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**The effect of EC membership of the IMO in
'internationalising' EU maritime transport law and policy**

Master Thesis

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1 Introduction

The present master thesis deals with the possibility of the European Community (EC) becoming a full member in the International Maritime Organization (IMO). The focus of the paper are the possible consequences EC IMO membership might have in international law.

The European Commission has already expressed the wish to apply for IMO membership several times and is intensifying its efforts again at the moment. The present thesis attempts to analyse the motivations of the Commission to do so as well as the position of the Member States of the European Union (EU).

The organizational structure and workings of both the EC/EU and the IMO will be discussed. In addition, I will provide an overview of how the idea of European membership in the IMO developed.

Another section discusses how an eventual EC membership might influence the existing structures. Two different scenarios will be discussed in particular. First, if the EU/EC membership was to replace the membership of single European Member States, how could this practically work ? And would the result still be in compliance with the general idea of the IMO ?

Secondly, if the EU/EC membership was to support the memberships of the single European Member States, how could the overlapping competences be distributed ?

Chapter 5.4.2 will examine the EC's membership in the World Trade Organisation in order to demonstrate how a shared membership might work.

Further, this thesis also tries to give an overview how the idea of a single European membership is evaluated by international organisations as well as by Non-EU Members in the IMO.

It is important to point out that many sources speak about an EU membership in the IMO. This is factually not very correct, as it would be only the EC who could become a member in international organisations. However, as even the European bodies themselves inconsistently use the terms EU and EC, one might assume that the focus should be on European membership as such.

The legal consequences on the national level which an EC membership might involve will not be discussed as they go well beyond the scope of the paper.

2 The Organizations

2.1 The International Maritime Organization

Shipping has always been an international business. It is therefore not astonishing that several attempts to agree on international conventions regarding shipping issues had already been made by the maritime industry by the middle of the 19th century. More than 30 countries agreed in 1863 on the „Rules of the Road“, the original version of today's Convention on the International Regulations for Preventing Collisions at Sea (COLREG, 1972). The „Convention of Safety of Life at Sea“ (SOLAS), adopted already in 1914, is still today the most undersigned convention.

The convention establishing the Inter-Governmental Maritime Consultative Organization (IMCO) with its head-quarters in London has been adopted by an international conference under the auspices of the United Nations March 6, 1948.

Article 1 of the „Convention on the International Maritime Organization“¹ defines the purpose of the organization as “to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade”.

Further, the highest practicable standards in the fields of maritime safety, efficiency of navigation and prevention and control of ship-source pollution shall be adopted.

The organization is based on the idea of non-discrimination between shipping nations, i.e. the removal of discriminatory action and restrictions. Member States shall have the freedom to promote their national shipping without actually restricting other Member's rights.

The convention entered into force March 17, 1958 and the first IMCO-meeting was held in 1959.

In 1982, the name of the organization changed to International Maritime Organization (IMO).

The IMO is financed by the shipping nations, depending on the number of vessels flying the nation's flag.²

Currently, 167 states have signed the IMO treaty, resulting in the fact that the key conventions now apply to over 98 percent of the world tonnage.

Additionally, several Inter-Governmental and Non-Governmental Organisations do take part at decisions within the IMO. The IMO's main bodies are the Assembly and the Council.

The Assembly meets every second year and adopts the budget as well as the proposals for new regulation prepared by the Committees and Sub-Committees.

The Council represents the Assembly's interests between the meetings and prepares the working plan and the budget plan for the Assembly.

¹ Also known as Geneva Convention

² The top ten contributors to the 2006-2007 organisation budget of GBP 49,730,300 are Panama, Liberia, Bahamas, United Kingdom, Greece, Singapore, Marshall Islands, Japan, United States and China.

Further, several Committees are established, namely for the following issues:

- Maritime Safety
- Marine Environment Protection
- Legal Issues
- Technical Co-operation
- Facilitation

Additionally, several Sub-Committees for specific matters are established.³

Proposals for new measures to be taken are prepared by a work group of the relevant Committee and Sub-Committee. The draft convention or protocol is then discussed and eventually adopted by the Assembly in its meeting every second year. Normally, a minimum number of Member States must give their consent for the proposed instrument to be adopted. However, in some cases the agreeing states must also represent a certain percentage of the world's tonnage.

Convention amendments or updates are normally agreed to on a tacit acceptance procedure, meaning that they are deemed to be adopted unless a certain number of states reject within a certain time period.⁴

3 Sub-Committees are established for the following: Fire Protection, Flag State Implementation, Safety of Navigation, Ship Design and Equipment, Radiocommunications, Search and Rescue, Standards of Training and Watchkeeping, Stability, Load Lines and Fishing Vessel Safety, Bulk Liquids and Gases, Dangerous Goods, Solid Cargoes and Containers

4 If conventions are amended by a Protocol, the latter one has to be ratified by a certain number of Member States before it enters officially into force.

2.2 The European Union and Community and its relation with the Member States

Presently, 27 States⁵ are members of the European Union (EU), among them several important seafaring countries including Spain, Greece and the United Kingdom (UK).

The main bodies of the EU are the European Parliament, the European Commission, the European Council and the European Court of Justice.

Only the bodies relevant to the present thesis will be discussed.⁶

The European Commission is constituted of one appointed representative from each member state. The main tasks are the drafting of new law proposals and the implementing of the relevant EU policies. It is therefore often called the “engine” of the European Parliament.

The Council of the European Union consists of ministers of the Member States' governments, but it is only the minister responsible for the topic who attends the meetings. Its main tasks are the adoption of new legislation and the representation of the Member States.

It is important to point out that the EU has no legal personality *stricto sensu* and therefore it is only the EC which is able to act in international law.

The European Community (EC) has its foundation in the „Treaty establishing the European Economic Community“⁷ from 1957⁸. The European Union (EU) has been established by the „Treaty on European Union“ in 1992⁹. The treaty is divided into the „Three Pillars of the European Union“¹⁰ and based on several European Communities including the EC .

Under the first Pillar, the Member States limited their own power and sovereignty by transferring some powers permanently to the European Community.

The Community has been provided with some expanded competences under the second pillar (Common Foreign and Security Policy Pillar), too. But still, the decision making under the second and third pillar is of an intergovernmental nature whereas it is clearly Community based under the first one.

The division of power between the Member States and the EU is mainly based on the ERTA-doctrine¹¹.

It basically states that the Community has authority over external negotiations if they might affect common Community areas.

5 Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom

6 For further information please see for example: Pinder John. *The European Union – A very short introduction*. Oxford, 2001

7 Changed to „European Community“ in 1986

8 Latest version OJ No. C 325, December 24, 2002

9 Latest version OJ No. C 321E, December 29, 2006

10 European Communities Pillar, Common Foreign and Security Policy Pillar, Justice and Home Affairs Pillar

11 Case 22/70 *Commission of the European Communities v Council of the European Communities*, page 263

The doctrine was later underlined by the Opinion 1/76 of the European Court of Justice. The Court ruled that the Community holds exclusive external competence on an objective if it has internal competence to achieve same.¹²

Both ECJ-rulings were confirmed by ECJ Opinion 1/94 which reads as follows:

“Once the Community has included in its internal legislative acts provisions relating to the treatment of nationals of third countries or has expressly conferred upon its institutions a competence to negotiate with third countries, it acquires an exclusive competence on the measure covered by these acts. This is also the case, even in the absence of an explicit provision enabling its institutions to negotiate with third countries, when the Community has achieved a complete harmonisation (...) because the common rules so adopted could be affected in the sense of the ERTA judgement (...) if the Member States retained a freedom to negotiate with the third countries.”¹³

The EU has, for example, the authority to speak and negotiate on behalf of its Member States, whenever trade related issues are involved, in particular when negotiated at the World Trade Organisation (WTO). The legal basis for the authority can be found in Article 133 of the EC-Treaty which refers to the Common Commercial Policy (CCP). This will be explained in detail in section 5.4.2.

The EU plays quite an important role in the international shipping world as several major shipping nations can be found among the EU Member States as illustrated on the following page.

