

Arctic Shipping from an EU Perspective

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Introduction

The European Union (EU) has, to date, taken a cautious stance with respect to shipping in the Arctic. There is no EU shipping legislation specifically targeting or extending to the Arctic, and the policy documents on the Arctic, which have been adopted by various EU institutions in the past decade, have been quite restrained with respect to the policy that the EU wishes to implement in respect of maritime transport in the area. This is despite the significant policy and economic interests that the EU has in Arctic shipping. The EU is the principal destination for goods and natural resources from the Arctic region and is among the prime regions to profit from the Arctic sea routes, which could reduce the distance between Northern Europe and Asia by as much as half.¹

The EU normally regulates shipping through the collective exercise by its member states of port state jurisdiction or - less commonly - coastal state jurisdiction. In other words, EU maritime safety and environmental legislation normally targets ships based on the region in which they operate, rather than on the basis of the ship's flag. Transposing this to the Arctic involves obvious difficulties, as the EU does not have coastal (or port) states in the region. Geographical factors therefore place clear limitations on the EU's possibilities for exercising influence over shipping in the Arctic, at least in a traditional manner.

However, the absence of a direct geographical link to the Arctic does not on its own justify the relative absence of an EU policy for Arctic shipping. First, there are a number of ways, other than regulation, in which the EU could exert influence, which might be at least as effective for achieving its policy goals. Second, even within the regulatory field, there may be options that have not yet been fully explored.

The focus of this article is on the regulatory relationship between the EU and the Arctic. Following a brief review of the recent Arctic policy documents from a shipping perspective, the following section assesses the applicability of the EU's current maritime safety and environmental legislation to shipping activities in the Arctic. Since it is concluded that current EU shipping legislation does not make much of an impact in the Arctic, the following section explores the legal challenges

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¹ Generally on the EU's economic interests in Arctic shipping, see A. Raspotnik and B. Rudloff, 'The EU as a Shipping Actor in the Arctic', Working Paper FG 2, 2012/Nr. 4, Stiftung Wissenschaft und Politik, Berlin, 2012. Available at www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/FG2_2012Nr4_rff_raspotnik.pdf

standing in the way of a more active regulatory approach of the EU towards Arctic shipping. The jurisdictional limitations imposed by existing rights and duties in the law of the sea are reviewed, with a view to exploring to what extent there is legal scope for a more active role for the EU in this area. It is concluded that there is such scope, even if there is little to suggest that an EU-based regulatory approach for the Arctic is currently required. Yet, as is noted in the concluding section, the lack of a clear indication of the EU's goals or ambitions for Arctic shipping limits the Union's possibilities for playing a more active role in this area, both within and outside regulation, and both at regional level as well as globally.

The Arctic policy documents

The Arctic policy documents adopted by the various EU institutions over the past decade have never been particularly radical, as far as shipping is concerned.² In general, they have highlighted issues on which there is large political agreement and kept the discussion at a very general level, so as to avoid concrete issues of potential controversy. Instead, the documents have emphasised the more general benefits that an increased involvement by the EU in Arctic shipping could bring about, notably in terms of technical and economic tools.

The tendency to avoid controversies has strengthened over time. While the earlier policy documents - by all institutions - were more specific, both with respect to the policies and the measures they would like to see implemented for shipping, subsequent documents have gradually toned down any indications of a potential role for the EU as a driver of Arctic shipping initiatives. Substantive regulation is left to the global maritime community, notably the International Maritime Organization (IMO), and, in contrast to tensions between the IMO and the EU about the regulatory initiative on other key regulatory issues,³ the EU policy

² The first document of this kind was the Commission's Communication on the European Union and the Arctic Region COM(2008) 763 final, adopted in 2008, which has since been followed by:

- Council conclusions of 8 December 2009 on Arctic issues;
- European Parliament resolution of 20 January 2011 on a sustainable EU policy for the High North (2009/2214(INI)) (hereinafter the '2011 European Parliament Resolution');
- Joint Communication from the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, 'Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps' (JOIN(2012) 19 final);
- European Parliament resolution of 12 March 2014 on the EU strategy for the Arctic (2013/2595(RSP), hereinafter the '2014 European Parliament resolution');
- Council conclusions of 12 May 2014 on developing a European Union policy towards the Arctic Region;
- Joint Communication of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy 'An Integrated European Union Policy for the Arctic' (JOIN(2016) 21 final) of 27 April 2016 (hereinafter the '2016 Joint Communication'); and
- Council conclusions on the Arctic of 20 June 2016 endorsed the policies outlined in the Joint Communication.
- European Parliament resolution of 16 March 2017 on an integrated European Union policy for the Arctic (2016/2228(INI))

³ Starting from its 1993 'Common policy for safe seas' (COM(93) 66 final), the Commission has emphasised the complementary role of EU legislation and its preparedness to resort to regional legislation should international rules be considered inadequate: "the Community needs to ensure

documents on the Arctic appear to be quite comfortable with the current global regulatory situation. With one small exception,⁴ the documents include no reference to a complementary role for the EU, should the global maritime community fail to adopt certain key standards.

With respect to more general principles of the law of the sea, all three main EU institutions have highlighted “the importance of respecting international law principles, including the freedom of navigation and the right of innocent passage”.⁵ This contrasts with the EU's general maritime policy, which is distinctively port and coastal state-oriented. Moreover, the documents include no indication as to *how* those international law principles should be respected in the Arctic, or how the navigational and environmental interests should be balanced. Existing controversies about maritime delimitation and zones involved in Canadian and Russian waters along the main Arctic sea routes are not mentioned at all.

In terms of substantive standards, the Arctic policy documents generally emphasise the need to implement global rules, including the recently adopted Polar Code, as well as regulatory initiatives by the Arctic States, in particular the Arctic SAR and MOPPR Conventions.⁶ EU initiatives in the region are limited to issues where the participation of the Union could provide benefits to the Arctic region as a whole. A particular emphasis has been placed on the monitoring capabilities developed by the EU and their potential usefulness for inducing compliance with existing (international) rules in the region.⁷ The role of the European Maritime Safety Agency (EMSA) has been specifically highlighted in this respect.⁸

that the IMO's work develops in a way which will produce adequate solutions for ships sailing in its waters" (para. 61). Most recently on this matter, see the Commission white paper 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system', COM(2011) 144 final and Communication 'Strategic goals and recommendations for the EU's maritime transport policy until 2018' COM(2009) 8 final.

⁴ The only exception to this cautious stance has been the European Parliament, which has twice called for potential supplementary measures by the EU. Para 67 of its 2011 resolution specifically called for the EU to adopt supplementary port-state measures "with a view to imposing a strict regime limiting soot emissions and the use and carriage of heavy fuel oil" if the international negotiations at the IMO did not produce the desired results for the Arctic. While this element no longer featured in the Parliament's next resolution of 2014, it reappeared in part in 2017. Para. 58 of the 2017 resolution "calls on the Commission, in the absence of adequate international measures, to put forward proposals on rules for vessels calling at EU ports subsequent to, or prior to, journeys through Arctic waters, with a view to prohibiting the use and carriage of HFO".

⁵ 2014 Council conclusions (n 2), para 10. Similar statements were made in the Council Conclusions [I've capitalized "Conclusions here to match its use in footnote 6] of 8 December 2009 on Arctic issues, (n 2), para. 16; 2012 Joint Communication n 2 para. 17; and 2014 European Parliament Resolution n 2, para. 48. The European Parliament came closest to criticising the Arctic coastal states, when calling on “the states in the region to ensure that any current transport route – and those that may emerge in the future – are open to international shipping and to refrain from introducing any arbitrary unilateral obstacles, be they financial or administrative, that could hinder shipping in the Arctic, other than internationally agreed measures aimed at increasing security or protection of the environment” (*Ibid.*, para. 50).

