Improving Compliance with the International Law of Marine Environmental Protection: The role of the European Union

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IMPROVING COMPLIANCE WITH THE INTERNATIONAL LAW OF MARINE ENVIRONMENTAL PROTECTION

The role of the European Union

André Nollkaemper

In recent years, the European Community (now Union) has expressed grand ambitions to improve compliance with the international law of marine environmental protection. This ambition responds to two pressures. Poor compliance with international standards has contributed to degradation of the European marine environment and deterioration of the competitiveness of the Community's maritime sector. While in many respects the objectives of promoting environmental protection and economic competitiveness are competing, the attempt to ensure world-wide adherence to gradually rising international standards may serve both objectives at the same time.

The European Community (EC) has not been well positioned to improve compliance with international laws, however. In contrast to its role vis-à-vis other international environmental issues, like depletion of the ozone layer (Jachtenfuchs 1990) and transboundary movement of hazardous wastes (Allen 1995), the role of the Community vis-à-vis the international law of marine environmental protection has been a modest one. Member states have chosen to develop and implement international law without Community involvement. They have restricted the international role of the EC to a bare minimum. The question is whether in the face of continuing pressure on the marine environment and competitiveness, member states will depart from this practice and allow the EC to develop a more significant role.

In this chapter I will discuss the development of the EC policy that aims to improve compliance with the international law of marine environmental protection. I will examine the pressures for reform as perceived by the
Community, the actual reforms taken and proposed by the EC, and the limitations on such reforms imposed by European and international law. The chapter concludes that the role of the EC in reforming international law remains a modest one and is likely to stay so; positions of member states and third states as well as the legal system are not conducive to an enhanced role. In the second section I will describe the background of the Community policy to improve compliance with international law. The third section sets out the narrow legal margins within which the Community has to seek an independent role to contribute to improved compliance of international law. In the fourth and fifth sections I will examine the main policies carried out or proposed by the EC to serve simultaneously the objectives of environmental protection and economic competitiveness. The final section will summarise the leading threads.

The pressures for reform

The compliance-gap

The body of globally applicable laws that aims to protect the world’s oceans from pollution is massive and diverse. It consists of dozens of treaties and an incalculable number of non-treaty instruments, including many resolutions adopted by the International Maritime Organization (IMO). It covers such wide-ranging issues as routing schemes, standards for crews, technological standards for separation of waste water, allocation of jurisdictional entitlements of coastal and flag states, and liability rules.

However, now it is clear that these international laws have not fully achieved their objectives. While international laws leave little to be desired in terms of substance, and formally are adhered to by most shipping nations, their implementation has been less than perfect (Peer 1992, Nollkaemper 1993: 555, Donaldson 1994). Sub-standard shipping is pervasive: the shipboard and shore-based management, levels of crew-training and maintenance of many ships are not in accordance with internationally agreed rules.

Ever more ships are registered in states that do not adequately enforce international rules, many of them being so-called ‘open register’ states (that is, states which do not limit eligibility for registration to ships whose owners or operators have any connection with that state). Lord Donaldson’s authoritative Inquiry into the prevention of pollution from merchant shipping notes that the vice of open registers is twofold. First, they lead to sub-standard levels of safety. Second, they have led some ship owners to shop around the world for registers which have the lowest standard of enforcement and which, in consequence, involve them in the least expense (Donaldson 1994: 51). Flag states with particularly high losses include Malta, Turkey, Cyprus, South Korea, Vanuatu, Panama, Greece and the Philippines. All these states except the last have expanding fleets (Donaldson 1994: 62). The variation in loss levels is high: the worst being 100 times the best in fleets of 2 million or more (EC 1993a: 7). Also the annual reports of the port state control authorities provide information as to laggards – the top ten deficiency ratios per flag state include Romania, Honduras, Syria, Turkey, Cuba, Belize, Egypt, Morocco, Algeria and Lebanon (MoU 1995: 47). Within the EC figures are slightly better, but variations between the best and the worst are still high; in terms of loss rate the worst (Greece) is still fifty times the best, whereas deficiency ratios vary between 52 and 12 per cent (EC 1995a: 7–9). Recent figures for the United Kingdom confirm these data. In 1995, the Marine Safety Agency of the United Kingdom claimed it had taken the world lead in publishing details of ships detained. Over 10 per cent of 1,821 foreign ships inspected in UK ports in 1995 failed to comply with international standards. States with the highest percentages of detained ships per inspected ships were Turkey, Honduras, Bulgaria, India, Malta and Panama. EC ‘toppers’ were Greece and Denmark.

