

The European Union's Role in Regulating Greenhouse Gases from Shipping

International Workshop on Greenhouse Gas Emissions and Shipping

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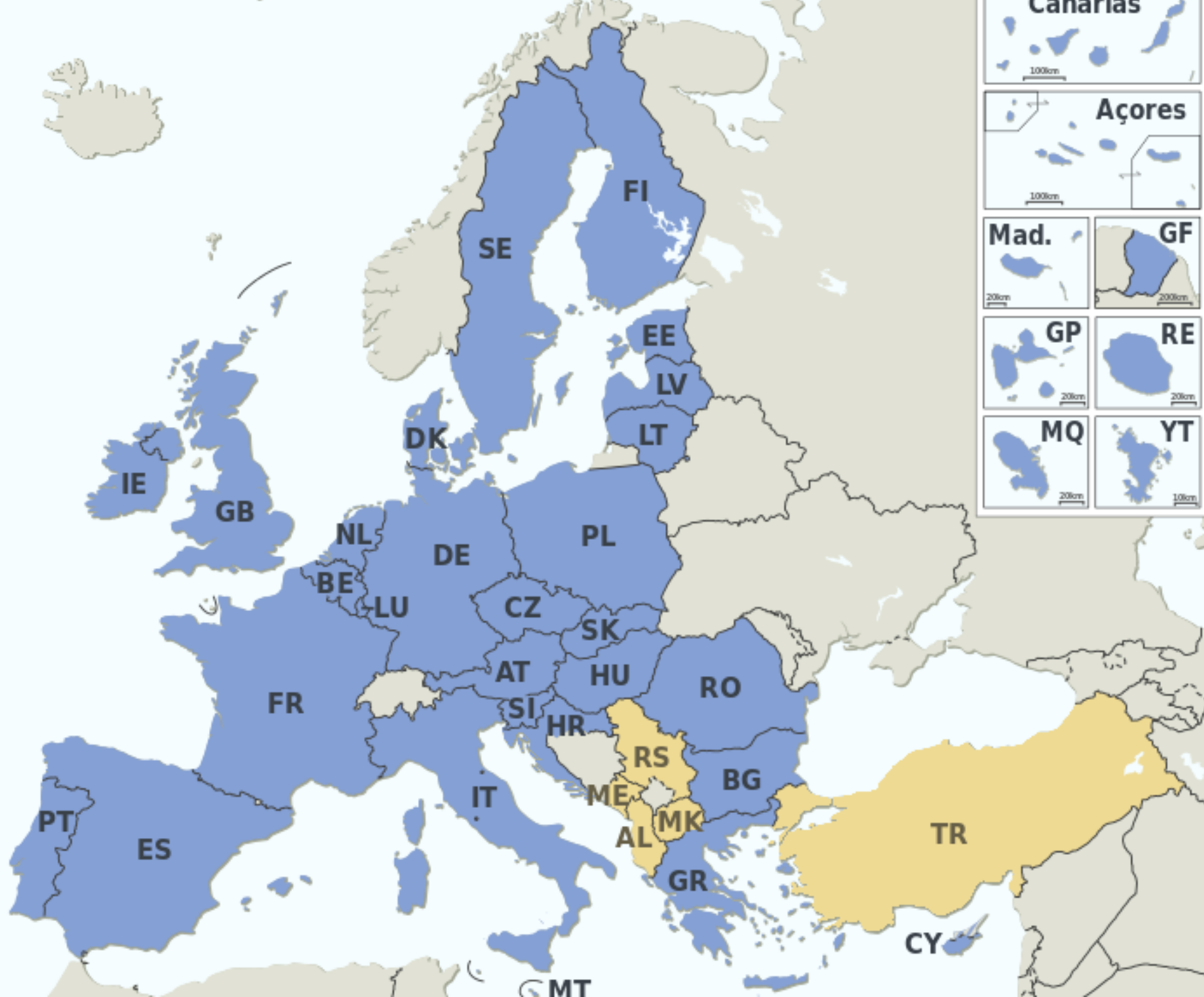
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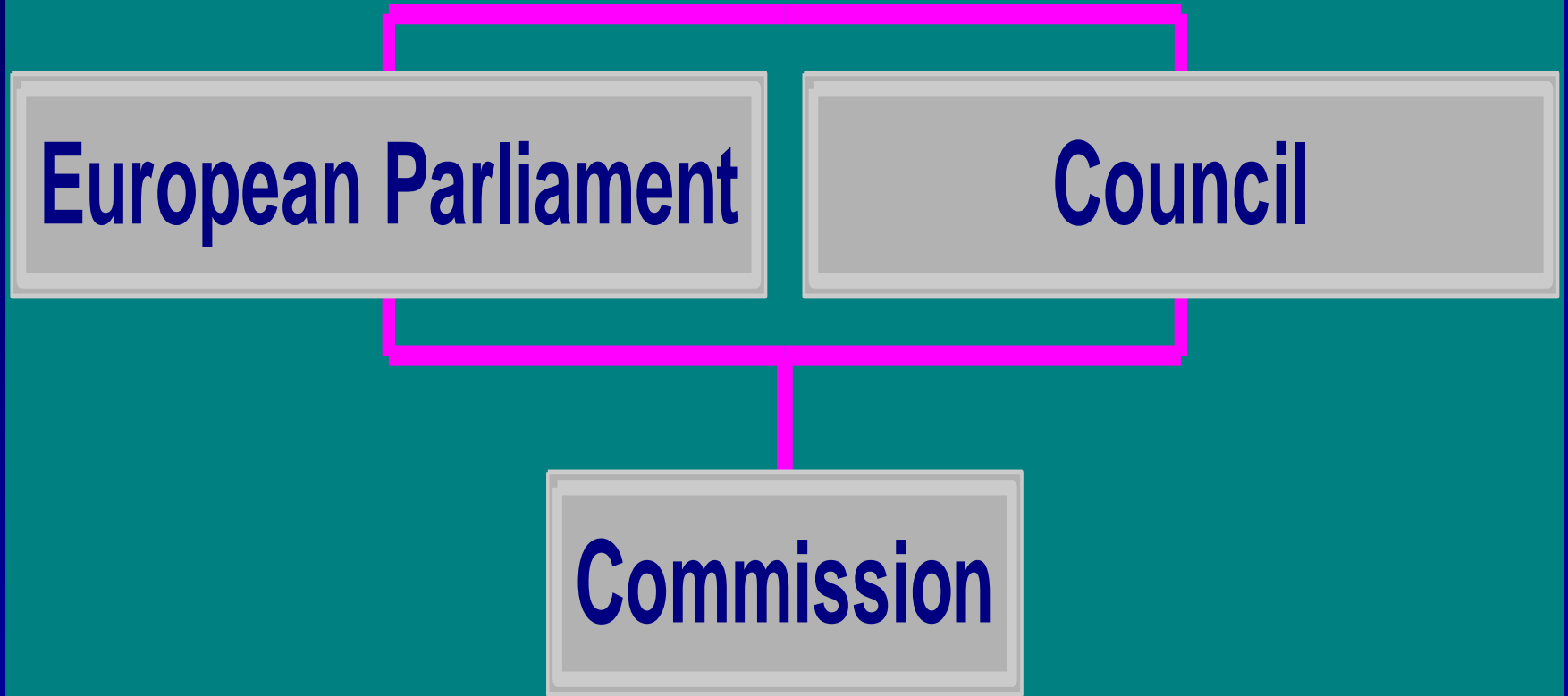
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EU-decision-making procedure



