

The European Union's Exercise of Jurisdiction Over Classification Societies

An International Law Perspective on the Amendment of the EC "Directive on Common Rules and Stan- dards for Ship Inspection and Survey Organisations and for the Relevant Activities of Maritime Adminis- trations"

Matthias Reuß/Jakob Pichon***

I. Introduction	120
II. CS as an Addressee in International and European Law	121
1. International Maritime Law	122
a. UNCLOS	122
b. The IMO's Regulatory Activities	123
2. European Law	125
a. EU Legislative Competences	125
b. The Role of UNCLOS and IMO Law for the EU	126
c. Extant EU Regulation on CS	127
III. The New EU Proposal to Amend the Directive on CS and Its Extraterritorial Aspects	128
IV. The New EU Proposal and International Law Regarding the Exercise of Prescriptive Jurisdiction	131
1. Justification on the Basis of the Territorial Principle	132
2. Justification on the Basis of the Nationality Principle	133
3. Justification on the Basis of the Protective Principle	135
4. Justification on the Basis of the Universality Principle	135
a. The Protection of the Marine Environment as an International Community Interest	136
b. The EU's Prescriptive Jurisdiction to Defend International Community Interests	138
c. The EU's Prescriptive Jurisdiction to Defend the Protection of the Marine Environment Through the Surveillance of CS	139
5. The EU's Prescriptive Jurisdiction for the Granting of Legal Advantages	140
V. The New EU Proposal and International Law Regarding the Exercise of Enforcement Jurisdiction	141
1. The EU's Enforcement Jurisdiction vs. Third States' Jurisdiction Over CS Who Are Their Nationals	141
2. The EU's Enforcement Jurisdiction vs. Third States' Flag State Jurisdiction	141
3. The EU's Enforcement Jurisdiction vs. Third States' Territorial Jurisdiction	142
VI. Conclusions and Perspectives	143

* Dr. jur., Research Fellow at the Institute (Max Planck Encyclopedia of Public International Law, Editorial Staff).

** Research Assistant at the Institute (Max Planck Encyclopedia of Public International Law, Editorial Staff).

The authors would like to thank Ms Sarah Wolf for her valuable and constructive legal advice and Mr Nicolas Nohlen for his editorial assistance.

I. Introduction

In the field of maritime affairs, the European Union (EU) is currently seizing opportunities to become more actively involved with environmental policies¹. The protection of the marine environment has long been a matter where international, European and domestic regulations are interwoven, and – as the case may be – combined with executive measures by governmental entities on different levels. As the EU intensifies and streamlines its regulation in this area, it increasingly faces multilayer phenomena where the position of its own acts within international law raises highly complex issues². It is against this background that one has to see the EU Commission's recent reform initiative regarding the legal framework for the recognition and control of Classification Societies (CS). In November 2005, the Commission submitted a draft proposal (Proposal)³ to amend Council Directive 94/57/EC on Common Rules and Standards for Ship Inspection and Survey Organisations and for the Relevant Activities of Maritime Administrations (Directive on CS)⁴. This Proposal raises various significant issues. For the purpose of this contribution, the focus will be on the EU's far reaching claims to exercise its prescriptive and enforcement jurisdiction: Does the Proposal insofar comply with its international legal framework? Which particularities result from the EU's objective to protect the marine environment?

Since CS are little known to a larger audience, their nature, purposes and activities, as well as the international maritime and European law addressing them shall be briefly described below (II). On this basis, the Proposal's basic features and central extraterritorial aspects shall be explained (III). In a further step, the present contribution examines as to what degree the EU's exercise of prescriptive and enforcement jurisdiction as envisaged by the Proposal fits into the international legal framework (IV and V). Ultimately, some conclusions and perspectives shall be developed (VI).

¹ See for instance the Green Paper on Maritime Affairs issued by the Task Force on Maritime Affairs established by the EU Directorate General for Fisheries and Maritime Affairs. This paper intends to streamline the EU maritime policies and assesses the benefits and challenges related to the implementation of EU maritime policies, including their economic, social, security, and environmental dimensions. Green Paper: Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas, COM(2006) 275 final Vol. II – Annex, 7 June 2006, available at <http://ec.europa.eu/maritimeaffairs/pdf/com_2006_0275_en_part2.pdf> (last visited on 6 February 2007).

² On the emergence of multi-level systems of rule-making, composed of international, supranational and national law, see *Wahl*, *Der einzelne in der Welt jenseits des Staates*, in: *Verfassungsstaat, Europäisierung, Internationalisierung*, 2003, 53-95; from the perspective of political science, see *Knodt*, *Regieren im erweiterten europäischen Mehrebenensystem*, 2005, 31 et seq., with further references.

³ COM(2005) 587 final, 23 November 2005, including the Explanatory Memorandum, available at <http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0587en01.pdf> (last visited on 6 February 2007); see for the current status of the procedure <<http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2005/0237>> (last visited on 6 February 2007).

⁴ Official Journal 1994 L 319/20.

II. CS as an Addressee in International and European Law

The primary function of CS is the technical surveillance of seafaring ships⁵. CS set standards for the design, construction and inspections of ships, carry out periodic surveys, and ultimately issue “class certificates”⁶ confirming whether or not a certain ship meets specific standards. Essentially, the purpose of these classification services is to protect the property interests of ship owners and operators, insurers, and other private parties directly affected by a ship's seaworthiness. At the same time, CS carry out public functions. On behalf of States and in the interest of the international community, CS perform surveys and issue “statutory certificates”⁷ which confirm that a seafaring ship complies with public safety standards. The respective standards are partly developed within the framework of the International Maritime Organization (IMO) and encompassed in several Conventions and IMO Resolutions⁸. These Conventions and IMO Resolutions impose obligations on flag States who frequently delegate the implementation of statutory requirements to specifically recognized CS. In this context, the preservation of the marine environment is among the key objectives of the CS' services. These few observations reveal some characteristic features of CS: While national, European and international public law address them in their specific capacity, their self-regulation is in quality and quantity equally advanced⁹. They remain essentially private actors, even where their standard-setting activities are concerned. Their co-operation with national and European administrations and their involvement with international organizations provide one of the furthest reaching examples of public-private-partnerships in the international field¹⁰. While their position in their respective

⁵ For a synopsis of the historical role and development of CS see *Boisson*, Classification Societies and Safety at Sea: Back to Basics to Prepare for the Future, *Marine Policy* 18 (1994), 363-377.

⁶ Cf. the definition in Art. 2(k) of the Proposal: “A ‘class certificate’ means a document issued by a recognized organisation certifying the fitness of a ship for a particular use or service in accordance with the rules and regulations laid down and made public by that recognized organisation.” The CS' privately set rules are often designated as “class rules”.

⁷ Cf. the definition in Art. 2(i) of the Proposal: “A ‘statutory certificate’ means a certificate issued by or on behalf of a flag State in accordance with the international conventions.”

⁸ For further details regarding SOLAS, MARPOL, LL and IMO Resolutions cf. *infra* (section II.1.).

⁹ The industry's self regulation is internationally coordinated within the International Association of Classification Societies (IACS), a cooperation of the world's leading CS. Its present members are: American Bureau of Shipping, Bureau Veritas, China Classification Society, Det Norske Veritas, Germanischer Lloyd, Korean Register of Shipping, Lloyd's Register, Nippon Kaiji Kyokai, Registro Italiano Navale, Russian Maritime Register of Shipping; associate member: Indian Register of Shipping.

¹⁰ With regard to this public private partnership cf. the Model Agreement for the Authorization of Recognized Organisations Acting on Behalf of the Administration issued by the Maritime Safety Committee (MSC) and the Marine Environment Protection Committee (MEPC) which aims to assist (domestic) maritime administrations when formalizing in writing the delegation of authority for the purpose of having statutory services rendered by a recognized organization on their behalf. This IMO Model Agreement is currently used by most CS, see MSC/Circ.710, MEPC/Circ.307, 9 October 1995, available at: <<http://www.uscg.mil/hq/g-m/nmc/imo/pdf/Circ1/Msc0/710.pdf>> (last visited on 6 Feb-

domestic legal order differs, it is always influenced by international and European law. The latter, as we shall see, irrespective of their provenance.

1. International Maritime Law

a. UNCLOS

The global framework for the exercise of jurisdiction over maritime traffic, security at sea and the protection of the marine environment is provided by the United Nations Convention on the Law of the Sea (UNCLOS)¹¹. As a framework convention, UNCLOS sets out general principles and duties, whereas the enactment of detailed rules for maritime safety and their implementation are left to other international and national bodies¹². UNCLOS tries to strike a balance between the freedom of the high seas, especially the freedom of navigation (Art. 87 para. 1 (a) UNCLOS), and the protection of the marine environment and maritime safety. Underlying principle of the law of the sea is the principle of flag State jurisdiction: A ship is, on the high seas, subject to the exclusive jurisdiction of the State under whose flag it is sailing (Art. 92 para. 1 UNCLOS)¹³. The duties of the flag State are substantiated in Art. 94: In effectively exercising its jurisdiction and control over ships flying its flag (para. 1), every flag State shall take such measures that are necessary to ensure safety at sea (para. 3 (a)). Such measures shall include those necessary to ensure that each ship, before registration and thereafter at appropriate intervals, is inspected by a qualified surveyor of ships (para. 4 (a)). With regard to vessel-source pollution, Art. 211 para. 2 UNCLOS refers to generally accepted international rules and standards (GAIRS) established through the competent international organization, i.e. the IMO. It is widely accepted that these GAIRS are minimum standards for flag States¹⁴ and both minimum and maximum standards

ruary 2007). On the particularities of public private partnerships in multilayer systems cf. also Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, EJIL 17 (2006), 47-48.