The causes of non-compliance are manifold. But one factor appears to be the key driving force behind inadequate compliance: non-compliance pays. This is most evident for the ship owner, who has the ultimate responsibility for the safe and pollution-free operation of a ship. Many ship owners seek the margin below international standards and above the level required for operation of the ship in order to improve their competitiveness. In recent years, ship owners have sought this margin by cutting investments in the maintenance of ships, understaffing crews and reflagging their ships to registers in states that impose less costly standards. Such decisions are facilitated by other actors. Many flag states accept or even stimulate sub-standard performance. There is a consistent pattern of sub-standard ships operating under the flags of countries that have ratified relevant treaties. The OECD has found that inadequacy of flag state surveys is ‘largely due to the fact that ship registration remains for these flag states, primarily, a competitive business and that commercial considerations are often seen to override safety matters’ (OECD 1996: 18; see also Donaldson 1994, Chapter 6). Also certain classification societies, hired to guarantee compliance with standards on board ships, play a role. To improve their market share they take only ‘soft’ glances at safety standards (OECD 1996: 20). Insurers and financiers also play their part, as ‘many flag states, class societies, insurers, financial institutions do not feel any responsibility for the safety performance of the shipping industry and optimize private profits disregarding social costs, aided by other players’ (Nieuwpoort and Meijnders 1996). The interests of one of these actors are one-dimensional, though. As many flag states are also port states and coastal states, their possible commercial interests in promoting or supporting sub-standard shipping may be neutralised by their ‘environmental interests’ in keeping their coasts free from pollution, or by a more general environmental concern, irrespective of a state’s own coast.
Second, the equality of competition that European states sought to achieve by adhering to international standards is achieved only on paper. More ships have chosen to register in open registers to achieve benefits such as tax allowances, freedom to crew ships with low-wage labour, regardless of nationality and without involvement of labour unions, less stringent vessel classification and inspection rules, and to search for standards of operation that make the ship sail, yet do not incur the high costs required for compliance with international standards. The resulting pattern of inadequate compliance imposes two pressures on the European Community and its member states. First, sea transport continues to pose threats to European marine ecosystems. Affected interests include those of seabirds, fish, marine mammals, local communities dependent on fisheries, and public health (Donaldson 1994: 25–26). Though some of the casualties in European waters are caused by ships registered in member states of the EC, it appears that responsibility for the majority of these cases lies with ships registered outside the EC. Illustrative is that Lord Donaldson’s Inquiry reports the incidents which led or could have led to significant pollution during the course of its work—twenty-seven of those cases involved ships registered outside the EC, whereas twelve involved ships registered in the EC (Donaldson 1994: Appendix D). The 1995 Annual Report of the Memorandum of Understanding on Port State Control is even clearer. It lists the top twenty-two flag states, ranked in percentage of ships delayed or detained following inspection. This list includes only one member state (Portugal) (MoU 1995: 47). The top twenty-two of priority cases for inspection in 1996/1997 (based on detention percentages) include only two member states: Greece and Portugal (MoU 1995: 53). As one can assume that the controls on the basis of the Memorandum of Understanding expose which ships pose a threat to European waters, this clearly indicates that the main threats to European waters come from ships flying the flag of non-member states. It is thus clear that the EC suffers environmentally from poor compliance in EC states, but in particular in non-EC states.

**Environmental and competitiveness pressures**

Poor implementation of existing treaties contributes to the continuing threats the maritime sector poses to marine ecosystems. Deliberate intentional discharges from ships as well as shipping accidents occur regularly in European waters. While shipping is responsible for only 12 per cent of all marine pollution, the effects remain a major cause of concern in the waters of the member states of the EC and the world over, not so much in terms of their global impact but certainly in terms of their impact on local coastal marine ecosystems. Affected interests include those of seabirds, fish, marine mammals, local communities dependent on fisheries, and public health (Donaldson 1994: 25–26). Though some of the casualties in European waters are caused by ships registered in member states of the EC, it appears that responsibility for the majority of these cases lies with ships registered outside the EC. Illustrative is that Lord Donaldson’s Inquiry reports the incidents which led or could have led to significant pollution during the course of its work—twenty-seven of those cases involved ships registered outside the EC, whereas twelve involved ships registered in the EC (Donaldson 1994: Appendix D). The 1995 Annual Report of the Memorandum of Understanding on Port State Control is even clearer. It lists the top twenty-two flag states, ranked in percentage of ships delayed or detained following inspection. This list includes only one member state (Portugal) (MoU 1995: 47). The top twenty-two of priority cases for inspection in 1996/1997 (based on detention percentages) include only two member states: Greece and Portugal (MoU 1995: 53). As one can assume that the controls on the basis of the Memorandum of Understanding expose which ships pose a threat to European waters, this clearly indicates that the main threats to European waters come from ships flying the flag of non-member states. It is thus clear that the EC suffers environmentally from poor compliance in EC states, but in particular in non-EC states.

The economics of the sector are unfavourable to improving the above situation. Over-capacity is vast, freight rates have tumbled, and profit margins are low or negative (Nieuwpoort and Meijnders 1996: 9). The spiral is downward. Failure to observe international requirements for safety and environmental protection not only causes environmental concerns. It also means that ship owners and flag states that fail to comply with international standards enjoy competitive advantages.

In most European states, the number of ships flying the national flag has decreased radically. In 1970, 32 per cent of the world tonnage remained under the flag of EC member states. In 1994, this figure had decreased to 14 per cent (EC 1996: 6). While for certain countries, including Luxembourg and Greece, ship owners have flagged in, the trend in the EC member states is that ship owners are flagging out. For instance, the number of ships sailing the Dutch flag has decreased from 548 (1986) to 371 (1993), while the number of Dutch vessels sailing a foreign flag increased in the same period from 251 to 365 (Asteris 1992, Peeters et al. 1996). The EC and the member states have perceived the demise in their shipping industry as a reason for concern. A shipping sector is still thought to be important for strategic and security reasons. In addition the economic losses are considerable in terms of loss of employment, loss of fiscal revenues, and loss of work in ship-related industries (EC 1996: 6).

The root cause of the trends in European shipping are due to competitiveness differences. For the main part, these appear to be caused by high labour costs and fiscal regimes (Asteris 1992: 192–194, Aspinwall 1996: 138–140). In addition, however, there is some evidence that part of the competitiveness loss is due to the fact that European ships operate in unfair international competition, as flags of convenience states are unable or unwilling to enforce international standards for safety and environmental protection. The very reason why states have relied on globally, rather than regionally, applicable treaties to regulate environmental effects of shipping is to ensure that environmental regulations do not undermine the competitive position of individual states and ship owners. Failure to comply with agreed rules undermines this objective and may threaten competitiveness. Poorly maintained and staffed ships compete with unfair advantage with those which have made the additional financial efforts to meet international requirements.

