III. COMENTARIOS DE LEGISLACIÓN

1. «The European Union's Post-"Brexit" Decisión-Making Capacity in the Development of International Maritime Law»

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RESUMEN

El artículo analiza desde una perspectiva de Derecho público (lucha contra la contaminación, protección medioambiental, y seguridad en la mar) las consecuencias interrelacionadas de la gobernanza global a través de la Unión Europea (UE) y la práctica internacional, así como su capacidad de representación democrática de la UE en el proceso de toma de decisiones en instituciones internacionales para fomentar sus intereses. Se proporciona una valoración de la capacidad de la UE para convertirse efectivamente en miembro de la Organización Marítima Internacional (OMI) debido a su peso como un actor líder a nivel global. Finalmente, el futuro estatus del Reino Unido (RU) tras abandonar la UE el 29 de marzo de 2019 plantea más preguntas relacionadas con las normas de seguridad marítimas y medioambientales aplicables al Reino Unido y los restantes 27 Estados miembros de la UE.

Palabras clave: Derecho marítimo internacional, política marítima comunitaria, «Brexit», Organización Marítima Internacional, seguridad marítima, lucha contra la contaminación marina.

ABSTRACT

The article analyzes from a public perspective (fight against pollution, environmental protection and safety at sea) the interrelated consequences of the global governance through European Union (EU) and international practice, altogether with the EU democratic representation in the decision-making process at international institutions to foster its interests. An assessment of the EU's capacity to effectively become a member to the International Maritime Organization (IMO) due to its weight as a leading global actor is provided. Finally, the future status of the United Kingdom (UK) after leaving the EU on 29 March 2019 raises further questions related to the applicable maritime and environmental safety standards to the UK and the remaining 27 EU Member States.

Keywords: international maritime law, European Union maritime policy, «Brexit», International Maritime Organization, maritime safety, marine environmental protection.

SUMMARY: I. THE EUROPEAN UNION COMPETENCES ON MARITIME TRANSPORT MATTERS.—II. THE EXTERNAL PROJECTION OF THE EUROPEAN UNION COMPETENCES: TOWARDS A EUROPEAN MARITIME SAFETY POLICY?—III. MARITIME SAFETY AND ENVIRONMENTAL PROTECTION IN THE EUROPEAN UNION AND THE INTERNATIONAL MARITIME ORGANIZATION.—IV. THE EUROPEAN UNION'S ROLE AS A LEGDING ACTOR IN SETTING MARITIME SAFETY AND ENVIRONMENTAL STANDARDS AT THE INTERNATIONAL MARITIME ORGANIZATION.—V. THE UNITED KINGDOM WITHDRAWAL FROM THE EUROPEAN UNION AND THEIR REPRESENTATION AT THE INTERNATIONAL MARITIME ORGANIZATION.—VI. CONCLUSIONS.—VII. BIBLIOGRAPHY.

I. THE EUROPEAN UNION COMPETENCES ON MARITIME TRANSPORT MATTERS

The effect of the shipping on marine ecosystems, environmental protection and fight against pollution are paramount for the International Maritime Organization (IMO) and the EU. The shipping firms have the capacity to influence in the public decision making processes at an international level. The maritime dimension as a real industry requires an analysis from a multidisciplinary dimension, in order to harmonize such contributions, in relation to the national laws, derived from at least four major regulatory blocks: Maritime Law, EU Law, International Law, and Private Law, the one derived from the autonomy of the industry operators. It is recalled that the EU is an integrative and unifying organization governed by the principle of conferral. When read in conjunction with Article 352 and 114 of the Treaty of the EU (TEU) [2], the EU exercise thereof is governed by the principles of subsidiarity and proportionality (Article 5 of the TEU). About the exclusive competences of the EU, this is the only one alone that can legislate, unless empowered by the Union or for the implementation of EU acts. Shared competences facilitate that both can legislate but with priority for the Union (with exceptions), including most of the activities. The competence to support, coordinate or complement, assume that the EU can help primarily through funding. Out of this classification, the coordination of economic and employment policies and the common foreign and security policy are included.

