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"Opening up the rich man's club: Ways to solve the clash between IMOs need for a more efficient decision-making process and the necessary participation of developing countries in the process"

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OPENING UP THE RICH MAN'S CLUB: WAYS TO SOLVE THE CLASH BETWEEN IMOS NEED FOR A MORE EFFICIENT DECISION-MAKING PROCESS AND THE NECESSARY PARTICIPATION OF DEVELOPING COUNTRIES IN THE PROCESS

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Chapter 1: Introduction

I. Problem Identification

The question this dissertation aims to answer is how developing countries¹ can be better included in the IMO's decision-making process in order to make the process more efficient regarding time efficiency and the enforcement of decisions.

It will be shown that the decision-making process of the IMO lacks efficiency regarding time-efficiency, which leads to a delay in finalising, adopting and implementing IMO decisions. Furthermore, the implementation and enforcement of decisions is inefficient. It will be demonstrated that the IMO would work more efficiently if developing countries would be better included in the decision making process. In order to point out ways to increase the IMO's efficiency and to improve the participation of developing countries in the process, seven suggestions on how to improve the efficiency of the IMO will be analysed. However, it will be shown that only a few of them have the double effect of improving the effectiveness of IMO's decision-making process and strengthening the participation of developing countries. Out of the seven proposals for strengthening the efficiency of the IMO's decision-making process that are to be examined in this work only a change to the structure of the IMO to open up the 'rich man's club'² and the expansion of the IMO's efforts to strengthen the member states implementation willingness achieve both objectives at the same time. However, there is not just one way to improve the IMO's decision-making process and the participation of developing countries in it. For achieving the best results, a few of the proposals should be combined.

II. Problem Context

Shipping is an international business. Ships flying flags from countries all over the world sail the oceans and cross the waters of several different nations. National regulations regarding specifically the environment, the construction of ships and safety on board can hardly regulate this international sector. Problems like oil pollution by ships or hull design and construction cannot be solved by a national legislator. 'Global problems need global solutions'.³ Therefore the main player in the field of international maritime environmental protection and

¹ Thereby the term developing countries includes developing countries as coastal, port and flag states (compare Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 323).

² Compare for terminology *IMO FAQs* available at <http://www.imo.org/About/Pages/FAQs.aspx#12>; Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 263.

³ Marcus Schröder *Die Koordinierung der internationalen Bemühungen zum Schutz der Umwelt* 38.

security at sea is an International Organization, namely the International Maritime Organization (IMO).⁴ The IMO is one of the smallest specialised sub-agencies of the UN.⁵ Since its first meeting in 1959, the IMO worked out approximately 50 conventions.⁶ Thereby, the IMO is providing 'the uniform regulatory framework which the shipping industry needs'.⁷

However, the IMO only develops the conventions. It has no executive powers or enforcement mandate.⁸ To become legally binding and consequently to become 'law', the conventions need to be enacted in to national law. Therefore the conventions can only be enforced by port and flag states. This lack of enforcement powers of the IMO leads to the result, that a successful protection of the environment and of crew and ship lies with the willingness of the member states to implement the IMO conventions in to national law and the willingness of coastal, port and flag states to enforce them. Therefore one could say that the IMO is a 'toothless tiger'⁹ that only gets its teeth with the help of the member states. Furthermore, IMO conventions only come into effect if a certain number of states have ratified them. This process often takes years.¹⁰ Therefore, the oceans are shipped by vessels that obey to highly different standards.¹¹ Consequently it can be assumed that the decision-making process of the IMO lacks efficiency regarding the time proceedings need to take place and the enforcement of decisions thereby found. To solve these problems different solutions have been evolved: One of them is the tacit acceptance procedure to accelerate the process of decision-making. The tacit acceptance procedure helps to adapt the conventions via amendments to the rapidly changing technical and ecological environment. Where decision-making processes often take

⁴ Compare Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 98.

⁵ Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick'(2006) 10 *Schifffahrt und Häfen* 15 at 15.

⁶ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 77; *IMO List of Conventions - List of IMO Conventions* available at <http://www.imo.org/About/Conventions/ListOfConventions/Pages/Default.aspx>.

⁷ Uwe Jenisch 'The European Union as an Actor in the Law of the Sea: The Emergence of Regionalism in Maritime Safety, Transportation and Ports' (2005) 48 *German Yearbook of International Law* 223 at 259.

⁸ Veronica Frank *The European Community and Marine Environmental Protection in the International Law of the Sea* 208.

⁹⁹ Compare Uwe Jenisch 'The European Union as an Actor in the Law of the Sea: The Emergence of Regionalism in Maritime Safety, Transportation and Ports' (2005) 48 *German Yearbook of International Law* 223 at 259.

¹⁰ Uwe Jenisch 'The European Union as an Actor in the Law of the Sea: The Emergence of Regionalism in Maritime Safety, Transportation and Ports' (2005) 48 *German Yearbook of International Law* 223 at 259.

¹¹ Compare Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices'(2011) 35 *Marine Policy* 201 at 201.

years, with the tacit acceptance procedure amendments can enter into force within 18 month or less.¹²

However, the decision-making process of the IMO is not only inefficient regarding time and enforcement. The decision-making process also fails to reflect the current member state reality in the IMO. The decision-making process of the IMO was established to suit the needs of a small group of developed countries that founded the IMO and controlled the organization in its beginning. However, since the IMOs first meeting in 1959, realities in shipping changed drastically. The number of member states increased from 21 to 170. Nowadays, the developing states outnumber the developed states in the IMO.¹³ Furthermore, vessels are in huge parts no longer registered with the shipowners country of origin, but with flags of convenience.¹⁴ The main part of these open registry states are situated in developing countries:¹⁵ The top ten ship registers measured in DWT are being headed by Panama, Liberia and the Marshall Islands, closely followed by the Bahamas.¹⁶ All of these countries can be considered as developing countries.¹⁷ Although the enforcement of IMO conventions is for the most part the responsibility of the flag states and therefore the developing

¹² According to IMO in exceptional cases amendments can enter into force in a year after being adopted, information *IMO FAQs* available at <http://www.imo.org/About/Pages/FAQs.aspx#12>, last visited 12 June 2014.

¹³ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 76.

¹⁴ States have the right to register vessels, if there exists a genuine link between the state and the ship (Art. 91 (1) UNCLOS). This term is very broad therefore states interpret the 'genuine link' differently. A distinction is made between open and closed registries. These terms refer to whether or not vessels that are owned by nationals of foreign states may be registered (H. Edwin Anderson 'The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives' (1996) 21 *Tulane Maritime Law Journal* 139 at 151). The term open register is a neutral term. The term flag of convenience however has negative connotation and generally describes a state that offers more convenient laws or policies to states registered under it (Oya Z. Özçayir *Port State Control* 23). The purpose of flags of convenience is 'to circumvent the strict registration requirements of developed countries' (H. Edwin Anderson 'The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives' (1996) 21 *Tulane Maritime Law Journal* 139 at 158). Although the term open registry is broader than the term flag of convenience, because not every open registry is a flag of convenience, most open registries are flags of convenience (compare H. Edwin Anderson 'The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives' (1996) 21 *Tulane Maritime Law Journal* 139 at 155). Therefore, although imprecise, the terms will be used interchangeable in the following as meaning flag of convenience.

¹⁵ H. Edwin Anderson 'The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives' (1996) 21 *Tulane Maritime Law Journal* 139 at 158; according to UNCTAD (*UNCTAD Merchant fleet by flag of registration and by type of ship, annual, 1980-2013* available at <http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=93>, last visited 01 July 2014), a total of 1 232 177 dead weight tons in thousands out of the total fleet worldwide of 1 628 783 dead weight tons in thousands, therefore 75 % were in 2013 registered in developing economies.

¹⁶ Compare *Lloyd's List Intelligence Flag State: Top Ten Registers*, available at <http://info.lloydslistintelligence.com/flag-state-top-10-ship-registers/>, last visited on 15 June 2014; John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 205; Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 63.

¹⁷ Compare *UN-List of developing economies by region* available at http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf, last visited 18 June 2014.

countries,¹⁸ the IMO did hardly address this change: the structure of the IMO scarcely changed over the years and the decision-making process was established for member states that have enough person-power, shipping expertise and English language skills to participate in the proceedings. This leads to the result that the efficiency of the IMOs decision-making is influenced negatively additionally to the aforementioned mechanisms that already lead to a lack of efficiency: All member states of the IMO have an equal vote.¹⁹ However, some member states are 'more equal than others'²⁰. The IMO can still be called 'the rich man's club'²¹. Although, the IMO established rules of procedure to approach this problem, these rules are not sufficient to strengthen the position of developing countries. Furthermore, some of the means of the IMO to accelerate proceedings like the tacit acceptance procedure lead to the result that it is even harder for developing countries to participate in the decision-making process. In particular the tacit acceptance procedure puts an enormous financial, administrative and legislative burden on the member states.²² Therefore the IMOs need for speedy proceedings clashes with the necessary involvement of developing countries in the IMOs decision-making process. However, the IMOs decision-making process and the enforcement of its decisions would benefit from an improved participation of developing countries. Furthermore, keeping in mind that the list of flag states is headed by developing countries, there exists in fact a necessity to find ways to open up the IMO for developing countries and better include them in the decision-making process.

III. Outline of the dissertation

In chapter 2 of this dissertation an overview of the IMOs history, the structure of the organization, its decision-making process and the participation of developing countries in the process will be given. Based on this background 7 ways to improve the effectiveness of the decision-making process of the IMO will be illustrated in Chapter 3. Each of the 7 suggestions will be summarized and analysed critically in order to show their respective effect on increasing the effectiveness of the IMOs decision-making process and improving the participation of developing countries in the process. In chapter 4 the findings of the dissertation will be summarized in a conclusion.

¹⁸ Compare Art. 94 UNCLOS.

¹⁹ Article 57 of the IMO-Convention (IMO Convention).

²⁰ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 170.

²¹ Compare for terminology *IMO FAQs* available at <http://www.imo.org/About/Pages/FAQs.aspx#12>.

²² Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 311.

Chapter 2: The IMO, its decision-making process and the participation of developing countries in it

I. Introduction

To understand the significance of the IMO in the field of maritime law and therefore to understand how important the IMO conventions, their speedy work-out and acceptance are, it is important to understand how the IMO started and how the organization changed over the years. Furthermore, one has to know the IMO's structure, its organs and its decision-making process in order to understand how the decision-making process of the IMO works and where it lacks efficiency.

II. The IMO: historical development and objectives

The IMO is the main player on the field of international maritime environmental protection and security.²³ This is reflected not only in the number of its member states, but also in the conventions the IMO worked out and the development of the organization over the years: In March 1948 the United Nations Economic and Social Council (ECOSOC) held an international shipping conference in Geneva. At this conference the IMO-Convention was adopted.²⁴ Ten years later in 1958, after the IMO-Convention was ratified by 21 states, the IMO entered into force.²⁵ The organization held its first meeting in 1959.²⁶

Nowadays the budget of the IMO for the years 2014/15 comprises of £ 64,304,000.²⁷ The IMO has 170 members and three Associated Members, namely Faeroes, Hong Kong and Macau.²⁸ Furthermore, according to Article 62 IMO Convention 77 non-governmental international organizations have been granted consultative status with the IMO.²⁹ On the list

²³ Compare F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) 57 *Tulane Law Review* 1208 at 1208.

²⁴ Originally the IMO was named IMCO (Inter-Governmental Maritime Consultative Organization), the name was changed in 1982 to IMO, for more information regarding the mentioned name change: Wilhelm H. Lampe 'The "New" International Maritime Organization And Its Place In Development Of International Maritime Law' (1983) Vol. 14 No. 3 *Journal of Maritime Law and Commerce* 305 at 305 ff.; Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 266 ff.

²⁵ According to Article 71 IMO-Convention; compare Agustín Blanco-Bazán ('IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 261) as to why it took the IMO ten years to enter into force.

²⁶ For more details on the IMOs history see Wilhelm H. Lampe 'The "New" International Maritime Organization And Its Place In Development Of International Maritime Law' (1983) Vol. 14 No. 3 *Journal of Maritime Law and Commerce* 305 at 310 ff..

