THE 'ERIKA III' PACKAGE: PROGRESS OR BREACH OF INTERNATIONAL LAW?

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1. Introduction

The 'Erika III' package is the third set of legislative measures with which the European Union (EU) has responded to the sinking of the oil tankers *Erika* (1999) and *Prestige* (2002).[2] It contains rules that are primarily intended to increase safety at sea—as opposed to security at sea. In a 2004 resolution on improving safety at sea, the European Parliament emphasized that 'rapid and complete introduction and strict enforcement' of the measures adopted by the Member States with the 'Erika I' and 'Erika II' packages must have top priority.[3] At the same, however, it made manifest that the Commission should quickly present its more comprehensive proposal for improving maritime safety as had already been announced.[4] With regard to the relationship between the International

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[2] The 'Erika I' package consists of the following measures: Regulation (EC) 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) 2978/94 [2002] OJ L64/1; Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001 amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions [2002] OJ L19/17; Directive 2001/105/EC of the European Parliament and of the Council of 19 December 2001 amending Council Directive 94/57/EC on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations [2002] OJ L19/9. The 'Erika II' package contains the following legislative acts: Regulation (EC) 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency [2002] OJ L208/1; Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC [2002] OJ L208/10.

[3] European Parliament Resolution 2003/2235 (INI) of 30 April 2004 on improving safety at sea [2003] OJ C 104E/730 para 8.

[4] Ibid., para 9.

Maritime Organization (IMO) and the EU, the parliament, while expressing its understanding for the concerns raised by the Secretary-General of the IMO over the unilateral and regional actions of States outside the IMO framework, stated that

> [unilateral] EU action [...] may sometimes be necessary in the interests of safety [...], moreover, that EU measures can act as a catalyst within the IMO, as in the case, for example, of the accelerated phasing-out of single-hulled tankers.[5]

With this, the European Parliament not only embraced the widely held view that the global safety standards adopted under the auspices of the IMO were insufficient—the first recital of the Decision emphasizes that 'various incidents in European waters have caused pollution since the Erika and Prestige disasters'—but, at the same time, presented an opportunity to shape the manner of cooperation between the two organizations. Indeed, the EU is predestined for the realization and, above all, the enforcement of the pertinent international standards due to its supranational character and economic power.[6] It is precisely this effort to resolve a potential jurisdictional conflict that is meant when the European Parliament speaks about the EU becoming a 'catalyst' for the IMO.

One year later in its Communication of 23 November 2005, the Commission presented its third catalog of maritime safety measures as called for by the Parliament.[7] In no way did it limit itself to the sole objective of improving safety at sea, however. The fundamental problem identified here was 'transit traffic, outside the jurisdiction of the Member States, involving high-risk vessels flying the flag of third countries'.[8] According to the Commission, the measures already adopted would need to be intensified in a manner that takes the importance of the shipping industry for European competitiveness into account.[9] The ongoing development of European maritime safety policy would represent a contribution toward 'strengthen[ing] the safety aspects of the integrated European maritime policy being developed',[10] which would include economic, social and

[5] Ibid., para 36.

[6] Wolfgang Graf Vitzthum, 'Schiffssicherheit: Die EG als potentieller Durchsetzungsdegen der IMO' (2002) 62 ZaöRV 163, 177.

[7] Communication from the Commission COM (2005) 585 final of 23 November 2005 Third package of legislative measures on maritime safety in the European Union.

[8] Ibid., 6.

[9] Ibid., 3.

[10] Ibid.

ecological concerns as well as security issues. This would ultimately involve achieving a balance between the 'conservation of resources and the improvement of competitiveness, long-term growth and employment in the maritime sector'.[11] Indirectly, the Commission also aimed at the creation of an open market for maritime transport services at the Union and international levels.[12] This explains the considerably greater emphasis placed on maritime law in the 'Erika III' package in comparison to its two predecessors. In addition, it has often been voiced that the EU should become a member of the IMO[13]—a wish that has yet to be satisfied and, due to the lack of revision to the IMO's founding instrument,[14] which does not provide for the membership of international organizations, also could not be satisfied so far.

The legislative package proposed by the Commission consisted of six directives and two regulations. After the drafts were in part significantly modified over the course of the legislative process, the final versions of the individual components of the 'Erika III' package entered into force in May 2009. They were based on the narrow and subject-specific competence norm contained in Art. 100 (2) of the Treaty on the Functioning of the European Union (TFEU)[15] which arguably enjoys priority over other competence norms with a more general character that could have also been considered.[16]

In the following text, an overview of the 'Erika III' measures will first be presented before proceeding to the current case law of the European Court of Justice (ECJ), focusing in particular on the example of the *Intertanko* decision and its relevance for assessing the EU's competences as an actor in international relations. This primarily concerns the existence and location of the direct and indirect boundaries on the actions of the

[11] Ibid.

[12] Clearly ibid., 4.

[13] See also Recommendation SEC (2002) 381 final from the Commission to the Council of 9 April 2002 in order to authorise the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community.

[14] Cf. Art. 4 of the Convention on the International Maritime Organization of 6 March 1948, 289 UNTS 3: 'Membership in the Organization shall be open to all States, subject to the provisions of Part III'.

[15] Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47.

[16] See Alexander Proelss, *Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks* (Duncker und Humblot 2004) 314 et seq. Following Martin Nettesheim, 'Horizontale Kompetenzkonflikte in der EG' [1993] EuR 243, 248.

Union drawn by international law, as well as their potential transgression. Thereafter, the insights made in this process will be applied to the question of whether the components of the 'Erika III' package are compatible with global maritime safety standards valid under international law. The contribution concludes with reflections on the relevance of the topic for the general development of international law.

2. The 'Erika III' Package: An Overview

The 'Erika III' measures, on the whole, aim at establishing more stringent standards in regard to controls, liability and insurance.[17]

In accordance with Directive 2009/21/EC on compliance with flag State requirements,[18] a safety inspection must always be performed before a vessel is granted the right to fly the flag of an EU Member State (cf. Art. 4). The Directive provides that the administrations of the Member States are subject to an IMO audit at least every seven years (cf. Art. 7); this involves a scheme to review the extent to which a State has satisfied the obligations specified in the binding IMO instruments to which it has become a party.[19] Within the EU, the performance of such audits is thus no longer at the discretion of the Member States. In addition, the Member States must develop, implement and update a quality management system, which must be certified according to international standards, for the operational aspects of its administrative activities in regard to flag State obligations by mid-2012 (cf. Art. 8). Irrespective of these requirements, the provisions of the Directive are far behind that of the Commission's original draft, which aimed at establishing a comprehensive and truly European shipping administration (including the introduction of a European flag).

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[17] See already the general expositions by Yves van der Mensbrugghe, 'Le paquet Erika III: Un bouquet varié de propositions concernant la sécurité de l'Union Européenne', [2006] ADM XI 85 et seq.; id., Le paquet Erika III sur la sécurité maritime dans la Communauté Européenne enfin ficelé [2009] ADM XIV 295 et seq.; Uwe Jenisch, 'New EU Legislation on Safety at Sea 2009', (2009) 146 Hansa International Maritime Journal 52 et seq.

[18] Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements [2009] OJ L131/132.

[19] The following IMO documents form the basis for the audit scheme: A 23/Res.946 of 27 November 2003, Voluntary IMO Member State Audit Scheme; A 24/Res.974 of 1 December 2005, Framework and Procedure for the Voluntary IMO Member State Audit Scheme; A 24/Res.975 of 1 December 2005, Future Development of the Voluntary IMO Member State Audit Scheme.

