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The Emergence of Maritime Governance in the Post-War World

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Introduction

Shipping highlights some of the adverse effects of globalization as can be seen in examples such as oil spills resulting from maritime accidents, seafarers reduced to 'modern slaves' and the risk of pandemics spread through seaborne trade and cruise trips. These observations raise the question of what, if anything, the public regulation of maritime shipping can achieve today. Regulation is usually understood as emanating from states, but the nation-state faces difficulties in coping with cross-border phenomena such as modern shipping. The obvious solution seems to be a close cooperation of states in regulatory matters; however, the issue of Flags of convenience illustrates the practical limitations of this approach in maritime matters.

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Against this background, this chapter aims to show that experiences from shipping can reveal some of the legal challenges presented by globalization. The development of the regulation of shipping reveals that globalized industries do not operate in a legal vacuum,[1] but that they require a more subtle form of regulation than the traditional state-centred perspective implies. The chapter describes the regulation of shipping as 'conglomeratic' because it is characterized by the involvement of a wide and growing range of different actors in creating and enforcing shipping standards, and attributes its conglomeratic structure to the fact that maritime shipping fully developed its global nature in the post-war era. On the basis of these observations, the chapter argues that an analysis of the shipping industry can serve as a means of better understanding the role of law in processes of globalization.

Regulating Global Shipping: From the Primacy of the Flag State to the 'Conglomeratic Approach'

Maritime shipping is a prime example of an increasingly globalized industry.[2] A ship is a highly mobile industrial plant and can readily be transferred to other jurisdictions. The different types of ships, such as bulk carriers, container ships, tankers or reefers transport cargo throughout the world, thus enabling the intercontinental trade of goods. Since the post-war era, the transboundary character of shipping has gradually become more and more pronounced. On the one hand technological advances such as containerization have increased the effectiveness, volume and thus importance of shipping, on the other hand the mobility of maritime shipping has been systematically used by shipowners to inhibit effective regulation, in particular through what has become known as 'flagging out'.[3] This began after the First World War as US shipping interests, seeking to evade US

[1] Simmel (2001, 684) regarding seafarers. Very sceptical: Roe (2013).

[2] See Alderton et al. (2004).

[3] Stopford (2009, 164, 191, 438–440).

regulations, registered their ships first in Panama and then, after the Second World War, also in Liberia.[4] Such 'open registries', as UNCTAD has called this phenomenon since the early 1970s[5] and which is by now the international standard term,[6] are especially popular with shipowners[7] from industrial nations[8] because they offer lower tax levels and allow the recruitment of low-cost crews from countries around the world. This shift to open registries was accelerated by the 1973 oil price increases, the related economic crisis, drastic temporary reductions in world trade and the continued production of ships built under subsidies which added to already existing worldwide surplus capacity. As a consequence, shipowners sought to reduce costs. Today, not only Liberia and Panama but even land-locked states such as Bolivia have set up open registries. In addition to flagging out, many shipowners have begun to use subcontracting and single-ship companies with addresses in offshore jurisdictions, in order to conceal ownership and limit their legal responsibilities.[9]

Thus, maritime shipping is a typical globalized industry, with multiple countries and cultures involved in every single voyage.[10] A typical ship

> may be owned by a Greek national through a Liberian Company. The ship may well have been built in Japan, but powered by Danish engines. It will no doubt be manned by a crew of mixed nationality, including for example, some Italian officers and Philippino ratings. It may have been financed through a New York bank and insured in London, time chartered to an oil multinational corporation for three years to carry Saudi Arabian crude oil from the Gulf to Rotterdam.[11]

As a globalized industry, shipping is also highly competitive with shipowners under continuous pressure to reduce costs. Moreover, the international

[4] Carlisle (1981, 2).

[5] First UNCTAD (1972–1973, 13).

[6] Sturmey (1983, 9).

[7] For analyses of their decisions Bergantino and Marlow (1997).

[8] Ownership of the world shipping fleet is highly concentrated. Shipowners from Greece, China, Japan and Germany together account for 41% of world tonnage: UNCTAD (2016).

[9] Gereffi et al. (2005, 461), see also Harlaftis and Tsakas, in this volume.

[10] DeSombre (2009).

[11] Odeke (1984, 10).

setting offers shipowners many opportunities for disreputable practices. Traditionally, flag states were regarded as responsible for enforcing regulation. However, widespread regulatory avoidance by shipowners and the lack of interest shown by 'open registry' states in enforcing regulation demonstrate that the flag state principle fails in a highly globalized industry such as shipping.