The EU Member States are forced to pursue the objectives of the Treaty on transport through a Common Transport Policy (Article 90 of the TFEU) [3]. The prevention and protection of the seas from voluntary or accidental oil spills is bound by parallel EU policies in the fields of: *a)* Transport (Article 90 *et seq*. of the Treaty on the Functioning of the EU or TFEU); *b)* Environment (Article 191 et seq. of the TFEU); *c)* Civil protection (Article 196 of the TFEU). The European practice to fight against marine pollution has been attached to maritime safety through the transport policy. In fact is already established in practice through bilateral agreements with non EU Member States. Article 207 TFEU is the only reference in the former EC Treaty as

[2] Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ 2012 C-326/13.

[3] *Ibid.*

regards the external relations of the field of transport, whereby the negotiation and conclusion of agreements shall continue to be governed by Title VI (rules on EU transport policy) and Article 218 of the TFEU, *procedural rules for reaching agreements between the EU and non-Member States or international organizations*.

II. THE EXTERNAL PROJECTION OF THE EUROPEAN UNION COMPETENCES: TOWARDS A EUROPEAN MARITIME SAFETY POLICY?

The classic regulatory scenario on the new rules actually representing the *communitarization* of the International Law and the external projection of this process it is found that there are serious obstacles to the legal codification, together with the appearance of difficult problems foreseen after the Treaty of Amsterdam in this *ad extra* dimension. This plurality of legal sources has modified the classic work methodology of intergovernmental and private organizations that develop the international maritime regulation[4]. The EU institutions themselves face new rulemaking alternatives after the *Interinstitutional Agreement* of 2003 (OJEU 2003/C 321/01), which expressly referred to the utility of alternative regulatory methods, including the co-regulation or the self-regulation. The methods or techniques used in this process of specialization[5] pass through the development of domestic or autonomous laws, but they primarily have been articulated through *international codification*.

The external projection of internal EU competition creates a complex regulatory scenario pursuant to which once the EU has exercised its internal competence by adopting provisions that set common rules (opinion of the Legal Service of the Council, 5 February 1999), the EU competence becomes exclusive (the exclusive Treaty-making power of Article 3.2 of the TFEU as opposed to the general one of Article 216 of the TFEU), in the sense that Member States lose the right to contract, individually or collectively, obligations with third countries which affect those rules (so-called doctrinally as *AETR/ERTA effect*). The Court of Justice of the EU (CJEU) stablished that Articles 91 and 352 of the TFEU empowered the EU to implement measures with *external effects* in terms of the Common Transport Policy (C-22/70 [1971] ECR 263), but without forgetting that the Article 91 of the TFEU could not be interpreted to authorize the EU to carry out international agreements[6]. That is reinforced with Article 191(1) of the TFEU, issuing that the EU environmental policy shall contribute to *pursuit promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change*. This power did not only emanate from the principle of concession authorizing the EU to conclude these international treaties, but from the implied authority

[4] ZIEGLER, «The Relationship between EU Law and International Law», *University of Leicester School of Law Research Paper,* No. 13-17, 2013, p. 14.

[5] WOUTERS *et al.,* «Study for the Assessment of the EU's Role in International Maritime Organisations», *Leuven Centre for Global Governance Studies*, April 2009, pp. 22-23; J. WOUTERS *et al.,* «The EU in the world of international organizations: diplomatic aspirations, legal hurdles and political realities», *Leuven Centre for Global Governance Studies*, Working Paper No. 121 - September 2013, p. 11.

[6] NENGYE and MAES, «The European Union's role in the prevention of vessel-source pollution and its internal influence», *The Journal of International Maritime Law,* vol. 15, 2009, pp. 415-418.

to carry out agreements in areas in which the EU had owned it and made use of it by the adoption of internal measures. That approach was modified and expanded to cases in which the EU has not exercised its internal competence under the Treaty, even if it was not adopted or derived secondary legislation such as Regulations and Directives, and its realization would require the conclusion of a Treaty or international agreement.

