Iliana Christodoulou-Varotsi

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Foreword

The International Maritime Organization (IMO), as the United Nations specialized agency responsible for the regulation of shipping engaged in international trade from the points of view of maritime safety and the prevention and control of pollution by ships, recognizes that these goals can only be effectively achieved if each and every link in the corresponding chain of responsibility meets fully its obligations. Flag, port and coastal States, as well as the shipping industry itself, all have roles to play in collectively improving safety and protecting the environment, both marine and atmospheric, through the development, adoption, and uniform implementation and enforcement of, global standards.

In this book, Dr. Christodoulou-Varotsi sets out to explore the extent to which the actions of the European Union and the United States, as the main originators of high standards in these fields, constitute a paradigm to the rest of the international maritime community. In this regard, while underscoring the need for a holistic, multilateral approach to maritime regulation – as epitomized by the work of IMO – the author explores how standards could be enhanced through the use of unilateral action.

In so doing, she raises the question of whether certain manifestations of unilateralism, illustrated by instruments proposed or adopted by the European Union and the United States, should or should not be integrated into the international law-making process to improve maritime safety and environmental protection. She concludes that unilateralism should be seen as a potential stage towards international action, rather than as constituting the solution to a problem, and should be exercised only exceptionally, when the possibility of reaching the desired outcome at the international level has been exhausted.

With particular reference to the control and reduction of marine pollution, Dr. Christodoulou-Varotsi explores suggestions towards a system focusing on pre-pollution prevention, where the market (through permits, for example), rather than Governments, would be the chief regulatory force. While demonstrating a marked degree of confidence in the capacity of private operators for self-regulation, the legal potential of such an approach in the shipping context is, as the author recognizes, yet to be fully explored.

All in all, Dr. Christodoulou-Varotsi's work adds to the debate on potential approaches to the regulation of maritime safety and prevention and control of pollution by ships, leaving the reader with challenging policy options that bring a different angle to the discussion. It is this different angle – which, in a democratic process, could benefit the outcome of any debate – that prompted me, a strong supporter of multilateralism, to contribute the Foreword to this book, for which I wish Dr. Christodoulou-Varotsi success in the fulfillment of her expectations.

Efthimios E. Mitropoulos
Secretary-General
International Maritime Organization

Preface

While it has been known for some time that "No man is an island, entire of itself,"[1] the same is apparently not self evident in respect of ships. But one has gained understanding. Perhaps the most significant traits in shipping policy after 1900 is the recognition that flag state safety regulation is inadequate when it is coasts, ports and the environment that needs protection. The ship interacts with its surrounding for good and – more significant for lawmakers – for bad. The need for port and coastal states to exercise their jurisdiction has become pressing.

As the flag state monopoly for safety regulation of shipping has been challenged, an interest for harmonization of rules emerges, or at least an interest in confronting the exercise of coastal jurisdiction in one state with that of another:

First of all, harmonization and harmonization attempts create foreseeability; a *ship should know what to expect* even if not solely subject to the legislation of its flag state.

Secondly, harmonized rules eliminate the need for – if at all possible – *changing parts of the vessel and routines between ports*.

Thirdly, harmonization provides justification for rules. If other port states need them – so do we.

Fourthly, harmonization of rules creates a *level playing field*, not least important for costly rules relating to safety and protection of the environment.

Fifthly, the harmonization process is a great international colloquium, in which terms and concepts are developed to ease communication, and in which representatives of all states gains knowledge of the state of the art.

Luckily, then, there is no obvious or general race against the bottom amongst coastal and port state legislators. Apparently, the interest in protecting the ports, coast and the environment has been stronger than the possible gains for the national users of transport by slacking the rope.

In this context, *Dr. Iliana Christodoulou-Varotsi* tells us a most fascinating story on the perhaps two greatest antagonists in the generally quite harmonized world of ship safety legislation: USA and Europe. The European story is a story of the emergence of Community competence and in exercise since the 1990ies. The US story is inevitably linked to the Exxon Valdez incident and the Oil Pollution Act, 1990, although this is only part of it.

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[1] John Donne (1572-1631): *Devotions Upon Emergent Occasions, Meditation XVII.*

I do not think *Dr. Christodoulou-Varotsi* dares to conclude clearly whether or not the relationship between the US and Europe is synergy or antagonism in this respect. But that is in any event not the main point. We owe her thanks for having accounted for the rules in a manageable format, focusing on the non harmonized features.

One may dislike unilateralism and regionalism; one may dislike government intervention. But the fact remains that if none of those having the opportunity takes an initiative, safety will not develop. Perhaps are the synergetic and the antagonistic effects of such initiatives not so different after all?

This project has been a part of a greater Maritime Safety Project at the Scandinavian Institute of Maritime Law.[2] The work with *Dr. Christodoulou-Varotsi* on safety has certainly made me look forward to further work in this field.

Oslo February 29, 2008

Professor Erik Røsæg
Scandinavian Institute of Maritime Law
University of Oslo

[2] See http://www.jus.uio.no/nifs/nifs/forskning/sjosikkerhet/.

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List of abbreviations

ACSNI	Advisory Committee on the Safety of Nuclear Installations
AFDI	Annuaire Français de Droit International
AFS Convention	International Convention on the Control of Harmful Antifouling Systems
APPS	Act to Prevent Pollution by Ships
B.U. L. REV.	Boston University Law Review
BAP	Best Achievable Protection
CDEM standards	Construction, Design, Equipment, and Manning standards
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CIS	Community Information Systems
CLC	Civil Liability Convention
CMI	Comité Maritime International
COLUM. J. ENVTL. L.	Columbia Journal of Environmental Law
COPE	European Pollution Damage Compensation Fund
CWA	Clean Water Act
DMF	Droit Maritime Français
DRPA	Delaware River Protection Act
ECOLOGY L.Q.	Ecology Law Quarterly
EEA	European Economic Area
EEC	European Economic Communities
EEZ	Exclusive Economic Zone
EMSA	European Maritime Safety Agency
EPA	Environmental Protection Agency
ETL	European Transport Law
EU	European Union

FORDHAM INT'L L. J.	Fordham International Law Journal
FWPCA	Federal Water Pollution Control Act
GEORGIA J. INT'AL & COMP. L.	Georgia Journal of International and Comparative Law
GREEK REV. MAR. L.	Greek Review of Maritime Law
HARV. INT'L L. J.	Harvard International Law Journal
HARV. L. REV.	Harvard Law Revew
HELLENIC REV. OF EUR. L.	Hellenic Review of European Law
IJSL	International Journal of Shipping Law
IMO	International Maritime Organization
INT'AL J. MAR. COASTAL L.	International Journal of Maritime and Coastal Law
INTERTANKO	International Association of Independent Tanker Owners
ISC	Incident Command System
ISM	International Safety Management
ISPS	International Ship and Port Facility Security
J. MAR. L. & COM.	Journal of Maritime Law and Commerce
JDI	Journal du Droit International. Clunet.
JIML	Journal of International Maritime Law
LDC	London Dumping Convention
LL	Load Lines Convention
LLMC	Limitation of Liability for Maritime Claims
LMCLQ	Lloyd's Maritime and Commerical Law Quarterly
MARIUS	Marius-Scandinavian Institute of Maritime Law
MARPOL	International Convention for the Prevention of Pollution from Ships
MCMP	Management Committee for Marine Pollution
MOU	Memorandum of Understanding
MPPRCA	Marine Plastic Pollution Research and Control Act
MTS J.	Marine Technology Society Journal
MTSA	Maritime Transportation Security Act

NCP	National Contingency Plan
NRT	National Response Team
NSR	Navigation Safety Regulations
OCEAN DEV. & INT'L L.	Ocean Development and International Law
OCEAN & COASTAL L.J.	Ocean and Coastal Law Journal
OCMI	Officer in Charge of the Marine Inspection
OPRC	International Convention on Oil Pollution Preparedness, Response and Cooperation
OSC	On-Scene Coordinator
OSLTF	Oil Spill Liability Trust Fund
OSPAR	Paris Convention for the Protection of the Coasts of the North-East Atlantic
PSC	Port State Control
PTSA	Port and Tanker Safety Act
PWSA	Port and Waterways Safety Act
R.C.A.D.I.	Receuil des Cours de l'Académie de Droit International
RECIEL	Review of European Community and International Environmental Law
REV. BELGE DR. INT'L	Revue Belge de Droit International
REEP	Review of Environmental Economics and Policy
REV. TRIM. DR. EUR.	Revue Trimestrielle de Droit Européen
RRT	Regional Response Team
SARA	Superfund Amendments and Reauthorization Act
SING. JICL	Singapore Journal of International and Comparative Law
SMS	Safety Management System
SOLAS	International Convention for the Safety of Life at Sea
SOPEP	Shipboard Oil Pollution Emergency Plans
STAN. ENVTL. L. J.	Standford Environmental Law Journal
STCW	Convention on Standards of Training, Certification and Watchkeeping for Seafarers

SUFFOLK TRANSNAT'L L. REV.	Suffolk Transnational Law Review
TEMPL. INT'L & COMP. L. J.	Temple International and Comparative Law Journal
TEX. L. REV.	Texas Law Review
TRANSP. L. J.	Transportation Law Journal
TUL. MAR. L.J.	Tulane Maritime Law Journal
U.S.	United States of America
U.S.C.	United Sates Code
U.S.F. MAR. L. J.	University of San Francisco Maritime Law Journal
UNCCROS	United Nations Convention on the Conditions for Registration of Ships
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
VA. ENVTL. L. J.	Virginia Environmental Law Journal
VAND. J. TRANSNAT'L L.	Vanderbilt Journal of Transnational Law
WILLAMETTE L. REV.	Willamette Law Review
WMU J. MAR AFFAIRS	World Maritime University Journal of Maritime Affairs
WORLD TRADE L.	World Trade Law

Acknowledgements

This study is the result of a post-doctoral research project conducted at the Scandinavian Institute of Maritime Law (University of Oslo) under the guidance of Prof. Erik Rosaeg. I would like to express my warmest thanks to Prof. Rosaeg and to my sponsor, Propondis Foundation, for all the assistance from which I have benefited in view of the elaboration of this project. I am also grateful to all the persons who provided further assistance to me with their views or useful documentation at different stages of this study; Mr. Matthias Edrick, Attorney, Peck, Shaffer & Williams LLP, Dr. Filippo Lorenzon, Lecturer in Law from the University of Southampton, and Dr. Brigitte Reschke, Senior Editor Law, Springer, are especially acknowledged. My warmest thanks are due to H.E. Mr. Efthimios Mitropoulos, Secretary - General of the International Maritime Organization for having honoured this work with his Foreword. I would like to dedicate this work to my family and especially to my mother.

N. Psychiko (Greece), August 2008

Adj. Prof. Dr. Iliana Christodoulou-Varotsi

*"The worth of any domestic program for maritime safety and environmental protection, whether regulatory or legislative, must be measured not only in terms of its immediate effectiveness, but also in terms of its ultimate impact on international efforts toward the same goal"**

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* Letter from John Wofford, U.S. Department of Transportation, to Representative John M. Murphy, Chairman of the House Merchant Marine and Fisheries Committee, dated 11 May 1978, quoted in Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States* (Part II), 29 J. MAR. L. COM. 565 (1998) at 598.

Abstract

The European Union (EU)* and the United States of America (U.S.) have been to a large extent the pacemakers of especially high standards of maritime safety, and their contribution to safety at sea and prevention of marine pollution is undeniable. To what extent can their action constitute a paradigm to the rest of the international maritime community, without suggesting a compromise of the uniformity sought by international maritime law?

The purpose of this study is to provide a European reading of current trends in maritime safety law and policies, on the basis of a comparison between a selective number of instruments adopted by the EU and the U.S.. The author considers that the U.S.'s maritime safety laws and regulations have acted as a catalyst or are likely to act as a catalyst for the EU, which is at the present stage a leading sea power. In the light of this assumption, the discussion explores unilateralism and multilateralism in international maritime law and searches for prospects and limitations. The author argues that when a unilateral approach departs from its initial goal, which is to exercise pressure for more effective action at the global level, some drawbacks are likely to arise, notably by underestimating the potential of a uniform action as such, or even the potential of alternative actions on the global level.

A preliminary part addresses basic concepts implied by the discussion, evolving around flag State, coastal State and port State jurisdiction. While Part I explores the emergence of unilateralism in maritime safety law with reference to the general trends of the laws and policies of the EU and the U.S., Part II narrows the focus down to three particular areas, namely prevention, preparedness and response, and liability.

Concluding remarks will include a recommendation on a very selective use of unilateral action in maritime safety law and on a holistic maritime safety approach; the latter should place the emphasis on enforcement and implementation, be less legalistic, demonstrate more confidence in the capacity of qualitative private operators for self-regulation, and ensure a foreseeable investment framework.

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* For the purposes of this study, the terms European Union (EU) and European Community (EC) will be used as synonyms.

Introduction

While each new maritime casualty is likely to shed light on unknown aspects of maritime safety and marine pollution prevention[1], a theoretical approach to this field is not exempt from a certain risk of fruitless repetition. A lot of ink has been spent indeed on maritime safety[2], especially by the international legislator[3]. Never-

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1 *See* e.g. CHENGI KUO, MANAGING SHIP SAFETY (1998), point 1.4:Lessons from Marine and Offshore Disasters, 9-20, Jean-Paul Declercq, *Transport Par Mer des Marchandises Dangereuses et Réflexions sur les Textes et les Réalités, Suite à la Perte en Mer de Conteneurs par Différents Navires Durant l'Hiver 1993/1994*, XIII ANNUAIRE DE DROIT MARITIME ET AÉROSPATIAL, 113 (1995), Marlene Calderon Veiga, *A Comparative Analysis of the European and North-American Approach in Dealing With Major Oil Spills*, 3 WMU J. MAR. AFFAIRS 2, 184 (2004), Martine Remond-Gouilloud, *Leçon d'un Naufrage*, Dalloz, 133-138 (1979).

2 Maritime safety and marine pollution prevention, which is a more restricted notion, are very closely related and cannot always be distinctively envisaged.
On maritime safety see *inter alia*: ALEXANDRA BELLAYER-ROILLE, LE TRANSPORT MARITIME ET LES POLITIQUES DE SÉCURITÉ DE L'UNION EUROPEENNE (2000), Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States*, 29 J. MAR. L. & COM. 565 (1998), DAVID J. SANDERS (Editor), MANAGEMENT OF SAFETY (1991). *See* also Harilaos N. Psaraftis, *Maritime Safety: To Be or Not to Be Proactive*, 1 WMU J. MAR. AFFAIRS 1 (2002), Iliana Christodoulou-Varotsi, *The EC Framework on Maritime Safety* (in Greek), 1 GREEK REV. MAR. L. 70 (2002) (in Greek), Iliana Christodoulou-Varotsi, *The Challenge of European Maritime Safety; An Overview of the EC's Policy and Regulatory Framework on Maritime Safety*, 311 MARIUS (Scandinavian Institute of Maritime Law) 285 (2004), KUO, id., PHILIPPE BOISSON, SAFETY AT SEA (1999).
On marine pollution prevention see inter alia: COLIN DE LA RUE and CHARLES B. ANDERSON, SHIPPING AND THE ENVIRONMENT (1998), DAVID W. ABECASSIS (Editor), OIL POLLUTION FROM SHIPS-INTERNATIONAL, UNITED KINGDOM AND UNITED STATES LAW AND PRACTICE (1985), 441, Michel Morin, *La Prévention et la Lutte Contre la Pollution par les Navires de Commerce*, XII ANNUAIRE DE DROIT MARITIME ET AÉROSPATIAL, 167 (1995), THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW (2004), 873 seq.
For both areas see http://www.imo.org (last visit 30.3.2006).

3 *See* Philippe Boisson, *La Problématique des Normes*, XVI ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 175 (1998).

theless, to the extent that maritime risks are constantly a reality[4], and law is one of the major instruments used to envisage them, a further exploration of maritime safety is likely to contribute to the understanding of the issue when this is done under the scope of new or less known parameters; *a fortiori*, exploring maritime safety further may reveal some points of interest because of the emergence of new interactions among the basic institutional protagonists of maritime safety such as the International Maritime Organization (IMO), whose role in the regulation of the maritime sphere is self-evident, the European Union (EU), as the world's leading sea power accounting for 40% of the world's fleet[5] and the United States of America (U.S.), in its apparent capacity of influencing, not to say dominant, policy-maker.

It is often explored by theory and practice whether the European and the North-American approach to maritime safety have constituted a challenge to the traditional framework which stems from the international legal order and specifically from the IMO[6]. First the U.S. and then the EC, in different contexts, have adopted or are in the process of adopting maritime safety instruments which depart from the international legal regime or shape the international requirements on the criteria of national or regional interests.

On the other hand, the EU, whose competence in the maritime field developed at a gradual and fragmented pace[7], demonstrates an increasing interest in maritime safety law. Significantly, even in the absence of political integration among Member States, a European coast guard, shaped on the model of the U.S. coast guard was suggested at different levels, academic and political[8]. Given the particularity of the EU, which, contrary to the U.S., mainly attracts transit maritime traffic involving high-risk vessels flying the flag of third countries outside the jurisdiction of the Member States[9], encouragement of the limitation of the transit right of cer-

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4 Despite the technical progress achieved, the maritime community cannot claim the same level of safety at sea as in the air. On the recurrence of major maritime disasters see BOISSON, *supra* note 2, 35 *seq*.

5 *See* the European Commission's Communication entitled Third Package of legislative measures on maritime safety in the European Union, COM(2005)585 final, Brussels, 23.11.2005, 3.

6 *See inter alia* BOISSON *supra* note 2, Erling Selvig, *The International Shipping Law of the 20th Century Under Pressure*, 6 JIML 190 (2000), Henrik Ringbom, *The EU's exercise of Port and Coastal State Jurisdiction*, XXV ANNUAIRE DE DROIT MARITIME ET AÉROSPATIAL, 209 (2007), M.J. Yost, *The Oil Pollution Act of 1990, IMO and Unilateral Action*, ABA, Section of International Law and Practice, 1992 Annual Meeting, 12.

7 *See* VINCENT POWER, EC SHIPPING LAW (2007).

8 *See* BELLAYER-ROILLE, *supra* note 2 (2000), Lengagne and Quentin, *infra* note 10, 81.

9 *See* Communication from the Commission-Third package of legislative measures on maritime safety in the EU, *supra* note 5, 5.

tain types of vessels in the exclusive economic zone of Member States was brought forward by the Transport Council of 5-6 December 2002[10].

It is evident in recent years that the EU has put forward, at different stages of development of its policy, a number of unilateral elements[11]. A recent example is the adoption of Directive 2005/35/EC and Framework Decision 2003/80/JHA on the introduction of penalties, including criminal penalties, on ship-source pollution[12]. One of the EC provisions shaping the scope of international requirements, but in the field of maritime security, is Regulation 725/2004/EC which has widened the scope of application of the International Ship and Port Facility Security (ISPS) Code and has rendered mandatory a number of provisions of the Code which are deprived from binding force[13]. More numerous are the EC instruments relating to maritime safety which depart from the international framework as to the acceleration of their entry into force[14]; of much significance to the future, is the intention of the European Commission to render obligatory, via EC legislation, IMO resolutions which are deprived of binding force.

On the other hand, long before the Oil Pollution Act of 1990, which has been assimilated by many as a paradigmatic unilateral approach to maritime safety[15], the Port and Tanker Safety Act (PTSA 1978) constituted the response of the U.S. maritime legislature to the "backdrop of slowly developing international rules"[16]. In the 1990s, OPA was the instrument which enhanced this tendency and provided for the competence of the U.S. Secretary of the Department of Transportation to adopt provisions "that exceed standards set internationally"[17]. The Port State Control constitutes another example where the U.S. prefers not to participate in re-

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10 *See* G. Lengagne and D. Quentin, *De l'Erika au Prestige: la Politique Européenne de la Sécurité Maritime Contrariée*, Rapport de l'Assemblée Nationale Française, no. 644, mars 2003, 76.

11 Notably see the discussion conducted by Uwe K. Jenisch in *EU Maritime Transport-Maritime Policy, Legislation and Administration,* 3 WMU J. MAR. AFF. 1, 67-83, 82 (2004).

12 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, OJ L 255, 30.9.2005 and Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution, OJ 2005 L255/164. *See* Iliana Christodoulou-Varotsi, *Recent Developments in the EC Legal Framework on Ship-Source Pollution: The Ambivalence of the EC's Penal Approach,* 33 TRANSP. L. J. 3 (2006).

13 Regulation 725/2004/EC of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security (Text with EEA relevance), OJ 2004 L 129/6.

14 *See* Regulation 3051/95/EC of 8 December 1995 on the management of RO-RO passenger vessels, OJ 1995 L 320/14.

15 Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484(1990) (current version at 33 U.S.C. §§ 2702-2761) (hereinafter "Oil Pollution Act" or "OPA"). On unilateral qualification, see BOISSSON, *supra* note 2, 190 *seq*.

16 *See* Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471 (1978), quoted in Allen, *supra* note 2, 598.

17 *See* 46 U.S.C. §3703(a).

gional instruments, which generally take the form of Memoranda of Understanding concluded among national maritime administrations, but to act on the basis of national programs[18]. In more recent years, and in a context related to security rather than safety, the ISPS Code[19], which aimed, in its capacity as an IMO instrument, to tackle the problem of preventing terrorist attacks in ports, was incorporated in the U.S. by the Maritime Transportation Security Act of 2002 (MTSA)[20] but applied to a wider range of vessels than those provided in the ISPS Code.

Despite the tendency to depart from the international norms, fundamental questions posed to both entities are relatively the same. From a formal point of view, while maritime safety is traditionally related to international maritime law, it is in actual fact deeply connected with international environmental law and evolves around the crucial question of what is the optimal level of marine pollution and consequently the optimal level of marine pollution prevention[21]. Protecting human life at sea, the vessel as a property, marine environment and shorelines seems evident to almost every human being; nevertheless, the shipping industry is assigned a specific role with regard to the above mentioned goals[22], in the frame of a delicate balance between profitability and sustainability. As the private nature of shipping becomes a public concern, it is not, however, always clear where the requirements related to maritime safety should be confined to and what public policy choices should be privileged[23]. Should the legislator via maritime safety law and policies confer a public benefit, i.e. protect the marine environment or confine

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18 The U.S. is engaged in a Port State Control Initiative of foreign vessels launched by the United States Coast Guard (USCG) in 1994. *See* 59 Fed. Reg. 36, 826 (19.7.1994).

19 On the ISPS Code, notably see *infra* note 287.

20 *See* Part I under 2.3.

21 *See* HENRIK RINGBOM (Editor), COMPETING NORMS IN THE LAW OF MARINE ENVIRONMENTAL PROTECTION (1997).

22 This role is however sometimes overestimated. Only about 15% of marine pollution is due to shipping activity; see Georgios Samiotis, *The Establishment of Strict Liability as a Major Instrument of Antipollution Policy in International and Domestic Law* (in Greek), in MARINE POLLUTION: THE PROBLEM OF DAMAGES AND PENALTIES (2004), 153. Land pollution, having a negative impact on marine environment, covers the remaining percentage. *See* MANGONE, UNITED STATES ADMIRALTY LAW, 265-287 (1997), 265. *See also* Martine Remond-Gouilloud, *Mer et Environment: De Quelques Relations Plus Ou Moins Raisonnables*, XIII ANNUAIRE DE DROIT MA-RITIME ET AÉROSPATIAL 19 (1995). As far as the U.S. is concerned " in 1997 …oil spills from vessels still represented forty percent of the amount discharged and continued to attract intense media scrutiny and public attention", in Laurence Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L. J. 481(2000), 485.

23 *See* the issue of the phasing out of single hull vessels as discussed below (infra Part II.1 seq.). While this issue has been extensively explored by academia and other sources, the interactions of this measure with the shipbuilding sector do not seem to have provoked the same attention.

itself to preventing a public harm, which implies a more limited role?[24] The contribution of the shipping industry to national economies and individual wealth, via the transportation of goods to places of consumption[25], and the contribution of the oil industry, in particular, to world balance, seem to justify the tolerance of a certain risk for the environment, which in the actual legal context should not go beyond certain limits[26]. These limits are set by the IMO and, in recent years, also by the EU and the U.S.

The European and North-American shipping industries are undoubtedly of those sectors where almost every fragment of the productive chain is heavily regulated under the scope of maritime safety. Maritime safety or safety at sea is defined as "the material state resulting from the absence of exposure to danger, and the organization of factors intended to create or perpetuate such a situation"[27]. Maritime safety is traditionally associated with the prevention of marine pollution, the removal of spills, liability and compensation issues. A number of approaches have been proposed to understand the nature of maritime risks and consequently build upon the concept of maritime safety[28], including e.g. the systemic approach, which focuses on the failure of a complex system, and a new approach which would be characterized as total, and where every event would be examined within a struc-

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24 This rationale is interestingly brought up in U.S. case-law with regard to the question of whether the double hull requirement of the Oil Pollution Act of 1990 constitutes a regulatory taking. *See* Criston Cicala, *The Double Hull Requirement of the Oil Pollution Act of 1990: Does it Constitute a Regulatory Taking?*, 24 TUL. MAR. L. J.877(2000). In *Maritrans Inc. v. United States* an action was brought in the United States Court of Federal Claims by the owner of a fleet of domestic barges seeking compensation from the United States government for an alleged regulatory taking. According to the position developed by the shipowner, the adverse economic impact resulting from the expense of retrofiting or retiring certain vessels amounted to a regulatory taking by the federal government for which he was entitled to compensation under the Fifth Amendment of the United States Constitution. This case brought up the question of whether public policy choice was undertaken in order to confer a public benefit or prevent a public harm. If the Court determined that the action was undertaken to prevent public harm, then it was generally thought that such action would not be considered a taking. If the governmental action was considered as conferring a public benefit, it would generally be considered a taking and would merit the just compensation required by the Fifth Amendment. [40 Fed. Cl. 790 (Fed. Cl. 1998)] *See* above mentioned article, p. 896.

25 The dependence of the EC and the U.S. on maritime transport should not be neglected. About 90% of the EU's foreign trade is carried out by sea. At the present stage, the U.S. imports approximately 3.3 billion barrels of oil annually by tanker and consumes approximately nineteen million barrels of oil every day. *See* U.S. DEPARTMENT OF TRANS., AN ASSESSMENT OF THE U.S. MARINE TRANSPORTATION SYSTEM: A REPORT TO CONGRESS at vii (1999), quoted in Kiern, *supra* note 22, 484.

26 *See* Remond-Gouilloud, *supra* notes 1 and 22.

27 *See* BOISSON, *supra* note 2, 31.

28 According to the fatalistic approach, focus is placed on the unpredictability of the sea, while the deterministic approach emphasizes technical or human factors. *See* BOISSON, *id.* at 37.

tured system comprising the ship, the environment and the maritime community[29].

While the rationale on maritime safety has traditionally been the exclusive playing field of the IMO, nowadays both the EU and the U.S. have developed, to some extent, "their own" policies on the matter. This phenomenon has been described as a challenge to the traditional multilateral framework of maritime law and has been in several cases assimilated to a symptom of undesirable unilateralism or regionalism[30]. This evolution calls for the exploration of other levels of action, which would be of a different nature than the majority of the existing ones; they should notably place the emphasis on implementation, be less legalistic, demonstrate more confidence in the private operators' capacity for self-regulation, be activated upon an integrated perception of common interests at sea and contribute to the shaping of a foreseeable framework of investment.

The EU on the one hand, has been actively involved in the area of maritime safety within the frame of the so-called common shipping policy only from the 90s. It is worth noting that the term "maritime transport" was mentioned only once in the Treaty of Rome (1957), which established the European Economic Communities (EEC)[31], while the generic term "safety [of transports]", was not mentioned in primary EC law, until the Treaty of Maastricht, i.e. in 1992[32]. A Communication on "safe seas" in 1993[33] was followed at a subsequent level by substantive legislation, which is binding upon Member States[34]. Each maritime casualty somehow constituted the level for the enhancement of such policy, including incidents such as The Estonia[35], The Erika[36] and The Prestige[37] from year 1994 to

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29 *See* BOISSON, *id.* at 38.

30 *See* Alexandra Bellayer-Roille, *Les Réactions Juridiques de la CE Suite au Naufrage du Prestige: Étude d'une Politique Ambitieuse de Sécurité Maritime*, XXI ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 170 (2003) (where the author considers that there is unilateralism only in the case of U.S.'s maritime policy and not in the case of EC maritime policy), BOISSON, *supra* note 2, 177 *seq.* (1999) (considers that both the EU and the U.S. maritime policies are expressions of unwanted unilateralism), Jacques De Dieu, *European Union Policies Concerning Ship Safety and Pollution Prevention v. International Rule Making* in RINGBOM (Editor), *supra* note 21, 141 (1997).

31 ILIANA CHRISTODOULOU-VAROTSI, L'ADAPTATION DU DROIT MARITIME HELLÉNIQUE ET DU DROIT MARITIME CHYPRIOTE AU DROIT COMMUNAUTAIRE 1 (1999).

32 *See* Article 71(1)(c) of the EC Treaty according to which the Council of Ministers is empowered to adopt measures aiming at the improvement of safety of transports.

33 COM(93)66 final, 24 February 1993.

34 As far as legislation is concerned, see the measures indicated under the name Erika I and Erika II, *infra* 191. *See* also *inter alia* Wim AG Blonk, EC *Maritime Policy: an Overview*, 30 ETL 6,735.

35 *See* H. Honka, *Questions on Maritime Safety and Liability Especially in View of the Estonia Disaster-Essay* in Honor of Hugo Tiberg, Off print, Juristforlaget, Stockholm, 1996, 351-382. *See* also *Sécurité des Ferries et Enjeux Économiques-Rapport Intermédiaire sur l'Estonia : On ne Savait Pas*, Journal de la Marine Marchande, 14.3.1995.

36 *See* Le Monde, 14.1.2000, "Erika": *La Commission d'Enquête Dénonce une Série de "Défaillances"*. *See* also Martin Ndende, *Regard sur les Procédures d'Indemnisation*

year 2002, which have influenced the development of EC common shipping policy on maritime safety. This evolution took place in a context where Member States of the EC have divergent or conflicting maritime interests, and with the European Commission, which was the instigator of such a policy, having only the status of an observer at the IMO[38]. From a technical point of view, the scope of EC common shipping policy is likely to be extended further by measures with an impact on maritime safety adopted outside the common shipping policy field[39] properly speaking, on the basis of the police and judicial cooperation pillar (third pillar), which is of intergovernmental nature[40]. It is worth mentioning that at this stage common maritime policy is in the process of promising, yet not consolidated, reforms which are being discussed; firstly, under the umbrella of the European Commission's Green Paper; the latter was adopted on 7 June 2006 by the Commission and it will constitute the basis of future proposals by the same body in view of an integrated maritime policy, whose ambition is to strengthen the protection of the marine environment, while promoting employment and competitiveness[41]. Secondly, additional changes are being promoted on the basis of the so-called Erika III package of legislative proposals[42].

The U.S.'s policy on maritime safety, on the other hand, is structured over a number of statutes, dating principally from the 70s, among which the most publicized in recent years is the Oil Pollution Act of 1990[43] (Title IV on Prevention and

des Victimes de la Catastrophe de l'Erika, XXI ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 89 (2003).

37 *See* Lengagne and Quentin, *supra* note 10. *See* also Henrik Ringbom, *The Erika Accident and Its Effects on EU Maritime Regulation*, in MYRON H., NORDQUIST and JOHN NORTON MOORE (Editors): CURRENT MARINE ENVIRONMENTAL ISSUES AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 281 (2001), Malgorzata Anna Nesterowicz, *European Union Legal Measures in Response to the Oil Pollution of the Sea*, 29 TUL. MAR. L. J. 29 (2004), Vincent Power and Denise Casey, *The Prestige:The European Union Legal Dimension*, 9 JIML 4 (2003). *See* also http://www.liste-hygiene.org/arcprestige.htm (last visit 29.1.2008).

38 *See* Bellayer-Roille, *supra* note 30, 171, Nesterowicz, *id.*

39 The so-called "common shipping policy" is based on Article 80 para.2 of the EC Treaty.

40 *See e.g.* Council Framework Decision no 2005/667/JAI of 12 July 2005, to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution , OJ 2005 L255/164, *See* Fabienne Kauff-Gazin, *Répression de la Politique Causée par les Navires*, Revue mensuelle LexisNexis Jurisclasseur –Europe, November 2005,17. *See* also Iliana Christodoulou-Varotsi, *The Sanctions in the Event of Marine Pollution Under the Scope of EC Law*, in MARINE POLLUTION : THE PROBLEM OF DAMAGES AND PENALTIES (in Greek) 417 (2004).

41 Notably see "Commission Green Paper- Towards a Future Maritime Policy for the Union: a European Vision of the Oceans and Seas", http://www.diplomatie.gouv.fr/en/article-imprim.php3?id_article=5285 (last visit 14.8.2006). *See* also background paper no 6 on Maritime Safety and Security, at http://ec.europa.eu/maritimeaffairs/pdf/SEC(2006)_689%20_6.PDF (last visit 14.8.2006).

42 *See supra* note 5.

43 *See* 33 U.S.C.2701(1994). On the Oil Pollution Act, notably see Antonio J. Rodriguez and Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L. J. 1 (1990), Ber-

Removal). The OPA was the result of the outcry of public opinion in the aftermath of the Exxon Valdez accident[44] and the ensuing vigilance of American legislators. The adoption of this super statute was intended to be a means of providing "the prevention, response, liability and compensation components [which] fit together into a compatible and workable system that strengthens the protection of our environment"[45]. The OPA was in actual fact intended to complete and improve former provisions which dealt with maritime safety and related issues in a rather fragmented manner[46]. While the impact of OPA on maritime legislations of other countries is a certainty, OPA seems to have opened Pandora's box.

In this context, our purpose is to research the convergence and/or divergence of EU and U.S. shipping policy on maritime safety, under the scope of international maritime safety law which constitutes the point of reference of the comparison. While the U.S. seems to act as a catalyst for EC maritime policy on safety at sea, it is not, however, clear where there is convergence and where there is divergence between the EU's and the U.S.'s respective policies, and what their respective contribution to the emergence or consolidation of unilateralism is. The interaction between these policies and regimes brings about the need to examine the extent to which European and U.S. rules converge and diverge from the aspect of the international requirements, their respective influence and their capacity to provoke a *de*

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nard Vanheule, *Oil Pollution Act: the International Liability and Compensation Regime*, 38 ETL 5 (2003), Cicala, *supra* note 24, 877, Damon L. Vickers, *Deterrence or Prevention-Two Means of Environmental Protection: An Analysis of the Oil Pollution Act of 1990 and Oregon Senate Bill*, 28 WILLAMETTE L. REV. 405 (1992), DAVID W. ABECASSIS, RICHARD L. JARASHOW, OIL POLLUTION FROM WHIPS 433-440 (1985), MANGONE, *supra* note 22, Gregg L. Mccurdy, *Overview of OPA 1990*, 5 U.S.F. MAR. L. J. 2 (1993), Kiern, *supra* note 22, Martine Remond - Gouilloud, Marées Noires:les États-Unis à l'Assaut (l'Oil Pollution Act 1990), 341 DMF 1991, PETER WETTERSTEIN, ENVIRONMENTAL IMPAIREMENT LIABILITY IN ADMIRALTY: A NOTE ON COMPENSABLE DAMAGE UNDER U.S. LAW 75-125 (1992), Russell V. Randle, *The Oil Pollution Act of 1990: Its Provisions, Intent and Effects*, 21 ELR 1991, Ray Leslie, OIL SPILL PREVENTION AND RESPONSE: HOW TO COMPLY WITH OPA AND OSPRA 1-8 (1994), Steven Swanson, *Federalism, the Admiralty and Oil Spills*, 27 J. MAR. L. & COM 379 (1996), Steven Swanson, *OPA 90 ÷10: The Oil Pollution Act After 10 Years*, 32 J. MAR. L. & COM 135 (2001), Thomas J. Wagner, *The Oil Pollution Act of 1990: an Analysis* 21 J. MAR. L. & COM 596 (1990).

44 Benjamin J. Grumbles, *Federal Oil Spill Legislation in the Wake of the Exxon Valdez*, 24 MTS J. 4 (1990), Edgar Gold, *Marine Pollution Liability after Exxon Valdez: The U.S. "All-Or-Nothing Lottery"*, 22 J. MAR. L. & COM 440 (1991), Michael J. Uda, *The Oil Pollution Act of 1990; Is There a Bright Future Beyond Valdez?*, 10 VA. ENVTL. L. J. 403 (1990-1991).

45 Statement by President George Bush Upon Signing H.R. 1465, 1990 U.S.C.C.A.N. 861-1, quoted in Browne Lewis, *It's Been 4380 Days and Counting Since Exxon Valdez: Is it Time to Change the Oil Pollution Act of 1990?*, 15 TUL. ENVTL. L.J. 97(2001).

46 *See inter alia* Lewis, *id.*, at II, MANGONE, *supra* note 22, at 276 seq., Kiern, *supra* note 22, at 502 *seq*.

l*ege ferenda* approach[47]. In this sense, the purpose of this paper, is to "reveal some order, some rational explanation and some principle of growth for the rules"[48] of international maritime safety and anti-pollution law, under the scope of a comparison between the EU's and the U.S.'s regulatory framework and policies. The study will also attempt to demonstrate the prospects and limitation of a *de lege ferenda* approach which would emphasize efficiency and effectiveness.

A preliminary part addresses basic concepts implied by the discussion which takes place in Parts I and II, namely flag State, coastal State and port State jurisdiction. These are also the premises on which the development of unilateralism takes place. While Part I explores the emergence of unilateralism in maritime safety with reference to EU and U.S. global laws and policy, Part II narrows the focus in the light of prevention, preparedness and response, as well as the ensuing liability issues relating to maritime casualties. In the final remarks some recommendations will be made evolving around a holistic approach to maritime safety law and the introduction of the discussion on market-oriented incentives to qualitative shipping.

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47 Academia has demonstrated a relatively limited and fragmented interest in the comparative approach of the question. *See* F. Dumont de Chassart, *La Pollution Marine par Hydrocarbures: Comparaison entre les Législations des États Unis et des États de la CE,* 2 ETL 232 (1991), Calderon Veiga, *supra* note 1, 171.

48 O.W. Holmes, *The Path of Law*, X HARV. L. REV. 457, 465 (1897), in Elli Louka, *Cutting the Gordian Knot: Why International Environmental Law is Not Only About the Protection of the Environment*, 10 TEMPL. INT'L & COMP. L. J. 79 (1996), at 79.

Preliminary part: Universalism in maritime law as a point of reference for lawmakers: Myth and reality

Regionalism or unilateralism in maritime law is based on differentiated interpretations of the international norms which may lead to reshaping the norms in question by widening or narrowing their scope, or by providing for additional or differentiated requirements. Schematically, international norms refer to the rights and obligations of the flag State, coastal State and port State. The interest of briefly examining maritime safety from the aspect of the flag State, coastal State and port State, is to reveal the limitations of States' actions in keeping with international law[49].

1. From the point of view of the flag State

The flag State is the State with which the vessel is registered. In their capacity as flag States, EU Member States and the U.S. enjoy a number of rights and are subject to a number of obligations which are notably provided for in the instruments addressed below[50].

The United Nations Convention on the Law of the Sea (hereinafter UNCLOS 1982, also commonly known as UNCLOS III) is the instrument which, according to the United Nations, "established for the first time one set of rules for the oceans, bringing order to a system fraught with political conflict"[51]. Despite recent

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[49] The presentation that follows is not intended to be exhaustive on international instruments. For the full list of international conventions on maritime safety and the prevention of marine pollution see http://www.imo.org/ (last visit 29.1.2008).

[50] *See* BOISSON, *supra* note 2, 375, G.P. PAMBORIDES, INTERNATIONAL SHIPPING LAW-LEGISLATION AND ENFORCEMENT, 1 (1999), John Hare, *Flag, Coastal and Port State Control-Closing the Net on Unseaworthy Ships and their Unscrupulous Owners*, http://web.uct.ac.za/depts/shiplaw/portste.htm (last visit 12.10.2005).

[51] *See* DAVID FREESTONE, RICHARD BARNES, DAVID ORG, THE LAW OF THE SEA: PROGRESS AND PROSPECTS (2006), quoted in Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L. J. 131, 132, 2005, MARIA GAVOUNELI, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA (2008) and MYRES S. MCDOUGLAS

developments in the Senate Foreign Relations Committee, the U.S. has not acceded to UNCLOS 1982; as it will be further discussed in the developments that follow, it is generally considered by U.S. Courts and academia that the Convention constitutes a mirror of generally accepted international legal principles or reflections of international customary law[52]; such a perception introduces limitations to the choices of the national lawmaker. The EC (former EEC) is party to UNCLOS 1982, in parallel to nearly all Member States[53]. The U.S. is, however, a signatory to the High Seas Convention (Geneva 1958), which even though it has been superseded by UNCLOS 1982, is considered to be in force for those States which have not acceded to UNCLOS 1982. As for the Geneva Convention on the Conditions for Registration of Ships (UNCCROS 1986)[54], which was adopted in view of the definition and the enhancement of the "genuine link" between the vessel and the registration country, this instrument has not yet entered into force; moreover, its success is considered very limited, since only a small number of States have signed and/or ratified it. Neither the U.S. nor EC Member States with strong maritime interests have so far ratified it[55]. It should be noted that the European Commission demonstrated some interest in the common position to be adopted by Member States when signing and ratifying the convention in question[56], while at the same time underlying that some provisions of the UNCCROS conflicted with the EC Treaty[57].

& WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEAN-A CONTEMPORARY INTERNATIONAL LAW OF THE SEA (1962).

52 With regard to UNCLOS and the U.S., notably see John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, , XXIV ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 229 (2006), John A. Duff, *A Note on the United States and the Law of the Sea: Looking Back and Moving Forward,* 35 OCEAN DEV.& INT'L L. 195 (2004), John Alton Duff, *UNCLOS and the Deep Seabed Mining Regime: The Risks of Refuting the Treaty*, 19 SUFFOLK TRANSNAT'L L. REV. 1 (1995). *See* also http://www.state.gov/www/global/oes/oceans/980610_los.html (last visit 2.1.2008).

53 With the exception of Denmark. With regard to UNCLOS and the EC, see *inter alia* Gregorio Garzon Clariana, *L'Union Européenne et la Convention de 1982 sur le Droit de la Mer*, 27 REV. BELGE DR. INT'L 1 (1995). *See* also Court of Justice of the European Community (ECJ), 30.5.2006, Commission v. Ireland, C-459/03, ECR 2006, I-4635 and Cesare P.R. Romano, *Case C-459/03 Commission v. Ireland*, Loyola-LA Legal Studies Paper No 2007-19, *available at* http://ssrn.com/abstract=969040 (last visit 2.10.2007).

54 *See* D. Momtaz, *La Convention des Nations-Unies sur les Conditions d'Immatriculation des Navires*, XXXII AFDI 715 (1986), G. Marston, *The UN Convention on Registration of Ships*, 20 J. WORLD TRADE L. 575 (1986), M. McConnell, *Business as Usual: an Evaluation of the 1986 United Nations Conventions on Conditions for Registration of Ships*, 18 J. MAR. L. & COM. 3 (1987).

55 Hungary is the only Member State which has ratified the Convention in question. *See* http://untreaty.un.org/ (last visit 29.1.2008).

56 Proposal for a Council of Ministers Decision on the Common Position to be adopted by Member States when signing and ratifying the United Nations Convention on Conditions for the Registration of Ships, COM(86)523 final.

57 *See* Articles 8, 9 and 10 of UNCCROS.

According to the High Seas Convention, every State shall take measures for its vessels as are necessary to ensure safety at sea with regard to communication, prevention of collisions, crew condition, equipment and seaworthiness of ships, in conformity with "generally accepted international standards"[58].

Under UNCLOS 1982, the flag State is required to take such measures for ships flying its flag as necessary to ensure safety at sea with regard, *inter alia* to construction, equipment, seaworthiness, manning, labour conditions and crew training and prevention of collisions[59]. States are required to monitor the condition of vessels flying their flag via appropriate surveys of the equipment and manning; moreover, the flag State is required to ensure observance with generally accepted international regulations, procedures and practices, and this obligation is repeated in relation to oil pollution[60].

UNCCROS 1986, which was adopted in the frame of the United Nations Conference on Trade and Development (UNCTAD) in view of the definition of the "genuine link", provides for the obligation of the flag State to implement applicable international standards on issues of safety and pollution prevention[61]. National Maritime Administration shall ensure that ships registered under its flag will apply *inter alia* international rules and standards regarding safety at sea and prevention of marine pollution[62]. The administration in question will proceed periodically to the survey of the ships flying the State's flag and ensure that appropriate documents proving the right to fly the flag will be on board[63].

The obligations of the flag State go beyond the above scope and are affected by more technical instruments which were adopted in the framework of the IMO. A number of obligations, mainly on the performance of ship surveys and the issue of the corresponding certificates, stem from well known instruments such as the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)[64] and the International Convention for the Safety of Life at Sea (SOLAS 1974)[65]. The U.S., which has been a party to MARPOL 73/78 since 1980, has acceded to three of the five Annexes and is in the process of acceding to Annex VI

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58 *See* Article 10.

59 *See* Article 94 (3).

60 *See* Article 217.

61 *See* Article 5(2).

62 *See* Article 5(3)(a).

63 *See* Article 5(3)(b) and (c).

64 The MARPOL Convention was adopted on 2 November 1973 and opened for signature on 15 January 1974. 12 International Legal Materials 1319 (1973). *Inter alia*, the convention placed stringent requirements on the discharge of oil products and petroleum products, required new tankers to be built with ranks segregated for oil and ballast water, prohibited in an absolute way the discharge of any oil within 30 miles of land and banned all discharges in the Mediterranean, Black and Baltic seas as well as the Persian Gulf. Additionally, national administrations were expected to provide reception facilities at ports for the proper discharge of oily residues. *See* MANGONE, *supra note* 22, 270 (1997).

65 *See* Part I, under 2.3.

which addresses air pollution from ships[66]. It should be noted that the U.S. had proposed that MARPOL 73/78 requires tankers to be built with double hulls, which was not accepted[67]. All EC Member States have ratified MARPOL 73/78, including nearly all relevant Annexes (I/II, III, IV, V and VI)[68]. The EU demonstrated some particular interest in the prevention of air pollution from ships and adopted specific measures to this regard[69].

