

IMO's mandatory Audit Scheme: an analysis of IMO's enforcement power

Candidate nr. 11

Master thesis in Law of the Sea, 01 September 2015 (Autumn semester)

Supervisor: T. Henriksen

Word count: 15069

Table of Contents

| | |
|--|------------|
| List of abbreviations | iii |
| Introduction | 2 |
| 1 The character of the IMO..... | 6 |
| 1.1 The legal status of IMO decisions for its Member States..... | 7 |
| 1.2 The relationship between the LOSC and the IMO..... | 8 |
| 1.3 Sanctioning in case of non-compliance with IMO instruments..... | 12 |
| 1.3.1 Removal of the ability to grant its nationality to ships..... | 13 |
| 1.3.2 Denying ships access to ports..... | 14 |
| 1.3.3 Targeting ships during port inspections..... | 14 |
| 1.3.4 Classification societies..... | 16 |
| 2. The IMO's mandatory Audit Scheme..... | 18 |
| 2.1 The development of the mandatory Audit Scheme..... | 18 |
| 2.1.1 III Code..... | 19 |
| 2.1.2 Framework and Procedures for the IMO Member State Audit Scheme..... | 20 |
| 2.2 The advantages of a mandatory Audit Scheme..... | 22 |
| 2.2.1 Transparency of the information gained from audits..... | 22 |
| 2.2.2 Improving performance of IMO instruments..... | 24 |
| 2.2.3 More homogeneity in international regulations regarding shipping and safety..... | 25 |
| 2.3 The role of Recognized Organizations in the mandatory Audit Scheme..... | 26 |
| 2.4 The enforcement of the mandatory Audit Scheme..... | 28 |
| 2.4.1 The pressure on States to abide by soft law principles..... | 31 |
| 2.4.2. The holistic nature of the Audit Scheme..... | 31 |
| 2.4.3 States' willingness to submit themselves to auditing..... | 31 |
| 3 IMO's mandate in relation to the Audit Scheme..... | 33 |
| 3.1 The changing role of the IMO..... | 33 |
| 3.2 The constraints on the expansion of IMO's mandate..... | 34 |
| 3.2.1. Constraints laid down in the IMO Convention..... | 34 |
| 3.2.2 Constraints regarding the mandate of other global bodies..... | 37 |
| 3.3 Consequences when mandate is exceeded..... | 38 |
| 3.4 IMO's mandate and the mandatory Audit Scheme..... | 40 |
| Conclusion | 42 |
| Bibliography | 45 |

List of abbreviations

| | |
|----------------|---|
| art. | Article |
| COLREG | International Regulations for Preventing Collisions at Sea |
| DOALOS | Division for Ocean Affairs and the Law of the Sea |
| GAIRAS | Generally Accepted International Rules and Standards |
| ICJ | International Court of Justice |
| III Code | IMO Instruments Implementation Code |
| ILC | International Law Commission |
| IMCO | International Maritime Consultative Organization |
| IMO | International Maritime Organization |
| IMO Convention | Convention on the International Maritime Organization |
| IMSAS | IMO Member State Audit Scheme |
| LOSC | Law of the Sea Convention |
| MARPOL | International Convention for the Prevention of Pollution from Ships |
| p. | Page |
| para. | Paragraph |
| pp. | Pages |
| Res. | Resolution |
| RO | Recognized Organization |
| SOLAS | International Convention for the Safety of Life at Sea |
| UN | United Nations |
| UNCLOS | United Nations Conference on the Law of the Sea |
| VIMSAS | Voluntary IMO Member State Audit Scheme |

Introduction

The International Maritime Organization (IMO) is a United Nations (UN) specialized agency with as its responsibility regulating safety and security of ships and the prevention of marine pollution by ships.¹ There is a general consensus among authors and other actors in the international community that the IMO created a framework of legislation sufficient to deal with the organization's functions within its competence and furthermore that the IMO adopted enough legislation laying down regulations regarding flag State responsibility and compliance. However, it is preferable to improve ratification and enforcement of - and check the compliance with - the legislation already in place.² A possibility of dealing with this issue is creating an option to measure the performance of flag States by an international authority in order to make these flag States comply with international laws and regulations better.

In 2001 the IMO approved a proposal by several Member States for the development of the Voluntary IMO Member State Audit Scheme (VIMSAS) at the 88th session of the Council, in June 2002, in order to improve the implementation and enforcement of IMO instruments by its Member States.³ This scheme opened up for the option for IMO Member States to monitor each other in order to increase compliance with the major IMO Conventions among all IMO Member States. This Audit Scheme is planned on becoming mandatory from 1 January 2016, becoming the IMO Member State Audit Scheme (IMSAS).⁴

According to the Secretary-General of the IMO, the goal of IMSAS is to eliminate sub-standard shipping⁵ by "assessing Member States' performance in meeting their obligations and responsibilities as flag, port and coastal States under the relevant IMO

¹ <http://www.imo.org/About/Pages/Default.aspx>. Visited on 8 June 2015.

² Allen 2009, p. 302; Mansell 2009, p. 3.

³ <http://www.imo.org/OurWork/MSAS/Documents/Voluntary.pdf>, para. 10 on p. 3. Visited on 5 May 2015.

⁴ <http://www.imo.org/OurWork/MSAS/Pages/default.aspx>. Visited on 5 May 2015.

⁵ IMO Secretary-General E. Mitropoulos during the opening of the second session of the ad hoc Council Joint Working Group, see: <http://www.imo.org/KnowledgeCentre/InformationResourcesOnCurrentTopics/InformationResourcesOnCurrentTopicsArchives/Documents/Voluntary%20IMO%20Member%20State%20Audit%20Scheme%20%282007%29.pdf> page 16. Visited on 5 May 2015.

treaties and then offering the necessary assistance, where required, for them to meet their obligations fully and effectively.”⁶

The IMSAS does not have as its goal to cause embarrassment to the States audited by exposing their weaknesses,⁷ but rather to provide a Member State “with a comprehensive and objective assessment of how effectively it administers and implements those mandatory IMO instruments which are covered by the Scheme.”⁸ The audit is therefore largely based on a dialogue between the Member State and the IMO, during which the scope of the audit is being discussed between the two parties.⁹ Some results of the audit are subsequently made public for all IMO Member States.¹⁰

The IMO decided not to adopt IMSAS by creating a new convention, but by amending its most important conventions¹¹ and by making mandatory the IMO Instruments Implementation Code (III Code), which provides a global standard to “Assist States in the implementation of instruments of the Organization”.¹² The III Code acknowledges that different States have different obligations under the Code. It first recognized that States should “view this Code according to their own circumstances”, meaning they are only bound by “those instruments to which they are Contracting Governments or Parties”, and secondly that the extent of the role as a flag- coastal or port State may differ from State to State.¹³

The introduction of IMSAS means that the IMO is given a lot of competence to check on the performance of its Member States in relation to its Conventions. However, the mandate of the IMO is, according to its founding Convention, limited to “recommend to Members for adoption regulations and guidelines...”¹⁴ The founding document of

⁶ <http://www.imo.org/MediaCentre/PressBriefings/Pages/A-28-ends-.aspx#VPgXccTuLB0>. Visited on 5 May 2015.

⁷ IMO Secretary-General E. Mitropoulos during the opening of the second session of the ad hoc Council Joint Working Group, see: <http://archives.dailymirror.lk/2004/03/29/ft/13.asp>. Visited on 5 May 2015.

⁸ <http://www.imo.org/OurWork/MSAS/Pages/AuditScheme.aspx>. Visited on 5 May 2015.

⁹ Liejun 2013, p. 2.

¹⁰ IMO Res. 2013 III, Appendix 1, Section 2.7;

<http://www.imo.org/en/OurWork/MSAS/Pages/AuditScheme.aspx>. Visited on 10 May 2015.

