions and measures towards third countries and third countries companies.⁷⁷ After the EEA Agreement entered into force, new EU acts, usually regulations and directives, are technically made part of the EEA Agreement when the EEA Joint Committee takes individual decisions in line with Art. 7 EEA Agreement.⁷⁸ The majority of EU maritime safety legislations are listed in Annex 13 of the EEA Agreement.⁷⁹ Theoretically, via EEA Agreement, the EU law regarding Arctic shipping could possibly be implemented in the Norwegian and Icelandic part of the Arctic as well.

⁷³ Agreement on the European Economic Area, OJ No L 1, 3.1.1994, 3; and EFTA States' Official Gazettes, updated on 15.11.2011.

⁷⁴ Preamble, para. 2, EEA Agreement.

⁷⁵ Art. 1, EEA Agreement, 1.1.1994.

⁷⁶ The Common Agriculture Policy and the Common Fisheries Policy are however excluded from the scope of the EEA internal market, *T. Koivurova/K. Kokko/S. Dudyck/N. Sellheim/A. Stepien* (note 69), 17.

⁷⁷ Protocol 19, EEA Agreement, 1.1.1994.

⁷⁸ *A. Jóhannsdóttir*, The European Union and the Arctic: Could Iceland's Accession to the EU Change the EU's Influence in the Arctic?, *GYIL* 54 (2011), 367.

⁷⁹ Annex 13, EEA Agreement, 4.5.2013, 52 et seq.

2. Institutions

a) European Commission

The European Commission issued its Communication about the EU and the Arctic Region in 2008 (COM (2008) 763 final). It is believed by the Commission that Arctic challenges and opportunities will have significant repercussions on the life of European citizens for generations to come. It is imperative for the EU to address them in a coordinated and systematic manner, in cooperation with Arctic states, territories and other stakeholders.⁸⁰ The EU's transport policy objectives in the Arctic are set by the Commission as: 1) it is in the EU's interest to explore and improve conditions for gradually introducing Arctic commercial navigation, while promoting stricter safety and environmental standards as well as avoiding detrimental effects; 2) Member States and the EU should defend the principle of freedom of navigation and the right of innocent passage in the newly opened routes and areas.

The Commission holds observer status and participates in IMO meetings based on the Agreement of Mutual Co-operation concluded by the Commission and the IMO Secretary-General in 1974. Within the Commission, Directorate General (DG) Mobility and Transport (DG MOVE) created in February 2010 when energy was split from the former DG Transport and Energy (DG TREN), is the most relevant DG to deal with maritime safety matters in the IMO.⁸¹ It has a Maritime Safety Unit and a representative on behalf of the EU to the IMO. DG Environment is also competent in matters such as ballast water management and air pollution from shipping, dealt with in the Marine Environment Protection Committee (MEPC) of the IMO. DG Maritime Affairs and Fisheries (DG MARE) has its C1 Unit: Maritime Policy, Atlantic, Outermost Regions and Arctic. This Unit is actually coordinating the Commission's work related to the Arctic. For example, C1 drafted the COM (2008) 763 final and sends one representative on behalf of the EU to the Arctic Council.

⁸⁰ COM (2008) 763 final, 20.11.2008, 2 et seq.

⁸¹ The Commission creates two new Directorates-General for Energy and Climate Action, 17.2.2010, available at <<http://europa.eu>>.

b) Council of the European Union

Final decisions of European law-making are taken by the Council of the European Union and the European Parliament. The Council adopted its conclusions on Arctic issues in 2009, which welcomed the Commission's Arctic Communication in 2008.