Generalisations on the financial benefits of ship owners and operators who choose not to comply with international standards are difficult. Everything depends on the age of the vessel, the type of trade it is engaged in and the abilities of the crew. However, a recent OECD report provides evidence that clearly indicates that financial advantages linked to the non-observance of agreed international rules and standards can reach a substantial amount of the running costs of a vessel and that by deliberately [avoiding] compliance with international rules and standards which govern safety and pollution prevention ... ship owners obtain financial benefits which can equate to a significant percentage of total vessel operating costs (OECD 1996: 5, 9).

The OECD report substantiates that there exists a considerable financial...
difference between the minimum level of expenditure to ensure owners’ compliance with international standards, on the one hand, and the so-called ‘floor level’, which corresponds to the minimum expenditure to keep the vessel operational, on the other. With an assumed standard level of operation for a twenty-year-old bulk carrier, for instance, standing at $3,250 a day, the margin of sub-standard operation could be as big as $500 a day or $182,500 a year. This, so the OECD report indicates, represents 15 per cent of the annual running costs for this type of vessel (OECD 1996: 10–15).

Cost savings can be enjoyed in a variety of ways, ranging from decisions not to put on board the required oil-spill clean up requirements or the required fire-fighting equipment, putting officers on board who do not hold valid licences, or using defective navigational equipment. All such decisions directly or indirectly contribute to increasing the risk of adverse environmental effects of shipping operations. While, again, generalisations are difficult, the above figures indicate the economic benefits of non-compliance and the potential impact on competitiveness. These benefits will grow with the development of ever more safety and environmental requirements.

The Community’s response to the compliance-gap

The above developments thus confronted the Community with two policy targets: improving environmental protection and improving competitiveness. In recent decades, member states had already initiated a wide variety of policy responses. These do not necessarily further both objectives at the same time. Unilateral Community standard setting for pollution control may further environmental protection, and possibly competitiveness within the Community, but undermine competitiveness world-wide. Haralambides (1993) argued that tougher environmental standards in the shipping sector will, in the short run, undoubtedly interfere with competitiveness. However, he adds that tougher standards also tend to induce innovation that may lessen costs in the long run. As I will further indicate below, this is not the policy presently pursued by the Community. Only on relatively marginal issues has the Community proposed or implemented unilateral measures (that is, apart from the IMO standard setting process) to improve safety and environmental protection, and the possibility of a win-win situation on this point has not been explored.

Conversely, competitiveness may be improved by reducing safety standards to the minimum level required by international law, thus curtailing environmental performance. As noted above, considerable costs may be saved in the margin between ‘good practice’ and ‘standard practice’ (OECD 1996: 10). This is presently being considered by the Netherlands. The Netherlands imposes certain requirements that go beyond the requirements of the applicable international laws (Peeters et al. 1996: 112–113). A recent economic analysis conducted for the government estimated that the costs for ship owners of requiring environmental performance that exceeds international requirements may amount to 1.3–1.6 per cent of annual operation costs (ibid.). The Netherlands Government announced that they will consider closely which requirements may be lowered so as to save costs. Although not all of those costs concern requirements directly related to environmental safety, they do indicate the type of policy responses searched for by states anxious to protect and improve competitiveness.

Alternatively, government intervention could subsidise ship owners or ports, thereby offsetting the competitive effects of stringent unilateral environmental protection and thus insulating the industry from the effects of competitive disadvantages. Such measures might include subsidies, fiscal incentives and imposing cargo reservations for national flag carriers. Europe has attempted to avoid government-imposed cargo reservation on trade between developed countries (Asteris 1992: 195). On the other hand, member states, sanctioned by the Commission, have actively supported shipping industries by providing state aid. While this, prima facie, is prohibited by the EC Treaty, the Commission has considered that ‘the importance of maintaining and developing the shipping sector for economic and employment reasons as well as the particular nature of the international competition it faces’ justify exceptions (EC 1996: 28). Another often used measure to promote competitiveness is the creation of specific registers for ships flying their flag to alleviate competitive disadvantages, in particular vis-à-vis open registers outside the EC. These registers were created to exclude ships flying the flag of the member state from certain costs in the fiscal and labour regime of the normal (‘first’) register. This has been done in Germany, Denmark and Finland (Aspinwall 1996: 136; EC 1996: 10).

While most of these policy options are presently being considered, their success has been limited. The Commission of the EC noted that they ‘have not been able to reverse the flagging out’ (EC 1996: 11). It is against this background that the Community has with full force entered a new direction: to ensure that safety and environmental standards are applied equally throughout the world, thus undermining much of the competitive advantages flag states and ship owners seek in the margin below international standards and above the minimum level needed to keep a ship in operation. It is this policy that unites the twin objectives of improved competitiveness and environmental protection.

The choice to pursue improved compliance as a key objective signifies a radical departure from existing policies. For a long time, the Community did not adopt an active policy to enhance compliance with international laws for marine environmental protection. The EC confined itself to support for the development and entry into force of rules in the IMO and their implementation in the member states, e.g. by recommending that member states ratify the Solas and Sccw Conventions (Erdmenger 1991). It did not incorporate international laws into Community law and did not bother
to attempt to enforce international laws through its own Community law procedures.

This low intensity regulation prevailed until the early 1990s. The accident with the Braer off the Shetland Islands in 1992 formed a watershed. The Community realised once more that implementation of international shipping law was utterly inadequate. The Community now deemed that it could no longer rely exclusively on the efforts of member states and the IMO to improve compliance. On 8 June 1993, the Council adopted the legislative plan of work on safety and environmental aspects of shipping laid down in the 'Common Policy on Safe Seas'.