To facilitate maritime shipping, the principle of freedom of the seas—prominently formulated by Hugo Grotius—was established.[12] Under this principle, ships are free to use the open seas to sail anywhere they want.[13] Nevertheless, this does not imply freedom from regulation. Under the flag state principle, maritime shipping regulation lies in the hands of the flag state, that is, the state where a ship is registered. The flag state has full jurisdiction over the ship, its crew and its operations and this jurisdiction is exclusive while the ship is on the high seas.[14] In this sense, the flag state principle can be seen as an expression of national sovereignty and thus of the traditional so-called Westphalian system of international law.[15]

The 1982 United Nations Convention on the Law of the Sea (LOSC), the overarching framework regarding ocean issues, sticks with the flag state principle (Articles 91, 92 LOSC). The LOSC recognizes the problem of open registries and seeks to address it by imposing obligations on the flag state regarding its shipping regulation (Articles 94, 217 LOSC)[16] and by extending the authority of coastal and port states over foreign flagged ships[17] (see, for example, Articles 218, 220 LOSC). However, because the LOSC continues to assert that the flag state is the principal authority, the international law of the sea only insufficiently addresses the conditions of the regulation of maritime shipping, especially since

[12] For historical accounts, see Gidel (1932), Fulton (1911), and Stier-Somlo (1917).

[13] It remains legally disputed if the ship or its flag states use the freedom of the sea. In one of its first cases, ITLOS stated that both are the users, MV Saiga (Saint Vincent and the Grenadines v. Guinea), 1 July 1999, ILR 120 (1999, 143).

[14] An exception is when the ship engages in piracy.

[15] The famous 'Lotus principle' referred to a shipping case. In this context the Permanent Court of International Justice considered a foundation of international law, says that sovereign states may act in any way they wish so long as they do not contravene an explicit prohibition, P.C.I.J. (ser. A) No. 10 (1927, 18) *The Case of the S.S. Lotus (France v. Turkey).*

[16] Witt (2007).

[17] Molenaar (1998), Yang (2006), and Marten (2014).

open registries have neither the capacity nor the inclination to regulate shipping properly[18] (capacity is often a problem regarding popular open registries with large fleets like Panama[19]). It is argued here that (a) the worldwide impact and the regulatory avoidance which are widespread in the maritime shipping industry demand an involvement of all the multiple actors that are concerned by maritime shipping rather than the monolithic approach implied by the flag state principle, and (b) that a regulatory regime involving these multiple actors is indeed emerging.

Since the 1970s, the time during which the open registries became more and more popular, the monolithic approach inherent in the flag state principle was progressively replaced by a conglomeratic approach to the regulation of maritime shipping. This conglomeratic approach can be characterized as follows: First, standard setting and law enforcement are no longer concentrated in the hands of the flag state, but are distributed across different actors. Secondly, there is a multiplication of actors involved in the regulation of shipping, and there is no hierarchical link between these actors. In the following, the key features and the emergence of the conglomeratic approach will be put in concrete terms by describing the actors of maritime governance and their regulatory roles.

International Organizations and Their Procedures

There is a long history of transnational decision-making in the maritime shipping sector, which greatly contributed to the development of a cross-border transportation system. However, the twentieth century is specific because it is characterized by a proliferation of international organizations, which created an extensive treaty-making system and numerous treaties

[18] Rothwell and Stephens (2016, 168).

[19] For social matters ITF (2016a, 25).

establishing international standards.[20] The technique whereby international law ensures such an international harmonized legislation is the delegation of standard-setting to international organizations.[21] Alongside this quantitative aspect of a more 'international' standard-setting, a further feature is the fact that the states' influence on the standard-setting process has been reduced more and more.

The most important international shipping standards are the International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended; the International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997 (MARPOL); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), as amended, including the 1995 and 2010 Manila Amendments and the Maritime Labour Convention (MLC). These conventions are often called the four pillars of the international maritime regulatory regime. They were concluded under the auspices of two international organizations.

The SOLAS, adopted in 1914 in the wake of the *Titanic* disaster, was created in a mixed multilateral diplomatic and technical arena and turned out to be a milestone for international maritime standard-setting. This form of standard-setting was institutionalized with the establishment of the Intergovernmental Maritime Consultative Organization (IMCO) in 1948, which eventually became the International Maritime Organization (IMO) in 1982.[22]

The IMO has a broad mandate; its purpose is summarized in Article 1 of the Convention on the International Maritime Organization as

> To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting maritime shipping engaged in international trade, and

[20] See Chirop et al. (2012, 1).

[21] In LOSC, when it comes to shipping regulation, a standard wording is 'generally accepted international rules and standards established through the competent international organization or general diplomatic conference' (for instance, Article 213, similar Article 94 Paragraph 5). This reference empowers the international level to set standards.

[22] Librando et al. (2014, 577).