The Council emphasised that the EU's policy on Arctic issues should be based on the UNCLOS and other relevant instruments.⁸² Moreover, it is believed by the Council that a reinforced multilateral governance of the Arctic could be achieved through strengthening and consistent implementation of relevant international, regional and bilateral agreements, frameworks and arrangements.⁸³ The Council therefore stressed the importance that Member States in their capacity as flag, port and coastal states should continuously promote and monitor the full implementation and further improvement of existing rules on navigation, maritime safety and security, vessel routing systems and environmental standards derived from the applicable international conventions concerning the Arctic, in particular within the IMO framework.⁸⁴ The Council welcomes and encourages the adoption of a mandatory Polar Code within the IMO.⁸⁵ The Council even provides some specific suggestions regarding Arctic shipping, such as to further explore the options and consequences of exchanging Automatic Identification System (AIS) information with no-EU/EEA Arctic States.⁸⁶

c) European Parliament

The European Parliament's legislative power has increased following the enactment of the Treaty of Lisbon.⁸⁷ The former co-decision procedure has now become the ordinary legislative procedure and applies as the default procedure.⁸⁸ The Parliament can take initiatives on what position EU Member States have to take regarding Arctic issues.

The Parliament has been an active participant in the work of the Standing Committee of Parliamentarians of the Arctic Region. In 2009, the Parliament adopted its "A Sustainable EU Policy for the High North" resolution, as a

⁸² Council Conclusions on Arctic Issues, 8.12.2009, 1.

⁸³ Council Conclusions on Arctic Issues (note 82).

⁸⁴ Council Conclusions on Arctic Issues (note 82), para. 13.

⁸⁵ Council Conclusions on Arctic Issues (note 82), para. 12.

⁸⁶ Council Conclusions on Arctic Issues (note 82), para. 14.

⁸⁷ Art. 14 (1) TEU.

⁸⁸ Art. 289 TFEU.

further step in the definition of an EU policy for the Arctic following the Commission and the Council. The Parliament points out that in spite of the efforts on a mandatory Polar Code, a faster solution to the issue of safety of Arctic shipping might be found through coordination and harmonisation of national legislation and calls on the European Maritime Safety Agency (EMSA) to concern itself to the maximum with Arctic shipping.⁸⁹ The Parliament supports the ban on the use and carriage of heavy fuel oil on vessels operating in the Antarctic, as approved by the IMO. It believes that a similar ban might be appropriate in Arctic waters as well.⁹⁰

d) High Representative and European External Action Service

The High Representative – a post currently held by *Catherine Ashton* – exercises, in foreign affairs, the functions previously held, the High Representative for Common Foreign and Security Policy and the European Commissioner for External Relations. The European External Action Service assists the High Representative in ensuring the consistency and coordination of the Union's external actions as well as by preparing policy proposals and implementing them after their approval by the Council.

The High Representative, together with the Commission, published the Joint Communication on the EU's Policy towards the Arctic in 2012 (JOIN (2012) 19 final). This is the latest EU policy document with respect to the Arctic. The EU is prepared to assist in the development of sustainable Arctic shipping.⁹¹ It is once again declared that the EU, through the Commission and Member States, supports the development of a mandatory "Polar Code" by the IMO.⁹² It is reaffirmed that a key EU policy objective remains full compliance with international law and principles as defined in UNCLOS, including the principles of freedom of navigation and the right of innocent passage.⁹³

⁸⁹ European Parliament Resolution of 20.1.2011 on a Sustainable EU Policy for the High North (2009 / 2214 (INI)), para. 12.

⁹⁰ European Parliament Resolution (note 89), para. 28.

⁹¹ Joint Communication (note 5), 9.

⁹² Joint Communication (note 5), 9.

⁹³ Joint Communication (note 5), 17.

3. Current Roles

a) The EU as a Flag State

The EU plays a major role in today's shipping world, 41 % of the world's total fleet (in dwt) is beneficially controlled by EEA companies. The EEA registered fleet is 224 million gross tonnage, representing 22 % of the world tonnage, the pure EU share being 19.3 %.⁹⁴ As almost 90 % of EU external trade is carried out at sea, the EU has significant experience in shipping, ship-building, satellite navigation, search and rescue as well as port infrastructure development.⁹⁵ The failure by the EU to establish a common ship register in the 1990s has not prevented it from establishing the foundation of an EU-wide flag state policy.⁹⁶ As part of the Third Maritime Safety Package (*Erika III* package), the EU adopted Directive 2009/21/EC on Compliance with Flag State Requirements in 2009. It aims 1) to ensure that Member States effectively and consistently discharge their obligations as flag states; and 2) to enhance safety and prevent pollution from ships flying the flag of a Member State.⁹⁷