⁶ 2014 Council Conclusions (n 2) para. 9. This aspect no longer features in the 2016 Conclusions n 2.

⁷ NO TEXT FOR THIS FOOTNOTE?

⁸ See 2014 Council Conclusions [see my comment above in footnote 5] (n 2) para. 9 and the 2014 European Parliament Resolution (n 2), para. 49. See also Joint Communication 'International ocean

The most recent Joint Communication for the Arctic, issued in April 2016, is remarkably free from topics that could generate controversy, both generally and in respect of the Union's maritime policy. It merely states that the EU "should encourage full respect for the provisions of UNCLOS ... including the obligation to protect and preserve the marine environment" (p. 7) and encourages states to ratify the IMO's 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments (p. 8). Under the heading of sustainable development, the Communication only refers to research and development tasks. The EU should, for example, "contribute to enhance the safety of navigation in the Arctic through innovative technologies and the development of tools for the monitoring of ... the increasing maritime activities in the Arctic" (p. 12).⁹

The only proposal for a regulatory initiative which is even remotely relevant for shipping is the promotion of biodiversity protection through the establishment of Marine Protected Areas (MPAs).¹⁰ How these areas are to be established, by whom and on what jurisdictional basis, is not clarified, nor is their effect, if any, on both the shipping and navigational freedoms that the document also seeks to ensure.

More recently still, the Commission and the High Representative for Foreign Affairs and Security Policy adopted a more general policy document on oceans' governance.¹¹ This covers oceans more generally and does not have a specific Arctic focus, although it is noted that the Arctic Ocean is "one of the most fragile sea regions on the planet" and that the Union, in line with its integrated Arctic policy, "should seek to ensure sustainable development in and around the region on the basis of international cooperation".¹² This document also supports the promotion of biodiversity protection through the establishment of Arctic MPAs.

The Ocean Governance Communication includes more concrete policy statements than the corresponding documents on the Arctic policy. It foresees an important role for the Union in contributing to international oceans policy, and it includes 14 different actions which must be pursued to strengthen the international ocean governance framework. These actions will form an integral part of the EU's response to the UN 2030 Agenda for Sustainable Development, with UNCLOS being its "main legal driver".¹³

governance: an agenda for the future of our oceans' (JOIN(2016) 49 final (hereinafter the 'Oceans' Governance Communication'), at pp. 9-10.

⁹ 2016 Joint Communication (n 2). Interestingly, the Communication in this context refers to research programmes designed to cope "with maritime security threats resulting from the opening of the North East passage", section 2.5.

¹⁰ In *ibid.* at p. 7 it is stated that the EU "should promote establishing marine protected areas in the Arctic, these areas being an important element in the effort to preserve biodiversity".

¹¹ N 7.

¹² *Ibid.*, pp. 6-7. The passages appear under the heading 'regional fisheries management and cooperation' and do not seem intended to affect maritime transport.

¹³ *Ibid.*, p. 5 The UN's 2030 Agenda for Sustainable Development identified conservation and sustainable use of oceans as one of the 17 Sustainable Development Goals (see e.g. at www.un.org/sustainabledevelopment/oceans/)

The institutions consider that the EU "is well placed to shape international ocean governance on the basis of its experience in developing a sustainable approach to ocean management, notably through its environment policy (in particular its Marine Strategy Framework Directive), integrated maritime policy (in particular its Maritime Spatial Planning Directive), reformed common fisheries policy, action against illegal, unregulated and unreported (IUU) fishing and its maritime transport policy".¹⁴ However, despite this starting point, maritime transport policy features very sparingly in the document. Even though one of the 14 actions listed is to "ensure the safety and security of the oceans", the ship-based activities focus almost exclusively on fisheries and maritime security. Commercial shipping is hardly addressed at all.

In summary, Arctic shipping has clearly not been at the centre of the EU's attention, either in the different institutions' Arctic policy documents or in its recent first general policy document on oceans' governance. On the contrary, the documents are very cautious on regulatory issues, whether at global or regional level, though some emphasis is given to other forms of steering mechanisms, such as making technology or research findings available.¹⁵ As a result, very little in the documents indicates a desire by the EU, or at least by the Commission and the Council, to take an active role in steering Arctic shipping policy, and the level of ambition- or at least specificity - appears to be decreasing. Instead, the EU views itself mainly as a facilitator with a set of useful tools that could benefit the Arctic states and the region as a whole, should the key stakeholders (which do not appear to include the EU itself) wish to make use of them.

The EU maritime regulation and Arctic shipping

General on EU shipping rules

The general rights and obligations under the law of the sea have been instrumental for shaping the EU's shipping policy and legislation. From the very early days of EU's maritime safety regulation in the 1990's until today, the policy has been based on a careful balancing between the rights and obligations of flag, coastal and port states under the law of the sea. As a consequence, an equally careful relationship has had to be established with the global shipping rules, notably the conventions adopted within the framework of the IMO.

¹⁴ *Ibid.*, p. 4.

¹⁵ For example, it has been emphasised by various EU institutions in their Arctic policy documents that the EU already holds a great deal of data on ship standards and movements. In addition to port state control and other compliance data on ships, a series of databases on ship movements are being hosted by the EMSA which acquire data by satellites, AIS and other means, which could prove useful not only for monitoring and surveillance of shipping activities in the Arctic, but also for assisting in rescue operations etc. EMSA also manages a small fleet of oil recovery vessels that can be brought in to assist with pollution emergencies in EU waters. Extending their potential scope of activity to the Arctic Ocean has not been proposed, but the collaboration between EMSA and the Arctic Council, notably through the Emergency Prevention, Preparedness and Response (EPPR) Working Group, which was established under the Arctic Environmental Protection Strategy (AEPS), is an indication of close collaboration between the two institutions in this field.

Shipping is an international business and there is therefore a longstanding tradition of regulating it at international (global) level, leaving little space for regional bodies like the EU. The preference for global rule-making is also confirmed in numerous articles of UNCLOS.¹⁶ In substantive terms, maritime safety and environmental protection is heavily regulated at international level, leaving relatively few 'gaps' for additional regional legislation. The IMO has adopted some 60 international treaties, covering anything from technical standards for ship design and construction and standards for discharge, to rules on dangerous goods and salvage, as well as search and rescue liability for pollution damage.¹⁷ Global shipping rules have traditionally not singled out the Arctic as an area where specific rules apply, but this partially changed in 2017, now that the Polar Code has entered into force.¹⁸

Despite this very globally-oriented starting point, the EU's maritime safety legislation has developed rapidly over the past 25 years, and now comprises some 50 directives and regulations.¹⁹ Roughly half of these acts relate in some way to marine environmental protection, which is an objective closely associated with maritime safety. Most of the EU rules are based on - or are even direct copies of - rules that also feature at international level (laid down in an IMO convention). Over time, the EU measures have tended to extend beyond the global rules by providing some regional 'added value', by advancing their entry into force, strengthening their enforcement within the Union, or sometimes by adding substantive requirements to the IMO rules.²⁰

Even EU rules that merely copy the international standards are far from pointless, however. In this case, the added value of EU legislation is that it harmonises implementation across the Union. Irrespective of formal adherence to the international rule in question, it brings the international obligations into the realm of EU law,²¹ and it significantly strengthens the legal tools available against

¹⁶ Eg. UNCLOS Articles 94, 211, 218 and 220.