¹² Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels*

¹³ Opinion 1/94 *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, paragraphs 95-96

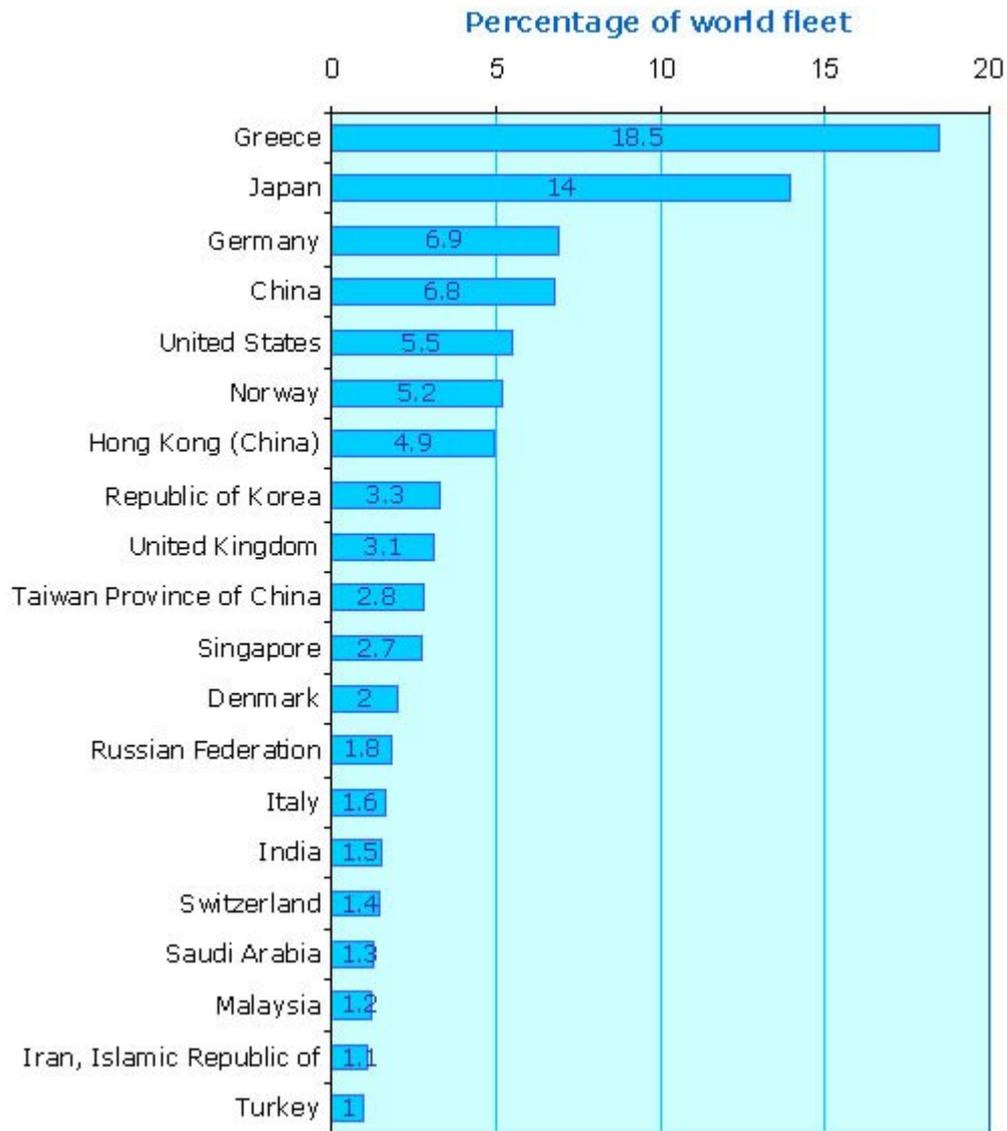


Table 1: The Top 20 beneficial ownership countries (January 2005)

Source: http://www.marisee.org/shippingfacts/worldtrade/ownership_countries.php, August 1, 2007

3 EC's maritime policy

3.1 Internal/External policy

According to Art. 3 f of the EC-Treaty the activities of the Community must include a common policy in the sphere of transport.

Title V (Art. 70-80) of the same treaty deals specifically with the transport sector. However, maritime transport is excluded from those regulations, see Art. 80.

The reason for the exclusion of maritime transport lies in the international nature of the maritime business and industry itself as well as in the fact that individual sectors of maritime transport are broadly regulated by international conventions, leaving very little space for regional regulations. Even in the absence of a Common European Transport Policy, the fundamental principles and general rules of the EC-Treaty apply to the sector¹⁴. Such fundamental principles include inter alia the prohibition of discrimination on the basis of the nationality and the freedom to provide services within the EU. The task of the European Union is therefore mostly a reactive one, as it must supervise and control the implementation of the international conventions.

Until the mid-1980s no real steps were taken by either the Commission nor by the Council to promote a common maritime policy or any maritime measures at all.

When Greece, one of the major players in the maritime world, joined the Community in 1981, the attitude of the Commission and the Council began to change. But it was only in 1986 that the first „Maritime package“, consisting of 4 regulations, was adopted.

The regulations dealt with the following:

- the freedom to provide services within the area of maritime transport¹⁵
- the influence of the European Competition Rules to maritime transport¹⁶
- pricing practices in maritime transport¹⁷ and
- free access to cargos in ocean trade¹⁸.

Since then, several regulations and directives have been adopted, mainly in the sector of maritime safety and environmental protection. The European Union has in the recent years published several major strategy papers regarding European Maritime policy.

14 See for example Case 167/73 *Commission of European Communities v French Republic*, followed by the Case 334/94 *Commission of the European Communities v French Republic*

15 Regulation 4055/86/EEC

16 Regulation 4056/86/EEC

17 Regulation 4057/86/EEC

18 Regulation 4058/86/EEC

The 2001 White Paper „European transport policy for 2010: Time to decide“ deals with the steps necessary to achieve a Common Transport policy, covering all means of transport.

Regarding maritime transport it points out the necessity of developing “motorways of the Sea” in order to take the pressure off congested roads. Ideally, the Sea-motorways should be established in logistically important places. Special mention is made of maritime safety and how it could be improved. It is suggested that more Port State Controls be conducted, a proposal which goes hand in hand with the strengthening of the competence of the Classification Societies.

Furthermore, the phasing out of single hull tankers should be expedited.

The to establish European Maritime Safety Agency (EMSA) should inter alia develop an advanced compensation system for marine pollution incidents. Another important issue is the flagging of vessels sailing under flags of convenience and including these vessels in European shipping registers. Member States should develop a more attractive system, perhaps through tax incentives, to persuade shipping companies to register their vessels in their home countries.

The latest publication regarding exclusively maritime transport is the 2006 Green Paper „Towards a future Maritime Policy for the Union: A European vision for the oceans and seas“.

With respect to Common Maritime Policy the Green Paper reads as follows:

„An all-embracing maritime policy of the EU should aim at growth and more and better jobs, thus helping to develop a strong, growing, competitive and sustainable maritime economy in harmony with the marine environment“

Three specific steps which have to be done in the regulatory context are identified:

„First, the EC and its Member States should put the full weight of their specific powers, combined influence and external policy instruments behind a policy to improve the performance of all flag states.

Second, new instruments to strengthen the monitoring of international rules on the high seas and their control by port states should be urgently developed using state-of-the-art technologies such as global satellite navigation (Galileo).

Third, an in-depth analysis, with the participation of social partners, should be conducted, in order to identify ways to enhance the competitiveness of ships sailing under European flags.“

Further, several issues are discussed in the paper, for example Europe's position towards other competitors in the shipping industry, sustainable maritime employment, life quality in coastal regions and maritime governance.

3.2 Directive 2005/35/EC and its consequences

3.2.1 ERIKA/PRESTIGE

At the end of 1999¹⁹, the Maltese flagged MT ERIKA broke in half 50 nm off the French coast.

Almost two-thirds²⁰ of the heavy fuel cargo was released into the sea.

The consequences of the spill were disastrous, as more than 400 km of coast line were contaminated and more than 50 000 sea birds were killed.

At the time of the incident the vessel was Greek-owned, managed by an Italian company and chartered by TotalFina with registration in Bermuda and Panama.

Astonishingly enough, the vessel had been checked three weeks before the accident by the Italian classification society RINA. Despite the inspection revealing that the main vertical frame was of insufficient strength, the vessel was allowed to sail. As it has been proven later, ERIKA and her sister ships were constructed defectively, all of them being 10% to 15% too light.

Before the ERIKA incident, three of the eight vessels had already broke or bended.

The MT PRESTIGE broke in half at the end of 2002²¹, spilling more than 63 000 tons of heavy fuel into the sea. More than 2900 km of the French and Spanish coast line became contaminated and more than 300 000 sea birds died. At the time of the incident the vessel sailed under the flag of the Bahamas and was classified by the American Bureau of Shipping. The ownership of the vessel is still today unknown.

Following the incident, the IMO published „Guidelines on places of refuge for ships in need of assistance“ which seek to avoid similar accidents by offering the vessel a port of refuge.

19 December 12, 1999

20 19 000 tons out of 31 000 tons

21 November 19, 2002

3.2.2 International regime

Pollution of the Seas is internationally regulated by several IMO-conventions, with MARPOL being the core-convention. MARPOL defines the scope when a vessel is allowed to discharge substances into the sea and the type of substances allowed to be discharged.

The convention is divided into 6 annexes, which cover not only oil pollution but also pollution by noxious liquid substances (NLS), sewage, garbage, air pollution and harmful substances in packaged form.

The first two annexes, dealing with pollution by oil and NLS, are mandatory for the undersigning States.

MARPOL distinguishes between operational and accidental pollution, whereas the latter one is not subject to financial and/or criminal prosecution.

Furthermore, there are several conventions dealing exclusively with oil pollution, namely oil pollution caused by tanker vessels.