Escorted by two Russian icebreakers, the German cargo ships *Beluga Fraternity* and *Beluga Foresight* of Bremen-based *Beluga Shipping GmbH*, crossed the Northeast Passage in summer 2009. The company showed its strong interest in the Arctic shipping in coming years.⁹⁸ Moreover, a recent survey provides that several European shipping companies are interested in developing activities in the Arctic. It is believed by those shipping companies that transit through Arctic routes, especially between Europe and Asia through the Northern Sea Route, could potentially save costs.⁹⁹ The EU

⁹⁴ European Community Shipowners' Association Annual Report 2011-2012, 9, available at <<http://www.ecsa.eu>>.

⁹⁵ Joint Communication (note 5), 4.

⁹⁶ *H. Ringbom*, *The EU Maritime Safety Policy and International Law*, 2008, 171.

⁹⁷ Art. 1, Directive 2009/21/EC, OJ L 131/132, 28.5.2009.

⁹⁸ It is declared by the *Beluga* company that: "we have booked in contracts for the shipment of project and heavy lift cargo with single weights of up to 1,000 tons that are to be discharged offshore onto barges in Siberia for their adjacent transport into the according destinations. The oil and gas producing industry as well as infrastructure extensions are well developing in Siberia and the temporarily open Northeast-Passage brings certain carriers closer and more directly to the market which has previously been impossible. In 2010, we will apply the new generation vessels of the *Beluga P*-class (subject to permission). With these 'super heavy lift powerhouses' using the Northeast-Passage might result in financial savings of about 600,000 US-Dollars per vessel and transit", *Beluga Shipping, The Arctic Shortcut, Shipping in Arctic Waters*, Brussels, 9.12.2009.

⁹⁹ *S. Pelletier/F. Lasserre*, *Arctic Shipping: Future Polar Express Seaways? Shipowners' Opinion*, *J. Mar. L. & Com.* 43 (2012), 557.

could always extend its flag state control to ships flying the flag of a EU Member State in the Arctic.

b) The EU as a Coastal State

The EU does not include any Arctic coastal Member State. Greenland became governmentally autonomous within Denmark¹⁰⁰ and is not an EU Member State.¹⁰¹ Therefore, under UNCLOS, the EU plays a limited role as a coastal state in the Arctic.

Although Iceland is not recognised as a coastal state by the Arctic Five (United States, Russia, Canada, Norway and Denmark),¹⁰² Iceland's EEZ stretches beyond the Arctic Circle. Iceland's application for an EU membership might change the EU's role as a coastal state in the Arctic. Iceland formally presented its application on 16.7.2009.¹⁰³ However, the new euro-sceptic government in Iceland has withdrawn its bid to join the European Union on 24.6.2013.¹⁰⁴

c) The EU as a Port State

The EU is a major destination of resources and goods from the Arctic region. For example, 88 % of the EU's total output of iron ore is produced in the Barents Region.¹⁰⁵ It is estimated that the Northern Sea Route could shorten the time taken by cargo vessels to travel between the Pacific and the Atlantic by about one third.¹⁰⁶ In case trans-Arctic shipping will be booming in the future, a large amount of commercial vessels will possibly end in a major European port, such as Rotterdam, London or Hamburg. This gives the EU an important role as a port state to regulate Arctic shipping.

Port state control in the EU is one of the most successful examples of the EU's effort to improve maritime safety within European water. The EU made use of its competence by adopting Directive 95/21/EC¹⁰⁷ which

¹⁰⁰ Art. 22 of Act No.473/2009 on Greenland's Self-Government.

¹⁰¹ Treaty amending, with regard to Greenland, the Treaties Establishing the European Communities, OJ L 29/1, 1.2.1985.

¹⁰² The Ilulissat Declaration, 28.5.2008, available at <www.oceanlaw.org>.

¹⁰³ Available at <eeas.europa.eu>.