²⁷ *IMO Structure - IMO budget 2014-2015* available at <http://www.imo.org/About/Pages/Structure.aspx>.

²⁸ *IMO Membership - List of IMO Member States* available at <http://www.imo.org/About/Membership/Pages/Default.aspx>; Article 9 IMO-Convention.

²⁹ *IMO Membership - List of the non-governmental international organizations in Consultative Status* available at: <http://www.imo.org/About/Membership/Pages/NGOsInConsultativeStatus.aspx>, last visited 10 June 2014.

of non-governmental international organizations one can find organizations like the Royal Institute for Naval Architects, the International Group of Protection and Indemnity Associations or the International Union for Conservation of Nature. The organizations that gained consultative status with the IMO represent economic, industrial, political or environmental interests. Moreover, 64 international governmental organizations gained observer status with the IMO these include the African Union, all nine supra-regional Port State Control Regimes and the European Commission.³⁰ According to Article 61 IMO Convention, the IMO may co-operate with intergovernmental organizations, whose interests and activities are related to the purposes of the IMO. The organizations participate in the technical work of the IMO as observers with consultative status, but without voting rights.

According to Article 1 (a) IMO Convention one of the objectives of the IMO is 'to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the 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'. The IMO is the 'only governmental organization responsible for developing international standards for vessels.'³¹ IMOs main instruments to fulfil this purpose are conventions. In the almost 60 years since the organization had its first meeting, the IMO worked out more than 50 conventions.³² The regulatory activity of the IMO concentrates on 'safety, vessel source pollution, legal rights and duties in merchant shipping, and liability and compensation regimes'.³³ The IMO conventions cover almost every aspect of shipping: Construction, Equipment, Design, Crew, Maintenance and Environmental aspects.³⁴ Some of the most important of these conventions, the "'milestone" conventions',³⁵ are the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for the

³⁰ *IMO Membership - List of international governmental organizations with observer status in the IMO* available at: <http://www.imo.org/About/Membership/Pages/IGOsWithObserverStatus.aspx>, last visited 10. June 2014.

³¹ Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 301.

³² *IMO Conventions - IMO List of Conventions* available at: <http://www.imo.org/About/Conventions/ListOfConventions/Pages/Default.aspx>.

³³ F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) *57 Tulane Law Review* 1208 at 1211.

³⁴ For more information on the fields of work of the IMO see Craig H. Allen 'Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention' (2009) *10 San Diego International Law Journal* 265 at 280 f..

³⁵ Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) *35 Marine Policy* 201 at 201.

Prevention of Pollution from Ships (MARPOL) and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).³⁶

The significance of the IMO for the development of international standards in the maritime field shows, how important the fast and efficient development of new conventions and their enforcement is. Time-efficient procedures for the preparation of new conventions, the amendment of older ones and the efficient enforcement of existing conventions are important to prevent the oceans from being shipped by substandard ships. However, the IMO's decision-making cannot be analysed critically without understanding how the IMO is structured and how its decision-making works:

III. Structure of the IMO

(a) Introduction

Initially the IMO consisted solely of the Assembly, the Council and the Maritime Safety Committee (MSC). Nowadays the IMO comprises in addition to the Assembly, the Council, and the MSC, a Legal Committee, a Marine Environment Protection Committee, a Technical Co-operation Committee, a Facilitation Committee, a Secretariat and 'such subsidiary organs as the Organization may at any time consider necessary'.³⁷ The main technical committees are supported by Sub-committees.

(b) The Assembly, the Council and the Secretariat

The Assembly is the governing body of the IMO. It consists of all member states.³⁸ The Assembly meets every two years.³⁹ The main functions of the Assembly are: to elect the Council, to receive and consider the reports of the Council, to decide upon any question referred to it by the Council, to approve the work programme of the IMO and to vote the budget and determine the financial arrangements of the Organization.⁴⁰ Therefore, the Assembly has an 'approval role'⁴¹ with regards to the functions named in Article 15 of the IMO Convention. Furthermore, the Assembly makes recommendations to the member states regarding maritime safety, the prevention and control of marine pollution from ships and other matters concerning the effect of shipping on the marine environment.

³⁶ For more information on the most significant IMO conventions compare Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick' (2006) 10 *Schiffahrt und Häfen* 15 at 18 ff..

³⁷ Art. 11 IMO Convention.

³⁸ Article 12 IMO Convention.

³⁹ Article 13 IMO Convention.

⁴⁰ Article 15 IMO Convention.

⁴¹ Veronica Frank *The European Community and Marine Environmental Protection in the International Law of the Sea* 207.

The Council is the IMO's executive body it supervises and coordinates the IMO's work.⁴² The Council inter alia considers draft work programs and budgets it receives the reports, proposals and recommendations of the Committees and circulates them to the member states.⁴³ According to Article 26 IMO Convention, the Council shall between sessions of the Assembly, perform all the functions of the IMO and therefore act as the governing body of the IMO. It can therefore be said that the Council is the IMO's most important component group,⁴⁴ preparing the IMO's budget, its working program and the major matters of its day-to-day business.⁴⁵ The Council is composed of 40 members that are elected for two years with the option to be re-elected by the Assembly.⁴⁶ The members of the Council shall be elected according to Article 17 IMO Convention:⁴⁷ Ten shall represent the largest interest in providing international shipping services (category A). These ten are for the years 2014-2015 China, Greece, Italy, Japan, Norway, Panama, Republic of Korea, Russian Federation, United Kingdom and the United States. Ten more shall represent the largest interest in international seaborne trade (category B). For 2014-2015 these are namely Argentina, Bangladesh, Brazil, Canada, France, Germany, India, Netherlands, Spain and Sweden. Twenty states shall represent a special interest in maritime transport or navigation, moreover, their election to the Council shall ensure the representation of all major geographic areas of the world (category C). These are for 2014-2015: Australia, Bahamas, Belgium, Chile, Cyprus, Denmark, Indonesia, Jamaica, Kenya, Liberia, Malaysia, Malta, Mexico, Morocco, Peru, Philippines, Singapore, South Africa, Thailand and Turkey. Initially the Council had 18 member states. This number was increased to 24 and later 32 members. The latest increase to 40 member states took place in 2002. The IMO changed the number of members in the Council to better reflect the changing reality in the shipping world: where the shipping industry was initially controlled by a very restricted number of nations, in the following years the number

⁴² Veronica Frank *The European Community and Marine Environmental Protection in the International Law of the Sea* 207.

⁴³ Article 21 IMO Convention; compare F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) 57 *Tulane Law Review* 1208 at 1221.

⁴⁴ Wilhelm H. Lampe 'The "New" International Maritime Organization And Its Place In Development Of International Maritime Law' (1983) Vol. 14 No. 3 *Journal of Maritime Law and Commerce* 305 at 317.

⁴⁵ Wilhelm H. Lampe 'The "New" International Maritime Organization And Its Place In Development Of International Maritime Law' (1983) Vol. 14 No. 3 *Journal of Maritime Law and Commerce* 305 at 317.

⁴⁶ Articles 16, 18 IMO Convention.

⁴⁷ *IMO Structure - List of the Council members for 2014-2015*, IMO Structure available at <http://www.imo.org/About/Pages/Structure.aspx#9>.

of nations involved in shipping grew. Furthermore, IMO wanted the views of developing countries to be better reflected.⁴⁸

The Secretariat assists the IMOs working organs in all of their work.⁴⁹ This includes 'professional advice in the technical and legal field, the preparation of document and reports on the outcome of deliberations.'⁵⁰ According to Article 47 IMO Convention, the Secretariat comprises of the Secretary-General and such other personnel as the Organization may require. The Secretary has approximately 300 international employees. It is situated with the headquarters of the IMO in London. The Secretary-General is the chief administrative officer of the Organization. He is appointed by the Council with the approval of the Assembly.⁵¹ Up to today only one out of eight appointed Secretary-Generals, namely Chandrika Prasad Srivastava from India belonged to a developing country.⁵²

(c) Legal Committee, Maritime Safety Committee, Marine Environment and Protection Committee, Technical Cooperation Committee, Facilitation Committee

The main part of the work of the IMO as a technical organisation is done by committees and Subcommittees.⁵³ All committees consist of all the member states.⁵⁴

The Legal Committee was only established in 1967 as a subsidiary to deal with legal questions in an aftermath of the Torrey Canyon accident.⁵⁵ The Legal Committee was for the first 14 years of its existence a subsidiary organ of the Council and only then became one of the Committees of the IMO.⁵⁶ It is empowered to deal with all legal matters of the IMO.⁵⁷ This includes for example topics like liability, compensation and rescue and recovery

⁴⁸ Compare Oya Z. Özçayir *Port State Control* 38; Wilhelm H. Lampe 'The "New" International Maritime Organization And Its Place In Development Of International Maritime Law' (1983) Vol. 14 No. 3 *Journal of Maritime Law and Commerce* 305 at 317.

⁴⁹ F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) 57 *Tulane Law Review* 1208 at 1221.

⁵⁰ Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 269.

⁵¹ Article 22 IMO Convention.

⁵² This 'telling example' has so far been without precedent in an UN body, Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 269 f..

⁵³ Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick' (2006) 10 *Schifffahrt und Häfen* 15 at 17.

⁵⁴ Articles 27, 32, 37, 42 and 47 IMO Convention.

⁵⁵ For more information on the Torrey Canyon incident and the setting up of the Legal Committee compare: Baris Soyer/ Andrew Tettenborn (Eds.) *Pollution at Sea – Law and Liability* 3 ff..

⁵⁶ F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) 57 *Tulane Law Review* 1208 at 1220.

⁵⁷ Article 33 IMO Convention.

operations.⁵⁸ Furthermore, the Legal Committee drafts international maritime law conventions.

The Maritime Safety Committee (MSC) shall consider any matter regarding maritime safety, e.g. construction and equipment of vessels, rules for the prevention of collisions, handling of dangerous cargoes, hydrographic information, log-books and navigational records and marine casualty investigations.⁵⁹ Initially the Maritime Safety Committee consisted of only 14 member states, elected by the Assembly.⁶⁰ For the same reason the number of Council member was increased, the Maritime Safety Committee was opened up to all member states.⁶¹

The Marine Environment and Protection Committee (MEPC) shall according to Article 38 IMO Convention consider any matter within the scope of the Organization concerned with the prevention and control of marine pollution from ships.

According to Article 43 IMO Convention, the Technical Cooperation Committee shall consider any matter within the scope of the Organization concerned with the implementation of technical co-operation projects for which the Organization acts as the executing or co-operating agency and any other matters related to the Organization's activities in the technical co-operation field. Therefore the Technical Cooperation Committee organizes and manages the technical development aid of the IMO.⁶² The MSC is concerned with all technical matters except those that are directly connected to pollution and are therefore handled by the MEPC.⁶³

The Facilitation Committee is a subsidiary body of the Council responsible for eliminating or simplifying formalities for ships in international maritime transport. The committee tries to strike the balance between the facilitation of maritime transport and maritime security.

⁵⁸ Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick'(2006) 10 *Schiffahrt und Häfen* 15 at 17.

⁵⁹ Article 28 IMO Convention.

⁶⁰ The composition of the MSC was even brought before the ICJ (Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 263 ff.).

⁶¹ See for more information on why the MSC was opened up to all member states of the IMO: F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) 57 *Tulane Law Review* 1208 at 1220.

⁶² Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick'(2006) 10 *Schiffahrt und Häfen* 15 at 23.

⁶³ F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) 57 *Tulane Law Review* 1208 at 1221.

(d) Subcommittees and working groups

The MSC and MEPC are supported by numerous sub-committees, e.g. the Sub-Committee on Human Element, Training and Watchkeeping, the Sub-Committee on Navigation, Communications and Search and Rescue and the Sub-Committee on Ship Design and Construction.⁶⁴ The Sub-Committees are open for all member states.