¹¹ 1833 UNTS 3 and 1835 UNTS 261 (Final Act), 10 December 1982, entered into force 16 November 1994. See Vitzthum, *Schiffssicherheit: Die EG als potentieller Durchsetzungsdegen der IMO*, ZaöRV 62 (2002), 163, 179.

¹² Ibid.

¹³ Cf. Vitzthum, *Raum und Umwelt im Völkerrecht*, in: id. (ed.), *Völkerrecht*, 3rd ed. 2004, 403; Kokott/Doehring/Buergenthal, *Grundzüge des Völkerrechts*, 3rd ed. 2003, margin note 339. See below, IV.2.

¹⁴ Cf. Art. 211 para. 2 UNCLOS: "States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference." (emphasis added). See also Schult, *Das völkerrechtliche Schiffssicherheitsregime – Eine Analyse der Kompetenzen von Küsten-, Hafenstaaten, regionalen Organisationen und Europäischer Gemeinschaft zum Schutz der Meere vor Verschmutzung durch Öltankerunfälle*, 2005, 72, 337 et seq.

for coastal States¹⁵. However, since the beginning of the Third Conference on the Law of the Sea it has been highly controversial which norms exactly form part of the GAIRS and which legal consequences follow from Art. 211 para. 2 UNCLOS vis-à-vis third States not having signed UNCLOS¹⁶.

b. The IMO's Regulatory Activities

The IMO¹⁷ creates operative regulations for the safety of shipping and the prevention of marine pollution. IMO Conventions referring to CS are the 1974 International Convention for the Safety of Life at Sea (SOLAS)¹⁸, the International Convention for the Prevention of Pollution from Ships (MARPOL)¹⁹ and the 1966 International Convention on Load Lines (LL)²⁰. In its successive forms, the framework convention SOLAS is the most important of all international treaties addressing the safety of navigation and technical minimum standards for the construction, equipment and operation of ships²¹. MARPOL is the main international convention aimed at preventing and minimizing pollution from ships, both accidental and from routine operations²². Since its first version, MARPOL covered

¹⁵ Cf. Art. 211 para. 5 UNCLOS: "Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference." (emphasis added). See also Wolf, *Neue Tendenzen küstenstaatlicher Umweltkompetenzen auf See: Eine Untersuchung am Beispiel der französischen "zone de protection écologique" im Mittelmeer*, ZaöRV 66 (2006), 117 with further references; Wolf, *Die Internationalisierung staatsfreier Räume – Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden*, 1984, 640. The qualification as minimum or maximum standards remains controversial with regard to harbour States, see Schult (*supra* note 14), 338 et seq. who argues in favour of minimum standards (345).

¹⁶ Schult (*supra* note 14), 73.

¹⁷ The IMO was founded (under the name of Inter-Governmental Maritime Consultative Organisation IMCO, renamed in 1982) in 1948 and is a UN special agency in terms of Art. 57 Charter of the United Nations.

¹⁸ 1184 UNTS 278, 1 November 1974, entered into force 25 May 1980.

¹⁹ International Convention for the Prevention of Pollution from Ships, 1973, ILM 12 (1973), 1319, as modified by the Protocol of 1978 relating thereto, ILM 17 (1978), 546 (MARPOL 73/87).

²⁰ 640 UNTS 133, 5 April 1966, entered into force 21 July 1968.

²¹ The first version of SOLAS was adopted in 1914, in response to the Titanic disaster, the second in 1929, the third in 1948 and the fourth in 1960. A revised Convention was adopted in 1974 (sometimes referred to as SOLAS, 1974). See also Vitzthum (*supra* note 11), 166; Proelß, *Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks*, 2004, 139.

²² MARPOL is a combination of two treaties adopted in 1973 and 1978 respectively and updated by amendments throughout the years. The Protocol of 1978 relating to the 1973 International Convention for the Prevention of Pollution from Ships (1978 MARPOL Protocol) was adopted at a Conference on Tanker Safety and Pollution Prevention in February 1978 held in response to a spate of tanker accidents in 1976-1977. As the 1973 MARPOL Convention had not yet entered into force, the 1978 MARPOL Protocol absorbed the parent Convention. The combined instrument is referred to as the International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by

pollution by oil, chemicals, harmful substances in packaged form, sewage and garbage. Its current version includes six Annexes of technical nature. MARPOL provisions constitute GAIRS in the sense of Art. 211 UNCLOS²³. In addition, as MARPOL has been signed by over 125 States whose market share represents almost the totality of seafaring activities, many of MARPOL's provisions have acquired the status of customary international law²⁴. LL regulates the freeboard with a view to ensuring adequate stability and avoiding excessive stress on the ship's hull as a result of overloading. The technical annex contains several additional safety measures concerning doors, freeing harbours, hatchways and other items. Besides the named conventions, the IMO relies essentially on non-binding instruments such as guidelines and recommendations²⁵. The IMO's regulatory approach is based upon the co-operation between flag States and CS: While flag States assume material obligations, they may authorize CS to act on their behalf in conducting the surveys and inspections required under the respective IMO instruments²⁶. When doing so, flag States shall notify the IMO of the specific responsibilities and conditions of the authority delegated. But even when flag States delegate these tasks, they remain under an obligation to establish and maintain the effective control over ships flying their flags. During the last decades, the IMO was facing three major challenges linked to CS: the definition of minimum standards for CS acting on behalf of States; the development of procedures for adequately monitoring the performance of CS; and the regulation of their liability²⁷. By adopting several resolutions with regard to recognition and control of CS and by amending the relevant IMO Conventions, the IMO has improved the quality management of CS. According to Appendix 1 of Resolution A.739(18)²⁸, CS have to fulfil a detailed list of minimum conditions in order to be recognized by flag State administrations to perform statutory works on their behalf²⁹. State administrations should establish a system of verifying and monitoring the activity of recognized

the Protocol of 1978 relating thereto (MARPOL 73/78), see *supra* note 19, and it entered into force on 2 October 1983. See also Proelß (*supra* note 21), 129.

²³ ILA London Conference 2000, Committee on Coastal State Jurisdiction Relating to Marine Pollution, Final Report, available at <http://www.ila-hq.org/html/layout_committee.htm>, 39 (last visited on 6 February 2007); Posselt, Umweltschutz in umschlossenen und halbumschlossenen Meeren, 1995, 268.

²⁴ Proelß (*supra* note 21), 129 et seq.

²⁵ For a survey see Pulido Bégines, The EU Law on Classification Societies: Scope and Liability Issues, *Journal of Maritime Law & Commerce* 36 (2005), 487, 495 et seq.

²⁶ See Art. 13 LL, Regulation I/6 SOLAS, Regulation 4 of Annex I and Regulation 10 of Annex II MARPOL.

²⁷ *Ibid.*, 495. Third-party claims against CS and the limits to their liability are analyzed at Baserow/Wurmnest, *Third Party Liability of Classification Societies*, 2005.

²⁸ Guidelines for the Authorization of Organisations Acting on Behalf of the Administration, Res. 733-779, IMO Resolutions, 18th Session 25 October-5 November 1993, 18 et seq. Resolution A.739(18) became mandatory by Regulation 1 of Chapter XI-1 of SOLAS on 1 January 1996.

²⁹ Cf. Schult (*supra* note 14), 359 note 1009.

CS. By Resolution A.789(19)³⁰ the IMO has refined the provisions of Resolution A.739(18). Resolution A.847(20)³¹ specifies duties for flag States with a view to the appropriate implementation of SOLAS, MARPOL and LL. In essence, this Resolution aims at promoting uniformity of inspections and maintaining established standards on the delegation of authority.