¹⁷ See www.imo.org/en/About/Conventions/ListOfConventions/Documents/Convention%20titles%202016.pdf

¹⁸ International Code for Ships Operating in Polar Waters (IMO Doc. MEPC 68/21/Add.1 Annex 10, full text available at www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf). The Code signifies amendments to three main IMO Conventions: the International Convention for the Safety of Life at Sea (SOLAS); the International Convention for the Prevention of Pollution from Ships (MARPOL); and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW). It entered into force on 1 January 2017.

¹⁹ For a list, see https://ec.europa.eu/transport/sites/transport/files/modes/maritime/safety/doc/maritime_safety_legislation.pdf

²⁰ See H. Ringbom, *EU Maritime Safety Policy and International Law*, (Martinus Nijhoff Publishers, Leiden/Boston, 2008).

²¹ Features such as the direct applicability/effect of EU law and its supremacy over national laws will strengthen the legal status of the rules concerned and widen the range of persons who may rely on them. This is particularly the case as EU rules will normally impose the obligations concerned directly onto the persons addressed in the conventions (such as ship masters, classification societies, companies etc.) without relying - as the IMO conventions do - on the flag state to implement these matters in their national systems.

member states that fail to implement the international rules.²² The presence of EU rules in a given field also transfers the competence for dealing with other issues in that field from the member states to the Union itself, as well as in respect of future international negotiations on the topic concerned.

Flag states

As a matter of policy the EU has not generally favoured regulating international shipping by means of flag state rules. Requirements that only apply to ships flagged in member states involve the risk of subjecting these ships to a competitive disadvantage in relation to ships of other flags. In view of the ease with which ship operators may change the flag of their ships, such an approach involves a risk of 'out-flagging', which in turn would reduce both the impact of the requirement and the size of the EU's fleet. With respect to ships operating in the Arctic, the prospect of out-flagging seems particularly real, as this type of trade supposedly involves a relatively low number of ships, which are specifically constructed and equipped for the trade.

However, while the EU rules that apply *exclusively* to ships flagged in a member state are relatively few, and usually target the administration rather than ships,²³ many EU acts *also* apply to this category, in addition to their focus on foreign ships operating in the coastal waters and/or ports of member states. Most EU rules that apply to ships flagged in member states do not include a geographic limitation of their applicability, although in some cases it follows from the nature of the requirements that their scope is limited to ships operating in, or in the immediate vicinity of, the EU.²⁴ In the absence of such a limitation, the rules for ships flagged in EU member states therefore apply wherever the ship in question operates, including in the Arctic. Thus, for example, the requirements to have proper insurance for maritime claims,²⁵ to have international safety management procedures in place,²⁶ or to use environmentally friendly anti-fouling paints on board ships' hulls,²⁷ all apply to ships flying the flag of an EU member state in the Arctic.²⁸ On the other hand, all of the EU flag state requirements which apply

²² The Commission supervises the rules being complied with and may, if not, bring member states to court. Member states may even face lump-sum penalties for non-compliance with EU law requirements. See Treaty on the Functioning of the European Union (TFEU) Article 260.

²³ See notably Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administration requirements [2009] OJ L131/47; Directive 2001/25 on the minimum level of training for seafarers [2001] OJ L136/17; and Directive 2009/21 on compliance with flag state requirements [2009] OJ L131/132.

²⁴ This is the case e.g. with respect to Directive 2002/59 establishing a Community vessel traffic monitoring and information system [2002] OJ L 208/10 (hereinafter, the VTMIS Directive) and Directive 2000/59 on port reception facilities for ship-generated waste and cargo residues [2009] OJ L332/81.

²⁵ Directive 2009/20 on the insurance of shipowners for maritime claims [2009] OJ L131/128

²⁶ Regulation 336/2006 on the implementation of the International Safety Management Code within the Community [2006] OJ L64/1.

²⁷ Regulation 782/2003 on the prohibition of organotin compounds on ships [2003] OJ L115/1

²⁸ On the more complex question as to whether the EU's double hull requirements on oil tankers applied to EU flagged ships which did not trade in EU waters, see Ringbom note 20 above, at pp. 172-173.

without geographical limitation do implement widely accepted IMO rules, and therefore do not add completely new substantive requirements.

Coastal states

EU maritime legislation does not usually address foreign ships that merely pass through member states' waters without entering their ports. The main reasons are twofold. First, the law of the sea imposes quite strict limitations on the kind of rules that coastal states may adopt and enforce in their different coastal zones. Outside the territorial sea, it is essentially only those rules that have been adopted at international level which may then be adopted by member states, and even with those rules, there are very tight limitations on what kind of enforcement measures are permitted.²⁹ Second, enforcing such rules at sea is complicated in practical terms, as it involves complex, costly and potentially dangerous actions at sea.

There are a few exceptions to the general absence of coastal state requirements at EU level. Three EU directives extend to ships that are merely passing through the waters of the member states.³⁰ The emphasis of all three lies in events taking place in the coastal zones of the member states, which means that their applicability in an Arctic context is limited to the coastal waters of the EEA member states Norway and Iceland.³¹ That in turn presumes that the geographical applicability of the directives from an EEA perspective has been specifically acknowledged,³² which does appear to be the case.³³

However, in normative terms, these requirements are not very demanding. The relevant requirements of the VTMS Directive relate to ship reporting systems,

²⁹ See in particular UNCLOS Articles 21, 211 and 220.

³⁰ VTMS Directive (n 24), Articles 8, 13 and 17; Directive 2016/802 relating to a reduction in the sulphur content of certain liquid fuels (codification), [2016] OJ L 132/58, Article 6. The scope of Directive 2005/35 on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences [2005] OJ L 255/11 as amended, extends, under its Article 3(1) to violations that have taken place in the coastal waters of member states and on the high seas.

³¹ All Arctic states implement a 200 nm EEZ, but this type of zone has not been established around the Svalbard Archipelago.

³² The Agreement on the European Economic Area, ([1994] OJ L 1/1, as amended) guarantees the main elements of the internal market throughout the area. For an EU act to apply in the EEA, the act needs to be EEA relevant (i.e. belong to the substantive and geographical scope of the EEA Agreement). These elements were recently challenged by EEA states in connection with Directive 2013/30/EU on safety of offshore oil and gas operations [2013] OJ L 178/66. See e.g. C. Cinelli, 'Law of the Sea, The European Union Arctic Policy and Corporate Social Responsibility', 30 A. Chircop *et al.* (eds.) *Ocean Yearbook* (Brill/Nijhoff, Leiden/Boston 2016) 245-254, at p.247 *et seq.*

³³ According to a Norwegian Government Report (White Paper), entitled 'The EEA Agreement and Norway's other agreements with the EU', the EEA Agreement does not apply to the Norwegian EEZ or continental shelf, unless specifically extended to those areas "if Norway, after an assessment of a particular matter, decides to assume specific EEA obligations outside its territory" (p. 13). Several EU maritime instruments which extend beyond the territorial sea have been incorporated into the EEA Agreement and hence apply in these areas. More recent instruments outside maritime regulation have met some resistance, however. See e.g. the oil and gas directive referred to in the previous footnote and Directive 2008/56 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] L164/19 as referred to in the White Paper, Meld. St. 5 (2012–2013), at p. 15 (Available at www.regjeringen.no/en/dokumenter/meld.-st.-5-2012-2013/id704518/)

ships' routing systems and vessel traffic services, and are closely linked to the rules and guidelines adopted for such systems by the IMO.³⁴ The discharge standards of Directive 2005/35 and sulphur in fuel requirements of Directive 2016/804 are similarly closely modelled on IMO rules, notably Annexes I, II and VI of MARPOL. Moreover, the main obligations of the latter directive concern 'Sulphur Emission Control Areas', which currently cover the North Sea and the Baltic Sea, but do not extend to Arctic waters.