The SOLAS covers the three principal areas of safety at sea, i.e. construction and equipment, operation and navigation. According to SOLAS Convention[70], the registration administration must fully guarantee the completeness and efficiency of the inspection and survey, and undertake to ensure the necessary arrangements to satisfy this obligation. On completion of the survey of the ship, certificates are issued by the maritime Administration or by another Government at its request[71]. The U.S. ratified SOLAS and the protocols of 1978 and 1988. All EU Member States have ratified SOLAS and the 1978 Protocol. The vast majority of Member States has also ratified the 1988 Protocol[72].

Since maritime safety is not defined only to technical standards but is also related to the human element, special mention deserves to be made of International Labour Organization (ILO) Convention 147, which defines flag State responsibilities with regard to seafarers and which was recently incorporated, alongside more than 60 other ILO maritime instruments, in a single text[73].

ILO Convention 147 provides[74] for two types of obligations on the registration State: firstly, the flag State has the duty to exercise effective jurisdiction or control over ships, particularly as regards safety standards, including standards of competency of the crew, hours of work and manning. Secondly, the flag State must also

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66 *See* http://www.chamber-of-shipping.com/index/news-app/story.1059 (last visit 26.9.2007). *See* also Constantine G. Papavizas and Lawrence I. Kiern, *U.S. Maritime Legislative Developments*, 38 J. MAR. L. & COM. 267 (2007).

67 *See* MANGONE, supra note 22, 270 (1997).

68 On the exact status of ratifications of international conventions see www.imo.org/

69 Notably see the Communication from the Commission to the European Parliament and the Council of 20 November 2002 entitled "A European Union strategy to reduce atmospheric emissions from seagoing ships", COM(2002)595 final.

70 *See* Regulation 6a.

71 *See* Regulation 13 and Article 17 of the LL.

72 With the exception of Austria, Belgium and some new Member States, namely the Czech Republic, Estonia, Hungary, Lithuania and Poland.

73 It should be noted that the 94th (Maritime) Session of the International Labor Conference held in Geneva, Switzerland, in February 2006, adopted a comprehensive international labour Convention to consolidate almost all ILO maritime labour Conventions and Recommendations currently in force, over 60 years, and set out the conditions for decent work in the increasingly globalized maritime sector (http://www.ilo.org/public/english/standards/relm/ilc/ilc94/index.htm). Also ILIANA CHRISTODOULOU-VAROTSI and DMITRY A. PENTSOV, MARITIME WORK LAW FUNDAMENTALS: RESPONSIBLE SHIPOWNERS, RELIABLE SEAFARERS (2008).

74 *See* Article 2. On the ILO Convention 147 see Iliana Christodoulou-Varotsi and Dmitri A. Pentsov, *Labor Standards on Cypriot Ships: Myth and Reality*, 37 VAND. J. TRANSNAT'L. L. 647 (2004).

ensure, notably via inspection, that ships comply with applicable international labour conventions and domestic laws.The U.S. ratified ILO Convention 147 in 1988, while EC Member States ratified it in their vast majority[75], including maritime oriented countries such as Cyprus, Greece, Malta and a maritime labour provider country, Poland. Yet, the EC is not a signatory party to Convention 147; it had, nevertheless, drawn the attention of Member States to signature, accession and ratification, as well as to the SOLAS and MARPOL Conventions since early times[76].

The Convention on standards of training, certification and watchkeeping for seafarers (STCW 1978), which aims at global minimum professional standards for seafarers and was subject to a major revision in 1995, was ratified by the U.S. and all EU Member States. It should be noted that the EC issued a Recommendation in 1978 encouraging Member States to ratify STCW 1978 and that it also elaborated further on the STCW regime with regard to minimum training requirements of seafarers[77].

It is clear from the above, that the international community does not lack norms defining the duties of the flag State with regard to maritime safety and the prevention of marine pollution. As far as the U.S. is concerned, as mentioned above, it has not ratified the UNCLOS 1982, while the EC is only exceptionally a contracting party to the international maritime instruments, due to institutional reasons. Since we will examine at a subsequent stage the issues related to enforcement and the problem of uniform application, let us briefly consider at this stage the situation of the coastal State.

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75 With the exception of Austria, the Czech Republic, Lithuania and Slovakia.

76 *See* Council Recommendation of 26 June 1978 on the ratification of Conventions on safety in shipping, OJ 1978 L 194/17.

77 *See* Council Recommendation of 21.12.1978 on the ratification of the 1978 International Convention on standards of training, certification and watchkeeping for seafarers, OJ 1979 L 33/31. *See* also Directive 2001/25/EC, as amended, of the European Parliament and of the Council on the minimum levels of training of seafarers, OJ 2001 L 136/17. According to Article 3(1) of said Directive, Member States should adopt measures in order to ensure that seafarers employed on board Community ships are trained as a minimum in accordance with the requirements of the STCW Convention, as prescribed in the Directive, and hold appropriate certificates. *See* CHRISTODOULOU-VAROTSI and PENTSOV, *supra* note 73, 770.

2. From the point of view of the coastal State

Coastal State intervention[78] is limited in scope and should be limited in use[79]. A State having a coastline is entitled under international law to adopt measures in order to protect its interests within four main zones of varying jurisdiction which are recognized by UNCLOS 1982, i.e. internal waters, territorial waters, contiguous zone and exclusive economic zone (EEZ)[80]. While coastal States are required not to hamper the innocent passage[81] of foreign ships through territorial sea[82], they are empowered to adopt laws and regulations in conformity with international law which limit the right of innocent passage through the territorial sea[83]. They may thus regulate maritime traffic, protect navigational aids, cables and pipelines, conserve living resources and protect the environment, prevent, reduce or control pollution and prevent the infringement of customs, fiscal, immigration and sanitary laws[84].

In this context, the point may be raised as to whether a substandard ship is violating its rights of innocent passage by being prejudicial to the peace, good order and security of the coastal State[85].

It should be noted that States are not empowered by international law to impose conditions relating to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or

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78 *See* Alan Tan Khee Jin, *Reconciling the Maritime and Coastal State Interests*, 1 SING. JICL 369 (1997), Alfred H.A. Soons, *Law Enforcement in the Ocean*, 3 WMU J. MAR. AFFAIRS 1, 3-16 (2004), Christopher P. Mooradren, *Protecting Sovereign Rights: the Case for Increased Coastal State Jurisdiction Over Vessel Source Pollution in the EEZ*, 82 B.U. L. REV. 803 (2002) and LINDY S. JOHNSON, COASTAL STATE REGULATION OF INTERNATIONAL SHIPPING (2004).

79 *See* Hare, *supra* note 50.

80 *See* Marguerite Lamour, *Exercice par l'État de ses Pouvoirs de Contrôle en Mer*, Rapport no 1658, Assemblée Nationale française, juin 2004. On coastal State jurisdiction *See* also Alan Boyle, *EU Unilateralism and the Law of the Sea*, 330 MARIUS (Scandinavian Institute of Maritime Law) 261 (2004) and R. CHURCHILL and A.V. LOWE, THE LAW OF THE SEA (1999).

81 On the meaning of "passage" and "innocent passage" see Articles 18 and 19 of UNCLOS 1982.

82 *See* Article 17 of UNCLOS 1982.

83 *See* Article 21 of UNCLOS 1982.

84 *See* Article 21 (a) to 21(h) of UNCLOS 1982.

85 *See* John Hare, *supra* note 50 and Lloyds List Dec. 5 1994. At a practical level, the issue arose on the occasion of the USCG's announcement in December 1994 that it would begin boarding potentially substandard vessels at sea buoys rather than wait for them to enter port and thereby sustain possible delays.

standards[86]. In such case, they must give due publicity to measures taken by them to enable foreign ships to comply[87].

With regard in particular to pollution, according to UNCLOS 1982, in the exercise of their sovereignty within their territorial waters, coastal States may adopt laws and regulations for the prevention, reduction and control of pollution, provided that they do not hamper innocent passage of foreign vessels[88]. For the purposes of enforcement, coastal States, as provided in the Convention[89], may in respect of their exclusive economic zone adopt laws and regulations for the prevention, reduction and control of pollution from vessels, conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference[90].

In the light of the above, a problem arose in the case of France and Spain following the maritime casualty of the Prestige[91], which had an impact at the EC level. In the aftermath of the Prestige, which was a catastrophe for a significant part of the French and Spanish coastline, unilateral measures were adopted by the States in question in the frame of a declaration pronounced at a press conference on 26 November 2002[92]. Under the so-called "Accords de Malaga", the exclusive economic zones of France and Spain were rendered inaccessible to vessels which did not present specific characteristics. Single-hulled vessels older than 15 years, transporting fuel oil, tar, bitumen and not equipped with devices allowing control of the level of pressure of hydrocarbons, were considered a threat to their shoreline. When entering exclusive economic zones, the vessels concerned were held to provide some information e.g. on the nature of cargo, the classification society involved, etc; in the event of doubt, an inspection was to take place aboard, during which if any danger was evident, the vessel would have to leave the exclusive e-

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86 *See* Article 21(2) of UNCLOS 1982. *See* also B. VUKAS, *Generally Accepted International Rules and Standards*, in A. SOONS (Editor), IMPLEMENTATION OF THE LAW OF THE SEA CONVENTION THROUGH INTERNATIONAL INSTITUTIONS, 405 (1991).

87 *See* Article 21(3) of UNCLOS 1982.

88 *See* Article 211(4) of UNCLOS 1982.

89 *See* Article 211(6)(a) of UNCLOS 1982 according to which "Where the international rules and standards...are inadequate to meet special circumstances and coastal states have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zone is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required…[they shall proceed to...] appropriate consultations through the competent international organization with any other states concerned…".

90 *See* Article 211(5).

91 On November 13, 2002 a Bahamas-registered tanker, the Prestige broke in two off the coast of Galicia, Spain, spilling an unknown but considerable quantity of heavy fuel oil. Approximately 1900 kilometers of shoreline have been affected in Spain and France, while around 138,000 tons of oily waste have been collected in Spain and some 18,300 tons in France (see Nesterowicz, supra note 37). On the Prestige incident, see *inter alia*, Lengagne and Quentin, *supra* note 37.

92 *See* Bellayer-Roille, *supra* note 30, 180.

conomic zone. As pointed out[93], the legitimacy of this agreement, which is based on UNCLOS 1982[94], may be challenged under the same instrument, because of France and Spain not having followed the procedure provided for in the convention in question[95] and also because of having evaded the IMO.

Moreover, at the EU level, the European Council on Transport held on 6 December 2002 supported this initiative and encouraged other Member States such as Italy and Portugal to proceed in the same way[96]. In a Communication of the European Commission to the European Parliament and to the Council on the Enhancement of Maritime Safety Following the Grounding of the Oil Tanker Prestige[97], the European Commission expressed the intention to explore further the enhancement of the position of coastal States with regard to vessels presenting a danger to maritime safety. In this context, a mandate was requested by the European Commission from the Council in order to negotiate the revision of UNCLOS 1982[98].

93 *Id.*

94 According to Article 56 of UNCLOS 1982 "1. In the exclusive economic zone, the coastal state has ...(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to…(iii) the protection and preservation of the marine environment… 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal state shall have due regard to the rights and duties of other states and shall act in a manner compatible with the provisions of this Convention".

95 *See* Article 211(6) of UNCLOS 1982.

96 *See* Bellayer-Roille, *supra* note 30, 181.

97 COM(2002)681 final, 3.10.2002.

98 Lettre de M. Romano Prodi, Président de la Commission Européenne, à son Excellence M. Costas Simitis, Premier Ministre de la Grèce, Président du Conseil Européen (traduction), en date du 17 janvier 2003, Bruxelles, le 17.1.2003, in Lengagne et Quentin, *supra* note 37, 151.

3. From the point of view of the port State[99]

Port State Control is based on the territorial jurisdiction of States. It constitutes a complementary means of control of vessels which in practice targets those vessels whose deficiencies have been wrongly tolerated by the flag State. The port State's action for the control of matters over ships is confined within certain limits, since, as mentioned above, the flag State has traditionally been the authority empowered to "exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag"[100]. Port State control is a dimension of port State jurisdiction, which signifies the competence of the port State to legislate and /or seek to enforce this jurisdiction over vessels calling at its ports[101]. While port State con-trol existed in respect of torts and crimes committed on a vessel within territorial waters, in terms of international law, port State jurisdiction was more clearly de-fined as concerns marine pollution prevention.

The legal basis of port State control is found in a number of instruments which are primarily international. PSC becomes operational on the basis of a number of regional agreements concluded between national maritime Administrations; the latter are deprived of binding force from a strict legal point of view, despite the authority which is assigned to them in practice. Among the international conventions constituting the basis of port State control, the following instruments may be cited, as amended: OILPOL (1954)102[102], SOLAS[103], MARPOL[104], STCW[105],

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99 A. Clarke (Sir), *Port State Control or Sub-Standard Ships : Who is to Blame ? What is the Cure?*, LMCLQ 202 (1994), Aboubacar Fall, *Le Contrôle par l'État du Port en Matière de Sécurité de la Navigation et de Protection de l'Environnement Marin,* 601 DMF 99 (2000), A. Blanco-Bazan, *Implementation of IMO Conventions by Flag and Port States*, in THE MARINE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT : LAW, POLICY AND SCIENCE 448-475 (1991-1993), E. ROUCOUNAS, THE STRENGTHENING OF THE PORT STATE UNDER THE NEW CONVENTION ON THE LAW OF THE SEA AND THE PARIS MEMORANDUM (in Greek) (1995), G.C. KASOULIDES, PORT STATE CONTROL AND JURISDICTION (1993), PAMBORIDES, *supra note* 50, 47, Iliana Christodoulou-Varotsi, *Port State Control of Labour and Social Conditions: Measures Which Can be Taken by Port States in Keeping With International Law* (A study for the International Labour Office), XXI ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 251 (2003), electronically available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id =736303, John Hare, Port State Control: *Strong Medicine to Cure a Sick Industry*, 26 GEORGIA J. INT'AL & COMP. L. (special admiralty issue) (1997), *available* at http://www. uctshiplaw.com/ psc2.htm, N. Ready, *Port State Control*, 2 JIML 6 (1995), Patrick Chaumette, *Le Contrôle par l'État du Port*, in LA NORME, LA VILLE ET LA MER, ÉCRITS DE NANTES EN L'HONNEUR DU DOYEN Y. PRATS, 7 (2000), Yves Tassel, *Le Contrôle des Navires par l'État du Port: Régime et Conséquences Commerciales*, XVII ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE, 237-255 (1999), Z. Oya Ozcayir, *The Role of Port State Control*, 8 JIML 5, 147 (2001).

100 *See* Article 5 of the Convention on the High Seas (1958).

101 *See* PAMBORIDES, *supra* note 50, 47.

102 *See* Articles IX and X.

Load Lines Convention (LL)[106] and ILO Convention 147[107]. The Convention on the High Seas[108] and UNCLOS 1982[109] also contain provisions on port State control. As far as regional agreements are concerned, the most well known are the Paris Memorandum of Understanding (MOU)[110], the Viña del Mar Agreement, the Tokyo Memorandum of Understanding, the Caribbean Memorandum of Understanding and the Mediterranean Port State Control[111].

It is not our intention to expand on the Paris MOU, which established a comprehensive system of regional co-operation for the exercise of port State control. The Paris MOU sets an annual limit of 25% as concerns inspections of foreign vessels[112], while an administrative infrastructure and a data basis are available within this system in an effort to achieve better coordination and efficiency.

While twenty maritime Administrations of EU Member States participate at the present stage in the Paris MOU[113], the EC itself has extensively used the international framework provided by the Paris MOU in an effort to harmonize port State control for its members[114]. This was realized by means of Directives[115], which are binding in EC law upon their result, while leaving Member States free to choose

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103 *See* Article 2 juncto regulation 19 of Chapter I of SOLAS 1974 and Article II(3) juncto regulation 19 of Chapter I(Annex) of the Protocol of 1978 relating to SOLAS 1974.

104 *See* Article 5(2) of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL).

105 *See* Article X juncto regulation I/4 of STCW 1978-1995.

106 *See* Article 21.

107 *See* Article 4.

108 *See* Article I of the International Convention relating to Intervention on the High Seas.

109 *See* Articles 218, 219, 220(1) and 226.

110 *See* http://www.parismou.org. *See* also, CHRISTODOULOU-VAROTSI and PENTSOV, *supra* note 73, 713, F. Odier, *Le Mémorandum de Paris et son Application*, ANNUAIRE DE DROIT MARITIME ET AÉRIEN 1275 (1985), G. Kiehne, *Investigation, Detention and Release of Ships Under the Paris MOU on Port State Control: a View from Practice*,11 INT'L J. MAR. COASTAL L. 2, 225 (1996), R. W. J. Schiferli, *The Memorandum of Understanding on Port State Control: its History, Operation and Development*, in THE MARINE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT : LAW, POLICY AND SCIENCE 448-475 (1991-1993), Y. Van der Mensbrugghe, *Les Navires Inférieurs aux Normes: le Mémorandum d'Entente de Paris du 26 Janvier 1982 sur le Contrôle par l'État du Port*, LA COMMUNAUTÉ EUROPÉENNE ET LA MER, 463-474 (1990).

111 *See* Christodoulou-Varotsi, *supra* note 99, 263 *seq.*

112 *See* Section 1.3 of the Paris MOU.

113 In the Paris MOU 25 national administrations participate, including the national administrations of Croatia, Iceland, Norway, Canada and the Russian Federation, which cover the waters of the European coastal States and the N. Atlantic basin from N. America to Europe. *See* http://www.parismou.org (last visit 4.3.2007).

114 *See* Claude Douay, *La Communauté, Etat du Port*, RMC 55 (1981).

115 *See* Council Directive 95/21/EC of 19 June 1995 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 (PSC), OJ 1995 157/1. Consolidated text at 29.11.2002 *available* at http://www.europa.eu.int/ (last visit 29.1.2008).

adequate transposition measures. This approach aimed at rendering obligatory and at the same time enhancing the control provided for in the Paris MOU[116].

Contrary to Canada, the U.S. participates neither in the Paris MOU nor in any other regional agreement[117]. In the U.S. there is no agreement or memorandum of understanding which is specifically dedicated to port State control. The U.S. seems to "act alone", but on the basis of a rigorous policy of port state control inspections with effect from May 1994: Boarding and inspection procedures are laid down in the United States Coast Guard (USCG) Port State Control Initiative which aims to ban substandard ships from U.S. waters[118]. A system of ship's points rating determines its categorization as Priority I, II or III, based on the performance records of the ship's owners, classification societies and flag States[119]. A special mention deserves to be made of the undoubted protagonist of port state control in the U.S. which is the USCG[120].

It is clear from the above that neither the EU nor the U.S. has a static relationship with the international legal framework on maritime safety and on the prevention of marine pollution. This dynamism has led to different degrees of unilateralism. To some extent, this orientation was positive, in the sense that it operated as a pacemaker in the frame of the IMO and, due to the pressure that it created, it accelerated or rendered more stringent international regulations. In other instances, it was prejudicial to the uniformity of international law. Where should the golden mean be placed? Moreover, U.S. policy seems to be the instigator for EU policy. To what extent might this be true? How far can the entities in question, the international maritime system and the shipping industry accommodate themselves within such a metamorphosis? Is the path of super statutes of national legislators the right remedy or do we need another cure? What alternative actions could be reasonably suggested to the regional legislature?

We will attempt to answer these questions in the developments that follow.

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116 *See* C. Maguire, *Port State Control: Brussels Style*, IJSL part 2, 118 (1996), E. Molenaar, *EC Directive on Port State Control in Context*, 11 INT'AL J. MAR. COASTAL L. 2, 241 (1996), Martin Ndende and Bertrand Vende, *La Transposition par les États de la Directive portant Communautarisation du Mémorandum de Paris*, 603 DMF 307 (2000), R. Salvarini, *The EC Directive on Port State Control: a Policy Statement*, 11 INT'AL J. MAR. COASTAL L 2, 225 (1996).

117 *See* Hare, *supra* note 50, 10, Ozçayir, *supra* note 99, 153.

118 *See* Hare, *id.*

119 *See* Part II under 1.3.2.

120 Legislative authority is given to the USCG under Title 46, Chapters 32 and 33 of the U.S. Code.

Part I:
Overall position of the EU and the U.S. towards universal maritime safety standards: Common standards, but...

Unilateralism is likely to exercise some pressure on the international system in order to accelerate changes at the international fora, sometimes in the direction of a more stringent or a more specifically-oriented maritime safety norm to be adopted. Unilateralism may also be used as a tool aiming at covering existing legislative gaps, often revealed in the light of marine casualties, in a more expeditious way than at the international level. According to academia, "international law defines this concept [of unilateralism] as the display of a State will to carry out certain legal acts, generating standards that form part of the legal system and produce limited effects"[121]. The issue of unilateral action, whose extent is to be discussed in the developments that follow, is not proper to the EU's and U.S.'s maritime safety law. It is worth briefly mentioning a number of national or regional provisions which have raised some controversy as to their unilateral or so-called unilateral character. Philippe Boisson in his comprehensive book on Safety at Sea provides some useful elements on the question[122].

The case of the Canadian legislation in the 1970s on marine pollution prevention in Arctic waters deserves a special mention[123]. Following the wreck of the oil tanker Arrow in February 1970, which polluted the costs of Nova Scotia, Canada adopted some provisions on the establishment of a number of control zones for safety of navigation, 100 miles in width, in which Canadian authorities could impose specific regulations, including construction and operation requirements, on ships, going beyond generally accepted standards. The Canadian approach was at a subsequent level however legitimated within the frame of UNCLOS 1982, which provided for specific requirements with regard to ice-covered zones. Canada also

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121 *See* BOISSON, *supra* note 2, 177. *See* also E. Suy, *Les Actes Juridiques Unilatéraux en Droit International Public* (1962), G. Venturini, *La Portée et les Effets Juridiques des Attitudes et des Actes Unilatéraux*, II R.C.A.D.I. 347 (1964), J. Dehaussy, *Les Actes Juridiques Unilatéraux*, 1 J.D.I. 14 (1965).

122 BOISSON, *id*.

123 *See* Alain Boyle, *EU Unilateralism and the Law of the Sea*, 20 INT. J. MAR. COAST. L. 2 (2005).
BOISSON, *id.*, 184, EDGAR GOLD, ESSENTIALS OF CANADIAN LAW (2003) 669.

drew the attention from the angle of unilateralism through the 1994 Coastal Fisheries Protection Act, which extended Canadian fisheries enforcement jurisdiction to cover certain high seas stocks beyond the EEZ, whose impact was more limited on the ensuing legislative developments[124].

The case of Norwegian legislation in the aftermath of the Estonia marine casualty is also to be mentioned[125]. The Estonia revealed in a most tragic context some limitations concerning the safety of Ro-Ro passenger ships[126]. The Norwegian regulations on new design standards for existing Ro-Ro passenger vessels, adopted well before being endorsed by IMO, had not avoided provoking some interest at the international level.

The strait of Malacca and the Turkish straits in the Bosphorus also gave rise to a number of unilateral initiatives in view of the regulation of shipping in these special areas, implying an unequal degree of acceptance by the international maritime community[127].

It is less acceptable, however, to see unilateralism serving immediate or short-term interests of States or groups of States. Unilateralism is not strictly speaking synonymous with regionalism. As far as the impact on the limitation of international norms is concerned, in our opinion regionalism may be considered, however, as a more generalized practice of unilateralism, which also results in a differentiated scope of international norms.

It may be of use for the understanding of possible synergies or antagonisms between the U.S. and the EU, before addressing specific areas of interest in terms of substantive law- which will be effected in Part II- to present at this stage EU and U.S. maritime safety law, via their respective legal framework and presumed quest for optimum maritime safety.

1. The EU "Common Maritime Transport Policy" on maritime safety and marine environment protection: Uniform, enhanced and anticipated rules

1.1. The context

About one third of trade (in terms of volume of goods) within the EU and 90% of trade with non-EU countries is carried by sea[128]; additionally, there are over 600 ports in Europe characterized, however, by their diversity[129]. According to the regional grouping of countries of domicile, at the beginning of 2004 at least 44.6 percent of the world fleet tonnage was attributable to European-owned parent

124 *See* Boyle, *id.* at 4.
125 *See* BOISSON, *supra* note 2, 182.
126 *See* Honka, *supra* note 35.
127 BOISSON, *supra* note 2, 185 *seq.*, 191 *seq.*
128 *See* Jenich, *supra* note 11, 67.
129 *Id.* at 68.

companies; at the beginning of 2004, EU countries controlled the majority of this tonnage, namely 74.2 per cent[130]. In this context, the importance of the maritime sector for the EU is self-evident; the need, however, for the elaboration of a common maritime transport policy was, at least at a first stage, far from evident.

The common maritime transport policy is a policy based on a concurrent competence[131] between the EC (first pillar) and the Member States, and covers a wide range of areas in the maritime field. In effect, the common maritime transport policy, for which "there is now general (but not universal) acceptance" and which "…develops partly by design and partly in response to incidents at sea"[132], has had a rather long, yet relatively recent process of development. The influence of the European Commission, which projected into the elaboration of a growing maritime transport policy, is more than noticeable; it has been the lever of EC ac-tion in the maritime field.

The principal legal foundation of this policy is Article 80 para. 2 of the EC Treaty, according to which "The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea [and air transport...].". The measures which constitute the common maritime transport policy notably address maritime safety and marine environment protection, external relations and maritime competition[133]. From a technical point of view, it should be noted that maritime transport is not subject to Title V of the EC Treaty, which addresses transport in general, but is tackled on a specific foundation in the EC Treaty, along with air transport[134].

In 1957, when the EEC Treaty was adopted, the image of a common shipping policy was far from being projected by the six founding Member States which then constituted the EEC[135]. The EC Treaty, via Article 80 para. 2, created a prospect instead of leaving a gap, which was in actual fact left at the discretion of Member States. It is not in the intention of this paper to expand on the evolution of the common maritime transport policy in the past years.

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130 *See* http://www.isl.org/ (last visit 22.3.2006).

131 On concurrent competence under EC law, see GUY ISAAC, DROIT COMMUNAUTAIRE GÉNÉRAL (1996), 45 : « D'une manière générale, les compétences attribuées aux Communautés sont des compétences concurrentes, au sens de l'article 72 de la Loi fondamentale de la République fédérale allemande: c'est-à-dire que les États conservent la compétence de légiférer ou de prendre des engagements internationaux avec les pays tiers aussi longtemps et dans la mesure où les autorités communautaires ne sont pas encore intervenues dans le domaine en cause. Seul donc l'exercice effectif des compétences communautaires exclut progressivement la compétence nationale ».

132 *See* Power and Casey, *supra* note 37, 342.

133 Notably see GARIFALIA ATHANASSIOU, ASPECTS JURIDIQUES DE LA CONCURRENCE MARITIME (1996), Malgorzata Anna Nesterowicz, *The Mid-Atlantic View of the Antitrust Regulations of Ocean Shipping*, 17 U.S.F. MAR. L. J. 45 (2004-2005), NIKOLAOS E. FARANTOURIS, EUROPEAN INTEGRATION AND MARITIME TRANSPORT (2003) and POWER, *supra* note 7.

134 Article 80 of the EC Treaty.

135 The Six EU Member States were Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

With regard to maritime safety in particular, as mentioned above, since the Treaty of Maastricht (1992) there is a specific provision in the EC Treaty referring to the safety of transport as a goal of EC action. Article 71(1)(c) has been explored by the European Commission in view of the elaboration of the common shipping policy on safety at sea. It was only in the 90s that the European Commission expressed, notably through the Communication on Safe Seas, a clear intention to explore safety at sea further [136]. Since then, a substantial package of legislation has been adopted in view of its application by the Member States, principally shaped on the international requirements; the measures in question enhance or alter the regulatory frame stemming from the international level[137].

In practice, EC maritime transport law consists of Directives, Regulations, Framework Decisions, Communications or Resolutions which address, in a binding or non-binding manner depending on the act[138], a plethora of issues relating to maritime safety and marine environment protection[139]. Part of the "acquis communautaire" on maritime safety is also extended to Norway, which is a mari-time State, and also to Iceland; along with Lichtenstein, these States are not members of the EC but participate in the European Economic Area (EEA)[140]. Consequently, the territorial application of EC maritime safety and marine pollution prevention law lends itself to a wider application than the one intended for the twenty-seven Member States. It is noteworthy that three Member States have strong maritime interests, namely Greece, which joined the EC in 1981, Cyprus and Malta whose accession took place in 2004[141].

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136 *See supra* note 33.

137 *See* infra.

138 *See* Article 249 of the EC Treaty.

139 *See inter alia* Martin Hedemann-Robinson, *Protection of the Marine Environment and the EU: Some Critical Reflections on Law, Policy and Practice*, 10 JIML 3 (2004).

140 On the EEA notably see NICOLAS MOUSSIS, EUROPEAN UNION: LAW, ECONOMY AND POLICY (in Greek) (2003), 522. Of specific interest: Michael Emerson, Marius Yahl and Stephen Woolcock, *Navigating by the Stars: Norway, the European Economic Area and the European Union*, Brussels, Center for European Policy Studies (2002).

141 On the harmonization of Cypriot maritime law to EC maritime law, see: CHRISTODOULOU-VAROTSI, *supra* note 31 (1999). *See* also Iliana Christodoulou-Varotsi, *L' Évolution du Droit Maritime Chypriote en Vue de l'Adhésion à l'Union Européenne,* 647 DMF 378 (2004), *Id.*, *Introduction to the Adjustment of Cypriot Maritime Law to the Acquis Communautaire*, HELLENIC REV. OF EUR. L. 164 (Dec. 2004), *Id.*, *Ensuring Qualitative Shipping in Cyprus : Recent Developments in Cypriot Maritime Law in the Light of the Acquis Communautaire* (in Greek), 32 GREEK REV. MAR. L. 2 (2004), *Id.*, *Ensuring Qualitative Shipping in Cyprus: Recent Developments in Cypriot Maritime Law in the Light of the Acquis Communautaire II*, XXIV ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE (2006).

1.2. The regulatory framework: Brief overview

Common shipping policy provisions on maritime safety comprise a range of measures adopted prior to the so-called Erika phase as well as two legislative packages commonly known as Erika I and Erika II. The Erika III package was proposed by the European Commission in 2005 and is currently subject to negotiations. The Erika III package is more than noteworthy because it provides some significant indication as to the intentions of the EC legislature on maritime safety law and the ensuing interactions with U.S. law and international maritime law.

The pre-Erika phase began in 1978 and included a wide and heterogeneous range of measures which have been amended at subsequent stages. Measures notably included pilotage of vessels by deep-sea pilots in the North Sea and English Channel[142], the transfer of ships from one register to another within the Community[143], minimum safety and health requirements for improved medical treatment on board vessels[144], minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods[145], minimum level of training of seafarers[146], common rules and standards for ship inspection and survey organizations[147], port State control[148], management of Ro-Ro passenger vessels[149], certification of marine equipment[150], a common model for an identity card for inspectors on port State control[151], harmonized safety regime for fishing vessels[152], safety rules and standards for passenger ships[153], registration of persons sailing on board passenger ships[154], mandatory surveys for the safe operation of regular Ro-Ro ferry and high speed passenger craft services[155], establishment of an information system on the exchange of data relating to marine pollution[156], safe loading and unloading of bulk-carriers[157], uniform reporting formalities and prohibition of organic compounds on ships[158].

142 *See* Directive 79/115/EEC of 21 December 1978, OJ 1979 L 33/32.
143 *See* Regulation 613/91/EEC of 4 March 1991, OJ 1991 L 68/1, as amended.
144 *See* Directive 92/29/EC of 31 March 1992, OJ 1992 L 113/19.
145 *See* Directive 93/75/EC of 13 September 1993, OJ 1993 L 247/19, as amended.
146 *See* Directive 2001/25/EC of 4 April 2001, OJ 2001 L 136/17, as amended.
147 *See* Directive 94/57/EC of 22 November 1994, OJ 1994 L 319/20, as amended.
148 *See* Directive 95/21/EC of 19 June 1995, OJ 1995 L 157/1, as amended.
149 *See* Regulation 3051/95/EC of 8 December 1995, OJ 1995 L 320/14, as amended.
150 *See* Directive 96/98/EC of 20 December 1996, OJ 1998 L 241/27, as amended.
151 *See* Directive 96/40/EC of 25 June 1996, OJ 1996 L 196/8, as amended.
152 *See* Directive 97/70/EC of 11 December 1997, OJ 1998 L 34/1, as amended.
153 *See* Directive 98/18/EC of 17 March 1998, OJ 1998 L 144/1, as amended.
154 *See* Directive 98/41/EC of 18 June 1998, OJ 1998 L 188/35, as amended.
155 *See* Directive 99/35/EC of 29 April 1999, OJ 1999 L 138/1, as amended.
156 *See* Decision 2850/2000 of 20 December 2000, OJ 2000 L 332/1, as amended.
157 *See* Directive 2001/96/EC of 4 December 2001, OJ 2002 L 13/9.
158 *See* Regulation 782/2003/EC, OJ 2003 L 115/1.

Following this first set of measures, the Erika I Package, which dates back to March 2000, was the EC's response to the casualty of the oil tanker Erika. The Erika I package contained three series of measures related to port State control[159], the activities of classification societies[160] and the phasing-out of single hulled oil tankers[161]. We will have the opportunity to discuss below port State control and the phasing-out of single hulled oil tankers from a comparative angle on U.S. and EC law. Concerning EC measures on classification societies, let us just mention that EC legislation is based on the need to bring classification societies under high quality standards, given their vital role over structure safety controls of vessels on behalf of flag States. Thus, the ability to operate within EC waters is conditional on meeting quality requirements[162].

The Erika II package contained measures with a view to facilitating the implementation of Erika I. The Erika II package resulted in the establishment of a Community vessel traffic monitoring and information system[163] and of the European Maritime Safety Agency (EMSA)[164], whose mission consists of the prevention of marine casualties via the monitoring of maritime safety and the evaluation of the effectiveness of EC law on maritime safety. The EMSA collects information, maintains a maritime safety database, and monitors classification societies and port State control inspections at the EU level[165]. It should be noted however that the Erika II package initially included a proposal for a Regulation on the creation of a European Pollution Damage Compensation Fund (COPE), which would function as a third tier of liability and would compensate victims of oil pollution, who had been unable to obtain full compensation under the international regime due to the limits of compensation; the proposed measure would not replace the International Oil Pollution Fund[166]. While this proposal did not progress at the EU level, it indirectly provoked the increase of liability limits at the international level[167].

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159 *See* Directive 2001/106/EC of 19 December 2001, OJ 2002 L 19/17, repealing Directive 95/21/EC.

160 *See* Directive 2001/105/EC of 19 December 2001, OJ 2002 L 19/9, repealing Directive 94/57/EC.

161 *See* Regulation 417/2002/EC of 18 February 2002, OJ 2002 L 64/1, repealing Regulation 2978/94/EC.

162 *See inter alia* Juan L. Pulido Begines, *The EU Law on Classification Societies: Scope and Liability Issues*, 36 J. MAR. L. & COM. 487 (2005), Jim Harrison, *The Accountability of Classification Societies: The Role of Classification and Market-Oriented and Policy Issues* (The "Erika"), 9/10 IMLJ 299 (2000) , LIA ATHANASSIOU, TASKS AND LIABILITY OF CLASSIFICATION SOCIETIES (in Greek) (1999).

163 *See* Directive 2002/59/EC of 27 June 2002, OJ 2002 L 208/10, repealing Directive 93/75/EC.

164 *See* Regulation 1406/2002/EC of 27 June 2002, OJ 2002 L 208/1.

165 *See* http://emsa.eu.int (last visit 29.3.2006). On EMSA see also Loic Grard, *Sécurité et Transport dans l'Union Européenne- Le Recours aux Agences de Régulation*, 10 Europe 10 (2003).

166 *See* COM(2000)802 final.

167 The Supplementary Fund Protocol (Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage,

The latest developments include Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements[168], and EU Council Framework Decision 2005/667/JHA for the enforcement of the law against ship-source pollution[169]. These instruments constitute, to a certain extent, a selective approach to MARPOL 73/78, which leaves the adoption of appropriate sanctions at the discretion of Member States. EC instruments provide for the approximation of Member States' legislation with regard to the imposition of administrative and criminal sanctions in cases of ship-source discharges of polluting substances committed with intent, recklessly or by serious negligence[170].

The eagerness of the EC legislature is also demonstrated by the so-called Erika III package of measures, presented on November 2005 by the European Commission, containing seven proposals of new European legislation and amendments to the existing one[171]. This package included a proposal for a Directive on the conformity requirements of flag States[172], an amendment of the Directive on classification societies[173], an amendment on the port State control Directive[174], an amendment on the traffic monitoring Directive[175], a proposal for a Directive on accidental investigations[176], a proposal for a Regulation on liability and compensation for damage of passengers in accidents[177], and a proposal for a Directive on the extra-contractual liability of shipowners[178].

The common maritime transport policy is the result of the confrontation of interests of maritime and non-maritime Member States and their convergent or divergent perception of shipping, due to their different contributions to the maritime transport sector. Some EU Member States principally constitute countries of regis-

1992) was adopted by the IMO in view of the compensation of claimants in circumstances where the maximum compensation provided by the Fund might be inadequate. *See inter alia* Gauci G. M., *The European Commission's Three-front Attack Against the Special Regime for Shipowners' Pollution Liability-Is the International Maritime Liability regime in Danger?* , 330 MARIUS (Scandinavian Institute of Maritime Law) 211 (2005) and Nesterowicz, *supra* note 37.

168 *See* OJ 2005 L 255/11.

169 *See* OJ 2005 L 255/164.

170 *See* Christodoulou-Varotsi, *supra* note 12. *See* also the response of the shipowners' and salvors' lobby in the UK: *Luxembourg Must Clear Muddy Waters of Pollution Directive*, Lloyd's List, Reproduced from the Law Page, 12 July 2006 and the ensuing litigation before the High Court of Justice (Queen's Bench Division), [2006] EWHC 1577 (Admin).

171 *See* http://www.europa.eu.int/comm/transport/maritime/safety/2005_package_3_en.htm (last visit 31.1.2006). *See* also *inter alia* the Communication from the Commission (2005) 0585 final of 23.11.2005-*Third Package of Legislative Measures on Maritime Sa-fety in the EU*.

172 *See* COM (2005) 0586 final.

173 *See* COM (2005) 0587 final.

174 *See* COM (2005) 0588 final.

175 *See* COM (2005) 0589 final.

176 *See* COM (2005) 0590 final.

177 *See* COM (2005) 0592 final.

178 *See* COM (2005) 0593 final.

tration, some are mainly port States and some are maritime transport users. Until the Treaty of Athens, signed on 16 April 2004, the EU was made up of 15 Member States only, with Greece being the Member State with the strongest maritime interests[179]. With the enlargement of the EU to 12 new Member States and more precisely with the accession of Cyprus and Malta, the maritime profile of the EU changes, as do the maritime safety standards of international registration in the EU[180]; a certain confrontation between maritime and non-maritime Member States is therefore apparent. Non-maritime Member States or States with less maritime interests are likely to be more favourable to changes suggested by EC law to the international maritime regime under the umbrella of the common shipping policy, while maritime Member States are likely to be sceptical to such changes and more sensitive to the maintenance of the status quo, in particular under pressure from their national lobbies.

Different national traditions with regard to the perception of shipping, including maritime safety, deserve a special mention. The economy of the study cannot afford an exhaustive approach to each Member States' approach to shipping. A few examples that follow are only indicative.

France, for example, is somehow the protagonist of the initiatives put forward at an EC level for "more legislation" over maritime safety[181]. This Member State has suffered indeed from a number of maritime casualties with a negative impact on its coastlines, tourism industry, etc., including the Erika and the Prestige incidents in most recent years[182]. France is also a Member State whose fleet on 1.1.2005 was ranked 29th on a world-wide basis upon dwt, i.e. less voluminous than the fleets of Greece, ranked 3rd, Malta, ranked 7th, Cyprus, ranked 9th, Norway (EEA State), ranked 11th, the U.S., ranked 14th, Italy, ranked 17th, Denmark, ranked 20th, Germany, ranked 22nd and the Netherlands, ranked 26th.[183]. The maritime tradition of France, as notably implied by the creation for the first time in contemporary history of the social insurance fund for seafarers, called E.N.I.M.[184], or by the adoption of the "Code de Commerce" of 1807 which governed mercan-

[179] Greece is ranked third with regard to the vessels flying the Greek flag on the basis of the tonnage (1102 vessels representing 43,365,000 dwt on 1.1. 2002 according to the statistics of the Institute of Shipping Economics and Transport Logistics of Bremen, as cited by the Greek Ministry of Mercantile Marine at http://www.yen.gr/yen.chtm?prnbr=25160) (in Greek) (last visit 3.29.2006).

[180] *See* Jenich, *supra* note 11, 68. It should also be noted that prior to the accession of the 12 new Member States to the EU, important changes in the maritime law and policies of the latter were rendered obligatory by the European Commission, in view of the incorporation by these States in a substantial manner of the "acquis communautaire" on common maritime policy. This resulted in the harmonization process of national maritime legal orders to the EC requirements notably in the field of maritime safety. This process notably had a major impact on open registers such as Cyprus and Malta. On the impact on Cyprus, see Christodoulou-Varotsi, *supra* note 141.

[181] *See* Lengagne –Quentin, *supra* note 37.

[182] *Id.* at 13.

[183] *See* the statistics of the 'Armateurs de France', *available* at http://www.armateurs-defrance. org/fr/02_transport/01_classement.php (last visit 13.8.2006).

[184] Etablissement National des Invalides de la Marine.

tile commerce far beyond French frontiers[185], is not of course in question; however, the contribution of this Member State to the shipping industry nowadays is more limited than in the past or compared with other Member States. Besides, the French maritime industry has recently sustained internal frictions with regard to a rising liberal approach to its registration rules via the "Registre International Français" (RIF), providing for a more flexible regime of registration and operation of oceangoing ships and ships involved in international cabotage, than the standard one[186]. In this context, France is generally favourable to legislative changes regarding maritime safety and openly supports the initiatives of the instigator of maritime safety policy, i.e. the European Commission, for enhanced maritime safety, via legislation[187]. It seems that in recent years the position of France on maritime safety for more and enhanced maritime safety legislation at the regional level, tends to be shared by Spain and Portugal[188].

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[185] For example, this was the case in Greece, where the newly born Greek State at the beginning of the 19th century had adopted as such the French "Code de Commerce" in view of the regulation of maritime commerce in Greece, and Articles 190 to 436 of the Second Book of the Code, on Maritime Commerce, were applicable in Greece up to 1910. *See* ANTOINE M. ANTAPASSIS, LES CODES MARITIMES GRECS, 3 (1983). This was also the case in Cyprus, where in 1864, when Cyprus was under Ottoman occupation, mercantile commerce was subject to the Ottoman Code of Maritime Commerce, which was at 80% of French influence. "It constituted the translation of maritime provisions of the French Code of Commerce of 1807" (*sic*, translation from French). *See* ANTHONY MADELLA, LE DROIT MARITIME FRANÇAIS, PhD Thesis, Université de Droit, d'Economie et des Sciences d'Aix-Marseille, 57 (unpublished, presented in 1988).

[186] *See* Law no 2005-412 of 3.5.2005 "relative à la creation du registre international français", Journal Officiel de la Republique Française, 4.5.2005. *See* also http://armateurs-defrance. org/fr/ (last visit 13.8.2006), as well as Patrick Chaumette, *The Anatomy of the RIF-the French International Register of Vessels*, in L'OBSERVATOIRE DES DROITS DE MARINS, NANTES LE 22 ET LE 23 JANVIER 2004, 255 and Henri de Richemont, Création du Régistre International Français, Première lecture, Rapport, Commission de Affaires Economiques du Sénat, no 92, 2003-2004.

[187] *See* Lengagne - Quentin, *supra* note 37.

[188] *See* for example the Letter of Jacques Chirac, President of France, José Maria Aznar, then President of Spain, and José Manuel Durao Barroso, then President of Portugal, to Costas Simitis, then Prime Minister of Greece and President of the European Council of March 2003, on the occasion of the measures instigated by the European Commission for the enhancement of maritime safety at a regional level and the invitation addressed to the Greek President to support such initiative. In Lengagne – Quentin, *supra* note 37, 155. *See* also the French-Spanish-Portuguese memorandum which constituted a joint contribution made by these three States to future European maritime policy and which was communicated to the Commissioner for Maritime Affairs, Mr. Borg on 27 April 2005. "The action undertaken was intended to develop a common European vision and action regarding maritime issues" {http://www.diplomatie.gouv.fr/en/article-imprim. php3?id_article=5285 (last visit 14.6.2006)}.

Much different is the example of Greece. The maritime sector has constituted a milestone for Greece and Greeks throughout the years[189]; its importance to the economy is more than vital[190]. The Greek-owned fleet is ranked first in the word and it is mainly engaged in oceangoing transport[191]. Greece, which has been a member of the EC since 1981, has had to address in recent years the issue of the increasing influence of EC maritime law and policy, including the maritime safety field, over its national legal order[192]. While the Greek shipowners' lobby is generally skeptical towards the increasing "interventions" of Brussels in the maritime field and considers that the IMO is the competent forum[193], the Greek government has demonstrated a more flexible attitude, balancing between publicly demonstrated zeal for the IMO and its uniform rules[194] and eager support of the common maritime safety policy[195].

In the developments below we will proceed at two levels. Firstly, we will demonstrate the intentions of the EC maritime legislatures. Secondly, we will provide a number of concrete examples of the approaches that these legislatures have taken.

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189 On the history of Greek-owned shipping, see GELINA HARLAFTIS, THE HISTORY OF GREEK-OWNED SHIPPING (2001).

190 *E.g.* in the year 2003, 9,5 billion euros were imported into Greece out of the activities of the Greek fleet, a sum which presents a rising trend from year to year, and which supports in a dynamic manner the balance of foreign payments of Greece. *See* Nikos D. Efthimiou, President of the Greek Shipowners Association, *The Path of the Sea Leads with Safety to the Future* (in Greek), in the special edition of the Greek Journal Naftemporiki, June 2004, 22. *See* also Dimitris Kapranos, Our Big *"Unknown" Industry* (in Greek), Greek newspaper Kathimerini, 13.6.2004.

191 For a brief and comprehensive overview of Greek shipping nowadays, see Panayiota Kouri (under the direction of Professor Aristotelis Naniopoulos), Maritime and Port Employment in Southern Europe, a Challenge for the Mediterranean States: the Case of Greece, http://www.acem.org/observat/pages/kouris.htm (last visit 14.8.2006).