2. European Law

a. EU Legislative Competences

The EU provides the second layer of regulation covering CS. It remains to be seen how the EU can in this instance justify its legislative competence. Where does it derive the right to recognize CS or, as the case may be, to deny them recognition, thereby deciding on their very existence? Primary community law appears to lack an explicit foundation. Moreover, the EU is not a flag State that could claim to exercise control over CS that classify the “EU fleet”: Up till now, ships fly the flags of individual EU Member States. These have domestic ships classified by domestic CS. It would appear to be reasonable – and certainly much more in conformity with the IMO provisions mentioned above – that the competence to legislate on CS remains within the sphere of the flag States. On the other hand, EU Member States have transferred their genuine right to legislate to the EU with respect to various maritime matters³². In this context, the EU's competences are based upon Art. 80 para. 2 EC Treaty³³ which provides that “[t]he Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport”. The EU has drawn on this provision as a blanket clause for the regulation of a vast array of matters related to maritime navigation³⁴. For years, it has used the article as a foundation for EU legislation on issues such as the cooperation with international institutions in

³⁰ “Specifications on the Survey and Certifications Functions Recognized Organisations Acting on Behalf of the Administration of 23 November 1995, Res. 780-838, IMO Resolutions, 19th Session, 13-23 November 1995, 85 et seq. Resolution A. 789(19) became mandatory under SOLAS regulation XI/1 on 1 January 1998.

³¹ Guidelines to Assist Flag States in the Implementation of IMO Instruments of 27 November 1997 Res. 839-873, IMO Resolutions, 20th Session, 17-27 November 1997, 36 et seq.

³² J e n i s c h, The European Union as an Actor in the Law of the Sea: The Emergence of Regionalism in Maritime Safety, Transportation and Ports, German Yearbook of International Law, 48 (2005), 223, 264.

³³ Consolidated Version of the Treaty establishing the European Community, Official Journal 2002 C 325/33.

³⁴ E r d m e n g e r, Artikel 80 EG, in: von der Groeben/Schwarze (eds.), Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, Vol. 1, 6th ed. 2003, margin note 5.

the field of maritime navigation or the improvement of safety at sea³⁵. This has been widely accepted among EU Member States and legal scholars³⁶. However, the assumption that Art. 80 para. 2 EC Treaty covers measures intended to improve the safety at sea by regulating the (domestic) institutions in charge of the technical surveillance of seafaring ships relies upon a rather extensive interpretation of the named provision. There is a strong case to be made that the EU's supervision of CS exceeds its wording of the article. The lack of a solid foundation for the EU's legislative competence in primary community law is even more disconcerting in view of the Proposal significant economic impact on CS.

b. The Role of UNCLOS and IMO Law for the EU

While UNCLOS cannot change the division of competences between the EU and its Member States which is enshrined in primary community law, it nevertheless provides a framework for the EU's legislative activities in the area of marine safety. The EU is a fully-fledged member of UNCLOS, having formally acceded to it in 1998³⁷. By its accession, the EU has pledged to abide by this global framework for maritime traffic, security at sea, and the protection of the marine environment. According to Art. 300 (7) EC Treaty, UNCLOS has become "binding on the institutions of the Community and on Member States". As a consequence, the European Court of Justice³⁸ can declare null and void secondary European maritime law which contradicts UNCLOS. On the other hand, the EU is neither a signatory of the convention establishing the IMO nor has it ratified any other IMO instruments. Therefore EU organs are not bound by the latter on the basis of Art. 300 (7) EC Treaty. However, a binding effect can possibly be derived from Art. 307 EC Treaty. This is certainly the case as far as all or at least the predominant part of the EU Member States are legally bound by the respective IMO instruments, and the EU's legislative action would generate a collision of duties for these States that they could not resolve without violating international law³⁹. Thus,

³⁵ Krück, Artikel 308 EGV, in: Schwarze (ed.), EU-Kommentar, 1st ed. 2000, margin note 4. In detail see Wolfrum, Die Europäische Gemeinschaft als Partei seerechtlicher Verträge, Archiv des Völkerrechts 32 (1994), 317 and Treves (ed.), The Law of the Sea. The European Union and Its Member States, 1997.

³⁶ See only Erdmenger (*supra* note 34), margin note 7.

³⁷ See for the following Schult (*supra* note 14), 331 et seq. See also the Council Decision of 23 March 1998 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, Official Journal 1998 L 179/1.

³⁸ As to the relation of the dispute settlement system of UNCLOS to EU law see also ECJ, Judgment of 30 May 2006, C-459/03, *Commission v. Ireland*.

³⁹ Schult (*supra* note 14), 335 et seq. It should be noted that Art. 307 EC Treaty is – due to temporal reasons – not directly applicable to IMO-Conventions. It is common sense, however, that Art. 307 EC Treaty can be applied in analogy on Conventions adopted after the entry into force of the EC Treaty but before the EU has executed its competences in this area, see only Krück (*supra* note 35), margin note 15.

only under these circumstances can the EU be indirectly bound by IMO instruments⁴⁰. Yet, even in this case the EU's legislative competences are still to be derived from primary community law, not from IMO instruments. As a concluding remark one should note that UNCLOS and IMO can only put additional legal constraints on the EU's (legislative) activities, but there is no way that they would transfer to the EU additional rights against its Member States.

c. Extant EU Regulation on CS

The present system for the recognition of CS by the EU has been established by Council Directive 94/57/EC⁴¹. Motivated by the perception that some CS did not have the qualities required to perform public services⁴², this Directive's Annex has established minimum criteria for CS with regard to surveys and inspections on behalf of EU Member States. These minimum criteria are inspired by the IACS⁴³ standards. Under the Directive only recognized organizations may be authorized by Member States to perform statutory functions on their behalf. Once recognized by an EU Member State, a recognized organization keeps its status in the whole territory of the EU. In addition, Art. 11 of the Directive mandates the EU Member States with the monitoring of CS working on their behalf. In 1997 the Commission incorporated IMO Resolution A.789(19) and amended the then existing Council Directive through Commission Directive 97/58/EC⁴⁴. Two years later, the "Erika" accident near the Atlantic coast caused exceptional high cost damages to the environment and prompted the Commission to adopt the so called Erika I⁴⁵ and II⁴⁶

⁴⁰ The binding effect of IMO law for EU secondary law is an issue that is currently pending within a preliminary reference in front of the ECJ, C-308/06, *The International Association of Independent Tanker Owners and Others v. Secretary of State for Transport*.

⁴¹ See *supra* note 4.

⁴² See for possible reasons for this situation OECD (Directorate For Science, Technology and Industry), *The Cost To Users of Substandard Shipping*, Prepared for the OECD Maritime Transport Committee (by SSY Consultancy & Research Ltd.), Paris, January 2001, 18, available at <<http://ntl.bts.gov/lib/24000/24400/24466/1827388.pdf>> (last visited on 6 February 2007); cf. also Pulido B e g i n e s (*supra* note 25), 491 et seq.

⁴³ See for the IACS already *supra* note 9.

⁴⁴ Commission Directive 97/58/EC of 26 September 1997 amending Council Directive 94/57/EC on Common Rules and Standards for Ship Inspection and Survey Organisations and for the Relevant Activities of Maritime Administrations, Official Journal 1997 L 274/8.

⁴⁵ Communication from the Commission to the European Parliament and the Council on the Safety of the Seaborne Oil Trade, COM(2000) 142 final, 21 March 2000.

⁴⁶ Communication from the Commission to the European Parliament and the Council on a second set of community measures on maritime safety following the sinking of the oil tanker ERIKA, COM(2000) 802 final, 6 December 2000. The Erika II package has not been particularly relevant to the rights and duties of CS. The compatibility of the Erika II package with international law examines L a g o n i, *Vorsorge gegen Schiffsunfälle im Küstenvorfeld: Gemeinschaftliches Schiffsmeldesystem und Hafenzugang im Notfall*, *Transportrecht* 24 (2001), 284 et seq.

packages. The Erika I package has been of immediate concern to CS⁴⁷. The most important changes for the legal situation of CS have been the following: (a) The monitoring of recognized organizations has become stricter⁴⁸. (b) The control over recognitions and the monitoring of CS, hitherto solely in the hands of the EU Member States, is now divided between the States and the EU Commission⁴⁹. (c) CS can only receive recognition if they have a good safety and pollution prevention performance record pertaining to the whole fleet they have certified⁵⁰. (d) Further obligations for CS have been introduced, e.g. the duty to supply all relevant information about their classed fleet, irrespective of flag, to the EU Member States' administrations⁵¹. The latest EU instrument in this field, Directive 2002/84/EC⁵², amended the CS' legal situation in some minor details⁵³.

III. The New EU Proposal to Amend the Directive on CS and Its Extraterritorial Aspects

The Commission's current Proposal⁵⁴ is supposed to replace Council Directive 94/57/EC⁵⁵. The Commission submitted it as part of the Third Package of Legislative Measures on Maritime Safety in the EU (Erika III package) in November 2005⁵⁶. Overall, the Commission intends to further enhance the safety of seafaring ships, to save navigators and other people aboard from harm, and to protect the marine environment⁵⁷. Its strategy is to put into operation higher standards of ship inspections: EU supervision of CS shall result in safer ships that will have fewer accidents and thus cause less pollution to the marine environment⁵⁸. Through Art. 6

⁴⁷ See in particular Directive 2001/105/EC of the European Parliament and of the Council of 19 December 2001 Amending Council Directive 94/57/EC, Official Journal 2002 L 19/9. For further information in regard to these changes see Pulido Begines (*supra* note 25), 505 et seq.