Working groups are set up to accelerate proceedings.⁶⁵ Especially when drafting conventions they are useful to bring together experts in e.g. technical matters. The member states can make proposals to appoint a working group. Setting up a working group can often be difficult with regards to terms of reference, states or groups of states that are supposed to participate or the question if there will be translations in to all languages.⁶⁶ At diplomatic conferences working groups are often essential for achieving results in the limited time of a conference.⁶⁷

(e) Budget

According to Article 55 (b) IMO Convention, 'the Assembly shall apportion the expenses among the Members in accordance with a scale to be fixed by it after consideration of the proposals of the Council thereon'. Currently the financial contributions of the member states are determined by using two components: 87.5 % are calculated based on the tonnage of the merchant fleet and the remaining 12.5 % are calculated based on the state's ability to pay as determined by a general UN formula.⁶⁸ The main contributors of the IMO budget in 2012 therefore were Panama, Liberia and the Marshall Islands.⁶⁹

(f) Conclusion

The growing number of member states of the IMO, the purpose of the organization and the conventions worked out by it prove the IMOs immense importance in the shipping law field.

⁶⁴ For more information on the Subcommittees compare Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick'(2006) 10 *Schiffahrt und Häfen* 15 at 17.

⁶⁵ There are different kinds of working groups, e.g. ad hoc working groups or open or closed informal working groups. For simplification purposes in the following all these different types of working groups will be addressed when speaking of 'working groups'. For more information on the other types of working groups compare: Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 189 ff..

⁶⁶ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 189.

⁶⁷ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 191, 197 f..

⁶⁸ Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick'(2006) 10 *Schiffahrt und Häfen* 15 at 17; Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 77.

⁶⁹ Panama was the main contributor to the IMO budget in 2012 paying 5.40 million £, followed by Liberia with 2.94 million £, number three were the Marshall Islands with 1.78 million £ and number five were the Bahamas with 1.32 million £. Numbers according to *IMO Structure - 'Top Ten contributors to the IMO budget 2012'* available at <http://www.imo.org/About/Pages/Structure.aspx>; compare *IMO FAQs - 'How much does IMO cost?'* available at <http://www.imo.org/About/Pages/FAQs.aspx#11>.

Therefore the speed with which IMO conventions enter into force and the emphasis placed by the member states on enforcing the conventions dictate the time it will take to further develop international regulations of the shipping law sector.

The IMO took steps to better include developing countries in to its working processes by increasing the number of member states in the Council representing a special interest in maritime transport or navigation. However, seats under the categories A and B are still reserved for the states with the largest interest in international shipping services and seaborne trade. Most of the open registry states do not fall under these categories and can therefore only be represented under category C. Therefore it is still not guaranteed that the open registries and therefore the major flag states are represented in the Council.⁷⁰ E.g. the 2003 elections did not provide Liberia with a seat on the Council.⁷¹ Keeping in mind that the Council is inter alia responsible for the budget of the IMO, this result is unsatisfactory. Since the distribution formula for the IMO budget distributes the main part of the payments to the states with the largest amount of gross tonnage registered and only a small amount being distributed according to capacity to pay, this results seems even more unreasonable.⁷² Moreover the states that distribute the largest part of the budget to the organization have only little influence on the decisions of the Council which is not only the executive organ, but also one of the main administrative organs. Nevertheless, these states are the states that are supposed to enforce most of the decisions of the IMO as flag states.⁷³

IV. The IMO as decision-maker

(a) Legal Instruments of the IMO

The IMO develops international standards to overcome the numerous national legislations that were in force before.⁷⁴ The legal instruments of the IMO to fulfil this purpose are: conventions, protocols, codes, guidelines, resolutions and recommendations. Conventions are 'formal instruments of a multilateral character'.⁷⁵ By means of protocols, the IMO can add significant improvements and additions to conventions.⁷⁶ Furthermore, protocols can help the

⁷⁰ For more information on open registries and flags of convenience: Oya Z. Özçayır *Port State Control* 23 ff..

⁷¹ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 374.

⁷² *IMO Structure - IMO budget 2012* available at <http://www.imo.org/About/Pages/Structure.aspx>; compare Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 374 f..

⁷³ Compare Art. 94 UNCLOS.

⁷⁴ Oya Z. Özçayır *Port State Control* 51.

⁷⁵ F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) 57 *Tulane Law Review* 1208 at 1226 f.; Oya Z. Özçayır *Port State Control* 51.

⁷⁶ Oya Z. Özçayır *Port State Control* 51.

IMO to cover new regimes that have so far not been covered by the convention. Codes can provide governments with 'guidance when implementing Conventions provisions in their domestic regulations'.⁷⁷ The IMO uses resolutions and recommendations as a speedy and effective way to convey information to the member states, so that the governments of the member states can consider the information. Moreover, resolutions are utilized to complement or to support governments in their implementation or interpretation of the corresponding convention. Whereas the majority of the IMO's legal instruments are recommendatory in nature, conventions are legally binding on the member states. However, some IMO codes have been incorporated into conventions and have thereby become binding themselves.⁷⁸ Furthermore, many member states implement codes, resolutions or recommendations in to their national laws whereby the legal instruments become legally binding nonetheless.⁷⁹

Conventions are not the most important means of the IMO's work: Codes can become legally binding and often resolutions carry more important information than conventions. However, because of the limited scale of this dissertation it will mainly focus on conventions.

(b) Adoption of IMO conventions

The IMO conventions generally fall into the following three categories: safety, environmental protection and legal matters.⁸⁰ The main bodies of the IMO responsible for the adoption of conventions are: the Assembly, the Council, the MSC, the MEPC, the Legal Committee and the Facilitation Committee. The first step to a new convention is the adoption of the convention.⁸¹ The member states of the IMO can in the aforementioned bodies discuss new developments in shipping and other related areas. Furthermore, the member states can articulate the need for a new convention or the amendment of a convention in any of these bodies. A proposal for the amendment of a convention or for a new convention can be made by member states, a group of member states or by an international organization. Therefore it is mostly the member states that 'dictate the content and pace of decision-making' in the IMO.⁸² For the most part the proposals are brought forward in the Committees, simply because the Committees meet more often than the main organs of the IMO. A well founded proposal goes

⁷⁷ Oya Z. Özçayir *Port State Control* 51.

⁷⁸ E.g. the International Safety Management (ISM) Code has been made part of the SOLAS Convention and is therefore mandatory for the member states of the IMO.

⁷⁹ Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick' (2006) 10 *Schifffahrt und Häfen* 15 at 20.

⁸⁰ F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) 57 *Tulane Law Review* 1208 at 1223; Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 301.

⁸¹ On the adoption of conventions see Oya Z. Özçayir *Port State Control* 51 f..

⁸² Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 369.

on to the Council or the Assembly. The Assembly or Council can advise a working group or subcommittee to proceed with the work on the proposal. The subcommittee or working group consults with the member states and international organizations with consultative status at the IMO and draws up a draft convention. The member states of the IMO need to find a consensus on the draft. The final draft will be sent to the Council or Assembly. For a complex body of rules, it can easily take years until the member states agree on a final draft.⁸³ The Council or respectively the Assembly summon a diplomatic conference to consider the formal adoption of the draft. Invitations to attend the diplomatic conference are sent out to all the IMO and UN member states and to the specialized agencies. Furthermore, the governmental and non-governmental organizations with observer respective consultative status are invited to send observers to the conference to present expert advice to the representatives of governments. All the invitees receive the draft convention before the beginning of the conference in order to be able to comment on the draft. Proposals made by the governments are taken into consideration to work out a draft that is acceptable for all or at least a majority of member states. If the member states agree on a draft, the new convention is adopted by the conference and will be deposited with the Secretary-General. The Secretary-General sends copies of the conventions to all the member states.

(c) Entry into force of IMO conventions

The prerequisites that need to be fulfilled for IMO conventions to enter into force are supposed to fulfil two purposes: to bring the convention into force as soon as possible and to implement it as widely as possible.⁸⁴ To enter into force, an IMO convention needs to either be accepted formally by a certain number of states or the convention needs to be formally accepted by a number of states that moreover represent a special percentage of the world's gross tonnage.⁸⁵ The number of states that need to accept the convention and the percentage of the world's gross tonnage are laid down in the Convention itself. They vary with the complexity of the convention and the number of states the convention affects.⁸⁶ The more complex the convention or the more member states it affects the more stringent are the entry-

⁸³ Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick' (2006) 10 *Schifffahrt und Häfen* 15 at 17.

⁸⁴ Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick' (2006) 10 *Schifffahrt und Häfen* 15 at 18; Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 313.

⁸⁵ Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 312 f..

⁸⁶ Oya Z. Özçayir *Port State Control* 52.

into-force requirements.⁸⁷ However, a convention generally needs to be accepted and to be applied by a large number of the members of the shipping community. Usually a convention is opened for signature by states for a period of twelve month.⁸⁸ According to Article 15 of the Vienna convention on the Law of Treaties, 1969 (**Vienna convention**), a state that did not sign the convention in these twelve month can accede the convention later.

These regulations for an entry into force of IMO conventions were established when the IMO was still dominated by developed countries. The developed countries not only dominated in numbers but also in terms of ship registration. The prerequisites were supposed to enforce the interests of the developed countries to let conventions enter into force upon their acceptance.⁸⁹ Nowadays the developing countries outnumber the developed countries and the main ship registries are situated in developing countries. Therefore the developing states 'will now hold the key to prompt entry into force of conventions'.⁹⁰

(d) Implementation of IMO conventions by the member states

IMO conventions are of little value until they are implemented in to national law.⁹¹ It is the member states' responsibility to implement IMO conventions in to their legislation. According to basic principles of international law, governments of member states that are parties to the IMO and that ratified a convention are obliged to incorporate the convention in to their law.⁹² However, member states often do not take this duty too seriously. The implementation procedure is not always up to IMO standards.⁹³ Furthermore, the member states often delay the implementation of new conventions. The delay is caused by different reasons:⁹⁴ Many states do not see the implementation of IMO conventions as a priority. Some IMO conventions are very complex and need to be rewritten to be implemented in to national

⁸⁷ Oya Z. Özçayir 'Flags of Convenience and the Need for International Co-operation' (2000) Vol. 7 Issue 4 *International Maritime Law* 111 at 112.

⁸⁸ Oya Z. Özçayir *Port State Control* 53.

⁸⁹ Compare Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 351.

⁹⁰ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 351.

⁹¹ Compare Thomas S. Busha 'The IMO Conventions' (1986) 6 *Ocean Yearbook* 160 at 166; Olav F. Knudsen and Björn Hassler ('IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 206 f.) therefore propose to have the IMO take over key implementation functions from the member states in order to ensure uniform procedures.

⁹² According to article 26 Vienna convention parties to treaties have to execute them in good faith. This also includes the implementation of the treaty. Furthermore, the member states that are party to a treaty are also obliged to enforce the treaty (Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 202).

⁹³ Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 202.

⁹⁴ Compare Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 304.

law.⁹⁵ Generally, no direct translation from official IMO texts into the respective national language exists.⁹⁶ Furthermore, lack of expertise in the shipping law sector and financial deficiencies are problems faced by many member states.⁹⁷ Moreover, the national implementation processes are often very time-consuming:⁹⁸ after ratifying a convention, the consequences of the convention for the national legislation must be evaluated. Actions must be taken to incorporate the convention in to national law and the existing legislation must be adjusted appropriately.⁹⁹ 'All of these steps must produce administrative practice in line with IMO intentions without direct IMO supervision.'¹⁰⁰ The result is that the entry into force of IMO conventions often gets even more delayed. The implementation of the conventions in to national law in the various member states therefore is not as uniform as what the IMO is aiming for.¹⁰¹

The IMO has taken diverse steps to improve the member states implementation willingness. The IMO e.g. developed a technical co-operation programme to provide expert assistance to countries that lack experience and resources.¹⁰² The IMO opened the International Maritime Law Institute on Malta and the Maritime University in Malmö, to prepare participants for the challenges faced when trying to implement IMO conventions in to national law. The IMO even established a special Sub-Committee on Flag State Implementation in 1992.¹⁰³ Primary objective of the Sub-Committee is 'the identification of measures necessary to ensure effective and consistent global implementation of IMO instruments and also the consideration of special related

⁹⁵ Oya Z. Özçayir *Port State Control* 54; Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 206; Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 328 f..

⁹⁶ Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 202.