192 *See* CHRISTODOULOU-VAROTSI, *supra* note 31.

193 *See inter alia European Strategy for Maritime Industry* (in Greek), Greek newspaper Kathimerini dated 20.8.2005.

194 *See inter alia* http://www.yen.gr/yen.chtm?prnbr=25210 (last visit 14.8.2006) (in Greek). *See* also, for example, under the Greek presidency of the European Union, it was reported that the Greek Minister of Mercantile Marine had declared that Greece "would oppose unilateral measures of the European Union that would undermine the status of the IMO" (*sic*, translated from French), in Lengagne and Quentin, *supra* note 37, 74.

195 For example, it was under the Greek presidency of the European Union when Regulation 417/2002/EC of 18 February 2002 on the phasing-out of single hulled oil tankers was adopted.

1.3. In quest of unilateralism: The EU maritime legislature's approach and method

In one of the very first instruments adopted by the EC, i.e. Council Recommendation of 26 June 1978 on the ratification of conventions on safety in shipping, Member States were encouraged on the basis of a non binding text to sign and ratify, where they had not already done so, the SOLAS and MARPOL Conventions and their protocols, as well as ILO Convention 147. This EC instrument is significant because it indicates that the point of reference of the EC action at the time of the conception of EC common maritime transport policy was the international maritime legal order, as reflected in the international *fora*, i.e. the IMO, then called IMCO, and the ILO. The question, however, is how far the EU has gone with regard to this point of departure and whether it has gone beyond the international limits in engaging itself in an approach which would present unilateral elements.

In the "Common Policy on Safe Seas" Communication of 24 February 1993, which demonstrates the theoretical premises of the European legislature on maritime safety and marine environment prevention, the European Commission ascertains the weakness of Member States while acting on an individual basis to reach a satisfactory level of maritime safety and considers that this goal cannot be accomplished without a "common" action, because of the political and legal means that the EC has at its disposal[196]. The EU's action on the matter firstly addresses the need for uniform and convergent implementation of the existing norms by the Member States by means of the harmonization process. In the same document, the European Commission considers that its action plan would assist the international organizations in better performing their role in the frame of the elaboration of international regulations[197]. This is significant as to the balance that the EU has taken care to maintain with regard to the international maritime *fora* and as to the recognition of the competence of the IMO[198]. However, the European Commission recognizes in this document the need to elaborate new international regulations in a number of areas in the maritime field; it also recognizes the need to address the problem of deadlines related to international regulations which may be too long and consequently, inefficient[199].

In the Communication that followed, entitled "Toward a New Maritime Strategy"[200] which was adopted three years later, the European Commission examines the issue of maritime safety from the angle of competitiveness. A new element is introduced in the EU maritime arsenal: the intention to render obligatory, via Community legislation, IMO resolutions which are deprived of binding force. The European Commission also expresses the intention to extend relevant require-

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196 *See supra* note 33, *id.*

197 *Id.*

198 *Id.* at 21.

199 *Id.* at 69.

200 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Brussels, 13.3.1996, COM(96)81 final.

ments under examination to vessels from third countries, in particular with a view to banning substandard ships from EU waters. Another new element which is noteworthy is the intention of the European Commission to develop some requirements going beyond the existing norms. This is demonstrated in the declaration, contained in the Communication, to adopt a legislative act providing for sanctions to freighters who use sub-standard ships with intent or with negligence[201].

The said documents provide to some extent the theoretical framework of action and methodology of the European legislature on maritime safety and marine environment protection. The above-mentioned goals have not been compromised in the course of the EU's action, despite divergent viewpoints of Member States and the enlargement process of the EU, bringing about new synergies in the maritime field.

A few examples may demonstrate so, even though the economy of this paper cannot afford an exhaustive list; consequently we will confine ourselves to some selective examples of EC acts which are, in our opinion, of interest. In Part II we will focus on substantive law issues, which at this stage will just be mentioned.

Regulation 3051/95/EC of 8 December 1995 on the safety management of Ro-Ro passenger vessels[202], as amended, aimed at improving maritime safety in the aftermath of the sinking of The Estonia via the establishment and maintenance by companies of adequate safety management systems on board and ashore. The said Regulation anticipated the application of the ISM Code to Ro-Ro passenger vessels and therefore departed from the international norms as to the acceleration of the entry into force of the relevant requirement[203]. Fulfilment of the obligations provided in the Regulation would be a prerequisite for authorization to operate Ro-Ro ferries on a regular service to or from EU ports. According to the same method, Regulation 782/2003/EC on the prohibition of organic compounds on ships[204] provided for the implementation of the IMO International Convention on the Control of Harmful Anti-fouling Systems (AFS Convention), which is not yet in force, in an anticipated manner for Member States as from 9 May 2003. A much publicized instrument which may be of interest in this context is Regulation 417/2002/EC on the accelerated phasing-in of double hull or equivalent design standards for single hulled tankers, as amended by Regulation 1726/2003/EC[205], whose substantive provisions will be examined under Part II; a new final date was introduced by EC provisions for single hull tankers, i.e. 2010 instead of 2015 while international requirements provided for the gradual replacement of single

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201 *Id.* at 6.

202 OJ 1995 L 320/14.

203 The ISM Code through its incorporation into the SOLAS 1974 would apply to Ro-Ro passenger vessels from 1.7.1998, while Regulation 3051/95/EC made the ISM Code mandatory at Community level with effect from 1 July 1996 for all Ro-Ro passenger ferries.

204 OJ 2003 L 115/1.

205 OJ 2002 L 64/1 and OJ 2003 L 249/1.

hulls by double hulls over a longer period initially ending in 2026, and pursuant to subsequent provisions in 2015 and in 2010[206].

The method of the European maritime legislature is also expressed in the field of port State control. The above-mentioned Directive 92/51/EC of 19 June 1995 on port State control, which has been amended several times, is based on the Paris Memorandum of Understanding (Paris MOU)[207]; the Paris MOU established a comprehensive system of regional cooperation for the exercise of port State control on the basis of an agreement between national maritime administrations. As a result, the binding force of the Paris MOU agreement was an issue. The EU utilizes the experience of Paris MOU in order to enhance port State control and ensure its uniform and scrupulous conduct by Member States. By incorporating the Paris MOU in its legislation via Directive 92/51/EC, the EU rendered obligatory toward Member States the instrument in question, including inter alia the obligation to carry out an annual total number of inspections corresponding to at least 25% of the number of individual vessels calling at their ports during a calendar year[208], which was far from being achieved on the sole basis of the Paris MOU. A number of provisions on port State control go beyond the framework established by the Paris MOU; this is , for example, the case with the concept of mandatory inspections of certain environmental high-risk ships, and with regard to the increased facility of banning certain ships with an exceptionally bad performance record from EU ports[209].

With regard to maritime security, the EU anticipated the entry into force of the International Ship and Port Facility Security Code (ISPS) Code[210] with Regulation 725/2004/EC on enhancing ship and port facility security[211]; Directive 2005/65/EC on the enhancement of port security is also to be noted[212]. Regulation 725/2004/EC provides for a harmonized interpretation and implementation of the relevant international security requirements, while going beyond the international frame, since contrary to the IMO requirements which concern only international shipping, EC measures also concern domestic shipping[213]; moreover, Member

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206 *See* http://www.europa.eu.int/scadplus/leg/en/lvb/l24231.htm (last visit 6.10.2007).

207 *See supra* note 111.

208 *See* ECJ, 22.6.2004, European Commission v. Republic of France, C-439/02, unpublished.

209 *See* Ringbom, *supra* note 37, 271.

210 On the ISPS Code see Iliana Christodoulou-Varotsi, *A New Maritime Security Regime-Terrorist Trap or Lawyers' Paradise? The EC Regulatory Framework on the Prevention of Terrorist Attacks on Maritime Transport,* in 330 MARIUS (Scandinavian Institute of Maritime Law) 285 (2005), Stephen Girvin, *The Commercial Implications of the ISPS Code, Id.,* 307, Thomas A. Mensah, *The Place of the ISPS Code in the Legal International Regime-For the Security of International Shipping*, 3 WMU J. MAR. AFFAIRS 1 (2004).

211 *See* Regulation 725/2004/EC of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security, OJ 2004 L 129/6.

212 *See* Directive 2005/65/EC of the European Parliament and of the Council of 26 October 2005 on enhancing port security, OJ 2005 L 310/28.

213 *See inter alia* Articles 1 and 3 of Regulation 725/2004/EC.

States will have to conform to a number of requirements in Part B of the ISPS Code as if they were mandatory[214]. Yet, in one of its Communications, the European Commission had claimed that it would resist unilateral measures[215].

The foregoing Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements is also noteworthy. The Directive aims at "incorporating international standards for ship-source pollution into Community law and at ensuring that persons responsible for discharges are subject to adequate penalties… in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships"[216]. Despite the issue of criminal competence of the EC as such, which is likely to raise some doubt[217], the Directive along with the above-mentioned Framework Decision 2003/80/JHA require Member States to provide for administrative and criminal penalties in the event of ship-source pollution committed with intent, recklessly or by serious negligence[218]. In a context where the imposition of appropriate sanctions is left under MARPOL 73/78 at the discretion of States which are parties to it[219], the European legislature neither rejected MARPOL 73/78 nor challenged the international civil liability regime for oil pollution damage (CLC and FUND Conventions, as amended), but limited to some extent the scope of tolerated illegal discharges of oil and noxious liquid substances, a question governed by MARPOL 73/78, via a selective approach to Annex I and Annex II of the said IMO instrument, which is likely to be regarded as a unilateral approach[220].

214 *Id.* at 297. *See* Article 3 para. 4 of the Regulation.

215 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on enhancing maritime transport security, Brussels 2.5.2003, COM(2003)229 final, 12.

216 *See* Article 1 of the Directive.

217 *See* José F. Castillo Garcia, *The Power of the European Community to Impose Criminal Penalties*, Eipascope 2005/3, 27 *seq*. *See* also ECJ, 28.6.2007, Opinion of the Advocate General Mazák in the pending case C-440/05, *available at* http://www.europa.eu.int/ , (last visit 29.1.2008).

218 *See* respectively Articles 8 and 2(1) of the Framework Decision 2003/80/JHA.

219 *See* Article 4 of MARPOL 73/78.

220 *See inter alia* Christodoulou-Varotsi, *supra* note 40 and Polychronis Tsirides, *Penal Protection of Marine Environment in the Frame of the European Community* (in Greek), in MARINE POLLUTION: THE PROBLEM OF DAMAGES AND PENALTIES (in Greek) (2004).

2. The maritime safety and anti-pollution legal framework in the U.S.: The quest for optimum safety, the quest for limits to the traditional standard-setting process

2.1. The quest for optimum safety in U.S. waters

The vitality of the maritime sector and the ensuing need for optimum safety is of paramount importance to the U.S. 95% of whose trade tonnage moves by sea[221]. The U.S. alone imported 455 million tons of crude oil in 2001, which represents 27% of total oil imported worldwide[222]; interestingly, 95% of all passenger and cargo vessels and 75% of all tankers calling on U.S. ports fly foreign flags[223]. The U.S. is also the State with the longest coastline and most extensive exclusive economic zone in the world[224].

The U.S. maritime safety and marine pollution prevention law is principally governed by federal instruments *inter alia* because of the need for uniformity. State competence, in the frame of a cooperative maritime federalism, is subject to important limitations, which have a constitutional justification. However, state regulation over maritime safety issues may exist and may conceptually be grouped into several categories according to purpose; to name the main categories in question[225], a state regulation may be intended to facilitate the enforcement of federal requirements, to fill an actual or perceived gap in the federal regulations by interposition of state standards applicable to a subject for which no federal rules exist or to establish a standard that is different from the federal standard. The inherent police power is very often presented as the foundation of state competence over maritime matters. It is not in the intention of this paper to discuss in depth possible conflicts between state and federal maritime safety policy and regulations.

In the enlightened article of Craig H. Allen on "Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the U.S.", a certain perception of U.S. maritime safety law and policy as an area marked by unilateralism, is not shared by the author, according to whom: "With few exceptions, the rules and standards that foreign vessels in U.S. ports and waters must meet are prescribed by international conventions"[226].

Yet, the maritime profile of the U.S. as such is far from being monolithic. As expected, some states have strong maritime interests, notably via the importance of their ports or the fragility of their marine environment, while others do not. The legislation of states are likely to reflect such interests. In the state of California,

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221 *See* http://www.state.gov/www/global/oes/oceans/980610_los.html (last visit 17.12.2005).

222 British Petroleum (BP). *Oil Trade Movements-Table of Oil Imports and Exports 2001*, quoted in Veiga, *supra* note 1, 183.

223 *See* Allen, *supra* note 2, 591.

224 *See* http://www.state.gov/www/global/oes/oceans/980610_los.html (last visit 17.12.2005).

225 *See* Allen, *supra* note 2, 354.

226 *Id.* at 590.

the port of Los Angeles for example, founded in 1907, constitutes Americas' busiest port with record volumes of cargo moving through the 7,500-acre harbour[227]. Significantly, Congresswoman Lois Capps from the state of California introduced measures in January 2003 in the House of Representatives that would accelerate the phase-out schedule for single hull tankers to 2005, instead of 2015, in the light of relevant developments in the EU legislative framework[228].

The state of Washington, with busy ports such as the New York and New Jersey port, has adopted its own arsenal of provisions over maritime safety, which have been challenged by private operators as going beyond the federal framework. While some substantive elements from the legislation of states will be presented in Part II, special mention deserves to be made at this stage on the issue of preemption of state legislation on maritime safety by federal legislation.

The question of federal preemption of the laws of states in the maritime field has been a source of landmark judicial decisions and theoretical interpretations whose analytical presentation goes beyond the limits of this study[229]; the issue revolves around the constitutional balance of powers between the federal and state governments, as it was shaped in a historical context, and the ensuing preemption of state navigational regulations through The Supremacy Clause, The Commerce Clause and international treaties[230]; the Supreme Court in an old case dated 1851, *Cooley v. Board of Wardens*[231], which related to state regulations requiring local pilots for vessels navigating in state waters, recognized that concurrent state and federal regulation of interstate and international activities may be permissible under certain circumstances[232]. Federal preemption was notably addressed in *Ray v. Atlantic Richfield Co*[233], where the Supreme Court held that the Port and Waterways Safety Act of 1972 (PWSA) and Coast Guard regulations adopted under the Act preempted certain of the state of Washington's pilotage requirements, limitations on tanker sizes, and tanker design and construction rules.

In this context, the state of Washington drew attention in the light of the "Best Achievable Protection" (BAP) regulations that impose more stringent safety requirements on tankers than do the Coast Guard regulations. The BAP regulations tackle a range of issues such as drug and alcohol testing and reporting, crew training policies, language proficiency requirements and operating procedures. The adoption of these regulations by the state of Washington was based on the interpretation of Section 1018 of OPA which provides for the imposition of additional liability from states relating to the discharge of oil or other pollution. The Interna-

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227 *See* http://www.portoflosangeles.org/factsfigures.htm (last visit 12.8.2006).

228 *See* Lengagne and Quentin, supra note 37, 72.

229 *See inter alia* Allen, *supra* note 2, Marva Jo Wyatt, *Navigating the Limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. MAR. L. J. 1 (1995), K. Allen Brooks, *California Oil Spill Laws in the Wake of United States vs. Locke*, 12 U.S.F. MAR. L. J. 227 (1999-2000), Sarah A. Loble, *Intertanko vs. Lowry: An Assessment of Concurrent State and Federal Regulation Over State Waters*, 10 U.S.F. MAR. L. J. 27 (1997).

230 *See* Wyatt, *id.*, 16 *seq.*

231 53 U.S. (12 How.) 299 (1851).

232 *See* Wyatt, *supra* note 230, 8.

233 *See* 435 U.S. 151 (1978).

tional Association of Independent Tanker Owners (Intertanko), "primarily concerned that the safety of its members' crews, their ships and the marine environment are not jeopardised by a patchwork of regulations developed in the individual coastal states of the U.S.", initiated action against the state of Washington in July 1995, claiming that 16 of the BAP regulations were preempted by federal law[234].

The ensuing judicial battle gave rise to a number of Court decisions. While the district court upheld all of the BAP regulations, on appeal, the Ninth Circuit of the Court of Appeals held that regulations requiring navigation and towing equipment were preempted by federal law, but that regulations that addressed staffing, personnel training and qualifications, and tankers operations were not[235]. It is significant that the Ninth Circuit Court believed that the U.S. did not adhere to a policy of international uniformity in tanker regulation, so that international agreements set only minimum standards that could be supplemented by the states[236]. In the ensuing appeal *U.S. v. Locke*, the U.S. Supreme Court reversed as it considered that the state of Washington's regulations regarding navigation watch procedures, crew English language skills and training, and maritime casualty reporting were preempted by the comprehensive federal regulatory scheme governing oil tankers; the decisions in both lower cases were remanded so the validity of other Washington regulations might be assessed in the light of the considerable federal interest at stake[237]. It is interesting to note that, with regard to training of seafarers, the Supreme Court considered that this is a field reserved for the federal government and that this is further confirmed by the circumstance that STCW Convention addresses crew "training" and "qualification" requirements.

The effort of the U.S. legislature to address maritime safety and marine pollution prevention has been a long-term task. It was in 1886 when the oil tanker The Gluckauf brought about the issue of a potential threat to American waters by an extensive oil spill[238]. However, federal regulation of merchant vessel safety began many years ago with Congress' enactment of the Steamboat Act of 1838[239]. The interest of the American legislature in a coherent legal frame on maritime safety and marine pollution prevention is notably revealed in 1871 when Congress re-

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234 *See* comments of former INTERTANKO Chairman Miles Kulukundis reported at http://www.intertanko.com/templates/Page.aspx?id=36113 (last visit 12.8.2006).

235 International Ass'n of Indep. Tanker Owners v. Lowry, 947 F. Supp. 1484 (W.D.Wa. 1996); International Ass'n of Indep. Tanker Owners v. Locke, 148 F. 3d 1053 (9th Cir. 1998). *See* brief comment by Mayer, Brown & Platt, in http://www.appellate.met/docketreports/sc12622030.asp (last visit 12.8.2006).

236 148 F. 3d at 1062-1063.

237 United States v. Locke, 529 U.S. 89. *See* Daniel G. Rauh, *State Authority Under the OPA: Federalist Elixir or Should the Supreme Court Sink Intertanko v. Loche?*, 24 TUL. MAR. L.J. 323. *See* also the syllabus (headnote) for *United States v. Locke* by the Reporter of Decisions, available at http://supct.law.cornell.edu/supct/html/98-1701.ZS.html (last visit 13.8.2006).

238 *See* http://fr.wikipedia.org/wiki/P%C3%A9trolier#La_r.C3.A9volution_du_Gluckhauf (last visit 6.10.2007).

239 5 Stat. 304 (1383).

pealed all previous vessel safety statutes and enacted a new comprehensive code of navigation and inspections law[240]. In 1885, Congress extended the U.S. steamboat inspection laws to cover foreign vessels carrying passengers to or from U.S. ports[241]. It is not in our intention however to present the historical background of the U.S. legislation on maritime safety and marine environment protection[242].

2.2. The regulatory framework: Brief overview

At the federal level, both the maritime safety and anti-pollution legal frameworks are addressed in Title 46 of the U.S. Code and the implementing regulations promulgated in Title 46 of the Code of Federal Regulations, as well as by Title 33 of the U.S. Code and the Code of Federal Regulations.

Title 46 requires the U.S. Secretary of the Department of Transportation to establish regulations governing the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of tank vessels[243]; in promulgating regulations the Secretary may prescribe provisions that exceed standards set internationally[244].

In addition to this, a number of statutes deserve special mention that they constitute the basic legislative framework of maritime safety and marine pollution prevention:

The Federal Water Pollution Control Act, commonly known as the Clean Water Act of 1972 (CWA)[245], was the principal piece of oil pollution legislation prior to the adoption of OPA 1990; it provides for pollution prevention and response requirements, contingency planning at the national level, spiller liability, financial responsibility, discharge prohibitions, including penalties for violations. The Act tackles the discharge of oil, hazardous substances, sewage and thermal pollutants.

The Ports and Waterways Safety Act of 1972 (PWSA)[246] is also a statute of prime importance with regard to maritime safety and marine pollution prevention. Its purpose consisted of the protection from damage or destruction of vessels, bridges, and waterfront structures on or immediately adjacent to the navigable waters of the U.S. and the protection of the waters and the resources therein from environmental harm, resulting from accidents involving those vessels and waterfronts facilities[247]. PWSA tackles port and waterfront safety, vessel navigation safety, operating requirements, traffic control, tanker design and construction

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240 16 Stat. 440 (1871).

241 22 Stat. 346 (1885).

242 On the evolution of Federal Maritime Environmental Legislation with the emphasis placed on liability issues, see Kiern, *supra* note 22, 502-507.

243 *See* 46 U.S.C. § 3703(a).

244 *Id.*

245 33 U.S.C. §§ 1251-1387 (1988). *See* MANGONE, *supra* note 43, 271.

246 Pub. L. No 92-340, 86 Stat. 424 (1972). It is to be noted that the Act has been subject to numerous amendments.

247 § 101, 86 Stat. at 424.

standards. A major amendment to be noted is the Port and Tanker Safety Act (PTSA)[248] which amended the PWSA in 1978.

On the basis of the provisions of PWSA, the Coast Guard promulgated a number of navigation safety regulations (NSRs) which apply to non-public vessels over 1,600 gross tons while operating on the navigable waters of the U.S., with the exception of foreign vessels that are transiting through the navigable waters but are not destined for or departing from a U.S. port[249]. The Act also required the Coast Guard to promulgate regulations on standards related to construction, design, equipment, and manning ("CDEM" standards) of tank vessels, including foreign tank vessels entering U.S. waters. It is to be noted however that the rules in question do not apply to foreign vessels having on board valid inspection certificates recognized under laws or treaties of the U.S.. The Act granted the Secretary authority to deny entry into U.S. navigable waters to any vessel not in compliance with the Act or any regulations promulgated under the authority of the Act[250].

Water pollution resulting solely from discharge of hazardous substances other than petroleum, natural gas and related products is addressed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund)[251]. CERCLA preempts CWA and OPA to the extent that they are inconsistent with CERCLA[252].

A lot of ink has been spent on the OPA 1990 which has constituted a remarkable stage in the evolution of U.S. maritime safety and marine environment protection law[253]. Broadly speaking, the preexisting federal legislation, including the CWA, remains in effect except for the imposition of liability which is now governed by OPA 1990[254].

According to Kiern, "upon reflection, it appears that it was not the Exxon Valdez incident alone, but rather this series of major oil spills, along with other lesser incidents in mid-1989 in our nations' waterways, that repeatedly prodded Congress through 1989-90 to enact the Oil pollution Act of 1990"[255]. The OPA is built on the basic framework of environmental legislation Congress enacted during the 1970s and 1980s; it aimed at addressing the major deficiencies in the preexisting legislation. OPA 1990 mainly tackles liability, compensation and financial responsibility issues; it also established a phased-in requirement for double hulls on tankers operating in U.S. waters or the U.S. exclusive economic zone[256], which anticipated relevant international requirements and thus provoked a conflict in the international shipping community as to its expediency. In addition to this, OPA established new drug and alcohol testing requirements for licensed or documented

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248 Pub. L. No. 95-474, 92 Stat. 1471 (1978).
249 *See* 33 C.F.R. § 164.01.
250 *See* Allen, *supra* note 2, 596.
251 42 U.S.C. §§ 9601-9675 (1988). On CERCLA see MANGONE, *supra* note 22, 277.
252 *See* Rodriguez and Jaffe, *supra* note 43, 6.
253 *See supra* note 43.
254 Rodriguez and Jaffe, *supra* note 43, 1.
255 *See* Kiern, *supra* note 43, 482.
256 Oil Pollution Act § 4115 (adding new Section 3703a to 46 U.S.C.).

mariners[257], alterations to manning standards for foreign tank vessels[258], changes to vessel communications equipments requirements[259] and special provisions regarding navigation and facilities in Prince William Sound[260], where the Exxon Valdez had grounded. A small number of amendments to OPA 1990 are of rather minor importance, with the exception of oil pollution liability limits which were raised in the 109th Congress by the Delaware River Protection Act of 2006 (DRPA) passed as title VI of Coast Guard and Maritime Transportation Act of 2006 (CGMTA)[261].

In addition to the above, the American legislator adopted a number of activity-based federal measures on pollution in certain areas or resulting from specific activities[262]. We will confine ourselves to mentioning the Outer Continental Shelf Lands Amendments of 1978[263], the Trans-Alaska Pipeline Authorization Act[264], and the Deepwater Port Act[265].

It is noticeable that the U.S. neither participates in any regional agreement on port state control nor has a related agreement or memorandum of understanding with that connection[266]; the U.S. is engaged in its own port state control system, commonly known as port state control initiative, which is conducted on an individual basis[267]. The 1994 Port State Control Initiative aims at identifying high-risk foreign merchant vessels on the basis of the performance records of their owners, operators, classification societies and flag States. The port state control is carried out by the U.S. Coast Guard. We will have the opportunity to explore port state control in the U.S. from a substantive point of view in Part II.

Emphasis should be placed on the special role and contribution of the U.S. Coast Guard[268], which is the unquestionable protagonist of the enforcement of the legislative arsenal on maritime safety and marine pollution prevention. The Coast Guard was authorized by OPA 1990 to implement regulations on the standards of compliance of double-hull requirements. However, it was authorized to regulate tanker standards, including design and construction of vessels, since 1972 on the

257 Oil Pollution Act § 4101 (amending 46 U.S.C. § 7101).

258 Oil Pollution Act § 4106 (amending 46 U.S.C. § 9101(a), 46 U.S.C. § 6101, and 33 U.S.C. § 1228(a)).

259 Oil Pollution Act § 4118.

260 Oil Pollution Act §§ 5001-5007.

261 *See* Pub. L. No. 109-241, 120 Stat. 516, 553-54 (2006). On minor amendments, see Kiern, *supra* note 22, 579. The new measures on oil pollution liability limits not only increased the existing limits, but for the first time they also distinguished financial responsibility between single and double-hull vessels-establishing higher liability limits for single hull tank vessels, and thus legislating a financial incentive for the use of double hull tank vessels. *See* Constantine Papavizas and Laurence I. Kiern, *2005-2006 U.S. Maritime Legislative Developments*, 38 J. MAR. L. & COM. 267 (2007).

262 *See* Rodriguez and Jaffe, *supra* note 43, 7 *seq.*

263 *See* 43 U.S.C. §§ 1811-1824 (1988).

264 *See* 43 U.S.C. §§ 1651-1655 (1988).

265 *See* 33 U.S.C. §§ 1501-1524 (1988).

266 *See* United States Coast Guard *Home Page*, http://www.uscg.mil/. *See* also *inter alia* Ozçayir, *supra* note 99, 154.

267 *Id.*

268 *See* BOISSON, *supra* note 2, 189.

basis of PWSA. From 1972 to 1990, the Coast Guard proposed the enactment of such requirements, but "for a variety of reasons ranging from international economy to domestic politics, such attempts to impose requirements being largely unsuccessful"[269]. The Coast Guard has also been provided with the task of periodically examining regulations applied by foreign States, particularly those relating to manning, crew training and qualification, and watchkeeping. Interestingly, the responsibilities of the Coast Guard have inspired the most fervent supporters of the European integration process who have an active interest in maritime issues to suggest the creation within the frame of the EU of a body which would be analogous to the U.S. Coast Guard[270].

Last but not least, the U.S. Environmental Protection Agency (EPA) should be noted. Statutes defining the EPA's emergency response program notably include CWA, CERCLA and OPA 1990[271].

2.3. The quest for unilateralism: The U.S. legislature's approach and method

We will have the opportunity under Part II to explore possible convergence or divergence of U.S. substantive law with EC law, as far as vessel construction requirements, port State control and human element requirements are concerned. Let us just at this stage consider the general approach of the U.S. legislature.

The question of the accession of the U.S. to the international private maritime law regime which notably includes liability, compensation and response issues has given rise to controversial discussions on U.S. maritime unilateralism, due to the choice of the U.S. not to join UNCLOS 1982 and CLC/FUND Conventions, and consequently to isolate itself from the vast majority of the world which applies this regime[272]. It would be a hasty and probably inexact conclusion, however, to automatically extend this comment to the international public maritime law regime, which addresses maritime safety and marine pollution prevention, princi-

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269 *See* Cicala, supra note 24, 881.

270 *See* BELLAYER-ROILLE, *supra* note 2.

271 *See* U.S. Environmental Protection Agency. *Emergency Management* (2008). http://www.epa.gov/emergencies/ (last visit 21.2.2008).

272 *See inter alia* Rodriguez and Jaffe, *supra* note 43, 24, according to whom: "One of the greatest disappointments of the Oil Pollution Act is the failure of Congress to make provisions for the U.S. to adopt the International Convention on Civil Liability for Oil Pollution Damage (CLC) Convention, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), and their 1984 protocols. The Act does contain a provision stating that it is in the best interest of the U.S. to participate in an international oil pollution regime that is at least as effective as U.S. law. As a practical matter, however, ratification of these conventions is impossible. Ratification would have been possible only if the amount of the vessel owner's liability under the OPA would not have exceeded the amount imposed by the 1984 Protocol to the CLC Convention. The Act's higher limits and the potential for unlimited liability under state law render ratification impossible".

pally on the basis of the most publicized provisions of U.S. law, e.g. on unilateral construction and design standards.

As pointed out by Allen in the above-mentioned article, "Examination of U.S. acceptance of international conventions on maritime matters demonstrates that the nation has been quite selective in its decisions whether to become party to any given international regime. Although the U.S. has been criticized for its reluctance to become party to some of the major international conventions relating to the sea and to pollution liability, the U.S. has been an outspoken supporter of international conventions which set international standards for vessels' safety and pollution prevention"[273] . Let us briefly explore certain parameters of the situation.

U.S. maritime safety and marine environment protection law contains of federal statutes and regulations in view of the implementation of the international instruments. The U.S. has ratified SOLAS 1974 and its two subsequent protocols (1978 and 1988). The contribution of the U.S. to the elaboration and entry into force of SOLAS, in its first versions, was characterized by dynamism but also prudence. On the one hand, the U.S. was exercising its influence in view of the advancement of SOLAS' provisions; on the other hand, it refrained from ratifying at once the instrument in question. Moreover, a number of national provisions were adopted at different stages, which usually led to their incorporation at the international level. In this context, it should be noted that SOLAS Convention 1929 was not ratified by the U.S. until 1936, in the aftermath of the 1934 fire on the passenger ship Morro Castle off the coast of New Jersey and the ensuing public outcry; however, the ratification was accompanied by reservations[274]. In 1936, the U.S. amended its regulations for the construction of passenger vessels on the basis of the principle of passive fire protection, which places emphasis on the nature of vessel construction and on the confinement of the fire to the space in which it originated, while eliminating possible reliance on any automatic or manual "active" systems of control[275]. At the third SOLAS Convention (1948) these requirements were adopted internationally. In 1968, the U.S. unilaterally required all passenger vessels operating from U.S. ports, with overnight accommodations for 50 or more passengers, to meet the 1966 Fire Safety Amendments[276] or U.S. passenger vessel requirements. Subsequent developments in SOLAS Convention 1974, incorporated the 1966 and the 1967 Amendments for fire safety. In 1992 the U.S. introduced a work item at the IMO on international approval of lifesaving appliances in view of the standardization of testing procedures[277].

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273 *See* Allen, *supra* note 2, 578.

274 *See* United States Coast Guard, http://www-uscg.mil/hq/g-m/mse4/solas.htm (last visit 22.3.2008).

275 *Id.*

276 *See* http://www.uscg.mil/hq/g-m/mse4/solas.htm (last visit 23.3.2006). The 1966 amendments proposed additional fire protection standards for existing passenger vessels.

277 *See* ACEBI. SOLAS *Requirements* (2003). *See* http://www.acebi.com/Solas.htm (last visit 21.2.2008).

Titles 33 and 46 of the U.S. Code and a multitude of Coast Guard regulations make applicable SOLAS Convention in the U.S. legal order[278]. As far as Chapter XI of SOLAS Convention on International Ship and Port Facility Security (ISPS) Code is concerned, in the wake of the September 11 attacks, Congress passed the Maritime Transportation Security Act of 2002 (MTSA)[279] to implement the ISPS Code in the U.S.. It is noteworthy however that the MTSA and its implementing regulations apply to a much wider range of vessels than the ISPS Code[280] and that unlike SOLAS Chapter XI-2 and the ISPS Code[281], the MTSA is not limited to vessels engaged on international voyages[282].

With regard to MARPOL 73/78, which is implemented by several statutes and regulations including the PTSA 1978, the Act to Prevent Pollution by Ships (APPS), the CWA, the Marine Plastic Pollution Research and Control Act (MPPRCA)[283] and the Regulations Relating to Tank Vessels Carrying Oil in Bulk[284], the U.S. deposited its ratification to MARPOL on 2 July 1980, and Congress passed implementing legislation[285]. The U.S. has also joined Annexes I, II which are mandatory and Annexes III and V[286]. The U.S. executive branch is in the process of finalizing the ratification package for MARPOL Annex VI on the issue of air emissions from marine vessels[287].

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278 *See* Allen, *supra* note 2, 589.

279 *See* Pub. L. No. 107-295, 116 Stat. 2064 (2002) (currently codified at 46 U.S.C. §§ 70101-70117 (2004)). Implementation regulations of the MTSA are set forth at 33 C.F.R. Chapter I (2007), 33 C.F.R. § 101.115 (2003). On MTSA and the ISPS Code see Antonio J. Rodriguez, *When Your Ship is in the Bull's Eye: the Maritime Transportation Security Act and Potential Vessel Owner Liability to Third Parties Resulting from a Terrorist Attack*, 17 U.S.F. MAR. L. J. 241, 250 (2004-05), Robert G. Clyne, *Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries*, 77 TUL. L. REV. 1183 (2003), Thomas J. Schoenbaum/Jessica C. Langston, *An All Hands Evolution: Port Security in the Wake of September 11th, 77* TUL. L. REV. 1333-1370 (2003). It should be noted that The Security and Accountability for Every Port Act of 2006 (or SAFE Port Act) (Pub. L. No. 109-347) complements the MTSA. *See* Papavizas and Kiern, *supra* note 262, 268 *seq*.

280 *See* Rodriguez, *Id.*, 250.

281 *See* SOLAS, Chapter XI-2, Regulations 2.1.1.

282 *See* 33 C.F.R. § 104.105(a) (2007). However, foreign vessels making innocent passage through U.S. territorial waters or transiting international straits through U.S. waters are not affected by the MTSA, 33 C.F.R. § 104.105(d) (2007).

283 *See* 33 U.S.C. §§ 1901-1915. The Marine Plastic Pollution Research and Control Act of 1987 amended the Act to Prevent Pollution from Ships in view of the implementation of the provisions of Annex V of the MARPOL 73/78 Convention relating to garbage and plastics.

284 *See* 33 C.F.R. pt.157.

285 *See* SCHOENBAUM, *supra* note 2, 877.

286 The U.S. ratified Annex III on 25 June 1991, which entered into force internationally on 1 June 1992. *See* Martin R. Lee, Oceans & Coastal Resources: A Briefing Book-Marine Pollution, *available at* http://ncseonline.org/nle/crsreports/briefingbooks/oceans/r.cfm (last visit 20.08.2005).

287 *See* Chamber of Shipping of America Home Page, http://www.knowships.org/report.php (last visit 21.2.2008).

The U.S. became party to the STCW Convention in 1991. It seems that between 1984 and 1992, significant limitations to the 1978 STCW Convention became apparent to the U.S.. The latter had deferred ratification efforts and worked for almost a decade to effect necessary changes to U.S. licensing regulations. The 1995 amendments to the STCW Convention, adopted by the U.S., entered into force in February 1997; as a result, steps necessary to implement the revised requirements were taken by the Coast Guard. It is worth noting that the U.S. had submitted a proposal to the IMO in view of a comprehensive review of the 1978 Convention. In its proposal the U.S. suggested that the review should specifically consider criteria used for insuring fitness of watchstanders and the role of the human element in maritime casualties[288].

The U.S. is also a party to the 1972 International Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, commonly known as the London Dumping Convention (LDC). This instrument is implemented through Title I of the 1972 Marine Protection, Research and Sanctuaries Act[289], which is also known as the Ocean Dumping Act.

The U.S. ratified the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC), which was adopted by the IMO on 30 November 1990. The ratification of this instrument took place on 13 May 1995[290].

However, the above mentioned legal framework did not prevent the U.S. legislature from adopting its own approach to certain issues, taking the risk of acting unilaterally or being perceived by the international community as having acted alone. The PTSA 1978 constituted, for example, the response of the U.S. legislature to a number of maritime casualties involving tankers in the late 1970s as well as to the "backdrop of slowly developing international rules"[291]. Section 9 of the Act provided for the first time[292], authority for the Coast Guard to establish conditions of entry into U.S. ports. The PTSA also authorized the President to enter into international agreements relating to port and vessel safety[293].

In addition to the above, foreign tank vessels operating in U.S. waters are required not only to meet international requirements but also to obtain a certificate attesting to their compliance with Chapter 37, on carriage of liquid, bulk and dangerous goods, of Title 46 of the U.S. Code. The internationally accepted practice of control of the compliance of foreign vessels to maritime safety requirements consists of the visual control of the certificates of compliance issued by the flag State on the basis of the international conventions, unless there are clear grounds

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288 *See* United States Coast Guard *Merchant Mariner Licencing & Documentation*, http://www.uscg.mil/stcw/stcw-history.htm (last visit 21.2.2008).

289 *Id.*, Pub. L. No. 92-532.

290 *Id.*

291 Allen, *supra* note 2, 598.

292 *Id.* at 599.

293 *See* 33 U.S.C. § 1230. However, PTSA facilitates consistency with later-enacted international developments by authorizing the Secretary of the Department of Transportation to modify any regulation or standard prescribed under PWSA to conform to the provisions of an international treaty, convention, agreements or an amendment that is ratified by the US. *See* Allen, *supra* note 2, 601.

for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of the certificate[294].

Section 3711 of Chapter 37 prohibits any foreign vessel from operating on U.S. navigable waters, unless it is granted a certificate of compliance issued by the Secretary of the Department of Transportation, indicating that the vessel was subject to examination and was found in compliance with the requirements of applicable provisions. The Secretary is authorized to accept, in whole or in part, a foreign certificate issued according to an international instrument to which the U.S. is a party, as a basis for the issue of certificate of compliance. However, it is noticeable that the Secretary does not have to accept foreign certificates as evidence of compliance, but may make additional action to ensure compliance with applicable domestic laws and regulations and international treaty provisions[295].

In our opinion, the requirement provided for in Section 3711 on a U.S. certificate of compliance as a systematic form of control functioning in addition to the international requirements is likely to reflect a different methodology than the one provided by the international instruments, in the sense that it constitutes a second tier of formality/control, which is not provided as such by the international conventions.

The other provision which may give rise to some discussion is Section 3703 of Chapter 37 (Title 46). The latter requires the Secretary of the Department of Tranportation to issue regulations for the design, construction, maintenance, etc. of vessels in view of increased protection of the marine environment. While the Secretary may prescribe different regulations applicable to vessels engaged in the domestic trade, it may also provide for regulations that "exceed standards set internationally". Exceeding international standards would presumably mean establishing higher standards than the existing ones or differentiated standards. However, higher standards may be synonymous to differentiated standards, as was the case with the double hull requirement on oil tankers, which we will examine in Part II.

It follows from the above that schematically there seems to be a dichotomy concerning the attitude of the U.S. legislature on the adoption of the international instruments on maritime safety and marine pollution prevention.

On the one hand, the U.S. has not joined UNCLOS 1982, which is the most comprehensive legally binding international instrument on the uses of the oceans[296]. Additionally, the U.S. has opted for unilateral criteria in paramount areas of shipping such as the construction and design of vessels and the entry of for-

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294 *See* e.g. Regulation 19 of SOLAS Convention (1974) and Article 5 of MARPOL.

295 *See* 46 U.S.C. 3711, http://www.law.cornell.edu/uscode/ (last visit 8.3.2006).

296 It seems, however, that the Agreement Relating to the Implementation of Part XI of UNCLOS 1982 which incorporates legally binding changes in the deep sea-bed mining provisions of the said convention "satisfactorily addresses the objections of the U.S. and other industrialized countries"; thus, it could make possible the accession of the U.S. to this instrument. *See* http://www.state.gov/www/global/oes/oceans/980610_los.html (last visit 15.8.2006).

eign vessels in U.S. ports, as dictated by the above-mentioned PTSA 1978 and OPA 1990.

On the other hand, the U.S. is a party to the vast majority of the IMO instruments on maritime safety and marine pollution prevention such as, to name but a few, MARPOL 73/78, SOLAS, OPRC, LDC, and STCW (including the 1995 amendments for the elaboration of which the U.S. was a protagonist) and its attitude has constituted a pacesetter for the adoption of important international maritime safety rules.

This policy, which resulted in an amalgam of uniform and differentiated provisions, has exercised an unquestionable influence on EC maritime safety law and policy.

In above-mentioned Part I, our viewpoint was the presentation of U.S. and EC maritime safety and marine pollution prevention law principally through the scope of the international norms, as a point of reference, which inevitably led to the search for unilateralism. In the Part that follows (Part II), we will adopt a substantive yet selective approach to the respective legal systems, in search of possible convergence or divergence between them.

At this stage, however, a first remark which may be made is that the EU has borrowed a number of elements from the U.S. maritime legislator. However, while the latter was shaping its policy and law in a context of the actual delay of the international system to react promptly towards urgent needs, especially in the 70s, the EU is sometimes inclined to reshape international requirements in a differentiated context: the international system is more energetic nowadays than in the past in its capacity to address the needs of the maritime industry at the global level; this would ideally result in qualifying the temptation of both powers to "act alone".

Part II:
The search for common trends: A substantive law approach in the light of prevention, preparedness/response and liability

The search for convergence between the U.S. and the EU on maritime safety laws and regulations implies in actual fact the examination of three rather than two parameters, the third one being the IMO; this is the case since depending on the degree and pace of the involvement of the IMO in the shaping of the regulatory frame of safety at sea, the IMO contributes to the balance or imbalance of the "dialogue" between the two maritime powers under examination.

However, this position should not hinder possible autonomy of the federal or regional legislator's aspirations in this field, i.e. a federal or regional maritime safety policy which would exist in any event, based on a federal or regional perception of interests. For example in the case of the EU, a common maritime safety policy would in actual fact be founded on the need for enhanced integration[297] between Member States in all sectors of the economy including maritime transport and maritime safety and whose ensuing consequence would be the shift of the competence on maritime safety from the synergy between the national and the international level (Member States-IMO) to the EC level[298]. Despite this, it is noticeable that when the legislator in the EU or the U.S. makes a statement on its policy choices, the failure of the international system to be at the expected level of action and efficiency is invoked[299].

In the light of the above, an effort will be made to address the search for convergence in terms of substantive law between the EU and the U.S. with regard to a range of parameters influencing maritime safety which in no manner exhaust the plethora of aspects related to safety at sea. Developments below are placed, on the

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[297] On the European integration process, see *inter alia* ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE (2004), Id., THE INSTITUTIONALIZATION OF EUROPE (2001) and GUY ISAAC, DROIT COMMUNAUTAIRE GENERAL (1996).

[298] On the balance of competencies between the EU and the Member States, notably see STONE SWEET, *id.,* and ISSAC, *id.*

[299] *See* for example the 1993 Communication of the European Commission on Safe Seas, *supra* note 33. With regard to the U.S., the backdrop of slowly developing international rules was put forward on the occasion of the elaboration of the Port and Tanker Safety Act (PTSA 1978).

one hand, in the context of the viewpoint of prevention and, on the other hand, in that of remedies, i.e. measures taken once an oil spill occurs.

In the developments below we will examine from a comparative angle maritime safety prevention, preparedness and ability to respond to maritime casualties; the discussion will also be extended to liability issues.

1. Prevention

The issue of prevention of maritime casualties will be addressed in a selective manner and more precisely from the perspective of the following areas: firstly, the design and contruction of oil tankers; secondly, the so-called human element, *i.e.* the aspects relating to sefarers and personnel involved in the shipping industry ashore and aboard; and thirdly, port State control.

1.1. Design and construction of oil tankers

To the extent that modern societies cannot live without oil and oil has to be transported from the source to consumption, inevitably transportation of oil by sea constitutes a privileged area of attention both by public opinion and the legislator[300]. The U.S. alone imported 27% of total oil imported worldwide in the year 2001[301]; furthermore, it imports by oil tankers approximately 3.3 billion barrels of oil annually[302]. Moreover, some 1 billion tonnes of oil enter the EU ports or cross the waters surrounding its territory each year[303]. We will not disagree that "the sheer magnitude [of oil] makes understanding the true extent of the role of petroleum in society too difficult to grasp"[304].

Oil tankers are at the heart of the story. The MARPOL 73/78 Convention defines an oil tanker as a ship constructed or adapted primarily to carry oil in bulk in its cargo spaces, and includes combination carriers and any "chemical tanker" as defined by the same instrument when it is carrying a cargo or part cargo of oil in

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300 The transportation (including refining and distribution activities) of crude oil or refined products results in the release, on average, of an estimated 150,000 tonnes (44,000,000 gallons) worldwide, each year. *See* OIL IN THE SEA-INPUTS, FATES AND EFFECTS, COMMITTEE ON OIL IN THE SEA:INPUTS, FATES AND EFFECTS, National Research Council, Washington D.C., 2003.

301 *See supra* note 130.

302 *See* U.S. DEPARTMENT OF TRANSP., AN ASSESSMENT OF THE U.S. MARINE TRANSPORTATION SYSTEM: A REPORT TO CONGRESS at vii (1999), in Kiern, *supra* note 22, 484.

303 *See* Communication from the European Commission on a Third Package of Legislative Measures on Maritime Safety in the European Union, *supra* note 5, 3.

304 *See supra* note 300. The citation is from the executive summary, 1.

bulk[305]. A single-hull oil tanker is a tanker where oil in the cargo tanks is separated from the seawater only by a bottom and a side plate[306].

It is generally admitted that, in the event of collision or stranding, an effective way of avoiding risks of oil spill into the sea consists of surrounding the cargo tanks with a second internal plate at a sufficient distance from the external plate. This design is known as a double hull[307]. A double hull tanker is defined as an oil tanker meeting the double hull or equivalent design requirements of Regulation 13F of the same Annex. The latter was adopted by the IMO in 1992 as an amendment to MARPOL Convention and required new tankers of 5,000 dwt and above to be fitted with double hulls separated by a space of up to 2 meters. Additional amendments followed at the IMO level on double hull requirements[308].