¹⁰⁴ Iceland opts out of joining the EU, 24.6.2013, available at <<http://www.icenews.is>>.

¹⁰⁵ Joint Communication (note 5), 3.

¹⁰⁶ Joint Communication (note 5), 3.

¹⁰⁷ Directive 95/21/EC of 19.6.1995, OJ 1995 L 157.

pre-empted national law and upgraded the commitments of the Paris MOU making them binding and uniform. After the 1999 *Erika* oil tanker disaster, Directive 2001/106/EC¹⁰⁸ was enacted as a part of the *Erika I* Maritime Safety Package in order to make compulsory rather than discretionary the inspection system of certain potentially dangerous ships, tighten up regulations relating to manifestly substandard ships and ensure the more effective implementation of Directive 95/21/EC. The Regulation 1726/2003 introduced an immediate ban on the transport of heavy-grade oil (HGO) in single-hulled tankers and laid down that in the future only double hulled vessels would be allowed to carry HGO within or from the EU after the *Prestige* oil tanker spill disaster.¹⁰⁹ A more ambitious regime was established by Directive 2009/16/EC¹¹⁰ in the *Erika III* package, increasing pressure on high-risk ships, reforming the control mechanisms in port states to make them more efficient and creating a new collective target for Europe as a whole to check all ships, with more frequent inspections of high-risk ships.¹¹¹ The EU law improved the quality of port state control in the Member States by harmonising the standards and information exchange for port state controllers and by its compliance regime, which contributes to uniform practices in the region and eliminates potential EU “ports of convenience”.

4. Potential Contributions

The EU's policy objectives towards Arctic shipping are outlined by documents published by the Commission, Council, Parliament and High Representative in recent years, especially by the COM (2008) 763 final as mentioned above.¹¹² It is proposed by the Commission that the EU should 1) fully implement existing obligations concerning navigational rules, maritime safety, routes system and environmental standards in the Arctic, in particular those under the IMO; 2) stress the need to avoid discriminatory practices (fees, obligatory services) by any of the Arctic coastal states towards third countries' merchant fleet; 3) improve maritime surveillance capacities in the far North; 4) maintain the competitive lead of European

¹⁰⁸ Directive 2001/106/EC of 19.12.2001, OJ 2001 L 19.

¹⁰⁹ Art. 1 (4) (b), Regulation 1726/2003 amending Regulation (EC) No. 417/2002, OJ 2003 L 249/1.

¹¹⁰ Directive 2009/16/EC of 23.4.2009, OJ 2009 L 131/57.

¹¹¹ Summary of the Port State Control Directive of the Third Maritime Safety Package, DG Maritime Transport, European Commission, available at <<http://ec.europa.eu>>.

¹¹² COM (2008) 763 final of 20.11.2008, 8 et seq.

shipyards in developing technology required for Arctic conditions; 5) explore support for designating some Arctic navigation routes as PSSAs.¹¹³ The following part will provide some suggestions on how the EU could make use of its internal and external influence to achieve its policy objectives.

a) Internal Influence

In the wake of the *Erika* and *Prestige* oil tanker disasters, there has been a visible political shift by the EU to be more proactive and responsible for the protection of the marine environment rather than waiting for a consensus in international decision making by the IMO. The EU has adopted a series of directives and regulations for the protection of the marine environment of European waters.¹¹⁴ With the adoption and subsequent implementation of the *Erika III* package, the EU now declares to have one of the world's most comprehensive and advanced regulatory frameworks for shipping.¹¹⁵ The EU is, however, not a member of the IMO, nor is it a contracting party to most IMO conventions. This situation provides disadvantages and advantages as far as the EU's work on shipping is concerned. On the one hand, the Commission has no jurisdiction to take steps to ensure that MARPOL provisions are implemented and respected by EU Member States. On the other hand, it is in the advantageous position to take initiatives at EU level.¹¹⁶ For example, Regulation (EC) 782/2003 on the prohibition of organotin compounds on ships¹¹⁷ was to be applied by EU Member States before the entry into force on 17.9.2008 of the Anti-Fouling Convention. Moreover, with the unique compliance regime of European law, the EU has a better chance for establishing more exhaustive, effective and rapid legislation on the European level and to enforce this legislation towards Member States.¹¹⁸

As discussed above, the adoption of a mandatory Polar Code has been debated within the IMO for years. The progress is quite slow. There are actually limited existing obligations concerning navigational rules, maritime safety, route systems and environmental standards in the Arctic under the

¹¹³ COM (2008) (note 112).