When the EU has not acquired an exclusive competence (eg jurisdiction over vessels, flagging and registration and enforcement of civil or criminal penalties), the Member States may exercise it with loyalty to EU Law[7]. In the context of the international coding process different solutions achieved in each specific sector must be relativized, as the degree of regulatory harmonization achieved not only depends on the consensus formally embodied in the signing of the Treaty text and its subsequent ratification. In fact, the progressive development of the International Law reveals *sectorization*, which makes necessary to analyze each specific area of policy actions to appreciate first, harmonization requirements, and secondly the appropriate instrument for this purpose. The case appraisal on the *Open Skies* judgments (C-467/98, ECR 2002, I-9519 *et al.*) shows, as a consequence of the EU's external competence, that the Member States had to replace bilateral agreements with the United States of America (US) in the field of aviation transport by measures compatible with agreements based on internal EU rules because the Member States could never take positions against the general interest of the EU, being sued at the CJEU for breaching the *duty of loya*lty (Article 4.3 of the TEU), by submitting a national position in an area falling within the exclusive competence of the EU under the *AETR/ERTA principle* (C-45/07, ECR I-701) following the adoption of Regulation 725/2004/EC (security requirements of the SOLAS and the ISPS Code), or submitting a unilateral proposal to list a substance in the Annex A of the Stockholm Convention on Persistent Organic Pollutants (C-246/07, ECR I-3317).

III. MARITIME SAFETY AND ENVIRONMENTAL PROTECTION IN THE EUROPEAN UNION AND THE INTERNATIONAL MARITIME ORGANIZATION

The awareness of the European public and the EU institutions themselves after a succession of ecological claims arising from the *Erika* vessel in French waters and the Prestige one in the Spanish coast had resulted in a battery of measures and legislative proposals whose future operational and effective mechanism to prevent and, where appropriate, compensate ecological damages and subsequent economic consequences should be evaluated subject to detailed legal analysis. The *Erika I and II maritime safety packages* were the pre-emptive answer focusing on the classification societies, strengthening the controls on vessels at the ports, the Member States requirement on having ports of refuge, installing black boxes on board of ships, pursuing the successful US Law comparative example of the *Oil Pollution Act* of 1990

[7] FRANK, *The European Community and Marine Environmental Protection in the International Law of the Sea. Implementing Global Obligations at the Regional Level*, Leiden/Boston, Martinus Nijhoff, 2007, p. 260.

as a reaction to the *Exxon Valdez* incident, which enshrined the unlimited liability of the ship owner for spills, requiring double hulls for ships calling at their ports and prohibiting passage of monohull vessels 50 miles from its coast, along with the requirement of having contingency plans in case of spills. The need to tighten inspections on vessels, to fight against the so called flags of convenience, coupled with competition between shippers, imposed the practice of *lowest price*, favouring the navigation of older ships, in detriment of quality and security.

The international regime regulating the International Oil Pollution Compensation Fund (IOPC Fund) was organized around two Conventions with two level responsibilities: *a)* The International Convention on Civil Liability for Oil Pollution Damage of 1969 (CLC 69) and its Protocol of 1992 (CLC 92), with a maximum amount of responsibility for the shipowner; *b)* The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) and its Protocol of 1992 (FUND 92), which assumes the remaining additional compensation up to a limit of about 200 million euros when some conditions are met. The *Erika* incident highlighted that one of the major deficiencies of the international system were the inadequate compensation limit, the Commission proposed a third level of responsibility for the EU (COM 2000, 802 final), the *Erika II package*[8], but the Council aimed to adopt a new one at a universal scale. The IMO adopted the Protocol of 2003 constituting a Supplementary Fund to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, entering into force on 3 December 2004, with the ratifications of Germany, Denmark, Spain, Finland, France, Ireland, Japan and Norway[9] accounting currently 19 out of the 28 EU Member States.

The *Statement of the Member States on Maritime Safety* of 2008, aimed to *reach, as soon as possible, an agreement on an efficient international framework regulating liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea*. The Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the TEC concerning the common position of the Council on the adoption of a Directive on the civil liability and financial guarantees of shipowners of 2008, deleted *the requirement to ratify Convention on Limitation of Liability for Maritime Claims (LLMC) of 1996*, as well as *the provision on the incorporation of the Convention into EU Law*. The Directive 2009/20/EC on the insurance of shipowners for maritime claims, introduced with the *Third Maritime Safety package* (*Erika III*), introduced at EU level requiring compulsory insurance to cover claims subject to limitation under the CLC 1969 Convention and its Protocol of 1992, which sets the maximum amount in case, which is the same for each vessel. The EU now has one of the world's most comprehensive and advanced regulatory frameworks for ships and shipping, due to the adoption and subsequent implementation of the *Third Maritime Safety package*[10].

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[8] De la Fayette, *New Approaches for Addressing Damage to the Marine Environment*, *The International Journal of Marine and Coastal Law*, vol. 20, No. 1, 2005, pp. 205-208.