It is to be noted that OPA 1990 does not define the term "double hull" but enables the USCG to formulate its own definition[309]. The Coast Guard construes the double hull as "the space between a vessel's skin and cargo tank that provides reasonable protection of the entire cargo block from damage due to grounding or collision, which are the most likely sources of vessel damage that result in loss of cargo"[310]. In simple terms, a double hull is a ship hull design and construction method where the bottom and sides of the ship have two complete layers of watertight hull surface; double hulls are a more extensive safety measure than double bottoms, which have two hull layers only at the bottom of the ship and not the sides[311].

In the event of an accident involving a collision or grounding a double-hull tanker will significantly reduce the expected outflow of oil compared to that from a single-hull vessel[312]; however, potential advantages of double hulls are subject to a number of limitations; the advantages concern in actual fact an effective double-hull tanker[313] which is operated by well trained crews and maintained to high stan-

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305 *See* Regulation 1(4) of Annex I of MARPOL 73/78. On the safety of oil tankers in general see BOISSON, *supra* note 2, 245.

306 A single hull tanker is defined by MARPOL 73/78 as an oil tanker not meeting the double hull or equivalent design requirements of Regulation 13F of Annex I.

307 *See* http://europa.eu/ (last visit 20.8.2006).

308 On tankers below 5,000 dwt the space must be at least 0,76 m. *See* http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258 (last visit 22.11.2006).

309 *See* MICHAEL M. GIBSON, ENVIRONMENTAL REGULATION OF PETROLEUM SPILLS AND WASTES (1993), 131, in Cicala, *supra* note 24, 880.

310 *Id.*

311 *See* http://en.wikipedia.org/wiki/Double_hull (last visit 23.11.2006).

312 *See* THE DOUBLE-HULL TANKER LEGISLATION: AN ASSESSMENT OF THE OIL POLLUTION ACT OF 1990, National Research Council, Washington D.C., 1998. *See* http://www.nap.edu/catalog/5798.html (last visit 22.11.06). *See* also BOISSON, *supra* note 2, 260.

313 *Id.* For instance, it is mentioned in the study in question that "Certain designs, most notably those with "single-tank-across" cargo tank arrangements [which do not have longitudinal bulkheads through the cargo tanks], may exhibit excessive oil outflow following an accident and encounter intact stability problems [stability when no damage has occurred is known as intact stability] during cargo transfer operations even though they

dards[314]. Moreover, opposing viewpoints have argued that double hulls are more dangerous than a single hull[315]. Obviously, to judge from subsequent developments in legislative terms, this viewpoint did not prevail. It is furthermore supported that the double hulls are most effective in preventing small oil spills from taking place[316] and that their advantages with regard to major oil spill is uncertain[317]. Another parameter which has to be taken into consideration is the age factor and design standards as supported by the shipyard's quality[318].

Last but not least, it is noteworthy that while a lot of ink has been spent on the regulatory framework of the design and construction requirements of oil tankers in recent years, less energy seems to have been spent by academia on the search for possible protectionism of the shipbuilding industry and other related areas of activities from the progressive replacement of single hulls by double hulls at the worldwide level[319]. To the extent, however, that not only double hulls but also equivalent designs which are likely to ensure the same level of protection are potentially acceptable[320], the industry is already in search of the next generation of

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are in full compliance with design regulations of the IMO and major classification societies as of July 1997". Executive summary, 3.

314 *See* BOISSON, *supra* note 2, 260.

315 *See* GIBSON, *supra* note 309, paras. 5.12, at 131, and Tammy M. Alcock, *Ecology Tankers and the Oil Pollution Act of 1990: a History of Efforts to Require Double Hulls on Oil Tankers*, 19 ECOLOGY L.Q. 97, 137 (1992), 111-13, both quoted in Cicala, *supra* note 24, 881.

316 *See* Alcock *supra id.* at 114 in Elisabeth Galiano, *In the Wake of the Prestige Disaster: is an Earlier Phase-out of Single-Hulled Oil Tankers the Answer?*, 28 TUL. MAR. L. J. 113 129 (2003).

317 *See* International Tanker Owner Pollution Federation Ltd., Accidental Tanker Oil Spill statistics (2002).

318 *See* Galiano, *supra* note 316, 126 and 132.

319 On a large range of academic publications addressing the issue of double hulls, there is little or no mention of this aspect. *See inter alia* Cicala, *supra* note 24, Galiano, *supra* note 316, Kiern, *supra* note 22, Rodriguez and Jaffe, *supra* note 43. Significantly, it is estimated that the cost of replacement of the single-hull world trading fleet of about 3, 000 tankers in the late 90s by new double hull vessels and their operation through one 20-year life cycle was about $30 billion greater than building and operating an equivalent single-hull fleet. *See* THE DOUBLE-HULL TANKER LEGISLATION: AN ASSESSMENT OF THE OIL POLLUTION ACT OF 1990, *supra* note 312, Executive summary, 7.

320 *See* the ENVIRONMENTAL PERFORMANCE OF TANKERS DESIGNS IN COLLISION AND GROUNDING-METHOD FOR COMPARISON, National Research Council, Washington D.C., 2001. According to this study, nowadays, while the IMO has approved two designs as equivalent to the double hull, i.e. the mid-deck design and a special variation proposed by Sweden and approved in 1997, the USCG has not made that determination for any approved alternative design. Consequently, proponents of alternative tanker designs have approached the USCG and the U.S. Congress with a view to seeing their proposals accepted on designs of oil tankers which are believed to offer performance equivalent to or better than the double hulls. Some proposals suggest that regulations should be based on performance criteria for designs rather than prescriptive criteria. The study seeks "to determine whether a methodology could be established for

safe oil tankers which could potentially result in putting double hulls aside[321] and leading the legislator before new regulatory dilemmas.

1.1.1. The backdrop of the adoption of provisions on the phasing-in of double hulls

The adoption of OPA 1990 took place in a context where the IMO had not regulated the phasing-in of double hull tankers; however, the IMO standards in MARPOL 73/78 had dealt with tank location in tank vessel designs and operation requirements such as ballast tank cleaning[322].

MARPOL 73/78, which did not initially comprise any provision on the introduction of double hulls, was nevertheless marked, during its elaboration, by this question. In 1973, the U.S. first had proposed mandating double hulls on tankers but the U.S. delegation failed to convince the rest of the world[323].

It is to be noted that at the time when OPA 1990 was adopted the so called tacit acceptance procedure was not unknown to the IMO[324]. According to this procedure the amendments enter into force on a specified date unless an agreed number of States Parties object by an agreed date[325]. Consequently it can be assumed that the position of the IMO in the 90s from the point of view of the pace of adoption of amendments to technical conventions was not hindered by the traditional way of adoption of amendments, which is generally considered to be a source of slowness[326].

The authority to regulate the construction and operation of tankers was prescribed in the U.S. in the Ports and Waterways Safety Act of 1971 (PWSA)[327].

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measuring the equivalency of alternatives to double-hull designs with regard to environmental performance". *See* also http://www.infocusmagazine.org/1.2/tankers/html (last visit 1.12.06).

321 *Id.*

322 *See* THE DOUBLE-HULL TANKER LEGISLATION: AN ASSESSMENT OF THE OIL POLLUTION ACT OF 1990, *supra* note 312, Preface v.

323 *See* RONALD B. MITCHELL, INTERNATIONAL OIL POLLUTION AT SEA (1994) and Alcock, *supra* note 315, 128, quoted in Galiano, *supra* note 316, 119.

324 For a detailed presentation of the progressive introduction of the tacit acceptance procedure, see http://www.imo.org/ (last visit 29.1.2008).

325 In practice, amendments are usually adopted by the IMO's Marine Environment Protection Committee (MEPC) or by a Conference of Parties to MARPOL.

326 If the amendment procedure is greatly expedited via the tacit acceptance procedure, the slow ratification process is the other side of the coin and it can constitute a problem. According to INTERTANKO'S representative, Mr. Fuglesang, "Another important consequence of the slow ratification process is that the assumptions upon which an international treaty has been based may have become outdated in the meantime. This problem is accentuated by the difficulty or impossibility of amending any treaty before it has taken effect". *See* OECD Workshop on Maritime Transport, Paris, 4-5 November 2004, paper submitted by Kristian R. Fuglesang, The International Association of Independent Tanker Owners (INTERTANKO). *Available at* http://www.oecd.org/dataoecd/20/15/33949558.pdf (last visit 4.12.2006).

327 *See supra* Part I under 2.2.

More precisely, the USCG, through the Department of Transportation, had the authority to promulgate regulations providing for standards for design, construction and maintenance of oil tankers[328]. Despite the USCG's attempts to make use of its authority on this level, for reasons "ranging from international economy to domestic politics", at the beginning of the 80s the efforts in question proved to be fruitless[329].

The grounding of the Exxon Valdez in Prince William Sound in 1989 and the ensuing ecological disaster due to the millions of tons of crude oil spilled into Alaskan waters, followed however by other major oil spills including the American Trader casualty in California, the Mega Borg explosions and fire in the Gulf of Mexico, and several spills in New York Harbor[330], led the U.S. Congress to adopt the Oil Pollution Act in August 1990. Section 4115(c)(2) in OPA 90 states that tank vessels shall be equipped with a double hull or "with a double containment system determined by the Secretary of Transportation to be as effective as a double hull for the prevention of a discharge of oil".

In the light of these measures on oil tankers and the U.S.'s pressure following the Exxon Valdez spill[331], the IMO initiated in 1992 two major amendments to Annex I of MARPOL 73/78 which reflected the impact of OPA 90: Regulation 13F required all new oil tankers of 5,000 dwt and above built since 1996 to be fitted with double hulls; it also provided for other methods of design and construction likely to be accepted as alternatives, provided that the same level of protection against oil pollution in the event of collision or stranding was ensured. Regulation 13G was also adopted in order to address *existing* crude oil tankers of more than 20,000 dwt and product carriers of more than 30,000 dwt. Existing single hull oil tankers were to be phased out according to a time frame ending in 2026[332].

At that stage, the EU was not in a position to react to these events in the same manner as it would probably have done nowadays. Despite the position of the EU at the end of the 70s to encourage Member States to proceed to the ratification of the international maritime safety conventions[333], EC positive law in the maritime sector a decade later, *i.e.* at the beginning of the 90s, remained limited. When the Communication of the European Commission was adopted in 1993 on "A common policy on safe seas"[334] OPA 90 was mentioned once on the occasion of ex-

328 *See* Alcock, *supra* note 315, 106, Cicala, *supra* note 24, 880, Galiano, *supra* note 316, 115 seq.

329 *See* Alcock, *id.* at 107, Cicala, *id.* at 881, Galiano, *id.* at 116.

330 While mention to the Exxon Valdez is systematically made with regard to OPA 1990, the other casualties are not always referred to. This parameter is mentioned in Rodriguez and Jaffe, *supra* note 43, 11 and in Kiern, *supra* note 22, 482.

331 *See* Galiano, *supra* note 316, 120.

332 *See* Power and Casey, *supra* note 37, 346. On these amendments, *See* also http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258 (last visit 22.11.2006).

333 *See* Council Recommendation of 26 June 1978 on the ratification of Conventions on safety in shipping (78/584/EEC), *supra* note 76.

334 *See supra* note 33.

ploring the need to deal with oil tankers which would be banned from U.S. waters[335].

It can reasonably be assumed that OPA 90 and the 1992 IMO amendments, in combination with the outcry of the public opinion in the aftermath of the oil spill of the Erika in 1999, had urged the European Commission to action. Significantly, in the Treaty on the European Union, commonly known as the Treaty of Maastricht, adopted on 7 February 1992 and considered to have significantly contributed to the boosting of the European integration process[336], a provision was inserted for the first time on the competence of the EC to address the safety of maritime transport[337]. The absence in the 90s, with the exception of Greece, of any Member States within the EC with strong maritime interests in their capacity as registration countries, rendered the purpose of the elaboration of a common maritime safety policy more feasible. In any event, the vision of the European Commission on maritime safety as presented in the 1993 Communication, was much wider than a mere reflection of the pressure exercised by the international or North-American legislators. Subsequent maritime casualties, including the Prestige, in 2002, resulted in the enhancement of the trend already commenced in the aftermath of the Erika grounding in 1999.

1.1.2. Substantive provisions or the withdrawal's schedule waltz

The aim of the adoption of OPA 90 was "to establish limitation on liability for damages resulting from oil pollution, to establish a fund for the payment of compensation for such damages, and for other purposes"[338]. Even though OPA 90 principally addressed liability issues, it will also be equally remembered with regard to the double hulls. From a formal point of view, OPA 90 comprises nine Titles which address respectively oil pollution liability and compensation, conforming amendments, international oil pollution prevention and removal, the Prince William Sound provisions, miscellaneous, the oil pollution research and development program, the Trans-Alaska pipeline system, and amendments to the Oil Spill Liability Trust Fund. Requirements on double hull tankers are found under Title IV, within Section 4115, which is entitled "Establishment of double hull requirement for tank vessels". The said Section amends the U.S. Code[339] by inserting a new section[340].

Under OPA 1990, all new vessels constructed for the carriage of oil shall be equipped with a double hull when operating in U.S. waters or in the U.S. exclusive economic zone; *existing* vessels are to be phased out progressively on the basis of

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335 *Id.* at 46 (French version).

336 *See* Article 2 of the said Treaty which provides that "this Treaty marks a new stage in the process of creating an even closer union among the peoples of Europe".

337 *See* Article 71(1)(c) of the EC Treaty.

338 *See* introductory points on the first page of the statute.

339 46 U.S.C. ch. 37.

340 A new Section 46 U.S.C § 3703a entitled "Tank vessel construction standards" is inserted after Section 3703.

a complex scheme, starting in 1995, which is operational on the criteria of age and size. By the year 2010, all oil tankers over 5,000 gross tons must have double hulls, except those which currently have double bottoms or double sides and whose operation may be permitted in the U.S. until 2015.

With the exception of oil pollution liability limits which were subject to an increase in 2006, subsequent amendments to OPA 1990 were of limited importance and did not affect the time frame of progressive withdrawal of single hulls; the former principally consisted of the Edible Oil Regulatory Reform Act (Edible Oil Act)[341] which required federal agencies to differentiate between petroleum and nonpetroleum (vegetable, animal, fish and marine mammal) oils when they established and implement regulations about those oils, and also allowed tankers carrying nonpetroleum oils to be subject to lower liability limits reserved for nontank vessels[342].

In the light of the preventive measures enacted by OPA, and under the pressure provoked by the maritime casualty of the vessel Erika in 1999 which had broken in half off the coast of Britanny, France, with 19,800 tons of heavy fuel oil being spilled into the sea[343], EC action was activated. The EU did not fail to admit "that action on maritime safety under the auspices of the IMO falls short of what is needed to tackle the causes of such disasters effectively. Action by the IMO is severely handicapped by the absence of adequate control mechanisms governing the way the rules are applied throughout the world. As a result, IMO regulations are not applied everywhere with the same rigor. The evolution of maritime transport over the last few decades and, in particular, the emergence of "flags of convenience," some of which fail to live up to their obligations under the international conventions, tends to aggravate this phenomenon."[344]

The EC's response was inter alia intended to address the consequences of OPA in the waters of the EC Member States[345]. Three instruments constitute the Community frame on the progressive phasing-out of single hull vessels, namely Regu-

[341] On the increase of limitation limits see the Delaware River Protection Act of 2006 (DRPA) passed as title VI of CGMTA (Pub. L. No. 109-241, 120 Stat. 516, 553-54 (2006)). On the other amendment, see Edible Oil Regulatory Reform Act, Pub. L. No. 104-55, § 1, 109 Stat. 546 (1995) (codified as amended in scattered sections of 33 U.S.C.).

[342] *See* at § 2(a), (d) (codified at 33 U.S.C. § 2720).

[343] *See* Nesterowicz, *supra* note 37.

[344] Quoted in Nesterowicz, *id.*

[345] Prior to the mention of the provisions which were adopted by the EC on the progressive withdrawal of single hull vessels, a Council Regulation (2978/94/EC) adopted in 1994 which is at the present stage repealed, addressed the implementation of IMO Resolution A.747(18) on the application of tonnage measurement of ballast spaces in segregated ballast oil tankers; the EC Regulation aimed at a unified implementation in the Community of the international frame concerning the charging of levies on environmentally-friendly vessels by port, harbour and pilotage authorities, including segregated ballast oil tankers.

lations 417/2002/EC[346], 1726/2003/EC[347] and 2172/2004[348]. The main instrument of reference is Regulation 1726/2003/EC.

Regulation 417/2002/EC was adopted following the IMO amendments to Regulation 13G of MARPOL Annex I which were adopted in April 2001 and were in force from 1 September 2002[349]; it is to be noted that the phasing-out schedule adopted by the IMO amendment in question was similar to the schedule provided for in OPA 90 and all single hull tankers were to be phased out by 2015[350].

Regulation 417/2002/EC, adopted in February 2002, i.e. before the entry into force of the IMO amendments, and entered into force the same day as the amendments in question, namely on 1 September 2002, prescribed "an accelerated phasing-in scheme for the application of the double-hull or equivalent design requirements of MARPOL 73/78 to single hull oil tankers"[351].

Under OPA 1990, all new vessels constructed for the carriage of oil shall be equipped with a double hull when operating in U.S. waters or in the U.S. exclusive economic zone; existing vessels are to be phased out progressively on the basis of a complex scheme, starting in 1995, which is operational on the criteria of age and size. Regulation 417/2002/EC applies to oil tankers of 5,000 tons dwt and above entering into a port or offshore terminal under the jurisdiction of a Member State, irrespective of their flag, or flying the flag of a Member State[352]. The Regulation does not apply to warships, naval auxiliary or other ships, owned or operated by a State and used only on government non-commercial service[353]. Compliance with the double hull or equivalent design requirements by single hull oil tankers shall take place according to a timetable targeting ships divided into three categories and providing for them a differentiated progressive withdrawal[354]. For category 1, 2003 was the year of phasing-out of ships delivered in 1973 or earlier, while 2007

346 OJ 2002 L 64/1.

347 OJ 2003 L 249/1.

348 OJ 2004 L 371/26.

349 The amendments in question were introduced on 27 April 2001 by the 46th session of the IMO Marine Environment Protection Committee (MEPC-46) by Resolution MEPC 95(46) and entered into force on 1 September 2002. By virtue of these amendments a new accelerated phasing-out scheme for single hull oil tankers was introduced.

350 *See* Galiano, *supra* note 316, 121.

351 *See* Article 1 of the Regulation.

352 *See* Article 2(1).

353 *See* Article 2(2).

354 According to Regulation 417/2002/EC (Article 3), Category 1 oil tankers refers to oil tankers of 20,000 tons dwt and above carrying crude oil, fuel oil, heavy diesel oil or lubricating oil as cargo, and of 30,000 tons dwt and above carrying oil other than the above, which does not comply with the requirements for new oil tankers as defined in Regulation 1(26) of Annex I of MARPOL 73/78. Category 2 oil tankers means oil tankers of 20,000 tons dwt and above carrying crude oil, fuel oil, heavy diesel oil or lubricating oil as cargo, and of 30,000 tons dwt and above carrying oil other than the above, which complies with the requirements for new oil tankers as defined in Regulation 1(26) of Annex I of MARPOL 73/78; category 3 oil tankers means an oil tankers of 5,000 tons dwt and above but less than that specified in the above-mentioned definitions.

was the year of phasing-out of the ships delivered in 1981 or later. For category 2 and 3, 2003 is the year of phasing-out of the ships delivered in 1973 or earlier and 2015 for the ships delivered in 1989 or later[355]. Additional provisions provide for implementation details of this basic timetable.

In the aftermath of the accident of the single hull oil tanker The Prestige, the EC legal regime on the prevention of oil pollution via design and construction standards had to be revisited, which led to Regulation 1726/2003/EC. The Prestige was a Bahamas-registered tanker which broke in two off the coast of Galicia, Spain, on 13 November 2002, spilling a substantial quantity of heavy fuel oil into the sea[356]. The Prestige incident provoked an outcry analogous to similar major maritime casualties in other parts of the world, and it contributed to activating the law-making process.

Since The Prestige was a 26-year-old vessel, age limits provided for by Regulation 417/2002/EC were considered "not sufficiently stringent"[357]. Consequently, for category 1 ships the deadline was brought forward by Regulation 1726/2003/EC from 2007 to 2005 and for categories 2 and 3, from 2015 to 2010[358]. Moreover, it was prescribed that no oil tanker carrying heavy grades of oil, i.e. crude oil and fuel oils with a determined density[359], irrespective of its flag, shall be allowed to enter or leave ports or offshore terminals or to anchor in areas under the jurisdiction of a Member State, unless such tanker is a double-hull oil tanker[360].

Regulation 1726/2003/EC prompted new IMO developments, and as a result the IMO agreed to introduce new double hull requirements at the international level to eliminate the gap with regard to the new European frame on maritime safety, including measures on the accelerated phasing-out of single hulls. In December 2003, a revised regulation 13G of the MARPOL Annex I was adopted where the final phasing-out date was shaped on the EC frame. With regard to category 1 tankers the date was brought forward to 2005, from 2007, and with regard to category 2 and 3 tankers the time frame was brought forward to 2010, from 2015[361].

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355 *See* Article 4.

356 Nesterowicz refers to a substantial quantity (*supra* note 37, 38); Galiano reports the "the spilling of 77,000 tons" (*supra* note 316, 113); Power and Casey report "the ship had 77,000 tonnes of heavy fuel on board... a large quantity of the Prestige's fuel oil (believed to be about 22,000 tonnes) was released into the sea..." (*supra* note 37, 343 seq.).

357 *See* point 3 of the Preamble of the Regulation 1726/2003/EC.

358 *See* Article 1(4)(a).

359 Heavy grades of oil mean, according to Regulation 1726/2003/EC: (a) crude oils with a density at 15°C of over 900 kg/m^3(5), (b) fuel oils with a density at 15°C of over 900 kg/m^3 or a kinematic viscosity at 50°C of over 180 mm^2/s(6), and bitumen and tar and emulsions thereof" (Article 1(3)(b)).

360 *See* Article 1(4)(c) "3".

361 *See* Article 19(4) of Regulation 1726/2003/EC.

Amendments of secondary importance were also introduced to the EC regime by Regulation 2172/2004/EC in the light of additional IMO amendments to MARPOL 73/78 in 2003.

The main body of provisions at the EC and U.S. level are supplemented by a number of derogations.

1.1.3. Derogations

According to OPA 90, requirements on tank vessel construction standards do not apply to a vessel used only to responding to a discharge of oil or a hazardous substance, or to a vessel of less than 5,000 gross tons equipped with a double containment system determined by the Secretary to be as effective as a double hull for the prevention of a discharge of oil. It should be noted that by 2001, the Secretary of Transportation had not approved an equivalently effective system. Moreover, double hull requirements do not apply before 1 January 2015 to a vessel unloading oil in bulk at a deepwater port[362] or a delivering vessel that is offloading in lightering[363] activities[364]; it deserves a special mention that the Louisiana Offshore Oil Port is the only offshore deepwater port in the U.S.[365].

While Section 4115 of OPA excludes single hulls of 5,000 gross tons or more from U.S. waters from 2010 onward, this is not the case for those with a double bottom or double sides which may be permitted to trade to the U.S. through 2015, depending on their age[366].

A number of derogations or exceptions are also found in the EC legislation. The double hull requirements do not apply to oil tankers of less than 5,000 tons dwt or to warships, naval auxiliary or other ship, owned or operated by a State and used only on a government non-commercial service[367]. However, "Member States shall, so far as is reasonable and practicable, endeavor to respect this Regulation [417/2002/EC] for the ships referred to in this paragraph"[368].

Despite the timetable of withdrawal provided by the EC regulations, by way of derogation, a Member State may, without prejudice to its national provisions, allow, under exceptional circumstances, an individual ship to enter or leave a port or offshore terminal or anchor in an area under the jurisdiction of that Member State

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362 A deepwater port licensed under the Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2126 (1975) (codified at 33 U.S.C. §§ 1501-1524).

363 Lightering is the process of transferring cargo at sea from one vessel to another. *See* THE DOUBLE-HULL TANKER LEGISLATION:AN ASSESSMENT OF THE OIL POLLUTION ACT OF 1990, *supra* note 312.

364 Within a lightering zone established under 46 U.S.C. § 3715 (b) (5) and more than 60 miles from the baseline from which the territorial sea of the U.S. is measured.

365 *See* THE DOUBLE-HULL TANKER LEGISLATION:AN ASSESSMENT OF THE OIL POLLUTION ACT OF 1990, *supra* note 312, preface vi.

366 *Id.*, Executive summary, 1.

367 *See* Article 2 of Regulation 417/2002/EC.

368 *See* Article 2(2) of Regulation 417/2002/EC.

when an oil tanker is in difficulty and in search of a place of refuge or when an unload oil tanker is proceeding to a port of repair[369].

1.1.4. Assessment

In the context described above and with reference to the mere chronological order of adoption of relevant legislations on the phasing out of single hulls, it is evident that the U.S. legislator was proactive to a greater extent than the IMO and the EU.

The territorial scope of the measures adopted at each instance at the regional level is central to the legality discussion in the light of UNCLOS 1982. Under OPA 1990, double hull requirements concern vessels which operate in U.S. waters or in the U.S.'s Exclusive Economic Zone; EC Regulation 417/2002 affected oil tankers entering into a port or offshore terminal under the jurisdiction of a Member State (irrespective of their flag, or flying the flag of a Member State).

A noteworthy parameter however in the discussion concerns the position of the U.S. with regard to UNCLOS 1982; as mentioned in previous developments, the former is not party to this instrument, but is generally considered to apply UNCLOS 1982 in a selective manner, under the umbrella of international customary law[370]. It is evident that this creates a source of uncertainty and renders legality control highly difficult.

Article 21(2) of UNCLOS 1982, which introduces an important limitation to the powers of coastal States to regulate innocent passage *in their territorial sea* with regard to design, construction, manning and equipment requirements of foreign vessels, is likely to be used for the legality test concerning some of the above measures. Interestingly, the Convention on the High Seas 1958 to which the U.S. is party, and which is considered to be in force for those States which have not acceded to UNCLOS 1982, does not comprise a provision analogous to Article 21(2) of UNCLOS 1982[371]. Moreover, provisions of UNCLOS 1982 on the EEZ limit coastal States' sovereign rights for the purposes of exploring and exploiting, conserving and managing living and non-living natural resources in the maritime area concerned; Article 56 of the said instrument also provides for the jurisdiction of coastal States with regard to a number of fields, including the protection and preservation of the marine environment. Interestingly, as will be mentioned under the developments on port State control, with the exception of pollution offences, the UNCLOS 1982 does not provide for port state jurisdiction[372]. In this context, it is obvious that the legality test on hull prerequisites, in their capacity as construction/design requirements, implies a different approach upon the territorial criterion (internal waters including ports, territorial waters and/or EEZ).

In brief, were unilateral measures having ports or offshore terminals as territorial scope, *when* they were adopted under a differentiated timeframe of withdrawal

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369 *See* Article 8 of Regulation 417/2002/EC, as amended by Article 1(6) of Regulation 1726/2003/EC.

370 *See* Duff, *supra* note 52.

371 *See* Boyle, *supra* note 123, 11.

372 *See* Article 218 of UNCLOS 1982.

of single hulls compared to the international scheme, legitimate? It would also be tempting to raise the legality of such measures in the hypothesis of application in the territorial waters of the EU Member States. Both questions present a point of theoretical interest with regard to the EU, since international and EU time frames of phasing-in of double hulls no longer diverge. In any case, these two questions may be explored with reference to the EU, since the EU is party to UNCLOS 1982.

Let us begin with the hypothetical point: Could, for example, the hypothetical measures in *territorial waters* be considered approximate reflections of generally accepted international rules and standards - since a considerable consensus and political will existed internationally on such orientation, at least, presumably, on the part of the majority of the EU Member States - and thus pass the legality test? We refer to approximate reflections and not absolute reflections of generally accepted international rules and standards, since there was some kind of modification to the international regime as a result of the anticipated entry into force of international standards.

The term "generally accepted international rules and standards" in the context of international maritime law and international law of the sea, which is nowadays a written law (UNCLOS 1982), is generally used to indicate instruments like SOLAS and MARPOL, which are undoubtedly instruments of reference and extensive adhesion at the worldwide level. This concept notably raises the issue of its content and the degree of acceptance that it implies[373]. Central elements of assessment are the source of such rule or standard, as well as the practice of States, i.e. not merely the existing practice, but that required by virtue of applicable instruments[374]. The degree of acceptance stems from the number of formal ratifications or accessions to an instrument.

In this context, from the viewpoint of the international law of the sea, it cannot be validly argued that hypothetical measures concerned, i.e. EU anticipated measures on construction/design in the territorial sea prior to their "endorsement" by the IMO, could pass the legality test, at least on the grounds of generally accepted international rules and standards, since MARPOL was the rule of reference as shaped by the IMO at each instance. *A fortiori*, passing the legality test would also be improbable from the viewpoint of "generally accepted international rules and standards", in the event where unilateral measures would substantively depart

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[373] On the meaning of generally accepted rules and standards, see Agustín Blanco-Bazán, *IMO Interface with the Law of the Sea Convention*, Paper presented at the seminar on current maritime issues and the work of the IMO- 23rd Annual Seminar of the Center for Ocean Law and Policy, University of Virginia School of Law, 6-9 January 2000; *available at* http://www.imo.org/ (last visit 3.1.2008). *See* also *Implications of the Entry Into Force of the United Nations Convention on the Law of the Sea for the IMO*, LEG/MISC/2, 6 October 1997 and the contribution of the working session of the Committee on coastal State jurisdiction relating to marine pollution at the 67th Conference of the International Law Association (1996). According to Boyle (*supra* note 123, 11) for the purposes of Article 21(2) of UNCLOS 1982 Convention, international rules and standards means primarily the MARPOL Convention and the SOLAS Convention.

[374] *See* Blanco-Bazán, id.

from the international regime in the context of construction/design requirements of vessels on innocent passage in territorial waters, i.e. measures which do not just anticipate the application of international rules but introduce provisions differentiated from the international regime. Any attempt to introduce analogous measures in the EEZ would also be liable to raise objections; this would not be the case, however, with regard to the measures that had actually been adopted having as territorial scope EC ports, because of the position of UNCLOS 1982 which does not contain any restrictions with regard to port State corresponding to Article 21(2) of the same instrument[375].

Another issue concerns the legal relationship between MARPOL and the EU, since the latter has not acceded to the former. Interestingly, with regard to coastal State jurisdiction in the territorial sea, MARPOL provides for minimum standards as far as pollution discharges are concerned[376]. Would the EU be free to shape at liberty MARPOL requirements such as hull construction/design requirements because the EU would arguably not have any obligation to apply this instrument? From the international point of view, which suggests an extensive interpretation, parties to UNCLOS 1982 have the duty to implement generally accepted IMO rules and standards, MARPOL being one of them, irrespective of whether they are or not party to the treaty where the rules concerned are comprised[377]. From an EC law perspective however, MARPOL requirements would not supersede EC requirements[378]; this would not be the case, if the EU had acceded to the said instrument since under EC case-law international requirements form part of the "acquis communautaire" to which legality control of EC law is exercised[379].

Beyond the interest of the debate at the theoretical and purely legal level, it is evident that there has been convergence, with an impact on substantive law, between the EC and the U.S. legislators: firstly, with regard to the decision to address the withdrawal of single hull oil tankers and secondly, with the choice of a progressive phasing-out which would allow the industry to adapt more or less comfortably. The same intentions of the legislators gave rise nevertheless to differentiated time frames, which were likely to create confusion in the eyes of the industry, the latter generally being in favour of global and uniform solutions[380] and to hinder the position of the IMO. In the case of EC law, time frames of withdrawal were changing, while in the case of the U.S. they have been stable since 1990.

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375 On the condition however that vessel construction and design measures in ports would be applied without discrimination.

376 *See* Boyle, *supra* note 123, 11.

377 *Id.*

378 *See* Hedermann-Robinson, *infra* 689, 270.

379 On the examination of the validity of EC law with regard to international law, see ECJ, 16.6.1998, C-162/96, Racke v. Mainz; on the respect of international law by EC law, see ECJ, 24.11.1992, C-286/90, Pulsen and Diva Navigation, and on UNCLOS forming part of EC law, see ECJ, 30.5.2006, C-459/03, European Commission v. Ireland.

380 *See* e.g. OECD Workshop on Maritime Transport, Paris, 4-5 November 2004, paper submitted by Fuglesang, *supra* not 326.

The practical impact of both OPA 90 and EC regulations on the design and construction of oil vessels from the angle of their capacity to prevent or render less dramatic the consequences of maritime casualties are far from self-evident.

While it is generally recognized that the OPA 90 significantly contributed to the decrease of oil pollution in U.S. waters and to enhanced awareness of maritime safety[381], it was also contended that the OPA 90 failed to satisfy its purpose[382].

In the case of the EC regulatory framework on the design and construction of oil tankers, the framework in question has been much criticized, even by the EU itself, for being slow or not adequately stringent; the impact of the regulatory measures on oil tankers should be envisaged from the angle of the general legislative package adopted by the EC with the aim of addressing marine pollution. It should be recalled, however, that in the EU a number of Member States, like France and Spain, have addressed bilaterally the passage of oil tankers through their exclusive economic zone, by rendering inaccessible to the area in question those vessels which do not satisfy certain prerequisites already mentioned under Part I. While this joint declaration between the President of France and the Prime Minister of Spain does not constitute an international treaty and is not binding, the reference that this declaration contains to Article 56 of UNCLOS 1982 far from provides a legal foundation to this agreement, which notably fails to satisfy the requirements of Article 211 of the same Convention[383]. More alarmingly with regard to the uniformity of the common maritime policy on maritime safety, this attitude was endorsed by the European Council of 6 December 2002. In the U.S. as well, it has been reported that a number of states, including Washington, California and Maine have adopted their own regulatory regimes which go beyond the require-

[381] *See inter alia Joint Hearing on the Oil Pollution Act of 1990 Before the Subcomm on Coast Guard and Maritime Transp. and Water Resources and Env't of the House Comm. On Transp. and Infrastructure*, 106th Cong. (1999) quoted in Kiern, *supra* note 22, 487. According to Admiral James M. Loy, since the enactment of OPA the number of large spills (over 10,000 gallons) dropped fifty percent, the rates of spills per million gallons of oil shipped plummeted sixty-four percent, and there have been no spills over one million gallons in the U.S.

[382] *See inter alia* Michael A. de Gennaro, *Oil Pollution Liability and Control Under International Maritime Law: Market Incentives as an Alternative to Government Regulation*, 37 VAND. J. TRANSNAT'L L. 265 (2004).

[383] It may be recalled that Article 56 of UNCLOS 1982 deals with the right of coastal States to exploit natural resources situated in their exclusive economic zone and that Article 211 of the same instrument provides for the obligation of consultation with the IMO in view of the adoption of special measures against pollution. It is interesting to note that at least three vessels were obliged by French authorities to leave the French EEZ, namely the Elanlos Titan, the Bitfiord and the Paean. *See* Jean-Jacques Ollu, *Union Professionnelle des Experts Maritimes*, http://upem.org/articles/infregl02.htm (last visit 23.2.2008).

ments of the USCG[384]. The golden mean between what should be the rule and what should be left outside the realm of the legislator, is controversial when it comes to the transportation of oil!

While it is difficult to compare figures[385] and to have an exact picture of the impact of both legislations on their respective jurisdiction[386], the impact of these legislations should in no case be underestimated with regard to their capacity to prevent marine pollution and to contribute to safe shipping; this is especially the case under a holistic approach as will be ours, i.e. in combination with other measures aiming at safety at sea, such as the human element and enhanced implementation measures, which are intended to operate in parallel with the design and construction requirements.

1.2. Requirements on the human element

Except in rare cases of *force majeure*, there is nearly always a human action behind every navigational incident or accident[387]. The so-called human element, i.e. the parameter relating to the non-technical aspect of maritime safety reflects the human dimension of shipping and as such has been subject to the attention of the international and regional legislature. Statistics demonstrate that approximately 80% of maritime casualties may be attributed to human failure[388].

Does the antagonism experienced at the level of technical aspects of maritime safety, as demonstrated above with regard to design and construction requirements, also affect the field of the human element? If so, to what degree? Would the EU and the U.S. be so eager to compete with each other for more regulations than prescribed internationally or even for divergent rules with regard to the human element, too? Or, would the human element requirements constitute a field of less intensive regulatory friction both at the international and the regional level? If this is the case, how may this be explained and what are the possible consequences on maritime safety? These are some of the points which may be raised.

For the USCG, the term "human factor" is defined as "the study and analysis of the design of the equipment, the interaction of the equipment and the human op-

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384 *See* P. Lehner et al., *A Decade After the Exxon Valdez: Inadequate Federal Action on Oil Ship Prevention*, NATURAL RESOURCES DEF. COUNCIL, Mar. 1999, cited in Kiern, *supra* note 22, 488.

385 This concern is also shared by the Committee on Oil Pollution Act of 1990 which expresses in its implementation review the need to obtain complete and reliable data with regard to the number of oil spills in U.S. waters. *See* THE DOUBLE-HULL TANKER LEGISLATION; AN ASSESSMENT OF THE OIL POLLUTION ACT OF 1990, *supra* note 312, Executive summary, 8.

386 Of relevant interest is the Comparative Analysis of the European and North-American Approaches to dealing with Major Oil Spills, by Veiga, *supra* note 1 .

387 BOISSON, *supra* note 2, no 406.

388 *"The Industry and Tanker Accidents"*, Safety at Sea, no 129, Dec. 1979, 19-23, quoted in BOISSON, *id.* at no 397. *See* also *id.* at no 402.

erator, and most importantly the procedures the crew and management follow"[389]. The European Economic and Social Committee, which is the consultative body of European social partners to the European Parliament, the European Commission and the Council of the European Union, called for "another Maritime Safety Package dealing more specifically with the human element", and deplored the fact that the human element had not been "sufficiently addressed" at EU level in the Third Maritime Safety Package[390].

If human error is significant as to its contribution to a maritime casualty, other factors like fatigue, overwork or economic pressure are also likely to contribute to such an undesirable result. The legal framework endeavors to reflect these concerns and suggests or compels proactive approaches. ILO Conventions and Recommendations on maritime labour, as well as a number of IMO Conventions, constitute the regulatory framework on the human element[391]. The International Labour Organization instruments which draw special attention are Convention 147 on Minimum Standards in Merchant Ships and the new consolidated Convention on maritime work, not yet in force, which was adopted in February 2006. IMO instruments directly connected with the human element are the STCW Convention and the ISM Code. The SOLAS Convention which is a technical instrument is not irrelevant to the human element, since it addresses manning issues, i.e. the requirements on the composition of crews[392]. Some aspects of the ISPS Code also affect the human element[393]. These two aspects will not be discussed, however, below[394].

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389 OMI. MSC 65/15/1, 10 Feb. 1995, Annex I, par. 4. Quoted in BOISSON , *id.* at no 406.

390 *See* European Commission, Bulletin EU 9-2006, Transport (11/14), *available at* http://europa.eu/bulletin/en/200609/p122011.htm (last visit 23.2.2008).

391 *See* ILIANA CHRISTODOULOU-VAROTSI and DMITRY A. PENTSOV, MARITIME WORK LAW FUNDAMENTALS: RESPONSIBLE SHIPOWNERS, RELIABLE SEAFARERS (2008).

392 Chapter V of SOLAS Convention provides in Regulation 14 a number of requirements referring to manning of ships. It includes a general obligation for Contracting Governments to ensure that all ships shall be sufficiently and efficiently manned from a safety point of view.

393 The ISPS Code is likely to have a negative impact on certain aspects of seafarers' rights, including the right of movement ashore; the ISPS Code is also likely to provoke a risk of work overload to maritime labour. The drafters of the Code were aware of these aspects and in the preamble of the Code these issues are addressed with precaution (see *e.g.* points 10 and 11 of the Preamble of the Code). *See* CHRISTODOULOU-VAROTSI and PENTSOV, *supra* note 391,17 *seq. See* also Alexandre Charbonneau, *Le Bien-Être Après l'Adoption de la Convention du Travail Maritime Consolidée (OIT)*: *Quelles Avancées Pour Quelles Lacunes ?*, Journées 2006, Observatoire des Droits des Marins, MSH Ange Guépin, Nantes, 119-142 and Patrick Chaumette, *Du Bien-Être des Marins en Escale: Les Ports Confrontés à la Sûreté et à l'Humanité*, in MÉLANGES A. H. MESNARD (2006) 45-58.

394 On these aspects see CHRISTODOULOU-VAROTSI and PENTSOV, *id.*, 665 *seq.* On the ISPS Code see *inter alia* Regina Asariotis, *Implementation of the ISPS Code: an Overview of Recent Developments, 11 JIML 4, 266 (2005). See also The International*

The purpose of the developments that follow is to examine the position of the EU and the U.S. with regard to the laws and policies on the human element and to attempt an assessment under the more general perspective of this study which is the search, with reference to these entities, for antagonism or synergy. For these purposes, we will firstly examine the regulatory frameworks of relevant entities with regard to the ILO requirements; secondly, we will look into the comparison from the angle of the STCW Convention; and, thirdly, the ISM Code will constitute another parameter of comparison. These developments will be globally assessed in the final division of this sub-Chapter.

1.2.1. Protecting the seafarer as the most vulnerable part of the chain: Search for antagonism or synergy through the ILO's vision

The most competent forum for the protection of the seafarer at the international level is the ILO, in its capacity as a specialized agency of the United Nations composed of independent States. The tripartite structure of the ILO deserves a special mention but it will not be discussed further[395].

1.2.1.1. ILO Convention 147

ILO Convention 147 on Minimum Standards in Merchant Ships constitutes an instrument of reference among maritime conventions relating to the human element, since it provides for the minimum internationally acceptable labour and social security standards for all merchant vessels regardless of their place of registration[396]. Convention 147 was adopted in 1976 and entered into force in 1981. As of April 2007, it has been ratified by 55 countries; all 27 Member States of the European Union, with the exception of Austria, the Czech Republic and Slovakia, have ratified it[397]. The U.S. ratified the Convention in 1988[398]. The poor ratification record of the said Convention in some areas of the world has been pointed out[399].

As noted below, ILO Convention 147 is also part of the instruments of reference for the conduct of port State control in the EU and the U.S.[400].

The main goal of ILO Convention 147 was to address the problem of substandard ships[401]. It is noticeable that the Convention also applies to vessels flying the

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Ship and Port Facility Security Code: Public and Civil Law at a Crossroads? (editorial), 12 JIML 4, 223 (2006).

395 *See* http://www.ilo.org/ as well as John Isaac Blanck Jr., *Reflections on the Negotiation of the Maritime Labour Convention 2006 at the International Labour Organisation*, 31 TUL. MAR. L. J. 35, 35-55 (2006).

396 *See* CHRISTODOULOU-VAROTSI and PENTSOV, *supra* note 391,17 *seq*.

397 *See* International Labour Organization, ILOLEX: *Conventions,* http://www.ilo.org/ilolex/english/convdisp1.htm (last visit 23.2.2008).

398 *Id.*

399 *See* Iliana Christodoulou-Varotsi and Dmitri A. Pentsov, *Labor Standards on Cypriot Ships: Myth and Reality*, 37 VAND. J. TRANSNAT'L L 3, 647-725, 654 (2004).

400 *See infra* Part II under 1.3.2.

flag of a Member State which has not ratified it[402]. Moreover, Member States which have not ratified the Conventions referred to in the Appendix[403] of ILO Convention 147 are held to ensure "substantial equivalence" to a number of obligations provided for in the Convention[404].

Member States which have ratified ILO Convention 147 undertake to have laws or regulations, for ships registered in their territory with regard to safety standards, including standards of competence, hours of work and manning, appropriate social security measures, and shipboard conditions of living and employment.

When the ILO Member State has ratified both ILO Convention 147 and other ILO Convention(s) listed in the Appendix, it has the duty to ensure strict compliance with the Convention(s) listed in the Appendix; where the Member State has ratified ILO Convention 147, but has not ratified a specific ILO Convention(s) listed in the Appendix, it does not have a duty to ensure strict compliance with

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401 On substandard ships see *inter alia* BOLESLAW A. BOCZEK, FLAGS OF CONVENIENCE (1962), David F. Matlin, *Re-evaluating the Status of Flags of Convenience Under International Law*, 23 VAND. J. TRANSNAT'L. 1017-1055 (1991), H. Edwin Anderson III, *The Nationality of Ships, and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L. J. 139, 139-170 (1996) , Maria J. Wing, *Rethinking the Easy Way Out: Flags of Convenience in the Post-September 11 Era*, 28 TUL. MAR. L. J. 173, 173-190 (2003) and, Patrick Chaumette, *Les Transformations au Sein de la Marine Marchande: Une Relation de Travail Sans Attaches?*, XIX ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 53 (53-93) 2001. *See* also *Safety and Environment Protection-Discussion Paper on Possible Actions to Combat Substandard Shipping by Involving Players Other than the Shipowner in the Shipping Market*, OECD, 1998 (OLIS: 8.8.1998) and ICONS, *Ships, Slaves and Competition, International Commission on Shipping-Inquiry Into Ship Safety*, 2000.

402 Both the Committee on Substandard Vessels set up by the 62nd Maritime Session of the International Labour Conference and the Conference itself decided against limiting the application of Article 4 of Convention 147 to ships flying the flag of the State which has ratified the Convention. *See* ILO, Substandard Vessels Particularly those Registered Under Flags of Convenience, 62nd (Maritime) Session , 1976, Record of Proceedings 192 (para. 77), 260-61 (ILO, Geneva 1977).

403 The Appendix to Convention 147 lists the following ILO Conventions and Articles of the ILO Conventions: the Minimum Age Convention, 1973 (No. 138), the Minimum Age (Sea) Convention (Revised), 1936 (No. 58), the Minimum Age (Sea) Convention, 1920 (No. 7); the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55), the Sickness Insurance (Sea) Convention, 1936 (No. 56), the Medical Care and Sickness Benefits Convention, 1969 (No. 130); the Medical Examination (Seafarers) Convention, 1946 (No. 73); the Prevention of Accidents (Seafarers) Convention, 1970 (No. 134)(Articles 4 and 7); the Accommodation of Crews Convention (Revised), 1949 (No. 92); the Food and Catering (Ships' Crews) Convention, 1946 (No. 68) (Article 5); the Officers' Competency Certificates Convention, 1936 (No. 53) (Articles 3 and 4); the Seamen's Articles of Agreement Convention, 1926 (No. 22); Repatriation of Seamen Convention, 1926 (No. 23); the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

404 *See* Article 2(a) of Convention 147.

such Convention(s), but instead it has the duty to apply it on the basis of the principle of "substantial equivalence"[405].