⁴⁸ Articles 9 and 10 of the amended Directive 94/57/EC.

⁴⁹ Articles 4, 7, 9 para. 1 and 10 of the amended Directive 94/57/EC.

⁵⁰ Art. 9 para. 2 of the amended Directive 94/57/EC.

⁵¹ Art. 15 para. 3 of the amended Directive 94/57/EC.

⁵² Directive 2002/84/EC of the European Parliament and of the Council of 5 November 2002 Amending the Directives on Maritime Safety and the Prevention of Pollution from Ships, Official Journal 2002 L 324/53.

⁵³ Cf. for these amendments Pulido Begines (*supra* note 25), 506.

⁵⁴ *Supra* note 3.

⁵⁵ *Supra* note 4.

⁵⁶ Communication from the Commission – Third package of legislative measures on maritime safety in the European Union, COM(2005) 585 final, 23 November 2005.

⁵⁷ Among the Directive's explicitly stated policy purposes are the objectives, see Explanatory Memorandum to the Proposal (*supra* note 3), 2-11.

⁵⁸ Cf. Explanatory Memorandum to the Proposal (*supra* note 3), 3: "The lack of cross checks in the system makes it unlikely that the quality of class certificates will ever be questioned when international certificates are issued. Errors made will inevitably have consequences downstream, including on the statutory certificates. They may affect a large number of ships before being detected [...]."

of the Proposal the Commission intends that recognition of CS by the EU will no longer depend on their size but solely on their quality and performance in terms of safety and environmental protection. Further, the Commission proposes to clarify and simplify the criteria for granting recognition to CS. Para. 3 of Annex I A of the Proposal stipulates that the number of inspectors has to be in proportion to the fleet being classed by a certain CS. Furthermore, para. 1 of Annex I B postulates the use of exclusive, permanently employed technical staff either from the respective CS or from other recognized organizations, since any other forms of temporary or *ad hoc* appointments of technical staff are considered to affect adversely their independence and quality of performance. Since the first recognitions of CS by EU Member States, the recognized organizations have sometimes significantly modified their corporate structures⁵⁹. In order to encompass all legal constructions, the Proposal introduces a broad organizational concept, by defining in its Art. 2 (e) organizations as a "legal entity, its subsidiaries and any other entities under its control, which jointly or separately carry out tasks falling under the scope of this Directive". The Commission allocates the recognition at the highest organizational level which corresponds to that definition⁶⁰. Consequently, both horizontal and vertical company groupings will be either fully inside or outside of the EU recognition system. In the same vein, Art. 23 para. 1 of the Proposal provides: "In the course of the assessment pursuant to Article 16 (3), the Commission shall verify that the holder of the recognition is the parent entity within the organisation. If that is not the case, the Commission shall amend the recognition accordingly by decision. Where the Commission amends the recognition, the Member States shall adapt their agreements with the organisation to take account of the amendment." With regard to the Commission's supervisory competences, Art. 17 allows Community assessors⁶¹ to access ships and information for the purpose of evaluating recognized CS. Contrary to the present legal situation in which these rights are only implied, the proposal explicitly states the Commission's claims: It prevents CS from invoking confidentiality clauses in their agreements with third parties in order to restrict the Community inspectors' access to information (Art. 17 para. 1). Moreover, the Proposal requests that recognized CS include provisions in their contracts with shipyards and ship-owners stating that statutory and class certificates may only be issued if the said parties do not oppose the access of Community inspectors aboard the respective ship⁶². With respect to the monitoring system for

⁵⁹ Explanatory Memorandum to the Proposal (*supra* note 3), 8.

⁶⁰ Cf. also the reference to the "parent entity" in Art. 6 para. 2 of the Proposal.

⁶¹ I.e.: Officials representing the EU Commission or the Maritime Administration of an EU Member State since both cooperate in the assessment of CS, cf. Art. 16 of the Proposal.

⁶² The Proposal reads:

"1. No clauses in a contract of a recognized organisation with a third party or in an authorization agreement with a flag State may be invoked to restrict the access of the Commission to the information necessary for the purposes of the assessment referred to in Article 16(3).

2. Recognized organisations shall ensure in their contracts with third parties for the issue of statutory certificates or class certificates to a ship that such issue shall be made conditional on the said par-

recognized CS, Art. 21 of the Proposal envisages the establishment of a joint body for quality system assessment and certification. Motivated, *inter alia*, by its inability adequately to sanction the CS that had certified the shipwrecked vessels “Erika” and “Prestige”⁶³, the Commission is determined to make the system of penalties more flexible and effective. Therefore Art. 12 of the Proposal replaces the only possible penalty, at present, of suspension of recognition by the application of gradual financial penalties. It is particularly noteworthy that Art. 11 of the Proposal⁶⁴ does not limit the Commission’s power to impose sanctions on recognized CS to their activities regarding ships flying under flags of EU Member States.

Whether or not all these provisions fully comply with the demand of the European Court of Human Rights (ECtHR) that EU secondary law has to respect fundamental rights and freedoms in a way comparable to the level established by the ECtHR⁶⁵ would deserve further examination but exceeds the scope of the present study.

The synopsis of the Proposal’s material provisions shows that it pertains to factual scenarios with far-reaching extraterritorial aspects. It goes without saying, that in the market of certification services, CS with multinational corporate structures offer their services on a global scale. It is thus unavoidable that any EU legislation regarding CS has legal implications that affect CS or at least some of their branches which are based in third States. However, the currently envisaged regime goes way beyond this inevitable effect and includes cases where EU officials would supervise CS which are EU-recognized, but no EU-nationals⁶⁶, with respect to their services regarding ships flying flags of third States⁶⁷, while these ships are located on the high seas⁶⁸, in the harbour of third States⁶⁹, or in the coastal waters of third States⁷⁰.

ties not opposing the access of the Community inspectors on board that ship for the purposes of Article 16(3).”

⁶³ In May 2003, Spain filed a law suit for damages at a Federal Court in New York against the American Bureau of Shipping, the CS which had classified the “Prestige”, see Vaughan, *The Liability of Classification Societies*, <<http://web.uct.ac.za/depts/shiplaw/assign2006/vaughan.pdf>> (last visited on 6 February 2007).

⁶⁴ The proposed article reads: “Where the Commission considers that a recognized organisation has failed to fulfil the criteria set out in Annex I or its obligations under this Directive, or that the safety and pollution prevention performance of a recognized organisation has worsened significantly, without it constituting, however, an unacceptable threat to safety or the environment, it shall require the organisation concerned to undertake the necessary preventive and remedial action to ensure full compliance with the said criteria and obligations and, in particular, remove any potential threat to safety or the environment, or to otherwise address the causes of the worsening performance.”

⁶⁵ Misgivings arise especially in view of the principle of proportionality, as recently applied by the European Court of Justice, cf. ECJ, Judgment of 6 December 2005, C-453/03, *ABNA and others*, in particular paras. 68, 69, 83 and 87. See also ECtHR Judgment of 30 June 2005, Application No. 45036/98, *Bosphorus v. Ireland*, para. 155.

⁶⁶ Cf. Art. 8 para. 3 of the Proposal: The requirement of a local representation does not imply nationality and is formally not mandatory.

⁶⁷ Cf. Art. 17 which refers to third parties without any explicit limitation to ships flying the flag of an EU Member State.

⁶⁸ One should note in this context Art. 89 UNCLOS providing that “[n]o state may validly purport to subject any part of the high seas to its sovereignty”. Hence, acts of state against foreign ships

In these instances, the Proposal seems to be particularly problematic since it covers the activities of CS that perform their services on the basis of national legislation issued by third States which might implement international maritime law in a way that is not taken into account by the EU. Moreover, the Proposal envisages EU officials interfering with the relationships between CS and States that are not bound by EU law, since it transfers to CS the responsibility to implement EU regulation into their contractual relations to these States.

IV. The New EU Proposal and International Law Regarding the Exercise of Prescriptive Jurisdiction

Bringing together European and international law in the multilayer regulation of CS is an intricate matter, complicated by the Proposal's far-reaching extraterritorial aspirations. The EU control over the service performance of globally acting CS begs the question of whether or not the Proposal complies with international law concerning the exercise of jurisdiction. By and large, States may exercise their jurisdiction as far as a genuine link exists between the regulating State and the regulated matter⁷¹. In the absence of such a link, a State may only exercise its jurisdiction affecting another State as far as the latter consents⁷². While examining the Proposal's extraterritorial aspects, one should recall that international law expects States to apply prudence and self-restraint in case of conflicting claims to exercise their respective jurisdictions, to limit themselves to instances where this exercise is reasonable, and to defer to another State if that State's interest is clearly greater⁷³.

on the high sea usually contravene international law, cf. Dahm/Delbrück/Wolfrum, *Völkerrecht*, I/1, 2nd ed. 1989, 328. However, for practical reasons actual instances of EU surveillance while foreign ships sail on the high seas are unlikely to occur.