> to encourage the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article.[23]

Within the IMO, national delegations composed primarily of technical experts work closely with observers from all areas of industry, trade unions and environmental organizations. This system created a global community of experts working through the IMO's system of committees, sub-committees and other expert groups, on a sessional and inter-sessional basis.[24] By 2018, the IMO had 174 member states and had produced over fifty international maritime conventions covering, among other issues, safety of life at sea, including construction, equipping, operation and maintenance; vessel-source pollution including liability and compensation for damage; preparedness for and response to maritime accidents; wreck removal; ship recycling; limitation of liability for maritime claims; training standards for seafarers; facilitation of maritime traffic; and salvage.[25]

Another international organization that plays an important role in maritime activities is the International Labour Organization (ILO).[26] The ILO was founded in 1919 to pursue a vision based on the premise that 'universal and lasting peace can be established only if it is based on social justice', and became the first specialized agency of the UN in 1946.[27] Its so-called tripartite structure gives an equal voice to workers, employers and governments of 187 member states[28] to ensure that the views of the social partners are closely reflected in labour standards. More than sixty conventions that have been adopted cover nearly all aspects of seafarers' working and living conditions. The MLC, adopted in 2006 and entered into force in 2013, updates and consolidates these earlier ILO conventions.

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[23] IMO.

[24] Simmonds (1994).

[25] See IMO.

[26] Roach (2016).

[27] Constitution of the ILO, Preamble.

[28] ILO.

Under domestic legal systems, if the majority votes in favour of a provision, the minority is bound by this decision. In contrast, public international law is not governed by the majority principle but by the consent principle. This reflects the fact that the foundation of public international law is national sovereignty. Therefore, as a general rule, an international convention only becomes legally binding when a state gives consent, namely signs and, normally, also ratifies the convention and implements it into its national legislation. In the modern maritime shipping world with its rapid technological development and the advent of open registries, this state-based solution has become unsatisfactory because the conclusion and implementation of international standards is often refused or stalled by the states. Since the established mode for the introduction of international standards is a highly time-consuming process, two instruments have been used to solve this problem by limiting the states' influence on the standard-setting process.

The first one is the 'tacit acceptance procedure' which was first stipulated in IMO conventions and can now also be found in those of the ILO.[29] IMO committees regularly draft and adopt the technical parts of international conventions mostly contained in amendments. These amendments become binding if within a certain period of time, a certain number of contracting parties (usually at least one-third representing at least 35% of global tonnage) have not explicitly rejected them—silence means consent. The tacit acceptance procedure enables amendments of international treaties to enter into force within as little as a year after being adopted. Although the requirement for consent is thereby not waived, consent becomes the default position and unless states issue a declaration of the contrary, they are bound by the amended treaty.[30] Furthermore, the tacit acceptance procedure is no longer solely used for strictly technical issues; shipping standards with far-reaching consequences have been introduced via this instrument.[31]

[29] See IMO; in detail König (2013, 8). The MLC has adopted this IMO procedure for MLC amendments (Article XV), see Servais (2011, 75, 105).

[30] Kachel (2006, 34).

[31] For example, the mandatory introduction of the International Safety Management Code, with further instances Pamborides (1999, 110).

The second instrument is the clause of 'no-more-favourable treatment' which also can be found in both IMO and ILO conventions.[32] Essentially, a no-more-favourable-treatment clause requires that each contracting party shall apply such conventions to a foreign ship in its ports even if the flag state of the ship has not ratified the respective convention. The clause is designed to prevent ships flying the flags of states that have not signed the convention—in particular, open registries—from having an unfair advantage. The no-more-favourable-treatment clause is not regarded as prejudicial to the sovereignty of states that are not party to the respective convention, because while it obliges signatory states to apply the convention to ships registered in non-signatory states, it does not place any direct obligations on non-signatories.[33] Furthermore, the no-more-favourable-treatment clause does not extend the jurisdiction of the signatory states since the right of port states to prescribe conditions for the entry into port already exists under public international law.[34] However, this is a point of form rather than of substance because from the perspective of the non-party states, it does not make any difference if an international treaty directly obliges it to comply with its provisions or if an international treaty obliges other states to apply its provisions to ships registered in non-party states.[35]

To summarize, the combination of international standard-setting with the tacit acceptance procedure and the no-more-favourable-treatment principle has diminished the role of flag states and increased that of international organizations and port states. International organizations have become the key players in shipping legislation. Nevertheless, there remain many weak points because international standard-setting still relies on a state-centred approach. For instance, regarding the tacit acceptance procedure, every state has the possibility to opt out of a convention and implementation likewise still relies on states. As a consequence of the remaining influence of states in international standard-setting, maritime

[32] For example, Article II SOLAS; Article 5 Paragraph 4 MARPOL, see Boisson (2016, 212) and Oral (2012, 219).

[33] Regarding the so-called *pacta tertiis* rule of Article 34 of the 1969 Vienna Convention on the Law of Treaties, see with further references Proelss (2018, 16).