From early times, i.e. before the entry of Convention147 into force, the EC took interest in the ILO's work in general and in Convention 147 in particular. A Council Recommendation of 26 June 1978 on the ratification of conventions on safety in shipping[406] recognized ILO Convention 147's "substantial contribution" to welfare standards and recommended Member States that had not already done so, to proceed to the signing and/or ratification of the said instrument. The European Commission seems to adhere to the spirit of the ILO's work in the maritime field[407]. Even though the EU is not represented at the ILO by the European Commission, and EU Member States have individual representation as sovereign States, the European Commission endeavors to coordinate the positions of Member States of the EU with regard to ILO issues.

Maritime labour questions are after all sensitive areas in the EU *a fortiori* as the total number of EU nationals employed on board ships flying the Community flag is currently down by 40%, as compared with 1985, and the predictions for the future are rather lacking in optimism[408].

On the one hand, at the Member States' level some discrepancies may be observed with regard to the ratification of ILO maritime conventions in general. While the number of ratifications is much higher in Europe than in other parts of the world, the picture of ratifications in Europe is far from being homogeneous[409].

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405 The question of the meaning of the term "substantial equivalence" was examined in 1990 by the ILO Committee of Experts in a General Survey on labour standards on merchant ships.
ILC, 77th Session, *General Survey of the Reports on the Merchant Shipping (Minimum Standards) Convention (No. 147), and the Merchant Shipping (Improvement of Standards) Recommendation (No. 155)*, 1976 (Geneva, ILO, 1990).

406 *See* Council Recommendation 78/584/EEC, OJ 1978 C163/17.

407 *See* "Green Paper-Towards Future Maritime Policy for the Union: A European Vision for the Oceans and the Seas", Brussels, 7.6.2006, COM(2006)275 final, 21.

408 *See* Communication from the Commission to the Council and the European Parliament of 6 April 2001 on seafarer training and recruitment, COM(2001)188 final, 6.4.2001. However, the term human element as such does not figure in the *"Green Paper-Towards Future Maritime Policy for the Union: A European Vision for the Oceans and the Seas" (Id.)* presented in June 2006 by the European Commission for further debating to the European civil society. While reference to seafaring issues was not omitted by the drafters of the text, it is interesting to note that this important document has not aligned with the internationally accepted term "human element".

409 *See* for example the ratification of ILO Convention No. 163 on Seafarers' Welfare, which was ratified by only 10 of the 27 Member States of the EU. On the ratification and implementation of this Convention in the EU, see Alexandre Charbonneau, *La Convention 163 de l'OIT Concernant le Bien-Être des Gens de Mer : Fondement à l'Action des Foyers*, XXII ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 307 (2004) and Iliana Christodoulou-Varotsi, *Les Défis du Bien-Être des Marins dans le Nouveau Contexte de la Convention du Travail Maritime Consolidée de l'OIT*, XXV ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 141 (2007).

On the other hand, the U.S. has had a difficult relationship with the ILO, which materialized in an "undeclared but unyielding moratorium on ratification of ILO standards" having lasted for a number of decades[410]. When the U.S. ratified ILO Convention 147 in 1988, the ratification record of the U.S. with regard to ILO instruments was very low and, as such, subject to criticism[411]. This was partly explained by the employer fears in the U.S. of seeing the ILO standards adversely affecting existing U.S. labour law[412]. As a result, they usually opposed the ratification of ILO non-maritime standards. It deserves a special mention that the U.S. has globally had a slightly less sceptical attitude towards ILO maritime conventions in comparison with ILO non-maritime Conventions. In the light of the adoption of the new consolidated convention on maritime work by the ILO, which has not yet entered into force, it is obvious that possible assessment with regard to compliance to ILO maritime standards is inevitably carried out in the light of the new prospects suggested by the new instrument.

1.2.1.2. The new consolidated convention on maritime work

In February 2006, a new consolidated maritime labour convention was adopted by the ILO[413]. The instrument in question is "designated to become a global instrument known as the fourth pillar of the international regulatory regime of quality shipping, complemented by the key conventions of the International Maritime Organization (IMO)"[414]. The new Convention is noticeable for many reasons, one of which is its innovative methodology; it constitutes a framework instrument comprising nearly all the existing maritime ILO Conventions and Recommendations[415].

One of the challenges of the new instrument was to avoid the risk of putting at jeopardy the existing levels of protection. As expected, the codification has been much more than a mere gathering of texts; it also comprised limited or sometimes noticeable amendments to the existing provisions[416].

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410 *See* Tadd Linsenmayer and Joseph P. Goldberg, U.S. *Ends ILO Moratorium by Ratifying Two Conventions*, MONTHLY LABOUR REV., June 1988.

411 According to Linsenmayer and Goldberg, in the year 1988 the U.S. had ratified 9 out of 160 ILO standards, the vast majority of which were maritime conventions. *Id.*

412 *Id.*

413 *See* International Labour Organization, *International Labour Standards*, http://www.ilo.org/public/english/standards/norm/mlc2006/index.htm (last visit 23.2.2008). *See* also International Labour Organization, *Interview with Mrs. C. Doumbia-Henry*, http://www.ilo.org/public/english/region/asro/tokyo/standards/2006interview.htm (last visit 23.2.2008).

414 *See* International Labour Organization, Feature Articles, http://www.ilo.org/public/english/bureau/inf/features/06/marit_qaa.htm (last visit 23.2.2008).

415 Convention No 185 on identity documents, signed on 19 June 2003 and entered into force in 2005 was not subject to the consolidated instrument.

416 *See* Dmitry A. Pentsov and Iliana Christodoulou-Varotsi, *New ILO Consolidated Convention on Maritime Work*, Russian Year Book of Labour and Social Security, No. 2, Publishing House of St Petersburg State University, 2007 (in Russian).

The new consolidated Convention is structured over three parts, i.e. the Articles, the Regulations and the Code. The Articles and Regulations provide for the basic rights and obligations of ratifying Member States. The Code encompasses the details referring to the implementation of the Regulations. It comprises a mandatory part (Standards) and a non-mandatory area (Guidelines). The Regulations and the Code address five subject areas, under the form of Titles: Title 1 addresses minimum requirements for seafarers to work on a ship, Title 2 addresses conditions of employment, Title 3 deals with accommodation, recreational facilities, food and catering, Title 4 deals with health protection, medical care, welfare and social security protection and Title 5 tackles compliance and enforcement.

Ratification of the consolidated convention by Member States leading to its entry into force will signify that States which will have ratified it will no longer be bound by the existing ILO Conventions, while States which will not have ratified the new instrument, will remain bound by the current Conventions; the latter will be closed to further ratification[417]. The new convention will enter into force twelve months after the ILO receives thirty instruments of ratification corresponding to at least thirty-three percent of the world's gross tonnage of ships[418].

The European Commission had to follow closely the consistency and compatibility between the new Conventions' provisions and the "acquis communautaire"[419]. Some areas of the new Convention are likely to fall within the exclusive Community competence; this is the case with regard to the coordination of social security systems[420]. Under EC law, Member States are free to determine their social security regimes[421]; however, when it comes to free movement of workers, including seafarers, and their ensuing social protection, EC law provides for rules of coordination between Member State legislations, in order to avoid possible gaps in the protection provided to migrant workers, or even conflicting situations implying unacceptable discrimination, to the detriment of the workers in question. The coordination of social security systems is governed by Regulations 1408/71/EC, 574/72/EC and 883/2004/EC and has given rise to an extremely rich body of case-law at the ECJ level[422].

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417 *See* International Labour Organization, *International Labour Standards-What We Do*, http://www.ilo.org/public/english/standards/norm/mlc2006/faqs.htm (last visit 23.2.2008).

418 As by May 2007, Liberia is the only State which has ratified the new Convention. *See* http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C186 (last visit 29.5.2007).

419 *See* Proposal for a Council decision on authorizing Member States to ratify, in the interests of the European Community, the 2006 Consolidated Maritime Labour Convention of the International Labour Organisation (presented by the Commission), COM(2006)288 final, Brussels, 15.6.2006, 4.

420 *Id.*

421 *See* http://ec.europa.eu/employment_social/social_security_schemes/index_en.htm (last visit 29.5.2007).

422 *See* Regulation 1408/71/EC of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (JO 1971, L 149/2) and Regulation 883/2004/EC (JO 2004 L 166/1) which replaces Regulation 1408/71/EC. The latter will apply upon entry into force of the implementing regulation

A saving clause was included in the Convention so as "to safeguard and ensure the precedence of EC law on the coordination of social security schemes in case the Convention leads to an outcome which differs from the EC rules on this matter"[423]. In this respect, the European Commission has proposed that the Council should authorise the Member States to ratify the 2006 Convention "in the interests of the Community"; this means that Member States would not be entitled to depart from this position by, for example, not ratifying the Convention in question.

The U.S.'s position during the adoption of the instrument was marked by an impressive change in comparison with its attitude towards the existing instruments. In the explanation of its vote, the U.S. government pointed out that "the U.S. believes that this is a historic moment, and a great achievement for the International Labour Organization and the international maritime community: the development of an international set of standards that guarantees seafarers' decent working and living conditions. We appreciate the efforts of the participants in this Conference to address U.S. concerns related to the scope of application of the Convention. As stated in the government group meetings and in the Committee of the Whole, the U.S. continues to have concerns with the scope of the Convention related to the application to our domestic vessels but, as noted above, we believe this is a historic moment, as the global maritime community has created the fourth pillar to ensure a level playing field and to further marginalize substandard shipping. We look forward to continued careful consideration of this Convention"[424].

It is clear from the above that the human element is in a process of change and that the capacity of the EU and the U.S. to incorporate new standards relating to maritime labour is being put to the test. This aspect will be assessed further below. Maritime standards do not only concern conditions of work and living on board, they also concern training, certification and watchkeeping of seafarers.

1.2.2. Training, certification and watchkeeping of seafarers

There is no need to stress that a ship is considered seaworthy not only if it is properly supplied and equipped, but also if it is properly manned[425]. The IMO Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) introduces a framework of reference for the assessment of levels of competence of seafarers seeking employment on board ship, alongside provisions in the very important area of watchkeeping[426]. Both EU Member States and the U.S.

whose elaboration is at the current stage pending (see Articles 89 and 90 of Regulation 883/2004/EC). *See* http://www.tress-network.org/TRESS/ (last visit 3.8.06). *See* also Prodromos Mavrides, *La Protection Sociales des Marins Dans le Droit Communautaire*, REV. TRIM. DR. EUR. (1994) 621.

423 *See supra* note 419, 4.

424 *See* Blanck, *supra* note 395, 54.

425 *See inter alia* SCHOENBAUM, *supra* note 2, 611.

426 PAMBORIDES, *supra* note 50, 173. The impact of STCW Convention on litigation should be assessed with reference to the impact of the ISM Code. *See* CHRISTODOULOU-VAROTSI and PENTSOV, *supra* note 391,426.

have adhered to the STCW regime. Some deviations concern specific points only and they will be presented below.

1.2.2.1. The general framework of international regulations on seafarers' standards of training, certification and watchkeeping

The STCW Convention 1978 was the first instrument to be adopted at the international level with a view to addressing training, certification and watchkeeping of seafarers; the Convention was supplemented by twenty-three Resolutions of recommendatory nature aiming at uniform rules in this field at the international level. The 1978 Convention was subject to amendments in 1991 and 1994[427]. A major revision took place in 1995 which came into force in 1997; it notably aimed at remedying implementation problems[428]. A STCW Code, providing for details relating to application, was also adopted, comprising respectively a mandatory part and a part of recommendatory nature.

It is noteworthy that as a result of the revision, States which are parties to the Convention are obliged to provide detailed information on the action adopted by them with a view to conforming to the new requirements[429]. New responsibilities were also introduced by the Convention for shipping companies[430]; the latter are obliged to ensure that the crews engaged by them satisfy international standards of competence and that certain aspects of seafarers' activity on board remain within the framework prescribed by the Convention (e.g. minimum resting periods)[431]. Among some of the areas affected by the 1995 revision was Port State Control (PSC) in the context of deficiencies liable to endanger human life, property or the environment[432], fatigue prevention of watchkeeping personnel, quality standards systems on the monitoring of training, certification, etc.[433].

Subsequent amendments were adopted in 1997, 1998 and 2006. It should be noted that the procedure of amendment of the STCW Annex is simplified and accelerated according to the tacit acceptance procedure[434].

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427 The first amendment dealt with the implementation of the Global Maritime Distress and Safety System (GMDSS) and the other replaced Chapter V on special training for crews on tankers.
See http://www.imo.org/Conventions/contents.asp?doc_id=651&topic_id=257 (last visit 10.3.2007).

428 G. Hans Sperling G., *The New Convention on Standards of Training, Certification and Watchkeeping: What, if Anything, Does it Mean?*, 22 TUL. MAR. L. J. 595 (1998).

429 *See* Chapter I, Regulation I/7.

430 *See* Chapter I of the Annex, Regulation I/14.

431 *See* Section AVIII/1 of the STCW Convention 1978, as revised.

432 *See* Chapter I, Regulation I/4 of the STCW Convention 1978, as revised.

433 *See* Chapter I, Regulation I/8 the STCW Convention 1978, as revised.

434 On the tacit acceptance procedure (which is also referred to as the tacit amendment procedure), see *inter alia* http://www.imo.org/Conventions/mainframe.asp?topic_id= 148# tacit (last visit 10.3.2007). *See* also Lei Shi, *Successful Use of the Tacit Acceptance Pro-cedure to Effectuate Progress in International Maritime Law*, 11 U.S.F. MAR. L. J. 299 (1998-99).

The first so-called White List of States considered to be giving "full and complete effect" to the revised STCW Convention, was published by the IMO in 2000[435].

The STCW Convention 1995 requires detailed documentation stemming from maritime administrations, recognized organizations and private operators, which is rendered necessary by the international composition of crews certified by administrations other than the flag State. The documentary evidence which renders the STCW convention operational has not omitted to generate an increased need for authenticity controls in view of the avoidance of fraudulent actions in this field[436].

1.2.2.2. The STCW requirements in domestic legal orders

It bears repetition that all Member States of the EU are parties to the STCW Convention 1995[437].

Directive 2001/25/EC is the legal instrument which defines by reference to the STCW regime (Convention and Code) minimum training, certification and watchkeeping standards for seafarers serving on board Community ships[438]. The scope of the Directive covers both seafarers from EC countries and seafarers from third countries employed on board vessels flying the flag of a Member State[439]. The Directive was adopted in view of the implementation of the STCW provisions, as revised, both simultaneously and consistently in all Member States[440]. Member States are held to adopt measures in order to ensure that seafarers employed on board sea-going Community ships are trained as a minimum in accordance with the requirements of the STCW Convention as prescribed in the Directive, and hold appropriate certificates[441].

The Directive provides for the rules on training, and the standards of competence to be satisfied by seafarers who are candidates for the issue or revalidation of certificates that allow them to perform functions for which the relevant certificates of proficiency are required. The rules in question mirror the requirements of the STCW Convention 1995.

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435 *See* http://www.imo.org/ (last visit 10.3.2007).

436 *See* A *Study on Fraudulent Practices Associated with Certificates of Competence and Endorsements* by the Seafarers International Research Centre (SIRC) in 2001. Main report, IMO, London, 2001 (IMO-483/01). The abridged report is available on the internet at http://www.imo.org/ (last visit 10.1.2007).

437 *See* Status of Conventions at http://www.imo.org/ (last visit 29.1.2008).

438 *See* Directive 2001/25/EC of the European Parliament and of the Council on the minimum level of training of seafarers, OJ 2001 L 136/17. Amended by Directive 2002/84/EC of the European Parliament and of the Council of 5 November 2002, OJ 2002 L 324/53, Directive 2003/103/EC of the European Parliament and of the Council of 17 November 2003, OJ 2003 L 326/28, Commission Directive 2005/23/EC of 8 March 2005, OJ 2005 L 62/14 and Directive 2005/45/EC of the European Parliament and of the Council of 7 September 2005, OJ 2005 L 255/160.

439 *See* Article 2 of Directive 2001/25/EC.

440 *See* CHRISTODOULOU-VAROTSI and PENTSOV, *supra* note 391, 755 *seq.*

441 *See* Article 3(1) of the Directive 2001/25/EC.

The Directive goes further than the sole area of standards of competence, by tackling the recognition of certificates issued by the competent authority of another Member State and by third countries. It is to be noted that, initially, recognition of qualifications of seafarers from EC Member States was subject to Directives 89/48/EEC and 92/51/EC which provide, respectively, for a first and second general system for the recognition of professional education and training[442]. This system was not specific to seafaring and did not lack a certain degree of sophistication. Upon expiration of the deadline for the transposition of Directive 2005/45/EC on the mutual recognition of seafarers' certificates issued by the Member States, which was 20 October 2007, the regime in question was subject to changes.[443]. In addition to the above, Directive 2005/45/EC provides for the obligation of Member States to address the problem of fraudulent practices associated with certificates of competence[444].

There is no need to stress how important it is for effective maritime safety that seafarers who hold certificates of competence issued by third countries and engaged on board Community ships have a level of competence equivalent to that required by the STCW Convention.

Directive 2003/103/EC modified further the regime in question by amending the procedure under which Member States may recognize certification of competence issued by third countries[445]. The amendment in question allows for the European Commission, assisted by the European Maritime Safety Agency (EMSA), to undertake the assessment role on behalf of the whole Community[446].

Contrary to the EU which is not only an area presenting great interest for passing traffic but also an area with registration interests, in the U.S. there is an enhanced interest in foreign vessels, since the majority of vessels calling at U.S. ports are foreign-flagged, and consequently their crews are international[447]. In this context, the importance of requirements on training, certification and watchkeeping is self-evident. The STCW Convention was ratified by the U.S. in 1991. In December 1992, the IMO's Maritime Safety Committee agreed to a U.S. proposal to conduct a comprehensive review of the 1978 Convention[448]. The United States

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442 *See* Directive 89/48/EEC of 21 December 1988 on the general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ 1989 L 19/16. Directive 92/51/EC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, OJ 1992 L 209/25. Directives 89/48/EEC and 92/51/EC have been amended by Directive 2005/36/EC on the recognition of professional qualifications, OJ 2005 L 255/22.

443 Directive 2005/45/EC of 7 September 2005, *supra* note 438.

444 *See* Article 4 of Directive 2005/45/EC.

445 *See* Article 1(3) of Directive 2003/103/EC.

446 *See* Article 1(3) of Directive 2003/103/EC. *See* also http://www.emsa.europa.eu/end185d007d002.html (last visit 22.5.2007).

447 Ninety-five percent of all passenger and cargo vessels and seventy five percent of all tankers calling at U.S. ports fly foreign flags. *See* Allen, *supra* note 2, 591.

448 *See* http://www.uscg/mil/stcw/stcw-history.htm (last visit 14.10.2005).

Coast Guard's regulations adopted in view of the implementation of the 1995 Amendments became effective in the U.S. in July 1997[449].

It is noticeable that, as far as foreign tank vessels entering U.S. ports and waters are concerned, the U.S. Secretary of Transportation is entitled to review training, qualification, watchkeeping and manning standards, to determine whether those standards are at least equivalent to U.S. or international standards accepted by the U.S.[450]. The statute requires the Secretary to prohibit entry of vessels failing to meet those standards[451].

While the impact of this important requirement will be assessed below, it is of interest to recall at this stage that, in addition to the issue of federal competence to shape international requirements, another major aspect consists of the competence of states to modify federal requirements, including the field of foreign seafarers' training and certification. This issue is referred to under the name of preemption.

In *United States v. Locke*, the U.S. Supreme Court considered that Washington's regulations on navigation watch procedures, crew English language skills and training, and maritime casualty reporting, were preempted by federal provisions on oil tankers[452]. As far as training of seafarers was concerned, the Supreme Court considered that this field was reserved to the Federal Government and that this was further confirmed by the circumstance that the STCW Convention addresses crew "training" and "qualification" requirements. Furthermore, *United States v. Locke* cites and reaffirms the position adopted in *Ray v. Atlantic Richfield Co*[453]. Under Ray's interpretation of Title II of Port and Waterways Safety Act (PWSA)[454], only the federal government may regulate the "design, construction, alteration, repair, maintenance, operation, equipping, *personnel, qualification and manning*" of tanker vessels[455]. The ensuing consequence is that Congress has left no room for state regulations on these matters[456].

Maritime safety is relevant to seafaring but also to managerial and operational concerns and action plans. The International Safety Management (ISM) Code is

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449 *See* 62 Fed. Reg. 34, 506 (1997).

450 *See* 46 U.S.C. § 9101.

451 *See* Allen, *supra* note 2, 592.

452 *See* United States. v. Locke, 529 U.S. 89, 116(2000). *See* Daniel G. Rauh, *State Authority Under the OPA: Federalist Elixir or Should the Supreme Court Sink Intertanko v. Loche?*, 24 TUL. MAR. L. J. 323 (1999-2000) and Peter J. Carney, *The International Association of Independent Tanker Owners (Intertanko) v. Locke: Do Oil and State Tanker Regulation Mix?*, 5 OCEAN & COASTAL L.J. 123 (2000). *See* also the syllabus (headnote) for United States v. Locke by the Reporter of Decisions *available at* http://supct.law.cornell.edu/supct/html/98-1701.ZS.html (last visit 13.8.2006).

453 *See* 435 U.S. 151(1978).

454 Now found at 46 U.S.C. § 3703(a).

455 434 U.S. at 110-111. *See* C. Jonathan Benner (Troutman Sanders LLP), *Legal Points of Interest: Intertanko North American Panel, Stamford, Connecticut*, 20.3.2006. *Available at* http://www.intertanko.com/upload/presentations/JonathanNAP.PPT#19 (last visit 30.5.2007).

456 *See* generally *Fidelity Fed. Sav.& Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982).

the third parameter chosen for this comparative approach in the light of the human element.

1.2.3. The International Safety Management (ISM) Code: The managerial/operational approach to maritime safety via the human element

In their third report in 1993 known as "Organizing for safety", the Advisory Committee on the Safety of Nuclear Installations (ACSNI), Study Group of Human Factors wrote: "Accidents rarely have a single cause. Some of the causes are evident at the time of the accident, such as mechanical failures and individual errors. Other causes, such as poor inspection or failure of supervision, may have no immediate effect. In that case they remain latent until some further factor pushes the situation over the edge. Bad organization makes these latent failures more common. Key steps in safety management, therefore, are the deliberate identification of hazards, their assessment, and making sure there are rules and procedures, training, and most importantly commitment to reduce the associated risk"[457].

The International Management Code for the Safe Operation of Ships and for Pollution Prevention, referred to as the International Safety Management Code (ISM), was adopted on 4 November 1993 in the frame of the IMO[458] and constitutes a managerial/operational approach to maritime safety[459]. The Code was amended on 5 December 2000[460]. From 1st July 1998 the Code came into force with regard to passenger ships, oil tankers, chemical tankers, gas tankers, bulk carriers and high speed cargo vessels with a GRT of more than 500, on international voyages; it became mandatory for companies operating other ship types on international voyages from 1st July 2002. The rationale behind the adoption of the Code is the consideration of crew negligence, ineffective management and lack of communication between the vessel and shore-based management as factors determining marine casualties[461].

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457 Quoted in 4FP.DGVII.T21.1999.J006, BERTRACN PROJECT, Final report for publication, Version 3-4.4.00, 18. *Available at* http://www.emsa.org/ (last visit 29.1.2008).

458 Resolution A.741(18) and in view of its application, a new Chapter IX was added to the Safety of Life at Sea Convention (SOLAS).

459 *See* CHRISTODOULOU-VAROTSI and PENTSOV, *supra* note 391, 640 *seq.* For a more comprehensive bibliography on the ISM Code, see IMO Information Resources (Sheet no 23) *available at* http://www.imo.org (under Human Element) (last visit 29.1.2008). *See* also ALEKA MANDARAKA-SHEPPARD, MODERN ADMIRALTY LAW (2001), 951 *seq.*, Joseph W. Janssen, Jennifer A. Kerr and John W. Keller, III, Marine Casualty Reporting and Investigation, 24 TUL. MAR. L. J. 167, (1999), Laurie Crick Sahatjian, *The ISM Code: a Brief Overview*, 29 J. MAR L. & COM 405 (1998), PHILIP ANDERSON, CRACKING THE CODE: THE RELEVANCE OF THE ISM CODE AND ITS IMPACT ON SHIPPING PRACTICE (2003), PHILIP ANDERSON, THE MARINER'S ROLE IN COLLECTING EVIDENCE IN THE LIGHT OF THE ISM (2006).

460 *See* IMO Resolution MSC.104(73).

461 CHRISTODOULOU-VAROTSI and PENTSOV, *supra* note 391.

The ISM Code potentially affects all kinds of disputes which are likely to emerge in the maritime activity, including personal injury[462], environment-related incidents and property claims[463].

Every company[464] should provide for a comprehensive safety management system (SMS)[465]. The company has the obligation to define and document the responsibility, authority and interrelation of all personnel who manage, perform and verify work relating to and affecting safety and pollution prevention[466]. A designated person whose function is to link the company and those on board is provided for[467]. It is not the intention of this paper to analyse the ISM Code. This information is provided only as a basis for the comparison of the approach of the EU and the U.S. to the said instrument.

1.2.3.1. The ISM Code in the EU and the U.S.

The European Community has "adhered" to the ISM mechanism on the basis of Regulation 3051/95/EC of 8 December 1995 on the management of roll-on/roll-off (Ro-Ro) passenger vessels, which in effect provided for the anticipated application of the Code to RoRo passenger vessels in the EU. Community provisions rendered the Code mandatory as from 1 July 1996 with regard to Ro-Ro passenger ferries operating in a regular service to and from ports of the Member States, on both domestic and international voyages and regardless of their flag. It should be noted that Regulation 3051/95/EC had given rise to several amendments and was repealed in the year 2006[468].

The ISM Code applies in the EU to cargo ships and passenger ships flying the flag of a Member State and engaged on international voyages, cargo ships and passenger ships engaged exclusively on domestic voyages regardless of their flag, cargo ships and passenger ships operating to or from ports of the Member States on a regular shipping service regardless of their flag, and mobile offshore drilling units operating under the authority of a Member State[469].

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462 *See* the decision of the Court of Appeal of Piraeus no 161/2004 [32 GREEK REV. MAR. L. 1, 3 (2004) (in Greek)] on the collision of the passenger ferry The Samina and its ensuing grounding, which resulted in the death of 80 passengers.

463 For a comprehensive approach to each aspect of the question, especially from the perspective of collecting evidence, see ANDERSON, THE MARINER'S ROLE IN COLLECTING EVIDENCE IN THE LIGHT OF THE ISM, *supra* note 459.

464 A company is defined by the Code as the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the Code

465 *See* Section 1.4 of the Code.

466 *See* Section 3.2 and 3.3 of the Code.

467 *See* Section 4 of the Code.

468 Regulation 3051/95/EC of 8 December 1995, OJ 1995 L320/14, subject to several amendments and finally repealed by Regulation 336/2006/EC of 15 February 2006 on the implementation of the ISM Code within the Community, OJ 2006 L 64/1.

469 *See* Article 3(1) of Regulation 336/2006/EC. On the exceptions, see Article 3(2).

With regard to the application of the ISM Code in the U.S., relevant statutes which should be mentioned notably are Chapter 32 of Title 46 of the USC entitled "Management of Vessels"[470] and Rules for the Safe Operation of Vessels and Safety Management Systems, as contained in relevant Regulations[471]. Powers with respect to management of vessels were delegated from the Secretary, Department of Transportation, to the Commandant of the United States Coast Guard[472]. A detailed description of the application of the ISM Code in the U.S. is provided by the USCG Marine Safety Manual[473].

The requirements for safety management systems are obligatory for all vessels engaged on a foreign voyage that call at a U.S. port as well as for all U.S. vessels engaged on a foreign voyage and which carry more than twelve passengers, or are 500 gross tons or more and are oil tankers, chemical tankers, gas carriers, bulk freight vessels, other freight vessels, high speed craft or self-propelled mobile offshore drilling units[474]. It is noticeable that vessels which are engaged on U.S. domestic routes or are engaged on a foreign voyage but do not meet the above requirements "may elect to receive voluntary ISM certification under this programme and be certificated"[475]. According to the USCG "all requirements are consistent with the International Management Code for the Safe Operation of Ships and for Pollution Prevention, Chapter IX SOLAS, short titled… ISM Code"[476].

1.2.4. Assessment

Even though EU Member States have traditionally had an overall position towards ILO instruments which was more favourable than the average acceptance of the said instruments in the U.S. and in other regions of the world, discrepancies were not absent among Member States. These discrepancies seem to be in the process of being waived by the clearly positive position of the European Commission towards the new consolidated instrument. Even though the European Commission has only the status of an observer and did not take part in the negotiations of the new instrument, it had taken note of the favourable vote of the Member States which participated in the negotiations. According to the European Commission, "a clear signal should be given to the rest of the world on the importance the Community attaches to the 2006 Convention and to the working and living conditions of the seafarers"[477]. This statement is in line with the above-mentioned explanation

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470 *See* 46 U.S.C. ch. 32.

471 *See* 33 C.F.R. pt. 96.

472 *See* 49 C.F.R. § 1.46 (fff) and (ggg) (1997).

473 Vol. II: Material inspection, Section E: International Conventions, Treaties, Standards and Regulations, Chapter 3: Safety, Management Systems (SMS).

474 *Id.* at E3-1. *See* also p. E3-3, point 4 on the differences of terminology between the U.S. legislation and the SOLAS Convention, Chapter IX.

475 *Id.* at E3-1. *See* 46 U.S.C. § 3202.

476 *Id.* at E3-1.

477 *See* Proposal for a Council decision on authorising Member States to ratify, in the interest of the European Community, the 2006 Consolidated Maritime Labour Convention of the ILO, *supra* note 419,7.

on the occasion of the U.S.'s voting of the new convention. This means that the new instrument provokes new correlations which should be understood as synergies between the two entities in the field of maritime labour protection standards.

It is obvious that if Member States proceed to a coordinated ratification of the new instrument, as suggested by the European Commission's proposal, the new instrument will be very near to its entry into force and the EU will have demonstrated its capacity to influence in a most determined manner the future of new maritime norms. With regard to the U.S.'s position, it seems that there is a missing link which does not allow the understanding of the shift between the initial sceptical position of the U.S. towards ILO maritime standards and the current attitude which is globally very positive. In any event, this change enhances a promising synergy in terms of maritime labour standards between the U.S. and the EU, which should in no case hide the possible difficulties of the enforcement of more than 66 maritime standards (thirty-seven conventions and twenty-nine recommendations) under a common normative umbrella.

As far as the STCW Convention is concerned, there is an issue concerning foreign tank vessels entering U.S. ports and waters, where the Secretary of Transportation is entitled to review training, qualification, watchkeeping and manning standards, with a view to determining whether those standards are at least equivalent to U.S. or international standards accepted by the U.S.[478]. This means that the Secretary is entitled to prohibit entry of vessels failing to meet those standards to the areas concerned.

This provision is likely to create friction with the international regime to the extent that higher prerequisites may be required in virtue of the federal provision, which would mirror "equivalent U.S. standards" prospectively higher than the international ones; in effect, the STCW Convention prohibits requirements towards foreign crews that go beyond those provided for by international law. According to Regulation I/3 of the STCW 1978 Convention, as revised, "any party defining near-coastal voyages for the purpose of the Convention shall not impose training, experience or certification requirements on the seafarers serving on board the ships entitled to fly the flag of another Party and engaged on such voyages in a manner resulting in more stringent requirements for such seafarers than for seafarers serving on board ships entitled to fly its own flag". The Regulation also provides that "In no case shall any such Party impose requirements in respect of seafarers serving on board ships entitled to fly the flag of another Party in excess of those of the Convention in respect of ships not engaged on near-coastal voyages".

In the EU, Directives 2001/25/EC and 2003/103/EC align their provisions to the STCW Convention. Certification of competence issued by third countries is recognised by the European Commission, assisted by the European Maritime Safety Agency (EMSA), which has undertaken the assessment role on behalf of the whole Community. The line which should be followed by this relatively new system on the part of the European Commission so as to avoid conflicts with international law, implies the absolute avoidance of the imposition of recognition

[478] *See* 46 U.S.C. § 9101.

criteria, including training education, of third countries going beyond what is prescribed by the STCW Convention.

Last but not least, with regard to the ISM Code, the latter applies in the EU not only on international voyages but also on domestic voyages, i.e. voyages in a sea area from a port of a Member State to the same or another port within that Member State[479]; in the U.S., vessels engaged on domestic routes are subject to the Code only on a voluntary basis[480]. In the light of this, the scope of application of the said Code has given rise to divergence between the two legal orders, which is synonymous to the introduction of unilateral elements on the part of the EC, namely the widening of the scope of application of the Code in order to include, on a mandatory basis, domestic routes as well.

Control of the above requirements over maritime labour is incorporated in port State control, which will be examined below.

1.3. Port State Control (PSC)

Port State control (PSC) constitutes another area of focus of the European and the North-American legislators and maritime administrators. The statistics and other data on PSC draw the attention of the international shipping community and have an impact on the credibility of all parties involved, including shipping companies, flag States, port States and classification societies[481]. PSC was only in the margin of UNCLOS 1982, which addressed port State jurisdiction with regard to pollution offences only under Article 218.

Traditionally, PSC, which may be defined as "the control of foreign flagged ships in national ports[482]" or "the process by which a nation exercises its authority over foreign vessels when those vessels are in waters subject to its jurisdiction"[483], has been principally organized on a regional rather than national level. This is due to the advantages of a global action which accepts the fact that pollution is transboundary[484]. In this context, regional memoranda of understanding (MOUs) have

479 *See* Article 2(9) of Regulation 336/2006/EC.

480 *See* 46 U.S.C. § 3202.

481 *See* Port State Control in the United States, Annual Report 2005, Department of Homeland security, United Coast Guard. *See* also Port State Control on Course, Report 2005, Paris MOU on Port State Control, *available at* http://www.parismou.org/upload/ (last visit 29.1.2008).

482 *See* Z. Oya Ozçayir, The Role of Port State Control 5 JIML, 147 (2001).

483 *See* USCG Marine Safety Manual, Vol. II: Material Inspection, Section D: Port State Control, General Aspects of Port State Control Examinations, 2. *Available at* http://www.uscg.mil/hq/g-m/nmc/pubs/msm/v2/dch1.pdf (last visit 29.1.2008) *See* also http://www.uscg.mil/hq/g-m/nmc/pubs/msm/vol2.htm (last visit 29.1.2008) on the procedures applicable to exercising control over foreign vessels under U.S. jurisdiction, on the procedures to ensure accountability for port State control boardings and detentions, on the targeting of foreign vessels, on procedures applicable to foreign freight vessels, on procedures applicable to foreign tank vessels and on procedures applicable to foreign passenger vessels.

484 *See* the Preamble of Directive 95/21/EC, as amended; *infra* note 503.

been established among maritime administrations in view of addressing the criteria and method of conduct of the said control. The latter finds its legal foundations principally in the international maritime conventions[485]. The memoranda of understanding, which tend to be considered as being deprived of binding effect, constitute the vehicle of PSC[486]. The EC has developed its own legal framework of PSC on the basis of the Paris MOU, while the U.S. developed its action on an individual basis with no reference to any regional memorandum of understanding.

In the developments that follow we will endeavor to search for convergence between the two systems while demonstrating that the PSC regime in the U.S. has been used to a certain degree as a model by the EU. Before searching for convergence between the two systems, it would be of interest to briefly recall the issue of the right of access of foreign vessels to ports, since, by definition, the PSC implies that the port State is entitled to regulate the conditions of access of foreign flagged vessels calling at its ports.

1.3.1. Is there a right of access of foreign vessels to ports?

PSC addresses examinations over foreign ships. It implies a positive answer to the question of whether the port State is entitled in international maritime law to regulate the right of access of foreign vessels to its ports. The question may be refined with reference to prescriptions relating to maritime safety including construction and other technical requirements, or living and working conditions aboard.

The U.S. Supreme Court in *Cunard S.S. Co. v. Mellon*[487] addressed the scope scope of PSC not only from the angle of U.S. law but also from the angle of international law. This case, dated 1923, concerned the application of U.S. liquor prohibition regulations to foreign flagged vessels in U.S. waters. The Court accepted the jurisdiction of the port state and the principle of comity when it held that "A merchant ship of one country, voluntarily entering the territorial limits of another, subjects herself to the jurisdiction of the latter…Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting

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485 *See* Preliminary Part under 3.

486 Cooperation agreements which are directly concluded between national administrations are not considered as international agreements according to some authors because they do not reflect the free will of subjects of international law and consequently are not subject to the latter (*See* PHILIPPE MANIN, DROIT INTERNATIONAL PUBLIC (1979) 71 *seq*, quoted by Yves van der Mensbrugghe, in *Les Navires Inférieurs aux Normes: le Mémorandum d'Entente de Paris du 26 janvier 1982 sur le Contrôle par l'État du Port*, COLLOQUE SUR LA COMMUNATÉ ET LA MER (1988), 463. This is not the case according to some other authors who see in such agreements the reflection of the unity of States at the international level and for whom the irregularities at the domestic level do not affect the international validity of such agreement to the extent that the violation of domestic law was not manifest (*See* G. Burdeau, *Les Accords Conclus Entre Autorités Administratives ou Organisations Publics de Pays Différents*, in MÉLANGES REUTER (1981) 103 *seq.*, quoted by Mensbrugghe, *id.*).

487 *See* 262 U.S. 100 (1923).

solely in its discretion"[488]. Moreover, the U.S. Supreme Court considered in its case law that most aspects of U.S. maritime labour provisions are not applicable to foreign vessels, even when beneficially owned by U.S. companies and operating regularly to U.S. ports[489].

The UNCLOS 1982, to which the EC and nearly all its Member States are parties[490], but to which the U.S. is not signatory, does not directly address the issue; it provides, however, that when a vessel is voluntarily within a port or at an off-shore terminal of a State, the latter may undertake investigations and potentially institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of international rules[491]. Moreover, according to the same instrument, States which have ascertained that a vessel within one of their ports or at one of their off-shore terminals is in violation of international law relating to seaworthiness of vessels, and the marine environment is threatened shall, as far as practicable, take administrative measures to prevent the vessel from sailing[492]. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and, upon removal of the causes of the violation, shall permit the vessel to continue immediately[493].

While it is generally accepted in academia that there is no general right of access to ports in international law and that no such right is referred to in UNCLOS 1982[494], it is implicit in UNCLOS that States are entitled to regulate and deny access to ports[495]. The same instrument, which, as mentioned above addresses pollution offences[496], does not "prohibit port states from regulating design, construction, manning and equipment of foreign ships in port but does not expressly permit them to do so"[497]. In addition to this, it should be recalled that port States would

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488 *Id.* at 124.

489 *Lauritzen v. Larsen* 345 U.S. 571(1953); *Lopes v. S.S. Ocean Daphne*, 337 F. 2d 777. (Ath. Cir. 1964); *Incres S.S. v. International Maritime Workers'Union* 372 U.S. 24 (1963) (quoted in Boyle, *supra* note 123).

490 With the exception of Denmark.

491 *See* Article 218 of UNCLOS 1982.

492 *See* Article 219 of UNCLOS 1982.

493 *Id.*

494 *See* Boyle, *supra* note 123. Pamborides reports a complete disagreement among scholars of the Law of the Sea on whether such a right exists or not, and if it does exist whether such right is absolute or not, see PAMBORIDES, *supra* note 50, 29.

495 *See* Boyle, *id.* Reference is made to Articles 25, 211(3) and 255 of UNCLOS 1982 and to the Military and Paramilitary Activities case of the International Court of Justice, 1986 ICJ Reports, paras. 212-13. However, an *obiter dictum* is reported by the same author, from the 1958 Aramco Arbitration holding, which was challenged by subsequent analysis, that "according to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the state require" (27 ILR 117 at 212).

496 *See* Article 218 of UNCLOS 1982.

497 *See* Boyle, *id. See* also in the same direction, Sir Anthony Clarke, Port *State Control or Sub-Standard Ships: Who is to Blame? What is the Cure?*, 2 LLOYD'S REP. 210 (1993).

refrain traditionally from interfering with regard to issues interesting the 'internal economy' of the ship and whose consequences are confined to the vessel[498].

The High Seas Convention (Geneva 1958), to which the U.S. is a signatory party and which is considered to be in force for those States which have not joined the UNCLOS regime, does not tackle the issue of the right of access of vessels to foreign ports but confines itself to the right of access of land-locked States to foreign ports, which is a different issue[499].

In this context, it would not be an exaggeration to say that to a certain extent PSC developed based on the silence rather than the explicit permission of the international law of the sea, and that technical maritime conventions on maritime safety, which make reference to it, supported its subsequent and progressive development[500].

1.3.2. General aspects of PSC in the EU and the U.S.: Purpose and scope

EU coastlines are estimated prior to the accession of Bulgaria and Romania at 99,648 km[501]. In the EU approximately 14,600 controls per year are shared by the Members belonging to the Paris MOU[502]. Port State Control at the European level is structured over a number of Directives. Member States are held to incorporate these instruments in their domestic legal order and to ensure their effective application within specific time limits. The legislative package of the EU on "port State control of shipping" is based on Council Directive 95/21/EC[503], as amended by Council Directive 98/25/EC[504], Commission Directive 98/42/EC[505], Commission Directive 1999/97/EC[506], Directive 2001/106/EC of the European Parliament and of the Council[507] and Directive 2002/84/EC of the European Parliament and of the

498 *See* PAMBORIDES, *supra* note 50, 48.

499 *See* Article 3(1). In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea. To this end States situated between the sea and a State having no sea-coast shall by common agreement with the latter, and in conformity with existing international conventions, accord: (a) To the State having no sea-coast, on a basis of reciprocity, free transit through their territory; and (b) To ships flying the flag of that State, treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to seaports and the use of such ports.

500 *See inter alia* Regulation 19 of SOLAS Convention which allows port State authorities to check whether the existing certificates correspond to the existing equipment. For more references to the international conventions relating to PSC, see Preliminary Part, *supra* note 99.

501 *See* the Proposal for an EU Coast Guard, *infra* 518,5.

502 *See* http://www.emsa.europa.eu/ (last visit 29.1.2008).

503 OJ 1995 L 157/1.

504 OJ 1998 L 133/19.

505 OJ 1998 L 184/40.

506 OJ 1999 L 331/17.

507 OJ 2002 L 19/17.

Council[508]. The emergence of a PSC organized in the frame of the EU should be associated with the strategy of qualitative shipping advanced by the European Commission inter alia in its communication on "A common policy on safe seas"[509] and by the Council, notably via its resolution of 8 June 1993[510].

The method employed by the EU in order to organize PSC consists in the adoption of a harmonized approach to the international standards by the Member States and on the taking of advantage of the experience gained during the operation of the Paris MOU, signed in Paris on 26 January 1982 and to which Member States were already parties or under associated status[511]. The transformation of this international corpus of provisions into EC law, on the basis of the above-mentioned Directives means practically, that the PSC regime is to be applied by Member States as mandatory EC law; its violation is likely to give rise to actions for infringements against Member States by the European Commission and condemnations by the European Court of Justice[512], rather than soft law stemming from memoranda of understanding between national administrations, despite the authority that the practice is likely to confer to such agreements among national administrations not constituting Treaties[513].

It is also noteworthy that at the present stage there is no European coast guard and that the aspects of PSC which would be carried out by a European coast guard are conducted individually by Member States on the basis of cooperation[514], notably via common data bases[515]. The idea of a European coast guard emerged in

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508 OJ 2002 L 324/53.

509 *See supra* note 33.

510 OJ 1993 C 271/1.

511 Cyprus, Estonia, Latvia, Lithuania and Malta joined the Paris MOU bringing the number of full members (prior to full membership, they were under co-operating status) to 25 (including Canada and the Russian Federation); Bulgaria and Romania are under co-operating status. *See* http://www.parismou.org/ParisMOU/Organisation/About+Us/Scope/default.aspx (last visit 5.1.2007).

512 *See* ECJ, 22.6.2004, European Commission v. France, C-439/02, ECR 2004-00000, and C-315/98, European Commission v. Italy, ECR, 1999, I-8001. In the first case the failure of France to fulfil its obligations under Article 5(1) of Council Directive 95/21/EC was recognised due to the insufficient number of inspections in the years 1999 and 2000. In the second case the infringement of Italy was recognised due to the non-adoption of necessary implementation measures to Directive 95/21/EC. *See* also Martin Ndende and Bertrand Vende, *La transposition par les États de la Directive Portant Communautarisation du Mémorandum d'Entente de Paris*, 603 DMF 603 (2000) 314.

513 On the legal nature of memoranda of understanding see Van Der Mensbrugghe, *supra* note 486.

514 *See* Article 14 of Directive 95/21/EC, as amended.

515 *See* Article 4 of Directive 95/21/EC, as amended. Two systems are to be distinguished, i.e. SIReNAC on the one hand, and Equasis on the other hand. SIReNAC reflects PSC via the Paris MOU. While the Netherlands host the secretariat of the Paris MOU, France runs the database and information system of SIReNAC (Ship Inspection Report Exchange), whose figures enable the establishment of white, grey and black lists according to deficiencies and performance. The Equasis database developed with the help of the European Commission. It allows users such as companies, governments and indi-

academia in the mid 80s[516]; this project was notably brought about in the frame of the preparatory work related to the European Convention, i.e. the institutional framework on the elaboration of a fundamental Treaty which would constitute, in the event of adoption, the EU's Constitutional instrument[517]. An EU coast guard, which would support the process of fighting against human and drug trafficking as well as cigarette smuggling and would also contribute to the prevention of marine environmental damage, was considered to represent a step forward for the political development of Europe[518]; ideally, it would provide an effective and efficient way of responding to the issues outlined above. In the proposal for an EU coast guard by a member of the European Parliament Delegation to the European Convention, it was clearly mentioned that "The EU could look towards the U.S. coast guard whose enforcement of U.S. treaties and laws focuses on conducting drug seizures…inspecting American and foreign vessels, performing air/sea rescues, helping to ensure vessel movement and enforcing marine environmental protection"[519]. However, this proposal does not seem to progress[520]. It deserves a special mention that the prospect of a European coast guard is examined under the frame of an EU migration policy addressing illegal immigration rather than under the maritime transport competence[521]. It is obvious that the European coast guard cannot be examined without regard to the question of the political destiny of the EU, which has not yet crystallized; if this question is not resolved, many of the potential competencies of a European coast guard will be hindered in practice and the maximum benefit of the prospective structure will not be achieved but will be confined to a coordination role[522].