Directive 2009/15/EC[20] and Regulation (EC) No 391/2009[21] concerning common rules and standards for ship inspections and survey organizations and for the relevant activities of maritime administrations replace and tighten the original Directive on classification organizations contained in the 'Erika I' package. They provide for the direct recognition and control of survey organizations by the Commission (cf. Art. 3 et seq. of Regulation [EC] No 391/2009) as well as the establishment of a 'working relationship' between the administrations of the Member States and the survey organizations working on their behalf (cf. Art. 5 of Directive 2009/15/EC), which should lead to clearer and more effective rules in regard to the performance of duties, liability and so forth.

The central rules on port State control were reformed by Directive 2009/16/EC.[22] This Directive provides for the introduction of a quality system for the most comprehensive possible control of all ships calling at ports in the EU on the basis of a more closely specified selection procedure. A risk profile must be created for every vessel calling at an EU port based on both generic (type of vessel, age, flag, classification organizations involved, and company performance) and historical parameters (number of deficiencies and detention measures) (cf. Art. 10). In regard to the basic inspection obligation and irrespective of the date of the previous inspection (cf. Art. 11), an expanded inspection procedure is applicable to vessels of the highest risk classification (cf. Art. 14). As *ultima ratio*, the Directive, which references the Paris Memorandum of Understanding (MoU) on Port State Control[23] in different areas (cf. only Art. 5, 8, 10), provides for temporary and ultimately permanent refusals of access (cf. Art. 16). This will be returned to as part of the analysis of the compatibility of the 'Erika III' measures with international law (see 4.3 below).

[20] Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations [2009] OJ L131/47.

[21] Regulation (EC) 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organizations [2009] OJ L131/11.

[22] Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control [2009] OJ L131/57.

[23] The Paris MoU of 26 January 1982 is a non-legally binding agreement on the harmonization of the requirements for performing port State controls in Europe as well as Canada.

Directive 2009/17/EC[24] addresses amendments to the Directive on vessel traffic monitoring.[25] In the forefront here is the effort to establish a harmonized regime of places of refuge. The original approach intended—to authorize an independent European authority to designate a legally binding place of refuge to a vessel in distress—was abandoned due to opposition from Member States. In accordance with the Directive, the Member States themselves now designate one or more authorities, which shall be authorized to make independent decisions concerning the accommodation of ships in need of assistance (cf. Art. 20 of the revised Directive on vessel traffic monitoring). The proposed system of mandatory mutual financial guarantees and compensation payments ('maritime Eurobonds') for the benefit of States which open their ports to vessels in distress was also abandoned. Further revisions concern the strengthening of 'SafeSeaNet' as a platform for the exchange of information concerning the safety of specific vessels in European waters (cf. Art. 22 (a) of the revised Directive on vessel traffic monitoring), as well as the expansion of the compulsory automatic identification system for fishing vessels of more than 15m length (cf. Art. 6 (a) of the revised Directive on vessel traffic monitoring).

With Directive 2009/18/EC establishing the fundamental principles for the investigation of accidents in the maritime transport sector,[26] which builds on the IMO Code for the Investigation of Marine Casualties and Incidents,[27] technical rules for the investigation of maritime accidents in the transportation sector were introduced. A legal obligation to conduct a safety investigation exists only in the event of very serious maritime casualties or when substantial interests of a Member State are involved; the latter is seen to exist, for example, when the vessel flies the flag of this Member State, or when the accident occurs in its 'maritime aquitory'[28] (cf. Art. 5 (1)).

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[24] Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system [2009] OJ L131/101.

[25] This refers to Directive 2002/59/EC (n. 2) which was integrated into the 'Erika II' package at that time.

[26] Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council [2009] OJ L131/114.

[27] IMO Doc. A 20/Res.849 of 27 November 1997, Annex.

[28] This term introduced by Wolfgang Graf Vitzthum encompasses the maritime zones part of a State's territory (internal waters, territorial sea, archipelagic waters); it clarifies

The objective of Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea[29] is the uniform implementation ('communitization') of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 1974 and its 2002 Protocol,[30] which had not previously been ratified by all EU Member States. It establishes a liability and insurance regime for the transport of passengers and their luggage. In this regard, the Directive goes beyond the Athens Convention as its rules also apply to domestic transport by sea (cf. Art. 2).

Finally, according to Directive 2009/20/EC on the insurance of shipowners for maritime claims,[31] Member States must require that the owners of ships with more than 300 gross tonnage flying their flags have insurance for these ships (cf. Art. 4). This insurance must cover maritime claims subject to the limitations of the 1976 Convention on Limitation of Liability for Maritime Claims in its revised version of 1996[32] (cf. Art. 4 (3)). The insured amount per vessel and incident corresponds to the maximum amount specified in the 1996 Convention. This constitutes an expansion and improvement to global shipping insurance law.

As already mentioned, the legal acts presented above were subject to numerous requests for revision by the European Parliament and the Council during the legislative process, which, at least in part, concerned their compatibility with global standards adopted under the auspices of the IMO. Also due to certain experiences with the 'Erika I' and 'Erika II' packages, the EU institutions seem to have shyed away from the European unilateralism considered appropriate by the Parliament in 2004. Before specific aspects of the 'Erika III' measures are examined against this background for their compatibility with international law, a glance will be taken at the experiences made with the preceding legislative packages.

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that a State's sovereignty over its *territorium* can be qualitatively distinguished from that over its maritime territory. Cf. Wolfgang Graf Vitzthum, 'Aquitoriale Souveränität. Zum Rechtsstatus von Küstenmeer und Archipelgewässern', in Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw and Karl-Peter Sommermann (eds), *Völkerrecht als Wertordnung = common values in international law: Festschrift für Christian Tomuschat* (N.P. Engel Verlag 2006) 1067 et seq.

[29] Regulation (EC) 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents [2009] OJ L131/24.

[30] Consolidated version: [2009] OJ L131/29.

[31] Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims [2009] OJ L131/128.

[32] Convention on Limitation of Liability for Maritime Claims of 19 November 1976, 16 ILM 606; Protocol Amending the Convention on Limitation of Liability for Maritime Claims of 2 May 1996, 35 ILM 1433.

3. Intertanko and the Limits of Union Competences in the Field of Maritime Safety

In the context of 'Erika I' and 'Erika II' as well as the measures adopted in the aftermath of the sinking of the single-hulled oil tanker *Prestige*,[33] it was above all in regard to the accelerated schedule for introducing a ban on single-hulled tankers stipulated by Regulation 1726/2003 as well as the stricter limits on sulphur in marine fuels established under Directive 2005/33 and their compatibility with the 1973 International Convention for the Prevention of Pollution From Ships (MARPOL)[34] where doubts had arisen.[35] Further points of contention included the extent of the obligations set out in Directive 2002/59 on vessel traffic monitoring.

3.1. *The ECJ's Intertanko Decision*

Notwithstanding this, it was questions concerning the provisions of Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements[36] and their compatibility with international law that finally landed before the ECJ in 2006. The plaintiffs in the initial proceedings (including the International Association of Independent Tanker Owners—Intertanko) claimed before the High Court of Justice of England and Wales that the introduction of the standard of 'serious negligence' for the investigation of liability for the discharge of polluting substances under the Directive, as well as its exclusion clause concerning the application of specific exemptions from liability, were not compatible with the rules contained in MARPOL Annexes I and II[37] and the UN Convention

[33] Included among these measures are Regulation (EC) 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers [2009] OJ L249/1, Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements [2005] OJ L255/11 and Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 amending Directive 1999/32/EC as regards the sulphur content of marine fuels [2005] OJ L191/59.