[34] Molenaar (1998, 119).

[35] Proelss (2018, 17).

conventions are reactive rather than proactive as they are often adopted in response to particular accidents or incidents, as the SOLAS convention shows.[36] Furthermore, they are of a compromise nature, thus only setting minimum standards.[37] Hence, standard-setting activities by regional actors such as the EU who can push through their own agendas, as well as incentive-based instruments of intermediate actors that foster higher standards in maritime shipping are very important.

The Role of Public Authorities in Port State Control and IMO Compliance Procedures

In standard-setting, the flag states' primary responsibility has been substantially reduced by the activities of international organizations. Regarding the enforcement of standards, the situation is a similar one. Although the IMO and the ILO are not empowered to enforce their standards, the monopoly of flag states has been pushed back by complementing it with inspections carried out by port states and with IMO procedures which foster compliance of the flag states with their international obligations.

Port state control refers to the control of foreign-flagged ships by the public authorities of a port state.[38] Where a port state control officer finds deficiencies, the officer may require their rectification. In serious cases, the ship may be detained or even banned from returning to a country's ports. It is by no means a recent phenomenon that vessels entering a foreign port are subject to standards mandated by local laws. A well-known example is the Merchant Shipping Act of 1876, which appears to be the United Kingdom's first regulation relying on port state jurisdiction to address the safety of foreign vessels engaged in international trade.[39] This initiative of port state control can be explained by the fact that the UK, the world's leading maritime power in those days, was witnessing great technological changes in the expanding maritime shipping industry. In recent decades,

[36] Chirop et al. (2012, 5).

[37] For the MLC Pineiro (2015, 48). For IMO Conventions Carlin (2002, 347).

[38] Kasoulides (1993), Marten (2014), and Molenaar (2015, 291).

[39] Marten (2014, 37–41).

the role of port states in enforcing international shipping standards has expanded vastly.[40] International law reflects this development, as several IMO and ILO conventions now give port states powers to inspect foreign vessels.[41]

However, port state control does not displace the flag state's control. Rather it follows a subsidiarity-based approach, compensating for deficits of the flag state.[42] Thus, the public authorities of flag states are still involved in the enforcement of shipping standards. To hold them to their obligations, the IMO has begun to establish several procedures aiming to guarantee that flag states properly implement and enforce international standards. The point of reference for these IMO compliance procedures is Article 94 LOSC, establishing flag states' fundamental duties and requiring them to take the steps necessary to secure compliance with international requirements (mainly ensuring periodic surveys and issuing and renewing ships' certificates).[43]

IMO compliance procedures against flag states have been widely introduced in the 1990s.[44] The most recent step has been the introduction of the so-called IMO Member State Audit Scheme (IMSAS), which entered into force in 2016. IMSAS which is mandatory[45] is intended to provide an audited member state with a comprehensive and objective assessment of how effectively it administers and implements mandatory IMO instruments.[46] Such IMO compliance procedures demonstrate that the flag states have lost their primacy in shipping regulation.

These compliance procedures differ from the traditional compliance procedures of international law. The traditional compliance mechanisms are actions taken unilaterally by individual states against other states. Thus,

[40] Marten (2014, 37).

[41] For instance SOLAS, Part B, Regulation 6 (c); MLC, Title 5, Regulation 5.2.1. But there is no international obligation to do so.

[42] For this interconnection, see Marten (2014, 225).

[43] LOSC Article 94 Paragraph 1 and 5; Article 94 Paragraph 4; Article 217 Paragraph 1 and 3.

[44] Lemke (2011, 268).

[45] Amendments to COLREG 1972, MARPOL Annexes I through to VI. SOLAS, 1974, as amended (adding a new chapter XIII) International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978.

[46] IMO.

it is upon each state to determine whether other states are fulfilling obligations owed to it, and whether there is non-compliance that cannot be rectified by means of negotiations or diplomatic measures, such as retortions, to induce the other state or states to comply with its or their obligations. In contrast, the new IMO compliance procedures have been characterized as 'collective' measures. This stems from the fact that not an individual state, but an international body has the competence to ascertain whether there is compliance and to take action in the case of non-compliance.[47] The background of such 'collective' compliance procedures is the fact that individual states regularly lack the interest and the information to consider taking measures against fellow states.[48]

Regional Actors

Since the 1970s, the regulation of maritime shipping is subject to processes of regionalization.[49] Regional actors are involved by implementing and enforcing international standards, setting stricter standards and contributing local knowledge in the international standard-setting process. The LOSC considers the IMO the predominant intergovernmental organization,[50] but regarding the protection of the marine environment it recognizes the importance of regional cooperation, as Article 237, 197, 127 LOSC show. The key regional actors are port states' agency networks, the EU and Regional Seas Organizations (RSOs).