¹¹ Load Lines Convention; Tonnage Convention; COLREG; SOLAS; Load Lines Protocol; STCW Convention; MARPOL Annexes I to VI (1973); MARPOL Protocol.

¹² IMO Res. 2013, p. 4.

¹³ *Ibid.*

¹⁴ IMO Convention, art. 15(j).

the IMO does not contain any provisions that gives the IMO enforcement and monitoring powers. This raises the question whether the introduction of IMSAS is within IMO's mandate, and, if this is the case, what the options are for the IMO to try and force its Member into acting in compliance with IMO legislation when non-compliance is detected.

Therefore, the research question formulated to deal with these issues is:

Is the IMO competent to adopt a mandatory Audit Scheme under its Convention and which measures could the Organization and its Member States take to enforce such a scheme?

In order to deal with this question, the thesis will be divided into three parts. Chapter 1 will discuss the character of the IMO. It first deals with the legal status of IMO decisions for its Member States. The different IMO instruments will be discussed, and it will be assessed to which extent these different instruments are binding on the IMO Member States. Further, the relationship between the Law of the Sea Convention (LOSC) and the IMO will be discussed. There will be an analysis on the meaning of LOSC references to the IMO and whether this gives the IMO more responsibilities and power via the LOSC. The last sub-chapter of Chapter 1 will deal with the possibility of sanctioning IMO Member States in case of non-compliance with IMO instruments. Questions raised here are who are the actors who can sanction, and what those sanctions can be.

Chapter 2 will discuss the IMO's mandatory Audit Scheme. First, there will be a closer look at the development of the mandatory Audit Scheme. It will be described how the Scheme came into place, and what the legal instruments are that implement the Scheme into IMO's existing legislation. Further, the advantages of a mandatory Audit Scheme rather than a voluntary one will be listed. What follows is a discussion on the role of Recognized Organizations (ROs) in the mandatory Audit Scheme. Chapter 2 will conclude with an assessment on the enforcement of the mandatory Audit Scheme which in particular focusses on the question whether the IMO or its individual

Members can take action when a flag States does not act in compliance with the Audit Scheme.

Chapter 3 of the thesis focusses on IMO's mandate in relation to the Audit Scheme. After a discussion on the changing mandate of the IMO over time, it will be assessed what the constraints on the expansion of this mandate are, and what the consequences for the IMO as an organization is when this mandate is exceeded. Lastly, in light of the findings in the first parts of Chapter 3, it will be researched whether or not the IMO is exceeding its mandate with the introduction of IMSAS.

There will only be a focus on flag States in this thesis. Even though the IMSAS also addresses both coastal- and port States, it is being recognized that flag States bear the main responsibility with regard to compliance with international law: according to the Secretary-General of the UN Oceans and the Law of the Sea (DOALOS) division, "it is the duty of flag States, not port States, to ensure that ships meet internationally agreed safety and pollution prevention standards."¹⁵

Sources and method

In order to answer the questions raised in this thesis, the following methodology will be used:

- Studying relevant juridical literature in order to get familiar with the gaps VIMSAS left which made it necessary for a mandatory scheme to be developed by the IMO.
- Studying relevant IMO Resolutions in order to get familiar with issues such as the process of the Audit Scheme and the role of ROs.
- Studying the 1948 Convention on the IMO in order to be able to discuss the constraints on the expansion of IMO's mandate.
- Studying international institutional law in order to get familiar with the working of international organizations and the IMO more specifically with regard to its Member States.

¹⁵ UNGA Doc. A/58/65, para. 92.

1 The character of the IMO

Chapter 1 of this thesis will discuss the instruments of the IMO, in order to be able in the next parts of this thesis to apply this discussion more specifically to the mandatory Audit Scheme. There will therefore first be a focus on the different IMO decisions and their legal status for its Member States. Further, in order to create full comprehension of the working of the IMO and its legal significance, the relationship between the LOSC and the IMO will be discussed. There will be an analysis of the meaning of LOSC references to the IMO and whether this gives the IMO more responsibilities and power via the LOSC. The last sub-chapter of Chapter 1 will deal with the possibility of sanctioning IMO Member States in case of non-compliance with IMO instruments. Questions raised here are who can sanctions, and what those sanctions can be.

The IMO came formally into existence with the Convention on the International Maritime Consultative Organization of 1948 (IMCO Convention, in 1977 amended into the International Maritime Organization (IMO) Convention). The basic purposes and functions of the Organization are laid down in this Convention. The main purpose of the Organization is a consultative one in support of national governments. The IMO aims to facilitate the co-operation and exchange of information between governments and the removal of discriminatory and unnecessary restrictions. The output of the Organization is to recommend to Members for adoption regulations and guidelines with regard to the subjects covered by its mandate.¹⁶ Its mandate, according to the IMO Convention, is restricted to the areas of shipping engaged in international trade, maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.¹⁷

To elaborate on these purposes and functions, the IMO Assembly adopts every six years a Strategic Plan, and High-level Action Plan every two years. The Strategic Plan contains the more specific direction towards which the IMO should move in order to reach its objectives as laid down in the Convention. The High-level Action Plan

¹⁶ IMO Convention, art. 15(j).

¹⁷ *Ibid.*, art. 1(a) & (b).

translates these objectives into actions, allocates roles to the various IMO organs and decides on a budget in order to execute the actions.¹⁸ The Strategic Plan as well as the High-level Action Plan are relevant sources to identify the direction towards which the IMO is heading in the years to come, since they are more specific than the Convention. They are therefore useful sources when researching the current tasks and responsibilities of the IMO.

In its most recent Strategic Plan,¹⁹ it is laid down that the “highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships” have to be adopted in order “to promote safe, secure, environmentally sound, efficient and sustainable shipping”.²⁰ The Strategic Plan then focusses on some issues requiring special attention by the IMO during those six years. Examples of this are heightened environmental consciousness and the promotion of efficient shipping.²¹ On the basis of these Strategic Plans, the IMO subsequently develops regulations in order for its Member States to comply with the goals set in these Plans.

1.1 The legal status of IMO decisions for its Member States

In order to execute the abovementioned goals of the Organization, the IMO has several functions. The function of the Organization is first and foremost an advisory one, in which the IMO recommends upon matters to its Members.²² The Organization furthermore drafts regulations, conventions, guidelines and codes via resolutions issued by the IMO.²³ The IMO has several organs with different areas of expertise to assist in the drafting of these IMO resolutions.²⁴ IMO resolutions can either lay down regulations with regard to the internal activity of IMO bodies - being binding upon such bodies - or regulations regarding its Member States.²⁵ When a resolution is a regulation laying down rules for its Member States, it is generally considered as being non-binding on the State, although its regulations can later be codified in an IMO

¹⁸ <http://www.imo.org/About/strategy/Pages/default.aspx>. Visited 7 May 2015.

¹⁹ <http://www.imo.org/About/strategy/Documents/1060.pdf>. Visited 7 May 2015.

²⁰ *Ibid.*, p. 3. Visited 7 May 2015.

²¹ *Ibid.*, p. 5. Visited 7 May 2015.

²² IMO Convention, art. 2(a).

²³ *Ibid.*, art. 2; 15(i) - (l).

²⁴ *Ibid.*, art. 11.

²⁵ Anianova 2006, p. 83.