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viduals to assess the quality of vessels, by including information regarding *inter alia* PSC deficiencies and banning orders. *See* http://www.equasis.org. (last visit 30.1.2008) On the role of France in the development of SIReNAC, see http://www.mer.equipement.gouv.fr/securite/01_reglementation/02_Internationale/03_memorandum/france.htm# (last visit 31.1.2008).

516 *See* BELLAYER-ROILLE, *supra* note 2, 314.

517 *See* the draft Treaty establishing a Constitution for Europe (18.7.2003) *as available at* http://european-convention.eu.int/ *See* also Fabienne Kauff-Gazin and Martin Pietri, *Première Analyse du Projet de Constitution Européenne*, Europe-Editions du Jurisclasseur, août-septembre 2003, 5.

518 *See* Proposal for an EU Coastguard, Contribution to the Convention on Europe from John Cushnahan MEP, 21 June 2002, CONV 150/02, *available at* http://register/ consilium. eu.int/pdf/en/02/cv00/00150en2.pdf (last visit 30.1.2008).

519 *Id.* 3.

520 *See* http://www.europeanvoice.com/archive/article.asp?id=26749 (last visit 12.12.2006).

521 *Id.*

522 In the field of border security, an independent body was created under the name Frontex (from French: Frontières extérieures, legally European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union), with a view to coordinating the operational cooperation between Member States. Frontex complements the national border management systems of the Member States. Its headquarters are in Poland. Frontex was established by Council Regulation 2007/2004/EC (OJ 2004 L 349/1) and it has been operational since 2005. While it is

EU Member States are held to ensure that the total number of inspections of the ships which fall into the scope of application of relevant EC directives and which are to be carried out annually at the national level correspond to at least 25% of the average annual number of individual ships which entered national ports[523]. This percentage is considered inadequate by the European Commission which, in its proposed third maritime safety package (Erika III), suggested the inspection of 100% of ships in the EU, the frequency being linked to the risk profile of ships under examination[524].

The concept of PSC in the U.S. followed a different path. U.S. law makes special reference to foreign vessels[525]; 8,000 foreign vessels make 50,000 port calls annually[526]. The U.S. has not opted for a PSC that would be structured over a regional agreement. The U.S. is engaged in a Port State Control Initiative of foreign vessels launched by the USCG in 1994[527]. The current regime, which is carried out by the USCG, built upon the USCG's foreign passenger vessel control verification program and its foreign tanker-boarding program, which has been in place since 1977[528]. The current regime is articulated over Title 46, Chapter 33 of the U.S. Code. With regard to tank vessels, Chapter 37 of the same Title is relevant. In addition, certain provision of the pollution prevention and navigation safety regulations apply to foreign vessels operating in U.S. waters[529].

Chapter 33 consolidates the laws relating to inspection and certification of vessels by the Coast Guard that have been elaborated over a period in excess of 140 years[530]. The original provisions were intended for steam vessels, due to the problem of steamboat explosions. The USCG verifies whether foreign vessels operating in U.S. waters are in conformity with international instruments and U.S. law and regulations.

In general, the provisions that foreign vessels calling at U.S. ports must comply with stem from the international conventions, as a result of the U.S.'s jurisdiction to prescribe rules and standards for foreign vessels which is limited under international law. A source of such limitation are the IMO conventions to which the U.S.

each Member State's task to control its own borders, the Agency ensures that this is done with the same high standards of efficiency. *See* http://www.frontex.europa.eu/ (last visit 30.1.2008).

523 This percentage is calculated on the basis of the three most recent calendar years for which statistics are available. Article 5 (1) of Directive 95/21/EC, as amended.

524 *See* MEMO/05/438, Brussels, 23.11.05, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/438&format=HTML&aged=O&language=EN&guiLanguage=en (last visit 30.1.2008).

525 *See* 46 U.S.C § 3303.

526 *See* Peters, Katherine McIntyre, Covering the Waterfront, Government Executive, September 1, 2004-11-15, 44, in Economic Statistic for National Oceanic and Atmospheric (NOAA) Administration, U.S. Department of Commerce, April 2006, 5th edition, 40, *available at* http://www.publicaffairs.noaa.gov/pdf/economic-statistics-may2006.pdf (last visit 30.1.2008).

527 *See* 59 Fed. Reg. 36, 826 (1994).

528 *See* Allen, *supra* note 2.

529 *See* 33 C.F.R. pts. 154-156 and 164.

530 46 U.S.C. ch. 33.

is a signatory party and which "are generally seen as justified by the national interest in promoting comity and obtaining reciprocal treatment for U.S. flag vessels"[531]. However, there are examples of requirements imposed by U.S. law to foreign vessels while on the U.S.'s waters that go beyond the above frame. The first one initially was with regard to the double hulls, already discussed above[532]. Another example is the requirement with regard to foreign tank vessels calling at U.S.'s ports, which in addition to satisfying relevant international standards, are obliged to obtain a certificate of compliance under Chapter 37 of Title 46 of the U.S. Code[533]. While the U.S. Secretary of Transportation may accept any part of a foreign certificate, endorsement or document, issued under a Treaty, convention or other international agreement to which the U.S. is a party, as a basis for issuing the certificate in question, the Secretary does not have to accept foreign certificates as evidence of compliance and it may take additional action to assure compliance with domestic and international law[534].

The certificate of compliance is revocable, valid for 24 months maximum and may be renewed[535]. In appropriate circumstances, the Secretary may issue a temporary certificate valid for not more than 30 days[536].

It is noteworthy, that the obligation to obtain a certificate of compliance does not apply to foreign vessels which are in innocent passage on the navigable waters of the U.S.[537].

While the conception of PSC in the U.S. and in the EU followed a different path, the purpose of both systems is vested in the banning of substandard ships and the promotion of qualitative shipping. Identified risk factors facilitate the detecting of vessels which are potentially likely to be characterized as substandard and, consequently, pose a threat to human life and/or the marine environment.

For the USCG a vessel is regarded as substandard if the hull, machinery, or equipment, such as lifesaving, firefighting and pollution prevention, are substantially below the standards required by U.S. laws or international conventions[538]. Some incentives are also provided for to the benefit of vessels which are in compliance with the existing requirements like, for example, the submission to Qual-

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531 *See* Allen *supra* note 2, 588.

532 *See* Part II, 1.1.

533 Pursuant to 46 U.S.C. § 3711 a foreign tank vessel may operate on the navigable waters of the US[…]only if the vessel has been issued a certificate of compliance by the Secretary of Transportation.

534 *Id.*

535 46 U.S.C. § 3711(b).

536 *Id.*

537 46 U.S.C. § 3702(e).

538 *See* USCG Marine Safety Manual, Vol. II: Material inspection, Section D: Port State Control, Chapter 1, p. D1-5. Moreover, the reasons of substandard shipping are invoked: the absence of required principal equipment or arrangement, gross noncompliance of equipment or arrangement with required specifications, substantial deterioration of the vessel structure or its essential equipment, noncompliance with applicable operational and/or manning standards, or, clear lack of appropriate certification, or demonstrated lack of competence on the part of the crew.

ship 21 in the case of the U.S. PSC which allows inter alia name recognition and a reduction in PSC examination frequency[539].

The EC legal frame on PSC applies to any ship and its crew calling at a port of a Member State or at an off-shore installation, or anchored off such a port or such an installation[540]. As far as ships of a gross tonnage below 500 are concerned, Member States are held to apply relevant international Conventions and, to the extent that a Convention des not apply, to take such action as may be necessary to ensure that the ships concerned are not clearly hazardous to safety, health and the environment[541]. Ships flying the flag of a State which is not party to a Convention are nevertheless subject to PSC carried out by Member States on the basis of the principle of no more favourable treatment[542]. Fishing vessels, ships of war, naval auxiliaries, wooden ships of a primitive build, government ships used for non-commercial purposes and pleasure yachts not engaged in trade do not fall within the scope of the PSC of Directive 95/21/EC, as amended[543].

1.3.3. The material aspects of PSC

Inspections are the means of conduct of PSC in the EU. During 2005, 21,302 inspections were carried out in the Paris MOU region on 13,024 foreign vessels registered in 112 different flag States[544]. The overall inspection rate in the region for the same period was 31.82% and all Members reached the inspection commitment of 25%[545].

Inspections mean a visit on board a ship in order to check both the validity of the relevant certificates and other documents and the condition of the ship and its equipment, as well as the living and working conditions of the crew[546]. If there are clear grounds for believing, upon completion of the inspection, that the condition of a ship or of its equipment or crew does not substantially meet the relevant requirements of a Convention, a more detailed inspection takes place[547]. To name but a few, examples of clear grounds are the oil record book not being properly kept, inaccuracies revealed during examination of the certificates and other documentation, indications that the crew members do not satisfy minimum levels of training, etc.[548]

An inspection should be carried out by the port State on any ship which is not subject to an expanded inspection with a target factor greater than 50 in the SI-

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539 *See* http://www.uscg.mil/hq/g-m/pscweb/Qualiship21.htm. *See* also the USCG Annual Report 2005, *supra* note 481, 17.
540 Article 3 of Directive 95/21/EC, as amended.
541 Article 3(2) of Directive 95/21/EC, as amended.
542 Article 3(3) of Directive 95/21/EC, as amended.
543 Article 3(4) of Directive 95/21/EC, as amended.
544 *See* the Paris MOU Annual Report 2005, 22.
545 *Id.*
546 Article 2 of Directive 95/21/EC, as amended.
547 Article 6(3) of Directive 95/21/EC, as amended.
548 *See* Annex III of Directive 95/21/EC, as amended.

ReNAC information system[549] provided that a period of at least one month has elapsed between the last inspection in the Paris MOU area[550].

The order of targeting for inspection takes into consideration "overriding" and "overall" targeting factors[551]. For example, ships which have been the subject of a report or notification by another Member State, or ships which have been involved in a collision, grounding or stranding on their way to the port, are considered as revealing an overriding priority for inspection[552]. Ships not inspected by any Member State within the previous six months, or ships flying the flag of a State appearing in the black list as published in the annual report of the Paris MOU, constitute some examples of ships considered as being under a priority status for inspection (overall targeting factor)[553].

Member States refrain from inspecting ships which have been inspected by any Member State within the previous six months, provided *inter alia* that its condition is neither classified under overriding priority for inspection nor under overall targeting factor, or that no deficiencies have been reported following a previous inspection, or no clear grounds exist for carrying out an inspection[554].

An expanded inspection[555] is notably provided for with regard to certain categories of ships, i.e. gas and chemical tankers older than 10 years of age, bulk carriers older than 12 years of age, oil tankers with a gross tonnage of more than 3,000 gross tonnes and older than 15 years of age and passenger ships older than 15 years of age[556]. A ship belonging to one of these categories is liable to an expanded inspection after a period of 12 months since the last expanded inspection carried out in a port of a State signatory of the Paris MOU[557].

With regard to the U.S., the first distinction to be made is between inspections which concern both U.S.-flagged and foreign vessels and PSC examinations which apply to foreign vessels only. Inspections under U.S. law aim to ensure that a vessel is of a structure suitable for the service in which it is employed, is equipped with proper appliances for lifesaving, fire prevention and firefighting, has suitable accommodations for the crews, sailing school instructors, and sailing school students, and for passengers on the vessel, if authorized to carry passengers, is in a condition to be operated with safety to life and property and complies with applicable marine safety laws and regulations[558]. The inspection takes place at least once every five years after the initial inspection for certification, with the exception of passenger vessels, nautical school vessels and small passenger vessels al-

549 *See supra* note 515.
550 Article 5(2)(a) of Directive 95/21/EC, as amended.
551 Article 5(2)(b) of Directive 95/21/EC, as amended.
552 *See* Annex I (I) of Directive 95/21/EC, as amended.
553 *See* Annex I(II) of Directive 95/21/EC, as amended.
554 *See* Article 5(3) of Directive 95/21/EC, as amended.
555 The items which must be part of an expanded inspection are laid down in Annex V (C) of Directive 95/21/EC, as amended. for each category of ship concerned. Expanded inspections are provided for in Article 7.
556 Annex V(A) of Directive 95/21/EC, as amended.
557 Article 7(1) of Directive 95/21/EC, as amended.
558 *See* 46 U.S.C.§ 3305(a).

lowed to carry more than 12 passengers on a foreign voyage, which are to be inspected at least once a year[559]. A successful inspection leads to certification[560].

According to Chapter 33 of Title 46 of the USC[561], freight vessels, passenger vessels and tank vessels are subject to inspection. In addition to these categories of vessels, some other types of vessels are subject to inspection, i.e. nautical school vessels, offshore supply vessels, sailing school vessels, seagoing barges, seagoing motor vessels, steam vessels, small passenger vessels, fish processing vessels, fish tender vessels, Great Lakes barges and oil spill response vessels[562]. The provision in question does not make the distinction between U.S. and foreign vessels[563].

A foreign vessel of a country having inspection laws and standards similar to those of the U.S., i.e. when it is a party to SOLAS Convention to which the U.S. is also a party, and that has an unexpired certificate of inspection issued by proper authority of its respective country, is subject to an inspection. The purpose of the latter is to ensure that the condition of the vessel is as stated in its current certificate of inspection[564]. In practice, the interest of this provision is that it confines inspection to the examination of whether the condition of the vessel's propulsion equipment and lifesaving equipment are as stated in the certificate[565]. Canadian vessels are recognized as having law and standards similar to those of the U.S.[566].

Furthermore, foreign vessels which are not party to SOLAS and vessels below Convention size may be inspected in accordance with U.S. vessel inspection provisions[567]. A vessel which satisfies inspection requirements is issued a U.S. Certificate of Inspection[568]. It is noteworthy that instead of performing an inspection for certification of foreign vessels whose country of registration is not party to SOLAS or of vessels below the Convention size, the Officer in Charge of the Marine Inspection (OCMI) may perform a PSC examination[569]. As we will see below a port state control examination of a foreign vessel is not intended, nor desired, to be analogous to an inspection for certification of a U.S.-flagged vessel[570].

A PSC examination of a foreign vessel may be initiated by the USCG, or be conducted upon request of another flag State administration on the basis of allegations for a substandard ship or upon request from the crew or trade union[571]. According to the USCG, "a PSC examination is not intended to be analogous to an inspection for certification of a U.S.-flagged vessel[572]. Rather, they are intended to

559 46 U.S.C.§ 3307.
560 46 U.S.C. § 3309. On the certificates of inspection, notably see 46 U.S.C. §§ 3310.
561 46 U.S.C. ch. 33.
562 *Id.*
563 *See* 46 U.S.C. § 3301 and 46 U.S.C. ch. 37.
564 *See* 46 U.S.C.§ 3303.
565 *See* USCG Marine Safety Manual, Vol. II, Section D:PSC, Chapter 1.4.
566 *Id.*
567 *See* 46 U.S.C. § 3301.
568 *See* 46 C.F.R. 2.01-5.
569 *See* USCG Marine Safety Manual, Vol. II, Section D:PSC, Chapter 1.3(a).
570 *See id.* at Chapter 1.F.
571 *See id.*
572 *Id.*

be of sufficient breadth and depth to satisfy a boarding team that a vessel's major systems are in compliance with applicable international standards and domestic requirements and that the crew possesses sufficient proficiency to satisfactorily operate the vessel[573]. The examinations are designed to determine that required certificates are aboard and valid, and that a vessel conforms to the conditions required for issuance of required certificates"[574]. In practice, PSC is performed by a walk-through examination and the visual check assessment of a vessel's relevant components, certificates and documents, and must be accompanied by a limited testing of systems and the crew[575].

PSC examinations in the U.S. are divided into annual examinations, reexaminations, in view of determining whether the vessel has remained in compliance with applicable provisions between annual examinations, or deficiency follow-up examinations, which aim to ensure that previously detected deficiencies have been corrected[576]. It is to be noted that in the event where there are clear grounds that the conditions of the ship or its equipment do not correspond with the certificates or the ship does not comply with existing requirements, any of these examinations is likely to be transformed into an expanded examination, i.e. a more detailed examination or testing. In addition to the above, monitoring is also likely to take place which is the process of witnessing any part of a bulk or break-bulk cargo operation, any part of a bunkering operation, or any part of a lightering operation.

The possibility of a foreign vessel being subject to PSC in the U.S. is determined by a number of points attributed to the vessel in question on the basis of a targeting matrix which is in fact a priority matrix[577]. The total of points attributed to the ship on the grounds of the matrix determines the vessel's priority.

The first criterion is the ship management of the vessel; it is assessed by means of a number of points. This criterion is related to the performance of the listed owner, operator or charterer[578].

The second criterion is about the performance of the flag State with regard to SOLAS, which is based on the detention ratio of the flag State[579]. The USCG tar-

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573 Boarding teams usually comprise a marine inspector and one or more boarding officers. Depending on the category of the vessel (e.g. tanker and passenger vessel) or the type of boarding (e.g. Priority I boarding), this composition may differ.

574 *Id.*

575 *Id.*

576 USCG Marine Safety Manual, Section D: PSC, Chapter 1.F (1).

577 *See* the PSC Safety and Environmental Protection Compliance Targeting Matrix, in Port State Control in the US: Annual Report 2005, *supra* note 481, 8.

578 *Id.*

579 According to the Annual Report 2005 of the USCG, *id.*, the detention ratio for the years 2003 to 2005 of registration countries such as Cambodia was 100%, Cyprus 2.54%, France 3.16%, Honduras 21.88%, Malta 3.10% and Panama 2.74%. Cambodia and Honduras and the other flag States with high detention ratio are subject to 7 points on the PSC Safety Targeting Matrix, while the remaining flag States mentioned above, along with the ones which are not mentioned here but are concerned, receive 2 points on the PSC Matrix. *See* the performance of flag States in the European ports in the Paris MOU Annual Report 2005, *supra* note 481, 38 *seq*.

gets flag State administrations for additional PSC examinations if their detention ratio scores higher than the overall average for all flags, and if a flag State is associated with more than one detention in the past three years[580]. It deserves a special mention that for 2005 overall flag State performance improved, with the three-year detention ratio declining from 2.30% to 2.00%[581].

The third criterion concerns classification societies. A number of points are attributed to the vessel with regard to the detention ratio of the classification society concerned, since vessel detentions may be related to the statutory activities conducted by the classification societies on behalf of the vessel's flag State[582]. While some deficiencies are class related, others are not. The USCG notifies the class society or recognized organization in writing of each class related detention and informs them of their right to appeal[583].

The fourth criterion deals with the vessel's history. If the vessels calls for the first time at a U.S. port or was not subject to PSC examination in the past 12 months, it is attributed 7 points; 5 points are given to the vessel for each detention, denial of entry, or expulsion within the past 12 months; 1 point is attributed if the Captain of the Port (COTP) restricted operations of the vessel for safety related issues within the past 12 months; 1 point is attributed for each casualty within the past 12 months and 1 point is attributed in the event of violation within the past 12 months[584].

The fifth and final criterion of the targeting matrix refers to the ship type. One point is attributed in the event of oil or chemical tanker or gas carrier or passenger ship or bulk freighter 10 years old or less. Two points are attributed to bulk freighter over 10 years old and up to 20 years old, and 4 points are given to bulk freighter over 20 years old[585].

The total of points provided to the ship according to the above criteria determines the priority status in view of a PSC examination[586]. Priority I vessels gather 17 or more points on the Matrix and their entry to the port may be restricted until the USCG examines the vessel[587]. This category of priority may concern, for example, ships involved in a marine casualty that may have affected seaworthiness[588]. Priority II vessels gather 7 to 16 points on the Matrix[589]. Cargo operations or passenger embarkation/debarkation should be restricted until the vessel is examined by the Coast Guard[590]. Non-Priority Vessel status implies 6 or fewer points

580 *See* the USCG Annual Report 2005, *supra* note 481, 9.
581 *Id.*
582 *Id.* at 12.
583 *Id.* Examples of best performing classification societies on the basis of this criterion are provided for *inter alia* in the case of Det Norske Veritas, Bureau Veritas, American Bureau of Shipping, Lloyd's Register, etc.
584 *Id.* at 8.
585 *Id.*
586 *Id.*
587 *Id.*
588 *Id.*
589 *Id.*
590 *Id.*

on the Matrix and, in such an event, the vessel is considered of low safety and environmental risk[591]. The Coast Guard may select and examine the vessel using the PSC random selection process[592].

1.3.4. Sanctions and appeals

In the EU, in the event of deficiencies which are clearly hazardous to safety, health or the environment, the competent authority of the port authority which has carried out the inspection ensures that the ship is detained[593]; 994 ships were detained in 2005 for deficiencies clearly hazardous to safety, health or the environment, which data has given rise to the establishment of best and low performing lists (black, white and grey lists)[594].

According to Directive 95/21/EC, unduly detained or delayed ships should be avoided[595]. The detention is to be lifted upon removal of the hazard or if it is established that the ship can, subject to any necessary conditions, proceed to sea without risk[596]. The inspector is the protagonist of the decision to detain the ship or not[597]. He exercises his professional judgment as to whether or not such a decision should be made, on the basis however of specific criteria[598].

If the inspection gives rise to detention, the port authority shall immediately inform, in writing and including the report of inspection, the flag State administration[599]; in addition, nominated surveyors or recognized organizations responsible for the issue of class certificate or certificates issued on behalf of the flag State are also to be notified where relevant[600]. A follow-up to inspections and detention is moreover prescribed by the Directive[601].

A detention, in U.S. law, is an intervention action taken by the port State when the condition of the ship or its crew does not correspond substantially with the applicable conventions to ensure that the ship will not sail, until it can proceed to sea without presenting a danger to the ship or persons on board, or without presenting an unreasonable threat of harm to the marine environment[602] . Detentions are carried out in U.S. law notably on the basis of SOLAS 1974 as amended, Regulation 19; Load Lines Convention, Article 21; MARPOL Article 5; STCW Article X and

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591 *Id.*
592 *Id.*
593 *See* Article 9(2) of Directive 95/21/EC, as amended.
594 *See* the Paris MOU Annual Report 2005, *supra* note 481, 23 and 33 seq.
595 *See* Article 9(7) of Directive 95/21/EC, as amended.
596 *Id*.
597 The inspector, according to Directive 95/21/EC, as amended, means a public-sector employee or other person, duly authorized by the competent authority of a member State to carry out PSC inspections, and responsible to that competent authority (Article 2). The professional profile of inspectors is defined in article 12 of the Directive.
598 *See* Annex VI on Criteria for Detention of a Ship.
599 *See* Article 9(5) of the Directive 95/21/EC, as amended.
600 *Id*.
601 Article 11 of Directive 95/21/EC, as amended.
602 USCG Marine Safety Manual, Vol. II: Material inspection, Section D, Chapter 1.

Regulation 1/4; ILO 147 Article 4; and the Ports and Waterways Safety Act (PWSA)[603] or a U.S. Customs hold[604].

Detentions in U.S. law in the year 2005 decreased according to the USCG's annual report[605]. In 2005 a total of 7,850 individual vessels from 76 different States made 62,818 port calls with 10,430 SOLAS safety and 9,117 ISPS examinations conducted. The total number of ships detained in 2005 for safety related deficiencies decreased from 176 to 127[606]. Significantly, the annual detention ratio was 6.26% for the year 1996 and 1.61% for the year 2005[607].

In the EU, the owner or the operator of a ship is entitled to exercise his right of appeal against a detention decision or refusal of access taken by competent authority[608]. Such appeal shall not cause the detention or refusal to be suspended[609]. The master should be informed by the competent authority about this right of appeal[610].

It is to be noted that Member States are held to ensure, according to their national legislation, that the above requirements on the right of appeal are duly incorporated in their domestic legal order[611]. Penalties, in case of infringement of national provisions adopted according to Directive 95/21/EC are also provided for[612]. Penalties must be effective, proportionate and dissuasive[613].

Negative publicity which is likely to stem from the public exposure of data related to PSC deficiencies from relevant data bases constitute, both in the EU and in the U.S., an indirect sanction to vessels with irregularities[614].

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603 *See* 33 U.S.C. § 1223(b).

604 USCG Marine Safety Manual, Vol. II: Material inspection. Section D. Chapter 1-4.

605 Port State Control in the United States, USCG Annual Report 2005, *available at* http://www.uscg.mil/hq/g-m/pscweb/annualReport05.pdf, 2. (last visit 21.1.2008).

606 *Id.*

607 *Id.* at 5.

608 *See* Article 10 of Directive 95/21/EC, as amended.

609 *Id.*

610 Article 10(3) of Directive 95/21/EC, as amended.

611 Article 10(2) of Directive 95/21/EC, as amended. For example, with regard to Cypriot law, see Articles 15 and 16 of The Merchant Shipping (Port State Control) Law of 2001 (Law 47(I)/2001). (Gazette No. 3487, Supplement I (I), dated 6.04.2001), as amended by The Merchant Shipping (Port State Control) (Amendment) Law of 2004 (Law 27(I)/2004). (Gazette No. 3815, Supplement I (I), dated 5.03.2004). As far as Greek law is concerned, see Article 10 of Presidential decree 88/1987 (FEK A΄90 of 23.4/16.5.1997) in combination with Article 45 para. 4 of the Code of Public Maritime Law.

612 *See* Article 19(a) of Directive 95/21/EC, as amended.

613 *Id.*

614 In the EU the public data base Equasis enables users such as companies, governments, organizations and individuals to make a judgment as to quality. Equasis contains information on PSC deficiencies and banning orders, as well as inter alia information on the history, identification and ownership of the ship. *See* http://www.emsa.europa.eu/end185d002.html#equasis, http:www.equasis.org/ and http://www.parismou. org (last visit 30.1.2008). In addition to this, figures provided by SIReNAC (Ship Inspection Report Exchange) enable the establishment of white, grey and black lists according to deficiencies and performance.

In the U.S. decisions of the Officer in Charge of the Marine Inspection (OCMI) are subject to appeal. The parties that are likely to have an interest in the appeal and that are allowed to provide information which may have been overlooked or omitted during the initial detention review process are shipowners, operators and classification societies; with regard to class-related detentions on safety and security, the appeal procedures prescribed in 46 CFR 1.03 should be followed[615]. As far as all other detentions are concerned (not class-related) with regard to safety and security, appeals should first be made to the cognizant Captain of the Port or OCMI who issued the detention[616]. If not satisfied with a COTP/OCMI decision on appeal, a request for reconsideration of the appeal may be forwarded to the District Commander[617]. Final consideration of the appeal may be forwarded to the Commandant of the Coast Guard via the Office of Vessel Activities (G-PCV)[618] which is final agency action for appeals[619].

1.3.5. Assessment

The PSC conducted in the U.S. has been usually presented as a drastic frame of control of foreign vessels calling at U.S. ports with tighter standards than the regional agreements[620]. The developments above suggest that there is divergence between the EU and the U.S. firstly with regard to the fact that PSC in the U.S. benefits from the existence of the USGC. In the EU the task of PSC is exercised by national bodies which are proper to each Member State and whose competence is likely to differ. The proposals advanced at different stages[621] on the creation of a European coast guard could fill potential gaps in PSC at the European level and allow a more homogeneous vision and execution of the whole task. However, there are two questions which need to be answered: the first one concerns the advisability of such a body in the sense that such a creation implies a clear vision of the political orientation of the EU, which is not provided at the present stage. The second one is deeply connected with the first point and concerns the nature (civil or military) and composition of a prospective European coast guard; a prospective supra-

615 *See* USCG Marine Safety Manual, Vol. II, Section D, Chapter 3.9 and USCG Annual Report 2005 on PSC, supra note 481, 6.

616 *Id.*

617 *Id.*

618 The Office of Vessel Activities (G-PCV) is responsible for overseeing commercial vessel safety and environmental protection compliance program, including direction of Coast Guard field activities and industry partnerships in support of applicable domestic and international provisions on domestic and foreign-flagged commercial vessels operating in U.S. waters. *See* http://www.uscg.mil/ (last visit 30.1.2008).

619 *Id.*

620 *See* Ozçayir, *supra* note 482, 159.

621 A recent allusion to the creation of a European Coast Guard is reported by the International Herald Tribune on the part of Franco Frattini, the vice-president of the European Commission in the context of the fight against illegal immigration and trafficking of human life. *See* International Herald Tribune, 30.11.2006, *available at* http://www.iht.com/articles/2006/11/30/news/migrate.php (last visit 9.1.2007).

national body with public powers, i.e. a fully-integrated body, is likely to be adversely coped with by a number of Member States. In any event, it should be recalled that in the current stage of development of the integration process in Europe, the policing of the seas is not regulated by EC law but by EU law, which is of intergovernmental nature and is subject to the so-called third pillar, which signifies limited political and judicial control by the European Parliament and the European Court of Justice[622].

The plethora of pending points brought about by the question of the creation of a European coast guard suggests that in the short term it is unlikely to see PSC in the EC being subject to an integrated body which would be similar to the USCG.

Secondly, there also seems to be divergence as to the pace of evolution of the systems under examination. The organization of PSC in the EU has been subject to a progressive development while PSC in the U.S. seems to have reached a consolidated stage. European PSC had to shift from a fragmented system to a promising structure, which has nevertheless not crystallized yet. This is also recognized by the European Commission which revisited the frame of PSC under the maritime safety legislative package, "Erika I", and currently under the proposed package, "Erika III"[623].

New approaches should aim at enhanced effectiveness; according to Directive 2001/106/EC which was adopted in the frame of "Erika I" as an amendment to Directive 95/21/EC, the mandatory expanded inspection of certain ships was introduced[624]. Moreover, it was prescribed by the same amendment that certain categories of ships would be refused access to Member States' ports (banning)[625]. Under the Erika III legislative package, which is at present under examination, the European Commission recognizes that in the current system barely 10 ships are banned from European ports and that this number could rise in future to as many as 200[626]; furthermore, it suggests the inspection of 100% of ships in the EU - the

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622 *See* BELLAYER-ROILLE, supra note 2, 317. On the third pillar, see European Glossary: Consultation Procedure, European Communities (2006), http://europa.eu/scadplus/glossary/consultation_procedure_en.htm (last visit 9.1.2007).

623 *See supra* Preliminary Part and Part I.

624 The vessels concerned are gas and chemical tankers older tan 10 years, bulk carriers older than 12 years of age, oil tankers with a precise gross tonnage and older than 15 years and certain passenger ships older than 15 years. *See* Article 7 of Directive 95/21/EC, as amended.

625 According to Article 7b of Directive 95/21/EC, as amended, "A Member State shall ensure that a ship in one of the categories of Annex XI, section A, is refused access to its ports, except in the situations described in Article 11(6), if the ship: either flies the flag of a State appearing in the black list as published in the annual report of the MOU, and has been detained more than twice in the course of the preceding 24 months in a port of a State signatory of the MOU, or flies the flag of a State described as "very high risk" or "high risk" in the black list as published in the annual report of the MOU, and has been detained more than once in the course of the preceding 36 months in a port of a State signatory of the MOU…".

626 According to the Paris MOU Annual Report 2005 (*supra* note 481, 24) 28 ships were banned in the year 2005, while 96 ships were banned between 2003 and 2005.

frequency being directly linked to the risk profile of the ships in question-, and consequently, the increase of the national target of 25%.

The recognition by the European Commission of the need to enhance PSC in the EU implies that there is room for more harmonized action. Despite the fact that the Paris MOU is one of the best performing regions on PSC in the world, the EU action aiming at zero tolerance with regard to the access of sub-standard and low-performing vessels to European ports strongly suggests that the EU has been using the PSC regime in the U.S. as a model.

The developments above addressed a comparison between the EU and the U.S. from the angle of prevention; our approach in the process will consist of addressing the comparison between the two entities in the light of preparedness and response to maritime casualties. The emphasis will be placed on oil pollution aspects.

2. Preparedness and the ability to respond: The need for promptness and effectiveness put to the test

How prepared are the EU and the U.S. for a major oil spill? Preparedness and ability to respond to maritime casualties require exploring policy-related issues as well as legal requirements stemming from international and regional instruments. In the developments below we will maintain that the U.S., even though it has not experienced in recent years a major oil spill like the one which involved the Exxon Valdez in the 90s[627], its capacity to respond seems to constitute a positive paradigm to be adopted by the EU, which is currently in the process of assessing and enhancing its potential in this field. Aspects from practice, i.e. selective past incidents, are highly illustrative of the difficulties encountered in this area; a brief description thereof will be made prior to the main discussion.

2.1. Viewing past incidents

The grounding of the Torrey Canyon on 18 March 1967 off Land's End, England, which resulted in the spilling of 33 million gallons of crude oil at sea, revealed the need for adequate preparedness and response[628]. Until 1967, the U.S. "had not formally addressed the potential for major oil or hazardous substance spills"[629]; a

[627] According to statistics maintained by the USCG, there have been no spills of over one million gallons since 1990. *See* Lewis, supra note 45, 99. It is noticeable however that almost 14,000 oil spills are reported each year in the US. *See* http://eee.epa.gov/oilspill.response.htm (last visit 22.10.2007).

[628] *See* UNDERSTANDING OF OIL SPILLS AND OIL SPILL RESPONSE by the Environmental Protection Agency (EPA), 31 *seq.; available at* http://www.epa.gov/oilspill/pdfbook.htm (last visit 26.11.2007).

[629] *Id.*

team of representatives from U.S. federal agencies was sent to Europe to observe the cleanup activities and "bring back lessons learned"[630]. Yet, the international community had to wait until 1990 for the adoption of The International Convention on Oil Pollution, Preparedness, Response, and Cooperation (OPRC), which entered into force in 1995.

2.1.1. Noticeable incidents in European waters

The Sea Empress was a tanker of 147,273 tons deadweight with a cargo of 130,018 tonnes of Forties light crude oil which ran aground off the port of Milford Haven in the UK in 1996[631]. During the salvage operations, lightening of the vessel by pressuring her cargo tanks with compressed air was required. A certain quantity of the ship's oil cargo was expected to be driven out through her damaged bottom. In effect, a larger quantity of cargo was lost; however, some 58,000 tonnes of crude oil remained on board. In the course of the salvage operation, taking the ship out to sea as soon as possible or bringing the ship into Milford Haven were envisaged as possible plans of action. The vessel was finally brought to a place of refuge; the doubts of the port authority concerned were superseded by the positive outcome of the operation.

It bears repetition that the sinking of the Erika in 1999, prompted the strengthening of EC maritime safety policy[632] and put to the test the response capacity of the entities involved[633]. The oil tanker Erika was under Maltese flag and was carrying 30,884 tonnes of heavy fuel oil when it experienced a structural failure while crossing the Bay of Biscay in heavy weather; the Erika broke up off the coast of Britanny, France, and an estimated 20,000 tonnes of cargo were spilled into the sea. The cleanup operations took place along approximately 400 kilometers of affected coastline and over 250,000 tons of oily waste were collected from the coast. Response vessels were provided for this incident by France, the Netherlands, the United Kingdom and Germany.

One year later (December 2000), the Castor, which was a tanker of 30,068 tonnes deadweight with a full cargo of gasoline, developed a large crack on its main

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630 *Id.*

631 *See* Richard Shaw, *Places of Refuge: International Law in the Making*, 9 JIML 2 (2003) 162. *See* also the *Report of the UK Marine Accident Investigation Branch (MAIB)*, HMSO, 1997 and *Lord Donaldson's Review, Salvage and Intervention, Command and Control, available at* http://library.coastweb.info/304/1/Donaldson_report.pdf (last visit 13.11.2007), 17 *seq*.

632 *See inter alia*, Nesterowicz, *supra* note 37.

633 On the causes of this incident see *Report of the Enquiry Into the Sinking of The Erika off the Coasts of Brittany on 12 December 1999* by the Permanent Commission of Enquiry Into the Accidental Sea (CPEM), *available at* http://www.beamer-france.org/english/inquieries/pdf/Erika_final_Report.pdf (last visit 14.11.2007). A brief description of the incident and the response measures is provided in the *European Maritime Safety Agency* (EMSA) *Action Plan for Oil Pollution Preparedness and Response*, 2004, 46 *seq. Available at* http://www.emsa.europa.eu/end185d014.html (last visit 31.10.2007).

deck during a storm off the coast of Morocco[634]. The Castor was taken in tow by a private salvor. Before she could be taken to a port of repair, it was decided that her cargo should be lightened. Requests were addressed by salvors to a number of Mediterranean countries to allow the transshipment to take place at a sheltered place of refuge. As no State allowed the laden Castor to enter its waters, the salvors had to proceed to a successful ship-to-ship transfer on the high seas after towing the vessel over 2,000 miles around the western Mediterranean.

The Prestige incident in 2002 once more opened Pandora's box in the context of maritime safety and preparedness to respond[635]. This Bahamas-registered tanker (81,564 dwt) laden with about 77,000 tonnes of heavy fuel oil, during its voyage from Latvia to Singapore, experienced structural damage off the coast of Cape Finisterre, Spain. A request was addressed by the salvors to the Spanish authorities to be allowed to tow the vessel into a sheltered place of refuge, which was not accepted. The Prestige had to be towed away from the coast. As the weather conditions deteriorated, the vessel broke in two and sank off the coast of Vigo. Unknown but substantial quantities of its cargo – an estimated 63,000 tonnes of heavy fuel - spilled progressively into the sea; approximately 1,900 kilometers of shoreline were affected in Spain and France. Around 138,000 tons of oilwaste were collected in Spain and some 18,300 in France[636]. It is reported that the total capacity of specialized recovery vessels deployed was insufficient to deal with a disaster of this scale; in addition to this, performance of those vessels that were in principle suitable for recovery of heavy fuel oil in Atlantic winter conditions was hampered by their late arrival. Tellingly, while the initial spill occurred on the 13 of November, the first specialized vessel was on site 6 days later, the second one 12 days and the third one 13 days[637]. In addition to this, a significant period of unloading in port had been observed, due to the lack of suitable ship to shore transfer systems[638].

2.1.2. Noticeable incidents in U.S. waters

A lot of ink has been spent on the Exxon Valdez; it is no question here to provide in-depth insight into this incident[639]. It is sufficient to recall that, on 24 March 1989, shortly after midnight, the oil tanker, Exxon Valdez, which was two years old, struck the rocks of Bligh reef in Prince William Sound, Alaska. As a result, more than 11 million gallons of oil spilled within 5 hours of the incident. Approximately 80% of the ship's oil cargo remained on board. The vessel had been loaded with 1.26 million barrels of oil (54 million gallons). Upon notification of

634 *See* Shaw, *supra* note 631, 162.

635 *See European Maritime Safety Agency* (EMSA) *Action Plan for Oil Pollution Preparedness and Response, supra* note 633, 42 seq.

636 *See* Nesterowicz, *supra* note 37, 38.

637 *See* EMSA *Action Plan for Oil Pollution Preparedness and Response, supra* note 633, 45.

638 *Id.* at 46.

639 The brief presentation of the Exxon Valdez is based on UNDERSTANDING OF OIL SPILLS AND OIL SPILL RESPONSE, *supra* note 628, 37 *seq.*

the incident, the On-Scene Coordinator (OSC) closed the Port of Valdez to all traffic. Damage was assessed by the USCG. By noon of the 25th of March, the Alaska Regional Response Team met by teleconference. The National Response Team was convened soon thereafter. The private operator of the trans-Alaska pipeline and the shipping terminal at Valdez first assumed responsibility for the cleanup, and an emergency communication center was opened in Valdez; a second operations center was set up in Anchorage, Alaska. It is noticeable that the OSC, in cooperation with the Exxon Corporation, established a number of goals for the response, including the prevention of additional spilling of oil; in actual fact, fourty-three million gallons of oil were at that stage still onboard. While the private operator exploiting the trans-Alaska pipeline and the shipping terminal had some equipment, the eleven million-gallon spill was possibly not addressed by existing apparatus. As the spill site was located two hours by boat from the port of Valdez, the response was operated from mobile platforms, and equipment had to be air-dropped or delivered by boat. On the second day of the spill, Exxon assumed responsibility for the cleanup and its costs. Three methods were attempted in the effort to cleanup the spill: in-situ burning, chemical dispersants, and mechanical cleanup.

On 12 June 1992, more than three years after the spill, the Coast Guard announced that the cleanup activities should end. The cost of the operations amounted to billions of dollars and the cost of legal settlements in millions more. Injury to the environment affected all levels. As a result of this incident, legislature in the U.S. adopted additional measures in the framework of OPA, requiring all tank vessels of 20,000 tons or greater to carry special equipment that would enable the vessel, the captain and the vessel traffic center in Valdez to communicate better for sailing through that area[640].

The New Carissa incident along the Pacific coast of Oregon in February 1999 resulted in the grounding of the vessel in a context of dramatic steps to ignite and burn the oil with explosives and then to sink it with a torpedo[641]. This maritime casualty highlighted the absence of any requirements in OPA for dry cargo or freight vessels to provide vessel response plans to the USCG, which was remedied at a subsequent stage[642]. The incident also shed light on shortcomings concerning salvage; significantly, it was maintained that the New Carissa might have been saved and the spill prevented if tugs boats or a salvage vessel had arrived sooner[643].

The unique features of each incident render the adoption of appropriate legal measures on preparedness and response a complex task.

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640 Under 33 C.F.R. § 165.1704, a tank vessel of 20,000 deadweight tons or more that intends to navigate within Prince William Sound, Alaska-regulated navigation area, must notably report compliance with respect to a number of requirements to the Vessel Traffic Center (VTC) and have special equipment.

641 *See* Kiern, *supra* note 22, 486.

642 *Id.*

643 *See* New Carissa FOSC Calls for Better Salvage Capacity, OIL SPILL INTELLIGENCE REP. (Cutter Info. Group), Jan. 6, 2000, at 1, cited in Kiern, *id.*, 487.

2.2. The legal framework: Building on the the International Convention on Oil Pollution, Preparedness, Response, and Cooperation (OPRC) and on regional cooperation

It is obvious that a coastal State must be prepared to respond to maritime casualties. Spill response options are far from being a monolithic choice since each incident is likely to reveal particularities requiring the expertise of specialists and the choice of specific and/or combined remedies. Indicatively, methods used vary considerably (e.g. mechanical recovery at sea (booms, skimmers grabs and response vessels equipped with sweeping-arm oil recovery systems), aerial application of dispersant chemicals, *in-situ* burning and shoreline cleanup[644].

A whole region, which implies more than one State involved, may be called upon to respond effectively to a casualty at sea; this is largely the case with EU Member States having a shoreline in the Baltic Sea, the North Sea, the Atlantic coast, the Mediterranean Sea and the Black Sea. High or poor levels of performance in responding to maritime casualties, including oil and "chemical"[645] spills, complement preventive measures. While it is not clear whether high levels of performance in responding to casualties may counterbalance deficiencies at the preventive level, it is self-evident that poor levels of performance in response may contribute to minimizing or totally invalidating the positive effects of prevention. As pointed out by the European Maritime Safety Agency (EMSA), in its Action Plan for Oil Pollution Preparedness and Response, for every tonne of oil recovered at sea, an estimated 10 tonnes of shoreline clean-up waste material is avoided[646].

The challenge of effective and prompt response is enormous, yet far from being taken for granted[647].

It is not in our intention to address in an exhaustive manner the issue of preparedness and response[648]. Selective developments will be devoted to this question as

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644 *See European Maritime Safety Agency* (EMSA) *Action Plan for Oil Pollution Preparedness and Response*, *supra* note 633, 36 *seq.*

645 The so-called chemical spills are spills relating to hazardous and noxious substances (HNS).

646 *See* EMSA *Action Plan for Oil Pollution Preparedness and Response, supra* note 633, 4.

647 Indicatively, limited research has been conducted with a view to identifying and comparing the best practices of States in funding and assessing preparedness measures and ability to respond effectively to catastrophic oil spills. *See* Veiga, *supra* note1. *See* also *EMSA Action Plan for Oil Pollution Preparedness and Response, supra* note 633, which constitutes a comprehensive report on the preparedness and response in the frame of the EU with regard to oil spills, id. *See* also the *EMSA Action Plan for HNS Pollution Preparedness and Response, available at* http://www.emsa.europa.eu/end185d014.html (last visit 31.10.2007) and *EMSA Work Programme 2007, available at* http://www.emsa.europa.eu/end185d014.html (last visit 24.10.2007). On response salvage and intervention, see *Lord Donaldson's Review, Salvage and Intervention, Command and Control, supra* note 631.

648 Several aspects of the issue are addressed in the documentation provided by EMSA and the Environmental Protection Agency (EPA) (US). Notably see the Action Plans by

a departing point for the comparison that will be attempted on the EU's and the U.S.'s respective regimes and ensuing correlations.

2.2.1. The international instruments

The International Convention on Oil Pollution Preparedness, Response, and Co-operation (OPRC), which was adopted by the IMO in 1990, has been in force internationally since 1995 and provides for reporting of casualties, contingency plans and salvage policy. All littoral Member States in the EU are parties to the Convention, as well as the U.S.. This is the instrument on which the response policy of a considerable number of EU Member States is based[649].

The convention requires vessels and harbour authorities to have oil pollution emergency plans and provides for oil pollution reporting procedures, including national contingency plans, as well as the promotion of international cooperation on exchange of information on oil pollution incidents[650]. Parties to the Convention are required to provide assistance to others in the event of a pollution emergency, and the assistance provided is subject to reimbursement. In addition to the OPRC Convention, a Protocol to the said Convention addressing incidents involving hazardous and noxious substances (HNS) has been in force since June 2007; at this stage, this instrument has not been ratified either by the entirety of EU Member States or by the U.S..

The need and concern for cooperation between salvors, other interested parties and public authorities in order to ensure the successful performance of salvage operations for the purpose of saving property in danger and preventing environmental damage, is also reflected in the Salvage Convention 1989[651], which is currently in force and to which both the majority of EU Member States and the U.S.[652] are parties.

Interestingly, UNCLOS 1982 rightly provides that "in taking measures to prevent, reduce or control pollution of the marine environment, States shall so act so

EMSA referred to above under notes 623 and 624 and the information provided by the EPA *available at* http://www.epa.gov/oilspill/lawsregs.htm (last visit 11.3.2006).

649 *See* the EMSA *Action Plan for Oil Pollution Preparedness and Response, supra* note 633, 12.