Port states regularly act through agency networks. A historic example of such networks can be found in the incident of the *Amoco Cadiz*, a major oil spill in 1978 that followed a tanker running aground off the coast of France. Subsequent to this incident, networks of public authorities of the port states have emerged in order to enforce international shipping standards more effectively. The underlying idea is that the elimination of

[47] Churchill (2012, 777).

[48] Beyerlin and Marauhn (2011, 318).

[49] For an in-depth analysis of the development of regionalism in the law of the sea Franckx (1998, 307) and, specifically on Europe, van Leeuwen (2015, 23).

[50] Critical: Ringbom (2015, 124).

substandard shipping, meaning ships that are not compliant with international standards, would be best achieved by regional alliances of public authorities. These agency networks do not act on the basis of an international treaty, but on that of agreements among the public authorities within a region, known as Memoranda of Understanding (MoUs). They embody a common database with shipping and inspection information, common inspector training and a code of conduct. The earliest and best-known regional cooperation of this kind is the 1982 Paris Memorandum of Understanding on Port State Control (Paris MoU). It includes twenty-seven public authorities from Europe including the Russian Federation and from Canada.[51] Paris MoU is the model upon which eight other regions of the world have based their agreements on port state control.[52]

Establishing their own institutions such as a Secretariat and a Member Committee,[53] these agency networks, also known as PSC MoUs, can be regarded as regional actors in maritime shipping issues because their status is between a formal international organization and a mere agreement.

The growing number of sub-standard ships trading with the EU and several maritime shipping accidents off European coasts, such as the *Erika* and *Prestige* accidents, have spurred the EU to develop its own regulation of maritime shipping, notably starting with the Communication on a Common Policy on Safe Seas in 1993.[54] At first, the EU aimed to improve implementation and enforcement of international standards. A prominent example is the Directive on Port State Control adopted in 1995[55] and extended after the tanker accidents of the *Erika* and the *Prestige*.[56] In 2002,

[51] Paris MoU.

[52] Asia and the Pacific (Tokyo MoU); Latin America (Acuerdo de Viña del Mar); Caribbean (Caribbean MoU); West and Central Africa (Abuja MoU); the Black Sea region (Black Sea MoU); the Mediterranean (Mediterranean MoU); the Indian Ocean (Indian Ocean MoU); and the Riyadh MoU. The United States Coast Guard maintains its own port state control regime, see IMO.

[53] Paris MoU.

[54] EU Commission (1993), see Urrutia (2006, 202).

[55] Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port state control), OJ L 157/1 of 7 July 1995. See in detail Salvarani (1996, 225).

[56] See Keselj (1999, 127). In detail van Leeuwen (2010, 75).

the EU established the European Maritime Safety Agency (EMSA),[57] providing technical assistance and support to the European Commission and Member States in the development and implementation of EU maritime shipping legislation.[58] For this purpose, EMSA assesses the functioning of the port state inspection systems and collects and analyses maritime shipping information.

The tendency in the EU's current regulation is to create its own regulatory concepts in order to push forward difficult negotiations on the international level. Thus, this form of European shipping legislation also includes standards which are stricter than the international ones in terms of time scales and content.[59] A well-known example is the issue of phasing out single hull tankers and replacing by them with double hull tankers; here, the EU's proposals forced the IMO to adopt a faster schedule.

RSOs are regional bodies that have been established for a specific and limited purpose, the protection and preservation of the marine environment of particular regional seas.[60] In general international environmental law, RSOs are called regional Multilateral Environmental Agreements (MEAs).[61] With their local knowledge and their specific interest in solving local problems, regional MEAs can offer solutions for environmental issues, implement international standards and negotiate their own standards. Even though they are based on intergovernmental agreements, MEAs have acquired a measure of autonomy, with their own institutions such as a Secretariat, a Conference of the Parties and scientific bodies to enable them to fulfil their functions.[62] Due to their organizational structure, they are called 'autonomous institutional arrangements'.[63]

Initially, RSOs were established in Europe in the 1970s: The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) and the Helsinki Convention for the Baltic

[57] Regulation 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ L 208/1.

[58] EMSA.

[59] See Höltmann (2012, 73).

[60] Tetzlaff (2015, 112).

[61] Birnie et al. (2009, 84).

[62] Birnie et al. (2009, 86).

[63] Scott (2011, 12).