Interestingly, all three directives to some extent even extend beyond member states' coastal waters, to the high seas. None of them, however, significantly affects rights and obligations in an Arctic context. First, the EU rules providing for sanctions for pollution violations specifically extend to violations in the high seas, but the main parts of the Arctic sea routes pass through the coastal waters of Russia or Canada. These rules have a specific foundation in UNCLOS, but since they are to be implemented exclusively by port state authorities, they will be discussed in the next section. Second, the sulphur in fuel directive only extends beyond the coastal states' waters in an optional form, through a vague enforcement provision referring to enforcement measures "in compliance with international maritime law".³⁵ Third, Article 19 of the VTMIS directive indirectly obliges member states to take measures that are "necessary to ensure the safety of shipping ... and to protect the marine and coastal environment" following incidents or accidents, even if that were to involve areas beyond their coastal waters. This follows from the reference to "appropriate measures consistent with international law", in combination with the well-established right of states to take intervention measures on the high seas.³⁶ On the other hand, this obligation includes significant flexibility for the coastal state and is in any case itself linked to hazards for the coastal states, and hence only applies to EU/EEA member states with an Arctic coastline, i.e. Norway and Iceland.

Port states

The bulk of the EU's shipping rules apply to ships, independently of their nationality, which (voluntarily) enter a port of a member state. Many of these rules implement international rules and hence serve to give effect by strengthening and harmonizing the enforcement of international (IMO and ILO) rules throughout the entire Union and EEA.

The most important EU measure aimed at enforcing international rules is the port state control (PSC) directive, which establishes a very elaborate control regime for any ship visiting EU/EEA ports, together with related databases, information tools, training programs etc.³⁷ Even if the PSC merely enforces international rules, it represents a very powerful tool for ensuring that the rules are implemented in practice. The entry into force of the Polar Code in 2017 has provided increased

³⁴ VTMIS Directive (n 24), Articles 5, 7 and 8.

³⁵ Directive 2016/802 (n 30), Article 6(4).

³⁶ As established in the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Damage and UNCLOS Article 221.

³⁷ Directive 2009/16 on port state control OJ [2009] L131/57.

opportunities to implement requirements that specifically apply to Arctic shipping through PSC.

The enforcement measures taken in EU ports in cases of non-compliance have been strengthened over time and now include quite drastic consequences, such as the “banning” of a ship from an entire region’s ports.³⁸

Apart from enforcing international rules in EU ports, some of the EU requirements have included EU standards (which go beyond their international counterparts) to be met by any ship entering an EU/EEA port. Many of those EU requirements relate to matters that are 'static' and do not change during the voyage of ships. In these cases, port state requirements may have a considerable impact on shipping worldwide, including in the Arctic. If, for example, an oil tanker entering an EU port is required by EU rules to be of a double hull construction, then even if those rules do not apply elsewhere,³⁹ tankers that intend to visit EU port will have to comply, wherever they operate. Other examples of regional EU port state requirements with similarly widespread effects include carriage requirements of voyage data recorders for certain categories of ships⁴⁰ and the early application of some international instruments, such as the AFS convention.⁴¹

The EU has also imposed requirements of a 'non-static' (operational) nature on foreign ships visiting its ports. Examples include reporting requirements, prohibitions on illegal discharges and fuel quality requirements. The geographical extent of the requirements needs to be mentioned here, but depending on a variety of factors which are discussed more closely in the port states section below, this does not exclude the possibility that such requirements may extend beyond the coastal waters of the port states, including to Arctic waters. The best existing example is probably directive 2005/35, which specifically obliges port states to consider instituting proceedings with respect to violations of MARPOL Annexes I and II that take place on the high seas. The relevance of this requirement in an Arctic context is limited by the fact that the directive does not extend to the coastal waters of other states, while the key maritime routes in the Arctic specifically run through the coastal waters of Canada and Russia.

A more recent example of how the EU has used port state jurisdiction for promoting concerns that extend beyond its own geographical borders is the regulation for monitoring, reporting and verification of CO₂ emissions by ships entering EU ports, that was adopted in 2015.⁴² The Regulation introduces obligations for ship owners to plan, monitor and report to the EU their estimated CO₂ emissions and it includes strong enforcement measures for non-compliers,

³⁸ *Ibid.*, Article 16, and similarly in section 4 of the 1982 Paris Memorandum of Understanding on port state control, as amended.

³⁹ This used to be the case on the basis of the requirements of EU Regulation 1726/2003 amending Regulation (EC) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers OJ [2003] L326/28 until the 2003 amendments to MARPOL Annex I, Regulation 20 entered into effect in July 2005.

⁴⁰ VTMS Directive n 24, Article 10 and Annex II(2).

⁴¹ Regulation 782/2003 on the prohibition of organotin compounds on ships, OJ [2003] L115/1.

⁴² Regulation 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, OJ [2016] L 123/55.

including – as a measure of last resort – the banning of the ship in question from all EU ports.⁴³ The regulation has proven controversial as it is commonly considered to be the first step towards a future regional market-based regulatory regime for GHGs in shipping,⁴⁴ which also raises several difficult questions of international law.⁴⁵

Conclusion

So far, at least, the EU's shipping legislation has not made much impact in the Arctic. Current legislation has not been developed with the Arctic in mind and includes no references to the Arctic area. More generally, too, the existing body of EU shipping rules adds only few obligations to those that already apply through the international rules. Some EU rules apply to ships flying the flag of EU/EEA member states irrespective of their location and some rather light operational EU requirements may extend to ships transiting the territorial seas and EEZs of Norway and Iceland. Requirements for ships entering EU/EEA ports have formed the main mechanism for the EU to implement its maritime policies, but even in this area, the more important discrepancies between EU and IMO requirements that emerged in the beginning of the millennium have largely been eradicated through subsequent flexibility on both sides. However, as is illustrated by the recent legislative activities in relation to greenhouse gas reductions from ships, this remains a potential mechanism for implementing particularly important regional rules, if global progress is not satisfactory.

Jurisdictional opportunities and restraints

General

The brief review given above of the present applicability of EU rules in the Arctic already indicates that there is some scope for a regional regulatory body, such as the EU, to influence shipping outside its own region. In this chapter, that scope will be explored in greater detail. What, in other words, would be feasible for the EU to do if it decided to regulate Arctic shipping more actively? What are the jurisdictional opportunities and limitations for potential EU rules in this field? In other words, is the EU's cautious policy on Arctic shipping dictated by legal necessity, or is there scope for a more assertive stance? The availability of legal options to the EU is necessary for knowing the limitations on the EU's ability to act and - hence - for assessing its Arctic shipping policy in political terms.

⁴³ *Ibid.*, Article 20(3).

⁴⁴ Along these lines, the European Parliament, in its first reading report on the revision of the EU Emissions Trading System of 15 February 2017, demanded that the IMO should have a system comparable to the EU ETS system available for global shipping by 2021. If that is not put in place, then shipping shall, according to the Parliament, be included in the European ETS as from 2023. See EP Doc. P8 TA(2017)0035, proposed new chapter IIa (articles 3ga-3ge).