The key objective of the Common Policy on Safe Seas is to contribute to the protection of European waters. However, in the shade of this objective the Common Policy on Safe Seas also seeks the enhancement of competitiveness. The policy repeatedly makes the point that uneven implementation of treaties has undermined the competitive equality that was the rationale of the global system of laws (EC 1993a: para. 22). The Common Policy on Safe Seas aims to enhance safety and prevention of pollution at sea through the elimination of sub-standard operators, vessels and crews from Community waters, and thereby seeks the combined objectives of protection of the European waters and the protection of competitiveness (EC 1993a: para. 2). This policy is confirmed in the later document 'Towards a New Maritime Strategy' – the policy document that aims to restore the economic position of the European shipping industry. This states that 'it is the conviction of the Commission that the strict enforcement of a safety policy based on internationally agreed standards will lead to a marked improvement of the competitive situation of ships under EC registers with stringent safety enforcement' (EC 1996: 12).

The choice for improving compliance appears less sensitive and controversial than most of the other policy choices to improve environmental performance and/or alleviate competitive disadvantages, such as subsidies, cargo reservations, or unilateral substantive standards that go beyond internationally agreed standards and hope to achieve a win-win situation. Nonetheless, the role of the EC to further the objective of improved compliance is by no means unproblematic, as I will discuss further below.

I will examine the main elements of the Community policy to reduce the compliance-gap of international law for marine environmental protection. First, however, I will discuss the legal margins that determine the leeway for the Community to contribute to implementation of this body of international law.

The narrow legal margins for Community action

The leeway for the Community to expand its role vis-à-vis the international law for marine environmental protection is strongly determined by applicable rules of European and international law. I will discuss these under three headings: the principle of subsidiarity, the Community's external competence in this particular field, and the applicable rules of international law.

Subsidiarity

The provisions on both common transport policy and environmental policy provide the Community with ample authority to develop a policy for the implementation of international laws applying to ship-based marine pollution. However, the exercise of this competence is subject to the principle of subsidiarity as laid down in Article 3B of the Maastricht Treaty. Under this principle, the Community shall only take action if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states.

As noted above, for many years member states did not use the Community institutions and implicitly considered that Community action was not necessary. However, in 1993 the Commission considered that prevailing reliance on policies of member states, either individually or through international institutions, was no longer adequate. The Common Policy on Safe Seas argues that individual action by member states has not produced adequate results in the past and is unlikely to do so in the future. We can assume that this means that the Commission finds reliance on implementation by individual member states, as well as on international policies of member states through the IMO, ineffective. The Community, so far the Common Policy on Safe Seas continues, thanks to its political and legislative machinery, would be uniquely placed both to ensure that member states apply standards to ships flying their flags in a more uniform and rigorous manner, and to enforce respect for the same standards on vessels of all flags when operating in EC waters (EC 1993a: para. 31).

The subsidiarity principle does not provide a clear-cut answer to whether Community intervention is indeed necessary. As a practical matter it is difficult or even impossible to examine whether more or less Community action is necessary to achieve the objective of environmentally safe sea transport. Is it clear that international law has not fully yielded the envisaged results. Whether EC intervention will prove more effective is uncertain at best. The subsidiarity principle is a two-edged sword which cannot only cut against Community action but also against state action (Fischer 1994, Golub 1996). The adoption of the Common Policy on Safe Seas clearly indicates a slight shift in the perceptions of member states in favour of Community intervention. However, as I will discuss further below, the scope of this shift and the depth of Community intervention remain a controversial matter. Whether or not Community action is necessary will have to be decided on each issue by an application of the broadly formulated subsidiarity test, that thus only
sets fairly general parameters for the development of Community policy vis-à-vis the international law of marine environmental protection.

**External policy**

The EC policy on ship-based marine pollution is largely an external policy that aims not only to regulate ships flying the flags of member states but also the flags of non-member states. As in all external environmental policies, the competence of the Community remains a hotly debated issue (Leenen 1984, Temple Lang 1986, Nollkaemper 1987, Haigh 1991, Brinkhorst 1994, Hession and Macrory 1994).

There is no doubt that in principle the EC is competent to pursue an external policy regarding marine environmental protection law. These competencies in principle are concurrent; while the Community is competent to accept and negotiate commitments under relevant treaties, whether the Community will do so is up to the member states. But when the EC has sole authority to act, and member states have to refrain from acting, is a question that continues to bewilder practitioners and scholars. The Council has never laid down a clear allocation of external powers in general or with regard to marine environmental protection, and has deferred to the European Court of Justice (ECJ) to fill the legal vacuum. The current position is that on most issues, the Community and member states share concurrent powers, a situation that calls for application of the ambiguous doctrine of cooperation (ECJ 1993: para. 5). The Common Policy on Safe Seas refers in many places to the need to coordinate positions in conformity with this doctrine.

The unanswered question is: what are the legal and environmental consequences of the obligation to cooperate? What does this obligation mean in light of the prevailing practice in international institutions where coordination meetings often result in cacophony? Opinions can be found on any position between two extremes — either it is said that the duty to cooperate implies that member states must take up a common position, and that if no common position can be agreed upon, member states should refrain from acting unilaterally (Frid 1993: 149); or it is said that the duty to cooperate does not amount to an obligation to reach a common position, but only to an obligation to use best endeavours to do so (MacLeod et al. 1996, Neuwahl 1996). It appears that for all practical purposes, the effect of the duty of cooperation will depend on a pragmatic, case-by-case seeking for coordinated positions. Like the principle of subsidiarity, the law on the external powers of the Community only provides broad parameters within which member states and Community institutions have to bargain for acceptable allocation of roles.

There is no uniform EC policy in international institutions related to marine environmental protection vis-à-vis non-member states. Member states more often than not pursue policies outside the EC context. In recent years coalitions of different groupings of member states of the EC have been more common than positions taken by the EC as a whole against non-member states. Often these coalitions are separated by a north-south line (with northern states generally being more supportive of stringent environmental policies than southern states with big fleet interests, notably Greece), but other coalitions also occur, much depending on the issue. The point is that, in contrast to fisheries, for instance, the law is not sufficiently developed to support and mandate a coherent external EC policy. Of course, this does not imply that a change in the law (more exclusive powers for the EC) will in itself change these coalitions — such a change in the law will only develop once the member states' perceptions of their interests converge, thus allowing more Community legislation and corresponding external powers.