The EU context

- **Background**

- Contracting party to Kyoto Protocol and Paris Agreement
- Ambitious policy objectives (2009: -20% by 2020, 40% by 2030)
- All sectors to contribute

- **EU ETS**

- Directive 2003/87 as amended, heavy industries, EU aviation
- International aviation was also to be included in 2012, ... (note ECJ C-366/10)
- MRV Regulation 2015/757, operative as from 2018

- **Shipping**

- Diverging views among Member States
- Conciliation about ETS in November 2017: 2021-2030, shipping to be included in 2023, if IMO does not deliver results

Dir. 2018/410 (March 2018) Recital No 4

"All sectors of the economy should contribute to the reduction of greenhouse gas emissions. ... Efforts to limit international maritime emissions through the International Maritime Organization (IMO) are under way and should be encouraged. The IMO has set up a process to adopt in 2018 an initial emission reduction strategy to reduce greenhouse gas emissions from international shipping. The adoption of an ambitious emission reduction objective as part of this initial strategy has become a matter of urgency and is important for ensuring that international shipping contributes its fair share to the efforts needed to achieve the objective of well below 2 ° C agreed under the Paris Agreement. The Commission should keep this under regular review, and should report at least once a year to the European Parliament and to the Council on the progress achieved in the IMO towards an ambitious emission reduction objective, and on accompanying measures to ensure that the sector duly contributes to the efforts needed to achieve the objectives agreed under the Paris Agreement. Action from the IMO or the Union should start from 2023, including preparatory work on adoption and implementation and due consideration being given by all stakeholders.