[9] Gonsaeles, «The Impact of EC Decision-Making on the International Regime for Oil Pollution Damage: the Supplementary Fund Exam», *Marine Resource Damage Assessment, Liability and Compensation for Environmental Damage*, Springer-Netherlands, MAES, 2005, pp. 85-131.

[10] Nengye and Maes (*vid.* No. 5), pp. 415-418.

IV. THE EUROPEAN UNION'S ROLE AS A LEGDING ACTOR IN SETTING MARITIME SAFETY AND ENVIRONMENTAL STANDARDS AT THE INTERNATIONAL MARITIME ORGANIZATION

As Mandaraka-Sheppard stated, the CJEU in relation to the INTERTANKO judgment (C-308/06, 2008, ECR I-4057) decided that it could not assess the validity of Directive 2005/35/EC relating to the MARPOL Convention, because the EU is not party to it, even though its members are[11]. The CJEU proceeded to interpret the term gross negligence as a patent violation of the duty of care. This test is even lower than the test required by MARPOL. However, as pointed by Wood[12], the choice of a Tribunal can be critical to the outcome of a case. He believes that the EU is the «bad guy» to some extent, or at least that's the perception. Among his reviews, he thinks there is a tendency to react in haste without much thought, and takes over the latest incident to take forward the proposals that have been on standby for a long time. Thus, this might not be a good way to legislate. He believes that there is a tendency to blame the UNCLOS[13] as anachronistic. The EU Commission and the European Parliament, at some point may be to blame, and their views are obviously influential. But ultimately it is the Council of Ministers which approves the proposals (the Member States). And at that level the pressure to keep the basic framework of the International Law of the sea is considerable. The interest on the 28 Member States as to what the International Law of the sea concerns are different, and not all of them are great maritime nations or naval powers. The EU must regulate matters under its competence at a regional level, either by inaction of the IMO or by the failure of existing international measures, respecting the limits of International Law under the *constitutional principles* of the EU[14].

The EU Member States are parties of most of international Conventions, and the EU has encouraged the adoption of Directives for a common interpretation of those standards established as general principles, and coordinating the position of the Member States inside the IMO. The European Maritime Safety Agency, born in 2002 by the Regulation 1406/2002/EC, is the EU answer to unify and harmonize procedures and criteria of information and inspection following the aftermath of the *Erika* oil spill in 1999. It is responsible for ensuring compliance with EU legislation,

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[11] MANDARAKA and SHEPPARD, «The 10th Cadwallader Memorial Lecture - 1st October 2008, Lawmaking and Implementation in International Shipping: which law do we obey?», *Maritime Business Forum. London Shipping Law Centre* 2008); ECHEBARRIA, «Normative regulation of the maritime industry in Luxembourgish Law: regulatory blocks in presence», Spanish Institute of Foreign Trade (ICEX), December 2012, p. 168; J. ECHEBARRIA, «The EU Maritime Policy: interaction between public and private Law and the different regulatory blocks in presence», *Transportation Law Journal. Land, Maritime, Air and Multimodal*, Madrid, Marcial Pons, No. 12, 2013, pp. 173-220; S. BOELAERT-SUOMINEN, «The European Community, the European Court of Justice and the Law of the Sea», *The International Journal of Marine and Coastal Law*, vol. 23, 2008, pp. 699-711.

[12] «The 10th Cadwallader Memorial Lecture - Lawmaking and Implementation in International Shipping: which law do we obey?», *Maritime Business Forum*, London Shipping Law Centre, 2008.

[13] United Nations Convention on the Law of the Sea (UNCLOS), adopted on 10 December 1982 in Montego Bay, UNTS Vol 1833 P 3, 1834 P 3, 1835 P 3.

[14] WESSEL, «Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?», *International Law as Law of the European Union*, Leiden/Boston, Martinus Nijhoff Publishers, 2011, pp. 16-17.

making visits and assisting Member States, publishing and updating the blacklist of the EU, ensuring technical support to the European Commission. Whether the EU's maritime safety policy is justified or reasonable, most of the EU's maritime safety legislation is consistent with International Law and it is likely that the EU will support the revision of the jurisdictional regime of the oceans to *extent the port and coastal State jurisdiction* and the *restriction of the Flag State exclusive jurisdiction* over its ships, probably as a contracting party of the IMO regulatory Conventions to establish a common *European maritime space*[15]. Besides the main economic aspects of the research projects, an *added value* and some recommendations must be provided to *strength the visibility and decision-making capacity of the EU Member States in the international regulatory scenario*. Karamitsos[16] pointed that the EU is not a sovereign State, but for all intents and purposes often behaves as such, and its influence cannot be ignored. Both the EU and the IMO bring together top technical worldwide experts and share the same objective: *safe, secure and efficient shipping on clean oceans*.