**International law**

A third set of determinants of Community action is derived from international law. International law imposes certain limits on the competence of the Community to enforce standards for ships sailing the flags of non-member states when these ships are outside the exclusive economic zone, territorial sea or ports of member states (Nollkaemper and Hey 1995). In several respects international law limits the possibilities for a further development of policies of port states and coastal states vis-à-vis ships sailing the flag of non-member states. For instance, it has often been suggested that IMO routing schemes could be more effective if they were mandatory. However, coastal states cannot do so unilaterally, because EC or national law cannot exceed international standards. Outside their territorial sea states cannot impose rules and enforce them against ships sailing the flag of a third state. A Community rule that would make such resolutions mandatory could not be enforced against ships sailing the flag of non-member states. Ships sailing the flags of third states can only be bound with consent of the flag state, which in practice will mean after IMO approval. Other Community policies that are hampered by international legal considerations are the proposed directive concerning the setting up of a European vessel reporting system (that would require ships entering or passing through maritime zones to report to port authorities) in the maritime zones of the member states and the Proposal for a Council Directive on the Minimum Level of Training for Maritime Occupations (COM(93)217).

However, the limits imposed by international law are easily overstated. While they impose certain limits on Community action, this does not mean that they paralyse the Community. They leave room for unilateral action. For instance, international law permits the Community to oblige its member states to apply safety and environmental standards that are more stringent than international law to ships flying their flag; permits the Community to oblige member states to improve their exercise of port state
jurisdiction, by which it can indirectly affect ships flying the flags of non-member states; and permits the Community to apply its relatively effective enforcement procedures to supplement the renowned ineffectuous enforcement procedures of international law. It is up to the Community to seek and explore the margins for unilateralism and, through that, contribute to the change of international law.

Improving implementation of international law

Convergent implementation of international law by member states

A first line of the EC policy to improve implementation of international law is targeted at the environmental performance of ships flying the flags of its member states. The Community considered that one reason for the poor implementation of international laws was the 'soft nature' of such laws – either in terms of their contents or in terms of their legal nature (EC 1993a: para 35). The use of ambiguous terms and the use of recommendations would not sufficiently guarantee environmental protection and equality of conditions of competition. The Community attempts to take away this assumed source of poor implementation by developing internal Community rules that fill gaps in the applicable international laws.

This policy suggests that the Community finds that environmental performance of the ships of member states is sub-optimal, and that the European waters and coasts are threatened by pollution from European ships. As noted earlier, the reports of the Memorandum of Understanding on Port State Control provide only limited support for this assumption. Although performance of certain flag states (notably Portugal and Greece) is troublesome, the threats posed by these ships to European waters is negligible compared to those posed by non-EC ships. Nonetheless, the results of port state control do suggest that at least some ships flying flags of member states do not comply with their international obligations. By approving of the Common Policy on Safe Seas, the EC member states accepted the reasoning of the Commission that environmental performance of member states should be improved.

The EC policy on convergent implementation also suggests, though this point is not elaborated in the EC's policy documents, that intra-Community competitiveness is jeopardised by different interpretation and application of international law (EC 1993a: 17). To the knowledge of this author, there are no studies of such effects. Although there is of course competition between neighbouring ports (like Rotterdam and Hamburg), most observers consider that this is more a matter of overall quality of the port, the connections between the port and subsequent transport facilities, and possibly dues for entry into port (an issue not regulated by international law), than a matter of differences in the application of international law or even unilateral substantive requirements.

Nonetheless, the EU has made a priority the development of internal Community rules that are to harmonise standards and enforcement in its member states. This represents a break with existing policy. Until the early 1990s, the Community had adopted few internal laws, dealing mainly with the control and reduction of pollution caused by hydrocarbons discharged at sea. Otherwise it totally relied on support for rules developed in the IMO. However, the Community has not totally abandoned its reliance on the work of the IMO. Most of its (proposed) internal rules are not fully unilaterally imposed environmental and safety standards that go beyond what is agreed in IMO, but rather measures that aim to strengthen IMO rules with a view to furthering their implementation. The Community has taken a threefold approach.

First, the Community attempts to achieve convergent application of generally formulated obligations contained in IMO Conventions. It attempts to substitute detail for vagueness. An example is the development of safety performance standards for marine equipment. Ship-borne equipment is covered by treaties, mainly SOLAS and MARPOL. The Common Policy on Safe Seas notes that despite these international rules, different levels of national standards exist, implementing the international rules or recommendations concerning technical specifications and testing procedures, leaving margins of appreciation to national bodies. This would lead to different levels of safety despite the existence of international standards. One result is that 'shipping companies face higher costs in some member states than in others because of differing national requirements, and accordingly are at a competitive disadvantage to companies in other member states' (EC 1993a: Part II, para. 16). For these reasons the Commission has proposed a directive that harmonises technical requirements and testing procedures.

Second, the EC aspires to insert legally binding rules in areas that are now governed by resolutions. The IMO has used many Resolutions in the implementation and specification of treaties. Apparently, there is a large number of variations in approaches of member states for the implementation and interpretation of legally non-binding standards. The EC has deemed it appropriate to remedy this situation by pursuing a mandatory application of IMO Resolutions by transforming them into directives.