⁹⁷ Oya Z. Özçayir *Port State Control* 56; Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 203.

⁹⁸ Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 330.

⁹⁹ Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 202.

¹⁰⁰ Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 202.

¹⁰¹ Compare Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 203.

¹⁰² For more information on the technical co-operation programme see: Craig H. Allen 'Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention' (2009) 10 *San Diego International Law Journal* 265 at 317 f..

¹⁰³ See for more information on the sub-committee on flag state implementation: Heike Hoppe IMO News (1999) 21 ff., Oya Z. Özçayir *Port State Control* 56 f.; Craig H. Allen 'Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention' (2009) 10 *San Diego International Law Journal* 265 at 315 f..

difficulties faced by developing countries'.¹⁰⁴ One of the main accomplishments of the sub-committee has been the development of guidelines to support flag states with the implementation of IMO instruments.¹⁰⁵

(e) tacit-acceptance procedure

(i) Introduction

As outlined above IMO conventions generally enter in to force when a certain number of states, usually two-thirds, that account for a minimum number of world shipping tonnage accept the convention. Since the biggest ship registries today can be found in developing countries,¹⁰⁶ nowadays the developing states control the speed with which a new IMO convention enters into force.¹⁰⁷

This traditional procedure for amending conventions is called the explicit acceptance procedure. The explicit acceptance procedure leads to the result that some of the IMO conventions enter into force years after their adoption.¹⁰⁸ Under the explicit acceptance procedure amendments could take five to ten years before they enter into force.¹⁰⁹ Because of the IMO membership growth nowadays a larger number of states need to accept conventions, in order for them to enter into force. Thereby the entry into force of the conventions is even more delayed.¹¹⁰ Often conventions are already outdated when entering into force due to rapid technical developments. Some conventions never even enter into force.¹¹¹ Therefore, an urgent need to speed up IMO's decision-making process exists. One way to speed up proceedings is the tacit acceptance procedure.¹¹² However, although the tacit acceptance procedure can be useful to speed up proceedings, it puts a lot of pressure on the member

¹⁰⁴ Heike Hoppe 'The work of the Subcommittee on Flag State Implementation' (1999) *IMO News* 21 at 21.

¹⁰⁵ Oya Z. Özçayır *Port State Control* 57.

¹⁰⁶ Compare *Lloyd's List Intelligence Flag State: Top Ten Registers*, available at <http://info.lloydslistintelligence.com/flag-state-top-10-ship-registers/>, last visited on 15 June 2014; John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 205.

¹⁰⁷ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 351.

¹⁰⁸ Compare Oya Z. Özçayır *Port State Control* 48 f..

¹⁰⁹ Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 307.

¹¹⁰ Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 305.

¹¹¹ For example the International Convention for the Safety of Life at Sea (SOLAS 60), that did not include the tacit acceptance procedure, was amended six times in between 1965 and 1973. Not one of these amendments actually entered into force. Eventually the whole convention was replaced in 1974 by SOLAS 74.

¹¹² For more details on the history of the tacit acceptance procedure in the IMO see Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' *U.S.F. Maritime Law Journal* 1998-1999 299 at 305 ff.; A.O. Adede 'Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience' (1976-1977) 17 *Virginia Journal of International Law* 201 at 206 ff..

states to rapidly implement the amendments in to national law. This rapid implementation causes inter alia high costs for the member states. Especially the developing countries that are the ones that control the entry in to force of convention struggle to raise that money.¹¹³

(ii) Using the tacit acceptance procedure

One way to at least accelerate the amendment procedures of the IMO is the tacit acceptance procedure. Since 1972 IMO conventions provide the tacit acceptance procedure regularly.¹¹⁴ Nowadays it was adopted for the main part of IMO conventions.¹¹⁵

By way of the tacit acceptance procedure an amendment enters into force at a specified time unless before that date, objections to the amendment are received from a defined number of member states.¹¹⁶ Requirements for objections, time limits for entry into force and the established blocking minority are specified in the convention in question.¹¹⁷ Therefore the diplomatic conference working on a new convention has discretion to include the tacit acceptance procedure in to the convention or not. Consequently it depends on each convention, if the tacit acceptance procedure is applicable for its amendments and in case the procedure is applicable what its requirements are. Conventions that can be amended by way of the tacit acceptance procedure give the member states a period of time, usually the minimum is one year, in which they can reject or accept the amendment. Only the member states that reject the amendment are requested to voice their opinion.¹¹⁸ The contracting states are allowed to opt-out of the amendment. However, the member states can only exercise their right to opt-out before an amendment is deemed accepted.¹¹⁹ Once the amendment is deemed accepted, it is not necessary to resubmit the amendment to every contracting state as it would be under the explicit acceptance procedure.¹²⁰

¹¹³ Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 331.

¹¹⁴ Thomas S. Busha 'The IMO Conventions' (1986) 6 *Ocean Yearbook* 160 at 167.

¹¹⁵ Oya Z. Özçayir *Port State Control* 50.

¹¹⁶ A.O. Adede 'Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience' (1976-1977) 17 *Virginia Journal of International Law* 201 at 207.

¹¹⁷ A.O. Adede 'Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience' (1976-1977) 17 *Virginia Journal of International Law* 201 at 206, 214.

¹¹⁸ Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 202.

¹¹⁹ Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 309.

¹²⁰ A.O. Adede 'Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience' (1976-1977) 17 *Virginia Journal of International Law* 201 at 206.

The tacit acceptance procedure helps the IMO to keep pace with the often rapid technical and ecological changes.¹²¹ By means of the tacit acceptance procedure amendments often take less than 18 months.¹²² The tacit acceptance procedure not only speeds up the procedure, it also brings an element of certainty in to the amendment process.¹²³ With the explicit procedure member states could not predict when an amendment would enter into force, whereas with the tacit acceptance procedure everyone involved in the proceedings knows exactly when the amendment will enter into force. Member states can better prepare for the implementation of the amendments in to national law.¹²⁴ However, the tacit acceptance procedure also bears the danger of amendments entering into force without the awareness of the maritime legal community:¹²⁵ The adoption procedure does not require a diplomatic conference and only member states rejecting the amendment are asked to voice their opinion.¹²⁶ Therefore the IMO member states have to pay special attention to the IMO proceedings so that they do not miss out on an amendment.

(iii) Legality of the tacit acceptance procedure under customary international law

A member state that stays silent on the matter is considered to have accepted the amendment under the tacit acceptance procedure.¹²⁷ The tacit acceptance procedure thereby generates a binding effect without the expressed consent of the member states. If the requirements for objection under the convention in question are not fulfilled by the specified date, all contracting parties, including the objecting ones, become automatically bound.¹²⁸ One could therefore argue that a member state that is bound without its explicit consent was denied the 'discretionary use of its treaty-making powers'¹²⁹. Nevertheless, the tacit acceptance procedure does not violate the principle of the sovereignty of States. The contracting states consented when concluding the respective IMO convention to the deemed acceptance and the binding

¹²¹ Compare Oya Z. Özçayir *Port State Control* 50.

¹²² Christoph Hinz *50 Jahre Vereinte Nationen – Tätigkeit und Wirken der Internationalen Seeschiffsorganisation (IMO)* 18; the IMO even states that the procedure often takes only one year: *IMO FAQs* available at <http://www.imo.org/About/Pages/FAQs.aspx#12>, last visited 13 June 2014.

¹²³ Oya Z. Özçayir *Port State Control* 50.

¹²⁴ Oya Z. Özçayir *Port State Control* 50.

¹²⁵ F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) *57 Tulane Law Review* 1208 at 1236.

¹²⁶ F. L. Wiswall 'Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) *57 Tulane Law Review* 1208 at 1227; Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) *35 Marine Policy* 201 at 202.

¹²⁷ Compare e.g. Art. VIII SOLAS 74 and Art. 16 (2) (i) MARPOL; Oya Z. Özçayir *Port State Control* 48.

¹²⁸ A.O. Adede 'Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience' (1976-1977) *17 Virginia Journal of International Law* 201 at 207.

¹²⁹ A.O. Adede 'Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience' (1976-1977) *17 Virginia Journal of International Law* 201 at 207.

effect generated by the tacit acceptance procedure.¹³⁰ According to Articles 11, 39 Vienna convention it is to be presumed that member states consented to the amendment. Therefore, contrary to Article 34 Vienna convention the tacit acceptance procedure can generate a binding effect on the member states without their expressed consent.

Furthermore, contracting parties have the option to opt-out of the amendment. Therefore they are still empowered to the discretionary use of their treaty-making powers.

(iv) Conclusion

The tacit acceptance procedure is a useful tool to speed up the IMO's decision-making process. Amendments that normally would take years to enter into force can do so with the tacit acceptance procedure in one to two years. Thereby the IMO is able to keep pace with the permanent changing technical realities. Furthermore, states can better prepare for the entry into force of amendments, because they know the exact date the amendment will enter into force. Since the IMO already did the 'ground work' regarding security on board of ships, protection of the marine environment and liability regulations, the tacit acceptance procedure can help keeping the existing conventions up to date.

However, although the ground work is done, the use of the oceans is developing fast. The IMO needs to be prepared to react adequately and rapidly to new challenges. The tacit acceptance procedure is mostly restricted to technical amendments. It is therefore useful for keeping existing conventions up to date, but not for speeding up the decision-making process for new conventions. It is debatable though, whether it is desirable to widen the scope of the tacit acceptance procedure. The tacit acceptance procedure makes it even more difficult for developing countries to participate in the decision-making process of the IMO. By speeding up the proceedings, the participation in the process and the implication of the amendments in to national law gets even more cost and time consuming than under the expressed acceptance procedure. Furthermore, member states need to pay special attention, not to miss out on new developments. Therefore, the tacit acceptance procedure should be included for amendments proceedings in as many conventions as possible. However, the application of the procedure should stay limited to technical amendments.

¹³⁰ Rainer Lagoni 'Die Internationale Seeschiffahrts-Organisation (IMO) als Rechtssetzungsorgan' 50; Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 307 f.; A.O. Adede 'Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience' (1976-1977) 17 *Virginia Journal of International Law* 201 at 202 f..

(f) Enforcement powers of the IMO

Enforcement 'entails the direct and immediate bringing into force of rules by states to compel "compliance" on the part of target actors'.¹³¹ Enforcement includes the application of consequences such as sanctions and penalties for non-compliance.¹³² The IMO itself has no enforcement powers. The enforcement of IMO conventions depends upon the governments of member states.¹³³ Generally the member states enforce the conventions concerning their own ships, therefore the vessels flying their flag. They set the punishments for offences where applicable. Furthermore, member states have certain limited powers as port states or coastal states regarding the vessels of other states. The enforcement powers of the member states as flag states, port or coastal states are determined in the respective convention.

(g) Can the IMO be called a legislator?

Legislation is 'the process of making or enacting a positive law in written form, according to some type of formal procedure, by a branch of government constituted to perform this process'.¹³⁴ A legislator is 'one who makes laws within a given jurisdiction'.¹³⁵ Without further defining the term 'law' it can be established that the IMO cannot be called a legislator. The IMO does not make law, the IMO supports states in the elaboration of law.¹³⁶ Although the organization gained more power over the years, it was found as a consultative body.¹³⁷ The IMO only prepares draft conventions. The member states of the IMO use these draft conventions as a basis for the development of national law. To become legally binding, the conventions need to be enacted in to the respective member states national law. The actual decision to implement the conventions in to law lies with the member states. Therefore, the IMO does not make law. The IMO makes decisions regarding new conventions. In the following the procedure of elaborating new conventions will therefore be called decision-making process.

¹³¹ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 230.

¹³² Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 321.

¹³³ Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 202.

¹³⁴ Bryan A. Garner (Edt.) *Black's Law Dictionary* 910.

¹³⁵ Bryan A. Garner (Edt.) *Black's Law Dictionary* 911.

¹³⁶ Olav F. Knudsen and Björn Hassler ('IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 202) describe the decision-making process of the IMO as the 'legislative process at the IMO'; F. L. Wiswall ('Uniformity In Maritime Law: The Domestic Impact Of International Maritime Regulation' (1983) 57 *Tulane Law Review* 1208 at 1210) calls the IMO a quasi-legislative body.