⁶⁹ For further details regarding the jurisdiction of harbour States over ships in their harbours and persons aboard these ships cf. Dahm/Delbrück/Wolfrum (*supra* note 68), 405-413.

⁷⁰ Cf. Art. 2 (1) UNCLOS.

⁷¹ It needs to be clarified that any jurisdictional powers that the EU exercises are derived from its Member States. Hence, what has been and needs to be said about the jurisdiction of States applies in the present context to the EU's jurisdiction. See only Callies/Ruffert, *Kommentar zu EU-Vertrag und EG-Vertrag*, 2nd ed. 2002, Art. 5 para. 3; Lenaerts/van Nuffel, *Constitutional Law of the European Union*, 2nd ed. 2005, 86 et seq. For the broader context cf. Art. 2 No. 1, Charter of the United Nations, 892 UNTS 119, June 26, 1945, entered into force 24 October 1945. See also Kott, *Souveräne Gleichheit und Demokratie im Völkerrecht*, *ZaöRV* 64 (2004), 517 et seq.; Jennings/Watts (eds.), *Oppenheim's International Law*, Vol. I, Introduction and Part I, 9th ed. 1992, § 109; Kaczorowska, *Public International Law*, 3rd ed. 2005, 121 et seq.; Dahm/Delbrück/Wolfrum (*supra* note 68), 320 et seq., 324; Verdross/Simma, *Universelles Völkerrecht*, 3rd ed. 1984, § 1183; Herdegen, *Völkerrecht*, 5th ed. 2006, § 26 margin note 1.

⁷² Cf. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. 1997, 109; Herdegen (*supra* note 71), § 26 margin note 1.

⁷³ Cf. American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States*, Vol. 2, 1987, § 403 para. 1 and 3. The reasonableness of claims to exercise jurisdiction is determined by weighing all relevant factors, including the intensity of the link between the regulated

Since international maritime law does not contain any explicit authorization for the unilateral implementation of its objectives, the EU needs to comply with the general requirement of a genuine link⁷⁴. As the Proposal's most questionable legal issue is its extension to the supervision of services provided by foreign CS with respect to foreign ships in foreign harbours, this scenario can be used as a yardstick for the required compliance.

1. Justification on the Basis of the Territorial Principle

As a general rule, the territory can provide a genuine link between a regulator and a regulated matter⁷⁵: Within its own territory, a State can regulate the conduct of all physically present natural and legal persons, regardless of their nationality. The territorial principle also justifies the exercise of jurisdiction in cases in which a conduct outside a State's territory has or is intended to have a substantial effect within⁷⁶. As far as the exercise of jurisdiction is based upon such effects, a State should only claim jurisdiction if the presumed effect is direct, foreseeable and substantial⁷⁷. For the present context, the territorial principle needs to be seen in the light of Art. 2 UNCLOS which extends the territorial sovereignty of coastal States, subject to UNCLOS and other rules of international law, to an adjacent belt of sea, described as the territorial sea. Furthermore, Art. 56 para. 1 (a) UNCLOS bestows upon coastal States within their respective exclusive economic zones, among others, "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil". In international maritime law, the territorial principle has been applied by the WTO Appellate Body in the *Shrimp* Case where a sufficient nexus to justify the exercise of the United States' prescriptive jurisdiction has been affirmed although the genuine link had in

matter and the regulating state, the circumstances and expectations of the States and persons affected, traditions of the international system, etc., see *ibid.*, § 403 para. 2.

⁷⁴ At any rate, it is doubtful whether the EU could derive any entitlements from IMO law since it is neither an IMO Member State nor explicitly addressed in IMO law. Cf. however Art. 3 para. 1 of the Proposal which relies on the IMO Member States' responsibilities and obligations pertaining to the appropriate enforcement of international maritime conventions. See also the Explanatory Memorandum to the Proposal (*supra* note 3), 3 and 9 *lit. g*.

⁷⁵ Brownlie, *Principles of Public International Law*, 6th ed. 2003, 299; Wallace, *International Law*, 5th ed. 2005, 117; see also Berge, *Criminal Jurisdiction and the Territorial Principle*, *Michigan Law Review* 30 (1931), 238, 254; Kegel/Seidl-Hohenveldern, *Zum Territorialitätsprinzip im internationalen öffentlichen Recht, in Konflikt und Ordnung – Festschrift für Murad Ferid zum 70. Geburtstag*, 1978, 233 et seq.

⁷⁶ *S.S. Lotus Case (France v. Turkey)*, PCIJ Series A, 1927, No. 10 [1927], 18 et seq.

⁷⁷ American Law Institute, (*supra* note 73), para. 403; the Restatement is widely perceived as an authority indicating and concretising the rules of public international law, see McCaffrey, *The Restatement's Treatment of Sources and Evidence of International Law*, in: Norton (ed.), *Commentaries on the Restatement (Third) of the Foreign Relations Law of the United States*, 1992, 2.

this case been the mere possibility that sea turtle, whose protection the controversial U.S. legislation aimed at, migrate to waters subject to U.S. jurisdiction⁷⁸.

To the extent that the Proposal lays down the rules for EU surveillance measures in foreign harbours or waters subject to foreign jurisdiction, it seems counterintuitive to base any claims to exercise prescriptive jurisdiction on the territorial principle. Nevertheless, the EU Commission apparently wishes to rely on this basis since it argues that ship surveys could have an impact on the territory of EU Member States, regardless where they have taken place, once the certified ships sail through EU waters⁷⁹. Yet the fact that any ship might end up sailing through EU waters creates but a tenuous link between the service performance of the CS that has certified the ship and the EU territory. As regards the Directive on CS, it should be emphasized that the required nexus is not between the ship survey and the ship's possible location at some uncertain point in the future, but rather between the surveillance of persons performing ship surveys and the ship's possible location at some later stage. This nexus is even weaker than the tenuous one in the above cited *Shrimp* Case and hardly meets the relevant triple test required by international law, i.e. that the presumed effect on the territory of the prescribing State be direct, foreseeable and substantial⁸⁰. Hence, in the present context the territorial principle cannot justify the EU's exercise of prescriptive jurisdiction.

2. Justification on the Basis of the Nationality Principle

Nationality constitutes a further, equally well established genuine link with the potential to provide a sufficient connection between the regulation and the regu-

⁷⁸ WTO/DS58/AB/R, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, para. 133: “The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction [Footnote omitted]. Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat – the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).”

⁷⁹ In this vein, the Commission reasons that the same strict standards should apply to ships flying the flag of a third country as to ships flying the flags of EU Member States “since both sail in Community waters”, see Explanatory Memorandum to the Proposal (*supra* note 3), 7.

⁸⁰ Cf. *supra* note 73. For an application of these criteria in judicial practice see District Court at the Hague Judgment in *Compagnie Européenne des pétroles S.A. v. Sensor Nederland B.V.*, in 1982, ILM 22 (1983), 66 et seqq. The Court held that an effect resulting from a controversial transaction that had taken place outside the territory of the state claiming jurisdiction between persons who were not nationals of that state was not direct (para. 7.3.4.).

lated matter⁸¹. The exercise of jurisdiction on the basis of the nationality principle extends to ships flying the flag of the respective state⁸². Art. 91 UNCLOS provides that States may define the conditions for the grant of nationality to ships and requires a genuine link between the respective States and ships. As the jurisdiction over nationals refers equally to legal persons the determination of their nationality is of utmost relevance. As a general rule, national law brings legal persons into existence and thus establishes their nationality⁸³. On the other hand, the jurisdiction over legal persons is only uncontroversial as far as they are incorporated under the laws of a certain State, their shareholders are (predominantly) nationals of that State, and the principal place of management and control is situated within that State. Conversely, there is no conclusive agreement on the question which of the named criteria create by themselves a sufficient link between a legal person and a certain State⁸⁴. In actual State practice, the State in which a legal person's effective seat is located and the State in which the legal person is legally incorporated are both acknowledged as States bestowing nationality upon legal persons⁸⁵, although this may obviously lead to conflicts and does not exclude the acceptance of further genuine links between legal persons and specific States bestowing nationality upon them⁸⁶. Once a legal person's nationality is determined, numerous details regarding the extension of jurisdiction to their foreign subsidiary companies remain controversial⁸⁷. Concerns have been voiced that, with a view to the legitimate exercise of jurisdiction, foreign subsidiary companies can not be considered as having the na-

⁸¹ Herdegen (*supra* note 71), § 26 margin note 9; Kokott/Doehring/Buergenthal (*supra* note 13), margin note 334; Wallace (*supra* note 75), 117; Verdross/Simma (*supra* note 71), § 1184.

⁸² Cf. Dahm/Delbrück/Wolfrum (*supra* note 68), 436 note 49; Kokott/Doehring/Buergenthal (*supra* note 13), margin note 339.

⁸³ Fatouros, National Legal Persons in International Law, in: Bernhardt (ed.), Encyclopedia of Public International Law, Vol. III, 1997, 495 et seqq. Cf. also District Court at the Hague Judgment in *Compagnie Européenne des pétroles S.A. v. Sensor Nederland B.V.* (*supra* note 80), 66 et seqq., para. 7.2.