¹¹⁴ COM (2000) 142 final of 21.3.2000 (*Erika I* package) and COM (2000) 802 final of 6.12.2000 (*Erika II* package).

¹¹⁵ COM (2009) 8 final of 21.1.2009, 7.

¹¹⁶ M. H. Robinson, Protection of the Marine Environment and the European Union: Some Critical Reflections on Law, Policy and Practice, JIML 10 (2004), 270.

¹¹⁷ Regulation (EC) 782/2003 of 9.5.20, OJ L 115/1.

¹¹⁸ N. Liu/F. Maes (note 19), 415 et seq.

IMO. This, however, gives the EU an opportunity to take its own initiatives at the European level.

The first question regarding the EU's potential internal action might be whether the EU should adopt a new Arctic Shipping Directive, or strengthen existing EU maritime safety legislation with special focus on the Arctic. In the author's opinion, it might be feasible for the EU to take the latter pathway in the foreseeable future. The EU has already established a comprehensive legal regime to regulate shipping. With the adoption and subsequent implementation of the *Erika III* package, the EU and the Member States are giving priority to the enforcement of existing EU and international rules and the speedy implementation of measures introduced by the three *Erika* packages.¹¹⁹

The second question is what specific measures the EU could consider with respect to Arctic shipping. One suggestion could be the implementation of the BWM Convention in advance for any EU flagged ships in the Arctic. The vulnerable Arctic marine ecosystem is threatened by pollution from increasing trans-Arctic maritime transport, such as invasive species from ballast water. The BWM Convention was adopted in 2004 with the specific focus of controlling the threat of invasive species from ballast water. Although the BWM Convention is not yet in force, some states, e. g., the United States, Australia, and Brazil, have been pro-active and have implemented domestic measures consistent with the provisions of the BWM Convention.¹²⁰ Nevertheless, the EU's involvement in ballast water management so far has been limited. The Commission only "strongly recommended" the ratification of the BWM Convention and has participated in the development of interim measures to reduce the risk of non-indigenous species being introduced through the discharge of ship's ballast water in the four Regional Seas Organizations (HELCOM, the OSPAR Commission, REMPEC/Barcelona Convention and the Black Sea Commission).¹²¹ For the protection of such a vulnerable and unique marine ecosystem as the Arctic, the EU could once again act in advance (as it did for the Anti-Fouling Convention) to implement the BWM Convention before its entry into force. The EU has the technology¹²² to require ships flying the flag of a Member State to install an IMO-approved ballast water management system when sailing in the Arctic.

¹¹⁹ COM (2009) (note 115), 7.

¹²⁰ C. Hewitt, Marine Biosecurity Issues in the World Oceans: Global Activities and Australian Directions, *Ocean Yearbook* 17 (2003), 193 et seq.

¹²¹ Implementing the Ballast Water Management Convention – the EU Dimension, Workshop Report, European Maritime Safety Agency, available at <<http://www.emsa.europa.eu>>.

¹²² Current lists of Ballast Water Management Systems, which received Type Approval Certification, Basic and Final Approval, October 2012, available at <<http://www.imo.org>>.

The entry into force of the BWM Convention is in any case emerging.¹²³ The EU then would not only set a model for the international community for the protection of the Arctic marine environment, but also take the lead and create incentives for the development of regional and international law.