650 *See* Shaw, *supra* note 631. *See* in particular Articles 3, 4 and 5 of the Convention. Article 3 requires States parties to adopt legislative measures requiring ships flying their flag to have on board a Shipboard Oil Pollution Emergency Plan (SOPEP) complying with applicable international standards; Article 4 provides for the obligation of States parties to adopt legislative measures requiring the master of ships which fly its flag to report any event on their ship involving a discharge or probable discharge of oil to the flag State and the nearest coastal State; Article 5 requires the authorities of the State receiving such a report to assess the nature, extent and possible consequences of the incident and to inform without delay all States likely to be affected, together with details of its assessment and any action to be taken.

651 *See* Article II of the Salvage Convention 1989.

652 On the implementation of the Salvage Convention 1989 in the U.S. see *Response of Maritime Law Association of the U.S. to the CMI Places of refuge Questionnaire, available at* http://www.mlaus.org/article.ihtml?id=610&folder=103 (last visit 2.12.2007).

as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another"[653].

The ability to deal with response to maritime casualties is sometimes put to the test in the particular context of the issue of granting or refusing permission to a vessel in danger to have access to a place of refuge. According to the IMO, a place of refuge is a place where the vessel "can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment"[654]. A vessel in need of assistance is a ship in a situation, apart from one requiring rescue of persons on board, which could give rise to loss of the vessel or an environmental or navigational hazard[655].

A lot of ink has been spent on places of refuge and the ability to respond in the event of maritime casualties, including studies commissioned by the Comité Maritime International (CMI) and EMSA[656]; yet, a number of issues provoke the need for simplification. Granting access to a place of refuge often involves a political decision, which can only be taken on a case-by-case basis with due consideration given to the balance between the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge, and the risk to the environment resulting from that ship being near the coast[657].

IMO Guidelines on places of refuge for ships in need of assistance mirror the existing legal regime and provide Member Governments, shipmasters, companies and salvors with a framework which should enable them to respond. Analysis factors are provided for, which render the assessment of the incident in view of the adoption of appropriate response in a place of haven more concrete[658]. However, it should be recalled that the guidelines in question are not mandatory and that Member States will use them in the context of applicable national and international law. After all, "when permission to access a place of refuge is requested,

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653 *See* Article 195 of UNCLOS 1982.

654 *See* IMO Resolution A.949(23) adopted on 5 December 2003 on Guidelines on places of refuge for ships in need of assistance, 1.19. *See* also IMO Resolution A.950(23) adopted on 5 December 2003 on Maritime assistance services (MAS), i.e. services, in circumstances of a ship's operation not requiring rescue of persons, which are responsible for receiving reports in the event of incidents and serving as a point of contact between the shipmaster and the authorities of the coastal State in the event of an incident.

655 *See* Resolution A.949(23), *id.*, 1.18. It should be borne in mind that when human lives are endangered due to an incident at sea, the applicable instrument is the International Convention on Maritime Search and Rescue (SAR).

656 *See* Erik Rosaeg and Henrik Ringbom, *Liability and Compensation with Regard to Places of Refuge*, Final report commissioned by EMSA, October 2004, *available at* http://www.emsa.europa.eu/Docs/other/places%20of%20refuge%20study%20def.pdf (last visit 26.6.2007). *See* also various contributions on places of refuge in the Comité Maritime International Yearbook 2005-2006, *available at* http://www. comitemaritime. org/year/2005_6/2005_6_idx.html (last visit 26.6.2007). In addition to the above, see: Sink *oe Shelter?-A Question of Collective Responsibility in Ship Safety*, Fourth Cadwallader Annual Memorial Lecture, The London Shipping Center, Proceeding published at 2/3 Int. M. L. 47-58 (2001).

657 *See* IMO Resolution A.949(23), *supra* note 654, 1.7.

658 *Id.* at 3.9.

there is no obligation for the coastal State to grant it, but the coastal State would weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible"[659]. In any case, liability concerns should not supersede technical and environmental concerns in the taking of the decision to grant or refuse access to a place of refuge[660].

The above legal framework is subject to a non-uniform implementation by EU Member States. which the EU endeavors to remedy.

2.2.2. The EU: Softening discrepancies between Member States, reinforcing capacities and cordination

The EU uses a number of tools with a view to enhancing the capacity of its Member States in the field of preparedness and response, including the harmonization process and regional cooperation. The competent bodies involved are notably the European Commission and EMSA.

2.2.2.1. The tool of harmonization

In the light of Directive 2002/59/EC on the establishment of a Community vessel traffic monitoring and information system[661], the European Community adopted a number of measures to be transposed in the legal order of Member States "with a view to enhancing the safety and efficiency of maritime traffic, improving the response of authorities to incidents, accidents or potentially dangerous situations at sea, including search and rescue operations, and contributing to a better prevention and detection of pollution by ships"[662]. The Directive constitutes a framework of action and the role of Member States and other stakeholders concerned, including masters, operators or agents of ships, shippers or owners of dangerous or polluting goods carried on board ships, should not be neglected[663]. The instrument notably provides for reporting and monitoring obligations, including the use of automatic

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659 *Id.* at 3.12. Reasonableness is also a key point in the context of liability which is likely to arise in the circumstances where a coastal State grants or refuses to grant permission for access to a place of refuge and for the ensuing environmental and other damage that is likely to occur. As a matter of fact, the concept of reasonableness has not yet been applied to decisions taken by coastal States authorities in a place of refuge situation. *See* Rosaeg and Ringbom, *supra* note 656, 68.

660 According to the above-mentioned report on Liability and Compensation with Regard to Places of Refuge, "[…the decision by the coastal State to accept or refuse the request for access by a ship in distress] should be made on the basis of technical and environmental criteria. Liability rules should, if anything, encourage and support decisions to be made on sound technical-environmental grounds and discourage the opposite". *Id.* at 7.

661 *See* 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, OJ 2002 L 208/10.

662 *See* Article 1 para. 1 of Directive 2002/59/EC.

663 *See* Article 1 para. 2 of Directive 2002/59/EC.

identification and voyage recorder systems[664]. For example the master of a ship must immediately report any incident or accident affecting the safety of the ship, any incident or accident which compromises shipping safety, any situation liable to lead to pollution of the waters or shore of a Member State or any slick of polluting materials and containers or packages seen drifting at sea[665]. Member States are held to adopt appropriate measures to address incidents or accidents at sea and to require private parties concerned to cooperate fully with them in order to minimize the consequences of the incident.

Places of refuge are also mentioned in the Directive: Member States are held to establish on the basis of relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans should contain the necessary arrangements and procedures, taking into account operational and environmental constraints, to ensure that ships in distress may immediately be sheltered in a place of refuge subject to the authorization by the competent authority. Where the Member State considers it necessary and feasible, the plans must contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response[666].

The European Commission and EMSA support Member States in the task of preparedness and response.

2.2.2.2. The institutional framework in support of preparedness and response: The European Commission and the European Maritime Safety Agency acting jointly and separately

While the preparedness and the issue of the ability of EU Member States to respond to maritime casualties initially reflected a concern of the European Commission, notably via the Community mechanism on facilitating reinforced cooperation in civil protection assistance interventions[667] and the Community framework for cooperation in the field of accidental or deliberate marine pollution[668], it

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664 *See inter alia* Title I of the Directive.

665 *See* Article 17 of Directive 2002/59/EC.

666 *See* Article 20 of Directive 2002/59/EC.

667 Council Decision 2001/792/EC, Euratom of 23 October 2001 which established a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions (OJ 2001 L 297/7). *See* EMSA *Action Plan for Oil Pollution Preparedness and Response, supra* note 633, 22 *seq.*

668 *See* Decision No. 2850/2000/EC of the European Parliament and of the Council of 20 December 2000 which set up a Community framework for cooperation in the field of accidental or deliberate marine pollution for the period from 1st January 2000 to 31 December 2006 (OJ 2000 L 332/1). The Community framework notably aimed at supporting and supplementing Member States' efforts at national, regional and local levels for the protection of the marine environment. *See EMSA Action Plan for Oil Pollution Preparedness and Response, id*, 21 *seq*. *See* also *The Community Framework for Cooperation in the Field of Accidental or Deliberate Marine Pollution*, http://ec.europa.eu/environment/civil/marin/mp01_en_introduction.htm (last visit 30.10.2007). On the regime following the Community framework on accidental and deliberate pollution, see the Communication from the Commission to the Council and the European

is to be noted that newly-born EMSA is called upon to provide a new boost to this area in cooperation with EU Member States and regional fora.

The Community mechanism on facilitating reinforced cooperation in civil protection assistance interventions was established in 2001 with a view to providing on-demand support in the event of emergencies, and enhancing the coordination of assistance provided by the Member States and the Community[669]. As pointed out by the European Commission, while there are several regional agreements on accidental marine pollution facilitating mutual assistance and cooperation among the Member States, the civil protection mechanism constitutes the reference tool at the Community level for facilitating mobilisation of assistance among Member States in the event of marine pollution accident[670].

The Community framework for cooperation in the field of accidental or deliberate marine pollution was adopted on the basis of Article 175 of the EC Treaty in order to contribute to the improvement of the capacity of Member States to intervene in the event of spillage or imminent threat of spillage of oil or other harmful substances into the sea[671]; its duration covered the period from 1 January 2000 to 31 December 2006. Illustrations of the cooperation in question are provided by the Community Information System (CIS)[672] and the Management Committee for Marine Pollution (MCMP)[673]. The Community framework for cooperation gave rise to implementation via annual plans under the form of courses and seminars, exchanges of experts, exercises, or pilot projects focused on intervention and clean-up techniques and methods[674]. While the European Commission stated that the Community framework for cooperation which expired in December 2006 would not be renewed in its current form, enhancing preparedness after 2007 was intended to continue to be an objective of the Community, in combination with the contribution of EMSA and of a number of Community programmes, particularly under cohesion and research policy[675].

Parliament, to the European Commission and Social Committee and to the Committe of the Regions entitled *Cooperation in the Field of Accidental or Deliberate Marine Pollution After 2007*, COM(2006)863 final. The Communication refers to the intentions of the European Commission in this field after the expiration of the period of action covered by Decision No. 2850/2000/EC.

669 *Id.* at 4.

670 *Id.*

671 *See* Communication from the Commission to the Council and the European Parliament to the European Economic and Social Committee and to the Committee of the Regions on the *Cooperation in the Field of Accidental or Deliberate Marine Pollution After 2007*, COM(2006)863 final, Brussels, 22.12.2006, 3.

672 The Community Information System (CIS) relates to the exchange of data between the Member States on intervention capacity and measures taken in the event of accidental or deliberate marine pollution. *Id.* at 3.

673 The Management Committee for Marine Pollution (MCMP) brings together experts from the administrations of the Member States in the environmental, transport and coastguard fields and constitutes a European forum for the exchange of good practice between the Member States. *Id.* at 4.

674 *Id.* at 3.

675 *Id.* at 7 *seq.*

The EMSA acts in support of the Community mechanism on civil protection[676]. Its role is also in harmony with the aims of the framework of cooperation in the field of accidental or deliberate marine pollution, which was brought to a formal end, as mentioned above, in December 2006. The added value of the contribution of EMSA in the field of preparedness and response is a challenge. It should be understood that EMSA does not constitute a Coast Guard body, but a specialized expert body within the Community's existing institutional structure, which has legal personality[677]. EMSA, which was created in 2002[678], upon entry into force of Regulation 724/2004/EC, has a legal obligation in the field of response to ship-sourced pollution within the Community. While EMSA is not legally competent to establish minimum standards for oil spill preparedness and response in the EU, it has an important role to perform in terms of promotion of best practices among Member States, coordination, exchange and dissemination of information and operational assistance[679]. EMSA assists the European Commission in preparatory work for the elaboration of Community legislation in these fields[680]; it also assists the European Community in the effective implementation of Community legislation on prevention and response to pollution caused by ships[681], supports Member States with additional means in a cost-efficient way[682] and is required to provide the Commission and Member States with objective and comparable data on pollution to enable them to improve their actions[683]. For the additional means mentioned above, coastal States remain responsible[684].

The role of EMSA in Europe should be understood in the light of national competency by EU Member States on response capacity and the contribution of regional *fora* of cooperation.

2.2.2.3. Regional cooperation in Europe

There are four regional instruments in Europe which are of interest to preparedness and response, namely the Helsinki Convention[685], with reference to the countries bordering the Baltic Sea, the Barcelona Convention[686], with regard to the Mediterranean Sea, the Bonn Agreement[687], with regard to the North Sea and the

676 *Id.* at 5.
677 *See* Article 5 of Regulation 1406/2002/EC.
678 Regulation 1406/2002/EC established EMSA in the aftermath of the Prestige incident. Amendments.
679 *See* EMSA *Action Plan for Oil Pollution Preparedness and Response, supra* note 633, 4 and 57 *seq.*
680 *See* Article 2 para. a of Regulation 724/2004/EC.
681 *See* Article 2 para. b of Regulation 724/2004/EC.
682 *See* Article 2 para. ciii of Regulation 724/2004/EC.
683 *See* Article 2 para. f of Regulation 724/2004/EC.
684 *See* EMSA *Action Plan for Oil Pollution Preparedness and Response, supra* note 633, 6.
685 *Id.* at 13.
686 *Id.* at 15 *seq.*
687 *See* http://www.bonnagreement.org/ (last visit 11.11.2007).

Lisbon Agreement[688], which covers mutual assistance between France, Spain, Portugal and the Morocco.

The following entities participate in the aforementioned agreements, whose purpose is to facilitate mutual assistance when a pollution casualty occurs on the coasts of the States involved, i.e. EU Member States with a shoreline within a specific geographical area (e.g. coastal States in the Baltic sea), the European Commission, third countries (non-EU members) and States from the European Economic Area (EEA). It should be noted that a Member State is not precluded from participating in more than one regional agreement.

Two issues are notably likely to be of interest in the context of regional cooperation and response to maritime incidents: firstly, the position, legally speaking, of the European Commission towards regional instruments and secondly, the practical operation of the agreements in question, especially in the light of possible synergies with the EU.

The European Commission is a contracting party to all the above-mentioned regional agreements[689]. As it has already been mentioned, the European Commission is also a contracting party to a number of international agreements on marine environment such as UNCLOS 1992 and the 1992 Paris Convention for the Protection of the Coasts of the North-East Atlantic (OSPAR). Upon ratification by the Community of an agreement concluded with an international organization or a State(s), the agreement in question becomes binding upon Member States and institutions of the EC[690] and forms part of the EC supranational legal order[691]. It has been contended that the Commission has refrained from engaging in systematic monitoring and following-up of the due application of the agreements in question, leaving the responsibility for implementation effectively with Member States[692].

In practice, the above-mentioned regional agreements reflect different variations from the point of view of their administrative structure and operation, which go beyond the scope of our developments. It deserves a special mention however, that the regional agreements in question operate in cooperation with EMSA and the aforementioned Community mechanism on cooperation in civil protection assistance. The above-mentioned cooperation does not supersede the prime role of individual EU Member States in this field.

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688 *See Lisbon Agreement*: *Cooperation Agreement for the Protection of the Coasts and the North-East Atlantic Against Pollution*, 8 RECIEL 1 (1999) (The text of the agreement is presented with a brief editorial explanation).

689 On the institutional aspects of regional agreements on the marine environment and the EU, see E. Hey, *The EC's Courts and International Environmental Agreements*, 7 RECIEL 7 (1999), Martin Hedermann-Robinson, *Protection of the Marine Environment and the European Union: Some Critical Reflections on Law*, *Policy and Practice*, 10 JIML 3 (2004).

690 *See* Article 300(7) of the EC Treaty.

691 *See* ECJ, 30.4.1974, *Haegemann v. Belgian State*, 181/73, ECR 1974, 449 and Court of First Instance of the EC, 22.1.1997, *Opel Austria GmbH v. Council of the EU*, T-115/94, ECR 1997, II-39.

692 *See* Hedemann-Robinson, *supra* note 689, 269.

2.2.2.4. National implementation: Discrepancies and challenges

EU Member States have built on the International Convention on Oil Pollution Preparedness, Response, and Cooperation (OPRC) in view of the development of their preparedness and response capacities. Two particular aspects deserve special attention at this stage: firstly, mention of the principles on which the mechanism of preparedness and response is based, and secondly, the reality of spill response options.

Contrary to the U.S., Canada, Australia, Finland and Malaysia, which have adopted the so-called Government-potential Polluter Approach, the majority of EU Member States have chosen the Government-only approach[693]. In the light of the Government-potential Polluter Approach, a legal obligation is placed upon the potential polluter (i.e. private operator) to finance and implement preparedness and response measures under the direction of the government[694]; in the light of the Government-only approach, the polluter is asked to cover the measurable costs of the response, and government authorities assume full responsibility in the execution of preparedness and response measures[695]. In the second system, the general taxpayer pays the full costs of preparedness and response that do not fall under existing international insurance schemes[696].

Despite the fact that the majority of EU Member States selected the Government-only approach, preparedness and response far from reflect homogeneous national practices[697]. For example, coastal States in the EU bordering the Mediterranean Sea seem to present deficiencies with regard to large on-board recovered oil storage capacity[698]. In addition to this, the new Member States have a lesser degree of response capacity than, in general, the EU 15 Member States, while the coastal States bordering the Baltic and North seas have elaborated a policy of regular testing and exercising in the field of preparedness and response[699]. With regard to particular Member States, it is noticeable that countries such as the United Kingdom and France have been able to integrate salvage into contingency planning, and that

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693 *See* Veiga, *supra* note 1, 172 *seq*. On the Polluter Pays Principle notably see Eric Thomas Larson, *Why Environmental Liability Regimes in the United States, the European Community, and Japan have grown synonymous with the Polluter Pays Principle*, 38 VAND. J. TRANSNAT'L. 541 (2005).

694 *Id.*

695 *Id.*

696 *Id.*

697 A brief overview of the situation in a number of EU Member States is provided by the EMSA *Action Plan for Oil Pollution Preparedness and Response, supra* note 633, 53 *seq*. *See* also Veiga, *supra* note 1. With regard to salvage and intervention, a brief description of applicable legal regimes in Australia, Belgium, Canada, France, Germany, the Netherlands, Norway, South Africa, Sweden and the USA is provided in the Annex of *Lord Donaldson's Review, Salvage and Intervention, Command and Control, supra* note 631.

698 *See* EMSA *Action Plan for Oil Pollution Preparedness and Response, supra* note 633, 54.

699 *Id.*

they have also ensured a budget for the provision of standby tugs[700]. On Portugal, a failure to implement contingency planning is reported "due to lack of funding and political willingness"[701]. The case of Spain is more delicate: while some drawbacks were apparent because of the slowness of operations and the failure to minimise environmental and economic harm in the aftermath of The Prestige incident, contingency planning practices were subject to improvements[702]. These observations are only indicative of the situation in the EU, and the evolving nature of these policy-making issues should be borne in mind.

In the U.S., preparedness and response are subject to a more systematic approach, which is undoubtedly facilitated by the federal structure of that State, its exposure to a number of natural risks requiring unified command and its long tradition on management.

2.2.3. Being proactive in the U.S.

2.2.3.1. Key concepts and legal instruments

As has been mentioned above, until 1967, where the incident relating to Torrey Canyon took place in Europe, the U.S. had not formally addressed the potential for major oil or hazardous substance spills[703]. In the aftermath of the experience stemming from this casualty, the National Oil and Hazardous Substances Pollution Contingency Plan, more commonly known as the National Contingency Plan (NCP), which provided for the National Response System (NRS), was established[704]. The 1968 plan "provided the first comprehensive system of accident reporting, spill containment, and cleanup…."[705].

The aforementioned OPRC Convention (1990) was ratified by the U.S. and legislation was adopted in view of giving effect to its provisions[706]. The U.S. Coast Guard has the lead over OPRC Convention but is not alone in this task. Interestingly, the U.S. is reported, prior to the entry into force of the Convention in 1995, to have "effectively put into practice on a provisional basis [the Convention] to respond to the oil pollution caused by the 1991 War in the Persian Gulf"[707].

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700 *See* Veiga, *supra* note 1, 175.

701 *Id.* at 180.

702 *Id.* at 181.

703 *See supra* under 2.1.

704 *See* the Regulations provided for in 40 CFR 300. On NCP notably see *supra* note 622 and http://www.uscg.mil/hq/g-m/nmc/response/#links (last visit 27.11.2007). On prevention and response in the U.S., also note Leslie Ray, OIL SPILL PREVENTION AND RESPONSE: HOW TO COMPLY WITH OPA AND OSPRA (1994).

705 *See* http://www.epa.gov/oilspill/ncpover.htm (last visit 22.10.2007).

706 *See* Senate Treaty Doc. 102-11.

707 *See* http://nosinternational.noaa.gov/conv/oprc.html (last visit 2.12.2007).

Reporting provisions provided for in OPRC Convention are provided for in Title 33 U.S.C. of the U.S. Code[708]. Existing regulations govern in detail reportable incidents and specify the form and time[709] of relevant notifications. "Marine casualties or accidents" applies to events caused by or involving a vessel and includes, but is not limited to, groundings, strandings, collision, explosion, as well as any incident involving significant harm to the environment[710]. The type of casualties which must be reported to the USCG are also provided for[711]. The owner, agent, master, operator, or person in charge of the vessel must notify under the regulations the nearest Coast Guard Marine Safety or Marine Inspection Office of any relevant casualty[712]. Serious marine incidents, notably including those relating to discharges of oil of 10,000 gallons or more into navigable waters of the U.S., are also reportable[713].

In addition to the above, the U.S., as called for by the Convention[714], has adopted Shipboard Oil Pollution Emergency Plans (SOPEP) regulations[715].

The NCP, which reflects a requirement of the Convention, deserves a special focus. The NCP should be understood as the organizational structure and procedures for preparing for and responding to discharges of oil and hazardous substances on both water and land[716]. This is a network of individuals and teams from local, state and federal agencies who combine their expertise and resources against oil pollution, including cleanup activities[717]. A contingency plan usually covers four directions, namely hazard identification, vulnerability analysis, risk assessment and response actions. The NCP, which has been subject to revisions over the years, seeks to ensure "that the resources and expertise of the federal government would be available for those relatively rare, but very serious, oil spills that require a national response"[718].

It should be noted that NRS comprises three important components, namely the On-scene coordinator (OSC), the National Response Team (NRT), and the Regional Response Team (RRT). OSC, who are federal officials responsible for di-

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[708] *See* Article 4 of the Convention. In the U.S., see U.S. §1906(b). Of interest is the Response of Maritime Law Association of the U.S. to the CMI Places of refuge Questionnaire, *supra* note 644.

[709] E.g. with regard to the notification of reportable marine incidents, the notification must be completed immediately after the safety concerns for the vessel have been addressed (46 C.F.R. §4.05-1).

[710] 46 C.F.R. § 4.03-1.

[711] *See* 46 C.F.R. § 4.05. Notably see Joseph W. Janssen, Jennifer A. Kerr and John W. Keller III, *Marine Casualty Reporting and Investigation*, 24 TUL. MAR. L. J. 167 (1999).

[712] *See* 46 C.F.R. § 4.05-1(a).

[713] *See* 46 C.F.R. § 4.03-2.

[714] Article 3.

[715] *See* 33 C.F.R. 151.26.

[716] *See* Jonathan L. Ramseur and Mark Reisch, *Environmental Activities of the U.S. Coast Guard*, Congressional Research Service (CRS) Report for Congress RS22145, 3.

[717] *See supra* note 704.

[718] *Id.*, at 29. For smaller areas other plans are available, namely Area Contingency Plans and Facility Contingency Plans.

recting response actions and coordinating all other efforts at the scene of the incident, originate from the USCG, the U.S. EPA, the U.S. Department of Energy and the U.S. Department of Defense. An OSC evaluates the size and nature of a spill and its potential hazards. Throughout the operation, the OSC monitors the actions adopted for the control and clean up of the spill. The NRT is an organization of 16 federal agencies with environmental responsibilities. The EPA serves as the NRT's chair and the Coast Guard serves as the vice chair. Its task relates to the distribution of information, the planning of emergencies and the training for emergencies; it is noticeable that the NRT does not respond directly to incidents. Last but not least, the RRT represents a particular geographic region of the U.S., including Alaska, the Caribbean and the Pacific Basin.

The National Response System is activated when the National Response Center, which is located in Washington, D.C., is notified of an oil spill.

Interestingly, an Incident Command System (ICS) was elaborated in the 1970s[719], which supports the above mechanisms. ICS seeks to provide standard response and operation procedures in order to reduce the problems and potential for miscommunication surrounding incidents, given the fact that when a casualty takes place, people from multiples agencies who do not routinely work together are called on to cooperate[720].

It is not in the scope of this paper to analyze the above concepts, whose presentation is intended for the overall understanding of existing mechanisms of preparedness and response. It is necessary, however, to have an insight into the existing legal framework.

2.2.3.2. Brief overview of laws and policies on preparedness and response: From CWA to SARA

While the Oil Pollution Act (1990) constitutes the chief federal legislation on marine pollution, since it establishes a comprehensive scheme for prevention, removal, liability, compensation, and penalties relating to oil pollution, the preexisting federal legislation, including the Federal Water Pollution Control Act (Clean Water Act)[721] , remains in effect except for the imposition of liability which is subject to OPA 1990[722]. The Clean Water Act 1972, which was the principal statute on oil pollution legislation prior to the adoption of OPA, provides for requirements on pollution prevention and response measures[723].

The President of the U.S. is the key person under the Clean Water Act for a plethora of important competencies concerning preparedness and response. He is entitled to institute means for the removal of an oil discharge and for mitigation or

719 *See* http://en.wikipedia.org/wiki/Unity_of_command (last visit 23.10.2007).

720 *Id.* It should be noted that the ICS is articulated over a number of key concepts, including: Unity of command, i.e. each individual participating in the operation reports to only one supervision common terminology; Span-of-control, i.e. the limitation of the number of responsibilities entrusted to an individual, etc.

721 *See* 33 U.S.C. §§ 1251-1387 (1988).

722 *See* Rodriguez and Jaffe, *supra* note 43, 1.

723 *See* 33 U.S.C. §1321.

prevention of the threat of a discharge into the navigable waters of the U.S. or adjoining shorelines, into or in the exclusive economic zone, or that may affect natural resources of the U.S. In so doing, the President has the authority to make any arrangement for removal or prevention, to direct removal actions, and to remove or destroy a vessel releasing or posing a threat of releasing[724] In addition to this, the President has the right to direct all Federal, state and private actions to remove a discharge, or mitigate or prevent the threat of a discharge from onshore or offshore facilities where such discharge is determined to be a substantial threat to the public health or welfare of the U.S.[725]. Moreover, the President is required to establish methods and procedures for removal of discharge oil and hazardous substances as part of the NRS[726]; he is also authorized to issue regulations establishing procedures, methods, equipment, and other requirements to prevent discharges of oil from vessels and facilities[727]. The powers of the President also extend to the establishment of regulations for facility and vessel response plans[728].

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which is commonly known as Superfund, was adopted in 1980 in view of the creation of a tax on the chemical and petroleum industries. Broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment, was provided for[729]. The tax in question was levied in a trust fund for cleaning up abandoned or uncontrolled hazardous waste sites. CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA) in 1986[730].

The OPA 1990 contains provisions on removal and response, mainly from the angle of liability. The Oil Pollution Act provides that the responsible party for a vessel or facility from which oil is discharged, or which poses a substantial threat of a discharge is liable not only for "certain specified damages" resulting from the discharge of oil, but also for removal costs incurred in a manner consistent with the NCP[731]. In addition to this, States are given access under OPA to Federal funds (per incident) for immediate removal, mitigation, or prevention of a discharge, and may be reimbursed by the Trust fund[732] for removal and monitoring costs incurred during oil spill response and cleanup efforts that are consistent with the NCP[733]. Moreover, the strengthening of planning and prevention activities was addressed by OPA by providing for the establishment of spill contingency plans for all areas of the U.S.[734] and by mandating the development of response plans for individual tank vessels and the development of certain facilities for responding to a worst

[724] *See* § 311(c)(1) of the CWA.
[725] *See* § 311(c)(2) of the CWA.
[726] *See* § 311(j)(1)(A) of the CWA.
[727] *See* § 311(j)(1)(C) of the CWA.
[728] *See* § 311(j)(5) of the CWA.
[729] *See* http://www.epa.gov/superfund/policy/cercla.htm (last visit 22.10.2007).
[730] Codified at 42 U.S.C. § 9601 *et seq.*
[731] *See* § 1002(a) of OPA.
[732] *See* www.epa.gov/OEM/content/lawsregs/opaover.htm (last visit 30.1.2008).
[733] *See* § 1019 of OPA.
[734] *See* § 4202 of OPA.

case discharge or a substantial threat of such a discharge[735]. Requirements for spill removal equipment and periodic inspections were also provided for under OPA[736]. In addition to the above, response is enhanced by the imposition of sanctions: failing to notify the appropriate Federal agency of a discharge gives rise to fines and to imprisonment[737], while failure to comply with a Federal removal order can result in civil penalties[738].

2.3. Assessment

In a study published in 2004 which aimed at the comparative analysis of approaches to dealing with major oil spills[739], four parameters were taken into consideration for the evaluation of the past responses of governments to major oil spills, namely emergency towing arrangements, contingency planning practices, response performance in selected past spills, and oil pollution legislation. While the study did not contend to provide "an accurate measurement of the situation"[740], it did, however, provide some indication on the national levels of performance in the preparedness system. In the light of the above, it was suggested that "the model implemented by the U.S. has in fact provided a baseline for measuring contingency planning in the rest of the countries"[741], such as, for example, the Incident Command System (ICS) which was adopted by the U.S. in 1996 and nowadays constitutes a global standard for spill response management[742].

For the European Commission, even though there is room for improvements after the expiry in December 2006 of the Community framework for cooperation in the field of accidental or deliberate marine pollution, the effectiveness of Community measures is far from being underestimated[743]; the EMSA, which is a more

735 *Id.*
736 *Id.*
737 § 4301(a) and (c) of OPA.
738 § 4301(b) of OPA.
739 *See* Veiga, *supra* note 1.
740 *Id.* at 173.
741 *Id.* at 176.
742 *See* http://www.training.fema.gov/EMIWeb/IS/ICResource/index.htm, ICS *Review Document* (last visit 22.3.2008).
743 According to the European Commission, "The actions carried out so far have had a significant impact. They have contributed to the emergence of certain legislative instruments". In addition to this, according to the European Commission, in the aftermath of the Prestige accident, "the MIC [Moniting and Information Centre] responded immediately to the requests for assistance from the Spanish authorities, facilitating the dispatch of specialised vessels, floating barriers and surveillance planes to the scene. The Commission also quickly set up an observer mission in Galicia. In addition, it contributed to ensuring coordination between Spain, Portugal and France, so that sufficient resources were made available to each of the three countries affected by the accident…". *See* the Communication from the Commission to the Council and the European Parliament, to the European Commission and Social Committee and to the Committee of the Regions

specialized body in this field, seems to share a more reserved attitude on the achievements, and demonstrates eagerness for improvements[744].

It is clear that the federal structure of the U.S. supports considerably the task of preparedness and response, which is, as described above, largely based, in practice, on coordination and management. In EMSA sources, drawbacks of the situation on preparedness and response in Europe, some of which were addressed above, are noted. This may suggest that the system has the potential for gaining from the experience obtained in the U.S., and the question is the extent of such influence. While national contingency plans of Member States have to satisfy international (OPRC Convention) requirements as minimum standards, National Contingency Plans vary considerably. Financial means at the disposal of Member States in view of the activation of such programs are also subject to national budget restrictions and priorities, which naturally differ.

In the above context, there is room in the EU for meticulous control by the European Commission of the compliance by Member States to the above mentioned Directive 2002/59/EC on the establishment of a Community vessel traffic monitoring and information system. Moreover, enhancement of best practices surrounding national contingency plans in EU Member States, to the extent that this goal is not fully achieved on the grounds of regional cooperation, should be sought. This exchange should also include best practices in the U.S.. The EMSA and joint groups from USCG and EPA could contribute in this direction. Last but not least, the European Commission, assisted by EMSA, should also explore on the one hand, the application of principles relating to the Incident Command System (ICS) by national contingency plans in view of improvements, and on the other hand, the vessel response plan requirement in the frame of port State control.

Contrary to the area of preparedness and response, which from the viewpoint of prevention relating to maritime safety has interested research and academia to a lesser degree, the concept of limitation of liability, believed to have originated as early as 454 A.D.[745], has continued to be discussed at least since the times of Grotius[746] and the discussion is still underway.

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entitled *Cooperation in the Field of Accidental or Deliberate Marine Pollution After 2007, supra* note 671, 7 and 4 respectively.

744 Indicatively, according to EMSA "For various reasons, it is difficult to be prepared for a large oil spill in European waters". *See* EMSA *Action Plan for Oil Pollution Preparedness and Response*, *supra* note 633, 3.

745 *See* James J. Donovan, *The Origins and Developments of Limitation of Shipowners' Liability*, 53 TUL. L. REV. 999, 1001 (1979).

746 *See* Katie Smith Matison, *Comparison of Shipowners' Limitation of Liability Schemes*, Lloyd's Maritime Training Programme, *available at* http://www.lanepowell.com/pdf/pubs/matisonk_002.pdf (last visit 30.1.2008).

3. Liability issues for marine pollution: The paradigm of oil

Extensive analysis on marine pollution liability, both by theory and practice, including comparative approaches between the IMO[747], the EU and the U.S.[748], is largely available. It would not be an exaggeration to say that liability issues, alongside double hull requirements, have generally been considered the points of reference *par excellence* of the assessment of U.S. maritime law in the light of international maritime norms[749].

The need for the right to limit liability in the shipping sector, at least as this right was perceived in the old times, was very well demonstrated in *Boutcher v. Lawson* (1733) where it was decided that the shipowner was liable without limit for the loss of the cargo of gold bullion which had been stolen by the ship's captain[750]. Since that time, the question has greatly evolved, as it will be demonstrated

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747 Måns Jacobsson , *The International Liability and Compensation Regime with Respect to Oil Pollution from Ships - International Solutions for a Global Problem*, 32 TUL. MAR. L. J. 1 (2007).

748 Notably see CHAO WU, LA POLLUTION DU FAIT DU TRANSPORT MARITIME DES HYDROCARBURES (1994), CHAO WU, POLLUTION FROM THE CARRIAGE OF OIL BY SEA: LIABILITY AND COMPENSATION (1996), DAVID W. ABECASSIS (Editor), OIL POLLUTION FROM SHIPS-INTERNATIONAL, UNITED KINGDOM AND UNITED STATES LAW AND PRACTICE (1985), C. DE LA RUE and C. ANDERSON, SHIPPING AND THE ENVIRONMNET : LAW AND PRACTICE (1998), Edgar Gold, *Marine Pollution Liability After Exxon Valdez : The U.S. 'All-Or-Nothing Lottery'!*, 22 J. MAR. L. & COM. 440 (1991), F. Dumont de *Chassart, La Pollution Maritime par Hydrocarbures, Comparaison Entre Législations de États-Unis et des États Membres de la Communauté Européenne*, 2 ETL 232 (1991), *Inho Kim, A Comparison Between the International and U.S. Regimes Regulating Oil Pollution Liability and Compensation*, 27 MARINE POLICY 3 (2003), Jean-Jacques Lavenue, *Pour Une Responsabilité du Propriétaire de la Cargaison et des Acteurs Engagés Dans l'Activité de Transport Par Mer Des Hydrocarbures ?*, in MARINE POLLUTION: THE PROBLEM OF DAMAGES AND PENALTIES (2004), 239, P. GRIGGS, R. WILLIAMS and J. FARR, LIMITATION OF LIABILITY FOR MARITIME CLAIMS (2005), LIA ATHANASIOU, THE DEBATE ON THE LIMITATION OF LIABILITY FOR MARITIME CLAIMS (2005) (in Greek), Peter Weterstein, *The Need to Revise Shipowners' Environmental Impairment Liability*, XXV ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE (2007), 325, XIA CHIN, LIMITATION OF LIABILITY FOR MARITIME CLAIMS (2001), Z. OYA OZÇAYIR, LIABILITY FOR OIL POLLUTION AND COLLISIONS (1998).

749 It has been demonstrated above that such an assessment entails, in actual fact, a greater number of parameters.

750 [1733] Cas. & Hard. 53; 95 English Reports 116. Cited in Gotthard Mark Gauci, *Limitation of Liability-Some Reflections on an Out-of-Date Privilege*, XXIII ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 47 (2005), 48.

below, revolving around hesitation, consolidation and challenge[751]. The position of the EU and the U.S. in this field has inevitably reflected this reality.

It is not, however, in the scope of this paper to present in detail the myriad of legal aspects relating to liability regime on marine pollution, and to which existing sources refer[752]. A selective approach to the question will be attempted from the viewpoint of our comparison. This will be done with reference to the relationship between the international legal regime on liability with regional (EU, U.S.) systems and of their respective correlations. The question of the accession of the U.S. to the international liability regime will also be discussed by arguing that even though such accession would considerably strengthen and consolidate the existing international system, both in pragmatic and symbolic terms, in effect, for the U.S. to be prompted to do so, the international regime should clearly be a better regime than its own. Would this be the case? The discussion will then be drawn from a number of features of the current regimes, notably implying putting to the test the capacity of the latter to deal with major oil spills in terms of compensation and deterrence of prospective polluters; some elements will then be introduced surrounding pre-pollution permit trading as a complementary alternative approach.

3.1. The international regime on limitation of liability for maritime claims: A consolidated, yet greatly challenged point of reference for the regime in Europe

The international regime on limitation of liability for maritime claims is articulated over a number of IMO Conventions, certainly aiming, yet not always achieving, uniformity. This cluster of instruments has been the reference for applicable regime in Europe, but not by the U.S.. As such, the regime in question has been subject to reviews by the European Commission. With regard to oil pollution, the European Commission considers that the international regulatory framework fails to provide full compensation and deterrence, and it is therefore prompted to suggest new measures. The challenge expressed by the European Commission, which suggests a corrective action to the existing system, opens Pandora's Box as to the advisability of international public policies in the matter; the challenge in question is also likely to leave room for influences from the American legislator as the latter has expressed its public policy choices in the frame of OPA 1990.

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751 The current international regime on limitation of liability has been put to the test by academia: notably see Antoine Vialard, *Responsabilité Limitée et Indemnisation Illimitée en Cas de Pollution des Mers par Hydrocarbures*, In MARINE POLLUTION: THE PROBLEM OF DAMAGES AND PENALTIES (2004), 379, Erik Rosaeg, *Maritime Liabilities at the Crossroads*, XXV ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 293 (2007), Wetterstein, *supra* note 748.

752 Notably see supra note 748. *See* also Måns Jacobsson, *The International Liability and Compensation Regime Revisited*, MARINE POLLUTION: THE PROBLEM OF DAMAGES AND PENALTIES (2004), 213.

3.1.1. The IMO regulatory framework or the silent agreement on strict, yet limited, liability

Uniformity sought by the international system did not prevent the adoption of a regime operating in parallel groups in the light of distinctions having to do with the subject matter concerned. Limitation of liability of personal injury and property claims arising out of each distinct occasion during the operation of a seagoing vessel, is governed by the International Convention relating to the Limitation of Liability of Owners of Sea-Going Ships (Brussels 1957) and its 1979 Protocol, as well as by the Convention on Limitation of Liability for Maritime Claims (LLMC 1976)[753] with its 1996 Protocol[754]. There are also a number of "liability instruments" with regard to specific polluting substances: as far as oil is concerned, positive international law stems from the Civil Liability Convention (CLC) 1969 (and its Protocols of 1976, 1984 and 1992) and the Fund Convention 1971 (and its Protocols of 1976, 1984, 1992 and 2003). It deserves a special mention that the CLC 1992 has been operative since 1996, while the Fund Convention 1971 ceased in 2002, and the Fund Convention 1992 has been operative since 1996. As far as hazardous and noxious substances are concerned, the HNS Convention 1996 should be mentioned[755]; last but not least, the Bunker Oil Pollution Damage Convention 2001 governs limitation of liability with regard to pollution from bunkers[756]. At the international level, as will be mentioned below, the regime relating to the liability of carriers of passengers by sea is subject to two instruments and is regulated by the Athens Convention 1974/2002. Two regimes operate in parallel at the present stage, the first one based on fault, and the other one having strict and fault-based liability.

Our developments will focus on the 1992 CLC regime. Some reflections will be extended to the "HNS", the "Bunkers" and "Athens" regimes.

A brief review of the well known features of the question should recall that the 1992 CLC regime mirrors strict liability requirements affecting the registered shipowner from pollution damage provoked by oil tankers. Moreover, the convention provides for the compulsory insurance of the shipowner with regard to ships carrying more than 2,000 tonnes; P & I clubs normally provide this cover. A direct action against the insurer is also provided for. Claims are brought against the shipowner but not against its servants or agents; interestingly, such proceedings may

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753 The LLMC Convention 1976 also governs claims regarding delay of cargo, passengers or their luggage, claims resulting from infringement of rights occurring in connection with the operation of the ship, claims regarding removal of destruction or rendering harmless the cargo of the ship and claims of a person to minimize or avert the loss.

754 Notably see Smith Matison, *supra* note 747.

755 Notably see Peter Wetterstein, *Carriage of Hazardous Cargoes by Sea-The HNS Convention*, 26 GEORGIA J. OF INT'AL COMP. L. 3 (1997).

756 Notably see Chao Wu, *Liability and Compensation for Bunker Pollution*, 33 JMLC 5 (2002) and Michael Tsimplis, *A Commentary on the Bunker Pollution Convention 2004*, MARINE POLLUTION: THE PROBLEM OF DAMAGES AND PENALTIES (2004), Philippe Boisson, *L'OMI Adopte une Nouvelle Convention pour Indemniser les Dommages Dus à la Pollution par les Soutes*, DMF 659 (2001).

not be brought against other actors such as, for example, the operator, charterer or manager, "unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result"[757]. It should be noted however that recourse actions are available to the registered shipowner[758]. In practice, the above-mentioned evidence concerning actors other than the shipowner, would tend to be a difficult task.

Breaking of limitation of liability may be considered particularly favourable to shipowning interests, in exchange for the shipowners approving the higher liability amounts[759]. The liable shipowner loses his right to limitation if it is proved that he has caused the damage "with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result"[760]. The loss of the right to limit is provided for under the above-mentioned conditions by LLMC 1976/96 Convention[761] and HNS Convention[762].

Compensation amounts stemming from the most recently adopted level of compensation, namely the Supplementary Fund 2003, are subject to a ceiling of SDR 750 million per damaging event, including however sums covered by the 1992 CLC and Fund Conventions. Interestingly, the above-mentioned regime fails to cover public/collective rights, as expressed in pure ecological damage, because this was not provided for in relevant texts. As a result, compensation for damage to the environment other than the loss of income, is confined to "costs of reasonable measures of reinstatement actually undertaken or to be undertaken"[763].

Current academic and other debates on a possible justification of the right to limit liability have not transformed into positive law and as a result the international regime on limitation of liability for oil pollution constitutes the norm of reference.

The instruments in question obviously present a tendency to be subject to amendments, bringing the ceilings of limitation in recent years higher and higher in order to respond to inflation, cost of corrective action and new demands. Yet, full compensation is far from being achieved in the context of very serious oil spills, which regretfully sometimes tend to affect the same coastlines and the same local communities. Liability claims may become an extremely costly affair after all, as has been clearly demonstrated in the Exxon Valdez incident, where in effect an amount of approximately $2 billion was required to clean up the Prince William Sound, thus exceeding by far its liability[764]. A decade later in Europe, where the international regime is applicable, compensation limits were not adequate to

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757 *See* Article III.4 of CLC Convention 1992.
758 *See* Article III.5 of CLC Convention 1992.
759 *See* Wetterstein, *supra* note 748, 335.
760 *See* Article V.2 of CLC Convention 1992.
761 *See* Article 4 of LLMC Convention 1976/96.
762 *See* Article 9.2 of HNS Convention.
763 *See* PETER WETTERSTEIN, REDARENS MILJOSKADEANSVAR (2004), 177 quoted in Wetterstein, *supra* note 748, 337.
764 *See* Lewis, *supra* note 45, at 127-28, quoted in De Gennaro, *supra* note 382, at 276.

ensure full compensation relating to the Erika and Prestige incidents[765]. However, is the problem with the liability regime a problem of compensation limits only, a problem to which period increases of ceilings would remedy, or is it a problem inherent to the rationale itself of the system on the right to limit liability as such, which places burdens on some stakeholders while ignoring others?

3.1.2. Putting the international regime on limitation of liability to the test - possible influences from the American system

There seems to be a shift nowadays from the traditional foundations of limitation of liability to a contemporary approach to the question. Would ships have stopped nowadays to be different[766]? Traditional criteria such as distance from the shore, exposure to perils at sea, economic considerations relating to the assets exploited at sea, insurance risk factors[767], do not seem to convince any longer as to the specificity of the limitation of liability at sea[768]. Liability is therefore subject to changes: an evolution, yet, not a revolution.

With regard to transportation of oil, the current international system on civil liability fails to ensure full compensation in cases of serious oil pollution incidents. Despite the periodic increase of compensation limits and subsequent adjustments for additional sources of money to cover claims, the Supplementary Fund of 2003 being such an example, the existing regime is no longer convincing as to its rationale and mode of operation. This prompts the need to look for improvements; the OPA 1990 could consequently be reviewed as a possible source of influence. The questions revolving around the issue are articulated over an old debate concerning civil liability in the maritime sector, the latter being traditionally considered a sector presenting particularities. These particularities have continued to be explored and challenged since the old times; according to an authoritative French jurist, Gilbert Gidel, "Il est arrivé [...], en ce qui concerne le droit commercial maritime, que son caractère de particularisme a subi quelques alterations au cours du XIXème siècle. Ce particularisme s'est affaibli pour des raisons juridiques et pour des considerations économiques... Les causes économiques qui ont atteint le particularisme du droit maritime sont le changement de caractère de l'exploitation maritime, la marine marchande tendant à devenir de plus en plus un "prolonge-

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765 *See* Vialard *supra* note 751, 382 at 383. *See* the pending aspects of the compensation proceedings concerning the Erika under http://www.iopcfund.org/erika.htm (last visit 7.1.2007).

766 *See* Lord Mustill, *Ships are Different-or are they?*, 490 LMCLQ 501 (1993).

767 In *The Garden City No*. 2 (2 Lloyd's Rep. 37, 1984 at p. 44) it is stated that "Limitation of liability…is of long standing and generally accepted by the trading nations of the world. It is a right given to promote the general health of trade and in truth is no more than a way of distributing the insurance risk".