[34] International Convention for the Prevention of Pollution from Ships of 2 November 1973, 1340 UNTS 184; Protocol of 17 February 1978, 1340 UNTS 61.

[35] See Henrik Ringbom, *The EU Maritime Safety Policy and International Law* (Nijhoff 2008) 48 et seq.

[36] See n. 33.

[37] MARPOL Annexes I and II are automatically binding for all parties to the treaty in accordance with Art. 14 MARPOL. They address marine pollution by oil and dangerous liquid substances carried in bulk.

on the Law of the Sea (UNCLOS).[38,39] The High Court of Justice stayed the proceedings and submitted the question at issue to the ECJ for a preliminary ruling in accordance with Art. 267 TFEU.

In its judgement of 3 June 2008, the Court refused to measure the Directive's provisions against the requirements of international law, whose breach was being invoked. Whether the claims raised by the plaintiffs in the initial proceedings were founded was not ruled upon. With regard to MARPOL, the ECJ relied on the formal argument that the EU was not party to the treaty[40] and—unlike in the case of GATT 1947[41]—also had not assumed the competences of the Member States in that respect.[42] In addition, the Court argued that the relevant provisions contained in the MARPOL Annexes would not represent binding customary international law.[43] In respect of UNCLOS, the ECJ held that, although the Convention would be binding for Union organs in accordance with Art. 216 (2) TFEU (= Art. 300 (7) EC), it '[. . .] does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States, irrespective of the attitude of the ship's flag State.'[44] According to the Court, it would only be able to judge the validity of a rule in light of an international treaty if the nature and substance of that treaty would not stand in opposition and if its provisions would be sufficiently precise and unconditional in form and content.[45]

3.2. *Critical Appraisal of the Decision*

3.2.1. *On the Direct Applicability and Executability of Older National Treaties*

It is submitted that the ECJ's reference to the lack of direct legal effect on individuals of UNCLOS rules is, in principle, not convincing. The EU acceded to UNCLOS in 1998[46] and has both exclusive and shared

[38] United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 397.
[39] ECJ, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, para 37 et seq.
[40] Ibid., para 47; cf. already ECJ, Case C-379/92 *Peralta* [1994] ECR I-3453, para 16.
[41] ECJ, Cases C-21–24/72 *International Fruit Company*, [1972] ECR 1219, para 10 et seq.
[42] ECJ, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, para 48 et seq.
[43] Ibid., para 51.
[44] Ibid., para 64.
[45] Ibid., para 45.
[46] Cf. Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law

competences in regard to particular areas codified in the treaty.[47] Precondition for the review of an act of secondary EU law as part of a preliminary ruling and in light of a 'communitized' international treaty in terms of Art. 216 (2) TFEU is categorically not the direct applicability of the norms contained in the treaty—that is, the possibility of the direct invocation of the pertinent norms by individuals in the sense of the *Van Gend en Loos* judgement.[48] On the contrary, it is only necessary that the pertinent norms are self-executing—that is, that they have direct effect.[49] In most instances, the ECJ did not rely on the requirement of direct applicability that it used in the *Intertanko* judgement[50] when assessing its competence to review an act of secondary EU law, but instead, while referring to the conceptually confusing term 'direct applicability', in substance analyzed the executability of the relevant treaty norms.[51] In the words of Advocate General *Kokott*:

> Whether or not the provisions in question are directly applicable and—correlatively—whether they confer rights on individuals is not conclusive for the purpose of responding to the request for a preliminary ruling. Even the legal bases of the Treaties are in principle not directly applicable in the sense that individuals can derive from them rights or legal consequences to their benefit. Nevertheless, individuals may question the legality of rules of secondary law by contesting the legal basis thereof.[52]

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of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof [1998] OJ L179/1.

47 Cf. Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 made pursuant to article 5 (1) of Annex IX of the Convention [1998] OJ L179/129.

48 Cf. ECJ, Case 26/62 *van Gend en Loos* [1963] ECR 3, 24 et seq.

49 See already Proelss (n. 16) 427 et seq.; ibid., 'European Community Law and WTO Regulations: The Direct Effect-Doctrine Revisited', in Suthiphand Chirathivat, Franz Knipping, Cillian Ryan and Paul. J.J. Welfens (eds), *EU—ASEAN. Facing Economic Globalisation* (Springer 2009) 193, 195 et seq.; Mario Mendez, 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) 21 EJIL 83, 102.—Precisely this executability is meant when the ECJ stated in the *Intertanko* judgement that the 'nature and the broad logic' of UNCLOS may not stand in the way of a review of secondary law in its light (ECJ, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, para 45). Cf. however ECJ, Case C-366/10 *The Air Transport Association of America and Others*, Opinion of Advocate General Kokott, para 71 et seq. (for legal proceedings brought by individuals); in contrast, the ECJ did not address whether the rights of individuals had been directly affected in its judgement of 21 December 2011; cf. para 53 of the judgement.

50 ECJ, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, para 64.

51 Cf. for example ECJ, Case C-104/81 *Kupferberg* [1982] ECR 3641, para 22 et seq.; Case C-12/86, *Demirel* [1987] ECR 3719, para 14; Case C-344/04 *IATA* [2006] ECR I-403 para 39; Case C-366/10 *The Air Transport Association of America and Others*, para 54 et seq.

52 ECJ, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, Opinion of Advocate General Kokott, para 66.

It is not at the Court's discretion to establish additional criteria beyond those provided by the TFEU for reviewing an act of secondary law in light of a treaty already adopted by the EU.[53] In this regard the judgement in the *Intertanko* case has been justifiably criticized for relying on 'judicial avoidance techniques';[54] it can in fact be assumed that many UNCLOS norms are self-executing—at least to the extent that they indirectly reference MARPOL by using the term 'generally accepted international rules and standards' (cf. for example Art. 21 (2), Art. 211 (2) and (5) UNCLOS).[55]

Upon closer examination, however, it should be taken into consideration that a special situation lay at the root of the *Intertanko* judgement.[56] The proceedings before the High Court of Justice were initiated by the plaintiffs with the sole purpose of bringing about a direct review of Directive 2005/35/EC in light of international law. At the time the proceedings were initiated the Directive had not yet been transposed into national law in the United Kingdom. In this regard, there was a danger that the comparatively high barriers to individual actions before the ECJ would in this way be circumvented. It is well known that natural and legal persons may only 'institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures' (Art. 263 (4) TFEU). According to the so-called Plaumann formula, direct and individual concern can be assumed when the act being challenged 'affects [the plaintiff] by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'[57] It is submitted that in the case at hand, the ECJ's insistence on the direct

[53] See however ibid., para 67.

[54] Mendez (n. 49) 99 et seq.

[55] Similar ECJ, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, Opinion of Advocate General Kokott, para 46 et seq.

[56] See Sonja Boelaert-Suominen, 'The European Community, the European Court of Justice and the Law of the Sea' (2008) 23 IJMCL 643, 702, 708.