The most important are the „International Convention on Civil Liability for Oil Pollution, 1969“ (CLC-Convention) and the „International Fund for Oil Pollution Damage, 1971“ (IOPC-Fund Convention) with the Supplementary Protocol from 2003.

The CLC-Convention in its latest version from 1992²² applies to oil pollution by tankers in convention states²³. The basic elements of the convention are:

- Channelling of the liability to the ship owner
- Strict liability of the ship owner
- Limitation of liability based on vessel's tonnage²⁴
- Requirement of compulsory insurance for the ship owner
- Right of direct action against the insurer

The maximum compensation payable under the convention is between 4.51 Million SDR²⁵ for vessels up to and including 5000 GT and 89.77 Million SDR for vessels over 140 000 GT.

²² As amended in 2000

²³ It is important to notice that neither the vessel's flag State nor the State where the shipowner's principal place of business is situated, have to be contracting states.

²⁴ Provided that the shipowner or his employees did not act with gross negligence or deliberately

²⁵ Special Drawing Right of the International Monetary Fund

The IOPC-Fund Convention in its latest version from 1992 provides additional cover where the damages may not be entirely covered under the CLC-Convention. The fund is financed by oil receivers who receive more than 150 000 tons of heavy or crude oil -transported by sea- in a single calendar year.

It became quite clear after the PRESTIGE incident off the Spanish coast in 2003 that the limits of the fund are not adequate in cases of heavy oil spills. Therefore, the „2003 Supplementary Protocol“ has been ratified very quickly. The maximum compensation available under the fund is now 750 Million SDR. The expression „three tier system“ is often used in connection with oil spill compensation and shall be explained a little bit further. “Three tier” refers to the fact that compensation is first paid under the CLC-Convention; if the damages are in excess of the CLC-maximum, the Fund takes over.

If the Fund does not compensate all claims and damages, the Supplementary Protocol from 2003 becomes applicable.

Additionally are there some other conventions already ratified but not yet in force, the HNS-Convention and the Bunker-Convention for example. The first one will apply to all vessels which carry the kind of cargo defined as HNS-cargo in the convention whereas the latter will apply to all vessels regardless of their type.

In the case of the ERIKA disaster in 1999, claims in the total amount of ca. 500 Million Euro were brought against the ship owner.

Under the fore mentioned international conventions it became obvious very quickly that the mandatory compensation was not going to cover even 50% of the estimated damage and forwarded claims. Civic action groups and other private campaigns unsuccessfully tried to receive a greater compensation from the ship owner/ship owner's state or even from the vessel's flag state, basing their arguments on the extra-ordinary and unique nature of damages.

Only 3 years later the MT PRESTIGE broke in half in Spanish territorial waters. The total claim amount is more than 850 Million Euro which exceeds the payable sum under the different Conventions. The claims are divided as follows:

Spain 839 claims, in total 744 Million EURO

France 474 claims, in total 118,5 Million EURO

Portugal 2 claims, in total 4,3 Million EURO

3.2.3 European regime

It became obvious immediately after the ERIKA incident that the total claims amount would be in excess of the available compensation under the international regime.

The European Community had to become active in two directions, namely the avoidance of similar catastrophes in the future and the development of new regulations regarding the amount of the available compensation.

The so called ERIKA packages were introduced and adopted.

The ERIKA I package became mandatory in 2003²⁶ and contains three primary measures: intensified inspection of all vessels entering Community ports under Paris MOU²⁷, intensified control and supervision of the ship's classification and inspection societies²⁸, and a ban of single hull tankers from European ports²⁹

All the measures in the ERIKA I were characterized by their short-term nature. However, the European Council recognised the necessity of long-term measures and referred to the creation of a second measure package. It was passed 9 months later and is called the ERIKA II package.

Its main features are the establishment of a common European maritime monitoring- and control system³⁰ as well as the improvement of liability regulations in case of oil pollution.

The latter was to be achieved through the establishment of „Compensation for Oil Pollution in European Waters Fund”, COPE, which is designed to have supplementary effect to the CLC- and IOPC-conventions³¹.

In this context, the idea of enhanced financial sanctions against persons who acted willingly, negligently or by omissions in case of oil pollution was also taken up.

Another feature is the establishment of two assisting bodies, namely the „European Maritime Safety Agency”, EMSA, in Lisbon, Portugal³² and the „Committee on Safe Seas and the Prevention of Pollution from Ships”, COSS³³.

The main task of EMSA shall be to support and supervise the Member States in the implementation and enforcement of European maritime legislation.

The idea of the COPE-Fund was later abandoned in favour of the Supplementary Protocol of the IOPC-Fund.

26 July 22, 2003

27 Directive 95/21 EC, modified by Directive 2001/106 EC

28 Directive 94/57 EC, modified by Directives 97/58/EC and 2001/105 EC

29 Suspension of Regulation 2978/94 EC by Regulation 417/2002 EC modified by Regulations 1726/2003 EC and 2172/2004 EC

30 Directive 2002/59/EC, simultaneously suspension of Directive 93/75/EEC („Hazmat- Directive“)

31 Proposal COM(2000) 802 final

32 Regulation 1406/2002 EC

33 Regulation 2099/2002 EC

The not yet enforced ERIKA III package contains the following measures:

- expansion of the flag state's duties, proposal COM(2005) 586
- modification of Directive 94/57/EC (ship's control and classification societies), proposal COM(2005) 587
- modification of Directive 95/21/EC (Port State Control), proposal COM(2005) 588
- expansion of Directive 2005/59/EC (Common European maritime control- and monitoring system), proposal COM(2005) 589
- creation of a new Directive regarding the investigation after maritime casualties, proposal COM(2005) 590
- creation of a new Regulation regarding carrier's liability towards passengers, proposal COM(2005) 592
- creation of a new Directive regarding the civil liability of ship owners, proposal COM(2005) 593

Special attention has to be drawn to the Directive 2005/35/EC which has been developed in the light of both - the ERIKA and PRESTIGE accident. In both cases has it been not successful to determine the real owner of the vessel who should be primarily responsible for compensation payments towards the claimants.

The European Community felt that something had to be done in order to enlarge the group of persons who could be held responsible after casualties involving oil pollution.

Additionally, the European Community wanted to achieve a stricter criminal liability of the enlarged group of responsible parties. Directive 2005/35/EC has been passed and was due to be implemented by the Member States in April 2007.

The Directive has been broadly discussed in the maritime industry, not only in Europe but in the whole world. The main point of criticism is that it seems to apply higher standards in European waters than internationally agreed under MARPOL. Under the Directive, it might now well be possible that even in case of accidental discharge of oil, one may be financially and criminally prosecuted. The problem is that the Directive does not only apply to vessels flying European flags but to all vessels visiting European ports.

Additionally, the group of the potential liable persons is in the view of many quite too large and in any case contradictory to MARPOL which only refers to the master, the crew and the ship owner. The explicit standards regarding the criminal prosecution are regulated by the underlying framework decision.³⁴

³⁴ Framework Decision 2005/667/JHA by the Council

3.2.4 Pending problems

Until now, Member States of the European Union have to implement the Directive without paying attention to the Framework Decision. The reason for that lies in recital 5 of the Framework Decision which is based on Article 34 of the EU-Treaty. The European Court of Justice (ECJ) has declared the Framework Decision regarding the protection of the environment null and void³⁵ which also referred in its recitals to the EU-Treaty as its basis. However, the correct basis would have been the EC-Treaty³⁶. Accordingly, the relevant Framework Decision for the Directive in question can be seen as null and void, too.

The Commission has filed an action to annul but no final award has been given yet by the ECJ. Summarizing the above, the Directive must now be implemented without reference to the Framework Decision. Only intentional, gross negligence or reckless acts may be subject to prosecution (see Art. 4 of the Directive).

Further, the Directive must be applied in conformity with public international law (see Art.9 of the Directive)

A group of large maritime players, namely INTERTANKO, INTERCARGO, BIMCO, ECSA, ICS, International Group of P&I Clubs, International Salvage Union, ITF and ETF, in 2003 published a statement regarding the Directive, at that time still a proposal for a Directive³⁷.

They supported the Commission's wish to evaluate and harmonize the implementation of MARPOL within the Member States. However, they expressed their strong concerns regarding the wording of the Directive which might lead to a regime contrary to or partly in violation of MARPOL and UNCLOS.

The main critique is that accidental discharge is being considered a criminal offence under the Directive. Another difference with MARPOL is that the Directive applies different regimes in cases of accidental pollution, depending on the place of incident. The group underlined that the Directive must be in strong conformity with both MARPOL and UNCLOS.

Further, the expression "serious negligence" used in the Directive is internationally not recognized and should therefore be replaced by the standard wording used in IMO conventions like MARPOL. The group referred to the internationally well established and recognized principle of proportionality which might be undermined by a ratification of the differing European regime. As the adopted Directive did not differ significantly from the proposal, the undersigning industry parties decided to raise the issue of the interference between the Directive and international law before the ECJ.