Press release 13/4 2018

"The agreement reached today at the IMO is a significant step forward in the global efforts to tackle climate change. The shipping sector must contribute its fair share to the goals of the Paris Agreement."

"The EU and its Member States played an instrumental role in brokering and securing this deal with our international partners. This is another example of the EU becoming a stronger global actor to spur strong and credible climate action."

"While the EU had sought a higher level of ambition, this is a good starting point that will allow for further review and improvements over time."

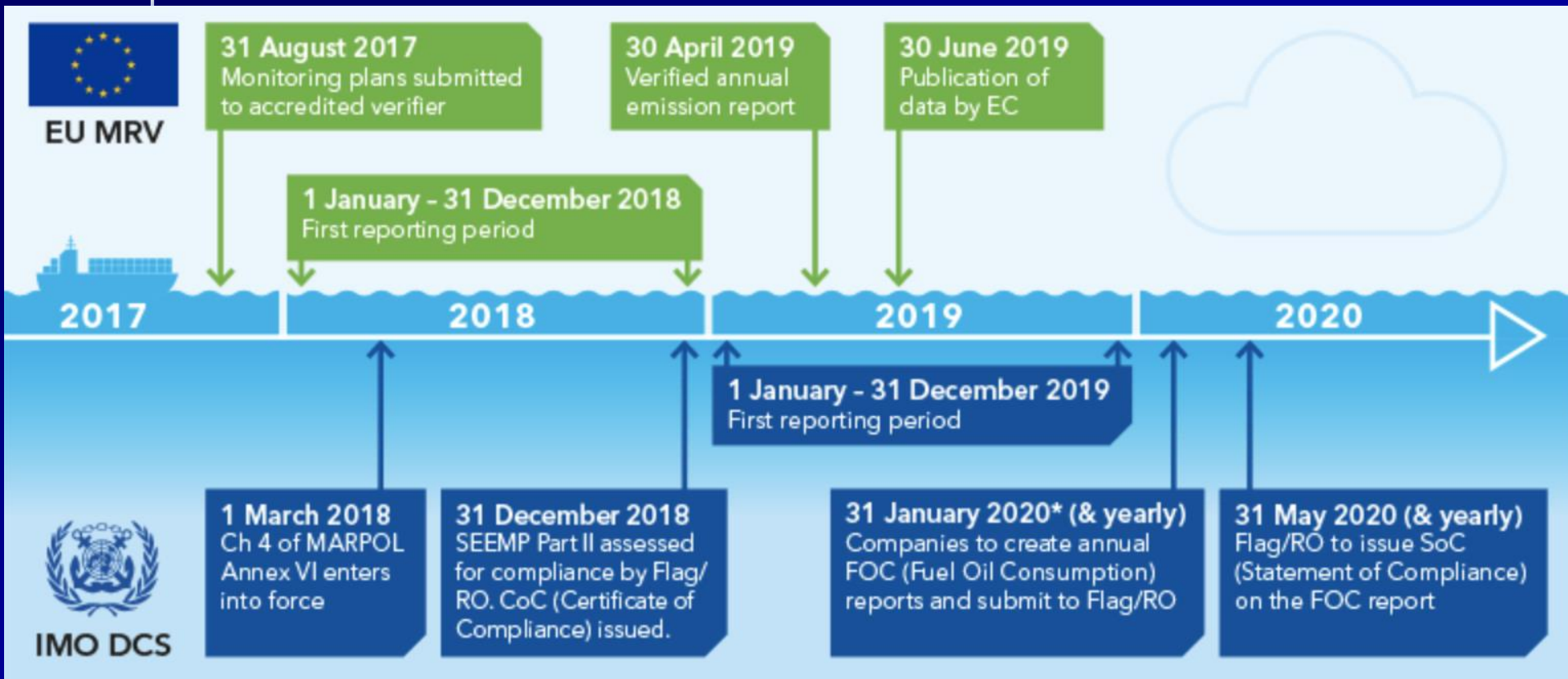
Areas of interest (or tension)

- A. Data collection system (MRV vs DCS)
- B. Short-term measures (by 2023)
- C. Mid- and long-term measures (post 2023)

Data collection systems

- EU MRV
 - Reg. 2015/757, EU port-bound, flag-blind (from 2018)
 - Reporting to EU be done in 2019
 - Sanctions for non-compliance
- IMO DCS
 - Global Data Collection System (2016) (Marpol Reg VI/22A)
 - World-wide
- Differences
 - Scope (international/national traffic, in-port emissions)
 - Content (calculation of transport work, transparency of data, verification of data, accreditation of verifiers etc.)
- Alignment?
 - Proposal delayed
 - Reporting probably yes, but differences will persist.