[57] ECJ, Case C-25/62 *Plaumann* [1963] ECR 95, headnote 4.—Whether the reformulation of the basis for legal action in Art. 263 (4) Alt. 2 TFEU has retroactive effects on the interpretation of individual concern and prompts a departure from the *Plaumann* formula is not uniformly judged; see Matthias Kottmann, 'Plaumanns Ende: Ein Vorschlag zu Art. 263 (4) AEUV' (2010) 70 ZaöRV 547, 556 et seq.

applicability of UNCLOS norms served indirectly to uphold the requirements of Art. 263 (4) TFEU.[58]

Having said that, such a synchronizing of the requirements of European judicial protection for individuals in the context of Art. 263 TFEU and Art. 267 TFEU seems to be inconsistent with the requirements of the rule of law if viewed in light of the principle of effective legal protection (cf. Art. 2 TEU).[59] Early on, the ECJ itself recognized the need to find a balance between the law of effective legal protection, on the one hand, and the imperative it set for itself to restrictively interpret the admissibility requirements for individual claims, on the other. According to the Court, this need arises from the nature of the EU as a community of law, in which neither the Member States nor the organs of the Union may evade review of whether their actions are in accordance with the founding treaties.[60] In order to ensure a 'complete system of legal remedies' in situations where affected parties are barred from bringing direct actions, 'such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.'[61] This countervailing mechanism fails, however, when—as in the case of the *Intertanko* judgement—the requirements for an individual action are nonetheless backhandedly applied during preliminary proceedings. It is precisely that moment when the character of the preliminary ruling process fails to foster the legal protection for individuals originally demanded by the ECJ itself. This seems even more problematic in light of Art. 19 (1) 2 TEU, according to which 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' While this rule, which was included in the TEU with the Treaty of Lisbon, is not directly applicable to the institutions of the EU, it is, arguably, nonetheless an expression of the need for comprehensive legal protection. Its relevance becomes evident if one takes into account that the Member States' courts are generally not entitled to overrule EU legislative acts due to the fact that the Member States have transferred the respective competence to the ECJ by way of Art. 19 (3) (b) TEU and Art. 263 TFEU. Thus

[58] Cf. Eileen Denza, 'A Note on Intertanko' (2008) 33 ELR 870, 875 as well as ECJ, Case C-366/10 *The Air Transport Association of America and Others*, Opinion of Advocate General Kokott, para 66.

[59] Consolidated Version: [2010] OJ C 83/13.

[60] ECJ, Case C-294/83 *Les Verts* [1986] ECR 1339, para 23.

[61] Ibid.; see also Meinhard Schröder, 'Die Vorlagepflicht zum EuGH aus europarechtlicher und nationaler Perspektive' [2011] EuR 808, 810.

the criticism ultimately remains that in *Intertanko* the ECJ unjustifiably evaded making a decision on the matter.[62]

3.2.2. *On the Interpretation of European Union Law in a Friendly Manner towards International Law*

It is submitted that the same can be said concerning MARPOL. In this regard, the judgement is arguably based on an exaggerated and one-sided understanding of the autonomy of the EU legal order. It is true that the EU is not party to the Convention; it also has not assumed the substantive rights and duties of the Member States by way of substitution. Nonetheless, the Court failed to take the collision clause contained in Art. 351 (1) TFEU sufficiently into account.[63] With regard to the object and purpose of that clause and in accordance with the maxim *pacta sunt servanda*, EU law shall not undermine the rights and obligations of the Member States established by international treaties.[64] According to the majority view, this norm, which is literally only applicable to treaties adopted prior to 1 January 1958 ('older national treaties'), can be applied by way of analogy to treaties adopted after 1 January 1958 if and to the extent that these collide with primary or secondary law which came into existence after their adoption.[65] At the same time, para 2 of the norm obliges the Member States to utilize all appropriate means to resolve incompatibilities between the international treaties they have adopted and EU law. This may necessitate negotiated revisions to the treaties[66] or, ultimately, even

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[62] Yet another question would be the result that the ECJ needed to reach in the matter. That cannot be answered here. See for example *Ringbom* (n. 35) 401 et seq.

[63] Reaching too far is ECJ, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, Opinion of Advocate General Kokott, para 77.

[64] In general Paul Craig and Gráinne de Búrca, *EU Law: text, cases and materials* (5th ed, Oxford Univ Press 2011) 204; Kirsten Schmalenbach, in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV*, (4th ed, Beck 2011) Art. 351 mn. 1.

[65] Cf. Craig and de Búrca (n. 64) 204; Stefan Lorenzmeier, in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds) *Das Recht der Europäischen Union* (Vol. III, Status: 46. Ergänzungslieferung Beck 2011) Art. 351 mn. 24; Schmalenbach (n. 64), mn. 8; André Nollkaemper and Ellen Hey, 'Implementation of the LOS Convention at Regional Level: European Community Competence in Regulating Safety and Environment Aspects of Shipping' (1995) 10 IJMCL 281, 298; Proelss (n. 16), 334. See also ECJ, Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, Opinion of Advocate General Kokott, para 95: 'A mutatis mutandis application of the first paragraph of Article 307 EC does not lead to any other conclusion. It is conceivable where an international obligation on the part of a Member State conflicts with a subsequently agreed measure of secondary law.'—If the Member States adopt a treaty which violates existing secondary law, this constitutes a violation of the principle of cooperation in accordance with Art. 4 (3) TEU; see Lorenzmeier, l.c.

[66] Cf. only ECJ, Opinion 1/76 [1977] ECR 741, para 7.

their suspension or termination.[67] This obligation exists only to the extent that the treaties are incompatible with EU law, however.[68] Whether or not this is the case must be determined on an individual basis. The ECJ in *Intertanko* refused to perform this test although it had already found in its previous case law that Art. 351 (1) TFEU would fail to serve its purpose 'if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement.'[69]

It is not necessary here to reassess in detail a line of argument advocated mainly by German authors which argued in favor of a limitation of EU competences stemming from the aforementioned obligation, provided that all Member States have acceded to the treaty in question.[70] Despite the fact that this view was well-received in legal literature[71] and, indeed, could have provided support for the plaintiffs' argumentation in the initial proceedings leading up to the *Intertanko* judgement, it is arguably going too far in light of Art. 351 (2) TFEU to posit that a breach of para 1 of that provision implies a violation of competences on behalf of the EU organs, thus rendering the legal act in question invalid (and not merely unlawful due to the breach of Art. 351 (1) TFEU). The nature of Art. 351 TFEU, which requires that the potential for collisions exists as a matter of logic, is a further argument against a competence-limiting effect.[72] Nonetheless,

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[67] For example ECJ, Case C-13/93 *Minne* [1994] ECR I-37, para 15.

[68] On violations of Art. 351 (2) TFEU see ECJ, Case C-205/06 *Commission/Austria* [2009] ECR I-1301, para 38 et seq. and Case C-249/06 *Commission/Sweden* [2009] ECR I-1335, para 39 et seq.

[69] ECJ, Case 812/79 *Burgoa* [1980] ECR 2789, para 9; cf. also ECJ, Case C-84/98 *Commission/Portugal* [2000] ECR I-5215, para 53; Case C-466/98 *Commission/United Kingdom* [2002] ECR I-9427, para 23 et seq.; Case C-216/01 *Budéjovický Budvar* [2003] ECR I-13617, para 145. In Case C-158/91 the ECJ examined whether a Community rule can be 'derived of effect by an earlier international agreement' ([1993], ECR I-4300, para 13).

[70] Proelss (n. 16) 330 et seq.; Wolfgang Graf Vitzthum, 'Europäisches Seerecht. Eine kompetenz rechtliche Skizze' in Michael Brenner, Peter M. Huber and Markus Möstl (eds), *Der Staat des Grundgesetzes—Kontinuität und Wandel: Festschrift für Peter Badura zum siebzigsten Geburtstag* (Mohr-Siebeck 2004) 1189, 1204 et seq.; Hans Krück, *Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaften* (Springer 1977) 139 et seq.; also Nollkaemper and Hey (n. 65) 298.