Convention. Even with its non-binding status, regulations - especially the ones laying down Codes and Guidelines for its Member States - are important instruments, since these regulations take into account the view of governments and all other interested parties, and therefore reflect standards agreed upon by consensus by many different parties.²⁶

IMO Conventions are binding upon the Member States ratifying the Convention.²⁷ These Conventions may be amended after consideration with the IMO and approval of two thirds of the Member States party to the Convention.²⁸ In instances where there exists a need for more detailed standards, the IMO can adopt Codes and other non-binding instruments to supplement its Conventions. Sometimes these Codes are given binding effect by the Conventions themselves, for example in the case of Annex II, Regulation 13 of the International Convention for the Prevention of Pollution from Ships (MARPOL), which makes the standards in two IMO Codes mandatory minimum requirements with regard to the construction of chemical tankers.²⁹

1.2 The relationship between the LOSC and the IMO

With regard to IMO resolutions, the IMO itself is of the view that parties to the LOSC are expected to abide by these rules and standards laid down in these resolutions, because they are adopted by consensus and therefore reflect global agreement by the IMO Members.³⁰ Kirgis adds to this argument that: "Many of the individuals who shape them [i.e. rules and standards] are also heavily involved in implementing them..."³¹ adding even more value to the presumption that these IMO instruments have the intended effect.

An IMO treaty or convention becomes mandatory when it enters into force, but only when it is - as stated before - ratified by the Member State. This means that all IMO instruments have to be implemented by its Member States into their national legislation in order for the instruments to have indirect enforcement power. For the

²⁶ Kirgis 1998, p. 727.

²⁷ See for example Load Lines Convention, art. IV; SOLAS, art. IX.

²⁸ See for example Load Lines Convention art. VI; SOLAS art. VIII.

²⁹ Kirgis 1998, p. 723.

³⁰ IMO Study 2012, p. 10.

³¹ Kirgis 1998, p. 727.

IMO to have any *direct* enforcement powers, an amendment of the IMO Convention would be required in order to broaden the scope of article 2 of the IMO Convention - laying down the functions of the Organization - and expand the powers of the IMO from merely recommendatory to binding upon its Member States.³² It is, however, questionable whether such direct enforcement powers are necessary in order for IMO instruments to have sufficient binding effect on its Member States. As will be explained in the next paragraph, there is a difference between the competence of the IMO under its Convention - which was elaborated on in the part above - and the wider effect of IMO Conventions through the reference to the Organization in the LOSC. Due to the working of the LOSC, the powers of the IMO might be viewed as being broader than prescribed in its Convention.

In recent years, there is a trend that international organizations - such as the IMO - become more of a law-prescribing body, rather than one who makes recommendations regarding the development of the law to its Member States.³³ With regard to the IMO, such legislative powers are granted to it by the LOSC, which refers more than two dozen times³⁴ to the “competent international organization”³⁵ when assigning functions that are not regulated under the Convention itself.³⁶ The LOSC furthermore uses terms such as “Take account of”, “conform to” and “give effect to” in relation to IMO provisions.³⁷ These terms imply that even though the IMO does not have any direct enforcement powers in relation to its Member States, its resolutions and treaties are still binding through the working of the LOSC, considering the fact that the LOSC is a binding instrument.

However, it is also possible to argue that the effect of IMO conventions through the LOSC is less than stated in the paragraph before. When this view is being argued, one has to look at articles 311 and 237 of the LOSC, which describe the relationship between the LOSC and other conventions and international agreements. Article 311 of the LOSC prescribes that other conventions not compatible with the rights and

³² Mansell 2009, p. 228.

³³ Allen 2009, p. 271.

³⁴ *Ibid.*, p. 284.

³⁵ The IMO became a “specialized agency” under the United Nations by entering into an agreement as laid down in article 57 of the United Nations Charter, according to Allen 2009, p. 272.

³⁶ Allen 2009, p. 271.

³⁷ IMO Study 2012, p. 10.

duties laid down in the LOSC cannot trump the LOSC. This means with regard to IMO treaties that in order for such treaties to have any legal significance for LOSC Parties, these treaties should only reflect rights and obligations compatible with the LOSC and without affecting the enjoyment by the LOSC Parties of their rights or the performance of their obligations under the LOSC.³⁸ Article 237 - as a *lex specialis* - subsequently states that with regard to the protection and preservation of the marine environment, other conventions might trump Part XII of the LOSC. Therefore, IMO conventions specifically concerned with such issues might trump the regulations as laid down in the LOSC, but only if the LOSC Party is also a party to such IMO conventions. From the discussion of articles 311 and 237 of the LOSC it can be concluded that IMO conventions only have a minor working through the LOSC and can only contain legal obligations for non-parties to IMO conventions if the IMO convention reflects rights and obligations compatible with the LOSC.

A second way in which the IMO can work through the LOSC, is in the case an IMO convention lays down internationally accepted rules or standards. The extent to which LOSC Parties should abide by IMO instruments is ruled by this degree of international acceptance of these standards.³⁹ Only when the IMO resolution represents “generally accepted international rules and standards” (GAIRAS) are its rules binding on LOSC Parties. The major IMO instruments are ratified by more than 95% of the gross tonnage of the world’s merchant fleet, proving international acceptance of said instruments, making these instruments suitable for falling under the term GAIRAS.⁴⁰ Subsequently, since the LOSC requires compliance with GAIRAS,⁴¹ the principal IMO instruments are applicable to all LOSC Parties, whether or not they are bound by a certain IMO instrument.⁴²

However, some authors express some reservations with regard to this view and argue that it should not be understood that there is no need for States to ratify the underlying IMO conventions because of the reference in the LOSC to IMO

³⁸ LOSC, art. 311(2).

³⁹ IMO Study 2012, p. 11.

⁴⁰ *Ibid.*

⁴¹ LOSC, art. 94(5).

⁴² Allen 2009, p. 292.

instruments.⁴³ According to Blanco-Bazán: “UNCLOS’ language is general and as such of a restricted operative character.”⁴⁴ He therefore states that very precise and detailed IMO rules and standards cannot be binding on State Parties to the LOSC unless they are also a party to the underlying treaty. He therefore emphasizes the importance of IMO decisions, in particular the adoption of IMO Conventions, due to the fact that the character of the LOSC is a too general one to assume that all IMO legislation is automatically applicable to all parties to the LOSC. His main argument to support this view is the fact that under the main IMO treaties, such as MARPOL, Parties have the right not to accept amendments made to these treaties. Under MARPOL, it is even possible to opt out from three of the Annexes, an option that many States used.⁴⁵ This would mean that parties to the LOSC that are not parties to these treaties, would be obliged to implement these new provisions without having the possibility to make such reservations to the amendments.⁴⁶ This seems like a strange result and furthermore contrary to article 34 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention), which states that a Party should always give its consent before being bound by a treaty. Blanco-Bazán concludes that: “Thus UNCLOS obligations to enforce IMO rules and standards should be understood as operative on condition that parties to UNCLOS also become parties to the IMO conventions where these rules and standards are contained.”⁴⁷ Kirgis argues in line with this view, stating that “sovereign states may not have intended to use the 1982 Convention to transform nonbinding recommendations into binding obligations without being explicit.”⁴⁸ The view contrary to the one expressed by these authors - that all IMO legislation is automatically applicable to the LOSC Member States - can hardly be argued. The principle that a treaty cannot create obligations for a third party that did not consent to the obligations laid down in a treaty, is a leading principle of international law and should therefore always be taken into account in the context of treaty obligations.⁴⁹

⁴³ Allen 2009, p. 292, Blanco-Bazán 1999, p. 278.

⁴⁴ Blanco-Bazán 1999, p. 278.

⁴⁵ *Ibid.*, p. 280.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, p. 278.

⁴⁸ Kirgis 1998, p. 735.

⁴⁹ Sinclair 1984, p. 99.

In conclusion, it can be said that the competence of the IMO under the IMO Convention functions in a way that all IMO instruments have to be implemented by its Member States into their national legislation in order for the instruments to have indirect enforcement power. The IMO Convention does not open up for the IMO instruments to have any direct enforcement powers. However, due to the wider effect of the IMO Convention through the reference to the Organization in the LOSC, the enforcement powers of the IMO can be viewed as encompassing more than just with regard to its competence as laid down in the IMO Convention. There are multiple instances where the LOSC refers to the IMO as being the “competent international organization”, thereby allocating rights and responsibilities to the Organization. It is debatable what the exact importance of these references in the LOSC are for the IMO as an organization, because despite the fact that IMO legislation can in many cases be viewed as laying down GAIAS, and are therefore binding upon LOSC Member States, it is the leading opinion that the underlying IMO Convention should still be ratified by as many Member States as possible, due to the general character of the LOSC, which can therefore not lay down detailed regulations in a way that the IMO can.