Sea are the central conventions for the protection of the sea. OSPAR started in 1972 with the Oslo Convention against dumping and was broadened to cover land-based sources and the offshore industry by the Paris Convention of 1974. These two conventions were unified by the 1992 OSPAR Convention, with the OSPAR Commission as the forum through which the contracting parties cooperate, as well as a Secretariat, five main committees and several working groups.[64] Regarding the Helsinki Convention, the Helsinki Commission (HELCOM) adopts recommendations for the protection of the marine environment, which is supported by a Secretariat, the Heads of Delegation and eight main groups.[65] Following the examples of the OSPAR and the Helsinki Convention, the UNEP's Regional Seas Programme (UNEP RSP) was established in 1974 in order to promote the preservation and protection of the marine environment worldwide. The UNEP RSP provides a framework for regional cooperation through a network of currently eighteen Regional Seas Programmes, which implement action plans and are often supported by regional seas conventions.[66] In contrast to the EU's taking the initiative in developing its own sets of standards, these RSOs have mostly focused on implementing international shipping standards.[67] However, in recent years, they have started to pursue their own environmental policies and provide impulses at the international level. To give an example, the organs of the OSPAR, the Helsinki and the Barcelona Convention have worked together to put in place voluntary guidelines[68] for the maritime shipping industry that request vessels entering the waters concerned to exchange all their ballast water at least 200 nautical miles from the nearest land in water at least 200 metres deep. The background for these guidelines is the fact that maritime shipping is a key vector of invasive species due to the discharge of ballast water and the sediments that it carries. The IMO Ballast Water Management Convention preventing the transfer of invasive species entered into

[64] OSPAR Commission.

[65] HELCOM.

[66] UNEP.

[67] Ringbom (2015, 124).

[68] The General Guidance on the Voluntary Interim application of the D1 Ballast Water Exchange Standard, see OSPAR.

force in 2017. Thus, the RSOs have anticipated international standards in their regions.

In recent years, the institutions of the Antarctic Treaty System (ATS) as well as the Arctic Council have fostered their regulatory roles, because both polar areas have very fragile environments susceptible to externally-inflicted damage, while global climate change has stimulated interest in making use of these regions' resources and transport routes. The ATS, consisting of three treaties[69] and one comprehensive Protocol on Environmental Protection, builds the framework for a regional MEA,[70] with the Antarctic Treaty Consultative Meetings, the Committee for Environmental Protection and a Secretariat as main organs. In the Arctic space, the Arctic Council, its Working Groups and its Secretariat can be regarded as a RSO.[71] The work on a so-called Polar Code, regarding navigation in polar waters, is a result of the regulatory cooperation of these two arctic actors and the IMO.[72]

Intermediate Actors

Intermediate actors are non-state actors fulfilling public functions. Similar to the regional actors mentioned above, they support the regulation of maritime shipping by implementing and enforcing international standards, setting stricter standards and contributing expertise in the process of international standard-setting. They differ from the regional actors in that regional actors are essentially state actors. The involvement of intermediate actors is said to constitute a form of 'hybrid governance' because, despite their private nature, they are involved in public regulation.[73] The

[69] The treaties are the Antarctic Treaty (AT, Washington, 1959), the Convention for the Conservation of Antarctic Seals (CCAS, London, 1972), and the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR, Canberra, 1980).

[70] Steiner et al. (2003, 236).

[71] However, the Artic Council is a result of soft law, because the 1996 Ottawa Declaration established the Arctic Council as forum for promoting cooperation, coordination, and interaction among the Arctic States and not a legally binding international treaty. For the role of the Arctic Council Fife (2013, 355).

[72] Mucci and Borgia (2014, 505).

[73] A well-known example is ICANN, see Möllers (2015, 124).

major intermediate actors are port authorities, classification societies, P&I clubs and the International Transport Workers' Federation (ITF).

Modern seaports are not mere interfaces between sea and land, but operational hubs for the logistics supply chain and, as such, play a significant role for seaborne trade. At the same time, the adverse impacts of expanding maritime transport are particularly tangible in the local area of a port.[74] Combining interest in the regulation of maritime shipping with the ability to do so, seaports, or strictly speaking the port authorities, have created their own instruments to foster environmentally friendly 'green shipping' since the 1990s. Their key instruments are financial incentives such as differentiated port fees to encourage ships to comply with or even go beyond existing environmental standards, e.g. for ships using cleaner fuels.[75] Often, differentiated port fees are used in combination with voluntary certification schemes or with environmental indexes. Such certifications and indexes provide information about the environmental impact of individual ships. Relying on a certificate or index that documents how environmentally friendly a ship is is obviously easier for ports than developing and enforcing a new metric.[76] One of the first certification schemes was the Green Award, initiated in 1994 by Rotterdam Municipal Port Management and the Dutch Ministry of Transport.[77] The Environmental Shipping Index (ESI) established in 2010 is a project within the World Ports Climate Initiative (WPCI).[78] It identifies seagoing ships that perform better in reducing air emissions than required by the current emission standards of the IMO.