¹³⁷ Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 260.

The only circumstances under which one could think of calling the IMO a legislator would be the tacit acceptance procedure. Without the expressed objections of member states, amendments can enter in to force automatically via the tacit acceptance procedure. Therefore, one could assume that the IMO is making law via this procedure, However, the tacit acceptance procedure is mainly reserved for technical amendments. The IMO cannot establish a new convention via the tacit acceptance procedure. Therefore, the actual process of legislation, the development of the conventions is still performed by means of the 'classical' explicit decision-making process of the IMO. Although the tacit acceptance procedure widens the IMO's power, the IMO can still not be called a legislator.

V. Participation of developing countries in the decision-making process of the IMO

(a) Introduction

Over the years the IMO changed from an organization that was found and dominated by developed countries to an organization, where the developed countries are outnumbered by the developing ones.¹³⁸ However, the organization and its structure could not keep up with this development. The IMO mainly remained the organization that was found by the developed countries in the 1950s. The most important language is still English. *Gaskell* even describes the usage of English as the main language in the IMO as 'Cultural Imperialism'.¹³⁹ Furthermore, the IMOs structure still serves the developed countries that have the financial means and are well skilled and strong in personal-power.

In the following it will be shown where the IMOs structure and decision-making process mainly disadvantages developing countries. The categories Structure of the IMO, Language, Decision-making process and Developing countries and the tacit acceptance procedure overlap in some areas and cannot present completely the influence developing countries have on the work of the IMO. However, they give an impression of the difficulties developing countries face and reveal approaches for possible change.

(b) Structure of the IMO

The structure of the IMO has hardly changed since its formation in the 1950s. Nevertheless, some improvements to the categories and number of Council members have been made.

¹³⁸ Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 331; Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 262 f..

¹³⁹ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 193.

These changes were expressly made by the IMO to better represent developing countries in the organization.¹⁴⁰ Therefore, the number of members of the Council was increased to 40. For category C geographical representation is taken into account, when appointing new Council members.

However, it is not enough to represent the views of developing countries only in category C.¹⁴¹ In particular, the increase of members under category C does not guarantee Council representation for the developing member states of the IMO that represent the major ship registries and therefore have to pay the major contributions to the IMO's budget. Category A and category B guarantee seats for the member states with the largest interest in international shipping services and seaborne trade. To better ensure that the major ship registers will be represented in the Council the IMO should guarantee at least some seats for the member states with the largest ship registries.¹⁴²

(c) Language

English is the de facto working language of the IMO.¹⁴³ A lot of the work of the IMO especially on diplomatic conferences takes place through informal networking that is mainly held in English.¹⁴⁴ When discussing draft conventions on diplomatic conferences, most delegates refer to the English draft of a provision.¹⁴⁵ Delegations that are not fluent in English face problems in participating in the work of the IMO. Although simultaneous translations at formal sessions take place, they are often not fast enough to follow up on short term changes. Furthermore, the translations are, by reason of time pressure, often not accurate enough.¹⁴⁶ Moreover, informal meetings and discussions mainly take place without translations. Therefore, delegations with English as a first language can possess a considerable advantage regarding their influence on the outcome of discussions and

¹⁴⁰ *IMO FAQs - 'IMO used to be called "the rich man's club". Has it changed at all?'* available at <http://www.imo.org/About/Pages/FAQs.aspx#12>.

¹⁴¹ Compare Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 331.

¹⁴² Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 375.

¹⁴³ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 191.

¹⁴⁴ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 191.

¹⁴⁵ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 191 f..

¹⁴⁶ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 192 f..

negotiations.¹⁴⁷ One method of the IMO to address these language difficulties is to use overhead data projectors at conferences: At the 1999 arrest diplomatic conference an overhead data projector was used to 'simultaneous display draft texts or amendments proposed in oral interventions.'¹⁴⁸ Thereby, although English was the language used, it was easier for non-native English speakers to follow the discussion while seeing the proposal in written form.

(d) Decision-making process

The decision-making process of the IMO puts the developing countries in disadvantage in some regards. The diplomatic conferences that are set up to discuss draft conventions often delegate tasks to working groups. These working groups meet outside the plenary and help to speed up decisions. Often the plenum does not discuss the wording of the legal instrument worked out by the working group anymore but simply votes on the outcome. Due to the tight time schedule of the diplomatic conference numerous working groups take place at the same time. In order to speed up and simplify proceedings, the working groups often meet without translation facilities. It is particularly difficult for delegations from developing countries that often lack man-power to participate in all of these working groups.¹⁴⁹ Developing countries simply do not have the means to send large delegations to diplomatic conferences.¹⁵⁰ The flight tickets to London often discourage governments of developing countries from sending a delegation to the IMO. They therefore either keep delegations really small, or instead of sending a professional delegation simply send representatives from their embassy in London.¹⁵¹ These representatives seldom come with expertise in the shipping law field. Furthermore, the members of the embassy have often only a slight idea of the conventions they are supposed to comment on.

It is impossible for small delegations to participate in all the working groups taking place at the same time. Moreover, the lack of language skills often leads to the problem that especially with regard to complex technical discussions delegates from developing countries cannot keep up. The IMO established guidelines that prohibit the holding of more than five

¹⁴⁷ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 193.

¹⁴⁸ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 193.

¹⁴⁹ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 101.

¹⁵⁰ Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 328 f..

¹⁵¹ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 99.

group meetings at a time.¹⁵² However, these guidelines do not stop the groups from meeting outside of the sessions.¹⁵³ Furthermore, developing countries often lack the expertise to participate in the discussions that take place at diplomatic conferences. This problem is being reinforced by a lack of financial resources that leads to the result that members of the embassy of the member state in London participate in the conference.

(e) Developing countries and the tacit acceptance procedure

The tacit acceptance procedure relies on the speedy acting of the governments of contracting parties. A delay in governmental decision-making can lead to a deemed acceptance and therefore the entry into force of an amendment. This procedure poses particular problems for developing countries.¹⁵⁴ The technical amendments to IMO conventions are often highly complex. Furthermore, they often require the performance of certain acts and the take-over of certain obligations. To evaluate the actual meaning and the changes imposed by an amendment technical expertise, manpower and financial resources are needed.¹⁵⁵ For developing countries it is often impossible to make these resources available in the short period of time that the convention in question offers for objections. Furthermore, the frequency of amendments coming into force often overstretches the capacities of developing countries.¹⁵⁶

VI. Conclusion

The IMO cannot be called a legislator. Generally, a legislator is defined as a person that makes and enacts laws.¹⁵⁷ The IMO only works out draft conventions. To become legally binding, the conventions need to be enacted in to national law. Therefore the actual decision to implement the conventions in to law lies with the member states. This does not make the IMO a 'toothless tiger'¹⁵⁸. The IMO is still a main participant of the decision-making process. However, the IMO is a 'toothless tiger' regarding its enforcement powers. Although the IMO is one of the main participants in the decision-making process, it has no executive powers or

¹⁵² *Guidelines on the Organization and Method of Work of the Maritime Safety Committee and the Marine Environment Protection Committee and their subsidiary Bodies* MSC-MEPC 1/Circ. 2 27 May 2008. p. 12.

¹⁵³ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 101.

¹⁵⁴ A.O. Adede 'Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience' (1976-1977) 17 *Virginia Journal of International Law* 201 at 208.

¹⁵⁵ A.O. Adede 'Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience' (1976-1977) 17 *Virginia Journal of International Law* 201 at 208.

¹⁵⁶ Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 310.

¹⁵⁷ Bryan A. Garner (Edt.) *Black's Law Dictionary* 911.

¹⁵⁸ Compare Uwe Jenisch 'The European Union as an Actor in the Law of the Sea: The Emergence of Regionalism in Maritime Safety, Transportation and Ports' (2005) 48 *German Yearbook of International Law* 223 at 259.

enforcement mandate.¹⁵⁹ Although the member states have to enact the conventions in to national law according to international law, the IMO has no means to penalize states that are not following up on their duty.¹⁶⁰ Regarding the question of enforcement of decisions, the IMO is therefore inefficient.

Regarding time efficiency, the IMO cannot be called efficient either. Often IMO conventions enter into force years after their adoption.¹⁶¹ This is on the one hand due to the explicit acceptance procedure of the IMO. On the other hands it is due in great part to the member states that take a long time to implement IMO conventions in to their national legislation. The decision-making process of the IMO is therefore often too slow to serve the purpose the IMO was founded for according to Article 1 (a) IMO Convention. Too often the IMO cannot respond effectively to current problems. Conventions are often already out of date when they enter into force. Therefore the danger of unilateral actions of states or regional organization like the European Union (EU) increases.¹⁶² Furthermore, some states tend to get impatient and implement conventions in to national law before they actually entered in to force.¹⁶³ Thereby endangering the uniform rule-application the IMO is aiming for. The IMO was founded to find international and multilateral solutions for global problems. However, the danger of fragmentation of maritime law due to the unilateral or hasty actions of states is still very present.

Furthermore, developing countries cannot participate sufficiently in the IMOs decision-making process. This is evident in particular on diplomatic conferences: Numerous working groups are working parallel on new conventions, fast decisions acquire a high level of expertise especially in technical aspects of shipping and the main part of the work is done in English. The IMOs need for a speedy decision-making process clashes with the developed countries lack of man-power, expertise and financial resources. This is also reflected in the problems developing countries face with the tacit acceptance procedure. The insufficient participation of developing countries in the decision-making process of the IMO has an adverse effect on the efficiency of the IMOs decision-making: The decision-making process does not receive enough input from developing countries. This does very likely not help to

¹⁵⁹ Veronica Frank *The European Community and Marine Environmental Protection in the International Law of the Sea* 208.

¹⁶⁰ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 98.

¹⁶¹ Compare Oya Z. Özçayir *Port State Control* 48 f..

¹⁶² Compare Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 347.

¹⁶³ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 353.

keep developing countries interested in the work of the IMO. Therefore, an urgent need to involve developing countries stronger in the decision-making of the IMO exists. Developing countries represent the largest ship registries in the world. They are the ones that most IMO conventions address as flag states. The flag states are supposed to shoulder the main responsibility to enforce IMO regulations. Insufficient participation in the decision-making process and structural deficiencies in the organization e.g. in the membership of the Council, that put developing countries at a disadvantage will neither help the IMO to fulfil its purpose, nor will they make the IMOs decision-making more efficient.

Chapter 3: Ways to improve the effectiveness of the IMOs decision-making process

I. Introduction

The IMOs decision-making process is inefficient. Different ways are being discussed to address this inefficiency regarding time-inefficiency and the lack of enforcement powers of the IMO.¹⁶⁴ In the following seven proposals will be analysed critically to show what the effect of each respective proposal would be.¹⁶⁵ The seven proposals are namely: Port State Control, lower the entry in to force threshold for new conventions, strengthening the enforcement powers of the IMO, re-flagging to developed states and to open up the rich man's club for developing countries. It will be shown how the proposals can improve the IMOs decision-making and what effect they have on the participation of developed countries in the process.

II. Port State Control

The first proposal intends to give more power to port states and further strengthen instruments of port state control.¹⁶⁶ Although this does not enhance time-efficiency of the IMOs decision-making process, it improves the enforcement of conventions.

¹⁶⁴ Compare Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 331 ff.; Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 347 ff.; Craig H. Allen 'Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention' (2009) 10 *San Diego International Law Journal* 265 at 267 f..

¹⁶⁵ For more proposals on how to improve the IMOs decision-making process see Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 347 ff..

¹⁶⁶ Compare Churchill/Lowe *The Law of the Sea* 217; A.V. Lowe 'The Enforcement of Marine Pollution Regulations' (1975) 12 *San Diego Law Review* 624 at 639 f..