V. THE UNITED KINGDOM WITHDRAWAL FROM THE EUROPEAN UNION AND THEIR REPRESENTATION AT THE INTERNATIONAL MARITIME ORGANIZATION

The UK withdrawal from the EU in the so-called «Brexit» process poses a new scenario since the power-balance concerning the international governance of the EU within the IMO will change. The UK will no longer need to follow EU Directives, Regulations nor the TEU or TFEU Treaties in different areas including environmental protection and fight against marine pollution. Despite the complex task of coordinating the regulatory efforts at international, EU, and national level, the United Nations Convention for the Law of the Sea (UNCLOS) of 30 April 1982, describes which are the powers of the States for the protection and preservation of the marine environment, altogether with the guiding principles. Article 305.1*.f)* allows international organizations to participate as a contracting party, and Article 197 foresaw the cooperation of states at the regional level. The internationality note of the Maritime Law and the trend towards the uniformity of the International Law historically embodied a profusion of conventional texts that coexist with rules of institutional and autonomous origin, along with the gradual importance of practices and commercial usage made by the operators involved in each sector. The four pillars of the international regulatory system are the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW 78)[17], the International Convention for the Safety of Life at Sea (SOLAS)[18], the International Convention for the

[15] Ringbom, «Maritime Safety Policy and International Law», *Martinus Nijhoff Publishers*, Leiden/Boston, 2008, pp. 518-519.

[16] «The 11th Cadwallader Memorial Lecture - Politicians, the European Commission, regulators, and shipping, what is the missing link and the way forward?», *Maritime Business Forum, London Shipping Law Centre*, 2010.

[17] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW 1978). London, 7 July 1978, entry into force: 28 April 1984, 1361 UNTS 190.

[18] International Convention for the Safety of Life at Sea, 1948 (SOLAS 1948). London, 10 June 1948, entry into force on 19 November 1952, 164 UNTS 113.

Prevention of Pollution from Ships (MARPOL 73/78)[19], and the Maritime Labour Convention (MLC) of 2006[20].

In order to prevent maritime pollution, stated as Protection and Preservation of the Marine Environment in Part XII of the UNCLOS, the *strategic goals and recommendations for the EU's maritime transport policy until 2018*[21], and the *White Paper on Transport of 2011* of the Commission[22] already aimed to *increase the effectiveness of EU involvement in the IMO, and reinforce international cooperation with EU trading and shipping partners, promoting a shared maritime safety culture and common efforts, e. g. on port-state control inspections, in particular with neighbouring countries*.

The UK will not be obligued to follow EU standards concerning shipping regulation but the minimum IMO regulations. The so-called «gold-plating», *i. e.* setting higher standards, remains an option but reciprocity or environmental protection shall be adjusted to EU standards if the UK intends to preserve trade relations with the EU Member States[23].

Each EU Member State has different national rules regarding the legal requirements for registering a commercial vessels, the authorized shipping companies and managers, the acquisition of nationality by the ship, the conditions of registration for vessels at the Ship Register, including the fiscal and financial conditions, the registration of the shipping company subject to taxation and their constitution form and tax matters (corporate income tax, the tax on the net profits, the Value Added Tax, etc.). There are other specific provisions in the maritime field such as the rules governing the depreciation of assets, the tax deductible provisions, the taxation of capital gains from the sale of the vessel, the tonnage tax, the Social Security of seafarers (after the entry into force of the Maritime Labour Convention of 2006), the ship mortgage, the small crafts, the crew and ship-owners management.

Altogether with the interrelated economic and social consequences of the EU practice, the maritime dimension as a real industry requires a multidisciplinary analysis in order to harmonize such contributions. Despite the literature on the subject is vague and ambiguous, the aim is to analyse through comparative research, how the international Conventions linked to Environmental Law and safety at sea, security measures and inspections applied at a regional level to comply with the Paris Memorandum of Understanding (MoU). Precisely, which is the relationship between

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[19] International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, 1340 U.N.T.S. 184, as amended by Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973, with annexes and protocol, London, 17 February 1978, entry into force: 2 October 1983, 1340 UNTS 61, 62 (MARPOL 73/78).