The legal nature of port authorities differs from region to region. In Europe, most seaports remain in public ownership, but they are moving towards a more independent private sector-like management.[79]

[74] Becker et al. (2011, 5).
[75] Lister et al. (2015, 191).
[76] European Commission (2017, 44).
[77] Green Award (2019).
[78] ESI.
[79] ESPO.

The main function of classification societies is the technical surveillance of seagoing ships.[80] Classification societies set standards for the design, construction and inspections of ships, carry out periodic surveys and ultimately issue so-called class certificates confirming whether or not a certain ship meets specific standards. Traditionally, the purpose of these classification societies, which arose in England in the second half of the eighteenth century, is to protect the property interests of shipowners and operators, insurers and other private parties directly affected by a ship's seaworthiness. Today, however, classification societies also carry out public functions, because flag states frequently delegate the fulfilment of their international obligations imposed by IMO conventions and IMO resolutions to specifically recognized classification societies.[81] On behalf of flag states, classification societies perform surveys and issue so-called statutory certificates which confirm that a ship complies with IMO standards.

This brief overview reveals the characteristic features of classification societies[82]: While remaining essentially private actors, classification societies perform a dual role. They have both a private aspect—classification or voluntary services on behalf of the maritime industry—and a public aspect—certification or statutory services on behalf of flag states. Thus, they can be described as intermediate actors.

Protection and Indemnity (P&I) insurance provides cover for named risk marine liabilities common to the maritime shipping industry. This type of insurance has its origin in London in the middle of the nineteenth century[83] and can be seen as a consequence of third party claimants succeeding in their attempts to file claims for damages against shipowners. The resulting P&I Clubs were an adjunct to the commercial Hull & Machinery underwriters already established in the market.[84] The P&I Clubs work on a mutual, not-for-profit basis (mutuality) and are owned and controlled by the shipowners.[85] Currently, there are thirteen P&I Clubs covering

[80] For a synopsis of the historical role and development of classification societies, see Boisson (1999, 353).

[81] See Thorpe et al. (1997, 521).

[82] Boisson (1999, 371).

[83] For the history of the Clubs, see Young (1995).

[84] See Young (1995).

[85] Bennett (2001, 15).

90% of the world's ocean-going fleet (by tonnage), which are coordinated by the International Group of P&I Clubs (IG P&I).[86]

In theory, mutuality provides an incentive for shipowners to minimize risk by adhering to maritime safety and environmental standards. In practice, mutuality is not, in itself, effective in raising safety and environmental standards, especially due to the problems of moral hazard and adverse selection.[87] Thus, the Clubs employ managers who control entry and attempt to set premiums that are commensurate with the riskiness of each member so as to give an incentive to minimize risk.[88] Insurance payouts are conditional upon the ship's compliance with international standards, and the Clubs can also set their own stricter standards.[89] Moreover, the Club Rules state that a ship may be required to be submitted to survey by a surveyor appointed by the Club. Hence, they can foster safe and environmentally friendly shipping.

Especially since the 1990s, international organizations and regional actors have made attempts to involve P&I Clubs more closely in the regulation of maritime shipping.[90] One option is a strict liability regime and compulsory insurance, but these measures can be hard to find support for on an international level[91] and are only reluctantly accepted by P&I Clubs.[92] A further approach for getting the Clubs into the regulatory process is the so-called Quality Shipping Campaign of the EU, launched in 1998. This Campaign makes use of a range of incentives and sanctions to ensure that private actors such as the P&I Clubs are more sensitive to adopting and enforcing high shipping standards.[93]

The ITF, an international trade union federation of transport workers' unions representing over 600,000 seafarers, plays a vital role in improving

[86] IG P&I (2019).

[87] Bennett (2001, 15).

[88] For the Clubs' instruments to foster safe and clean shipping, see Riley (1998, 107).

[89] Eivendstad and Petire (2012, 327).

[90] On this issue, see Bennett (2000, 875).

[91] Originally, only regarding oil pollutions from tankers, known as Civil Liability Convention 1969. The Bunker Convention entered into force in 2008, but has only 58 contracting parties; the Hazardous and Noxious Substances by Sea Convention from 1996 has not entered into force due to signatory states not meeting the ratification requirements.

[92] For this point, Eivendstad and Petire (2012, 340).