1.3 Sanctioning in case of non-compliance with IMO instruments

This sub-question will first discuss several options for imposing sanctions on States in cases where States did not implement and enforce the IMO instruments they have ratified. It is relevant to discuss these possibilities of laying sanctions on IMO Member States, because of the fact that the mandatory Audit Scheme is included in the major IMO instruments. Therefore, it is relevant for the answering of the research question to see what happens if these major IMO instruments are not properly implemented by the Member States who ratified them. Secondly, this sub-chapter will look at how to ensure compliance with IMO instruments, also in cases where sanctioning is not an option.

An initial question to be posed, however, is *when* a Member State is in non-compliance with IMO norms. Non-compliance means a violation of a standard, but as can be seen in many IMO Conventions, this standard is not always clear. Sentences such as “to the satisfaction of the Administration” are included in IMO treaties,⁵⁰

⁵⁰ Barchue 2006, p. 1.

which makes it difficult to draw a general conclusion on what non-compliance with a norm means. It can therefore be concluded that in the case where norms laid down in IMO Conventions are not clear cut, it is dependent on a case-to-case analysis whether a Member State is acting in compliance with a norm or not.

The IMO Convention comprises of two articles that entail sanctions. Article 10 lays down that a State cannot become or remain a Member State contrary to a resolution of the United Nations General Assembly (UNGA). Further, article 56 states that in case a Member fails to abide by its financial obligation to the Organization, loses its vote in the Assembly, the Council and the various Committees. These articles do not clarify what happens if a Member State does not act in compliance with the instruments issued by the IMO, such as MARPOL or the International Convention for the Safety of Life at Sea (SOLAS). The only commitment related to enforcement comprised within these instruments, is the duty on its Member States to report on matters relating to application of these instruments.⁵¹ Even though these reports might reveal violations of IMO instruments, the IMO can merely impose mild pressure on the violating Member State in order to make the State comply. Therefore, the reports have more a statistical purpose rather than a sanctioning one.⁵²

Accordingly, in order to research what the possibilities are to lay sanctions on IMO Member States acting in non-compliance with IMO legislation, one has to look outside of IMO law and more to general international compliance law. There are several options to be found in general international law regarding sanctions on IMO Member States:

1.3.1 Removal of the ability to grant its nationality to ships

Due to the nature of the IMO - first and foremost an advisory one - it was not possible to provide for sanctions in the IMO Convention that would interfere with the legally binding rights and duties under the general international law of the sea, more specifically as laid down in the LOSC.⁵³ This because the LOSC lays down legal obligations on its Members, and due to the *pacta sunt servanda* principle, as laid down

⁵¹ Kirgis 1998, p. 744.

⁵² *Ibid.*

⁵³ Mansell 2009, p. 231.

in article 26 of the Vienna Convention, “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. Therefore, the IMO cannot interfere with the rights and duties laid down in the LOSC. This significantly limits the possibilities for the IMO to lay sanctions on its Members. For example, a sanction for not abiding by IMO legislation cannot be removal of the ability of a State to grant its nationality to ships, since this is an exclusive sovereign right granted to States, as laid down in article 90 and 91 of the LOSC, and therefore the granting of nationality together with the conditions attached to this are beyond the mandate of the IMO or other international organizations.⁵⁴ It would therefore interfere with the principle of State sovereignty - which protects States from outside interference in their domestic affairs - to circumvent the rights laid down in the LOSC and provide for sanctions against flag States that do not effectively implement and enforce the standards required by the instruments they have ratified that are contrary to the rights laid down in the LOSC.

1.3.2 Denying ships access to ports

The port State has more options for laying sanctions on States not acting in conformity with their IMO obligations, because of the fact that the port State can include articles on sanctions in its national law. The port State could therefore deny the access to its port to ships flying the flag of States not meeting the required standards as laid down in IMO instruments.⁵⁵ The downside of this type of measures is that the effect of such measures will not be as substantial, since it will primarily be taken by individual States or at best regional MoUs,⁵⁶ rather than the international community as a whole.

1.3.3 Targeting ships during port inspections

Besides denying access to ports, the port State can also inspect foreign ships that visit its ports to ensure that they meet IMO standards. If the port State finds that such ships do not meet the standards in a satisfactory way, the port State has the possibility of detaining the ship until repairs are carried out.⁵⁷ The legal basis for such

⁵⁴ Mansell 2009., p. 230-231.

⁵⁵ *Ibid.*, p. 231.

⁵⁶ Takei 2012, p. 84.

⁵⁷ <http://www.imo.org/OurWork/MSAS/Pages/ImplementationOfIMOInstruments.aspx>. Visited on 15 May 2015.

inspections can be found in most of the main IMO treaties. In MARPOL, it is laid down that a ship in port can be subjected to inspections with regard to operational requirements as laid down in MARPOL in the case “where there are clear grounds for believing that the master or crew are not familiar with essential shipboard procedures relating to the prevention of pollution by oil.”⁵⁸ The port State is then allowed to detain the ship until “the situation has been brought to order in accordance with the requirements of this Annex.”⁵⁹ With regard to the 1966 International Convention on Load Lines (Load Lines Convention), the port State is allowed to “as far as is reasonable and practicable”⁶⁰ verify whether or not there is a valid Load Line Certificate on board. If this is the case, the Convention opens up to several very specific controls the port State can undertake on board of foreign ships in its port.⁶¹ The port State furthermore should “ensure that the ship shall not sail until it can proceed to sea without danger to the passengers or the crew”,⁶² also implying the port State is allowed to detain the ship until it conforms with the standards as laid down in the Load Lines Convention. The SOLAS Convention and 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention) hold similar provisions regarding port State control.

Furthermore, in emphasizing the possible effectiveness of port State inspections, the IMO adopted Resolution A.682(17) on Regional Co-operation in the Control of Ships and Discharges, in order to promote the conclusion of regional agreements with regard to port State control.⁶³ The 1982 Paris Memorandum of Understanding (Paris MoU) is an example of such a regional agreement, although the Paris MoU is predating the IMO Resolution A.682(17). Following the Paris MoU, many other Memoranda of Understanding followed, covering practically all coastal States in the world.⁶⁴

⁵⁸ MARPOL, Regulation 8A(1).

⁵⁹ *Ibid.*, Regulation 8A(2).

⁶⁰ Load Lines Convention, art. 21(1).

⁶¹ *Ibid.*

⁶² *Ibid.*, art. 21(2).

⁶³ <http://www.imo.org/OurWork/MSAS/Pages/ImplementationOfIMOInstruments.aspx>. Visited on 15 May 2015.

⁶⁴ <http://ibicon.ru/psc-port-state-control.html>. Visited on 15 May 2015.

The Paris MoU has as its main goal to universalise the standards for port State control as laid down in the before mentioned IMO instruments,⁶⁵ rather than all port States having different - national - standards, which opens up for the possibility for ship to choose the port with the most favourable port State control standards.⁶⁶ Parties to the Paris MoU strive towards ensuring that “no more favourable treatment” is given to ships of non-Parties.⁶⁷ This means that States should not be in a disadvantage with regard to how strictly they are inspected, merely because they ratified certain Conventions.