[71] See Doris König, 'The EU Directive on Ship-Source Pollution and on the Introduction of Penalties for Infringements: Development or Breach of International Law?' in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Thomas Mensah* (Martinus Nijhoff 2007) 767, 784; Henning Schult, *Das völkerrechtliche Schiffssicherheitsregime* (Duncker und Humblot 2005) 332 et seq.

[72] Lorenzmeier (n. 65), para 18. Against this background, I no longer maintain my earlier opinion to the contrary (cf. Proelss [n. 16] 332).

it should clearly be noted that a danger exists in situations where the Member States are bound to maximum standards at the international level[73] that the autonomous legislative activities of the Union could bring them into an irreconcilable web of obligations as a consequence. Having said this, on closer observation one can only speak of a collision in a narrower sense if and to the extent that the treaty in terms of Art. 351 (1) TFEU establishes more than mere minimum standards, which can be transgressed either unilaterally or at the supranational level. This cannot generally be said in regard to MARPOL.[74]

Irrespective of the aforementioned, it is submitted that the object and purpose of Art. 351 (1) TFEU and the EU's commitment to the compatibility of its legal system with international law that is implicit in that provision as well as in Art. 3 (5) TEU[75] in conjunction with the principle of sincere cooperation and mutual respect (cf. Art. 4 (3) TEU), support the premise that EU law must at least be interpreted in a manner friendly toward the international rights and obligations of the Member States deriving from treaties in terms of Art. 351 (1) TFEU. In light of the principle of uniform application of EU law as well as the wording of Art. 351 TFEU, this premise should also apply where only some (and not all) Member States are contractually bound.[76] Following case-law of the German Federal Constitutional Court (*Bundesverfassungsgericht*) concerning the interpretation of national law with affinity toward international law,[77] the rule of interpretation advocated here implements the maxim *pacta sunt servanda* expressed in Art. 351 (1) TFEU in situations in which the rules contained in older national treaties do not appear to be compatible with EU law at first glance. From the standpoint of legal methodology, it constitutes a conflict prevention tool, which can only be applied if and to the extent to

[73] Maximum standards are standards which may not be exceeded by the contracting parties.

[74] See Schult (n. 71) 336 et seq.; too undifferentiated is Sara Vatankhah, 'The Contribution of the EC to Maritime Safety in View of the "Third Maritime Safety Package" of the European Commission' in Peter Ehlers and Rainer Lagoni (eds), *Maritime Policy of the European Union and Law of the Sea* (LIT 2008) 41, 57. Cf. also ECJ, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, Opinion of Advocate General Kokott, para 80 et seq.

[75] According to Art. 3 (5) TEU the European Union shall 'contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

[76] Proelss (n. 16) 333; potentially of a different opinion Schult (n. 71) 334.

[77] Cf. only BVerfGE 58, 1 (34); 59, 63 (89); 64, 1 (20).

which a norm of EU secondary law allows several interpretations. In any event, existence of a duty to interpret EU law with affinity toward international law ought to be considered in situations in which the Member States had shared external competence in regard to the subject matter governed by the older national treaty at the time that treaty was concluded.[78] A further condition ought to be that the Member States do not enter into treaty obligations with the purpose of circumventing EU law. The latter results from the principle of sincere cooperation as well as from the ratio of para 2 of Art. 351 TFEU. These provisions also lead to the result that in situations where an interpretation of EU law with affinity toward international law fails due to the conflicting wording of the pertinent norm, the obligation of the EU to not undermine the rights and obligations contained in the pertinent older national treaty can only exist for a brief transitional period, which is difficult to tangibly define.

By preventing such situations whenever possible, the duty to interpret EU law in a manner friendly toward international law advocated here—which in light of Art. 3 (5) TEU must also be applied to customary international law[79]—helps to strike a balance between the prohibition of interference contained in Art. 351 (1) TFEU and the duty to adapt contained in Art. 351 (2) TFEU, thus contributing to legal certainty. Moreover, it guarantees that the Member States will not face the danger of being held responsible for violations of international law, which have arisen due to actions in compliance with EU law.[80] Interestingly, the ECJ expressed itself in a similar way in the *Intertanko* judgement when it found that Member States' obligations under MARPOL can influence the interpretation of UNCLOS and provisions of EU secondary law falling within the scope of MARPOL:

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[78] Cf. Proelss (n. 16) 335 et seq.—If a Member State adopts an international treaty on a subject matter over which the Union has exclusive competence, this violation of EU competences does not have any influence on the validity of the treaty under international law. Within the EU, however, Art. 351 (1) is not applicable to such situations. Cf. Lorenzmeier (n. 65), para 19.

[79] The ECJ has consistently assumed an obligation on the part of Union organs to observe customary international law in their exercise of competences; cf. ECJ, Case C-286/90 *Poulsen und Diva Navigation* [1992] ECR I-6019, para 9; Case C-158/91 *Levy* [1993] ECR I-4300, para 13; Case C-405/92 *Mondiet* [1993] ECR I-6133, para 13; Case C-364 and 365/95 *T. Port* [1998] ECR I-1023, para 60 et seq.; Case C-162/96 *Racke* [1998] ECR I-3655, para 45; Case C-366/10 *The Air Transport Association of America and Others*, para 123.

[80] Cf. BVerfGE 74, 358 (370).

> In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78.[81]

Due to the nature of the national Court's reference, however, which was restricted to the examination of the validity of the specific Directive, the Court did not undertake an interpretation of EU law in the manner required of it. This reticence reflects the far too formalist tone of the entire judgement and leads to a less than satisfying result in the matter. For the referring court, *Intertanko* only concerned the compatibility of Directive 2005/35/EC with the MARPOL Convention. If the ECJ explicitly assumed that the requirements of MARPOL ought to be upheld when interpreting the provisions of Directive 2005/35/EC precisely because all Member States (although not the EU itself) are bound by the Convention, it arguably would have needed to clarify whether such an interpretation of the Directive is at all possible in regard to the question submitted for the preliminary ruling and, if so, which consequences then emerge.

There are good arguments for applying the principle of interpretation of EU law in a manner friendly toward international law to other problematic areas in the external relations of the EU and its Member States. Emerging issues such as those arising in the context of overlapping jurisdictions between courts and arbitral tribunals could be resolved in this manner. An important example is the *MOX Plant* case, in which Ireland submitted claims against the United Kingdom before both an arbitral tribunal in accordance with Annex VII UNCLOS as well as before an arbitral tribunal on the basis of Art. 32 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)[82] for violations of the relevant convention.[83] In addition to this, Ireland submitted a

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[81] ECJ, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, para 52. In its recent judgement on emissions trading the ECJ did not consider an interpretation with affinity toward the Chicago Convention (cf. Case C-366/10, para 72). Cf. however the Opinion of Advocate General Kokott, para 66: 'The fact that all Member States of the European Union are Contracting Parties to the Chicago Convention can nevertheless have an effect on the interpretation of provisions of EU law; this follows from the general principle of good faith, which also applies under international law and has found specific expression under EU law in Article 4 (3) TEU' (footnotes omitted).

[82] Convention for the Protection of the Marine Environment of the North-East Atlantic of 22 September 1992, 2354 UNTS 67.