³⁵ On September 13, 2005

³⁶ Case C-176/03 *Commission of the European Communities v Council of the European Union*

³⁷ See INTERTANKO et al. (2004), pages 2-4

In order to get a ruling by the ECJ on a Community matter, one has to challenge the matter before a Member State's court which might then refer to the ECJ, but only if there are well founded reasons to believe that the matter might be an issue of conflict (see Art 234 of the EC-Treaty).

On June 7, 2006, INTERTANKO, INTERCARGO, the Greek Shipping Co-Operation Committee, Lloyd's Register and the International Salvage Union challenged the matter before the Royal Court of Justice in London.

Four issues have been brought to the attention of the judge. One question has been whether the EC may -independently of international conventions³⁸- issue legislation regarding oil pollution on the High Sea and in the EEZ by third country vessels. With respect to the territorial waters, the question was whether the EC may issue regulations differing from MARPOL at all.

The last two issues deal with the term "serious negligence". The question was whether the appliance of it would generally be in conformity with international law and in particular whether it would conflict with the right of innocent passage as provided by UNCLOS.

All four points have been declared to be well founded and therefore the case has been transferred to the ECJ.

No ruling has been given yet but is expected to take place in coming months, especially given that the deadline for the implementation of the Directive has already been met. The outcome of the ECJ ruling is very uncertain, but given that the Directive has been developed by the European bodies, one might tend to expect a positive ruling from the ECJ.

38 Especially MARPOL and UNCLOS

4 The key features of the work of the IMO

The working slogan of the IMO is „Safe, secure and efficient shipping on clean oceans“. Since its establishment the focus of the organization's work has been on the key areas safety, prevention of pollution, establishment of liability regimes and education. Due to the political developments during the last years, security has also become an important feature, especially in the adoption of the ISPS-Code³⁹ in 2002.

At its 21st session in 1999 the Assembly adopted Resolution A.900(21) which highlights the objectives to be achieved during the next years.

More than ever before, IMO urgently stresses the necessity to develop a more robust safety culture and environmental conscience. It has to be ensured that IMO standards and regulations relating to maritime safety and environmental protection are implemented uniformly. The broad early acceptance and ratification of all MARPOL Annexes is of particular importance. Not only for environmental protection but also in safety issues, the organization pointed out the need to focus on passenger ships and bulk carriers. Priority shall be given to the technical co-operation programmes. Further, the IMO wants to promote and support the efforts of Governments and industry to prevent and suppress unlawful acts which threaten the security of ships, the safety of the crew and the environment. The emphasis of IMO's work shall be shifted to people and excessive regulation should be avoided.⁴⁰ At the same meeting the Assembly adopted Resolution A.901(21). It underlines the necessity of technical co-operation in supporting developing countries to improve their fulfilment and performance of maritime standards. Further in 2001, the Resolution A.909(22) was adopted. It points out the need of all Member State's participation in defining the tasks and goals of the organisation. Special mention is made of the possibility for all IMO-Member States to submit policy documents to the Council for consideration, even if the State is not a member of the Council. Hereby, the IMO wants to achieve a stronger participation of all undersigning States. The IMO Strategic Plan for the six-year period 2006-2011⁴¹ and the High-Level Action Plan for 2006-2007⁴² set out three main strategic directions to achieve the IMO's mission in the future. The status and effectiveness of the organization shall be enhanced and a comprehensive framework shall be developed and maintained. Last but not least, the IMO wants to enhance the profile of shipping in general and to instil a quality culture and environmental conscience.⁴³ The highest priority is given to ensure the safety of human life at sea. Security issues at sea and in port, the environmental impact of shipping and legal matters are on the agenda as well.

³⁹ The International Ship and Port Facility Security Code

⁴⁰ In addition, the IMO wants to improve the implementation of the proactive 1990's policy with a increased use of the Formal Safety Assessment and continue the implementation of Resolution A.500(XII) and Resolution A.778(18)

⁴¹ A24/Res.970

⁴² A 24/Res.971

⁴³ A 24/Res.970, page 6

5 EC-membership in the IMO

5.1 Present situation

The IMO invites Non-Governmental Organizations (NGO's) and Inter-Governmental Organizations (IGO's) to participate. Currently, 65 NGO's have consultative status in the IMO.

The European Commission belongs to the 42 IGO's which have entered into agreements of cooperation with the IMO. This means that the European Commission may take part at reciprocal consultations on topics of common interest and may deliver and ask for information on planned projects and work programmes.

In particular, the Commission participates in the Maritime Safety Committee, the Marine Environment Protection Committee, the Technical Cooperation Committee and the Legal Committee.

However, the Commission does not have permission to negotiate on any subject directly on its or on a Member States' behalf.

The co-operation was agreed to on June 28, 1974 and has since then provided the Commission with observer status at the IMO.

In this context, Council decision 77/587/EEC might be important to examine.

This decision sets out a procedure whereby all Member States should meet and co-ordinate their positions prior to relevant meeting in international organizations. During such meetings it should be determined whether the particular issue raised problems of common interest and if so, whether a coordinated joint action in the international organizations should be taken.

5.2 European attempts

The idea of the EU becoming a full member of the IMO has been first published in the already mentioned 2001 „White Paper on Transport“.⁴⁴ This paper considers it to be paradoxical that the EU as the world's leading commercial power has not more than observer status in most intergovernmental organizations.

Especially in the organizations with leading roles in the transport sector, the Union should speak with a single voice in order to promote a common interest.

The problem is that „the Member States do not always adopt a consistent position within these organisations in relation to what has been agreed at Community level.“⁴⁵, and therefore efforts should be made in order to promote a single, common position of the EU.

„The Community needs to provide itself with the means of exerting real influence in the international organisations which deal with transport, in particular (...) the International Maritime Organisation. At the end of 2001 the Commission will propose that the Council open negotiations with these organisations with a view to the European Union becoming a full member.“⁴⁶

The European Commission asked the Council on April 9, 2002, to authorize them to negotiate towards full membership.⁴⁷

It based the request inter alia on the statement that

„There are significant drawbacks in merely having observer status, which is the position of the European Community at the ICAO and the Commission at the IMO. For instance, (...) at the IMO the Commission cannot speak on behalf of the Community - even in areas where it has exclusive competence - nor can it refer to EU decisions, which may lead to positions being taken up that are contrary to the Union's interest.“⁴⁸

It was also then that the European Commission recognized that the process of full membership would probably take several years. The central issue is that according to the „Convention on the International Maritime Organization“, only States are allowed to become full members. Therefore the Convention would have to be amended by two thirds of the members.

44 COM(2001) 370 final

45 Ebd. page 98

46 Ebd.

47 IP/02/525

48 Ebd.

The Commission proposed the following as a transitional measure in the meantime :

„(...) with regard to the IMO, the Commission asks the Member States to reach agreement so as to enable the Presidency of the Union or the Commission, in accordance with its responsibilities, to formulate the European position.“⁴⁹

No clear position was taken in regard to whether a EU membership would be in addition to the Member States' chairs or whether it would lead to the EU voting in a bloc.⁵⁰

The Commission's request was supported by a formal recommendation to the Council in favour of the request.⁵¹

Once more, the Commission claimed to have external competence in relation to sea transport.

The argument is that as the Commission has built up a considerable body of European law in this matter, it should have the right to negotiate the same matter on an international level.

Further, the existing dissimilarity between international law and Community law could be reduced by the Community being directly involved in the international law making process.

The Commission supports its efforts to an European membership in the IMO with Article 302 of the EC Treaty which states that the Commission shall maintain all appropriate relations with the United Nations and its agencies as well as with all international organisations.

The recommendation did not only deal with the EU's/EC's membership in the IMO but also in the International Civil Aviation Organization (ICAO)⁵².

The Convention on International Civil Aviation as in force now provides only for States to become a member (see Article 92). In order for the EC to become a member, the Convention would have to be amended based on a two-third majority of the undersigning States.

In this context it might be interesting to look at the European level as well. The European Organisation for the Safety of Air Navigation (EUROCONTROL) has as its main objective the development of an European Air Traffic Management System.

Presently, it is still the 1981 Eurocontrol Convention which is in force. However, the reversed 1997 Convention is in some parts provisorily in force and is going to be fully applicable when ratified by more parties. Article 40 of the 1997 Convention allows membership to regional economic integration organizations.

49 Ebd.

50 Roger Hailey. *EU seeks voice at sea and air bodies*. 2002

51 SEC(2002)381 final

52 Established December 7, 1944 by the Convention on International Civil Aviation (Chicago Convention)

The EC signed a Accession Protocol in 2002.⁵³

However, one has to notice that a single European Market in air transport has been established in 1992. Therefore it is much easier for the Commission to argue in favour of an European membership in international air transport organisations as in other transport organisations. The *Open-Skies Judgements*⁵⁴ by the ECJ underlined the exclusive competence of the EC to negotiate international agreements in the field of air transport⁵⁵.