1.3.4 Classification societies

Classification societies are non-governmental organizations who set safety and environmental standards for the design, construction and operation of ships.⁶⁸ Besides the fact that these societies play an important role in the support and development of new technologies in the area of shipping, they also assess ships against these safety and environmental standards. This assessment - or classification - is mandatory under SOLAS.⁶⁹ If a classification society approves of the design and construction of a ship, it issues a safety certificate,⁷⁰ deeming a ship internationally safe for navigation. This role makes classification societies an important player in the international law of the sea and puts them in a strong position to enforce IMO standards with regard to the design and construction of ships and equipment.⁷¹ If classification societies deem a ship not acting in compliance with international rules and standards relating to the design, construction and operation of ships, it can refuse to issue a safety certificate, which in practice means a ship has to stay in port.⁷²

Even though classification societies operate under their own rules and interpret safety standards independently from IMO’s interpretation,⁷³ there is still a close collaboration between the IMO and classification societies with regard to the

⁶⁵ Paris MoU, section 2.1.

⁶⁶ *Ibid.*, preamble.

⁶⁷ *Ibid.*, section 2.4.

⁶⁸ <http://www.lr.org/en/who-we-are/organisation/what-we-do.aspx>, visited 21 August 2015.

⁶⁹ SOLAS, regulation II-1/3-1.

⁷⁰ http://www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF, visited 21 August 2015.

⁷¹ Kirgis 1998, p. 746.

⁷² *Ibid.*

⁷³ Sadler 2013, p. 87.

development of safety standards. This means that if a classification society deems a ship not acting in compliance with its standards, it is likely the ship is also not acting in compliance with IMO standards, and the other way around.⁷⁴ It can therefore be stated that classification societies play an important role in the enforcement of international shipping rules with regard to the safety of ships.

In conclusion it can be said that there are three options in the general international law of the sea regarding enforcing IMO legislation. First, the port State can deny access to ships it deems not acting in compliance with IMO legislation. Secondly, once a ship is in port, the port State can execute inspections and, when necessary, detain the ship until repairs necessary for acting in compliance with IMO legislation are carried out. Lastly, classification societies can deny a ship safety certificates, which has as a result that a ship will internationally not be regarded as being safe for navigation, and will therefore be port bound.

⁷⁴ Sadler 2013, p. 87.

2 The IMO's mandatory Audit Scheme

In this Chapter 2 there will be a specific focus on IMSAS. The goal of this part is to analyse the legal significance of the Scheme for its Member States by looking at the working and enforcement of the Audit Scheme.

2.1 *The development of the mandatory Audit Scheme*

The IMO's mandatory Audit Scheme is the result of a lengthy process regarding increasing flag State compliance. In 2001, the IMO introduced the Self-Assessment of Flag State Performance,⁷⁵ after the IMO Secretary-General stated in a speech that: "I believe that the problems perceived today do not lie basically with shipping's regulatory framework or with the mechanism by which that framework is constructed, but with its implementation."⁷⁶ The Self-Assessment of Flag State Performance is fully based on the principle that a Flag State determines its deficiencies itself and accordingly rectifies determined deficiencies. In 2005, VIMSAS was adopted by the IMO through Resolution A.974(24).⁷⁷ VIMSAS can be seen as an evolution from the Self-Assessment of Flag State Performance by the introduction of a third party to the assessment process.⁷⁸ In 2014, the IMO completed the legal framework to make the VIMSAS mandatory, since it was believed by many authors and developed States that the VIMSAS could only be fully functional when made mandatory.⁷⁹ Developing countries were more reluctant to accept a mandatory Audit Scheme. Their objection was based on the costs that would be brought by rectifying deficiencies found during a mandatory audit.⁸⁰

It was chosen not to adopt IMSAS by creating a new treaty, because States would first have to accept this new treaty in order to be bound by the Audit Scheme.⁸¹ However, when amending the major existing IMO treaties, Member States would not have to ratify a new treaty but they would be bound by the obligations of the Audit Scheme by being a member to those other major IMO treaties. To illustrate this advantage,

⁷⁵ IMO Res. 2001.

⁷⁶ Mansell 2009, p. 143.

⁷⁷ IMO Res. 2005.

⁷⁸ Molenaar 2014, p. 282.

⁷⁹ Mansell 2009, p. 238.

⁸⁰ *Ibid.*, p. 147.

⁸¹ Barchue 2009, p. 69.

Barchue shows with a table⁸² that approximately 99,04% of the world shipping tonnage are a party to the 1974 SOLAS.⁸³ When amending SOLAS to include the regulations regarding the Audit Scheme, these regulations would therefore apply to 99,04% of the world shipping tonnage, unless a Member State would choose to use its right to object to a certain amendment. It is without a doubt that an amendment of SOLAS is more effective when ensuring compliance with the Audit Scheme than a new, stand-alone treaty, despite the possibility some States might use its right to object.⁸⁴

It is for this reason that it was decided to adopt IMSAS through an amendment of the major IMO Conventions. The IMO adopted several regulations laying down the working of the IMSAS. As already stated in Chapter 1 of this thesis, IMO regulations are non-binding on its Member States. Only when regulations are being codified in an IMO Convention and ratified by the IMO Member States can they be regarded as being binding. Therefore, the instruments discussed in this part should be regarded as having a merely advisory function rather than a legally binding one, unless the instrument is codified or implemented in a Convention. The instruments and amendments to the major IMO Conventions⁸⁵ relevant for the Audit Scheme are summarized by the IMO in a non-exhaustive list.⁸⁶ It is these amendments which will make the auditing of IMO Member States mandatory in 2016, when the scheme comes into force.

2.1.1 III Code

The first relevant instrument adopted by the IMO regarding IMSAS is the III Code⁸⁷, which was made mandatory through amendments in the abovementioned major IMO Conventions. The III Code provides a standard enabling States to meet their obligations as various actors - flag-, port-, and coastal State - under IMO legislation,

⁸² Barchue 2009, p. 69.

⁸³ Barchue based its table on the assumption that the IMO has 168 Member States. However, currently the IMO has 171, which makes it possible the percentages as shown in Barchue's example are not completely accurate anymore. <http://www.imo.org/About/Membership/Pages/Default.aspx>, visited on 29 May 2015.

⁸⁴ Barchue 2009, p. 69.

⁸⁵ With "major Conventions" is meant in this context: SOLAS, Load Lines Protocol, MARPOL, MARPOL Protocol, STCW Convention. See IMO Res. 2013, p. 2.

⁸⁶ IMO Res. 2013 II.

⁸⁷ IMO Res. 2013.

rather than directly opening up for mandatory external auditing under IMSAS.⁸⁸ The objective of the III Code is the same as for IMSAS - enhancing global maritime safety and protection of the marine environment⁸⁹ - but the Code specifies in detail how to reach this goal. It is stated that States should first develop a strategy to act in accordance with the Code and other IMO legislation, secondly to monitor and assess whether the Code is indeed implemented and enforced, and, lastly, review the strategy created continuously in order to see whether the objectives laid down in the Code and other IMO legislation - such as IMSAS - are met.⁹⁰ Because of the fact the III Code is implemented in various IMO instruments, the III Code only applies to States who did ratify those instruments.

The III Code is not specifically drawn to deal with IMSAS. It instead elaborates on how to correctly implement all IMO legislation. Because of the fact that IMSAS is incorporated into the major IMO Conventions - and the III Code applies to these major Conventions - the III Code is applicable to IMSAS.

2.1.2 Framework and Procedures for the IMO Member State Audit Scheme

The second relevant resolution is the Framework and Procedures for the IMO Member State Audit Scheme.⁹¹ The first part of this Resolution - consisting of the description of the framework of the Audit Scheme - has as its objective to describe in details what the Audit Scheme is for and what it is trying to assess. This is, first, whether the Member State has legislation in place to increase maritime safety and prevent marine pollution. The Audit Scheme furthermore assesses whether this legislation is being properly enforced by the Member State.⁹²

The first part of the Resolution lays down several principles that should be taken into account when an audit is carried out. The first principle described is the principle that sovereignty of the Member State should always be recognized.⁹³ This is a general principle of international law and means that a State always has to give its consent

⁸⁸ http://www.imo.org/en/MediaCentre/PressBriefings/Pages/A-28-ends-.aspx#.Vdwx18R_vB0, 28 July 2015.