[83] Cf. *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention* (*Ireland v. United Kingdom*), Final Award of 2 July 2003, (2003) 42 ILM 1118 et seq. In contrast, the arbitral tribunal stayed the proceedings in accordance with Annex VII UNCLOS after the Commission made its intention public to institute infringement proceedings against Ireland before the ECJ; cf. *The MOX Plant Case* (*Ireland v. United Kingdom*), Order

request for provisional measures in accordance with Art. 290 (5) UNCLOS to the International Tribunal for the Law of the Sea (ITLOS).[84] Finally, the EU Commission initiated infringement proceedings against Ireland before the ECJ on the basis of the existing obligation of Member States 'not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein' according to ex Art. 292 EC (= Art. 344 TFEU), and the premise that the treaties adopted by the EU and the Member States as mixed agreements represent integral parts of the legal order of the Union.[85] In its judgement, the Court followed the Commission's argumentation on the whole and stated the following:

> It follows that the provisions of the Convention relied on by Ireland in the dispute relating to the MOX plant and submitted to the Arbitral Tribunal are rules which form part of the Community legal order. The Court therefore has jurisdiction to deal with disputes relating to the interpretation and application of those provisions and to assess a Member State's compliance with them. [...] It is, however, necessary to determine whether this jurisdiction of the Court is exclusive, such as to preclude a dispute like that relating to the MOX plant being brought by a Member State before an arbitral tribunal established pursuant to Annex VII to the Convention. [...] The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive jurisdiction of the Court is confirmed by Article 292 EC, by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein [...].[86]

The ECJ's assumption of exclusive jurisdiction for disputes over the rights and obligations of Member States arising from international treaties to which the EU is also party is again, arguably, based on an oversubscription to the autonomy of the Union's legal order. While it is true that Art. 216 (2) TFEU (and thus the ECJ's jurisdiction in principle, as well) extends to the provisions of a mixed agreement falling within the Union's

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of 24 June 2003, (2003) 42 ILM 1187 et seq. Following the ECJ's judgement of 30 May 2006, Ireland withdrew its claim from the UNCLOS tribunal on 15 February 2007.

84 Cf. *The MOX Plant Case* (*Ireland v. United Kingdom*), Order of 3 December 2001, ITLOS Reports 2001, 95 et seq.

85 Cf. ECJ, Case C-459/03, *Commission/Ireland* [2006] ECR I-4635, para 61 et seq.

86 Ibid., para 121 et seq.

sphere of competences,[87] this does not force one to conclude that calling on an international court or arbitral tribunal intended by the applicable treaty automatically constitutes a violation of Art. 344 TFEU—even if and to the extent that the Union has already adopted rules in the area in question. Indeed, instisting on the ECJ's exclusive jurisdiction fails to recognize that the adoption of a mixed agreement in no way affects the allocation of competences between the EU and the Member States in the internal legal order of the Union. Consequently, recourse by the Union organs to a shared competence on the field of external relations does not lead to an exclusive Union competence in terms of Art. 2 (2) sentence 2 TFEU. If the interpretation of the provisions of a mixed agreement is at issue which belong to an area that does not fall under the exclusive competence of the EU, it is not comprehensible in general why Art. 344 TFEU should then lead to the exclusive jurisdiction of the ECJ.[88] The mere acceptance of the jurisdiction of an international court or tribunal in regard to a mixed agreement does not, in itself, immediately endanger the division and exercise of the competences as laid out in the European treaties. Only when the court or tribunal's interpretation of the pertinent norms of the mixed agreement is no longer compatible with other Union law can this lead to the inapplicability of the relevant judgement within the EU legal order. The line of argument advocated here is consistent with the ratio of Art. 351 (2) TFEU (which is, however, not directly applicable to the constellation described above in light of the EU's status as contracting party), and it should be noted that the ECJ itself did not object to the EU's own acceptance of a dispute settlement mechanism governed by international law, provided that it did not compromise the foundations of the EU legal order.[89]

[87] In light of Art. 4 (3) TEU and the principle of uniform application of EU law it is submitted that this also applies to those provisions which fall under the exclusive competences of the Member States; cf. Alexander Proelss, 'The Intra-Community Effects of Mixed Agreements' in Paul J.J. Welfens, Franz Knipping, Suthiph Chirathivat and Cillian Ryan (eds), *Integration in Asia and Europe* (Springer 2006) 255 et seq. with references to ECJ case law. See also Pierre Pescatore, 'Les relations extérieures des communautés européennes', (1961–II) 103 RdC 1, 133.

[88] But see Boelaert-Suominen (n. 56) 678 et seq.—If one accepts the view presented here that the duty to interpret Union law with affinity toward international law is also applicable to courts and tribunals whose jurisdictions are established by treaties concluded as mixed agreements, a revision of Art. 344 TFEU is not necessary; cf. however Nikolaos Lavranos, 'The *MOX Plant* and *Ijzeren Rijn* Disputes: Which Court is the Supreme Arbiter?' (2006) 19 LJIL 223, 246.

[89] ECJ, Opinion 1/91 [1991] ECR I-6079, para 35.

It shall not be left unmentioned that the ECJ's approach to the autonomy of the Union legal order ultimately fosters disregard for the expertise of a court or tribunal in regard to its founding international treaty. Arguably, the court specifically created for the settlement of disputes under an international treaty is generally the best able to appropriately unfold the significance of the rights and obligations contained in that treaty in regard to its objectives and in consideration of its genesis.[90] Consideration of the interpretation of a mixed agreement by a specialized international body thus represents an ideal approach to the implementation of the objectives contained in Art. 3 (5) TEU. This is particularly true in respect of functional institutions (e.g. implementation committees) that were established in order to guarantee the proper performance of an international treaty, and thereby seek to prevent the emergence of legal disputes. In any case, whether or not Art. 344 TFEU is at all applicable to such non-judicial institutions seems questionable from the outset.

On the other hand, the application of the duty to interpret EU law with affinity toward international law in an institutional context does not stand in the way of Member States calling on the ECJ as an alternative; this principle of interpretation cannot alter the comprehensive jurisdiction of the ECJ over EU law (including international treaties which represent integral parts of the EU legal order in terms of Art. 216 (2) TFEU). What is argued here is that Art. 344 TFEU simply ought not be applied in a manner that creates an absolute barrier against the jurisdiction of international courts and tribunals within the EU legal order.

4. The Compatibility of the 'Erika III' Measures with International Law

In light of the aforementioned the question remains to be answered whether the 'Erika III' package is compatible with international law.

[90] Cf. also *The MOX Plant Case* (*Ireland v. United Kingdom*), Order of 3 December 2001, ITLOS Reports 2001, 95 (para 51). Also critical in regard to European jurisdiction in this area of environmental protection is Simon Marsden, 'MOX Plant and the Espoo Convention: Can Member State Disputes Concerning Mixed Environmental Agreements be Resolved Outside EC Law?' (2009) 18 RECIEL 312, 326: '[…] may not produce the best outcome […]'.

4.1. *Insurance of Ship Owners for Maritime Claims*

Initially, doubts were raised as to the compatibility of Directive 2009/20/EC with the international law of the sea. The draft of this Directive originally provided that foreign ships must possess and demonstrate proof of insurance coverage as soon as they enter the Exclusive Economic Zone (EEZ) of an EU Member State. As the EEZ does not belong to a State's territory, this could have represented an exercise of extraterritorial jurisdiction[91] not covered by the UNCLOS (cf. Art. 58 (1)) and the 1976 Convention on Limitation of Liablity for Maritime Claims.[92] Although a coastal State may adopt laws and regulations for the prevention, reduction and control of marine pollution from ships in its EEZ in accordance with Art. 211 (5) UNCLOS, the rules in question must comply with the 'generally accepted international rules and standards' (GAIRAS) adopted under the auspices of the IMO.[93] Such standards did not and do not exist in regard to liability for maritime claims.