⁴⁵ See H. Ringbom 'Global Problem—Regional Solution? International Law Reflections on an EU CO₂ Emissions Trading Scheme for Ships' (2012) 26(4) *International Journal of Marine and Coastal Law (IJMLC)* 613-6

The starting point for finding the answers to those questions is, as has been highlighted by the EU itself, the international law of the sea as codified in UNCLOS.⁴⁶ The five Arctic coastal states have similarly emphasised that the UNCLOS framework “provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions” and “therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean”.⁴⁷

This branch of international law is particularly stable for the moment, due to the high authority and broad formal acceptance of UNCLOS. The convention has 168 contracting parties, including the EU and all its member states. The same rights and obligations apply to the EU as to any other party to the convention; being an intergovernmental organization offers no jurisdictional advantages or disadvantages as compared to individual state parties.⁴⁸

The on-going negotiations to establish a new implementing agreement to UNCLOS dealing specifically with the protection of biodiversity beyond national jurisdiction may certainly be of relevance for the Arctic,⁴⁹ but it is not expected to fundamentally alter the rights and obligations as laid down in UNCLOS.⁵⁰

Flag states

The main responsibility for ensuring the safety and environmental performance of ships, irrespective of the area concerned, lies with the ship’s flag state. UNCLOS

⁴⁶ This approach features in all documents listed in note 2, as well as in the recent Ocean Governance Communication referred to above at notes 11-13.

⁴⁷ The 2008 “Ilulissat Declaration”, available at www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.

The Arctic coastal states’ emphasis on the adequacy of UNCLOS for Arctic governance had its background in the growing worldwide interest in Arctic resources, uncertainty over the precise maritime borders that apply in the Arctic and growing calls for a special treaty regime for the Arctic Ocean, similar to the one governing Antarctica.

⁴⁸ UNCLOS, Annex IX. When acceding to UNCLOS, the EU provided a declaration on the division of competences on the basis of Annex IX (see Council Decision 98/392 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof 2008] OJ L 179/1). That declaration has not been updated and no longer reflects the internal division of competence between the EU and its member states.

⁴⁹ In its resolution 69/292 of 19 June 2015, the UN General Assembly decided to develop an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. According to para. 2 of the resolution, “negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology”. For subsequent progress, see www.un.org/depts/los/biodiversity/prepcom.htm

⁵⁰ The ‘package’ referred to in the previous note did not include issues related to navigation of commercial ships and alterations of the jurisdictional regime for navigation have not been on the agenda at the first two meetings of the Preparatory Committee and therefore seem unlikely to feature prominently in the potential future agreement.

imposes a number of minimum criteria on flag states' legislation, by reference to the "generally accepted" international rules and standards.⁵¹ For example, UNCLOS requires flag states to adopt such measures regarding the construction, equipment and seaworthiness of ships as are necessary to ensure safety at sea.⁵² Equally, under the IMO conventions, the agreed international standards, which apply irrespective of where a ship navigates, normally represent minimum standards for flag states. From an international law point of view, it is accordingly uncontroversial to complement or exceed the international (IMO) requirements, by imposing requirements that apply to ships flying the flag of EU/EEA member states when operating in the Arctic.

In practice, the effect of EU-based flag state requirements could be significant. By tonnage, roughly a fifth of the world's fleet flies the flag of an EU/EEA member state,⁵³ though a somewhat smaller proportion appears to apply to ships operating in the Arctic.⁵⁴ However, as already noted above, stringent flag state rules run the risk of causing reflagging of ships outside the EU, which would defeat the purpose of the rules and generate a number of additional concerns. The limits on how far the EU (or any individual state) may go in imposing additional requirements for its own ships operating in the Arctic are not therefore legal in nature, but rather formed by the practical consequences and risks to which demanding flag state rules may give rise.

Coastal states

Alongside flag states' jurisdiction, UNCLOS offers certain prescriptive and enforcement powers to coastal states, in the form of jurisdictional rights (rather than obligations) over foreign ships that transit their waters. The balance between the coastal and maritime interests differs in respect of each maritime zone, depending on the geographical proximity of the zone in question to the coastal state.

In brief, the general legal possibility for a coastal state to impose its own national rules on foreign ships navigating in its coastal waters is mainly limited to ships within its own internal waters.⁵⁵ Beyond that, national rules are permissible only to the extent that they do not relate to the design, construction, equipment and manning of ships within the territorial sea, and even such rules must not have the practical effect of denying or impairing foreign ships' right of innocent passage.⁵⁶ Beyond the territorial sea, unilateral coastal state legislation is essentially ruled out.⁵⁷ However, rules that give effect to "generally accepted international rules and standards", in particular if they are established "through the competent international organization", can be established by the coastal states in their EEZ, but not beyond that. In addition to these limitations, a range of other UNCLOS

⁵¹ UNCLOS, Articles 94(5) and 211(2).

⁵² UNCLOS Article 94(3).

⁵³ See e.g. www.ecsa.eu/images/files/STAT_ECSA_2013_4.pdf.

⁵⁴ 29 out of the 207 transits of the Northern Sea Route in 2011-2015 were made by ships flagged in an EU/EEA member state. See www.arctic-lio.com/nsr_transits.

⁵⁵ UNCLOS Article 2(1).

⁵⁶ UNCLOS Article 24(1)(a).

⁵⁷ UNCLOS Article 211(5), (6).

provisions limit the ability of states to take enforcement measures against ships that fail to comply with the rules while in transit through their coastal waters.⁵⁸

However, in the Arctic context an additional UNCLOS article specifically dedicated to 'ice-covered waters', Article 234, does admit a broader environmental prescriptive and enforcement jurisdiction for coastal states for environmental purposes.⁵⁹ Even if several of the conditions imposed by the article are unclear and subject to divergent views in legal literature,⁶⁰ it is clear that the article - by removing the reference to international rules - significantly strengthens the jurisdiction of coastal states in the Arctic. So far, Canada and Russia have made use of this jurisdiction by adopting special legislation for Arctic shipping,⁶¹ and Denmark has indicated its preparedness to use the jurisdiction provided under Article 234 for Greenland's coastal waters.⁶²

In the absence of Arctic coastlines of the EU member states,⁶³ the option of using this article is limited to the EEA member states, Norway and Iceland. However, neither country can rely on it for climatic reasons, in view of the article's condition that the waters concerned are ice-covered for most of the year, a condition which is not met by Iceland or (mainland) Norway.⁶⁴

⁵⁸ See e.g. Articles 220 and 24(1).

⁵⁹ Under Article 234, coastal states specifically "have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence".

⁶⁰ See e.g. K. Bartenstein: 'The "Arctic Exception" in the Law of the Sea Convention: A contribution to safer Navigation in the Northwest Passage' (2011) 42(1-2) *Ocean Development & International Law* (2011) 22-52 at p. 24 and A. Chircop: 'The Growth of International Shipping in the Arctic: Is a regulatory Review Timely?' (2009) 24(2) *IJMLC* 355-380 at p. 372. See also E.J. Molenaar 'Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region' (2014) 45(3) *Ocean Development & International Law* 272-298 at p. 276, T. Henriksen, 'Protecting Polar Environments: Coherency in Regulating Arctic Shipping', in R. Rayfuse (ed.) *Research Handbook on International Marine Environmental Law* (Edgar Elgar Publishing, Cheltenham, 2016) 363-384 at pp. 380-381.

⁶¹ Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12 (AWPPA), available at <http://laws-lois.justice.gc.ca/eng/acts/A-12/>. The Russian Federal Laws from 2012 and 2013 related to Governmental regulation of merchant shipping in the water area of the Northern Sea Route are available at www.arctic-lio.com/nsr_legislation..

⁶² See e.g. Kingdom of Denmark Strategy for the Arctic 2011-2020 http://naalakkersuisut.gl/~media/Nanoq/Images/Udenrigsdirektoratet/100295_Arktis_Rapport_UK_210x270_Final_Web.pdf, at p. 18.

⁶³ Greenland belongs to EU member state Denmark, but has exited from the EU and is hence not subject to EU laws; rather, it is associated with the Union as one of the overseas countries and territories (OCTs) with a specific Partnership Agreement governing the mutual relationships. See Council Decision 2014/137/EU on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other [2014] OJ L76/1.