With regard to rail traffic, the EC successfully applied for an amendment of the Convention concerning International Carriage by Rail (COTIF) in order to become a member in the Intergovernmental Organisation for International Carriage by Rail (OTIF). According to Article 38, regional economic integration organizations may be awarded a membership in the organization.

„§ 1 Accession to the Convention shall be open to regional economic integration organisations which have competence to adopt their own legislation binding on their Member States, in respect of the matters covered by this Convention and of which one or more Member States are members. The conditions of that accession shall be defined in an agreement concluded between the Organisation and the regional organisation.

§ 2 The regional organisation may exercise the rights enjoyed by its members by virtue of the Convention to the extent that they cover matters for which it is competent. This applies also to the obligations imposed on the Member States pursuant to the Convention, with the exception of the financial obligations referred to in Article 26.

§ 3 For the purposes of the exercise of the right to vote and the right to object provided for in Article 35 §§ 2 and 4, the regional organisation shall enjoy the number of votes equal to those of its members which are also Member States of the Organisation. The latter may only exercise their rights, in particular their right to vote, to the extent allowed by § 2.(...)“

53 Protocol on the accession of the European Community to the Eurocontrol International Convention relating to Cooperation for the Safety of Air Navigation of 13 December 1960, as variously amended and as consolidated by the Protocol of 27 June 1997

54 Case C-467/98 *Commission of the European Communities v Kingdom of Denmark*, Case C-468/98 *Commission of the European Communities v Kingdom of Sweden*, Case C-469/98 *Commission of the European Communities v Republic of Finland*, Case C-471/98 *Commission of the European Communities v Kingdom of Belgium*, Case C-472/98 *Grand Duchy of Luxembourg*, Case C-475/98 *Commission of the European Communities v Republic of Austria*, Case C-476/98 *Commission of the European Communities v Federal Republic of Germany*

55 In December 1998, the European Commission brought cases against several Member States before the ECJ. The Member States had concluded bilateral „open-skies“ agreements with United States. The Commission argued that mainly due to the establishment of the European Single Market in air transport in 1992, Europe had become an equal global player as the United States. Whilst the Commission recognized that the agreements indeed brought some benefits to Europe, it pointed out that the United States gained a considerably larger benefit than Europe. Due to the patchwork effect of the several agreements with the Member States, the United States carriers could fly without restrictions to almost any points in the EU. Additionally, US airlines could fly between two points within the EU. European airlines did not enjoy such rights in the United States.

Despite its strong efforts in the transport sector, the EC is yet only a full member in one United Nation's agency, namely the Food and Agriculture Organization of the United Nations⁵⁶.

Article II of its Statute gives a clear definition of the term “regional economic integration organization” which “must be constituted by sovereign States, a majority of which are Member Nations of the Organization, and to which its Member States have transferred competence over a range of matters within the purview of the Organization, including the authority to make decisions binding on its Member States in respect of those matters”.

It is suggested to base all membership negotiations with organisations on the same definition. However, it is not clear whether the definition should be inserted in the respective amended conventions.

⁵⁶ Since November 26, 1999

5.3 International responses

The main points of criticism in relation to a full EU membership in the IMO are firstly that the IMO would become a purely political field and lose its present technical co-ordination task. An EU membership „would restrict the freedom of national government technical experts to comment on the development of IMO regulations.“ and „would diminish the level of technical debate at IMO“. ⁵⁷ Secondly, there are strong concerns that the IMO would become a very European organization. Obviously, this would be contrary to its international basis and nature.

The membership of the EU „would weaken the authority of the global regulatory regime and indeed of the IMO itself“. ⁵⁸

The EU is generally viewed as a positive force when dealing with maritime matters.

The background for that might be that several major shipping nations are Member States in the EU. Whenever Greece, Malta, France and Germany express their opinion about maritime subjects, one might be tempted to see such an opinion as an European one.

The EU Member States have taken an increased active position in the IMO during the last years, partly attributable to several major incidents in European waters.

The consolidated European efforts are viewed sceptically by non-EU countries. ⁵⁹

In 2005, the International Chamber of Shipping (ICS) expressed its concerns about shipping matters being approached more and more from a regional than a global perspective.

As shipping is so highly international, one should always bear in mind that „differing national or regional rules resulting in administrative inefficiencies and market distortions, interfering with the smooth flow of international trade.“ ⁶⁰

It was only in 2006 that the idea of a full EU membership in the IMO was taken up again.

The aforementioned 2006 Green Paper „Towards a future Maritime Policy for the Union: A European vision for the oceans and seas“ ascertained that several policies and approaches have been concluded, all of which partly touch upon maritime matters but none of which comprehensively deal with relevant policy. The paper suggests that there is an urgent need for a „European maritime policy that embraces all aspects of the oceans and seas. This policy should be integrated, intersectoral and multidisciplinary and not a mere collection of vertical sectoral policies“. ⁶¹

The key question is whether the EU should have an integrated maritime policy.

It is acknowledged that on the international level, the EU and its Member States are actively involved in regulation making processes.

⁵⁷ David Osler. *ICS urges stand against EU power grab*. 2005

⁵⁸ Ebd.

⁵⁹ Chris Horrocks. *The influence of Europe*. 2005

⁶⁰ ICS. *Letter to the European Commission*. July 19, 2005

⁶¹ COM(2006) 275 final, page 5

„The role and status of the EU in these fora should reflect this role, which is presently not always the case“.⁶² The necessity of a full membership of the EU in the IMO is supported by the argument that „in several cases the issues under consideration fall within the exclusive competence of the Community“.⁶³

The Commission invited all interested parties to participate in the final version of the Green Paper with sending their comments and remarks to the Commission during the 12 month consultation process.⁶⁴

The Confederation of European Shipmasters' Associations (CESMA) generally welcomed and supported the idea of an overall European maritime policy. It restricted its support to issues which require a multinational approach, for example the prevention of pollution, the investigation of accidents and harmonisation in standards. Issues which clearly are only of national interest should not be taken up on a common European level.

CESMA also expressed its strong support for the idea of the EU/EC becoming a full member at the IMO. It considers the present situation with all EU Member States having one voice in the IMO to result in slow and insufficient lawmaking in maritime matters.

„The EU could bring something new and perhaps fresh in an effort to change maritime legislation for the benefit of maritime safety and protection of the environment. Protests will come from numerous officers of administrations, attending IMO meetings, who spend weeks in London without reaching any result or progress, one year after the other“⁶⁵

In its position paper, CESMA refers to its own structure and aim, namely speaking with one voice for all members and therefore being the European voice of ship masters.

The United Kingdom's government in its response did not indicate any support for a full EU membership.

To the contrary, it fears that „is likely to be counter-productive as it carries the risk that non-EU IMO actors will perceive the EU bloc as a threat to IMO's tradition of honest, open technical debate“⁶⁶ A similar statement was made by the Malta International Shipping Council which simply stated that the plan of direct EU membership in IMO had already been turned down by the Member States.⁶⁷

62 Ebd

63 Ebd

64 From June 7, 2006 til June 30, 2007.

65 CESMA (2007), page 4

66 United Kingdom, Department for Transport (2007)

67 Malta International Shipping Council (2006)

The Baltic and International Maritime Council (BIMCO) supported the idea of an integrated maritime policy but expressed its doubts about the consequences of a full EU membership in IMO. On a BIMCO Conference on Future Maritime Policy for the EU, BIMCO's president at that time⁶⁸, analysed the present situation in the EU from a different angle.

First of all, BIMCO is supportive in regard to an integrated maritime policy, but it had difficulties in welcoming the EU's wish of full membership in the IMO.

BIMCO's then-president pointed out that the EU Member States on average ratified only 37 of 56 conventions approved in the IMO. The worst result is a ratification of only 15 conventions whereby the very best result is a ratification of 48 conventions. In order to change this imbalance, the European Maritime Safety Agency (EMSA) must become more actively engaged.

Further, he warned that „it is imperative that the international context of regional regulations that effect the shipping industry are always borne in mind and that regional considerations resolved through legislation are promulgated via international channels and instruments where possible“.⁶⁹

The European Association of Classification Societies (EurACS) indeed pointed out that an European point of view in the IMO is established anyway, due to 40% of the world tonnage being European owned.⁷⁰ Instead of applying for a single membership, the EU should focus on rationalizing and harmonizing the existing legislation.⁷¹ Further, it should establish a system of incentives for quality shipping and promote environmentally friendly shipping and support initiatives in this regard.⁷²

As already in 2005, the International Chamber of Shipping (ICS) and the International Shipping Federation (ISF) clearly positioned themselves in opposition to an eventual full EU membership. They also expressed their great practical concerns about the transformation of IMO Conventions into EU Directives and Regulations as this might lead to „an unnecessary layer of legislation and additional bureaucracy, repeating requirements set out in international maritime law (...)“⁷³ Therefore, the focus of the Community should be on harmonisation and supervision of the ratification and implementation of Conventions.