Another suggestion could be the ban on the carriage and/or use of heavy grade oil for trans-Arctic ships that enter into any EU port. The EU's concern with the pollution that might be caused by heavy grade oil is clear. The EU Regulation 1726/2003 introduced a ban on the transport of heavy-grade oil in single-hulled tankers and laid down that only double hulled vessels would be allowed to carry HGO within or from the EU. Moreover, with effect from 1.7.2005 the Western European Tanker Reporting System comes into force in the Western European Particularly Sensitive Sea Area. Every kind of oil tanker of more than 600 tonnes deadweight, carrying a cargo of: 1) heavy crude oil, meaning crude oils with a density at 15 °C of higher than 900 kg/m³; 2) heavy fuel oils, meaning fuel oils with a density at 15 °C of higher than 900 kg/m³, or a kinematic viscosity at 50 °C of higher than 180 mm²/s, are required to participate.¹²⁴ The EU of course is not able to ban the carriage and/or use of heavy grade oil for Russian vessels which supply settlements/local communities in the Arctic. It is, however, allowed under UNCLOS to strengthen the EU's port state control on the carriage and/or use of heavy grade oil by trans-Arctic ships. The EU is a significant economic force with a consumer base exceeding even that of the United States. Ship owners rely heavily on the Western European trade and can scarcely afford the costs of European unilateralism.¹²⁵ So far, most shipping in the Arctic is still destinational, moving goods into the Arctic for community re-supply.¹²⁶ Nevertheless, in the future when there are more commercial trans-Arctic shipping activities, the EU's internal ban might have a strong external influence to push the international ban of heavy grade oil in the Arctic.

¹²³ N. Liu, Current Legal Developments: China: Prevention of Invasive Species from Ballast Water, *Int'l J. Marine & Coastal L.* 28 (2013), 175.

¹²⁴ Adoption of Mandatory Ship Reporting System in the Western European Particularly Sensitive Sea Area, Resolution MSC 190 (79), 6.12.2004, MSC 79/23/Add.2.

¹²⁵ A. Tan, Vessel-Source Marine Pollution, the Law and Politics of International Regulation, 2006, 88.

¹²⁶ Arctic Council Arctic Marine Shipping Assessment 2009 Report, 91.

b) External Influence

aa) IMO

It is recognized by the EU that UNCLOS and the IMO remain the major basis for Arctic cooperation concerning maritime issues.¹²⁷ The Commission, with the assistance of EMSA, is seeking coordination and arranging meetings with EU Member States, prior to IMO sessions, in order to build EU common positions on EU relevant topics.¹²⁸ In 2005, the “Procedural framework for the adoption of Community or common positions for IMO related issues and rules governing their expression in the IMO” (SEC (2005) 449, Procedural Framework) was drafted by the Council.¹²⁹ Despite the fact that the Procedural framework not being formally approved, it is voluntarily used in practice. It is fair to say that despite the EU's lack of membership in the IMO, its coordination process for influencing IMO decision making is generally deemed to be quite effective and successful so far.¹³⁰ However, not always do EU Member States, especially those with strong shipping interests such as Malta, Cyprus, Greece and Poland, follow the decisions adopted at the Coordination process. It seems that no substantial measures can be taken by the EU to deal with this problem since the coordination process is not legally binding.¹³¹

With respect to the Arctic shipping, the EU should also coordinate with Norway and Iceland. Currently, Norway and Iceland are invited to participate in the on-the-spot coordination meetings in London and in the prior meetings in Brussels. However, the prior meetings are Shipping Working Party (SWP expert) meetings of the Council. Norway and Iceland are formally not allowed to participate in SWP meetings as they are not Member State. This obstacle is overcome by not convening as a SWP expert meeting first and then at the end of the meetings request Norwegian and Icelandic delegates to leave the room. Afterwards, the meeting continues/reconvenes as a formal SWP (expert) meeting and reconfirms the outcome of the preceding meeting. Norway and Iceland also need a special invitation to attend the coordination process, otherwise they are not even allowed to enter the Council building in Brussels where the SWP expert meeting takes place.

¹²⁷ SWD (2012) 182 final of 26.6.2012, 30.

¹²⁸ SWD (2012) (note 127), 23.

¹²⁹ SEC (2005) 449 of 1.4.2005.