⁸⁹ IMO Res. 2013, p. 4.

⁹⁰ *Ibid.*

⁹¹ IMO Res. 2013 III.

⁹² *Ibid.*, p. 3.

⁹³ IMO Res. 2013 III, p. 4.

before it can be bound by any international law. This might sound like a contradiction because of the fact that the idea of the Audit Scheme in its new form is that it is no longer voluntary for a State to be audited, but that it becomes an obligation. However, this obligation has to be seen in the light of all general principles of international law, of which the principle of sovereignty is an important one. This brings into question how “mandatory” the scheme therefore is. This will be further discussed in the final part of the thesis.

The second part of the Resolution describes the procedures for the IMO Member State Audit. There is a main focus on the preparation prior to the audit, the conduct of the actual audit, and the reporting requirements under the scheme.⁹⁴ This part is elaborated on in the Auditor’s Manual for IMSAS,⁹⁵ which can be regarded as a guideline for States when they are undertaking an audit.

The Secretary-General will develop a schedule on which the audits of different States are planned. These audits should take place at least once every seven years.⁹⁶ After that, a Memorandum of Cooperation will be signed between the Member State and the Secretary-General, showing the scope of the audit and the responsibilities of both parties.⁹⁷ The next step is the nomination of auditors, which is done by the Member State. The Member State nominates auditors who are, based on their level of expertise regarding undertaking audits, listed by all IMO Member States. The Secretary-General subsequently has a final say in approving the auditors.⁹⁸ The auditors are during the actual audit accompanied by a State official of the Member State that is being audited.⁹⁹ This actual audit consists of the collecting of “evidence” that proves compliance - or shows non-compliance - with IMO Conventions. This is done by interviewing staff, reviewing documents and observing selected activities of the relevant entities of the Member State.¹⁰⁰ Evidence of non-compliance is being reported and shared with the Member State, before the audit closing meeting, where these findings and observations of the auditor are shared with all relevant personnel

⁹⁴ IMO Res. 2013 III, p.11.

⁹⁵ IMO Circ. 2013.

⁹⁶ IMO Res. 2013 III, part II, para. 4.1.1.

⁹⁷ *Ibid.*, part II, para. 4.2.1 & 4.2.2.

⁹⁸ *Ibid.*, part II, para. 4.3 & 4.4.

⁹⁹ *Ibid.*, part II, para. 6.4.1.

¹⁰⁰ IMO Res. 2013 III, part II, para. 6.4.2.

from the audited Member State.¹⁰¹ The auditor can also use this closing meeting to suggest a corrective action plan to the Member State in order to amend the discrepancies found.¹⁰² The last step in the audit procedure is the drafting of an audit report by the auditor and a corrective action plan by the Member State responding on the findings laid down in the audit report.¹⁰³ After three to four years after the undertaking of an audit, it is possible to conduct a follow-up audit, in order to determine the status of implementation of the corrective action plan.¹⁰⁴

In conclusion it can be said that it was decided not to create a new, stand-alone treaty for the adoption of IMSAS, but rather to amend IMO's major treaties to include the obligation of a Member State audit scheme. The most important amendment to IMO's major treaties, is the making mandatory of the III Code, which provides a standard for Member States enabling them to meet their obligations under IMO legislation. The III Code does not specifically open up for mandatory auditing, but instead elaborates on how to correctly implement all IMO legislation. The Framework and Procedures for the IMO Member State Audit Scheme then elaborates more in detail on the functioning of the Audit Scheme. As opposed to the III Code, which has been implemented in the major IMO Conventions, the Framework and Procedures for the IMO Member State Audit Scheme is merely a recommendatory instrument.

2.2 The advantages of a mandatory Audit Scheme

As discussed in the first sub-question of Chapter 2, the Audit Scheme will transform from a voluntary scheme to a mandatory one. There are several advantages of a mandatory audit scheme rather than a voluntary one.

2.2.1 Transparency of the information gained from audits

As a part of the current voluntary nature of the Audit Scheme, all information gathered from audits is confidential and can only be viewed by the IMO and the State audited. It is therefore presently not possible for other States to review the performance of the State audited.¹⁰⁵ When the Audit Scheme evolves into a

¹⁰¹ IMO Res. 2013 III, part II, para. 6.5.1.

¹⁰² *Ibid.*, part II, para. 6.5.3.

¹⁰³ *Ibid.*, part II, para. 7 & 8.

¹⁰⁴ *Ibid.*, part II, para. 9.1.

¹⁰⁵ Mansell 2009, p.227.

mandatory scheme, the III Code prescribes that it is required of a State audited “to provide evidence of conformity to requirements and of the effective operation of the State.”¹⁰⁶ This means that the process of auditing has to become more transparent in order for a State to comply with this provision. There is, however, in the III Code no real obligation on Member States to actively share the information gained during audits. There is a provision in the Framework and Procedures for the IMO Member State Audit Scheme, but, as concluded above, this is merely a recommendatory instrument. However, if States choose to abide by this instrument despite its recommendatory character, this would mean part of the audit will become public for all IMO Member States. The instrument devotes a section to confidentiality with regard to the information gathered during audits.¹⁰⁷ Here it is stated that all information gathered during audits will be treated with confidence, which means that the Member State should always give its consent before any of the information is communicated to another Member State. However, the second part of the confidentiality section states as an exception that the executive summary report, the corrective action plan and comments on the progress of implementation of the corrective action plan will be released to all IMO Member States.¹⁰⁸ These are relevant documents for other Member States yet to be audited to review, since it comprises the details on what the Member State audited plans on changing with regard to compliance with IMO instruments and how it plans on doing this. Other Member States could use these documents to already improve their performance regarding compliance with IMO instruments prior to the auditing.

If it would become common practice to abide by the Framework and Procedures for the IMO Member State Audit Scheme, it would mean that the confidentiality that currently exists between the IMO and the State audited will disappear and the process of auditing will become more open and a State’s performance will become for all States to review.

¹⁰⁶ IMO Res. 2013, part 1, para. 10.

¹⁰⁷ 2013 III, appendix 1, section 2.7.

¹⁰⁸ 2013 III, appendix 1, section 2.8.

2.2.2 Improving performance of IMO instruments

Due to the current voluntary nature of the Audit Scheme, States can choose whether they wish to be audited or not. In his Master thesis, Park examined the number of States that were voluntarily audited under the Audit Scheme. He concluded that in 2012, 67 States expressed their willingness for being audited, and 48 of them were actually audited under the Audit Scheme.¹⁰⁹ This is not a very disappointing number, considering the IMO has 171 members and VIMSAS has only entered into force in 2005. Furthermore, Park shows an increase in audits of 86% between 2006 and 2009.¹¹⁰

When the Audit Scheme becomes mandatory, this has as a result that the State's choice to be audited or not disappears. Therefore, not only more States will be audited, but also different kind of States will be subject to an audit. Under the voluntary scheme, mainly developed countries volunteered to be audited. Developing countries were more cautious due to the costs rectifying deficiencies found during the audit would bring.¹¹¹ By making the audit scheme mandatory, also developing countries will be subject to the audits, despite the financial reservations they might have.

When a broader range of States subject themselves to auditing, the IMO gets a more reliable overview where its gaps and weaknesses lie. The IMO itself, in this regard, takes as an example the question to which extent technical assistance would help for States to act in accordance with IMO legislation and where this technical assistance would have the greatest effect.¹¹² When the IMO identifies its own weaknesses, it gets easier for the Organization to pressure States to implement unanimously and fully the regulations as laid down in its instruments better.¹¹³ How IMO instruments are being enforced in case of non-compliance by IMO Member States, will be discussed in a further part of this thesis.