An example was IMO Resolution A747(18) on segregated ballast tanks (SBTs). SBTs have certain environmental advantages. In conventional oil tankers the same tanks are used for water when in ballast and for cargo when laden. When ballast water is discharged, oily waste enters the marine environment. Tankers equipped with SBTs separate the ballast water from the cargo and in principle ballast waters do not contain oily wastes. However, many ships have been reluctant to use SBTs as ports discriminate against
SBT tankers: because they are bigger and ports tend to calculate dues according to overall tonnage, SBTs are charged more than less environmentally friendly tankers (EC 1993a: paras. 7.54 and 7.62). While some ports (including Rotterdam) had unilaterally reduced port dues for SBTs, this is not the global pattern and presently there is an economic disincentive for using SBTs. In order to avoid owners who order SBT tankers paying additional port costs, the IMO has called for a non-binding resolution on states to follow the example of Rotterdam. Reportedly, however, this resolution has been poorly implemented. The Commission noted that ports 'in many countries, including some Member States' continue to charge SBT tankers in a manner which does not comply with this resolution (EC 1993a: para. 32). The EC now aims to make the IMO resolution mandatory within the EC and hopes to contribute to solving this problem (EC 1993a: para. 7.57). In the future more IMO resolutions may be transformed into directives, including, for example, the International Maritime Dangerous Goods Code (IMDG) and the Code for Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (EC 1993a: Part II, paras. 27–28). Although no comprehensive data are available that support these figures, as noted above, the results of port state control do suggest that at least some ships flying flags of member states (including Greece, Portugal, Spain and Denmark) do not comply with their international obligations. By approving the Common Policy on Safe Seas, the EC member states accepted the reasoning of the Commission that implementation by member states of the more important IMO Resolutions should be improved.

Third, the Community has initiated additional rule-making to ensure that member states fulfil the obligations flowing from internationally agreed standards on safety and environment. For instance, it has proposed common criteria for registers that would have to ensure environmental protection and be conducive to eliminating distortions of competition which can result from varying registration conditions and flag state enforcement (EC 1996: 15–16). Also, the Community has adopted a directive on classification societies (Directive 94/57) that aims to improve the quality of the work of these societies so as to ensure that ships supervised by member states as flag states live up to international standards.

The EC policy to enhance the convergent implementation of international law by member states may induce better compliance. One obvious result is that the EC legislations can improve compliance by invoking the enforcement procedures available under the EC Treaty. Although a case can be made that the Community could enforce treaties directly, that is, without transformation into Community law (Nollkaemper and Hey 1995), no use has been made of this possibility. In any case, the possibilities of enforcing legally non-binding IMO rules will be limited. Transforming international rules into Community law may increase the use of enforcement proceedings and thereby compliance in member states.

However, in several respects the policy of the Community aimed at the convergent implementation of international law is limited. First, whether the mere fact that a resolution is adopted in legally binding form and in a more detailed manner actually will enhance compliance is a matter of some uncertainty. It is clear that international law has not fully yielded the envisaged results. But whether that is due to the fact that IMO rules are vague and often non-legally binding is uncertain at best. Whether legally binding and detailed EC law will prove more effective is equally uncertain.

Second, this part of Community policy will have a narrow scope — it will mainly affect ships flying the flags of member states. From an environmental perspective the gains may be limited, as it affects only ships of member states, while, as noted earlier, most threats are caused by ships from non-member states. From the perspective of competitiveness, such unilateral action undermines the very uniformity that was the raison d’être of the global rules. Even though these EU rules are not fully unilateral, as they are based on international rules, rather than prescribing new rules, they are inspired by the idea of improving environmental performance within the Community, thus enlarging rather than reducing the compliance-gap. For this reason it is necessary that unilateral Community action targeted at ships flying the flags of member states is accompanied by policies targeted at ships flying the flags of non-member states.

**Strengthening enforcement by port states**

A second line of the EC policy to improve implementation of international law is to improve port state enforcement. The role of port states is critical in enforcement of international laws. Ideally, they perform only a marginal role as the prime responsibility for enforcement should rest with flag states. However, inadequate performance of flag states has put the task of port state to the fore. Port states can step in, as a form as self-defence, and try to remove sub-standard ships from their ports. This may serve the indirect aim of pressing flag states and ships to improve environmental performance and thereby to restore this aspect of competitiveness.

The Law of the Sea Convention sanctions port state control, whereas the IMO Conventions rely heavily on port state control to ensure that vessels conform to the safety, technical, environmental and social standards for seafarers as laid down in the conventions. In the early 1980s, European states developed the concept of port state control in the Paris Memorandum on Understanding on Port State Control (MoU 1982). Signatories agreed to harmonise and increase inspection of compliance with seven treaties. Practice since then has shown that the problems of sub-standard shipping are real: the number of deficiencies found by authorities has remained at a constant high level. Port state inspection is now widely regarded as 'a very, if not the most, important policing mechanism for the shipping industry'.
Port state control can simultaneously contribute to the objectives of environmental protection and competitiveness. Port state authorities inspect deficiencies, and can call on a ship to remedy such deficiencies; prevent a vessel from proceeding on its voyage; and notify the flag state and next port of such deficiencies. Such measures can make it more difficult for ship owners to obtain financial benefits by not observing international rules. Depending on the tightness of control measures and corrective actions, port state control can minimise or offset the financial advantages resulting from the operation of sub-standard vessels.

The role of the EC in port state control over compliance with international law has remained relatively marginal. In the early 1980s, the Council rejected a proposal for a directive on the harmonisation of port state control - member states were concerned that this could trigger an external competence of the EC that could detract from their competencies in the IMO (Erdmenger 1991: 1191-1192). and opted for the development of the Memorandum on Port State Control as an instrument outside the Community framework. Since then the Community has played a modest role as a member of the MoU.

However, the Common Policy on Safe Seas envisaged a new role for the Community. The high number of sub-standard ships that continue to operate in Community waters; the number of detections, which vary greatly between countries participating in MoU; and the lack of uniformity in inspection criteria and detention criteria would, so the Common Policy on Safe Seas argues, call for Community intervention. By developing its own policy on port state control, the EC hopes to improve compliance with international law of ships flying the flags of non-member states.