(a) Port State Control Regimes

Generally the enforcement of IMO conventions lies foremost with the flag states.¹⁶⁷ Port state control only serves as a substitute in case flag states fail to comply with their responsibilities.¹⁶⁸ However, the enforcement of the international rules by the flag states often suffers from serious shortcomings. To overcome these shortcomings and to exercise their own powers more effectively, port states in different regions of the world have combined their forces under regional port state control (PSC) regimes.¹⁶⁹ PSC is therefore often addressed as the 'safety net' to prevent substandard vessels from shipping on the high seas.¹⁷⁰ Port State Control Regimes are not established by international contracts, but by means of an administrative agreement between the competent authorities in the respective member states, namely Memorandums of Understanding (MoU).¹⁷¹ Therefore the MoUs are not binding on the states but provide merely soft law.¹⁷² Originating from the first MoU, the Paris MoU for Western Europe,¹⁷³ today nine PSC regimes exist worldwide.¹⁷⁴ The functions of a PSC regime can be explained best on the example of the Paris MoU. The purpose of the MoU is to harmonise port state control activities.¹⁷⁵ Thereby, the PSC regimes try to increase maritime safety, to protect the marine environment and to improve living and working conditions on board of ships.¹⁷⁶ The Paris MoU does not create new rules and regulations for its member states to enforce, but standardizes the national port state controls.¹⁷⁷ The PSC Regime assists the member states in preventing double inspections and to make inspections on vessels more effective. The Paris MoU therefore establishes the international conventions by means of

¹⁶⁷ Oya Z. Özçayir *Port State Control* 94.

¹⁶⁸ Compare Oya Z. Özçayir *Port State Control* 94.

¹⁶⁹ For a more critical analyses of the PSC regimes compare Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 204 ff.; Craig H. Allen 'Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention' (2009) 10 *San Diego International Law Journal* 265 at 311 f..

¹⁷⁰ Oya Z. Özçayir *Port State Control* 91; Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 203.

¹⁷¹ Compare Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 90.

¹⁷² George C. Kasoulides 'Port State Control and Jurisdiction: Evolution of the Port State Regime' 143 f..

¹⁷³ For more information on the Paris MoU see John Hare 'Port State Control: Strong Medicine To Cure A Sick Industry' (1997) 26 *Georgia Journal of International and Comparative Law* 571 at 578 ff..

¹⁷⁴ Paris Memorandum of Understanding (MOU) (1982); Vina del Mar MOU (1992); Tokyo MOU (1993); Caribbean MOU (1996); Mediterranean MOU (1997); Indian Ocean MOU (1998); Abuja MOU (1999); Black Sea MOU (2000), Riyadh MoU (2005); furthermore, the only purely national port state control organization, the U.S. Coast Guard.

¹⁷⁵ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 90.

¹⁷⁶ Compare the preamble of the *Paris MoU* available at

<https://www.parismou.org/system/files/Paris%20MoU%2C%20incl%2037th%20amendment%20%28final%29.pdf>.

¹⁷⁷ George C. Kasoulides 'Port State Control and Jurisdiction: Evolution of the Port State Regime' 186.

which the controls on board are being carried out. Among these international conventions one can find the most important IMO conventions STCW, MARPOL and SOLAS. Furthermore, the competent authorities agree on how the inspections on board of the vessel are conducted and how the officials applying the inspections have to be trained. To transmit the results to the other member states, under the Paris MoU a system was created to exchange information. Under the PSC regime the national authorities can inspect documentation and physical conditions and where necessary even detain vessels until insufficiencies are remedied.¹⁷⁸

Member states control each other and third states through the PSC. Vessels that do not comply with IMO conventions can be detained by port state authorities. Therefore, states develop an economical interest in implementing IMO conventions.¹⁷⁹ PSC Regimes target in particular developed countries that have open registries.¹⁸⁰ PSC regimes frequently address vessels that sail under flags of convenience. Ships that are registered under flags of convenience are most commonly detained.¹⁸¹ Therefore a strong port state control puts additional pressure on the flag states to enforce IMO conventions. Furthermore, the harmonization of port state controls prevents a 'port-shopping' in between regions.¹⁸² And PSC regimes increase 'the number of prosecutors' and can thereby facilitate the enforcement of IMO conventions.¹⁸³

(b) The IMO and Port State Control Regimes

The IMO defines Port State Control as 'the inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules.'¹⁸⁴ Furthermore, the IMO calls PSC 'a "safety net" to catch what the flag state implementation system

¹⁷⁸ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 90.

¹⁷⁹ Compare Craig H. Allen 'Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention' (2009) 10 *San Diego International Law Journal* 265 at 305 f.; Heike Hoppe 'The work of the Subcommittee on Flag State Implementation' *IMO News* (1999) 21 at 24 f..

¹⁸⁰ Compare John Hare 'Port State Control: Strong Medicine To Cure A Sick Industry' (1997) 26 *Georgia Journal of International and Comparative Law* 571 at 579.

¹⁸¹ Oya Z. Özçayir *Port State Control* 26 f..

¹⁸² Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 205; Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 94.

¹⁸³ A.V. Lowe 'The Enforcement of Marine Pollution Regulations' (1975) 12 *San Diego Law Review* 624 at 642 f..

¹⁸⁴ *IMO Port State Control* available at

<http://www.imo.org/OurWork/Safety/Implementation/Pages/PortStateControl.aspx>.

misses.¹⁸⁵ The IMO encouraged the formation of regional PSC regimes. The IMO conventions give power to the port states to control the enforcement of the conventions.¹⁸⁶ Many of the conventions include provisions for vessels to be inspected by the port state when they enter into a foreign port to ensure that they fulfil IMO conditions. In addition to the conventions the IMO passes resolutions that 'coupled with the international conventions, impose obligations on port states to exercise the controls envisaged by the resolutions.'¹⁸⁷ The IMO's port state control measures can be found in Resolution A 787 and its annexures.¹⁸⁸ The Resolution provides basic guidance on the conduct of PSC procedures by setting guidelines for inspections, detentions and reporting procedures.¹⁸⁹ The IMO plays an active role in supporting the cooperation between the regional PSC regimes. The organization inter alia holds workshops for PSC MoU Secretaries and Database Managers. These workshops are organized and financed by the Technical Co-operation Fund. The purpose of the workshops is to help coordinate and harmonize the activities of the regional PSC regimes by establishing a platform for co-operation and at the same time a forum for the people involved to meet and exchange ideas and experiences.

The IMO should strengthen its efforts to harmonize and co-operate the regional PSC regimes even more. The organization should give even more power to the port states. Furthermore, the information exchange in between the regional PSC regimes needs to be enhanced. Information Databases need to be 'accurate, comprehensive and frequently updated'.¹⁹⁰ On the one hand this helps to not delete vessels by inspecting them in each and every port. On the other hand other port states can be forewarned that a substandard ship is entering their port.¹⁹¹ Furthermore, a better information exchange leads to a fairer and more uniform enforcement of port state control. Vessels that fly flags of convenience would not be inspected repeatedly just because they are registered under an open registry, if the regional PSC regimes exchange data achieved in their respective inspections. The IMO already requires member states to

¹⁸⁵ Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 203.

¹⁸⁶ Many IMO conventions demand that vessels carry certificates on board to prove that the ships have been inspected and have been found to fulfil the required standards (Oya Z. Özçayir *Port State Control* 93).

¹⁸⁷ John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 347.

¹⁸⁸ Resolution A 787 (19) Procedures for Port State Control; for more information on Resolutions A 787 (19) see Oya Z. Özçayir *Port State Control* 106 ff..

¹⁸⁹ Oya Z. Özçayir *Port State Control* 106 f..

¹⁹⁰ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 368.

¹⁹¹ John Hare 'Port State Control: Strong Medicine To Cure A Sick Industry' (1997) 26 *Georgia Journal of International and Comparative Law* 571 at 577.

transfer information about their port state controls to the organization.¹⁹² However, the member states do not really follow up on this demand.¹⁹³ Most developing member states have not sent a single report on PSC to the IMO.¹⁹⁴ Member states complain that the IMO does not use the reports it receives in a useful way.¹⁹⁵ The information gathered are scarcely analysed and handed back to member states by the organization.¹⁹⁶ The IMO already started initiatives to overcome these shortcomings, namely the IMOs International Ship Information Database (**ISID**) and the Global Integrated Shipping Information System (**GISIS**).¹⁹⁷ However, the IMO should improve the system of information exchange in between PSC regimes.¹⁹⁸ Useful analyses of the collected data could be an incentive for member states to comply with their duty to transfer information to the IMO. The EU established the European Quality Shipping Information (**Equasis**), an electronic information database to exchange information between regional PSC regimes.¹⁹⁹ The system makes use of the latest internet technology. The IMO could co-ordinate its efforts with the EU. Furthermore, the IMO should try to strengthen the information exchange between port and flag states. Only if the flag states know which of the ships flying their flag got detained and why, can they keep up with their responsibilities as flag states. Furthermore, the IMO should try to support the PSC regimes in their efforts to harmonize standards in between the 9 regional regimes. The co-operation in between the different regional PSC regimes should be strengthened even more.²⁰⁰

¹⁹² Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 367.

¹⁹³ Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 324; Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 246, 269 f..

¹⁹⁴ Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 324.

¹⁹⁵ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 373.

¹⁹⁶ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 281.

¹⁹⁷ Craig H. Allen 'Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention' (2009) 10 *San Diego International Law Journal* 265 at 310 f..

¹⁹⁸ In 2003 New Zealand proposed that the IMO should analyse the annual reports generated by the PSC regimes in depth to identify operational and policy similarities and differences to further unify the PSC inspections (New Zealand, FSI Doc. 11/6/2 (2003)). Thereby measures or recommendations to standardize and co-ordinate PSC even better could be worked out. For more information compare SUB-COMMITTEE ON FLAG STATE IMPLEMENTATION 13th session Agenda item 6 (FSI 13/6/4) 23 December 2004 *REGIONAL CO-OPERATION ON PORT STATE CONTROL-Harmonization and co-ordination of port State control activities* 5.

¹⁹⁹ For more information on Equasis compare Oya Z. Özçayır *Port State Control* 281 ff.; Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 368; Craig H. Allen 'Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention' (2009) 10 *San Diego International Law Journal* 265 at 310 f..

²⁰⁰ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 368 f..

(c) Conclusion

The port states generally have to bear the costs for PSC controls. Developing countries often lack the financial means to comply proper PSC inspections.²⁰¹ However, the PSC inspections under the existing PSC regimes strengthen the implementation and enforcement willingness of member states, including developing member states with open registries. The PSC control is a significant tool to improve the enforcement of IMO conventions.²⁰² It constitutes a safety net that helps to reduce the number of substandard vessels. The PSC inspections can put an economic burden on the flag states to prevent their ships from being detained by improving the compliance with IMO conventions. In this regard the PSC regimes already strengthen the efficiency of the IMO. They can strengthen the IMO's efficiency even more, if they would receive more powers and if the information exchange in between the various regimes and in between flag and port states would be improved.

However, giving more power to port states and improving the information exchange in between regional PSC regimes and port and flag states does not address the structural problems the IMO faces and cannot speed up decision-making proceedings. Developing countries cannot participate better within the IMOs decision-making process because of an improved port state control. Nevertheless, combined with other means to improve the IMOs efficiency, strengthening the PSC regimes by improving their information exchange and giving them more power is a useful tool to enhance IMOs efficiency at least in part.

III. Tacit acceptance procedure

A way to accelerate the IMOs decision-making process could be to further develop the application of the tacit acceptance procedure. The tacit acceptance procedure does not only speed up proceedings, but member states can also better prepare for the implementation of conventions, because they know exactly when an amendment enters into force.²⁰³ The tacit acceptance procedure 'improves the possibilities to amend existing maritime conventions in accordance with the rapid technical evolution in the field without having to await formal acceptance by all States Parties to a convention.'²⁰⁴ The IMO has already done the 'ground work' in maritime law with the legal instruments put in place so far. The main areas are covered so

²⁰¹ Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 268 f..

²⁰² Craig H. Allen 'Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention' (2009) 10 *San Diego International Law Journal* 265 at 306, 309.

²⁰³ Oya Z. Özçayir *Port State Control* 50.

²⁰⁴ Wolfgang Graf Vitzthum 'Schiffsicherheit: Die EG als potentieller Durchsetzungsdegen der IMO' (2002) 62 *Zeitschrift für ausländisches öffentliches Recht* 163 at 179.

that it is generally sufficient to continually adapt the conventions to the ever changing circumstances. Therefore, the tacit acceptance procedure was a huge step for the IMO to accelerate its decision-making process.