68 Knud Pontoppidan

69 BIMCO (2006)

70 EurACS (2005)

71 Ebd., page 3

72 Furthermore, the training standard of ship and shore working personnel should be increased. Innovation should be promoted through both technologies and management subjects.

73 ICS & ISF (2007)

In March this year, one of the Commissioners⁷⁴ strongly expressed his opinion that the maritime industry is using the IMO and its procedures as a brake on new legislation.

The fact that national governments agreed to co-ordinate their positions prior to IMO meeting did not result in a satisfactory improvement.

The Commission's maritime director at that time⁷⁵ said that „at the moment the IMO does not recognize the existence of the EU“.⁷⁶ Because if it did, then „documents produced in Brussels would have an official status in IMO“.⁷⁷

The sudden return to the topic was seen in relation with the alleged plan of the German presidency of the European Council to re-open the topic of a European constitution. If the EU had its own constitution, it would probably intensify the attempts to act as a single player with a single voice in the international scene.

The then-director of the IMO's Legal Affairs and External Relations Division⁷⁸ pointed out that it is factually incorrect to allege that the IMO does not recognize the existence of the IMO. The EU has had observer status in the IMO since 1974 and on many occasions submitted documents which were circulated among the entire IMO. She also underlined the indeed speedy legislation making process at IMO, with special reference to the introduction of SOLAS chapter XI-2 and the ISPS-code.⁷⁹

74 Jacques Barrot

75 Fotis Karamitsos

76 Justin Stares. *Stop using IMO as 'brake' on new legislation thunders Barrot*. 2007

77 Ebd.

78 Dr. Rosalie P. Balkin

79 Dr. Rosalie P. Balkin. *IMO and European bodies' joint actions continue to shape shipping*. 2007

5.4 Possible scenarios

5.4.1 EC-membership replacing EU-States' membership

In none of the numerous statements by the European Commission or the European Council, can a concrete explanation be found of how the European membership in IMO would work in practice. It is still unclear whether EU membership should replace or support the membership of EU Member States. In its recommendation in favour of a membership application, the Commission suggests to the Council the following division of power:

- “Where Community coordination relates to an area in which powers are fully harmonised, the Commission speaks and votes on behalf of the 15 Member States⁸⁰.
- Where Community coordination relates to an area of national competence, Member States express their individual views and vote individually.
- Where Community coordination relates to an area where powers are shared and a common position has been established, the latter will be presented by the Council presidency or by the Commission. If a common position has not been agreed, Member States will express their own views and vote individually, with due regard to Article 10 of the Treaty”.⁸¹

Article 10 of the EC-Treaty reads as follows:

„Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.“

Hence, the Article establishes a duty of close co-operation between the Member States and the Community.

As one may notice, the recommendation of the Commission is very general, and does not precisely define the fully harmonized areas referred to. Taking into consideration the ERTA-doctrine, one might assume that these areas are those in which Community legislation exists.

But the question of how to restrict the field arises.

⁸⁰ Now 27 Member States

⁸¹ SEC(2002)381 final, page 39

As the normal procedure is to adopt a directive in order to motivate the Member States to ratify an IMO Convention, is it then correct to identify the specific IMO Convention as a Community matter?⁸²

Or is it more correct to assume that the Community has only power in such matters which concern the relationship of the Community as a whole, for example relationships with other countries? Would the adoption and ratification of IMO Conventions fall under such types of relationships?

The ECJ took a very clear position in the *MOX-Plant Case*⁸³ which dealt with shared competences. Ireland brought an action against the United Kingdom, arguing that the United Kingdom infringed several articles of the „United Nations' Convention on the Law of the Sea (UNCLOS)“⁸⁴ whilst operating the Sellafield reproduction plant which is closely situated to the Irish Sea.

In compliance with UNCLOS, Ireland started proceedings before an international arbitral tribunal. The European Commission then brought an action against Ireland, arguing that it infringed its assigned Community duties. Paradoxically, the infringement was not to bring the case before an international arbitral tribunal but to have not consulted the Community before doing so.

The explanatory statement was that as not only the EU Member States but also the EC as such are parties to UNCLOS, it must be considered to be a shared/mixed agreement.

Further, the Commission argued that the case in question fell within the Community's power and therefore Ireland infringed Community law.

The ECJ agreed with the Commission and confirmed that the matter fell within the Community's power. However, it is difficult to use the ECJ decision in order to extract general guidelines or principles from it as it is based very much on the specific case circumstances.

Taking into consideration the general attitude of the Commission and its iterated efforts to gain full EU/EC membership in the IMO, one may assume that it is most likely that EU/EC membership would replace the votes of the single EU Member States.

This point of view is supported by the already mentioned recommendation from the Commission to the Council in favour of an IMO membership⁸⁵. It is stated that the EC should have the same number of voting rights as the EU Member States have in the relevant body but where they are not allowed to vote due to the exclusive external competence of the Community.⁸⁶

⁸² As it has been the case for example with the ratification of the „International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS-Convention)“, see 2002/972/EC

⁸³ Case C-459/03 *Commission of the European Communities v Ireland*

⁸⁴ In particular Articles 123, 192, 193, 194, 197, 206, 207, 211, 213 and 217

⁸⁵ SEC(2002)381 final

⁸⁶ Ebd. page 45

As it is the case already now, the EU Member States would then ideally have to meet prior to IMO meetings and discuss the relevant matters. On the IMO meeting, the eventually agreed consensus would be presented towards the Assembly by the EC's representatives.

Two questions arise. First, what happens if no consensus can be agreed upon by the EU Member States? Does then the Commission's point of view prevail? The second question regards the EC's representatives. How are they elected? How many they should be and from which countries do they come from?

What would their power include? An interesting issue is also how many votes the EC would have in the IMO. The normal principle in the IMO is one vote per Member State. Would then the EC have 27 votes and if so, could they be split? Or would the EC have one vote which might overrule 26 other votes?

Another important matter is the totally different position EU Member States would have in the IMO in the event of an EC membership prevailing over the single States' memberships.

Especially the expertise from shipping nations like Greece, Portugal and Spain would be lost on the international level, as they then would have only the possibility to speak on their own behalf's during the EC meetings but not in the IMO. Additionally, the high influence traditional shipping register countries like Malta and Cyprus enjoy towards the ship owners might be dramatically reduced. The meetings on a European level would somehow lead to a consensus which is then taken into the IMO to find another consensus on the international level with all other IMO Members. Obviously, the result would be a very weakened position.

An additional layer of opinion finding would not only result in additional costs but also in the deprivation of extraordinary, exceptional ideas which might then not be able to pass even the first consensus layer, i.e. the European Level. As previously mentioned do such European meetings already take place but the Commission claims that the position taken by European Member States in the IMO often differs from what has been agreed previously. The Commission refers to that fact as an underlining of the necessity of a common European voice in the IMO. However, one might ask whether this deviation is not the expression of non-agreement which should not be restrained.

As many European States have always been and still are major players in the shipping world, it is very important to keep in mind that they are also competing with each other. Finding a common position might therefore actually lead to a superficial market restriction within Europe. Towards third countries, a Common European position would indeed lead to a very strong influence of Europe and most likely to great advantages for the European shipping business.

An advantage of a membership replacing the single EU-States' ones might be that the time consuming co-ordination process as under shared agreements could be avoided.

5.4.2 EC-membership supporting EU-States' membership

In one of the earlier publications of the European Parliament, the following point of view was taken:

„Obviously the Commission will represent the EU only in these matters which fall within its competence conferred upon the EU by treaties. In all other cases the EU Member States will continue to represent themselves in IMO.“⁸⁷

How should it practically work that EU Member States continue to represent themselves in some matters and in some matters they are represented by the Commission/the EC ?

It might be helpful to take a look at the work of the EC and its Member States at the World Trade Organization (WTO). Similar to the IMO, the WTO's main bodies are the biennial Ministerial Conference as the main decision making forum and the General Council as the day to day actor. Voting is based on consensus.

As trade agreements fall within the sphere of the Common Commercial Policy (CCP)⁸⁸, it is important to look at Article 133 of the EC-Treaty.

„1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. (...)

3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations.(...)

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.“

⁸⁷ European Parliament, „Report on the external relations of the European Union in the field of transport (2002/2085/8INI)), page 11

⁸⁸ As established by the ECJ in Opinion 1/94 WTO

Paragraph 5 of the Article extends the applicability of the first four paragraphs to agreements in the field of trade in services and intellectual property. But „(...)This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.“

Paragraph 6 continues:

„An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation. (...)

Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States. (...“

Summarizing the above, it can be said that the Commission has exclusive competence in WTO negotiations when the matter in question falls within the CCP.

Unfortunately Article 133 does not give an exact definition of the CCP.

As many international agreements effect both CCP and non-CCP matters, the doctrine of implied external powers has been developed. The ERTA-case established the principle that the Community's authority to sign international agreements may not only arise from an express legal basis but also „from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions“.⁸⁹

Further, the principle has been established that where the Community has exercised internal powers in a field, the latter is then 'occupied' by the Community. Member States are not allowed to exercise any action in the matter both internally and externally unless Community law expressly provides for to do so.