[20] Maritime Labor Convention, 2006, Geneva 7 February 2006, entered into force 20 August 2013 (Register number 51299), last amended on 5 June 2018.

[21] EU (European Commission) Communication, Strategic goals and recommendations for the EU's maritime transport policy until 2018, COM(2009) 8 final (Brussels: European Commission, 21 January 2009).

[22] EU (European Commission), 2011a: White Paper: Roadmap to a Single European Transport Area-Towards a competitive and resource efficient transport system, COM(2011) 144 final (Brussels: European Commission, 28 March 2011).

[23] Syreloglou, Baatz, Coles, Hudson, Quinn, Serdy, Tsimplis, Veal and Zhang, «The UK maritime sectors beyond Brexit» (Institute of Maritime Law and the Southampton Marine and Maritime Institute of the University of Southampton 2017), p. 15.

Port State Control[24] and Flag State implementation[25], and the specificities in their application to EU Member States compared to other world leading economic and commercial powers such as the USA or China. The EU Port Services Regulation 2017/3524[26] sets out the applicable rules on port services, inancial transparency rules and port infrastructure charges to EU ports requiring them to inform relevant authorities about any public funding received. However, once the UK can depart from those rules when it leaves the EU after 29 March 2019.

No major consequences are expected but in certain areas such as maritime cabotage between EU ports that is currently restricted to EU ship-owners according to Article 1(1) of the Maritime Cabotage Regulation 3577/925[27]. The EU or the Member States should give permission to non-EU to fill the feasible gap once the UK leaves the EU. However, the UK allows registering vessels to qualified ship-owners of a European Economic Area (EAA) State. Moreover, any arrangement between the UK and the EU is subject to the future trade relationship in important areas such as the EU or EEA ship-owners of UK registered vessels and the seafarers' rights to to work in UK registered ships. Degrading the EU standards to the IMO ones while making the UK a more attractive option in terms of taxation could have a negative impact on British and foreign worker's conditions and the environmental impact of shipping[28]. However, UK vessels operating in EU waters will effectively complying with the harmonised IMO and EU regulatory frameworks irrespective of their flag or ownership[29]. The same applies to EU registered vessels operating in the UK if the latter applies more stringent safety and environmental standards. The EU's response to the outcome of the UK's domestic decision in those areas will be determined by any future trade and political agreements in negotiation process.

The UK is currently a member to the IMO along with the other EU Member States. The EU plays an important role in the development of the IMO's regulatory framework. Any future membership of the EU to the IMO may have an impact in the measures adopted to protect the maritime environment at an EU level; considering the evolution of the transport policy in the EU and the influence and conflicts with the IMO where international rules are developed, the EU has threatened with the non-introduction of regional IMO standards unless it accepts their demands. Despite the EU is not part of the IMO[30] acting only as an observer, the EU has the

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[24] Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on Port State Control, OJ 2009 L 131/57.

[25] Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on Compliance with Flag State Requirements, OJ 2009 L 131/132.

[26] Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports, OJ L 57, 3.3.2017, pp. 1-18.

[27] Council Regulation (EEC) No. 3577/92 of 7 December 1992 applying the principle of freedom to provide sevices to maritime transport within Member States, Official Journal of the EU-OJ L 364, 12.12.1992, p. 7.

[28] SYRELOGLOU *et al.* (*vid.* No. 22), pp. 75-76.

[29] BUTCHER, *Briefing Report: Brexit and Transport, House of Commons Library,* 2018, *https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7633*.

[30] JENISCH, «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*, vol. 48, 2005, p. 232.

ambition to become a full member with the same rights as other sovereign states as the Commission already stated [31]. There are external constraints for the EU's accession to the IMO, to persuade two-thirds of the Parties to insert a Recognized Economic Integration Organization (REIO) clause in the Geneva Convention on the IMO of 1948 (as it happened at the Food and Agriculture Organization), the slow implementation of IMO Conventions due to the non-existence of a European flag, or the difficult issue of acquiring further vote in addition to the votes of each of its Member States. Internally it will be translated into a loss of the negotiation power of each Member State to fulfill the *duty of loyalty* [32]. In a globalized shipping sector, the IMO has channelled the need of shipping companies for a level playing field concerning the application of harmonized rules to all Flag States including the UK [33]. However, EU Member State's legal status in the IMO does not affect the nature of its competences and the need for cooperation. The membership of the UK to the European Maritime Safety Agency (EMSA) remains as different issue that will have to be discussed between the UK and the EU. On one hand, the UK will not be longer a member of the EMSA. On the other hand, Articles 13 (5) and 17 of the Regulation 1406/2002 [34] would entitle the UK participation at the EMSA as part of any feasible trade and political agreements [35].