⁸⁴ Cf. for further details, Orrego Vicuña, International Dispute Settlement in an Evolving Global Society, 2004, 40. Cf. District Court at the Hague Judgment in *Compagnie Européenne des pétroles S.A. v. Sensor Nederland B.V.* (*supra* note 80), 66 et seqq., para. 7.3.2. which holds that the nationality of the natural persons owning or controlling a legal person cannot justify a state's jurisdiction over the latter.

⁸⁵ See Hailbronner, Der Staat und der Einzelne als Völkerrechtssubjekte, in: Vitzthum (*supra* note 13), 187; Kokott/Doehring/Buergenthal (*supra* note 13), margin note 338. See also *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment of 5 February 1970, ICJ Rep. 1970, 4 et seq. which concerns the right of a State to protect shareholders of its nationality in a foreign corporation and recognizes the individuals' right to diplomatic protection in respect of the legal person's State of incorporation and the State where the legal person's registered office is located.

⁸⁶ Fatouros (*supra* note 83). For further details see Dahm/Delbrück/Wolfrum, Völkerrecht, I/2, 2nd ed. 2002, 102 et seq.

⁸⁷ Fatouros (*supra* note 83).

tionality of their parent entities⁸⁸.

As far as the Proposal addresses CS regardless of the complex design of their international corporate structure as indivisible entities that are either totally within or outside the EU system of recognition, it treats them as persons falling under EU jurisdiction as if they were nationals. As has been pointed out, international case law and doctrine are rather reluctant simply to conceive foreign subsidiaries as nationals of the State where their parent corporation is located. In fact, the nationality principle rather contradicts EU claims to exercise prescriptive jurisdiction over CS that are independently incorporated as legal persons under the law of another State which grants them its nationality.

3. Justification on the Basis of the Protective Principle

According to the protective principle – another foundation that can establish a sufficient link between governmental regulation and regulated matters – a State can exercise its jurisdiction even over foreigners and beyond its territory if thereby defending security or other public interests⁸⁹. This principle acknowledges the need of States to protect their own governmental functions⁹⁰. However, not every State interest is sufficient to warrant the reference to this principle. Interests of equal weight to national security are required⁹¹. In the present case, the Proposal's purpose to enhance marine safety does not amount to this weight. The modalities of the control of the service performance of foreign CS regarding foreign ships do not adversely affect any governmental functions of the EU. As a consequence, the protective principle does not provide a basis for the exercise of prescriptive jurisdiction envisaged by the Proposal.

4. Justification on the Basis of the Universality Principle

The Proposal's extraterritorial exercise of prescriptive jurisdiction could possibly rely on the universality principle. In general, the universality principle allows States to exercise jurisdiction for the defence of legal values that the international community considers to be particularly worthy of protection⁹². Such values can re-

⁸⁸ Herdegen (*supra* note 71), § 26 margin note 10, who cautions against an extensive interpretation of the nationality principle in this context; cf. the District Court at the Hague Judgment in *Compagnie Européenne des pétroles S.A. v. Sensor Nederland B.V.* (*supra* note 80), 66 et seqq. which disregarded the foreign nationality of the parent entity of a locally incorporated legal person.

⁸⁹ Dahm/Delbrück/Wolfrum (*supra* note 68), 321.

⁹⁰ Oxman, Jurisdiction of States, in: Bernhardt (note 83) 55 et seqq., 58.

⁹¹ Malanczuk (note 72), 111. Further examples can be found at Oxman (*supra* note 90), and at District Court at the Hague Judgment in *Compagnie Européenne des pétroles S.A. v. Sensor Nederland B.V.* (*supra* note 80), 66 et seqq., para. 7.3.3.

⁹² Cf. the formulation of the universality principle at Dahm/Delbrück/Wolfrum, *Völkerrecht*, I/3, 2nd ed. 2002, 999; Cassese, *International Law*, 2nd ed. 2005, 451 et seq.; Kott/Doh-

sult from the identification of international community interests, which are public goods so fundamental in nature that they are of immediate concern to all States⁹³. Hence, the Proposal was possibly justified if the EU claimed rightfully that the Proposal defends international community interests.

a. The Protection of the Marine Environment as an International Community Interest

The protection of the natural environment has been widely acknowledged as an international community interest⁹⁴. In fact, international environmental law is one of the areas where the international community has first asserted the legal significance of international community interests. At present, numerous international treaties refer to natural resources as global “common goods” or “common concerns of mankind”⁹⁵. Such references corroborate the exceptional interest that international law attributes to the protection of the natural environment. There already exist precedents in international case law that illustrate the broad consensus regarding the qualification of environmental protection as an international community interest⁹⁶. WTO panels have concluded that “the objective of sustainable development, which includes the protection and preservation of the environment,

ring/Buergenthal (*supra* note 13), margin note 326. As a basis for jurisdiction, the universality principle has been most frequently invoked when the international community interest to prevent particularly offensive acts constituting international crimes has been at stake, cf. Wallace (*supra* note 75), 121 et seqq. Cf. (with respect to piracy) Art. 19 of the 1958 Geneva Convention on the High Seas, 29 April 1958, 450 UNTS 82, and Art. 105 UNCLOS.

⁹³ Terminological discussions are in progress. Terms in use are “common interests”, “global commons”, “common concerns of mankind”, “common heritage of mankind”, and others. All these concepts are closely related and coincide sufficiently to use within the present discussion the term “international community interests” for their designation. Cf. Feichtner, Community Interest, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (awaiting publication). See also Beyerlin, State Community Interests and Institution-Building in International Environmental Law, ZaöRV 56 (1996), 602, 606.

⁹⁴ See Sands, Principles of International Environmental Law, 2nd ed. 2003, 188-189 with further references; see also Brunée, “Common Interests” – Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law, ZaöRV 49 (1989), 791, 807.

⁹⁵ Among these are the United Nations Framework Convention on Climate Change, ILM 31 (1992), 849, 9 May 1992, entered into force 21 March 1994; the Vienna Convention for the Protection of the Ozone Layer, ILM 26 (1987), 1529, 22 March 1985, entered into force 22 September 1988; and the Convention on Biological Diversity, ILM 31 (1992), 818, 5 June 1992, entered into force 29 December 1993.

⁹⁶ Cf. e.g. the so called F4 Panel of the United Nations Compensation Commission (UNCC) which reviewed environmental and public health claims resulting from Iraq’s invasion and occupation of Kuwait in 1990/1991. The Panel held that the protection and conservation of the environment is a common concern that entails State obligations towards the international community, Panel Reports F4/3(2003), 18 December 2003, paras. 42-43; F4/4/II(2004), 9 December 2004, para. 38; F4/5(2005), 30 June 2005, paras. 40-41, all reports available at <http://www2.unog.ch/uncc/reports.htm#_F4> (last visited on 6 February 2007); see in detail Sand, Compensation for Environmental Damage from the 1991 Gulf War, Environmental Policy and Law, 35/6 (2005), 244-249.

has been widely recognized by the contracting parties to the General Agreement⁹⁷ and that “[provisions of the GATT] must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment”⁹⁸. All these legal developments reflect the necessity that “[i]nternational law must bridge the discrepancy between ecological unity and administrative separation”⁹⁹. More particularly, international law protects the marine environment¹⁰⁰. According to Art. 192 UNCLOS “States have the obligation to protect and preserve the marine environment”. This provision is widely seen as an obligation owed to the international community as a whole¹⁰¹. The importance assigned to the protection of the marine environment is reinforced by Art. 290 (1) UNCLOS. This provision defines the prevention of serious harm to the marine environment as an objective that justifies the prescription of provisional measures by the competent court or tribunal¹⁰². Arts. 61 and 62 UNCLOS specify rights and duties of States in their exclusive economic zones concerning the conservation of living resources. Agenda 21 repeatedly refers to “natural resources” and goes into detailed statements about “marine living resources”¹⁰³. The international community’s initiatives to criminalize the pollution of the marine environment¹⁰⁴, highlight the exceptional value that States ascribe to its protection. The international criminalization of marine pollution will clearly influence the States’ jurisdictions to adjudicate and to enforce. In the interim, the legal obligations resulting from the inclusion of marine preservation among the international

⁹⁷ WTO *United States – Restrictions on Imports of Tuna*, Report of the Panel (DS29/R), 16 June 1994, 50, para. 5.42.

⁹⁸ WTO/DS58/AB/R, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, para. 129.

⁹⁹ Brunée (note 94), 791, 795.

¹⁰⁰ For a survey cf. Wolfrum (*supra* note 15), 150 et seq.

¹⁰¹ See only Durner, *Common Goods, Statusprinzipien von Umweltgütern im Völkerrecht*, 12th ed. 2001, 142 et seq. with further references.