768 According to Rosaeg, the conflict between insurable risks and non-insurable risks when it comes to limitation of liability for maritime claims is a false debate. *See supra* note 751, 297.

ment sur mer de l'activité nationale"[769]. These reflections were expressed in the 30s!

The debate is considered open as long as the international regime does not ensure full compensation relating to major oil casualties. There are approaches in theory which place the emphasis on methodology, while others stress structural changes. Other proposals tend to complement rather than radically change the existing regime; last, but not least, the extension of the liability chain to interests which have been up to now very much protected has been explored. The viewpoints below are only a few of the most authoritative ones which explore the challenges of the matter in recently published sources. They are briefly presented with a view to illustrating the unsettled nature of the issue; some of these reflections constitute more elaborated positions which find their initial foundations in other contributions.

According to Rosaeg, with regard to limitation of liability relating to maritime casualties, the arguments on insurable and non-insurable risks constitute a false debate[770]. The existing international regime should be able, according to this author, to move towards more flexible approaches; such flexibility could be ensured through model law type legislation, like several UNCITRAL instruments, or typical uniform U.S. legislation[771]. Model laws, rather than binding Conventions, should not put to the test uniformity, since "uniformity is first the result of the similar thinking and the uniform concepts developed in the discussions leading up to the Conventions, and not the Conventions themselves"[772].

Vialard, suggests structural changes which should transform what the author negatively qualifies as "FLIPO"[773] (instead of FIPOL, which is the French term for the Fund 1992/2003) into an effective "FIIPOL", i.e. an International Fund of *Unlimited* Compensation of Oil Pollution Damage[774]. Vialard considers that such an international Fund ensuring full compensation should be created; such a Fund should be in a position to institute at its discretion appropriate civil and criminal proceedings against the wrong-doers, against the "fauteurs d'eaux troubles" (*sic*)[775]. The author suggests some of the features that such a Super Fund should present; the problem relating to funding should be resolved by the increase of the

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769 GILBERT GIDEL, DROIT INTERNATIONAL PUBLIC DE LA MER (1932). Quoted in Lavenue, *supra* note 748, 241. Free translation in English: "It occurs (...) with regard to commercial maritime law that its particular character went through some altera-tions during the 19th century. This particularity has grown weaker due to legal and eco-nomic reasons...The economic reasons which have affected the particularity of mari- time law are the change of features relating to maritime undertakings, merchant marine being inclined to become more and more 'an extension at sea of national activity' ".

770 *See* Rosaeg, *supra* note 751, 297 seq.

771 *Id.* at 299.

772 *Id.*

773 "Fonds limité d'indemnisation des dommages de pollution par hydrocarbures" *See* Vialard, *supra* note 751, 386.

774 In French "Fonds international d'indemnisation illimitée des dommages de pollution".

775 *See* Vialard, *supra* note 751,390.

taxes which are levied upon the oil transported[776]. While this author is favourable to the influence of OPA 1990 on the international regime, he does not support, at least at a first stage of development of the question, the enlargement of the concept of pollution damage[777].

Wetterstein suggests a range of proposals which should be able as a whole to improve the existing regime: he supports the idea of greater liability imposed on shipowners in the Supplementary Fund 2003, which is financed by the oil industry without any increase in shipowner's liability burden[778]. He also considers that the compensation ceiling in the Supplementary Fund 2003 should have been set much higher[779]. In addition to this, he proposes that the risks and liability associated with oil transport should be more largely borne also by other participating actors than the shipowner[780]; however, he is sceptical as to the imposition of increased liability on charterers, other than bare boat charterers[781]. A lowering of the "breaking threshold" as regards limitation of liability, could be envisaged[782]. With regard to the concept of pollution damage, which is subject to a restrictive regime under applicable positive international law, Wetterstein suggests an explicit obligation on the shipowner to ensure alternative restoration, that is to acquire "equivalent resources and habitat" when restoration of the environment is not possible[783]. Last but not least, according to this author, "it would be important that the international compensation regime as far as possible resembles the OPA"[784].

Extending liability to a number of participating actors who have been up to this stage particularly protected is notably stressed by Lavenue[785]. According to the latter, the current international regime is not satisfactory and should be able to ensure full compensation, notably through the concept of "responsible party" as this concept has been shaped in OPA 1990[786]. The existing regime requires, according to Lavenue, a review of its theoretical foundations and should accommodate an enlarged chain of responsible actors, since the reasons traditionally advanced for the channelling of liability on the shipowner are no longer valid. In the light of the above, the author argues in favour of the inclusion in the liability chain of the charterer, operator, cargo interests, classification societies, in brief, of any person likely to be involved in the maritime casualty. The author also points out that the State, in the light of its social solidarity role, could be present in the compensation procedures by providing for advanced compensation from a State Fund, operating

776 *Id.* at 391.
777 *Id.*
778 *See* Wetterstein, *supra* note 748, 329.
779 *Id.* at 330.
780 *Id.* at 333.
781 *Id.* at 334.
782 *Id.* at 336.
783 *Id.* at 339. *See* also Peter Wetterstein, *The Principles of Limitation and Sharing of Liability,* in Legislative Approaches in Maritime Law, 111 MARIUS (Scandinavian Institute of Maritime Law) no 283 (2001).
784 *See* Wetterstein, *supra* note 751, 346.
785 *See* Lavenue, *supra* note 748, 259.
786 *Id.* at 240.

on the basis of Pollution Taxes, which would act prior to the international mechanism and would benefit from recourse actions[787]. Lavenue is favourable to the enlargement of the pollution damage concept[788]. *Mutatis mutandis*, he considers that OPA 1990, Canadian legislation[789] and international conventions on civil liability for nuclear energy should influence the international regime in the field under examination[790].

Interestingly, while European-oriented viewpoints tend to consider more or less OPA 1990 as a panacea for the international regime on civil liability for oil pollution, on the other side of the Atlantic, theory does not lack a certain scepticism as regards the capacity of OPA 1990 to deter prospective polluters and ensure effective compensation[791]. According to Schoenbaum, "there is a great need to revise the American law of limitation of shipowners' liability to bring it into accord with international practice and modern policy concerns"[792]. According to the same author, "The purpose of modern limitation of liability laws differs from those in the past. The availability of insurance to cover losses in marine casualty situations [...] calls new purposes into play. Limitation of liability laws should be drawn to take advantage of economic efficiencies and economies of scale in procuring and paying for insurance to cover potential losses. Whether it is easier and cheaper for one party rather than another to insure against a potential risk, the law should provide the appropriate incentives to do so. The enhancement of economic efficiency and the utilization of the best system of spreading risk should be the new guiding purpose of limitation law"[793].

Gold is sceptical about the problem of unilateralism in maritime safety law and, with this as a departing point, he extends his scepticism to the dichotomy between the liability regime for oil pollution stemming from OPA 1990 and the international regulations[794].

Bearing the above in mind, we may consider that it is highly unlikely for the existing regime to accommodate radical changes; yet, the system can certainly be improved. Firstly, the loss of the right of the shipowner to limit his liability should become more tangible for unsatisfied claimants. Unbreakable thresholds of liability reflect a compromise during international negotiations but they do not reflect the reality of very serious incidents. Consequently, the loss of the right to limit liability should be reviewed in stricter terms, allowing litigation to perform its role. Secondly, "responsible party", as expressed by OPA 1990, which will be developed more in detail below, seems to be a contemporary concept likely to reflect

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787 *Id.* at 260.
788 *Id.* at 259.
789 *Id.* at 255.
790 *Id.* at 262.
791 *See inter alia* De Gennaro, *supra* note 382 and Lewis, *supra* note 45.
792 *See* SCHOENBAUM, *supra* note 2 806.
793 *Id.*
794 *See* Edgar Gold, *Liability and Compensation for Ship-Source Marine Pollution: The International System*, in HELGE OLE BERGESSEN, GEORG PARMANN and OYSTEIN B. THOMMESSEN (Editors), YEARBOOK OF INTERNATIONAL COOPERATION ON ENVIRON-MENT AND DEVELOPMENT 31 (1999/2000) 7.

and satisfy the concerns of claimants, without compromising the position of shipowners and other parties who have acted lawfully. Increase of liability limits is only a partial solution to the problem and the system should be able to provide the key to unlocking unlimited liability: the litigation area could be a possible arena for such action.

While discussions are underway, in pragmatic terms, changes have revolved around the idea of increase of compensation limits rather than putting to the test the multiple tier structure of the system or the principle of unbreakable thresholds of liability. The EU's action in this field prompted noticeable international developments.

3.1.3. The EU's attempts to "go further" and the ensuing pressure on the international regime

EU Member States present a heterogeneous picture as to their accession to the above instruments, which remain however their point of reference[795]. As far as maritime countries in the EU are concerned, which might provide an indication with regard to the situation, Cyprus and Malta are parties to LLMC 1996, while Greece is party to LLMC 1976. Some Member States with coastal or shipping interest are not parties at all to LLMC 1976/1996[796].

Compensation limits were considered as problematic by the EU in the aftermath of The Erika accident and, as a result, a proposal was put forward by the European Commission in the year 2000[797] in view of the creation of a complementary fund which would function as a third tier of liability and would therefore bring the existing system nearer to what was hoped to be full compensation[798]. The European Pollution Damage Compensation Fund (or COPE) would not replace or invalidate the International Oil Pollution Convention Fund but would strengthen the existing system by providing for additional compensation, thus bringing applicable compensation limits higher (EUR 1,000 million). This proposal would be comparable to the ceiling in the U.S. Oil Spill Liability Trust Fund. While this initiative did not lead to positive law, it exercised noticeable pressure on the international system which led to the revision of the international ceilings of limitation by the IMO and the adoption of the Supplementary Fund Protocol 2003. The latter aims at the compensation of claims in the context where the maximum compensation provided by the Fund might be inadequate.

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795 A look at the IMO's data on the status of ratifications by countries may easily provide useful information as to the situation (see http://www.imo.org/) (last visit 30.1.2008).

796 This is the case for Austria, the Czech Republic, Italy, Hungary, Portugal, Slovakia, Slovenia and Romania.

797 *See* COM(2000)802 final.

798 *See* GWENDOLINE GONSAELES, THE IMPACT OF EC DECISION-MAKING ON THE INTERNATIONAL REGIME FOR OIL POLLUTION DAMAGE: THE SUPPLEMENTARY FUND EXAMPLE (2005). *See* also M. Gauci, *The European Commission's Three-Front Attack Against the Special Regime for Shipowners' Pollution Liability: Is the International Maritime Liability Regime in Danger?*, 330 MARIUS SCANDINAVIAN INST. OF MAR. L. 214 (2004).

In the proposal for a Directive on civil liability and financial guarantees of shipowners[799], which is part of the Erika III package of November 2005, the European Commission proposed rendering obligatory the ratification of LLMC 1996 by Member States. The proposal provides, however, that the rules contained in LLMC 1996, which would be binding upon accession to it on an obligatory basis by the EU Member States, would be without prejudice to the implementation in each Member State of other international conventions that also provide for the limitation of liability with regard to certain claims, and which are, by rule, excluded from the scope of LLMC. The instruments concerned are CLC Convention 1992, HNS Convention and the Bunkers Convention[800].

In the European Commission's Proposal for a Regulation on liability of carriers of passengers by sea and inland waterways in the event of accidents[801], which is part of the Erika III package, the European Commission proposed incorporating the provisions of the Athens Convention 2002 into EC law[802]. It should be briefly recalled that, on the international level, the regime on liability of carriers relating to passengers by sea is governed by two instruments, namely the Athens Convention 1974, which is a fault-negligence oriented text, and the Athens Convention 2002, which provides for a two-fold liability regime combining strict and fault-based liability. The European Commission does not confine itself to proposing the ratification of Athens 2002 by EU Member States; new elements are provided for in the proposal in question, which are likely to raise the usual compatibility issues with the international system. The scope of application of the international instrument is extended in the proposal to cabotage and international carriage of passengers. Interestingly, limits of liability are not increased. Member States could, however, decide to increase the limits in a uniform way and amend the EC text, accordingly[803].

The above proposals demonstrate as a whole a dissatisfaction on behalf of the European Commission, which is the instigator of the common maritime transport policy, towards the international regulatory framework on limitation of liability. What after all dissatisfies the European Commission in the existing system, if system there is?[804] In one of its Communications adopted in the year 2000[805], the European Commission developed three directions which should be satisfied in the liability regime: firstly, prompt and non-bureaucratic compensation should be pro-

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799 COM/2005/0593 final, 23.11.2005.

800 *See* Malgorzata Anna Nesterowicz, *The Third Set of Community Legislative Measures in Favour of Maritime Safety: the Liability Projects*, XXV ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 281 (2007), 289.

801 *See* COM/2005/0592 final 23.11.2005.

802 On the proposal of the European Commission for a Regulation on liability of carriers of passengers by sea and inland waterways in the event of accidents, see Nesterowicz, *supra* note 800, 281.

803 *See* Article 4.

804 According to Rosaeg, the regime on limitation of liability should not be considered as a system, since it lacks in sound policy foundations, it is not problem-resolution oriented and is riddled with exceptions. *See supra* note 751, 296.

805 *See* supra note 772.

vided to victims; secondly, the maximum compensation limit should be determined sufficiently high; thirdly, the regime should deter non-qualitative tanker operators and cargo interests from transporting oil.

While the above concerns are still pending and the "full compensation" solution is being sought for, Directive 2005/35/EC was adopted, thus opening Pandora's box on criminal liability.

3.1.4 Criminal liability for marine pollution: Not novel, yet, far from being consolidated at the EC level

The issue of criminal liability with relation to marine pollution offences is not novel. Criminal sanctions for accidental discharges are not unknown in the domestic legal order of a number of EU Member States. What is more controversial nowadays, and thus subject to scepticism, is the legal capacity of the EU to legislate in the criminal field, an issue which goes beyond the scope of this study[806].

Two instruments were adopted in view of the criminal approach of the EU to marine pollution, namely Directive 2005/35/EC[807] of the European Parliament and Council of 7 September 2005 concerning ship-source pollution and the introduction of penalties for infringements, and Council Framework Decision 2005/667/JHA of 12 July 2005 on the strengthening of the criminal law framework for the enforcement of the law against ship-source pollution[808]. Directive 2005/35/EC aims to "incorporate international standards" (*sic*) for ship-source pollution into Community law and to ensure that persons responsible for discharges are subject to adequate penalties in view of the improvement of maritime safety and the enhancement of protection of the marine environment from pollution by ships[809]. This instrument was adopted in the framework of the first pillar which is based on the EC Treaty, while the Framework Decision, which aims at supplementing the Directive with detailed rules in criminal matters[810], was adopted in the framework of the third pillar, which is of intergovernmental nature. We will refrain from developing further the institutional aspects of the question[811].

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806 Notably see Castillo Garcia, *supra* note 217; see also Christodoulou-Varotsi, *supra* note 12.

807 *See* Council Directive 2005/35/EC, OJ 2005 L 255/11.

808 *See* Council Framework Decision 2005/667/JHA, OJ 2005 L255/164.

809 *See* Article 1 of Directive 2005/35/EC.

810 *See* point 4 of the preamble of the Framework Decision 2005/667/JHA.

811 On these aspects notably see the Opinion of Advocate General Mazak delivered on 28 June 2007 in ECJ case C-440/2005 (Commission of the European Communities v. Council of the European Union). In this dispute the European Commission seeks the annulment of Council Framework decision 2005/667/JHA on the grounds that the measures contained therein, providing for an approximation of Member States' legislation in criminal matters, should have been adopted on the basis of the EC Treaty rather than on the basis of Title VI of the Treaty on European Union. *See* also Christodoulou-Varotsi, *supra* note 12.

The adoption of the above instruments gave rise to a number of legal issues, some of which are still pending[812]: While the EC is not party to MARPOL Convention, its Member States are. The MARPOL Convention does not specify the type of sanctions that should be adopted by its Parties when its requirements are violated by private operators. However, the instrument in question provides that such sanctions should be "adequate in severity to discourage [such] violations"[813]; the competent Administration for the imposition of such sanctions under MARPOL is the flag Administration. A number of EC Member States already have criminal provisions in their domestic legal order against ship-source pollution, but the challenge of the EC instruments is that they consolidate a controversial EC competency, i.e. criminal competency, and they introduce criminal sanctions in the event of ship-source pollution committed not only with intent or recklessly, but also with "serious" negligence[814]. Moreover, the above-mentioned EC measures alter in a restrictive manner the material scope of MARPOL Convention[815], by providing that accidental spills are not exceptionally tolerated when they are committed in territorial waters and internal water, including ports[816]. These are only a few of the matters which have been raised by the measures in question.

It is clear, however, despite the above, which are of unsettled nature, that EC law is under the influence on this point of U.S. law. Since pollution provisions are considered public welfare statutes in the U.S., "intent" is not always required as an ingredient before proof of conviction[817]. The Refuse Act 1899[818] and the Clean Water Act 1970[819], as amended by OPA 1990, provide for criminal punishment in the event of pollution of navigable waterways. Interestingly, the Refuse Act provides for strict liability crime, whereas the Clean Water Act requires negligent, or knowing violations for criminal conviction[820]. EC instruments do not go, however,

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812 *See* the Opinion of Advocate General Kokott delivered on 20 November 2007 in the ECJ case C-308/2006 pertaining to a preliminary ruling (Article 234 of the EC Treaty) from the High Court of Justice of England and Wales with reference to a joint action by a coalition of ship-owning and other interests against the United Kingdom's Secretary of State for Transport in connection with the planned implementation of Directive 2005/35/EC.

813 *See* Article 4 of MARPOL Convention.

814 *See* Article 4 of Directive 2005/35/EC.

815 *See* Regulation 11(b) of Annex I and Regulation 6(b) of Annex II of MARPOL Convention 73/78.

816 *See* Article 5 of Directive 2005/35/EC.

817 *See* Olagunju G. Anthony, *Criminalization of Seafarers for Accidental Discharge of Oil: Is There Justification in International Law for Criminal Sanction For Negligent or Accidental Pollution of the Sea?*, 37 J. MAR. L. & COM. 219 (2006), 229. *See* also on criminal liability, John G. Ingram, *Criminal Liability and the Fifth Amendment*, 5 U.S.F. MAR. L. J. 2 (1993) and Mark B. Harmon and Harry T. Gower, III, *Prosecuting Marine Pollution Crimes*, 5 U.S.F. MAR. L. J. 2 (1993).

818 *See* 33 U.S.C. § 407.

819 *See* 33 U.S.C. § 1251 *et seq*.

820 *See* Anthony, *supra* note 817, 230.

as far as U.S. law, which also provides for the so-called "whistle-blower" and compensates him to 50% of the fine imposed on the convicted polluter[821].

The U.S., as it will be briefly examined below, has developed its own civil liability regime and has not joined the international regime. This situation has been used by academia and practice as a paradigm of effective action against marine pollution from which the international system should "borrow" certain elements. It also constitutes an important source of influence of relevant EC law proposals.

3.2. Limitation of liability for oil pollution in the U.S.: Brief overview

The description which follows aims to provide a general outline of limitation of liability as it stems from the regulatory framework in the U.S. prior to the adoption of OPA 1990 and under the latter. The principle under OPA is limited liability. Yet, in some cases unlimited liability is likely to be activated. This is achieved in the light of the concept of responsible party and by means of the action of states.

3.2.1. Preexisting law: FWPCA, CWA and CERCLA

Preexisting law to OPA 1990 having an impact on the oil polluter, comprised three categories of statutes: firstly, general federal pollution legislation; secondly, statutes addressing pollution in certain areas or resulting from specific activities; thirdly, state legislation. With regard to state legislation, it deserves special mention that prior to OPA 1990, while states were entitled to impose additional cleanup and removal liabilities, state legislation governing compensation by claimants was preempted[822]. Only general federal statutes will be presented below.

In the 70s, the Federal Water Pollution Control Act (FWPCA)[823], as amended, imposed civil sanctions for oil pollution and provided for strict liability for federal cleanup costs[824]. Pursuant to FWPCA, responsible parties were owners, operators, or any onshore or offshore facility from which oil was discharged into or upon the navigable waters of the U.S., the adjoining shoreline, or the waters of the contiguous zone[825]. Interestingly, under this statute, private parties could not recover damages or cleanup costs due to an oil spill from a vessel[826] and usually had to recover their losses on the basis of principles relating to maritime torts, which implied establishing culpable negligence[827].

The main statute relating to oil pollution prior to the adoption of OPA 1990 was, however, the Clean Water Act (CWA) 1977, which modified FWPCA 1972

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821 *Id.* at 236.

822 *See* Rodriguez and Jaffe, *supra* note 43, 10. On states' legislation notably see John D. Edgcomb, *Responding to an Oil Spill in California*, 5 U.S.F. MAR. L. J. 2 (1993) and *The 1993 Maritime Survey of State Pollution Statutes*, 5 U.S.F. MAR. L. J. 2 (1993).

823 33 U.S.C. § 1251-1387

824 *See* generally *id.*

825 *Id.* at 1321(f)(1), (f)(2).

826 *Id.* 1321(o)(1).

827 *See* Gold, *supra* note 44, 435, quoted in Lewis *supra* note 45,103.

amendments. A responsible party having failed to clean up was strictly liable to the U.S. for the actual cost of removal of the oil or hazardous substance up to a limit based on tonnage[828]. The CWA 1977 provided for civil sanctions against the owner, the operator, or person in charge of the onshore or offshore facility or vessel (responsible party) that discharged a prohibited amount of oil or a hazardous substance[829]. Showing of a fault was not required. Moreover, CWA 1977 imposed criminal sanctions in the event of negligent or knowing violations[830]. Limited defences were provided for under CWA 1977[831] and liability limits were likely to be broken in the event where the government could prove that "the discharge was the result of wilful negligence or wilful misconduct within the privity or knowledge of the owner"[832]. When the source of the discharge was a vessel, such claims were subject to the Limitation of Liability Act[833]. It should be noted that in addition to the imposition of strict liability on the responsible party, the Clean Water Act provided for the government to institute proceedings directly against a third party who solely caused a discharge[834]. Moreover, under CWA, for the first time Congress allocated a fund up to $35,000,000 for the immediate cleanup of spills and discharges as well as other related costs[835]. Vessels were also required to maintain evidence of financial responsibility[836].

The CWA 1977 was preempted by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)[837], which governs discharges of hazardous substances other than petroleum, natural gas, and related products[838]. This means that liability for discharges of oil from vessels at sea is not governed by CERCLA[839]. The CWA 1977 was successful in providing for strict liability but it contained, nevertheless, a number of gaps: it did not address the question of damages from uninsured or bankrupt vessels and did not provide for liability for personal and property damages incidental to the discharge or spill[840]. OPA 1990, whose historical background has been examined at different stages above, constitutes a comprehensive statute governing prevention, removal and liability.

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828 33 U.S.C. § 1321(f)(1).
829 *Id.* at § 1321(b)(6)(A).
830 *Id.* at § 1319(c).
831 *Id.* at § 1321(f).
832 *Id.*
833 46 U.S.C. §§ 181-188 (1988). *See* also William M. Duncan, *OPA's 1990 Effect on the Shipowner's Limitation of Liability Act*, 5 U.S.F. MAR. L. J. 2 (1993).
834 33 U.S.C. § 1321(g).
835 *See* MANGONE, *supra* note 22, 272.
836 *Id.*
837 42 U.S.C. §§ 9601-9675(1988).
838 *See* 42 U.S.C. §9607(a).
839 *See* Lewis, *supra* note 45, 104.
840 *See* MANGONE, *supra* note 22, 272.

3.2.2. Deterrence, compensation and punishment or the Oil Pollution Act 1990

As already mentioned, OPA 1990 has given rise to extensive analysis since its adoption[841]; yet, it is useful to recall its basic principles, which articulate over a two-tier structure, an unlimited number of "responsible parties", a liability which is limited but which can easily be transformed into an unlimited one, a broadest possible protection of claimants via the possibilities of compensation, and advanced protection for natural resource damages.

In order to be held liable under OPA 1990 the person or entity concerned, has to be a "responsible party"[842]. This is a key concept under OPA.

Responsible parties are owners and operators[843] of vessels, onshore facilities, offshore facilities, and pipelines and licensees of deepwater ports. Significantly, the term "responsible party" is given a broad definition ensuring that more than one party can be held accountable for the costs of pollution stemming from oil spills[844]. The responsible party is liable for all removal costs and damages. Removal costs constitute a wide-ranging category, including those incurred by a public entity and those incurred by any other person while taking actions which were in conformity with the National Contingency Plan (NCP)[845].

Recoverable damages notably comprise natural resource damages[846], damages to real or personal property, including economic loss, damages for loss of subsistence use of natural resources, regardless of ownership or management, net losses of taxes, royalties, rents, fees or shares of net profits, or impairment of earning capacity, and damages for the net costs of increased public services caused by a discharge of oil. Natural resource damages include the cost of restoring, rehabilitating, replacing or acquiring the equivalent of the damaged natural resources[847]. Assessing natural resource damage is the task of public trustees[848]. A number of methods are used in view of this difficult assessment, notably including the as-

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841 *See supra* note 43. *See* also SCHOENBAUM, *supra* note 2, 883 *seq*.

842 33 U.S.C. § 2702(a).

843 *Id.* at § 2701(26).

844 *Id.* at § 2701(32)(A)-(F).

845 *Id.* at § 2702(b)(1)(A) and (B).

846 Natural resources include land, fish, wildlife, biota, air, water, ground water, drinking water supplies and other such resources belonging to, managed by, or held in trust by, or controlled by the U.S., any state, local government, Native American tribe or foreign government. *See* id. at §2701(20). *See* also James L. Nicoll, Jr., *Marine Pollution and Natural Resource Damages*, 5 U.S.F. MAR. L. J. 2 (1993), Malgorzata Nesterowicz, *Civil Liability for Oil Pollution Conventions 1969 & 1992 and the OPA of the U.S. 1990-The Comparison of Oil Pollution Damage*, Proceedings, Institute of Maritime and Transportation Law, Stockholm University, 24.3.2000, Thomas J. Wagner, *Recoverable Damages Under OPA 1990*, 5 U.S.F. MAR. L. J. 2 (1993).

847 It should be noted that OPA does not allow for double recovery for damages for the same incident and natural resources. *See* 33 U.S.C. § 2706(d)(3).

848 *See* NRDA, 15 C.F.R. § 990.11 (1999).

sessment of the worth of natural resources to people who use them[849] or the multiplication of the per-person valuation by the affected population[850].

Economic losses, lost profits and impairment of earning capacity as a result of an oil spill incident can be recovered by private parties[851]. However, under this instrument, the class of claimants which is likely to recover economic losses may be limited, as the claimant must have suffered some type of foreseeable loss[852].

Defences to liability are provided for in a restrictive manner: a responsible party is not liable for removal costs and damages if the discharge was "solely" caused by an act of God[853], and act of war, an act or omission of a third party, or a combination of those elements[854]. Onus of proof lies on the shoulders of the responsible party[855]. However, the aforementioned defences are not available, in the event where the responsible party fails or refuses to report an incident according to the law, to provide assistance requested by an official during the removal activities, or to comply with an order issued by FWPCA provisions or other federal statutes without sufficient cause[856].

Limitation of liability under OPA 1990 is regulated in such a manner as to provide special weight to the exception, i.e. unlimited liability, thus somehow weakening the rule of limitation as such. A party's liability is limited according to the type and size of vessel or facility involved in the incident[857]. It is generally recognized that parties with greater participation in the benefits from maritime activities are exposed to the greatest amount of liability[858]. It deserves special mention that the responsible party cannot limit his liability in virtue of this statute, if the oil spill was proximately caused by the gross negligence or wilful misconduct of the responsible party, its agents, employee, or person acting according to a contract with the responsible party[859]. Moreover, if the oil spill occurred because one of those parties infringed a federal safety, construction, or operation regulation, the responsible party is not allowed to limit his liability[860]. The sword of Damocles hangs over the responsible party who knows or has reason to know of the incident

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849 *See* Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269 (1981), 281.

850 *See* Cross, *id.*, and J.T. Smith II, *Natural Resource Damages Under CERCLA and OPA: Some Basics for Maritime Operators*, 18 TUL. MAR. L. J. 1 (1993) 3.

851 *See* 33 U.S.C. § 2702(b)(2)(B).

852 *See* Lewis, *supra* note 45, quoting *In re Cleveland Tankers, Inc.* 791 F. Supp. 669 (E.D. Mich. 1994). However, see a less restrictive interpretation of the requirement on the claimant's allegation of "injury, destruction, or loss" to his property, in *Sekco Energy, Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008 (E.D. La 1993) (Quoted in Lewis, *supra* note 45, 119).

853 33 U.S.C. § 2701(1).

854 33 U.S.C. § 2703(a)(1)-(4).

855 *Id.*

856 33 U.S.C. *id.* at § 2703(c)(1)-(3).

857 33 U.S.C. *id.* at § 2704(a).

858 *See National Shipping Co. Of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F.-Supp. 1436 fn. 6 (E.D. Va. 1996).

859 *See* 33 U.S.C. § 2704(c)(1)(A).

860 *Id.* at § 2704(c)(1)(B).

and refuses or fails to report it. In such a case, there is no limitation available to the responsible party[861].

States are not preempted under OPA 1990 from their right to legislate on marine pollution and institute liability schemes which go beyond OPA requirements[862]. While this aspect of OPA 1990 compromises uniformity and predictability of litigation, at the same time, it renders the regime as a whole exceptionally rigorous and prospectively deterrent.

In addition to the above, OPA 1990 provides for payments from an Oil Spill Liability Trust Fund (OSLTF) for uncompensated claims and certain removal, administrative and operational costs incurred by governments[863]. State-regulated funds exist in parallel with OSLTF providing a third source of recovery.

3.2.3. Strict criminal liability

"OPA provides a complete statutory framework for proceedings against individuals for civil and/or criminal penalties arising out of oil spills..."[864]. OPA enhanced the existing criminal framework for marine pollution by an increase of criminal penalties[865]. Each day of discharge constitutes a separate offence and penalties double for repeat offences[866]. Criminal provisions were enhanced by OPA with regard to shipping, vessel operations and inspections, negligent operation of a vessel, the carriage of liquid bulk dangerous cargoes, load lines, pilotage, and manning requirements for vessels[867].

From the viewpoint of the U.S. Coast Guard, the framework established by OPA 1990 is intended to be most rigorous: according to the U.S. Coast Guard "the Government need not show knowledge or negligence, but need only show that the prohibited conduct occurred", and a company, its officers, employees, and mariners "could be convicted and sentenced to a criminal fine even where [they] took all reasonable precautions to avoid the discharge"[868].

It is obvious that the U.S.'s criminal regime on oil pollution seems to constitute a point of reference for the European Commission in its initiatives to strengthen criminal sanctions by the EC Member States for ship-source pollution, including pollution from oil. The above-mentioned EC Directive 2005/35/EC mirrors such influence. Even though a number of EC Member States already provide for criminal sanctions in the event of marine pollution from oil, there are noticeable dis-

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861 *Id.* at § 2704(c)(2)(A).

862 *Id.* at § 2718(a) to (b).

863 26 U.S.C. § 9509 and 33 U.S.C. § 2712. On OSLTF notably see OZÇAYIR, *supra* note 748, 272.

864 Statement of Senator Wendell Ford of Kentucky, 144 CONG. REC. S12, 390 (daily ed. 12.10. 1998), quoted in Kiern, *supra* note 22, 571.

865 *See, e.g.*, 33 U.S.C. §§ 2701.2718(c).

866 *See* Randle, *supra* note 43.

867 *See* 33 U.S.C. § 2701 and 46 U.S.C. §§ 2302, 3318, 3718, 5116, 8101, 8104, 8502, 8503(e) (1994).

868 *See* U.S. Coast Guard, Commandant Instruction M16201.1, Criminal Enforcement of Environmental Laws 1-3, 1-19 (30 July 1997). Quoted in Kiern, *supra* note 22, 576.

crepancies between laws and practices followed by Member States[869], which are believed to weaken the force of international requirements in this field[870].

OPA does not confine its influence on regional legislators; its influence also extends to international developments.

3.2.4. OPA 1990 and the 1992 IMO amendments: Myth and reality

Only two years after its adoption, OPA 1990 was already prompting the IMO to do more: the 1992 amendments to the international compensation regime, were adopted by the IMO which notably included the increase of liability limits. It may be recalled that the 1992 liability regime provided for strict liability of registered shipowners from oil tankers for pollution damage in territorial waters and in EEZ of contracting States. It also provided for limited defences, and liability limits were set higher than the previous regime.

However, while the international regime was sensitive to the pressure exercised on it by OPA 1990, it also rejected an anticipated, yet very much "feared", influence of OPA. The additional Protocol to CLC Convention 1992 specifically excludes compensation claims because of oil pollution against the charterer and operator. It is not clear whether this was just a clarification to Article III of CLC Convention 1992[871] and it would not be an exaggeration to see in this provision, the negative influence of OPA on the international system, i.e. the limits of its "desired" influence.

Despite possible controversy on whether OPA 1990 constitutes a paradigm of good legislation to be adopted by others, the question of whether the U.S. should join the international regime on civil liability for oil pollution provides an indication on the uncertainties implied by public choices which are generally considered to be effective and efficient.

3.2.5. Should the U.S. accede to the international regime on limitation of liability?

The discussion on the accession of the U.S. to the international regime on civil liability, somehow implies that the system which will be left behind is less satisfactory than the system prospectively acceded to. Another issue is whether one nation should be left alone to bear the cost of clean-up and compensation[872]. It is obvious that if the U.S. accedes to the international regime, the latter will be both enhanced

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869 *See* e.g. the laws and practices followed by Greece and Cyprus: Iliana Christodoulou-Varotsi, *Background to Implementation of Directive 2005/35/EC and General Principles* (With the Focus on Greece and Cyprus), EMSA Workshop on the exchange of best practices in dealing with illegal discharges and the gathering of evidence (Lisbon, 8-9 October 2007).

870 *See* Article 4 of MARPOL 73/78 Convention.

871 *See* Lavenue, *supra* note 748, 247.

872 *See* Jaclyn A. Zimmermann, *Inadequacies of the Oil Pollution Act of 1990: Why the United States Should Adopt the Convention on Civil Liability*, 23 FORDHAM INT'L. J. 1499 (2000), 1531.

and consolidated. The more contributors there are, the greater will be the capacity of the funds available for compensation.

The U.S. refused to accede to CLC regime but it did not fail to participate in its works. While officially the U.S.'s rejection of CLC regime is justified on the grounds of ceilings of liability which were considered too restrictive, other possible reasons which might explain this position is that states in the U.S. had opposed ratification because CLC Convention would preempt state law; the extensive coastline of the U.S. was also believed not to be sufficiently protected from damage due to large spills in the event of accession to the international regime[873]. In the 1984 amendments, the U.S. participated but did not join. In 1992, the U.S. participated in the IMO amendments but its attitude remained the same[874].

While public policy choices of any kind remain controversial, the relative success of OPA to deal with a number of issues is obvious. Yet, some drawbacks might be detected, which could potentially be considered as arguments in favour of accession to the international regime. For example, unless there is an express agreement between the U.S. and a foreign claimant's country, OPA bars international claimants from its remedies[875]. More precisely, in addition to satisfying the other relevant requirements, a foreign claimant is required to demonstrate, in order to recover removal costs or damages resulting from an incident, that it has not been otherwise compensated for the removal costs or damages and that recovery is authorized by a treaty or executive agreement between the U.S. and the claimant's country[876]. In addition to this restriction, it should be noted that OPA 1992 applies only to assets which are subject to U.S. jurisdiction; as a result, shipowners without assets in the U.S. are in a more favourable position than those who have assets in this jurisdiction[877].

The discussion on the possible accession of the U.S. to the international CLC regime remains most probably theoretical as long as the international regime does not go a step further. As suggested above, such a progress should borrow something from the boldness of the U.S.'s corresponding regime.

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873 *Id.*

874 *Id.*

875 *Id.*

876 This also results if the U.S. Secretary of State, in consultation with the U.S. Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for U.S. claimants. *See* 33 U.S.C. § 2707(a).

877 *See* Smith, *supra* note 850, 143, quoted in Zimmermann, *supra* note 872,1532. *See* also on related issues Bonnie E. Racquet and Randall J. Romsdahl, *Piercing the Corporate Veil Under OPA 1990*, 5 U.S.F. MAR. L. J. 2 (1993).

Concluding remarks – Recommendations[878]

1. The old debate is not dead: Freedom of the seas vs. coastal States' rights

It would not be an exaggeration to say that even nowadays the old "conflict" between freedom of navigation and coastal States' rights, which was the main concern of UNCLOS 1982, is far from entirely crystallized. The background of synergy and antagonism between the entities chosen for the purposes of this study inexorably leads to the ambiguities of the international law of the sea discussion on the rights of flag and coastal States to regulate international shipping. In some cases, the ambiguities of the international regime seem to nourish the choices of national legislature in a controversial manner[879]. Some aspects of this question were raised in the developments above, notably from the point of view of the introduction of double-hull requirements prior to the international adoption of the rule, or according to an accelerated time frame.

It is obvious that the discussion on the limitations of international maritime safety law has not exhausted its interest. The UNCLOS 1982, as the chief instrument of reference, and the plethora of international Conventions of the IMO provide for limitations as to how far States can go, which are subject to interpretation. Thus, these limitations are far from being monolithic or clear-cut[880].

An important development concerns the interest of the U.S. in recent years to accede to UNCLOS 1982. It is generally believed that the rules of UNCLOS 1982 are accepted by the U.S. as "reflections" of international customary law or as generally accepted principles of international law. The initial reservations of the U.S. concerning the provisions of UNCLOS 1983 on the seabed do not prevail nowadays in the ongoing discussions concerning the prospect of accession, and in some

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878 Dannis L. Bryant, *The Maritime Compliance Program : Foghorn for the Shipowner*, 24 TUL MAR. L. J. 591 (2000). Hermann Kaps, *Quality Shipping-Incentives, Disincentives*, 3 WMU J. MAR. AFF. 1 (2004) 85.

879 An illustration of this concern coming from the industry is reflected in the position of the President of the Chamber of Shipping of America (CSA), Joseph Cox, before the Senate Foreign Relations Committee in the frame of the hearings on UNCLOS 1982, who refers to coastal state regulations that have been "stretching the interpretations of the law of the sea into unrecognizable forms". *See UN Convention on the Law of the Sea: Hearing Before Senate Foreign Relations Committee*, 108th Cong. 4 (Oct. 21, 2003) (testimony of Joseph J. Cox, President and CEO of Chamber of Shipping of America).

880 Notably see the issues raised in the recent case-law ECJ C-308/2006, *supra* note 812.

cases accession is considered a compatible step with the U.S.'s aspirations. In the current state of the situation, however, it is not clear to what extent UNCLOS 1982 may be considered a criterion for determining the legality of measures adopted by the U.S. in its capacity as coastal State.

It may be recalled that under UNCLOS 1982 on laws and regulations of the coastal State relating to innocent passage[881], the coastal State may adopt provisions in conformity with the Convention relating to innocent passage through the territorial sea, in respect of a specific number of issues; such laws and regulations shall not apply, according to this instrument, to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards. This is an important limitation which constitutes a natural boundary to possible normative actions of unilateral orientation. On the other hand, however, port State jurisdiction is very large in scope.

In addition, there is another parameter which deserves to be taken into consideration. This is the parameter which has to do with the position of each entity (State or regional entity) with regard to technical international conventions which are relevant to maritime safety. Some of the latter provide for minimum standards, while others do not. The EU for example is not party to MARPOL Convention. What is the impact that such a situation is likely to have? Does this mean that the EU is free to adopt a rule which can go beyond or is materially (or textually) in conflict with MARPOL requirements, since it is not bound by it? What about Member States, which are, nevertheless, bound by their international obligations to comply with MARPOL Convention? Of course, from the position of EC law the problem is non-existent, since Member States are held to adjust their international obligations so as to ensure compliance with EC law, which is of a *suis generis* nature - and this despite the fact that international law is part of the norms of reference for the control of legality of EC law. Would this be a vicious circle?

Despite the above, which touches the legal core of the issue, the obvious power of measures - which are sometimes defined as unilateral - to influence other lawmakers, both at the regional and international level, is a reality.

A constructive antagonism is likely to be found at some points, i.e. an antagonism which may render the international legislature more vigilant and eventually more effective from a universal point of view. The antagonism in question is at odds, when it clearly suggests a position departing from the letter and the spirit of the international system. What is the borderline between what is acceptable and what is not?

Since universalism has been part of the "real map" of international maritime law for the last few decades, it may be suggested that instead of defying this tendency in block and without discretion, it would be more realistic to subject it to disciplinary rules. The recommendations which follow should be seen as a Code of practice to lawmakers.

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[881] *See* Article 21 of UNCLOS 1982.

2. The "problem of synergy and antagonism" as part of the "solution"

In what respect may certain forms of unilateralism be integrated in the international lawmaking process? This can be done only under conditions. First, unilateralism must be clearly defined, which is a more delicate task than it implies at first glance. Secondly, it ought to be subject to a framework.

Schematically, as was examined above, unilateralism sometimes indicates material, i.e. substantive, conflicts between international and regional or national provisions, while in other cases it indicates anticipated measures with reference to the international framework. In the first category of measures would also fall those measures which change the scope of actions concerned, e.g. providing that a measure is applicable not only to international routes but also to domestic routes. The position of a national legislature rejecting the international legal regulatory framework and creating its own norms to regulate a certain matter has also been interpreted as a form of unilateralism.

Unilateralism should be exercised only exceptionally, when the possibilities of reaching the desired outcome at the international level are reasonably exhausted, and under the condition that adequate transitional periods are provided for. Unilateralism should be viewed as a temporary stage towards international action rather than an end as such; it should confine itself to exercising pressure on the international regime, rather than constituting the solution to a problem.

While the debate on unilateralism is underway in terms of substantive law on maritime safety, it is obvious that both the international and regional/national legislators have not sufficiently explored the potential of market incentives for qualitative shipping. Would this direction soften the dichotomy between unilateralism and universalism by introducing some pragmatic elements into the field under examination?

3. Viewing the potential of underestimated directions by legislators: Market-oriented incentives in support of qualitative shipping

It has been argued that the existing statutory regimes on oil pollution control and compensation "have only served to create vast government bureaucracies, whose only true function is punishing polluters after spills have occurred"[882]. These criticisms are addressed both to the U.S.'s regime and the international regime[883]. Utilization of market forces, in view of the enhancement of maritime safety re-

[882] *See* De Gennaro, *supra* note 382, 267.

[883] "The after-the-fact system of fines and punitive measures created by the CLCs and OPA has not prevented the amount of oil spilled in the word's oceans during the last twenty-five years because it fails to address the market-based reality of the oil transport industry". *See* id. 267.

mains an open issue. Such an orientation could be explored more intensively by legislative agendas.

In this context, it has been suggested by a number of authors that a system focusing on pre-pollution prevention, with the market rather than government as the chief regulatory force, would create a more effective and efficient liability scheme for oil pollution prevention and control; such a system would oblige public policymakers to determine the amount of oil that could be spilled within a certain timeframe, e.g. a year, and permits would be issued which would be sold to vessels interested in oil transportation[884]. Private actors, whose pollution on the basis of pollution permits would be below a certain limit, could freely trade their permits to other parties. From a functional point of view, the methodology employed with regard to radio spectrum auctioning or landing slots sale in the air transportation sector could be used. An air emissions trading scheme could also provide a useful paradigm[885].

From an economic point of view, market-based pollution control mechanisms, which developed mainly in the 90s, are based on the idea that pollution is an economic problem which can be resolved via conventional market mechanisms[886]. Yet, the legal potential of such an orientation remains to be explored further with regard to shipping, as a complementary or alternative action to the conventional means, depending on the merits of such an approach. How far are the IMO, the EU and the U.S. prepared to go in this direction? Which entity will have the lead and prompt the others to follow?!

What is certain is that lawmakers do not have the last word! Tellingly, it is estimated that by the year 2010, oil transportation in the Gulf of Finland is expected to increase from 77 million tonnes in 2003 to 190 million[887]; the creation of new pipelines is also likely to affect the position of traditional countries of registration, and a potential risk of exposure to perils that were mainly experienced by coastal States will emerge and be shared by others[888]. The positions of States

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884 *Id.,* 268. *See* also *infra* note 885.

885 The EU Emission Trading Scheme constitutes the largest in the world and is largely modelled on the mechanisms of the Marrakech Accords and Kyoto Protocol. *See* A. Denny Ellerman and Barbara K. Buchner, *The EU Emissions Trading Scheme: Origins, Allocation and Early Results*, 1 REV. ENV'L. ECON. & POLICY 1 (2007) 66.

886 *See* Bradley C. Bobertz, *Legitimizing Pollution Through Pollution Control Laws: Reflection on Scapegoating Theory*, 73 TEX. L. REV. 711(1995), Lisa Heinzerling, *Selling Pollution, Forcing Democracy*, 14 STAN. ENVTL. L. J. 300, (1995) 305, quoted in De Gennaro, *supra* note 382, 282. *See* also Bruce A. Ackerman and Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988) and Case R. Sunstein, *Democratizing America Through Law*, 25 SUFFOLK U. L. REV. 949 (1991).

887 *See* EMSA *Action Plan for Oil Pollution Preparedness and Response, supra* note 633, 54.

888 *See* e.g. the current project on the construction of the Burgas (Bulgaria) – Alexandroupoli (Greece, Northen Aegean Sea) oil pipeline under Russian control. The pipeline will normally be completed in the coming years and will have a capacity of 35,000,000 tonnes of oil per year. Notably see Greek newspaper Kathimerini dated 18.1.2008 and http://en.wikipedia.org/wiki/Burgas-Alexandroupoli_pipeline (last visit 18.1.2008).

and regional entities are likely to change in the light of new facts, some of which are more or less anticipated and some of which are still unknown[889]. Should lawmakers have to review their position towards more uniform or more intelligent laws, this should be done with a sense of intergeneration responsibility both as regards adequate energy needs and marine environment protection. Law alone cannot achieve this, but a holistic approach to maritime safety can, with the emphasis placed on implementation/enforcement and on human element.

Beyond technicalities, the sea can provide room for such action; the right balance is still being sought; as long as pending issues are not resolved via existing instruments by current generations, internationally or regionally, they constitute both a burden and a challenge for the future.

[889] An indication of such developments may constitute the use of biofuels. *See* the UN Press Conference dated 2.3.2007 launching the international biofuels forum (Department of Public Information, News and Media Division, NY).

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