VI. CONCLUSIONS

The EU has the competences to design an EU Common Transport Policy and the EU Member States are obligued to follow them. The *ad extra* dimension of the EU competences and the so-called *AERT/ERTA effect* that requires the EU permission to make any arrangements with third States is a key point in the new current negotiations between the UK and the EU. The EU has a preminent role as a global stakeholder in the decision making at the IMO through the EU Member States and has shown a consistent approach to preventing maritime pollution and promoting safety at sea by adopting higher standards than the IMO. The three *Erika* packages serve as a proof of the EU's approach to these matters. The EU maritime legal framework is consistent with the international regime set out by the IMO.

The new relation between the UK and the EU will be based on the respect of mutual rules on shipping issues. Many aspects varying from mutual fishery rights in UK or EU waters or the applicable environmental and safety standards that can be lever-

[31] European Commission, Recommendation from the Commission to the Council in order to authorise the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community, 2 April 2002, EU SEC(2002)381 final.

[32] NENGYE and MAES, «Legal constraints to the European union's accession to the international maritime organization», *Journal of Maritime Law and Commerce*», vol. 43, No. 2, 2012.

[33] PAPÍ, ALFONSI, TRONCOSO and LANGER, «Research for TRAN Committee —BREXIT: transport and tourism— the consequences of a no-deal scenario», European Parliament, Policy Department for Structural and Cohesion Policies, Brussels, 2018, pp. 80-81.

[34] Regulation (EC) No. 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ L 208, 5.8.2002, pp. 1-9.

[35] PAPÍ, ALFONSI, TRONCOSO and LANGER, «Research for TRAN Committee —BREXIT: transport and tourism— the consequences of a no-deal scenario», European Parliament, Policy Department for Structural and Cohesion Policies, Brussels, 2018, pp. 14-15.

aged or stricter in the post-Brexit UK are subject to negotiation. Ship registration is linked to cabotage permissions in the EU while the current British legal regime offers the possibility of qualified ship-ownerships of the EEA. Maritime transport is linked to carriage of goods and passengers. Consequentially, any legal requirements will follow atrade discussions whether ambitious or not. Only the outcome of EU Commission's appointed main negotiator, Michel Barnier, and the UK's Secretary of State for Exiting the European Union, Dominic Raab, along with their respective teams will determine the outcome of any future withdrawal arrangement and/or a feasible trade deal. Only a balance between detailed and well-organized rules, as well as flexibility and pragmatism during the negotiations can make the UK and the EU succeed towards regulatory harmonization.

VII. BIBLIOGRAPHY

BOELAERT-SUOMINEN, S., «The European Community, the European Court of Justice and the Law of the Sea», *The International Journal of Marine and Coastal Law*, vol. 23, 2008.

BUTCHER, *Briefing Report: Brexit and Transport, House of Commons Library,* 2018, *https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7633*.

DE LA FAYETTE, *New Approaches for Addressing Damage to the Marine Environment*, *The International Journal of Marine and Coastal Law*, vol. 20, No. 1, 2005.

ECHEBARRIA, J., «Normative regulation of the maritime industry in Luxembourgish Law: regulatory blocks in presence», Spanish Institute of Foreign Trade (ICEX), December 2012.

— «The EU Maritime Policy: interaction between public and private Law and the different regulatory blocks in presence», *Transportation Law Journal. Land, Maritime, Air and Multimodal*. Madrid, Marcial Pons, No. 12, 2013.

FRANK, *The European Community and Marine Environmental Protection in the International Law of the Sea. Implementing Global Obligations at the Regional Level*, Leiden/Boston, Martinus Nijhoff, 2007.

GONSAELES, «The Impact of EC Decision-Making on the International Regime for Oil Pollution Damage: the Supplementary Fund Exam», *Marine Resource Damage Assessment, Liability and Compensation for Environmental Damage*, Springer-Netherlands, MAES, 2005.

JENISCH, «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*, vol. 48, 2005.