However, these concerns were addressed in the final version of the Directive. Its Art. 4 (2) limits the scope of application to ships calling at the ports of EU Member States. As part of the coastal State's internal waters, ports are subject to its full territorial sovereignty.[94] The extent to which Member States are additionally authorized to demand compliance with this requirement on ships travelling in their territorial waters— this formulation refers to the territorial sea falling under the 'aquitorial sovereignty' of the coastal State, in which foreign ships enjoy the right of innocent passage (cf. Art. 18 et seq. UNCLOS)— is conditional on its compatibility with international law. As the Directive fully reflects the requirements of the 1976 Convention on the Limitation of Liability for Maritime Claims in regard to the maximum amount of liability (cf. Art. 4 (3)), it is clearly consistent with the requirements of international law.

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[91] Vatankhah (n. 74) 62 et seq.; Jenisch (n. 17) 56.

[92] See n. 32.

[93] According to Eric Molenaar (*Coastal State Jurisdiction over Vessel-Source Pollution* [Springer Netherland 1998] 175 et seq.), it is not necessary for the pertinent rules and norms to be customary international law in order for them to be considered 'generally recognized'; the only prerequisite for this is that the relevant IMO rules have entered into force. Cf. also Ringbom (n. 35) 433.

[94] Cf. only Robin R. Churchill/Vaughan A. Lowe, *Law of the Sea* (3rd edn, JurisPubl 1999) 64 et seq.; Ringbom (n. 35) 204 et seq. with further references.

4.2. *Notification Requirement in Accordance with the Directive on Port State Control*

This could be a different matter in regard to Directive 2009/16 on port State control, however. Problematic at first glance is the duty arising from Art. 9 in conjunction with Annex III of the Directive to notify the port authority at least three days prior to the expected arrival of a ship in its harbor for the purpose of vessel identification, expected length of anchorage, and so forth. It often cannot be ruled out that a ship is still located outside the maritime aquitory of the coastal State in question at that point in time. In light of the freedom of navigation applicable beyond the territorial sea (cf. Art. 58 (1) in conjunction with Art. 87 (1)(a) UNCLOS) there is good reason to argue that a third State vessel cannot be required to notify of its arrival when it is still in the EEZ or on the high seas.[95] Admittedly, the ECJ has refused to regard the inclusion of non-European aircraft operators in the European trading scheme for greenhouse gas emissions allowances as an impermissible exercise of extraterritorial jurisdiction,[96] even though the emissions certificates to be traded must be calculated for the entire international flight (and not just for the individual segments over the territories of the EU Member States). This does not lead to a different outcome, though. Schematic recourse to the argument that the flights in question start or end at an airport on EU territory[97] does not change the fact that the principle of territoriality fails to provide a sufficient link for the inclusion of flight segments over non-EU territory in the trading scheme. The fact that a State has jurisdiction over a particular subject matter (here: take-off and landing on its own territory) does not necessarily imply that its legislative authority extends to all other aspects related to the subject matter concerned.[98] This is all that much more true as the possibility exists of restricting the inclusion of non-European aircraft operators in the European emissions trading scheme to flight

[95] See Rainer Lagoni, 'Vorsorge gegen Schiffsunfälle im Küstenvorfeld: Gemeinschaftliches Schiffsmeldesystem und Hafenzugang im Notfall' [2001] TranspR 284, 286; Vitzthum (n. 6) 176 et seq.; contra Ringbom (n. 35) 253 et seq.—In contrast, calling at a port itself can be made dependent on the fulfillment of the duty to notify; cf. Art. 25 (2) and Art. 211 (3) UNCLOS.

[96] ECJ, Case C-366/10 *The Air Transport Association of America and Others*, para 125 et seq.

[97] Ibid., para 125.

[98] See Markus Volz, *Extraterritoriale Terrorismusbekämpfung* (Duncker und Humblot 2007) 223.

segments over EU territory.[99] At any rate, comparability is lacking between the situation examined in the recent ECJ judgement and the situation at sea. This is because Art. 26 (1) UNCLOS establishes that even in the territorial sea no fees may be levied for mere passage (or for the 'use' of the environment of the coastal State) due to the right of innocent passage. For the maritime zones beyond the territorial sea this is all that much more applicable.

Notwithstanding this, the question whether a sufficient link for the duty to notify of arrival exists when a vessel is in the EEZ or on the high seas does not need a definite answer in the present context. As in the case of Directive 2002/59/EC on vessel traffic monitoring, the notification need not be made by the captain of the ship, but can alternatively be made by the agent or operator of a ship (cf. Art. 9 (1) of Directive 2009/16/EU). At least the shipping agent will regularly be present in the coastal State's territory. From this perspective the duty to notify does not represent an exercise of extraterritorial jurisdiction.[100]

4.3. *Access Refusals in Accordance with the Directive on Port State Control*

Finally, the question arises whether the possibility existing under the Directive on port State control of issuing temporary or even permanent refusals of access to ships of third States is compatible with the international law of the sea. The authorization to conduct port State controls in the first place derives from the fact that ports are subject to the coastal State's territorial sovereignty. Art. 211 (3) UNCLOS implies that port States have the competence to impose conditions on foreign vessels for access to their harbors or territorial waters or for anchoring at their off-shore terminals for the purpose of preventing, reducing and monitoring the pollution of the marine environment.[101] Art. 219 UNCLOS ('on their own initiative') further confirms the existence of a right on the part of the port State to conduct ship inspections. Almost all IMO Conventions contain provisions which authorize the treaty parties to inspect foreign ships calling at their ports in order to monitor compliance with the standards codified in the conventions.

[99] To the extent that the subject matter is divisible; cf. ibid., 223 with further references.

[100] On the Directive on vessel traffic monitoring see Proelss (n. 16) 402.

[101] Cf. also *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. USA*) (*Merits*), ICJ Reports 1986, 13, para 213.

The port State's authority to conduct inspections is not unlimited, however. Ships causing marine pollution on the high seas may, in general, only be pursued at ports of call in accordance with Art. 218 UNCLOS if and to the extent that violations of the international rules and norms applicable to discharge of materials or energy are at issue. This extraterritorial enforcement competence was extended to air pollution from shipping emissions with Regulation 11/6 of Annex VI MARPOL.[102]

If one looks beyond the question of the permissibility of access refusals, Directive 2009/16 does not exceed the boundaries set by UNCLOS or the standards set in the IMO Conventions. It does not lay down its own substantive requirements, but instead sets out exclusively procedural requirements for the EU-wide harmonization of standards for controls. In regard to the criteria for the detention of a third State vessel, Annex X of the Directive expressly refers to the rules contained in the pertinent IMO Conventions (including MARPOL) and thereby binds all control competences on the globally applicable maritime safety regime. In addition to this, Art. 4 (1) of the Directive requires, in general, that port State controls are performed 'in accordance with international law'. On the basis of the duty to interpret the norms of the Directive in conformity with international law following from that provision, the Member State competence set out in Art. 3 (1) to control a ship in its territorial waters but outside a port—somewhat problematic in regard to the right of innocent passage—still appears compatible with international law.