¹⁰⁹ Park 2012, p. 35.

¹¹⁰ *Ibid.*

¹¹¹ Mansell 2009, p. 147.

¹¹² <http://www.imo.org/OurWork/MSAS/Pages/AuditScheme.aspx>, visited on 30 May 2015.

¹¹³ Liejun 2013, p. 2.

2.2.3 More homogeneity in international regulations regarding shipping and safety

When elaborating on the advantages stated under sub-chapter 2.2.1 and 2.2.2, another advantage can be detected. Despite the fact that much of the communication between the audited Member State and the auditor has to be treated with confidentiality, IMSAS has as its advantage that that parts of the communication - among others the corrective plan issued by the Member State to repair discrepancies identified - have to be shared with all Member States of IMO.¹¹⁴ The audit Scheme has as a result that not only the Member State can identify where its shortcomings lie, but - due to its public character once the Audit Scheme becomes mandatory -¹¹⁵ also other Member States can benefit from the outcome of another State's audit and use it to implement and enforce IMO legislation itself in a better way.¹¹⁶ This has as a result that the Audit Scheme creates globally more homogeneity in international regulations regarding shipping and safety because both the Member State audited as well as other IMO Member States can use the - public - result of the audits to improve their performance. When all the IMO Member States act in accordance with the IMO instruments, this has as a result that globally there will be more homogeneity in international regulations regarding shipping and safety.

In conclusion it can be said that there are several advantages in adopting a mandatory Audit Scheme rather than a voluntary one. Besides making some of the information gained from an audit transparent and public, the working and performance of the IMO instruments will be improved and more homogeneity in international regulations regarding shipping and safety will be reached due to the mandatory nature of the Audit Scheme.

The Audit Scheme does not only address conformity with IMO legislation, but also the delegation of authority by a Member State to ROs,¹¹⁷ such as classification societies.¹¹⁸ The next part will be dedicated to the role of these ROs.

¹¹⁴ IMO Res. 2013 III, appendix 1, section 2.

¹¹⁵ *Ibid.*, Appendix 1, Section 2.7.

¹¹⁶ Barchue 2009, p. 67 & 68.

¹¹⁷ IMO Res. 2013 III, para. 5.4 & 5.5.

¹¹⁸ <http://www.imo.org/en/OurWork/MSAS/Pages/AuditScheme.aspx>, visited on 1 July 2015.

2.3 The role of Recognized Organizations in the mandatory Audit Scheme

The IMO Resolution regarding Procedures for Port State Control¹¹⁹ contains a definition of an RO. The IMO states that an RO is “an organization which meets the relevant conditions set forth by A.739(18) and has been delegated by the flag State Administration to provide the necessary statutory services and certification to ships entitled to fly its flag.”¹²⁰ With this provision, the IMO provides an opportunity to allow the flag State to delegate statutory services and certification of ships to be carried out by ROs, who therefore play an important role in flag State jurisdiction and control. Also SOLAS opens up for the option to delegate certain duties to ROs while at the same time requiring flag States to establish a system to ensure adequacy of these organizations.¹²¹ In the international community, there is however no full understanding of what exactly the responsibilities of ROs are, and neither what the competence of such organizations is.¹²² With regard to shipping, the most relevant RO is a classification society. These non-governmental organizations set safety and environmental standards for the design, construction and operation of ships.¹²³ Because of this role, classification societies are also important for the support and development of new technologies in the area of shipping.

Recently, the IMO came up with the so-called Code for Recognized Organizations, or RO Code,¹²⁴ which serves as an international standard and consolidated instrument containing minimum criteria against which organizations are assessed towards recognition and authorization and the guidelines for the oversight by flag States.¹²⁵ Besides the RO Code, the IMO III Code addresses the delegation of authority to ROs as well.¹²⁶ The flag State should ensure that ROs conform strictly to international instruments.¹²⁷ In order to do this, the flag State should determine that the RO has enough technical and financial resources to execute the tasks the flag State assigns to it.¹²⁸ The III Code, however, does not require a direct audit of ROs.¹²⁹ It instead urges

¹¹⁹ IMO Res. 1995.

¹²⁰ *Ibid.*, p. 7.

¹²¹ SOLAS, Chapter 1, Part B, Regulation 6.

¹²² Barchue 2009, p. 2.

¹²³ <http://www.lr.org/en/who-we-are/organisation/what-we-do.aspx>, visited 21 August 2015.

¹²⁴ IMO Res. 2013 IV.

¹²⁵ *Ibid.*, Annex 1, p. 9.

¹²⁶ IMO Res. 2013, p. 8, §18.

¹²⁷ Park 2012, p. 33.

¹²⁸ IMO Res. 2013, p. 8, §18.1.

the flag State to regulate the delegation of authority in accordance with the III Code.¹³⁰

The scope for the delegation of authority laid down in aforementioned instruments, however, is very broad. According to the III Code, an RO can assist the flag State in “conducting surveys, inspections and audits, issuing of certificates and documents, marking of ships and other statutory work required under the conventions of the Organization or under its national legislation”.¹³¹ This is a wide scope of responsibilities that can be delegated to ROs, especially due to the sub-sentence “...and other statutory work.” This implies there is basically no limit on the tasks a flag State can delegate, as long as it has a jurisdictional basis in either IMO legislation, or national legislation of the flag State.

This has as a result that many responsibilities are delegated to ROs. A legion of governments entrust all their maritime administration duties to ROs. If one were to see this with the fact that around 73 percent of the world fleet is registered under a nationality different from the ship’s owner¹³² - due to the absence of any State accountability with regard to ship registration because of the lack of legislation in this regard, ship registration is a true business opportunity¹³³ - it can be concluded that the majority of the world’s ships are being surveyed and inspected by ROs that do not have any genuine link with these ships that have owners in a distant State.¹³⁴ In most of these cases it can be assumed that this is for reasons of reducing operating costs or avoiding regulations in the State of the owner, and therefore these flags are often referred to as “flags of convenience”.

In conclusion, it can be said that flag States have a rather broad mandate to delegate tasks to ROs. Due to the fact that it is not defined in international law what the exact responsibilities of ROs are or what the competence of these organizations is, the role of ROs under international law - and more specifically under IMO legislation -

¹²⁹ Mansell 2009, p. 223.

¹³⁰ IMO Res. 2013, p. 8, §18.

¹³¹ *Ibid.*

¹³² UNCTAD 2013, p. 55.

¹³³ Barchue 2006, p. 1.

¹³⁴ Mansell 2009, p. 137.

remains quite vague. Flag States therefore often delegate a broad range of responsibilities to ROs. When this fact is viewed in light of the matter that a great percentage of ships is registered as a “flag of convenience”, it can be stated that many ships are being surveyed by ROs that do not have any genuine link with the ship, which could make proper control over these ships problematic. It is in the interest of the flag State to improve the working of ROs, taken into account that the flag State is responsible for making sure its vessels are in compliance with the IMO Conventions.

IMSAS could potentially be a solution for above concluded issues. If flag States together with ROs will be audited, both of these actors will be forced to take more responsibility, since they will be accountable under IMSAS for their performance. IMSAS could further possibly clarify the “genuine link” requirement between the flag State and the ship, as laid down in article 94 of the LOSC.¹³⁵ As stated above, this genuine link requirement is currently viewed as being problematic, since there is often not a genuine link between a flag State or RO and the ship. With the coming into force of IMSAS, the responsibility of the flag State and ROs will increase, flag States will be forced to only survey ships on which they can realistically exercise control.

A requirement for IMSAS to deal with these and other issues, is that the Audit Scheme can be properly enforced in order to force flag States to act in conformance with IMSAS. The next part deals with the enforcement of the Audit Scheme to view the possibility of laying down measures on flag States which, after auditing, appear not to be complying with the major IMO Conventions.