Difference in timeline



Source: DNV

Short-term measures

- EEDI & EEOI clearly insufficient
- EU: should be more efficiently used
 - Strengthening reduction targets?
 - Revising reference lines?
 - New operational measures based on new indicators?
 - Some proposals have significant reduction potential
- No particular EU proposal in this domain (has to be agreed by IMO) (but note ISPI)

Longer-term measures (post-2023)

- The setting
 - Initial strategy's goals are endorsed, but how to achieve them?
 - Imprecise guidance from both IMO and EU at this point
 - Agreement: measures are needed, shipping's share of emissions is increasing
- What does the EU want?
 - EU emission trading scheme?
 - Other measures (fuel levies)?
 - What are the demands on the IMO?

The design of a regional shipping-ETS

■ Fundamental issues:

- Who shall be responsible for rights (legal subject)?
- Scope (type of ships, area, voyages, cargo or owner etc.)?

■ Considerations

- Possibility to circumvent the rules
- Monitoring and enforcement (data and resources)
- Effectiveness (environmental) versus jurisdictional constraints
 - System should be flag blind
 - Limitation to EU's own coastal waters is not effective

→ Raises question about jurisdiction

('Can you do this?' and 'how far out can the requirements extend?')

International law considerations

Three examples of how the matter could be approached

- Law of the sea
 - Port state jurisdiction (no general access right)
 - Coastal state jurisdiction (Prescriptive jurisdiction, GAIRS, Art. 218(1))
 - Reconciling the two
 - Static/operational requirements
 - Enforcement measures (withholding benefits / penalties)
 - Is this UNCLOS stuff at all?
- General international law: principles on extra-territorial jurisdiction
 - 'Substantial and genuine connection'
 - Degree of interest between flag and port states
- Other treaties: international trade law