Can this also be taken to mean that a third State vessel can be permanently banned from European ports in the event of repeated violations of the substantive safety standards required under the IMO conventions? On the one hand, neither UNCLOS nor the IMO Conventions expressly provide for the imposition of a permanent refusal of access;[103] on the other hand, such a ban embodies a measure that falls within the territorial sovereignty of the port State as a matter of principle, and which is only prohibited when it is tied to the extraterritorial activities of a ship or its crew. The refusal of access must, however, be compatible with the

[102] Admittedly, this only applies between States which have both ratified Annex VI MARPOL and are also parties to UNCLOS.—Regulation 11/6 states: 'The international law concerning the prevention, reduction and control of pollution of the marine environment from ships, including that law relating to the enforcement and safeguards, in force at the time of application or interpretation of the Annex, applies, *mutatis mutandis*, to the rules and standards set forth in this Annex' (emphasis in the original).

[103] See Ringbom (n. 35) 295.

duty contained in Art. 227 UNCLOS not to discriminate against the ships of foreign States as well as the principle of proportionality—a general rule of law.[104] Thus, it would be incompatible with international law if an inspection practice were to emerge, according to which only ships flying particular flags would be denied access to European ports *a priori*—that is, without reasonable grounds for suspicion. However, Directive 2009/16 prevents violations of these principles by ensuring that (1) the imposition of a permanent refusal of access is only permissible after the third temporary refusal of access (cf. Art. 16 (4)), and that (2) legal action against the imposition of—temporary or permanent—refusals of access is possible (Art. 20). A violation of the principle of non-discrimination is not apparent because the Directive applies to all States, whose ships call at European ports. That the ships of one or more States could be affected by a refusal of access does not fall within the scope of application of Art. 227 UNCLOS; the imposition of control measures is, in reality, the consequence of the uniform application of standards applicable to all States.

In summary, the measures contained in the 'Erika III' package are compatible with the international law of the sea. A conflict between the EU, on the one hand, and the IMO, on the other, does not exist.

5. Conclusion

Although European secondary law is compatible with the requirements of international law in the given case, this cannot lead to the conclusion that a discussion of the extent of the Union's competences in the field of international relations—for example in regard to the extension of the European emissions trading scheme to non-European airlines—is much ado about nothing. That it could eventually come to a conflict between a globally responsible international organization, in which the EU does not directly participate, and the supranational EU is highlighted by previous experiences in the field of maritime safety. It should be recalled that the EU's 'Erika I' initiative to regulate the accelerated introduction of double hulls[105] motivated the IMO to resume its work on the topic and ultimately adopt an accelerated schedule for the decomissioning of single-hulled oil

[104] See also ibid., 296 et seq.

[105] Cf. Communication COM (2000) 142 final of 21 March 2000 from the Commission to the European Parliament and the Council on the safety of the seaborne oil trade.

tankers. While the EU adapted the original Commission draft in order to coordinate it with the new MARPOL requirements and ensure the compatibility of EU law with international law,[106] the readiness of the Union's organs, confronted with the oil spill on the coast of Brittany, to tread their own uniquely European path if need be was unmistakeable.[107] The EU evidently pursued a similar 'bottom-up approach' to the implementation of more stringent environmental standards in the area of maritime emissions.[108] In a communication of 28 January 2009, the Commission urged that '[i]f no effective global rules to reduce GHG emissions from [maritime transport] can be agreed upon', irrespective of the IMO's general responsibility for the drafting and adoption of global measures, the EU 'should agree its own measures.'[109] In another Communication it continued that the EU should:

> [...] strive for and cooperate towards achieving all the objectives of the EU maritime safety and security policies by means of international instruments agreed through the IMO. If IMO negotiations should fail, however, then the EU should take the lead in implementing measures on matters that are of particular importance for the EU, as a first step, pending wider international agreement and taking the international competitive environment into consideration.[110]

There is clearly no lack of will to undertake such a unilateral approach as seen in regard to the inclusion of foreign aviation in the EU-wide emissions trading scheme—after the ECJ's resolution of the outstanding legal questions in this context on 21 December 2011[111]—which became effective as of 1 January 2012.[112]

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[106] Cf. Regulation (EC) No 417/2002 (n. 2).

[107] See already COM (2001) 370 final of 12 September 2001, European transport policy for 2010: time to decide, 97: 'The Community has built up a considerable body of law over the last ten years, especially in air and sea transport [...] The Community has adopted specific regulations which do not always coincide with the recommendations and agreements made in international organisations.'

[108] Overview in Alexander Proelss and Killian O'Brien, 'Völker- und europarechtliche Anforderungen an Abgasemissionen von Seeschiffen' [2011] NordÖR 97 et seq.

[109] COM (2009) 39 final of 28 January 2009, Towards a comprehensive climate change agreement in Copenhagen, 7 et seq.

[110] COM (2009) 8 final of 21 January 2009, Strategic goals and recommendations for the EU's maritime transport policy until 2018, 10.

[111] Cf. ECJ, C-366/10 *The Air Transport Association of America and Others*.

[112] 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 [2009] OJ L8/3.

It is unlikely that the EU is prepared to act outside the globally applicable framework of international law on a permanent basis, however. At the forefront of the European approach is the effort—strengthened by Europe's significant economic power[113]—to exert political pressure on the Member States of the IMO to more quickly bring about a reform of international maritime and climate protection law. This political interest, however rational, should not distract from the legal dimension analyzed in this paper. Despite the fact that the EU's approach has led in the past to a tightening of the international maritime safety regime, this does not yet make it legitimate in and of itself. A purely outcome-oriented evaluation would fail to recognize that a repeatedly unilateral approach on the part of the EU could ultimately undermine the authority and competence of the IMO. In light of the global nature of shipping and its importance for the world economy, more stringent regional rules would be a small victory at a very high price.[114] Ultimately, this could even contribute to the further fragmentation of international law; legal uncertainty and an encroachment on international law's overall claim to normative validity could be the consequence.

Even from the EU's perspective, there are concerns about such European *Sonderwege*. On one hand, such an approach could (further) reduce the EU's political weight in international relations; in the words of *Gráinne de Búrca* this would represent 'a significant departure from the conventional presentation and widespread understanding of the EU as an actor maintaining a distinctive commitment to international law and institutions.'[115] The case law of the ECJ—which, in the view represented here, significantly overemphasizes the autonomy of the Union legal order despite the requirements of European primary law—would find its match in the course of action taken by other Union organs.[116] In regard to the specific example of shipping, the danger exists that outflagging in favor of non-European shipping registers would begin.

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[113] See Liu Nengye and Frank Maes, 'The European Union and the International Maritime Organization: EU's External Influence on the Prevention of Vessel-Source Pollution' (2010) 41 JMLC 581, 590.

[114] Cf. also Rainer Lagoni, 'Umwelt und Schiffssicherheit im Völkerrecht und im Recht der Europäischen Gemeinschaften' (1994) 32 AVR 382, 395 et seq.; Proelss (n. 16) 326; uncritical, in contrast Nengye and Maes (n. 113) 588 et seq., 594.

[115] Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*" (2010) 51 HIJL 1, 2.

[116] See also the criticism expressed in Mendez (n. 49) 103.

The European Union is therefore well advised to remember its role as a potential enforcement organ for the IMO. It has done so with the 'Erika III' package. In this area of international relations that concerns the effective implementation and enforcement of global standards, the supranational structure of the Union has stood the test—not least of which being due to the existence of compulsory jurisdiction. At the same time, however, some things still need improvement in regard to the centralized control of the relevant actors in the area of maritime safety—which is necessary for the effectiveness of any safety regime. Above all, the successful intensification of port State controls deserves unconditional support. It remains to be seen whether the Union organs will follow this path in the future, however—authentically fostering international law rather than persisting with an exaggerated understanding of the autonomy of the European Union's legal system.