⁶⁴ The exercise of jurisdiction based on Article 234 by Norway in the Svalbard Archipelago would be justified from a climate point of view, but would have to be subject to the 1920 Treaty concerning the Archipelago of Spitsbergen.

Port states

General

In light of the above, the principal option that remains available to the EU for regulating shipping in the Arctic would be in the port state capacity, which is also the jurisdictional mechanism preferred by the EU for regulating shipping more generally.⁶⁵ Roughly one third of the ships making use of the transpolar routes today have their point of departure or arrival in the EU,⁶⁶ and it can be expected that if trans-Arctic traffic were to boom, one of the end ports would very often be an EU/EEA member state.

By contrast to the detailed regime for coastal states' jurisdiction over ships, UNCLOS does not provide much guidance on the extent to which (port) states may impose requirements on foreign ships that visit their ports. While it is widely acknowledged that ships have no general right of access to ports and that the port state may accordingly impose conditions on access,⁶⁷ the more precise limitations as to how port states may exercise their jurisdiction are not clear. The question is particularly unsettled with respect to a port state's jurisdiction over matters that take place beyond its own maritime zones.⁶⁸

Options

Using port state jurisdiction as a basis for the EU to regulate Arctic shipping offers several possibilities. Even without any change of legislation, it is feasible to target Arctic shipping through special attention to port state control, such as through 'concentrated inspection campaigns', for ships coming from or heading towards Arctic waters. More permanent targeting arrangements that raise inspection priorities for ships operating in the Arctic would probably necessitate a change to the EU's PSC Directive,⁶⁹ but even such measures would not be problematic in terms of international law. The strengthening of the PSC at EU-level could be carried out in close cooperation with the Arctic coastal states, as all of them participate in, or collaborate closely with, the Paris MOU,⁷⁰ which is very closely calibrated with the EU's PSC legislation.

⁶⁵ See Ringbom (n. 20) at chapter 5.

⁶⁶ According to statistics provided by the NSR Information Office (www.arctic-lia.com/nsr_transits), 36 per cent of the transits that were not heading for Russia in 2011-2015 were destined for a European port.

⁶⁷ See e.g. UNCLOS Articles 25(2) and 211(3).

⁶⁸ See e.g. Ringbom n 45, R. Churchill, 'Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships – What Degree of Extraterritoriality?' (2016) 31(3) *International Journal of Marine and Coastal Law (IJMCL)* 442-469.

⁶⁹ N 37.

⁷⁰ Paris Memorandum of Understanding on Port State Control, 1982, latest amendment from 27 May 2016. See www.parismou.org. The text of the MOU does not include a geographical scope of coverage, but operates with the (undefined) terms 'region of the memorandum' or 'Paris MOU region'. Under section 9.2, the MOU is open to participation for maritime authorities of "a European coastal State and a coastal State of the North Atlantic basin from North America to Europe". Maritime authorities of all Arctic states except the US are already signatories to the Paris MOU, and there is close cooperation with the US Coast Guard. There are thus no immediate legal hurdles for extending the application of the regime to the Arctic region.

The PSC Directive provides an administrative tool to enhance maritime safety and environmental protection, but port states could go further by imposing judicial penalties for violations of the international rules in the Arctic. For pollution discharge violations, this could also be done without further regulatory change, as there is a specific legal basis for such extra-territorial jurisdiction in UNCLOS. Article 218 permits port states to institute proceedings in respect of violations of international pollution rules (i.e. the MARPOL standards), even if there is no link between the spill and the state in question. This possibility has already been implemented in Directive 2005/35,⁷¹ as far as oil and noxious liquid substances are concerned, and could easily be expanded to cover other forms of discharges regulated by MARPOL, such as garbage and sewage. While this Directive extends to the high seas, it does not include discharges made in other states' coastal waters. This is a crucial omission in an Arctic context, given that both sea routes largely run through Canadian or Russian coastal waters. However, on the basis of UNCLOS' article 218(2), such discharges could also be subject to proceedings in a port state within the EU, if so requested by the coastal state(s) concerned or by the ship's flag state. A more practical concern relates to the collection of information and evidence of unlawful spills in remote locations. Existing satellite-based remote detection systems, such as EMSA's 'CleanSeaNet' system,⁷² are optimised for oil discharges only and even those are difficult to detect in icy conditions.⁷³

The examples given above concern the implementation and enforcement of *international* rules in EU ports. It has already been noted that shipping is heavily regulated at international level and that a further strengthening of the standards has recently been agreed through the adoption of the Polar Code. In view of this, and of the likelihood that a significant share of Arctic traffic in the future will have an EU/EEA port as a point of departure or arrival, such measures may be expected to be quite effective for ensuring that high standards are met by the ships that operate in the Arctic.

Nonetheless, the EU might also wish to consider implementing less widely accepted or even unilaterally imposed rules for Arctic shipping. One possibility, which has been used by the EU in the past as a port state requirement, is to require the implementation of international rules that have been adopted, but not yet widely ratified, by ships visiting EU ports.⁷⁴ In an Arctic context, the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments could be a case in point.⁷⁵ It entered into force in September 2017, but at first only applies to flag states representing some 35% of the world's tonnage. Within the EU, the Convention has only been ratified by less than one in

⁷¹ Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements [2005] OJ L 255/11.

⁷² See www.emsa.europa.eu/csn-menu.html

⁷³ Hänninen & Sassi, 'Acute Oil Spills in Arctic Waters – Oil Combating in Ice' Study, VTT, 2010, available at www.uscg.mil/iccopr/files/Acute_Oil_Spills_in_Arctic_Waters_11JAN2010.pdf, at pp. 17-19.

⁷⁴ See notes 26 and 27 above.

⁷⁵ See also N. Liu 'The European Union's Potential Contribution to Enhanced Governance of Arctic Shipping' (2013) 73(4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 705-733 at p. 727.

three EU/EEA member states.⁷⁶ Requiring ships that operate in the Arctic and enter EU ports to have the necessary equipment on board to prevent the introduction of non-indigenous species through their ballast waters, could be one way of speeding up the implementation of this convention.

Another, more far-reaching, alternative would be to implement rules that have been adopted only in the form of recommendations at the international level. Here, too, past EU shipping regulation offers examples.⁷⁷ In an Arctic context, the Polar Code's Part B includes several potential examples, including a ban on the carriage and use of heavy grades of oil in the Arctic,⁷⁸ which has also been repeatedly mentioned as a potential EU measure by the European Parliament.⁷⁹

More controversially still, the EU could implement rules for Arctic shipping that have no counterparts at all at global level. A hypothetical example could be EU-based requirements for ships operating in the Arctic to have specific equipment on board to reduce emissions of soot and 'black carbon'; requiring ships operating in the Arctic to have a special extended form of insurance to cover the greater risks; mandatory contributions to an EU-based emission trading system for reducing greenhouse gas emissions, etc. An example of an 'operational' requirement could be an EU-based 'no go' area for commercial ships in the high seas area of the Arctic, as a means of implementing the Arctic MPAs, as proposed by the recent ocean governance and Arctic policy documents.⁸⁰

Legal limits - some considerations

The legal limits on how far the EU, as a group of port states, could go in requiring ships operating in the Arctic to comply with its own requirements are not clear. The overall assessment depends on a series of considerations, but generally speaking, a weaker link to international rules, or to the territorial interests of the EU itself, will normally also weaken the legal case for the EU's regulatory jurisdiction. Some relevant considerations are mentioned below.