I.e. similar considerations under different int. law disciplines

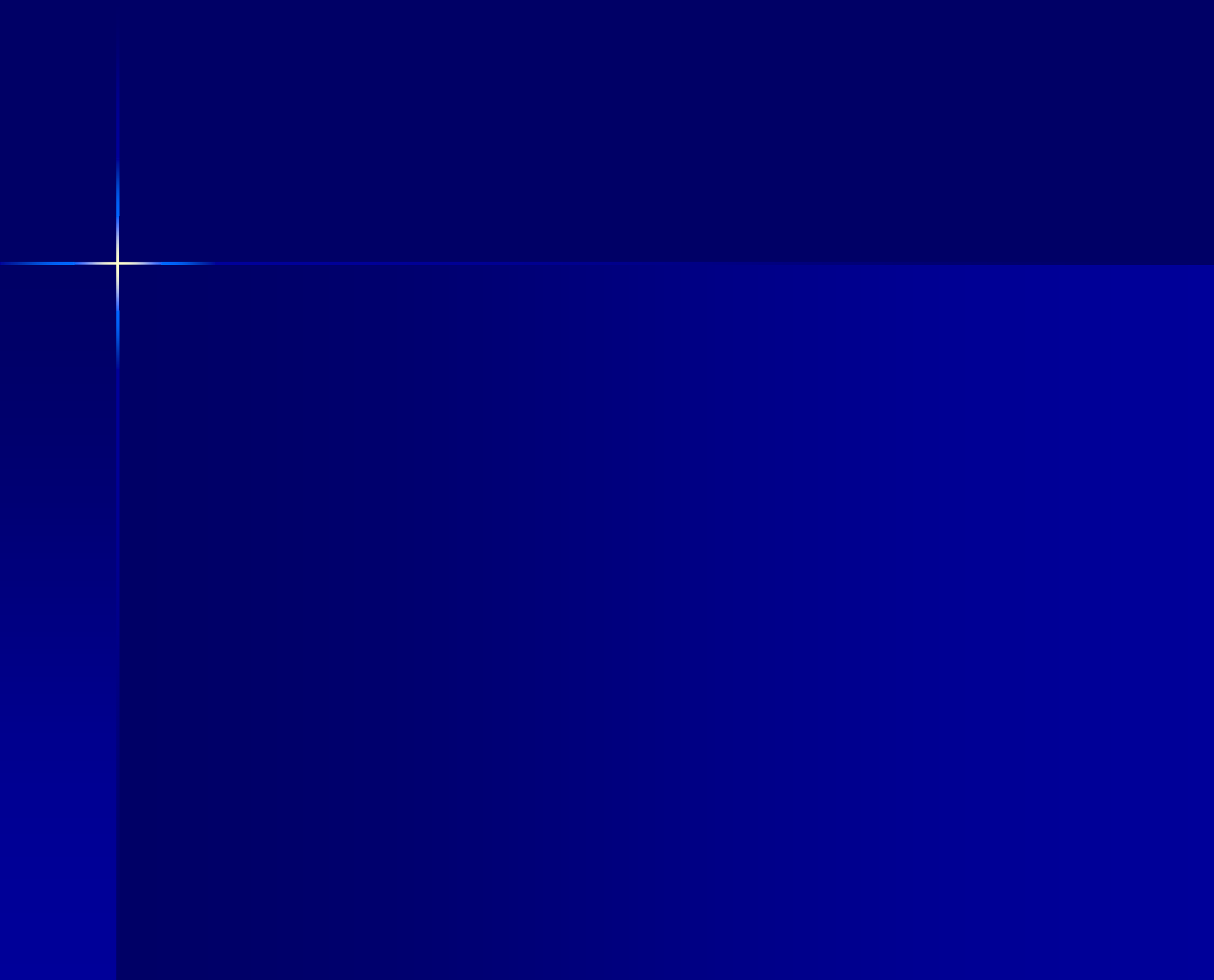
- Law of the sea: port State measures are available but have to be non-discriminatory, reasonable, proportionate to achieve the aim, not constitute abuse of rights and must respect 'safeguards' in UNCLOS. Punitive enforcement measures (including fines) might not be available if prescriptive basis is weak.
- International law principles on extra-territorial jurisdiction: relatively imprecise, no 'hard' law. Idea gaining ground of a single principle of jurisdiction based on 'genuine and reasonable interest' and balancing of interests in relation to the jurisdiction of other States.
- International trade law: limitations to be assessed in view of object and purpose of measures, discriminatory effect, international cooperation efforts, available alternatives, overall balancing of interests.

Considerations when balancing the interests

- Effort required by ship owners/operators (financial, administrative etc.)
- Effect on navigational rights/principle of global regulation
- Objective (global concern, broader implications than shipping, support in other international fora)
- Effectiveness
- Available alternatives?
- Efforts to achieve a multilateral solution (repeated efforts)
- Benefit for the region? (depends on usage of funds)
- Perspective decisive → forum of a legal dispute

Concluding observations

- The EU's role at IMO is ambiguous – it wants to make progress, but its demands are unclear
- Informal influence is important
- The EU cannot extend its threats beyond 2023
- Legality ultimately depends on:
 - Nature of obligations (do they relate to static or operational conditions, geographical reach etc.)
 - Chosen methods to enforce violations (sanctions, denied port entry etc.)
 - General reasonableness, based on underlying purpose, proportionality, available alternatives, effects on shipping and trade etc.
 - When interests are balanced, the global nature of the matter, the efforts at IMO and relatively limited effects on navigation would speak in favour of a right of bodies like the EU to take this type of measures



3 Principles on extraterritorial jurisdiction under public international law

- Four main principles:
 - Nationality principle
 - 'Protection principle'
 - Universality principle
 - Effect principle (more controversial)
- Jurisdictional bases need to meet standards of reasonableness
- The principles tend to converge into a single principle based on a "genuine and reasonable connection" combined with balancing of interests in relation to other states concerned.

3 International Trade Law (GATT and GATS)

- An ETS would probably be covered by GATT and GATS and duties thereunder (MFN, national treatment, market access etc.)
- But: exceptions in GATS art. XIV, GATT art. XX:
“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade ..., nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
... (b) necessary to protect human, animal or plant life or health...”
- WTO-case law: protection of legitimate interests, good faith, non-discriminatory measures, international cooperation, balancing of interests
- ‘Standstill’ clause from 1996