In 1994 the Community adopted the directive of port state control. By adopting this instrument the Community has offered a modest contribution to port state control of compliance with international law. In a number of respects this Directive differs from the MoU: it displays more detail, including minimum requirements for inspection; it is legally binding, and consequently enforceable in the Community. There are no signs that the Community intends to impose additional substantive requirements on ships entering ports, as has been done by the United States. Rather than imposing new requirements, the Community attempts to use international law as a weapon against non-member states. Its policy fits in with the prevailing pattern where port states are reluctant to use their economic power to impose new regulations because of fear of retaliation or loss of trade to rival ports (Nieuwpoort and Meijnders 1996: 11).

It must be noted that all this is largely based on unexpressed and unsupported assumptions that a different policy (that is, one that would impose substantive requirements) would indeed lead to loss of trade to rival ports.

MARINE ENVIRONMENTAL PROTECTION

Although in the northern European context there is considerable competition between ports, use of substantive requirements for entry into ports has never been a key policy to compete with other ports in the region. Likewise, there is no hard evidence that the introduction of port state control in Europe (the same would hold for the EC) has caused the operation of sub-standard ships to shift to other regions. However, as one expert added, the assumption that this may be the case as such 'seems valid enough' (Schifferli 1993: 442). It is for this reason that European states have for some time, and with increasing success, promoted the development of port state controls in other parts of the world.

Strengthening international law

A third envisaged Community contribution to the improved compliance of international law is the effective participation of the Community in competent international organisations, particularly the IMO. Long before the EC recognised the ineffectiveness of existing laws to ensure environmental protection and competitiveness, contracting parties of the relevant IMO Conventions had done so. During the past decade(s), they have initiated a continuous process of reform. The present agenda includes many items critical to improvement of compliance, most of all improvement of flag state performance (including development of guidelines and better assistance to developing countries); extension of port state control; and clarification and improvement of vessel traffic services. While, as noted above, the EC is pursuing a unilateral policy on some of these issues, there is no doubt that if the EC really wishes to achieve progress in environmental protection and competitiveness, it also has to reach ships flying the flags of non-member states. It is for this reason that a key strategy of the Common Policy on Safe Seas is to improve contents and implementation of international law by supporting developments in the IMO.

Effecting this objective requires a drastic change in prevailing practice of external Community policy. For a long time, the Community's role in IMO has been limited. It is an observer, but not a party to the IMO Conventions. This is no oversight: member states have not wished the Community to perform that role. As previously mentioned, by 1980 the existence of external powers of the Community was already a matter of discussion. A proposal for a directive on the harmonisation of port state control was rejected by the Council. Illustrative also is the sorry plight of proposals for accession to the London Dumping Convention (Suman 1991).

The Commission has envisaged a surge in the use of external powers. In the Communication on the Common Policy on Safe Seas as well as in other documents it refers to the exercise of external powers as an important means of enhancing safety and environmental protection. It has called on member states to 'boost co-operation' and envisages that the EC 'participate as
contracting party in all new conventions (maritime safety, prevention of pollution) so as to secure consistency (EC 1993b: 18). Most of all this is relevant to efforts to improve environmental performance of flag states. Thus, the Commission proposes a joint effort by Community and member states in the IMO to agree on a world-wide basis on certain conditions for flag administrations and their ship registers (EC 1996: 14–15); and has called on member states to provide support to the Sub-Committee on Flag-State Implementation; to provide input in regulatory discussions and support to developing countries (EC 1993a: Action Programme annex para. 126); and effectively to coordinate action to help strengthen IMO action on the role of the human element (EC 1993a: Action Programme annex paras. 128–137).

The prospects of this policy remain uncertain. As noted above, European Community law only defines in broad terms the scope of competence of the Community. Member states and Community institutions will have to elaborate on a case-by-case basis whether they will coordinate their positions and proceed through the Community institutions. The Community cannot, under present Community law, force its member states to surrender their role in the IMO to the Community. The key question then is whether member states are willing to give up their traditional freedom in IMO. In the 1980s member states were not willing to do so, and resisted almost any exercise of external powers by the Community. Recent years have shown substantial development in the willingness of member states to act in a coordinated manner within a Community framework. Coordination between the member states and the Commission for regulatory discussions in the IMO has become standard procedure. However, the Community retains a low profile. As noted above, the coalitions between member states in the IMO are manifold, and member states, in differing coalitions, oppose each other more often than they act together in the EC vis-à-vis non-member states. Observers consider that this can be explained by a variety of factors: general environmental awareness/priorities (which explains the common coalition of northern European states), position towards desirability of government control (which puts the United Kingdom often in the coalition of southern states), and the more narrow factor of flag states' interests combined with low environmental concern (of which Greece is the best example). But, again, much depends on the issue at stake, and most observers feel generalisations are not helpful. As yet, it remains unlikely that the Community would actually replace member states.

Concluding observations

Inadequate compliance with international law for the protection of the marine environment imposes continuing pressure on the marine environment as well as on the competitiveness of the European shipping sector. The EC has thus tried to achieve the joint objectives of improving environmental protection and safeguarding competitiveness by improving international compliance. To this extent, global treaties remain critical to the objectives of world-wide environmental protection and competitiveness.

The Community tries to pursue these joint objectives by three strategies: convergent implementation in member states; port state control; and external action within the framework of the IMO and other relevant international institutions. On each of these points, the Community attempts to use the margins left open by European and international law. As yet, however, these three policies have led to limited results – the Community has adopted a few directives that intend to undo the ambiguity of international law: a directive on port state control that largely overlaps with the Paris MOU; and a cautious attempt to improve use of Community institutions in the framework of the IMO. Member states do not appear eager to grant the Community an independent role vis-à-vis the international law of marine environmental protection. The Community's policy has been defensive rather than aggressive – it aims to defend and improve compliance with existing laws, but is reluctant to develop new standards unilaterally. Whereas it may wish to promote new standards internationally, its legal and political status in the IMO makes the prospect for doing so limited.