¹⁰² Cf. Benzing, *Community Interests in the Procedure of International Courts and Tribunals*, *The Law and Practice of International Courts and Tribunals* 5 (2006), 369, 381 et seq., 407; Weckel, *Les premières applications de l’article 290 de la Convention sur le droit de la mer relative à la prescription de mesures conservatoires*, 109 *RGDIP* (2005), 829 et seq.

¹⁰³ Adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF. 151/26/Rev.1. See, for example, para. 17.70, et seqq.

¹⁰⁴ Thus the ILC in its work on State Responsibility treated as an international crime “a serious breach of an international obligation of essential importance for the safeguarding of the human environment such as those prohibiting massive pollution of the atmosphere or the sea” (Art. 19(3)(d) of the Draft Articles on State Responsibility, *Yearbook of the ILC*, Vol. II, Part Two, 1976, 95 et seq.; in Art. 26 of its work on the Draft Code of Crimes against the Peace and Security of Mankind the ILC treated wilful and severe damage to the environment as a crime against peace and security of mankind, see Report of the ILC on the Work of its Forty-Seventh Session, Doc. A/50/10, 30 margin notes 119-121, available at <http://untreaty.un.org/ilc/documentation/english/A_50_10.pdf> (last visited on 6 February 2007). Even though this crime had not been included in the Rome Statute (ILM 37 [1998], 999) as a crime *per se*, Art. 8(2)(b)(iv) of the Rome Statute deems “widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” a war crime.

community interests must be made operational. In this context, the duty to prevent damage can be perceived as a reasonable corollary¹⁰⁵. The implications for the States' exercise of prescriptive jurisdiction will deserve further study.

b. The EU's Prescriptive Jurisdiction to Defend International Community Interests

The legal consequences resulting from the positive acknowledgment of an international community interest have not yet been worked out in detail. Nonetheless, certain legal consequences can already be determined. States are expected to cooperate for the promotion of international community interests and to exercise their sovereign rights in a way which furthers them¹⁰⁶. Besides, States can no longer rely on the argument of lacking reciprocity for the defence of their own non-compliance¹⁰⁷. State practices which hitherto could have been refused as interventions can become legitimate¹⁰⁸. As far as institutionalized international proceedings for the protection of the respective international community interest are available, all States have standing to seek enforcement¹⁰⁹. While these consequences resulting from the incorporation of international community interests into the international legal order still lack corroboration, the specific impact on the jurisdiction of States is even less established. Thus far, there exists no treaty, customary or case law that would clearly indicate that the incorporation of international community interests transfers an additional basis for jurisdiction to States. If such incorporation was to imply a tacit broadening of the jurisdiction of individual States, conflicts of jurisdiction might abound. A further undesirable consequence might be unilateral State attempts to define the implementation policies for other States. Conflicts between incompatible implementation strategies would be unavoidable. Moreover, the unilateral exercise of prescriptive jurisdiction would rather be at odds with State obligations to cooperate in the area of furthering the realization of international community interests. It could also be argued that the "soft law" character of certain instruments establishing international community interests contradicts the presumption that the right to implement them globally is bestowed upon individual States or even groups of States. Soft law can hardly authorize the legislative intrusion on

¹⁰⁵ Cf. the discussion of "Vorsorgepflichten" at Hohmann, *Präventive Rechtspflichten und -prinzipien des modernen Umweltvölkerrechts*, 1992, 249.

¹⁰⁶ Cf., with specific reference to environmental interests, Beyerlin (*supra* note 93), 607.

¹⁰⁷ Hohmann (*supra* note 105), 243 et seq.

¹⁰⁸ Cf. the contributions in Jäckel (ed.), *Ist das Prinzip der Nichteinmischung überholt?*, 1995; Beyerlin, *Die humanitäre Aktion zur Gewährleistung des Mindeststandards in nicht internationalen Konflikten*, 1975; Lillich, *Forcible Self-Help by States to Protect Human Rights*, *Iowa Law Review* 15 (1969), 205.

¹⁰⁹ Benzing (*supra* note 102), 389 et seq. Cf. Wolfrum, *International Environmental Law: Purposes, Principles and Means of Ensuring Compliance*, in: Morrison/Wolfrum (eds.), *International, Regional and National Environmental Law*, 2000, 3, 14; Martin-Bidou, *Le principe de précaution en droit international de l'environnement*, *RGDIP* 103 (1999), 631, 655.

the turf of other States that have not implemented it, or merely have not implemented it in a way that satisfies the expectations held by legislating State. On the other hand, as State obligations to safeguard international community interests are not related to the States' geographic situation, the States' prescriptive jurisdiction in this field can certainly not be determined on the basis of a traditional formulation of the territorial principle¹¹⁰. Equally unsatisfying would be attempts to restrain the protection of international community interests to measures linked to the nationality of persons involved. In fact, the reliance on a personal link would render the reference to international community interests superfluous¹¹¹. Apart from that, one has to keep in mind that the mandate of international institutions to enforce international community interests is limited and the character of the international legal order remains, by and large, decentralized¹¹². In the light of this observation, individual States (or regional international organizations) will most likely continue to act on behalf of the international community as a whole and assume the responsibility to implement international community interests¹¹³. If international community interests are to be realized at all such unilateral efforts might, for the time being, seem inevitable¹¹⁴.

c. The EU's Prescriptive Jurisdiction to Defend the Protection of the Marine Environment Through the Surveillance of CS

Whereas it is unquestionable that the EU is legally bound to protect the marine environment which is widely recognized as an international community interest, the concrete foundation of prescriptive jurisdiction for the surveillance of CS on the defence of international community interests might still face substantive objec-

¹¹⁰ Cf. § 70 "Einschränkungen der Gebietshoheit unter dem Gesichtspunkt des internationalen Umweltschutzrechtes", in: Dahm/Delbrück/Wolfrum (*supra* note 68), 441-452.

¹¹¹ Cf. WTO *United States – Restrictions on Imports of Tuna*, Report of the Panel (DS29/R), 16 June 1994, 50, para. 5.17: "The Panel further observed that, under general international law, States are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory. Nor are States barred, in principle, from regulating the conduct of vessels having their nationality, or any persons on these vessels, with respect to persons, animals, plants and natural resources outside their territory. A state may in particular regulate the conduct of its fishermen or of vessels having its nationality or any fishermen on these vessels, with respect to fish located in the high seas". (Emphasis added.)

¹¹² Cf. Benz ing (*supra* note 102) 372 et seq.

¹¹³ Cf. Feichtner (*supra* note 93), and Benz ing, (*supra* note 102).

¹¹⁴ It should be recalled that, with respect to enforcement measures, an acknowledgement of individual States' right to unilaterally implement international community interests – as perceived by these States – could open Pandora's Box. Accordingly, unilateral attempts do not cease to provoke widespread criticism among international legal scholars, cf. in regard to the military actions taken by NATO forces against Yugoslavia in 1999 only R andelzhofer, in: Simma et al. (eds.), *The Charter of the United Nations*, Vol. I, 2nd ed. 2002, Article 2(4) para. 56 with further references; and in regard to the war against Iraq in 2003; Bruha, *Irak-Krieg und Vereinte Nationen*, AVR 41 (2003), 295, 296 et seq. and Ambos / Arnold, *Der Irak-Krieg und das Völkerrecht*, 2004, 217-414.

tions. Firstly, the surveillance of CS serves the purpose of protecting the marine environment only indirectly. The empirical assumptions underpinning the Proposal – i.e. that ships will become safer, have fewer accidents, and cause less pollution, if the EU tightens its supervision of CS – are far from compelling. One might even argue that the EU approach does not enhance ship safety, but rather drives EU-based CS out of the market and leaves the performance of classification and certification services to foreign CS beyond EU control. In that case, the Proposal could from an environmentalist point of view even backfire. Secondly, up till now international community interests have not yet crystallized into uncontroversial bases for the exercise of prescriptive jurisdiction. In view of the current state of the evolving law, the defence of international community interests might already support EU claims to exercise its prescriptive jurisdiction, but the reliance on this argument alone might not be sufficient to prevail over the international legal principle that States should exercise self-restraint in case of conflicting jurisdictions.

5. The EU's Prescriptive Jurisdiction for the Granting of Legal Advantages

Leaving the different international legal bases for the EU's exercise of prescriptive jurisdiction behind, a further consideration comes into play: As far as the granting of preferential treatment or any other legal advantages is concerned, the States' jurisdiction to prescribe reaches considerably further than in the case of prohibitions or compulsory regulations¹¹⁵. The Proposal's controversial provisions refer to legal advantages granted by the EU. Strictly speaking, CS are not obliged to seek EU recognition, hence the conditions that the Proposal expects the CS to meet are not mandatory. This finding applies to all CS, wherever they are based, however their international corporate structures are designed, and whether the CS' contracts with third States or with private individuals originating from these States are at stake. Only if and as far as CS seek recognition by the EU, they would find themselves and all their subsidiary companies subject to EU legislation that requires them to negotiate with all of their clients the right of access of supervising EU officials to the ships they certify. To put it succinctly: The EU legislation offers CS to make them part of the "EU public service": It grants them the legal advantage to exercise public functions on behalf of the EU and its Member States. The rights going along with this special status are only transferred if the CS submit to certain conditions. Hence, misgivings about an excessive use of the EU's prescriptive jurisdiction that may have remained from its exclusive foundation on the defence of international community interests are overcome by the additional consideration that the EU Proposal concerns the granting of legal advantages.