[93] For this concept, see Haralambides (1998).

living and working conditions for seafarers since its beginnings.[94] The ITF coordinated trade union action against open registries in one of the earliest reactions against capital mobility. Its focus has shifted from the elimination of open registries in the 1950s to enhancing the living and working conditions for seafarers on ships flying the flag of an open registry since the 1970s.[95] Shipowners sailing under what the ITF considers a 'flag of convenience' have been pushed to sign one of the standard collective agreements drawn up by the ITF. Shipowners agreeing to do this are given a 'blue certificate'. A blue certificate means that the ITF inspectors will refrain from impeding the respective vessel from sailing. In the case that shipowners refuse to cooperate with the ITF, hurdles might crop up in the form of boycotts or other industrial actions if the minimum living and working conditions on board as guaranteed by the collective agreement are not respected.[96]

The ITF works closely with public actors in setting international standards and enforcing them. The ITF organizes seafarers' representation at the tripartite negotiations at ILO Maritime Sessions and meetings in the ILO Joint Maritime Commission. Under the MLC 2006, trade unions have their own right of complaint against the port state control authorities which are obliged to enforce the MLC.[97] In practice, the global network of ITF inspectors supports public authorities with its information and expertise in enforcing international shipping standards like the MLC.[98]

[94] It was founded in 1896 as the International Federation of Ship, Dock and River Workers. In 1898 it expanded to include non-maritime transport workers. After the First World War, the federation was re-established in 1919 as the ITF, see ILO (2019), see also Fink (2011, 145).

[95] Koch-Baumgarten (1997), see further Koch-Baumgarten (1998, 36; 1999) and Simon (1993).

[96] Koch-Baumgarten (1997).

[97] Standard A.5.2.1 no. 3 and no. 1 lit. d.

[98] ITF (2016b, 8).

From State-Centred Regulation to Conglomeratic Global Governance

The above description of the current international regulation of maritime shipping has shown that flag states no longer are the key actors in maritime issues. Instead, a 'conglomeratic' regulatory structure has emerged as a number of international organizations, public authorities of port states, regional and intermediate actors have become increasingly involved in maritime standard setting and enforcement. This conglomeratic regulation is not just a variation upon the governance once provided by the liner conference system[99]: The liner conference system represents a form of self-governance by selected groups of producers pursuing their own commercial interests, whereas the conglomeratic regulation represents public regulation, still influenced by states and international organization, despite the growing role of intermediate actors such as classifications societies and P&I clubs. Therefore, the conglomeratic regulation represents a new and different way of making and enforcing rules at sea, characterized by the interaction of a multitude of actors.

The LOSC hints at these regulatory changes: The preamble of the LOSC emphasizes the importance of a 'cooperation of the states', and Art. 94 LOSC gives rule-making competences to international organizations and mentions the right of port states to control ships. Primarily, however, the conglomeratic structure has been created not through legislation but through the practice of state and non-state actors responding to the failure of flag states to meet their responsibilities.

Thus, in response to globalization and to the shortcomings of a state-centric approach, namely the failures of flag states in maritime regulation, a conglomeratic approach to regulation has emerged in the maritime world. Perhaps the most important period in this process was the period from the early 1970s and extending to the early 1980s when the most important IMO conventions and their core elements, the tacit acceptance procedure and the no-more-favourable-treatment clause, were adopted.[100] Furthermore, in that period the first steps were taken to harmonize port

[99] See Premti (2016) and OECD (2015).

[100] Pamborides (1999, 100).

state control inspections. However, the growth of conglomeratic regulation was neither abrupt nor even and linear; rather, shipping disasters can be identified as the key drivers of the increased regulatory activities.[101] The sinking of the *Titanic* (1912), the *Torrey Canyon* (1967) and the *Amoco Cadiz* (1978) resulted in the adoption and revision of the conventions SOLAS and MARPOL. The *Amoco Cadiz* oil spill also stimulated the introduction of the tacit acceptance procedure and the establishment of agency networks on port state control. The expansion of the EU's regulatory activity can be traced back to the incidents of the *Erika* (1999) and the *Prestige* (2002). Regulatory reform proceeded in a slow and still unsteady manner. Therefore, it cannot be excluded that in the future new actors and new instruments will complement the international shipping regime.

Despite these shortcomings and limitations, the changing conception of international regulation that can be observed in maritime shipping issues can be acknowledged as an example of global governance. Global governance is commonly defined as 'the complex of formal and informal institutions, mechanisms, relationships, and processes between and among states, markets, citizens and organizations through which collective interests on the global plane are articulated and duties, obligations and privileges are established'.[102] Thus, the concept of global governance implies that while states do remain key actors in addressing global problems, a multitude of other actors beyond and below the state have evolved in parallel and engage in international regulation. These actors range from international non-governmental organizations, multinational corporations and international economic institutions to transnational social movements. The conglomeratic structure of regulation that has emerged in the shipping world over the past decades is one example of such global governance[103]

[101] Pamborides (1999, 12).

[102] Rosenau (1999).

[103] In this sense van Leeuwen (2015, 23): 'maritime governance is defined as the sharing of policy making competencies in a system of negotiation between nested governmental institutions at several levels (international, supranational, national, regional and local) on the one hand, and state actors, market parties and civil society organizations on the other hand'. Also Blooret al. (2006, 535).

and may throw light on the mechanisms, achievements and challenges to be faced in areas other than shipping.

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