How does this work practically ? In order to avoid lengthy discussions whether a matter falls within the exclusive competence of the EC or not, the Commission acts de facto as the only spokesman representing the EU Member States in the WTO.

The positions to be presented in the Ministerial Conference are co-ordinated in regular meetings between the Member States and the Commission.

⁸⁹ Case C-22/70 *Commission of European Communities v Council of European Communities*, paragraph 16

Article 133(3), 2nd paragraph provides for the establishment of a Committee whose tasks are to assist the Commission in trade and tariff negotiations and to ensure the Council's final acceptance of the agreement.

The Committee operates as a link between the European Council and the European Commission. Its Members are high level Member States civil servants. The Committee and the Commission meet every two weeks to discuss relevant matters. The Commission tries to base its final position in the WTO on majority agreement among the EU Member States.

Unfortunately, the division of power between the Community and the Member States in transport matters is not as clear as in the field of trade, as Article 133, 6 continues:

„The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.“

As analysed earlier, the EC Treaty expressly states that maritime transport is excluded from the regulations dealing with transport (Art.80).

Hence, the competences referred to are then of a general, principal nature.

In a shared membership of the EC and the European States in IMO, the EC could easily prevent the EU States from any action simply by exercising internal competence in relevant shipping matters. Therefore, a clear definition of the Member States' own competence matters is vital for a functioning shared membership. Further, procedures should be established on how to support the Community in the fields where it has exclusive power, express or implied.

Member States should be given a chance to participate in the Community's decisions as they have long standing experience in IMO debates and agreements.

A common critique is that Community institutions do not have specialists and experts engaged in law making process but instead proposals and directives are prepared by European lawyers who do not necessarily have a practical understanding of the matter in question.

As the shipping business effects global trade and is going to become even more important in light of globalisation, the necessity of experts in shipping related matters is inevitable in order to adopt appropriate measures.

6 Implications on the structure and concept of the IMO

The structure of the IMO is clearly built upon the idea that only sovereign states may seek membership in the organization. Article 1a defines the purpose of IMO as to „provide machinery for cooperation among Governments“, not intergovernmental organisations.

Further, Article 4 states that „Membership in the Organization shall be open to all States“.

No mentioning is made of any other entities than States having the possibility to become Members.

Article 61 details the relationship between the IMO and other intergovernmental organisations:

„The Organization may, on matters within its scope, cooperate with other intergovernmental organizations which are not specialised agencies of the United Nations, but whose interests and activities are related to the purposes of the organization.“

The agreement of cooperation which exists between the European Commission and the IMO clearly fall under the above article. No right to vote or similar issues are taken up by the article, which leaves to the impression that such rights are simply not granted. The idea behind the article is to integrate intergovernmental organizations in shipping questions but not to offer them a chair in the IMO.

Article 63 regulates the handing over of specific functions from international organisations, both governmental and non-governmental, to the IMO. It goes without saying that such functions must be within the scope of the IMO's work.

As previously already mentioned, the IMO convention would have to be changed by means of an amendment in order to allow non-States to become a member.

In order to do so, special attention must be paid to Article 66:

„Text of proposed amendments to the Convention shall be communicated by the Secretary-General to Members at least 6 months in advance of their consideration by the Assembly. Twelve months after acceptance by two-third of the Members of the Organization, other than Associate Members, each amendment shall come into force for all Members. If within the first 60 days of this period of twelve months a Member gives notification of withdrawal from the Organization on account of an amendment the withdrawal shall, notwithstanding the provision of Article 73 of the Convention, take effect on the date on which such amendment comes into force“

Summarizing the article, the following steps would have to be taken:

- The European Community or the European Commission on its behalf apply to the IMO's Secretary General for an amendment of the IMO convention which allows regional economic integration organizations to sign it and to become a Member of the IMO.
- The Secretary General proposes the amendment to all IMO Members at least six months prior to the next Assembly meeting.
- If agreed by all Members, Article 66 would have to be amended by inserting a clause which allows organisations like the EU to become a party of the IMO.

In the event such agreement is reached, all affected rules, including procedural rules would have to be amended or changed accordingly. The signature of acceptance would then be deposited with the Secretary General of the United Nations, see Article 71 of the IMO Convention.

If the IMO Secretary-General rejects the proposal of an amendment of the Convention, only a position taken by the IMO Council could overrule the rejection, see Article 15:

„The function of the Assembly shall be (...)

(m) to refer to the Council for consideration or decision any matters within the scope of the organization (...“

A simple majority of the Council Members being present would be sufficient for the proposal of an amendment to the IMO Parties.

No indication can be given as to what decision a referendum in the IMO would lead to.

In case the amendment of the IMO Convention was agreed, the European Community would become a full member of the IMO. The organisational and procedural structure, especially with respect to the allocation of votes, would have to be changed accordingly.

But a membership of the European Community would definitely lead to changes of the IMO's concept, too. The IMO was established with the idea that States with an interest in shipping and related matters discuss relevant issues on an equal basis. Each State should be given the same powers, rights and duties. No difference should be made regarding neither the financial situation of a State nor the influence a State might enjoy in shipping matters. If the EC was to become a full member, the basic idea behind the IMO would be suspended. It would not longer be a pure meeting forum for States with the same powers but become much more involved in political structures and discussions than today.

The high level of technical debate could indeed decrease when the large European Shipping nations not longer speak on their own behalf but are represented by the EC's delegates.

One cause of concern is that the European position would more or less only indicate an eventually very low level of consensus among EU Member States and between them and the European Commission.

In the latter case, one may ask again whether the Commission's point of view would prevail over the Member States view and then be presented as the European view in the IMO.

Article 300 of the EC-Treaty states the procedure to be followed when concluding agreements with international organisations:

“1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it. (...)

7. Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.“

As already pointed out, no reference can be found in the Treaty to international agreements in the maritime transport sector. Despite this, one may assume that if EC membership in the IMO is agreed upon by the Member States, the procedure in Article 300 would be followed.

The Commission would then negotiate the agreement, whereby the Member States via the Council may issue directives on the substance of the agreement in question.

Depending on the subject matter, the European Parliament might be entitled to an opinion.⁹⁰

It is important to point out that Article 300 grants only negotiation power but no conclusion competence to the Commission. The conclusion of an agreement is done by the Council on behalf of the Member States which -for shared agreements- would have to ratify it.

The determining of the legality of an agreement a posteriori would stay with the ECJ.⁹¹

⁹⁰ Depending on whether Article 310 EC applies.

⁹¹ As confirmed in Case C-12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*

7 Conclusion

In summary, two main factors can be identified behind the EU/EC's efforts to gain membership in the IMO. Firstly, the European Commission/European Community wishes to expand its external competences into the field of maritime trade. Secondly, the Commission/Community would like to strengthen the European influence in the IMO.

The very different point of views among presentations of European States in IMO meetings in the past may be identified as a minor factor as well. Several times, the Commission expressed its concern about the perception of Europe in the IMO when even the EU Member States dissent on the issues. The in-formal meetings prior to IMO rounds are not successful as Member States act differently from what has been agreed. The question is whether there is enough proximity at all in the national interests of the 27 Member States in order to agree on a common position.

Bearing in mind the interests of several EU shipping nations, one might tend to assume that it is quite difficult to agree on common positions with a competing party.

With the eventual membership of the EC in the IMO, the desire to expand the Community's power into the field of maritime affairs would definitely be satisfied. In line with the ERTA-principle, the EU Member States could no longer make independent decisions on the same matters as would be 'occupied' by the Community. As the shipping business is expected to become even more important in the future (due to the expected continued grow of globalisation) this field of Community competence would be a considerably large one.

Whether the membership would in reality result in a stronger European influence in the IMO must be analysed with precaution. On one hand, the unified European position could lead to a much more powerful and persuasive role for Europe in the IMO.

On the other hand, a single European voice might prevent important discussions and different perspectives on important matters. If the EU was to speak with only one voice, the Assembly might suddenly face the loss of 27 actively engaged parties.

At the same time, if the European membership is seen as diminishing the influence of Europe in the IMO, other States might take the opportunity and surprise the Assembly by becoming very proactive.

In so doing, the IMO might play an even greater role in meeting the needs and special circumstances of developing countries.

The main criticised points regarding an eventual full membership of the European Commission/European Community, whether supporting or replacing the EU states memberships, are quite similar by all parties.