First, the substantive nature of the rule in question is relevant. In particular, whether a port state may legally assert jurisdiction depends at least in part on whether the rules in question relate to 'static' features of the ship or to questions

⁷⁶In December 2016, 10 out of 31 EU/EEA member states had ratified the convention. See www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx

⁷⁷ See e.g. Council Regulation 2978/94 on the implementation of IMO Resolution A.747(18) on the application of tonnage measurement of ballast spaces in segregated ballast oil tankers, OJ [1994] L319/1 and Directive 2001/96/EC of the European Parliament and of the Council of 4 December 2001 establishing harmonised requirements and procedures for the safe loading and unloading of bulk carriers OJ [2002] L13/9.

⁷⁸ But see also the Polar Code, n 18, Part II-B, section 1.1 recommending that ships apply its rules when operating in Arctic waters. See also Liu n 75 at pp. 714-15 and the 2009 Arctic Marine Shipping Assessment (AMSA), n 36 60, considering the prospect of banning the carriage of heavy grades of oil and of discharging other hazardous substances as potential future IMO measures to protect the Arctic environment. The 2009 AMSA and related follow-up work undertaken by the Arctic Council's working group Protection of the Arctic Marine Environment (PAME) are available at www.pame.is/index.php/projects/arctic-marine-shipping/amsa.

⁷⁹ See note 4 above.

⁸⁰ See text at ns 10-12.

of operation or behaviour.⁸¹ In the former case, e.g. ice-class or equipment requirements for ballast water treatment, it is easier to find a jurisdictional basis for the requirement, given that any violation of the requirement will 'follow' the ship and hence also occur within the port where the state's jurisdiction is undisputed. Conversely, it is more difficult for a port state to assert jurisdiction in respect of (non-static) operations or behaviour that occur outside its coastal waters, where it has no prescriptive jurisdiction. Potential examples include an obligation to *use* certain equipment or procedures beyond the port state's coastal waters, a zero discharge policy on oil discharges⁸² and rules relating to 'grey water' discharges from ships in the Arctic.⁸³ Discharge rules without an international counterpart will not be covered by the jurisdiction provided to port states under UNCLOS article 218(1). Potential, though less certain, alternative bases for jurisdiction could be one of the accepted bases for extra-territorial jurisdiction under general international law or merely the requirement for a sufficient 'substantive connection' between the matter under regulation and the port state.⁸⁴

Second, the choice of enforcement measures to make the requirement effective plays a role. For example, refusing a ship the right of access to a port (or other losses of entitlement to which the ship or its flag state has no specific right) must be presumed to require a less solid prescriptive basis than punitive enforcement measures, such as fines and other types of sanctions.⁸⁵ A measure's legal basis may be easier to establish where the consequence of non-compliance is denial of (subsequent) access to the port state. Measures of this type are particularly effective in a regional context, such as in the EU, where the refusal could be jointly implemented by all EU/EEA states, thus extending the ban to all ports in the region. Moreover, coordinated implementation of port state jurisdiction among a larger group serves to avoid the risk of 'ports of convenience', whereby ship operators could evade the requirements by simply choosing another port of destination.

Third, other types of legal obligations may limit a state's options to exercise port state jurisdiction against foreign ships. First, treaty obligations may impose such limitations. While this is not a common feature in the IMO conventions, other areas of international law, notably international trade law, may impose important limitations on port states' freedom in this respect.⁸⁶ Second, more general international law principles impose certain general reasonableness criteria, which

⁸¹ See e.g. Churchill n 68, pp. 450 *et seq.*

⁸² See e.g. Canadian Arctic Shipping Pollution Prevention Regulations (ASPPR) C.R.C., c. 353, s. 29. Available at http://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._353/

⁸³ This matter is not regulated in MARPOL, but the ASPPR (n 82), s. 28 prohibits the discharge of any waste, with the exception of untreated sewage, in the Arctic waters.

⁸⁴ See in particular B. Marten 'Port State Jurisdiction, International Conventions and Extraterritoriality: An Expansive Interpretation' in H. Ringbom (ed.) *Jurisdiction over Ships – Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff, Leiden/Boston, 2015) p. 105.

⁸⁵ E.J. Molenaar, 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage' (2007) 38(1-2) *Ocean Development & International Law* 225–257 at p. 229.

⁸⁶ See Churchill n 68, pp. 450 *et seq.* See also A. Serdy, 'The Shaky Foundations of the FAO Port State Measures Agreement: How Watertight Is the Legal Seal against Access for Foreign Fishing Vessels?' (2016) 31(3) *International Journal of Marine and Coastal Law (IJMCL)* 422–441.

may also serve as limitations. Port entry requirements may, for example, not be discriminatory or constitute an abuse of right by the port state.⁸⁷ The measures must be adopted in good faith and must be proportional to their objectives. In this respect it has been suggested that the objective of a measure in itself should play a role in its legal justifiability, and that a measure that aims at protecting common values or resources should enjoy a stronger claim to legality.⁸⁸ Measures aimed at protecting the Arctic against the risks involved with shipping are likely to score highly in such an assessment. Also, measures that serve to implement standards with an international basis (e.g. in the form of non-binding measures, or international rules that have not yet entered into force) will be easier to justify than purely unilateral port state requirements.

In conclusion, port state measures, unlike coastal state requirements, are not constrained by precise standards or clear legal limitations. Generally speaking, port state requirements appear to work best - in a practical sense as well as in terms of legal justification - for 'static' requirements. Yet the lawfulness of any requirement will need to be assessed based on all the interests involved, including those of ship operators in the region and of the Arctic coastal states, depending on the design and effects of the individual requirement. Nevertheless, it is clear that port states have considerable latitude in implementing such requirements and hence that the EU also has some regulatory leeway when implementing port state requirements aimed at improving safety and protecting the environment in the Arctic, should it wish to do so.⁸⁹

Conclusion

International law offers more jurisdictional opportunities for the EU to regulate shipping in the Arctic than has so far materialised in existing legislation or envisaged in recent EU policy documents. In an Arctic context, there are no signs of jurisdictional challenges by the EU of the kind that have been commonplace in its 'normal' shipping legislation, usually following major pollution accidents.

Possibilities exist for targeting Arctic shipping, even without a change of regulation, notably in the field of implementing and enforcing the international standards in EU ports. This option generates significant potential, not least since the global rules for Arctic navigation have recently been strengthened through the adoption of the Polar Code. Moreover, the solid legal basis of the EU's port state control regime allows EU member states acting collectively to implement very powerful enforcement measures against ships which fail to comply with the rules. Violations of international pollution rules that have taken place in the Arctic can similarly be enforced by port states on the basis of the unusually broad UNCLOS

⁸⁷ UNCLOS Article 300.

⁸⁸ See e.g. S. Kopela, 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons', (2016) 47(2) *Ocean Development & International Law* 89-130 and C. Ryngaert & H. Ringbom 'Introduction: Port State Jurisdiction: Challenges and Potential', (2016) 31(3) *International Journal of Marine and Coastal Law* p. 379-374.

⁸⁹ Generally, see B. Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer, Heidelberg 2014), Molenaar n 85 and Ringbom, n 20, section 5.1.

Article 218, but in this case, close participation by the (Arctic) coastal state concerned is a precondition for its successful implementation.

Requirements that are more independent from the international rules require a different legal justification. However, even such rules could be adopted for the Arctic, the jurisdictional connection being that ships that operate in the Arctic in the future will often either fly the flag of an EU/EEA member state or travel to or from an EU/EEA port. In the former case, the limits of the jurisdiction are purely political, while the precise jurisdictional limits of how far the port state(s) can go in this area are relatively unclear.

Concluding remarks on the EU and Arctic shipping

The EU's relationship to the Arctic is often problematic, as is illustrated by a number of other current articles on this topic. The relationship involves many types of political issues at different levels, and there is often a mismatch between the policy priorities of the Arctic countries and the role that the EU sees for itself in the region. As a relatively new player on the Arctic policy scene, without a policy tradition to lean back on or a direct geographical link that would justify its seat at the negotiation table, the EU has struggled to find its position in international Arctic cooperation.