However, the tacit acceptance procedure is generally only applicable for technical amendments. Furthermore, the tacit acceptance procedure can only help to improve the time-efficiency of the IMO, but it has no impact on the enforcement of the conventions and the participation of developing countries in the decision-making process of the IMO. On the contrary, the accelerated procedure constituted by the tacit acceptance procedure makes it even more difficult for developing countries to keep pace with the proceedings because of the additional financial and logistical pressure caused by the tacit acceptance procedure. However, well-educated personal and financial and technical support can help overcome these shortcomings, so that the tacit acceptance procedure shall further on be used for technical amendments.

IV. Lowering thresholds for new conventions entry into force

Another way to speed up the IMOs decision-making could be to let conventions enter in to force faster. In order to meet this objective the entry in to force threshold for new conventions must be lowered.²⁰⁵ If the tonnage requirement in conventions for an entry in to force of the conventions would be lowered, conventions could enter in to force faster. Especially environmentalists ask for this change of the entry in to force mechanisms.²⁰⁶ Environmentalists are afraid, that new conventions to protect the marine environment will not enter in to force in time. The decision, if conventions enter in to force lies to a large extent in the hands of developing states. They are the ones that represent the largest shipping registries worldwide. However, environmental matters are mainly not the most pressing concern of developing states.

Some conventions already deviate from the established procedure and lower the entry in to force threshold of conventions: the 1990 International Convention on Oil Pollution Preparedness, Response and Co-Operation (OPCR Convention) required for its entry in to force the acceptance of 15 IMO member states. Thereby the tonnage these 15 member states were holding was not taken into account for an entry in to force.²⁰⁷ Furthermore, the

²⁰⁵ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 352.

²⁰⁶ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 352.

²⁰⁷ Article 15 (1) 1990 OPCR Convention: 'This Convention shall enter into force twelve months after the date on which not less than fifteen States have either signed it without reservation as to ratification, acceptance or

International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER) that entered into force in 2001 reduced the requirements for tonnage minimum.²⁰⁸ The prerequisite for entry in to force of BUNKER was according to Article 15 BUNKER the acceptance of 'five States each with ships whose combined gross tonnage is not less than 1 million'. These prerequisites can be easily fulfilled by many Western European countries or small marine powers such as Australia.²⁰⁹ In 2001 the global shipping tonnage consisted of some 650 million gross tons.²¹⁰ The prerequisite for entry in to force in the BUNKER thereby leads to the result that the conventions could enter in to force with the acceptance of less than 1 % of global shipping tonnage.²¹¹

Therefore, IMOs decision-making process could accelerate by reducing the threshold for entry in to force of new conventions and reducing the requirements regarding tonnage. However, this would happen at the expense of the open registry states.²¹² Therefore the reform would be 'fundamentally undemocratic'.²¹³ Moreover, it seems opportunistic to change the requirement of entry in to force as soon as the outcome can no longer be controlled by the developed states but lies in the hands of developing countries.²¹⁴ By changing the thresholds, the developed countries would take away the one control mechanism and strong influence the open registry states and therefore at least some of the developing countries have on IMOs decision-making process. Furthermore, it would probably damage IMOs credibility.²¹⁵ Moreover, the entry in to force prerequisites of IMO conventions are supposed to implement the respective convention as widely as possible.²¹⁶ By lowering the threshold a convention can be brought in to force with the participation of only a few member states. Therefore its universality is not guaranteed and the procedure would detract from IMOs 'spirit of

approval or have deposited the requisite instruments of ratification, acceptance, approval or accession in accordance with article 15.'

²⁰⁸ Article 14 (1) BUNKER: 'This Convention shall enter into force one year following the date on which eighteen States, including five States each with ships whose combined gross tonnage is not less than 1 million, have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.'

²⁰⁹ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 352.

²¹⁰ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 352.

²¹¹ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 352.

²¹² Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 352.

²¹³ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 353.

²¹⁴ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 353.

²¹⁵ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 353.

²¹⁶ Lei Shi 'Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law' (1998-1999) *U.S.F. Maritime Law Journal* 299 at 313.

consensus'.²¹⁷ The convention could only be enforced via port state controls of a limited number of states.

The change of the entry in to force threshold of IMO conventions could therefore be a way to speed-up IMO conventions. However, it cannot be a drastic change to minimum or not existent tonnage requirements. Although, a drastic reduction of the tonnage requirement would probably speed up proceeding, it would do so at the cost of the open flag registry states. Therefore the thresholds could be lowered e.g. from 50 % to 30 % for some conventions in order to decrease the speed of entry in to force whilst ensuring that the open registry states still have enough say in the entry in to force.

V. Improve the implementation willingness of states

One of the main reasons why it takes so long for IMO conventions to enter into force is the lack of implementation willingness of the member states. To improve the implementation willingness of the member states the IMO could on the one hand try to assist the member states in establishing the conditions and entities needed to implement IMO conventions. On the other hand, the IMO could strengthen its cooperation with the EU.

A reason for the implementation unwillingness of the member states is often a lack of legal and technical expertise on how to implement complex conventions in to their respective national law. The IMO tries to address the implementation unwillingness of states by assisting the member states with technical support via a technical co-operation program. Furthermore, three international maritime training centres closely connected with the IMO have been established.²¹⁸ The training centres and the technical cooperation program are supposed to help train and assist professionals from member states in order to give them the necessary technical and legal knowledge to be able to implement IMO conventions in to their respective national law. These centres and programs can assist developing countries in particular to better participate in the IMOs decision-making process, while at the same time supporting the implementation willingness of the member states in general. The IMO should try to coordinate the work of the training centres and the technical cooperation program, in

²¹⁷ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 354.

²¹⁸ For more details regarding the technical cooperation system and the three training centres see: VIII. Open up the rich man's club for developing countries.

order to prevent the programs from overlapping and in order to follow up on and monitor the professionals that have already accomplished a program.²¹⁹

Although unilateral acts of the EU undermine the efforts of the IMO to achieve a uniform rule-application, the EU could still be of help regarding the implementation unwillingness of the member states.²²⁰ All 28 member states of the EU are member states of the IMO. In contrast to the IMO, the EU possesses a powerful enforcement apparatus.²²¹ Therefore by implementing IMO conventions into European Law, the conventions are binding for EU member states. Often the EU incorporates IMO conventions into the European Legal Order by 'duplicating them into EU directives or regulations'.²²² Directives need to be incorporated in to the respective national legal order of the EU member states. The directive sets a time limit for the transfer into the national law of the EU member states. Regulations are directly binding on the EU member states. Any non-compliance by the EU member states can be brought before the European Court of Justice (ECJ).²²³ Therefore the EU can assist the IMO with the implementation and the enforcement of IMO conventions.²²⁴ It could even be helpful to open up the IMO membership for regional economic integration organizations like the EU.²²⁵ On the one hand the EU could speak with one voice in certain areas for all its member states and thereby accelerate proceedings. On the other hand, international treaties signed by the EU become automatically part of the European legal order and therefore become binding on the member states of the EU.²²⁶ Instead of seeing the EU as a threat for the uniform international law system that the IMO tries to establish,²²⁷ the EU can also be seen as a chance for improving the IMOs efficiency.²²⁸ However, although a stronger cooperation of EU and IMO could help with the implementation and enforcement of conventions, it has no effect on the participation of developing countries in the decision-making process of the IMO.

²¹⁹ Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 334.

²²⁰ Compare Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 282.

²²¹ Baris Soyer/ Andrew Tettenborn (Eds.) *Pollution at Sea – Law and Liability* 160.

²²² Baris Soyer/ Andrew Tettenborn (Eds.) *Pollution at Sea – Law and Liability* 160.

²²³ Baris Soyer/ Andrew Tettenborn (Eds.) *Pollution at Sea – Law and Liability* 160.

²²⁴ Wolfgang Graf Vitzthum 'Schiffsicherheit: Die EG als potentieller Durchsetzungsdegen der IMO (2002) 62 *Zeitschrift für ausländisches öffentliches Recht* 163 at 181.

²²⁵ According to Article 4 IMO convention only states can become members of the IMO.

²²⁶ Daniel Thym 'Die völkerrechtlichen Verträge der Europäischen Union' (2006) 66 *Zeitschrift für ausländisches öffentliches Recht* 863 at 900.

²²⁷ Compare Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 281 f..

²²⁸ Compare Wolfgang Graf Vitzthum 'Schiffsicherheit: Die EG als potentieller Durchsetzungsdegen der IMO (2002) 62 *Zeitschrift für ausländisches öffentliches Recht* 163 at 182.

VI. Strengthening the enforcement powers of the IMO

The IMO itself has no enforcement powers. The organization has to rely on the governments of member states to enforce its conventions. The enforcement of conventions is mainly the responsibility of flag states. Developing countries as flag states often do not comply with their responsibilities as flag states in particular because the inspections that are needed are very cost and personal intensive.²²⁹ Therefore by giving enforcement powers to the IMO, the IMO could at least in some instances control the enforcement of its conventions.²³⁰ Although this would take away power from the member states, it would also make the financial burden that comes with these enforcement powers easier to shoulder for the developing countries.

The IMO could very easily start to charge fines from ships that break existing rules.²³¹ This would make rule-breaking expensive for shipowners and therefore unattractive. The cost benefits that shipowners gain from not complying with IMO conventions could be annulled. Furthermore, the IMO has already been given the authority to review the training, examination and certification procedures of Contracting Parties to the STCW via the 1995 amendment to the convention. Governments of member states have to provide relevant data to the MSC. The committee will decide whether or not the member state concerned meets the requirements of the STCW. Thereby, the IMO can supervise and evaluate the performance of member states.²³² Based on this evaluation of performance the IMO publishes a 'white list' of countries that comply with the STCW. The IMO should enhance its enforcement powers within more conventions in this way. However, the STCW protocol initiative 'met with minimal opposition because of the weak bargaining position of the major labour providing states'.²³³ It is questionable, if the IMO can acquire enforcement powers as easily if it is not Bangladesh or the Philippines that loses out on power but developed countries. Furthermore, the IMO has to have the financial and personal means to be able to deal with more enforcement powers.

²²⁹ Compare Veronica Frank *The European Community and Marine Environmental Protection in the International Law of the Sea* 40.

²³⁰ Compare Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 326, 336; Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 206 f..

²³¹ Olav F. Knudsen, Björn Hassler 'IMO legislation and its implementation: Accident risk, vessel deficiencies and national administrative practices' (2011) 35 *Marine Policy* 201 at 206.

²³² Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 370.

²³³ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 370.

VII. Re-flagging to developed states

Reflagging more ships to developed states would probably lead to a better flag state control and therefore to a better enforcement of IMO conventions.²³⁴ Furthermore, it could lead to a faster entry in to force and implementation of conventions.²³⁵ Various developed countries in particular Western European countries try to rebuild their national registries.²³⁶ They try to win shipowners back to their respective national flags by offering favourable regulatory and tonnage tax regimes. For example the German government started a campaign to reflag ships to the German ship registry.²³⁷ Therefore, the costs for flagging a ship out of the German registry have been increased. The German Flag Act has been amended. Ships can only be flagged out of the German registry, if the shipowner either pays a certain amount of money or guarantees training places for German seafarers on board of the flagged-out vessel. German shipowners have to pay in to a solidarity fund to support the shipping industry. The German Federal Ministry of Transport is intensifying campaigns to promote the German flag.²³⁸ However, the main part of worldwide tonnage can still be found in the open registries.²³⁹ The main motivation of a shipowner for registering a ship under a flag of convenience has always been the economic advantage gained by it.²⁴⁰ This motivation cannot be changed easily by developed countries. The shipping industry is still suffering from the economic crisis, open registries offer the possibility of 'cheaper shipping': low taxes or none at all, low requirements regarding labour laws and poor training and safety standards on board of the vessel and low standard registration formalities.²⁴¹

However, reflagging campaigns by Western European countries are not being started to guarantee better flag state compliance or to help enforce conventions to protect the marine environment, but to bring tax income and jobs back to the respective countries. Therefore, reflagging ships does not guarantee an improvement of the speed of entry in to force of IMO

²³⁴ Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 335.