First and foremost, it is feared that the high level of technical expertise could not be maintained. If several important key shipping nations did not or only partly have the chance to participate in the decision making process, their former tasks would have to be overtaken by other parties or simply would not be overtaken by any party. Consequently, this could lead to decisions taken by non-experts with certainly good will but no technical/practical understanding of the consequences. Another concern is that if European shipping nations are not longer single members in the IMO, the whole organisation might become very unattractive for the world community. Thirdly, almost all major shipping unions/organisations expressed their strong concerns about the IMO becoming extremely politicised if full membership was awarded to the EC. Until today, the IMO has restricted its scope of work to assistance and technical co-operation among all undersigning governments. If membership is made available to regional economic integration organizations, the IMO might suddenly face situations where it has to define what such an organisation is.⁹² Coalitions among governments which might have economic motives would then have a direct impact on their work in the IMO.

Despite the strong criticism on the idea of European membership in the IMO, several advantages of such a membership can be identified:

Perhaps, legal uncertainties as now with the 'Ship source pollution Directive' could be prevented by taking up the matter directly through international law.

Presently with regard to the Directive, the main point of discussion is whether the EC is infringing international law. In particular, the disagreement concerns the MARPOL convention. The EC interprets the internationally agreed standards only as minimum standards and not as maximum standards. The problem would not exist if the EC would have tried to amend the MARPOL regime on the international level, i.e. in the IMO. Either all parties had agreed to an amendment or not, but no single European solution as of now would have been possible.

Another advantage could be that the EC could use its influence to hasten the law making progress in the IMO. As it happened with the phasing out of single hull tankers, the EU might indeed speed up the legislation process, probably even more so as a full IMO member.

A third advantage might be that the exemplary European legislation might be transformed into an international one, thereby improving the international standards.

⁹² This situation might be avoided by inserting a similar clause like Article II of the Statute of the Food and Agriculture Organization of the United Nations:

„... a regional economic integration organization must be one constituted by sovereign States, a majority of which are Member Nations of the Organization, and to which its Member States have transferred competence over a range of matters within the purview of the Organization, including the authority to make decisions binding on its Member States in respect of those matters“.

The question arises whether those outlined positive effects could only be obtained by the EC becoming a full member in the IMO or whether there might be other, less controversial possibilities which could achieve the same result.

With regard to the dispute on the interpretation of internationally agreed standards, one might also consider seeking an interpretation clause in the relevant organisation.

Furthermore, the EC could have proposed an amendment to the MARPOL Convention, either through the Commission which enjoys observer status or through one or all EU Member States. Last but not least, the EC could have asked for a ruling by the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany.

Concerning the sped up adoption of new legislation in the IMO, the Commission might also consider intensifying its work as an observer in the organisation.

As it enjoys the right to produce documents and to distribute them among all IMO members, it could try to persuade Members to adopt a tighter time frame in certain matters.

The same applies to the improvement of the international standards in general.

What would the disadvantages of an European membership in the IMO be ?

It is safe to assume that it could create a certain insecurity or even instability among the other members as they would have to interact with a economic regional power instead of several States. Further, an EC membership might lead to an establishment of different regional blocks within the IMO. The United States of America already irritated the IMO community in 1990 when independently adopting the Oil Pollution Act (OPA 90). The Act provides for a different compensation and liability regime in case of an oil pollution than in the rest of the world where MARPOL and the respective conventions dealing with oil pollution apply. OPA 90 has been adopted in the light of the grounding of the tanker EXXON VALDEZ on the Bligh Reef in William Sound, Alaska in 1989.⁹³

As the resulting oil spill was the largest ever in the U.S. History⁹⁴, the public reaction was overwhelming, which made possible extraordinary changes in law to avoid similar future incidents in American waters. The result now is that vessels trading worldwide and therefore potentially calling American ports must provide two sets of certificates, one for USA and one for the rest of the world.

European membership could lead to European solutions in international questions which might be contradictory not only to the idea behind international law but also to procedures already in force.

⁹³ March 3, 1989

⁹⁴ The vessel lost more than 40.000 tons of crude oil and more than 2000 km coast line have been polluted.

Furthermore, other States might interpret EC membership as an implicit signal to find regional partners in the IMO and to establish regional memberships as well.

This would definitely be in contradiction to the whole idea of the IMO as it might lead in the end to very few groups discussing international maritime business.

Not surprisingly, other IMO members which are not EU members have expressed neither their support nor their objections to a single European membership.

This could have two reasons, first, that they do not expect that the EC is in fact applying for such membership, and second that they are of the opinion that an application would not pass the referendum anyway.

Even if all EU Member States were voting in favour of the application and the accompanying amendments of the IMO convention, it would only be 27 of 167 states – far from the requisite two-third majority.

It is not easy to establish a stimulation for non-EU States to support an EC membership as there might be no direct advantage for them. Indirectly, they might experience an advantage as they would only have to conduct negotiations with one party instead of 27.

Another reason why third countries have been so quiet about the matter might be that they consider this to be a purely European issue which should be solved internally. This assumption might be supported by the strong opposition from the EU Member States themselves.

The rejection of the idea by the EU-States has both, an external and internal dimension.

Externally, they mainly fear suffering losses in their international influence in shipping.

Internally, the very technocratic approach is criticised. In order to fulfil its obligations in the IMO as a full member, the Commission might end up making decisions without consultations with the EU-States. The latter are very concerned with that possible lack of transparency and legitimacy.

Less transparency might indeed lead to a greater efficiency⁹⁵ but to a strong dissatisfaction and opposition as well. The European States themselves seem to be distrustful of the Commission and want to keep their own rights to vote and to veto, if necessary.

The rejection of the proposal by the affected States might have led to the impression that the whole discussion is only about one of the various ambitious projects of the European Commission, supported by the so called “EURO-Federalists”.

However, it would be very superficial to assume that if it was decided that the EC has non-exclusive competence in maritime questions, it would not signify a non-existing EC competence.

95 As decisions might be taken in a very small group without losing too much time.

Finally, the already mentioned possible impact an EC membership in the IMO might have on international law should be discussed in detail.

On an international level, the principal actors are States. They agree with other States on certain issues by the conclusion of an agreement.

The rationale behind internationally agreed rules is therefore consensus and reflection of same.

The agreeing parties restrict their own power in order to grant the success of internationally agreed conventions or agreements. Generally speaking, one could say that the States waive exercise of their sovereign power in certain areas in order to grant the compliance with the agreed rules on a wider basis. In international law, States act not only on their behalf but also as part of the world community. Therefore it might sometimes make more sense to agree only on a part of what should ideally be agreed upon but with the certainty that the agreed to law will be complied with by all parties.

However, as already mentioned, as in the 'ship source pollution Directive' case the European political level regards the agreements only as a minimum consensus, i.e. only setting minimum standards. This view is not supported by other IMO States.

Fundamental principles/postulates established in international law are freedom, equality and effectiveness. Even if the international law is characterized by its laissez-faire approach, there is no doubt that those postulates must be respected.

The Charter of the United Nations (UN) defines the basic principles in Article 2 as the following:

“The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

The Organization is based on the principle of the sovereign equality of all its Members.

All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.“

No overruling effective controlling system is established in order to secure the compliance with those principles. To the contrary, it is based on confidence and the good will of the parties.

Additionally, it is assumed that all States are aware of the fact that in case of infringements, political, economical and psychological factors would come into account.

It is not infrequently argued that international law is based too much on the good will of the parties and too often abused because of the lack of an effective penalty system for infringements.

However, one has to remember the very basic idea of governmental co-operation is to secure peace.

In the case of the IMO membership, a clearly regional approach on a international level to fundamentally international matters is taken. Its effect would not only be that the EC would extend its competences in maritime matters but also that regional European features would be promoted world wide. Who would really profit from such an approach ?

Shipping has always been and will be a very international matter which should therefore be regulated internationally, upon the most possible consensus of all parties involved. The IMO is the competent forum to discuss such matters and to adopt relating legislation. It is based on the principle of equality, whereby each party enjoys the same rights. Admitting the EC to become a full member in the IMO would disorganize the well established and functioning system. Additionally, no clear answer can be found as to how EC membership should practically work, whether it should replace or support the membership of EU Member States. In both cases, uncertainties exists as how the European votes could then be split and counted. The EU Member States are opposed to EC membership and prefer to speak in the IMO on their own behalf. European and International shipping organisations are mainly against a full membership of the EC. Non-EU States seem to not take the idea seriously at all.

The two main driving factors behind the application are of a pure European nature and do not give a slightest indication that the international Community would profit from an approval.

In sum, no real need can be found for the EC to become a full member in the IMO. If the Community is unsatisfied with the Member States' behaviour at the IMO Assembly and claims it to be contrary as to what has been agreed before, it should establish a more effective system of pre-Assembly meetings. The only obvious advantage European membership in the IMO would bring is that the Community could extend its competences in the field of maritime trade, which is still today excluded by the EC-Treaty. This purely political motivation should not be used to change the well functioning system and structure of the IMO.

To the contrary, the EC should focus on EU Member States' meetings prior to the IMO Assembly as the proper place to discuss its future goals in maritime affairs. Additionally, the European Commission should intensify its work as an observer in the IMO. Last but not least, one should not forget that the EC/EU does not have a common constitution and is certainly not a sovereign state, and should therefore not enjoy rights as if it was.

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