KARAMITSOS, «The 11th Cadwallader Memorial Lecture - Politicians, the European Commission, regulators, and shipping, what is the missing link and the way forward?», *Maritime Business Forum,* London Shipping Law Centre, 2010.

MANDARAKA and SHEPPARD, «The 10th Cadwallader Memorial Lecture - 1st October 2008, Lawmaking and Implementation in International Shipping: which law do we obey?», *Maritime Business Forum,* London Shipping Law Centre, 2008.

NENGYE and MAES, «The European Union's role in the prevention of vessel-source pollution and its internal influence», *The Journal of International Maritime Law,* vol. 15, 2009.

— «Legal constraints to the European union's accession to the international maritime organization», *Journal of Maritime Law and Commerce*», vol. 43, No. 2, 2012.

PAPÍ, ALFONSI, TRONCOSO and LANGER, «Research for TRAN Committee —BREXIT: transport and tourism— the consequences of a no-deal scenario», European Parliament, Policy Department for Structural and Cohesion Policies (Brussels 2018).

RINGBOM, «Maritime Safety Policy and International Law», *Martinus Nijhoff Publishers*, Leiden/Boston, 2008.

SYRELOGLOU, BAATZ, COLES, HUDSON, QUINN, SERDY, TSIMPLIS, VEAL and ZHANG, «The UK maritime sectors beyond Brexit» (Institute of Maritime Law and the Southampton Marine and Maritime Institute of the University of Southampton, 2017).

WESSEL, «Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?», *International Law as Law of the European Union*, Leiden/Boston, Martinus Nijhoff Publishers, 2011.

WOOD, «The 10th Cadwallader Memorial Lecture - Lawmaking and Implementation in International Shipping: which law do we obey?», *Maritime Business Forum*, London Shipping Law Centre.

WOUTERS *et al.,* «Study for the Assessment of the EU's Role in International Maritime Organisations», *Leuven Centre for Global Governance Studies*, April 2009, pp. 22-23.

— «The EU in the world of international organizations: diplomatic aspirations, legal hurdles and political realities», *Leuven Centre for Global Governance Studies*, Working Paper No. 121, September 2013.

ZIEGLER, «The Relationship between EU Law and International Law», *University of Leicester School of Law Research Paper,* No. 13-17, 2013.

C. JURISPRUDENCIA

I. RESEÑAS DE JURISPRUDENCIA

1. Tribunal de Justicia de la Unión Europea

Sentencia de 25 de julio de 2018, Sala 2.ª, asunto C-128/16 P (*DOUE* núm. C 328/3, de 17 de septiembre de 2018). Caso *Comisión Europea c. Reino de España y otros.*

Ayudas de Estado; art. 107 TFUE, apartado 1; Régimen fiscal aplicable a determinados acuerdos de arrendamiento financiero para la adquisición de buques (sistema español de arrendamiento fiscal); Identificación de los beneficiarios de la ayuda; Requisito de selectividad.

Desde el año 2006 el sistema de arrendamiento fiscal (SEAF) previsto en España es objeto de varias denuncias ante la Comisión Europea, motivadas por las posibles ventajas que este sistema ofrecía a las compañías navieras permitiendo que pudieran obtener descuentos, entre un 20 y un 30 por 100, por la adquisición de buques construidos en astilleros españoles, en perjuicio de la actividad de venta de los astilleros del resto de los Estados miembros. El sistema SEAF se estructura a partir de un banco que actuaba como intermediario entre el comprador (empresa naviera) y el vendedor (astillero), con el objetivo de generar ventajas a la compañía naviera en forma de descuento sobre el precio del buque (entre el 85 y el 90 por 100). Los beneficios derivaban de la aplicación de varias medidas fiscales: a la contratación de arrendamiento financiero (amortización acelerada y amortización anticipada de determinados bienes); a las agrupaciones de interés económico (transparencia fiscal); y a las actividades marítimas (régimen especial de tributación por tonelaje).

Con la Decisión 2014/2000/UE, de la Comisión, de 17 de julio de 2013, relativa a la ayuda estatal SA.21233 C/11 (ex NN/11, ex CP 137/06) ejecutada por España *Régimen fiscal aplicable a determinados acuerdos de arrendamiento financiero también conocidos como Sistema español de arrendamiento fiscal*, la Comisión estimó, que varias de las medidas fiscales, la amortización acelerada de los activo arrenda-