²³⁵ However, it is not guaranteed that re-flagging to developed countries would lead to a faster implementation of conventions. Often the developed countries are the ones that hold up the entry in to force of conventions, compare Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 353 ff..

²³⁶ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 364.

²³⁷ Compare German Federal Ministry of Transport and Digital Infrastructure - *Quality First – German Flag* available at http://www.deutsche-flagge.de/en/german-flag?set_language=en.

²³⁸ Compare German Federal Ministry of Transport and Digital Infrastructure - *Quality First – German Flag* available at http://www.deutsche-flagge.de/en/german-flag?set_language=en.

²³⁹ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 364.

²⁴⁰ Oya Z. Özçayir *Port State Control* 24.

²⁴¹ James Newdigate 'The Attraction of Convenience: The South African Ship Registry Predicament' (2012) 24 *South African Mercantile Law Journal* 194 at 197; Oya Z. Özçayir *Port State Control* 24 f..

conventions. In the past it has often been the developed states that delayed the entry in to force of an IMO convention.²⁴² Furthermore, it seems as if the reflagging to developed states is an attempt to re-establish the 'rich man's club' which existed at the time of the beginning of the IMO. Instead of finding a way to better include and to cooperate with developing countries, this proposal tries to find a way around the developing countries and therefore tries to ignore the real conditions of today's shipping law world. Therefore re-flagging to developed states cannot be the solution to the problem of IMO's lack of effectiveness.

VIII. Open up the rich man's club for developing countries

The IMO itself needs to strengthen mechanisms to support developing countries in the efforts to participate in the work of the IMO. The usage of overhead data projectors on conferences for the simultaneous display of draft texts or amendments proposed in oral interventions can offer useful support to non-native English speakers.²⁴³ The IMO has adopted guidelines to provide that not more than 5 working groups meet simultaneously during a Committees meeting.²⁴⁴ Furthermore, when a working group has finished its work on a topic, no other working group shall be established working on the same topic during the same session.²⁴⁵ Inter-sessional working groups are not supposed to take place until their convocation is highly necessary.²⁴⁶ However, these efforts of IMO have not wholly stopped working groups from meeting outside the official plenary hours.

Furthermore, the structure of the IMO needs to be revised. The Council has to better represent the interests of the member states with the largest ship registers. Therefore, the IMO needs to guarantee at least a number of seats under category C in the Council for these member states.

As indicated above the IMO has already taken various steps to improve the member states implementation willingness. The steps taken also support developing countries to act as equal members next to the developed countries. The IMO developed a technical co-operation program to provide expert assistance to countries that lack experience and resources.

²⁴² Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 153 f.

²⁴³ Compare Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 193.

²⁴⁴ *Guidelines on the Organization and Method of Work of the Maritime Safety Committee and the Marine Environment Protection Committee and their subsidiary Bodies* MSC-MEPC 1/Circ. 2 27 May 2008 p. 12 paragraph 3.26.

²⁴⁵ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 101.

²⁴⁶ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 101.

Furthermore, the technical co-operation programme organizes national and regional workshops and seminars to assist member states that face difficulties with the implementation and enforcement of conventions.²⁴⁷ Three international maritime training centers that are closely connected with the IMO have been found: The International Maritime Law Institute on Malta offers postgraduate courses in Maritime Law. The Maritime University in Sweden provides maritime advanced degree courses and the International Maritime Academy in Italy offers shorter training courses in specific maritime areas, e.g. security on board of ships, maritime environmental protection or transport of hazardous goods.²⁴⁸ All three institutions are foremost established for participants from developing countries.²⁴⁹ They are meant to prepare participants for the challenges faced when trying to implement IMO conventions in to national law. Thereby, the IMO educates professionals in the developing member states to have a better chance to influence decisions in the IMO and to implement and enforce these decisions in their respective home country.

Furthermore, developed countries need to be ready to adopt more operational and financial responsibilities in order to support developing countries. Finding funds to assist member states that are requesting technical and financial assistance could be a first step to help developing member states to shoulder their responsibilities.²⁵⁰

IX. Conclusion

The aforementioned critical analysis of seven proposals to strengthen the efficiency of the IMO shows on the one hand that the IMO already puts a lot of effort in to improving its efficiency. On the other hand it shows that there is still a lot that can be done and that there exist not just one solution to the problem. The most basic way to solve the problem of the IMOs time and enforcement inefficiency that on the same time supports the participation of developing countries in the decision-making process is to reinforce the efforts to establish the conditions and entities in member states that are needed to participate successfully in the decision-making process of the IMO. Thereby, the IMO can address the implementation unwillingness of the states and accelerate the enforcement of IMO decisions. Furthermore, the developing countries will be empowered to participate in the IMO proceedings on the same level as the developed countries. Therefore, the IMO should further strengthen its

²⁴⁷ Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick'(2006) 10 *Schiffahrt und Häfen* 15 at 23.

²⁴⁸ Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick'(2006) 10 *Schiffahrt und Häfen* 15 at 23.

²⁴⁹ Heike Hoppe 'Die Weltschiffahrtsorganisation im Überblick'(2006) 10 *Schiffahrt und Häfen* 15 at 23.

²⁵⁰ Compare Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 332 f..

efforts in the technical co-operation programme and the training centres. Moreover, the IMO needs to open up the 'rich man's club' even further, so that it will be easier for developing countries to participate: enforcing the guidelines to provide that not more than 5 working groups meet simultaneously during a Committees meeting, reminding the member states of the justification of these rules and using overhead data projectors on conferences for the simultaneous display of draft texts or amendments proposed in oral interventions are good starting points.

Furthermore, the IMO needs to give more power to the port states so that the shortfall of flag states in the use of their enforcement powers can be compensated for. Moreover, the IMO should improve the exchange of information in between the nine PSC regimes and the port and flag states. Thereby the information gained by the PSCs can be used more efficiently. This would lead to the result that it would be easier to free the oceans from substandard ships and to enhance the pressure on flag states to live up to their responsibilities. The exchange of information could on the one hand be improved by using the data the IMO is already collecting from the port states more efficiently. On the other hand, the IMO could advance a stronger cooperation with the EU and thereby support and share the success of the data exchange in Equasis. Moreover, the IMO could benefit from a stronger alliance with the EU by using the EUs enforcement powers for a better implementation and enforcement efficiency of the IMO. The EU could even be a 'potential enforcement organ of the IMO'.²⁵¹ Simultaneously, the IMO should try to strengthen its own enforcement powers in new conventions. Although, the tacit acceptance procedure puts developing countries in a disadvantage, it is a necessary procedure in order to speed up the amendment proceedings in the IMO.

Chapter 4: Conclusion

Although, the IMO cannot be called a legislator, it is the most important international organisation regarding international maritime environmental protection and security. This is shown in the number of its member states, the number of conventions prepared by the IMO and the significance of these conventions for the protection of the marine environment and the security on board of ships. However, the development of the IMO over the years does not only show the growing importance of the organization. It also shows how the realities inside

²⁵¹ Wolfgang Graf Vitzthum *Schiffsicherheit: Die EG als potentieller Durchsetzungsdegen der IMO* (2002) 62 *Zeitschrift für ausländisches öffentliches Recht* 163 at 179.

the IMO changed. The IMO was found by developed countries.²⁵² The structure and the decision-making process of the IMO still favours the developed countries.²⁵³ However, nowadays it is the developing countries that outnumber the developed ones. Furthermore, the main open registries are located in developing countries. Therefore the main flag states and therefore on the one hand the main contributors to the IMO budget and on the other hand the states that are foremost responsible for enforcing IMO conventions are developing countries. This reality does not reflect in the IMOs structure and decision-making process. The IMO can still be seen as the 'rich man's club'. The 'rich man's club' does not work efficiently any more, though. Because of the growing number of member states, the insufficient participation of developing member states, the time consuming decision-making processes and the implementation unwillingness of the member states the IMOs decision making lacks in time and in enforcement efficiency. To keep the unified international system that the IMO found alive and up to date, the IMO has to have a time-efficient decision-making process and a functioning enforcement system.

When evaluating the efficiency of IMOs decision-making, one needs to keep in mind that the IMO is responsible for finding a compromise between 170 member states that come together with highly different interests and aims. The conventions that are finally adopted are often not the best that could have been achieved, but the only way the states could come to an agreement.²⁵⁴ However, having an international solution that the member states agreed on and will therefore most probably adopt in to their legislation is better than to have the ideal convention that will have no effect whatsoever. Nevertheless, the decision-making process of the IMO lacks efficiency, especially the time consuming process of establishing new conventions. Although, this lack of time efficiency is partly due to the fact that the IMO is working very accurately and tries to include as many different opinions in the outcome of its decision-making as possible, the efficiency can be increased. Various ways to improve the efficiency of the IMO have been made.²⁵⁵ On the one hand, it lies within the responsibility of the member states of the IMO to be more reliable in implementing IMO conventions. The

²⁵² Agustín Blanco-Bazán 'IMO – Historical highlights in the life of a UN Agency' (2004) 6 *Journal of the History of International Law* 259 at 259.

²⁵³ Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 331.

²⁵⁴ Nicholas Gaskell 'Decision Making and the Legal Committee of the International Maritime Organization' Vol. 18 No. 2 (2003) *International Journal of Marine and Coastal Law* 187.

²⁵⁵ Compare Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 331 ff.; Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 347 ff..

member states need to acknowledge the importance of the IMO for the marine environment and security on board of vessels. They have to fulfil their international responsibilities to incorporate a convention that they ratified in to their respective national law.²⁵⁶ Furthermore, they are the ones that as coastal states, flag states and port states are responsible for enforcing the IMO conventions. Developed member states need to be willing to assist developing member states financially in their efforts to keep up with the implementation and enforcement of IMO conventions. However, developing member states should not 'use the lack of financial assistance as an excuse for non-compliance with global standards'.²⁵⁷ The IMO can support the states by strengthen their efforts to better educate officials responsible for the enactment of IMO conventions in to national law. Furthermore, the IMO can support the member states in their capacity as port states by increasing the competences of Port State Authorities.

On the other hand the IMO itself needs to revise its structure and its decision-making process. Although, there is not just one solution to improve the efficiency of the IMO that on the same time better includes developing member states in the process, a combination of various proposals could bring the IMO closer to the objective: The IMO needs to support the developing countries in achieving the means to participate as equal members next to the developed countries. Therefore, the IMO needs to deepen its efforts in the technical co-operation programme and in the three international maritime training centres. Thereby enabling the developing countries to act as equals next to the developed countries. Furthermore, with the support of better educated professionals the implementation willingness of the member states can be increased. The developing member states and the developed member states will have the expertise to work out new conventions and amendments and to transfer even complex conventions and amendments in to their respective national laws. Moreover, the IMO needs to open up the organization to developing countries. One way of doing this is to guarantee at least some seats under category C in the Council for the member states with the largest ship registries.²⁵⁸ The IMO should give more power to PSC regimes. Thereby the IMO can use the PSC regimes as the security net that they are supposed to be and control if the member states fulfil their responsibilities as port states. Furthermore, PSC regimes can control the compliance of open registry states with the IMO

²⁵⁶ Compare Art. 26 Vienna convention.

²⁵⁷ Saiful Karim 'Implementation of the MARPOL Convention in Developing Countries' (2010) 79 *Nordic Journal of International Law* 303 at 337.

²⁵⁸ Alan Khee-Jin Tan *Vessel-Source Marine Pollution – The Law and Politics of International Regulations* 375.

conventions. To make the PSC already in place more efficient, the IMO has to support the regimes in the exchange of information. Therefore the IMO can use the data that the member states already have to submit to the IMO. Moreover, the IMO should try to strengthen the connections in between the nine PSC regimes and in between port and flag states.

Furthermore, the IMO should continue to apply the tacit acceptance procedure to all conventions for technical amendments. Although, this speedy procedure puts developing countries in a disadvantage, it is unavoidable to increase the speed of the IMOs decision-making. With the help of the technical co-operation programme and the three international maritime training centres the IMO can try to better prepare the developing countries for the proceedings. The IMO should try to gain more enforcement powers and the threshold for the entry in to force of new conventions can be lowered at least slightly.