¹³⁰ N. Liu/F. Maes, The European Union and International Maritime Organization: EU's External Influence on the Prevention of Vessel-Source Pollution, J. Mar. L. & Com. 41 (2010), 588.

¹³¹ V. Frank (note 70), 264.

Having participated in these meetings in which positions for the EU Member States are concluded, Norway and Iceland are expected to support these positions within the IMO. If they disagree with any position concluded by EU Member States, they can make reservations. There is no case so far that Norway and Iceland did not comply with these arrangements. This allows Norway and Iceland to influence EU decision making. It is also expected that Norway and Iceland should comply with what has been agreed. Nevertheless, the arrangement has no legal basis. This means that in case Norway or Iceland do not support the EU positions within the IMO, there is almost nothing that the EU can do. It is therefore suggested that a reinforced coordination process is in need for the EU to improve the effectiveness of its involvement in the IMO.¹³² Moreover, the EU needs to better engage with Iceland since Iceland so far rarely participates in the coordination process.

The designation of the Western European Particular Sensitive Sea Areas could be seen as successful practice of the EU's external influence on the IMO decision making process.¹³³ Nevertheless, it seems to be very difficult for the EU to pursue the designation of the whole Arctic Ocean as a Particular Sensitive Sea Area without support of the coastal states such as Russia, the United States and Canada.

Alternatively, the EU could first consider convincing Norway and then the IMO to establish a PSSA around Svalbard. A 200-mile Fishery Protection Zone around Svalbard was established by the Norwegian government in 1977. Norwegian sovereign rights in the 200-mile EEZ are, however, disputed.¹³⁴ For example, Russia does not acknowledge Norwegian jurisdiction

¹³² N. Liu/F. Maes (note 130), 594.

¹³³ After the "Prestige" disaster, which seriously threatened coastal areas of Portugal, Spain, France and Belgium, the EU, through those Member States together with the United Kingdom and Ireland, submitted a proposal to the MEPC asking for the designation of Western European Waters as a PSSA. The proposal covers a vast area from the Shetland Islands north of Scotland to the southern Portuguese-Spanish border in the respective States' EEZ and territorial seas. The proposal created concerns about its potential violation of the LOSC for hampering freedom of navigation in such a large sea area, which is traditionally a busy shipping traffic area, e. g. English Channel. However, the WE PSSA was designated by the IMO on 15.10.2004. See IMO MEPC Resolution 121 (52), Designation of the Western European Waters as a Particularly Sensitive Sea Area, 15.10.2004.

¹³⁴ "Under a treaty of 1920 Norway's sovereignty over Svalbard was recognised, while the other States parties to the Treaty were accorded equal rights to carry on certain economic activities, including fishing and mining, in Svalbard's territorial waters. By virtue of its sovereignty, Norway is entitled to establish the full range of maritime zones in respect of Svalbard. It has established a 12-mile territorial sea and a 200-mile fishery protection zone (rather than an Exclusive Economic Zone) around Svalbard. Svalbard also has a continental shelf, extending beyond 200 miles in places. The Norwegian government argues that the equal rights of fishing and mining do not apply beyond the territorial sea, whereas a number of other States parties take the opposite view." See R. Churchill/G. Ulfstein, *The Disputed Maritime Zones Around*

in the waters around the Arctic archipelago of Svalbard and believes that Russian vessels are not obliged to follow Norwegian law in the area unless the rules have been approved by the Norwegian-Russian Joint Fishery Commission.¹³⁵ In the era of climate change and ice-melting, the designation of a 200-mile Svalbard PSSA might result in better prevention of marine pollution from increasing Arctic shipping. As long as it is approved by the IMO, there will be no dispute regarding the jurisdiction of a coastal states, in this case, Norway. The EU could at least try to persuade Norway within the coordination process and then submit a proposal to the IMO.