Internally, too, the coordination of Arctic issues within the EU is complicated by the fact that 'Arctic issues' cut across a series of EU policy sectors (trade, energy, environmental protection, fisheries, shipping, security etc.) which are guided by very different principles, competences and traditions, and, hence, present variable preparedness for elaborating specific Arctic dimensions of the EU policies. In addition, in the absence of 'hard' legislation in the field, different EU institutions have their own policy ambitions which will not always match and may also result in confused messages as to what the EU's Arctic policy should be.

Equally, the study of the EU Arctic policy for a single relatively well-established sector like shipping, reveals a number of competing interests and policy ambivalences.

On the one hand the EU's maritime safety and environmental policy to date has been distinctively coastal in nature, clearly emphasising environmental and coastal concerns over shipping interests and navigational rights. In view of this and of the general emphasis of sustainability and environmental values of the Arctic in the policy documents, one might expect that the inclination of the EU would be to place Arctic shipping under a particularly heavy regulatory burden. This has not been the case, and the review of jurisdictional options and limitations above illustrates that the absence of an Arctic dimension to the EU's shipping regulation cannot be explained solely by the Union's relative geographical remoteness from the Arctic. Even in the absence of an Arctic coastline, the EU has legal possibilities for regulating Arctic shipping, should it wish to do so.

On the other hand, it might be considered that the EU's caution in respect of Arctic shipping has to do with its navigational interests in the area. Europe's economic interests in Arctic shipping are significant, both due to its focus on Arctic resources and the benefits provided by shorter shipping routes. From this perspective, the Union's interests could be expected, apart from ensuring that all shipping operations that take place in the region are safe and environmentally sustainable, to be on ensuring the navigational concerns and passage rights of ships and on achieving general legal certainty for shipping operations in Arctic waters.

So far, however, the EU has also not taken an active stance on issues relating to Arctic navigation. It has not, for example, adopted a view on key issues of maritime delimitation, which are critical for determining the scope of the navigational rights, in both of the principal navigational routes in the Arctic, i.e. the 'Northern Sea Route' along the Russian coastline and the North-West Passage in Northern Canada. There are still legal uncertainties as to which maritime zones are involved in both routes, as both coastal states claim sovereignty over parts of their Arctic waters based on historical title.⁹⁰

Despite the contested nature of these Arctic maritime claims, the EU has not taken a firm view on either of them.⁹¹ Nor has it made a pronouncement on the regulatory reach of Article 234, which is equally relevant for understanding the extent of Arctic coastal states' jurisdictional rights,⁹² or on the relationship between that article and the regime for transit passage through straits used for international navigation under UNCLOS Part III, Section 2. The latter question would be relevant if the Canadian and Russian straight baseline claims were held

⁹⁰ The Canadian system of straight baselines around the Arctic islands was established in 1985 and effectively causes large parts of the Northwest Passage to lie within Canadian internal waters, where Canada has full sovereignty. Similarly, Russia has established straight baselines to enclose some of the Russian Arctic straits that form part of the NSR and that would otherwise form part of the territorial sea. See e.g. R. D. Brubaker, 'Straits in the Russian Arctic', (2001) 32(3) *Ocean Development & International Law* 263-287. See also the laws referred to in n 61.

⁹¹ The Canadian straight baseline claim is contested by many parties, including the US and several EU member states who lodged diplomatic protests when Canada established the baselines, regarding them as inconsistent with international law and rejecting Canada's claim that historical title could provide an adequate justification for them. See e.g. Ted L. McDorman, *Salt Water Neighbors, International Ocean Law Relations Between the United States and Canada*, (Oxford University Press, Oxford 2009) at pp. 236-244 and Molenaar (n 60) p. 275. See also J. A. Roach and R. W. Smith, *United States Responses to Excessive Maritime Claims* (Brill Nijhoff, Leiden/Boston 2012, 3rd ed.) at p. 112, which includes an excerpt from a communication by several European Community member states to Canada dated 9 July 1986, in which the EC member states conclude that they "cannot ... in general acknowledge the legality of these baselines".

⁹² The only recent international discussion on the reach of Article 234 in relation to Arctic Shipping was a debate at the IMO's Maritime Safety Committee in 2010 on the legality of Canada's mandatory 'Northern Canada Vessel Traffic Services Zone Regulations' (NORDREG). The debate centred on whether or not Canada was obliged to seek IMO approval before making NORDEG mandatory. Before this debate, which was ultimately inconclusive, certain EU member states had issued *Notes Verbales* to Canada. The European Commission, however, declined to do so, reportedly due to a lack of certainty as to whether Canada's action warranted a diplomatic protest and because of potential broader implications for the EU's Arctic policy. See Molenaar (n 60) p. 278

to be invalid and key parts of the Arctic sea routes were hence considered to be international straits through the Canadian and Russian territorial seas.⁹³

It is possible, of course, that the absence of an active Arctic shipping policy by the EU is due to the consideration that there is no need for a regional approach in this field and that many of the key matters are better and more efficiently regulated at global level. Indeed, global measures adopted by the IMO or another competent international organisation would no doubt score higher than EU rules in terms of both coverage and political legitimacy. Indeed, many of the issues referred to in the policy documents (such as securing passage rights and navigational freedoms) even require global measures to have effect.

However, by failing to set out its Arctic priorities in a concrete manner, the EU also reduces its chances of making an impact at global level. One of the key strengths of the EU lies in its capacity to exert pressure on organisations to implement their rules in a harmonised manner, and to act on its own if required to avoid results that are unacceptable from the point of view of its own policy objectives. It is at international negotiations at the IMO or, even more so, in UN-based negotiations on jurisdictional rules, such as the on-going negotiations for the BBNJ Agreement, that the EU has greatest possibility for influencing international shipping laws and policies.

In view of this, the limited substantive direction in the EU's shipping policy for the Arctic is unfortunate. The most recent Arctic policy documents issued by various EU institutions include no reference to regulatory initiatives or to substantive targets or ambitions, either at regional or global level. This not only contrasts with the EU's own vision - as set out in the policy documents - of its role in the Arctic and general ocean governance,⁹⁴ but also makes it more difficult to make a substantive impact in the relevant international fora. The failure to indicate its policy ambitions or priorities for Arctic shipping - and the absence of any reference to its preparedness to use its own regulatory instruments for this purpose - hence represent a missed opportunity for the EU to play a key role in shaping the future of one of the Earth's most unique and vulnerable regions.

⁹³ While it seems plausible to argue, as Molenaar has done (n. 60, p. 275), that the regime for ice-covered waters constitutes *lex specialis* over the straits regime, states with large navigational interests in those areas have sometimes taken an opposite approach. See Roach and Smith (n 91) at pp. 318-320, 478-479 and 494. See also the position paper on Arctic shipping issued by the International Chamber of Shipping (ICS) in 2014: "ICS believes that the UNCLOS regime of transit passage for straits used for international navigation (as codified in Part III of UNCLOS) takes precedence over the rights of coastal States under Article 234". Available at www.ics-shipping.org/docs/default-source/resources/policy-tools/ics-position-paper-on-arctic-shipping.pdf. However, the paper provides no further justification for this belief.

⁹⁴ See text at note 14 above. See also *ibid.* at p. 5: "Action by the EU and its Member States needs to be more 'joined-up' across external and internal policies. Their combined weight will significantly increase the potential for positive change. The EU should ensure coherent action between its internal and external policies in accordance with its commitment to enhance policy coherence for sustainable development."