Notes

1 I use the term 'law of marine environmental protection' to refer to the body of international law applying to the environmental effects of maritime transport. I will not refer to the laws applying to marine pollution from other sources.
2 The Commission's role in representing the Community, and the tension this creates with the ability of member states to negotiate individually, is also discussed in Chapters 2, 3 and 5.
6 Under art. 94 of the Law of the Sea Convention, a flag state is obliged to exercise its jurisdiction and control over ships sailing its flag.

7 At present a two-tier marker in classification society has been created, with societies in the second tier performing poorly. See also Donaldson (1994), para. 7.30.

8 The Government of the Netherlands expressly identified this as an important cause of unfair competition; see Letter of the Minister of Transport, Water Management and Public Works to Parliament of 25 May, 1995, K. 1994–95, 24165, nr 1, p. 5. See also EC (1996), Chapter B.II.

9 Such win-win strategies are discussed in the introductory chapter of this volume, and play an important role in EU policy to reduce greenhouse gas emissions (Chapter 5).

10 All government interference leads to market distortions, as it subsidizes price dumping and over-capacity, and puts more pressure on freight rates and thus fuels the need for more cost-reduction by ship owners (Nieuwpoort and Meijnders 1990). The use of such ‘carrots’ is discussed in the introductory chapter and has played a particularly important role in relation to climate change (Chapter 5), greening the CAP (Chapter 7) and EU development aid (Chapter 8).


12 Recommendation 79/114, OJ 1979 L 33/33.

13 Accidents in 1979 involving the Argo and the Khark-V induced the Council to adopt a Resolution that calls on member states to ensure stricter compliance by ships flying their flags with the technical rules for safety and pollution prevention contained in, in particular, the Marpol and Solas Conventions; and to intensify the inspections of foreign ships in their ports, as provided for in the MoU on Port State Control, particularly focusing on compliance with the manning requirements of the Solas and Stcw Conventions. OJ 1990 C 206/1.

14 Council Resolution on a common policy on safe seas, OJ 1993, C 271/1.

15 The EC Treaty provides sufficient legal basis for the development of safety and environmental rules on shipping. Such rules are primarily to be based on art. 84(2). It may be argued that art. 75 (in the case of safety rules) and art. 130s (in the case of environmental rules) can be used as additional legal bases; but in principle art. 84(2) is a sufficient legal basis and can incorporate the objectives of art. 75 and 130s. See the discussion of legal bases in Chapter 3.

16 Art. 84(2), the only provision expressly providing for regulation of maritime transport, does not make any mention of external powers. However, there is little doubt that the Commission possesses implied external powers under the case-law laid down in ECJ (1971, para. 16) (hereinafter ERTA), ECJ (1976, paras 19–20), ECJ (1993, paras 7–9). Article 130(4) does provide for an external competence in regard to environmental policy.

17 Concurrent powers are powers that the Community may exercise if the Council so decides, but which are not (yet) exclusive Community powers; see Temple Lang (1986).

18 On the inadequacy of existing coordination in many international institutions, see Maunu (1995: 126).

19 This might change, though, if the institutions were to impose more precise obligations of cooperation on member states (Nieuwpoort 1996: 678).

20 Within their territorial sea coastal states can prescribe and enforce routing systems as long as these are compatible with the right of innocent passage. But there is some room for discussion as to what specific information states may require before infringing on the right of innocent passage. See Plant (1990).

21 Proposal for a Council Directive concerning the setting up of a European vessel reporting system in the maritime zones of Community Member States, OJ 1994 C 22; amended proposal OJ 1994, C 193. The draft directive contains a number of provisions that should safeguard the rights of non-member states. Art. 2(3) provides that the application of Eurorep shall be ‘without prejudice to the right of inoffensive passage through territorial waters, the right of unhindered passage in transit through international straits, and freedom of navigation outside territorial waters’. Art. 5(3) provides that the reporting obligation of art. 5(1) is not mandatory for transit vessels (that is, vessels not bound for Community ports or intending to anchor in territorial waters or flying the flag of a member state). After the entry into force of the Solas amendments, mandatory reporting for vessels carrying dangerous or polluting goods will be permitted.

22 For a discussion of the various ways in which international obligations can be ‘soft’, see Reisman (1988).

23 Resolution of 26 June 1978 setting up an action programme on control and reduction of pollution caused by hydrocarbons discharged at sea, OJ 1978 C 162. This action programme responded to the infamous stranding of the Amoco Cadiz off the coast of Brittany in 1978. The Council also set up an Advisory Committee and an information system relating to the combating of oil pollution. See Commission Decision 80/686 (OJ 1980 L 188), amended by Decisions 85/208 (OJ 1985 L 89) and 87/144 (OJ 1987 L 57), and Council Decision 86/85 (OJ 1986 L 77/33).


25 However, port state control has been criticised as an ‘end-of-pipe’ solution that attempts to solve economic problems by fighting only symptoms and does not create incentives for the necessary self-organisation in the industry. See Nieuwpoort and Meijnders (1996: 10).

26 Costs of corrective action should be high enough to compensate the daily financial benefits. The OECD calculates that in cases involving both detention and non-detention the daily benefits may still outweigh the costs of corrective action (OECD 1996: 16–17, 23).


28 Subsequently, the draft directive provided the basis for the MoU on port state control.

29 Directive 95/21 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the member state, of international standards for ship safety, pollution prevention and shipboard living and working conditions, OJ 1995 L 157/1.


Bibliography