bb) Arctic Council

It is believed by the EU that the Arctic Council is the most important forum for international cooperation in the region.¹³⁶ The Commission applied, on behalf of the EU, for observer status in the Arctic Council on 1.12.2008. The EU's application was, however, deterred in the Eighth Ministerial Meeting of the Arctic Council. It is stated by the Kiruna Declaration that "The Arctic Council receives the application of the EU for observer status affirmatively, but defers a final decision on implementation until the Council ministers are agreed by consensus that the concerns of Council members, addressed by the President of the European Commission in his letter of 8 May are resolved, with the understanding that the EU may observe Council proceedings until such time as the Council acts on the letter's proposal".¹³⁷ The EU's application is strongly opposed by Canada due to the EU's ban on import and export of seal products into the EU internal market. In the author's opinion, Regulation 1007/2009 on Trade in Seal Products (so called Seal Ban) is a perfect example to show the external impact on Arctic issues caused by the EU's internal legislation.¹³⁸ The EU was not granted observer status yet,¹³⁹ the EU Member States France, Germany, the Netherlands, Poland, Spain, the United Kingdom and Italy all have observer sta-

Svalbard, in: M. Nordquist, J. N. Moore/T. Heidar (eds.), *Changes in the Arctic Environment and the Law of the Sea*, 2010, 551 et seq.

¹³⁵ Russia Wants to Discuss Svalbard Fisheries Protection Zone, 6.10.2011, available at <<http://barentsobserver.com>>.

¹³⁶ SWD (2012) (note 127), 27.

¹³⁷ Kiruna Declaration on the Occasion of the Eighth Ministerial Meeting of the Arctic Council, MM, 8.-15.5.2013, Kiruna, Sweden, 6.

¹³⁸ Regulation 1007/2009 on Trade in Seal Products, 31.10.2009, OJ L 286/36. The Regulation is challenged by Canada in the World Trade Organization. See also *T. Perišin*, *Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges*, ICLQ 62 (2013), 373 et seq.

¹³⁹ According to the Commission, the EU was already admitted as an observer of the Arctic Council in condition that the EU could solve its seal ban issue with Canada. Interviews with Head of the C1 Unit, DG Mare, European Commission.

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tus in the Arctic Council. It is expected by Arctic Council Member States that observers will make relevant contributions, especially at the level of Working Groups.¹⁴⁰

It is suggested that the EU could learn from its experience regarding IMO issues to set up its coordination process for Arctic issues within the Arctic Council. So far, DG Mare and EEAS together send staff in order to follow activities in the Arctic Council. Those representatives could become facilitators/coordinators for the coordination process in the future. It is foreseeable that Denmark, Finland and Sweden may be in fear of losing their own voice and role on Arctic issues. Nevertheless, the EU, to speak with one voice, will play a much more important role in the Arctic governance, especially when negotiating with major powers such as the United States, Russia and China.

IV. Conclusions

The EU has concrete competences to make substantial contributions to the governance of Arctic shipping. As a non-member of the IMO, the EU has flexibility to take initiatives at the European level to remedy gaps of current international law applicable to Arctic shipping. Internally, the EU could impose its legislation to any ships flying a flag of an EU Member State in the Arctic. It is suggested that the EU could implement the BWM Convention before its entry into force for EU flagged vessels in the Arctic. This will not only set a model in the international community, but also create incentives for the development of regional and international law. As an economic power and potential destination for trans-Arctic shipping, the EU could strengthen its port state control in respect to the carriage and/or use of heavy grade fuels by trans-Arctic shipping. This may have a strong external influence for the adoption of a mandatory Polar Code.

Externally, the EU should reinforce its non-legally binding coordination process and better engage/incorporate with Norway and Iceland. With an enhanced coordination process, the EU could pursue its policy objectives within the IMO more effectively. For example, the EU might consider proposing the establishment of a PSSA around Svalbard.

Finally, if the EU could learn from its practice regarding IMO issues to set up a coordination process within the Arctic Council, it is foreseeable that the

¹⁴⁰ P. Graczyk/T. Koivurova, A New Era in the Arctic Council's External Relations? Broader Consequences of the Nuuk Observer Rules for Arctic Governance, *Polar Record* (2013), 8, available at: CJO2013, doi:10.1017/S0032247412000824.

EU may play a much more important role in the decision-making process of the Arctic Council.

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