¹¹⁵ Cf. Herdogen (*supra* note 71), § 26 margin note 3.

V. The New EU Proposal and International Law Regarding the Exercise of Enforcement Jurisdiction

The multilayer regime that CS are subject to reveals its density when it comes to administrative enforcement measures. From an international law perspective, the crucial point here is the Proposal's supposition that other States should tolerate the exercise of enforcement jurisdiction by the EU. On the whole, the legitimacy of the exercise of jurisdiction depends to a large degree on the specific type of jurisdiction. Hence, a legal foundation for the exercise of prescriptive jurisdiction does not necessarily justify the jurisdiction to enforce. Apart from few exceptions, such as in case of consent, international law prohibits States to execute their law outside their own territory¹¹⁶.

1. The EU's Enforcement Jurisdiction vs. Third States' Jurisdiction Over CS Who Are Their Nationals

The EU imposes its inspections on CS who are nationals of third States. At a perfunctory glance, this adversely affects the rights of the States who have granted their nationality to the inspected CS. For outside the EU's own territory – be it on the high seas or in foreign harbours – enforcement measures against foreign CS usually exceed the limits defined by international law. But in the situation under scrutiny such doubts can be surmounted: If and as far as EU officials subject foreign CS to administrative measures, this is merely provoked by the fact that the same CS seek recognition from the EU. Figuratively speaking, they appear in their own interest as petitioners in an administrative procedure in front of the EU. In the light of their application for recognition, CS can not rely upon their own third State nationality as an argument for evading EU inspections, nor can the respective States raise this argument.

2. The EU's Enforcement Jurisdiction vs. Third States' Flag State Jurisdiction

Furthermore, EU inspections imply the presence of EU officials aboard foreign ships. This presence has to be studied in the light of the flag State jurisdiction of the States who have granted their nationality to the ships¹¹⁷. As a starting point, one ought to recall that the EU does not impose its inspectors on any flag States against their will: The EU Proposal envisages that CS include a consent clause

¹¹⁶ Cf. Dahm/Delbrück/Wolfrum (*supra* note 68), 326 et seqq.

¹¹⁷ The following paragraph has to be read with the caveat that occurrences of EU supervision on the high seas might for practical reasons be exceptional.

within their contracts with third parties¹¹⁸. From a formalistic point of view, critics might be startled by the fact that the flag State's consent is expressed within its contract with a non-State actor. Since the determination of rights and duties between the EU and the flag State is at stake, a formal treaty between the two could be required. However, such objections would lack foundation. In international law, the consent of States is not subject to any specific formal requirements¹¹⁹. Nor should the voluntariness of the consent be questioned from an economic perspective. Flag States do not depend on EU-recognized CS. The latter have no monopoly; flag States can always have their merchant fleets certified by CS which are exclusively based outside the EU. Hence, flag States are under no coercive economic pressure and at full liberty to give or withhold their consent to EU inspections. Consequently, the enforcement jurisdiction implied by the EU Proposal does not violate the flag state jurisdiction of third States.

Whereas the international legal conflict between the flag State's jurisdiction and the EU's enforcement jurisdiction can be resolved once the flag State submits to the contractual clause enabling EU officials to enter foreign ships, the actual problem for EU-based CS lies in the far more likely scenario that the flag State refuses to accept the controversial clause. The obligation to include such clauses not only adversely affects the CS' freedom to engage in contractual relations at their own volition, but also constitutes a material competitive disadvantage for EU-based CS¹²⁰. Most flag States will prefer to award contracts to CS that are based in countries that do not confront them with the interference by foreign officials. As far as the flag State does not submit to the clause enabling EU-officials to enter its ships, CS can either do business in defiance of EU regulation – and consequently jeopardize their EU recognition – or forgo the opportunity to classify the ship flying the flag of any other States.

3. The EU's Enforcement Jurisdiction vs. Third States' Territorial Jurisdiction

Whereas there is a strong case that the EU's exercise of enforcement jurisdiction does not violate other States' jurisdiction over their nationals – be it persons or ships – there still remains the crucial issue of conflicts with other States' territorial

¹¹⁸ Cf. Art. 17 (2) of the Proposal.

¹¹⁹ None of the Vienna Conventions applies directly to contracts between States or international organizations (here: the EU) and foreign private law persons (here: the respective CS). Art. 3 of the Vienna Convention on the Law of Treaties, however, recognizes even the legal value of international agreements which have not been put in writing. There is therefore no obstacle for the consent being contained within a contract between the consenting State and a third (private) party.

¹²⁰ Incidentally, the right to classify and certify ships hailing from EU Member States implied by the EU-recognition does not constitute an economic advantage compensating for the losses that CS suffer through the EU regulation as only a fraction of the world fleet flies the flags of EU Member States.

jurisdiction. For when EU officials survey the performance of CS with respect to the ships they certify, these ships will presumably be located in harbours. Contrary to older views, international law does not perceive ships as “swimming islands” of their respective flag States. Consequently, the intended EU surveillance of ships located in harbours occurs on the territory of the coastal States to which the harbours belong¹²¹. The assumption that coastal States should admit EU officials on their territories while these officials perform supervisory functions over CS, thereby exercising sovereign powers derived from the EU, is highly surprising if one recalls that even the coastal States themselves could only exercise their own enforcement jurisdictions with respect to foreign ships passing through their territorial waters in a very limited way¹²². Neither does Art. 218 UNCLOS bestow upon the harbour State enforcement jurisdiction that could be delegated to the EU, since this provision for the prevention of pollution of the marine environment is materially limited to the institution of “proceedings in respect of any discharge from that vessel”. So where should the coastal States derive the right to allow EU officials aboard foreign ships, if they may not even send their own officials there? Even with respect to ships flying the flag of the harbour State while they are located in the harbour, the problem remains that the right of access that has possibly been stipulated in the contract between the State (in its capacity as a flag State) and the CS does not necessarily extend to the flag State’s territory. The right of access aboard a certain ship does not *per se* imply the right of access to a certain harbour or other parts of the flag State’s territory. Without an explicit contractual clarification to this effect, there would even under these particular circumstances be no basis for EU enforcement measures in a foreign harbour. Thus the bottom line is that the EU Proposal expects foreign harbour States to condone the presence of EU officials on their territory, and to submit to EU officials executing public administrative acts on their territories. In this regard, the enforcement jurisdiction envisaged by the Proposal runs the risk of violating international law.

VI. Conclusions and Perspectives

The case of CS illustrates the complexity of multilayer systems, where national, European and international legislation and administration are intertwined. In its attempt to regulate the recognition of CS, the EU risks setting rules contradicting international law. In its extraterritorial aspects, the proposed amended Directive on CS is only defensible as far as the exercise of prescriptive jurisdiction is concerned. In this regard, the Proposal finds support to a certain degree in the EU’s objective to defend international community interests. Yet it is only with the additional consideration that the extraterritorial aspects of the Proposal relate to the legal advantage of CS to perform public services on behalf of the EU and its Member States,

¹²¹ Cf. Vitzthum (*supra* note 13), 386.

¹²² Cf. in particular Arts. 27 and 28 UNCLOS.

that the EU can justify its exercise of prescriptive jurisdiction. Conversely, the exercise of enforcement jurisdiction envisaged by the Proposal would clearly disregard the limits of international law. Administrative measures – such as the supervision of the service performance of CS by EU-officials on the territory of another State – disregard the prohibition to execute governmental functions on foreign territory. Thus they go blatantly beyond the limits of international law.

In the area of international maritime affairs, the EU exemplifies a significant current in international law: It responds to a – real or perceived – shortcoming of the international legal order by unilateral regulation. As long as the international order lacks institutionalized implementation mechanisms for the defence of international community interests, individual States or groups of States assume the responsibility to compensate for this deficiency, be it with or without the explicit authorization of the international community.

However, it is obvious that the EU's commendable environmental objectives will not be achieved if EU law drives EU-based CS out of the market, leaving the performance of classification and certification services to CS beyond EU control. As a result of the Proposal, EU-based CS are facing considerable losses in their international business activities. While only a fraction of the global merchant fleet sails under the flag of any EU member State the bulk of business opportunities for CS lies abroad, i.e. in States whose flags are still used on a large scale in international maritime traffic. It should be stressed that, for lack of technical expertise and human resources, neither the EU nor any of its Member States would be in a position to substitute for the services provided by EU-based CS in case the EU legislation further undermines their existence. The public-private-partnership of which the co-operation of CS and flag States is on the international scale an outstanding example is certainly not enhanced by the envisaged EU legislation.