2.4 The enforcement of the mandatory Audit Scheme

With the coming into force of the mandatory Audit Scheme, the IMO will be able to conduct audits without the consent of the flag State. The question that arises, however, is whether the IMO can take any actions when the audit shows that a flag State does not effectively implement and enforce the standards laid down in the IMO instruments that are covered by the Audit Scheme.¹³⁶ An initial question to be posed, however, is *when* a Member State is in non-compliance with IMO norms. Non-compliance means a violation of a standard, but as can be seen in many IMO

¹³⁵ Allen 2009, p. 267.

¹³⁶ Takei 2012, p. 84; Mansell 2009, p. 230.

Conventions, this standard is not always clear. Sentences such as “to the satisfaction of the Administration” are included in IMO treaties,¹³⁷ which makes it difficult to draw a general conclusion on what non-compliance with a norm means. It can therefore be concluded that in the case where norms laid down in IMO Conventions are not clear cut, it is dependent on a case-to-case analysis whether a Member State is acting in compliance with a norm or not.

In Chapter 1 of this thesis, it was already discussed what the options for the IMO and its individual Member States are to lay sanctions upon IMO Member States in case of non-conformity to the norms laid down in IMO Conventions. The conclusion of Chapter 1 was that States in the capacity of port States have the most options of imposing sanctions on vessels not acting in conformity with IMO legislation. A first option discussed in Chapter 1 is the possibility of denying a vessel access to port. A second option could be to target a vessel during port inspections. If any discrepancies between the vessel and IMO legislation are detected, the port State holds the right of detaining the vessel until repairs are carried out. The general conclusion of this Chapter was that the options to lay sanctions on the flag State are rather limited, due to the fact that the only actor who can really establish sanctions is the port State, which means a vessel physically has to come into port before any sanctions can be imposed. This makes the mechanisms of imposing sanctions on non-conforming flag States rather limited.

As was also concluded in Chapter 1 of this thesis, the only way IMO instruments can be properly enforced without the assistance of the port State, is when they are implemented into the national law of the Member State. This makes the flag State responsible for ensuring compliance with the provisions of these treaties.¹³⁸ An exception to this rule is if the IMO instrument reflects a customary international law rule. In this case, the rule has to be followed by the State, even if it was not translated into its national law.

There are however two major restraints on the working of the system of making the flag State responsible for ensuring compliance. First, many treaties provide for the

¹³⁷ Barchue 2006, p. 1.

¹³⁸ *Ibid.*

possibility to delegate flag State obligations to non-government bodies. The problem with granting authority to ROs is discussed in the previous sub-chapter of this Chapter 2. When delegating authority to ROs, the flag State is still responsible for ensuring compliance, but it is complicated to check the RO properly, since they act in an independent way from the flag State, which makes control problematic. Secondly, many IMO treaties allow a broad interpretation of its provisions with regard to implementation into national legislation. Sentences such as “to the satisfaction of the Administration” are included in IMO treaties.¹³⁹ This has as a result that IMO treaty provisions are being implemented into national legislation in a variety of ways by the IMO Member States.¹⁴⁰ This is not a positive result, since homogeneity is always an aim that should be strived for in international law. Allen, therefore, describes several solutions for this issue.¹⁴¹ He first declares that some States propose that technical and financial assistance should be provided for States who need help implementing and carrying out their obligations under international maritime law. Secondly, he describes how other States would use international courts to clarify the true meaning of international maritime legislation in order to make States implement it in the way the legislation was meant. The IMO Convention opens up for asking the ICJ for an advisory opinion on any question or dispute regarding the interpretation or application of the Convention on the request of the IMO, but only if the question cannot be settled through the IMO Assembly.¹⁴² Both the IMO as an organization and individual Member States have the possibility of bringing a question or dispute before the IMO Assembly to be resolved, but only the IMO itself can request an advisory opinion at the ICJ. The individual IMO Conventions do not provide for any dispute settlement provisions. It can therefore be assumed that the same rules apply as do for the interpretation or application of the IMO Convention for these individual Conventions. However, several authors suggest that even without laying sanctions on the flag State, the Audit Scheme will still contribute to a better general compliance with IMO legislation.

¹³⁹ Barchue 2006.

¹⁴⁰ *Ibid.*

¹⁴¹ Allen 2009, p. 267.

¹⁴² IMO Convention, art. 69 & 70.

2.4.1 The pressure on States to abide by soft law principles

First, Barchue argues that even though the IMO might not have the authority to directly lay sanctions upon its members in case of non-compliance with the Audit Scheme, the Audit Scheme can still “serve as the vehicle to establish and improve accountability amongst Member States of IMO with respect to their treaty obligations.”¹⁴³ What is probably meant with this statement is that due to the transparent character of the Audit Scheme - mainly the fact that some of the information of the Audits will be shared with other IMO Member States - States will feel pressured to comply with IMO legislation when non-conformity is detected. According to Guzman, an important reason why States might feel pressured to comply with non-binding legislation, or soft law, is because they value their reputation.¹⁴⁴ The reason is that a reliable reputation comes with many benefits for a State, for instance the fact that it is easier for such States to enter into agreements with other States because they believe the State to be reliable. Therefore, a State’s reputation is valuable for it, and a State will as a result not easily compromise that reputation.

2.4.2 The holistic nature of the Audit Scheme

Secondly, Barchue proposes that because of the holistic nature of the Audit Scheme - the Scheme does not only address the flag State, but also the coastal- and port State, as well as ROs - not only the flag State would be held accountable for non-compliance, but all the actors of the shipping industry.¹⁴⁵ This lays down a major responsibility on the flag State: if a flag State were to not comply with IMO legislation, it would not only damage its own reputation, but also that of the rest of the actors involved in the shipping industry.

2.4.3 States’ willingness to submit themselves to auditing

Thirdly, it is not an unimportant factor that IMO Member States have shown the willingness to be audited by gradually adopting a more stringent form of auditing through IMO legislation. Already in 1995, the Member States amended the 1978

¹⁴³ Barchue 2009, p. 2.

¹⁴⁴ Guzman 2002, p. 1849.

¹⁴⁵ Barchue 2009, p. 2.

STCW Convention by adding several provisions with regard to auditing each other.¹⁴⁶ It can therefore be concluded that States want to put these auditing commitments upon themselves because they see the value in acting in conformance with IMO legislation.

The conclusion of this final chapter of Chapter 2, is that port States are in the most advantageous position to lay sanctions on IMO Member States in cases of non-compliance. However, there are several arguments to make why - even without a sanction system in place - the Audit Scheme would still contribute to better compliance with IMO legislation. First, in order for a State to keep a good reputation in the international society, States often feel pressured to abide by norms that are either regarded as being soft law norms, or norms where no true compliance system is in place. Secondly, because of the fact that IMSAS addresses all the actors in the shipping industry, it is of great relevance for all these actors to act in compliance with the Audit Scheme, in order not to damage the image of the entire shipping industry of a certain State. Lastly, all IMO legislation comes into place after extensive debate with its Members. The coming into force of IMSAS is no exception. States have shown their willingness to be audited, and there is therefore no reason why they would not act in compliance with the Scheme once it comes into force.

¹⁴⁶ Barchue 2009, p. 64.

3 IMO's mandate in relation to the Audit Scheme

Chapter 3 of this thesis focusses on IMO's mandate. There will first be an assessment on what the constraints are on the expansion of this mandate, and what the consequences for the IMO as an organization are when this mandate is exceeded. Lastly, in light of the findings in the first parts of Chapter 3, it will be researched whether or not the IMO is exceeding its mandate with the introduction of IMSAS.

3.1 *The changing role of the IMO*

The IMO was originally established in 1948 as the Inter-Governmental Maritime Consultative Organization (IMCO). Consultation was the main aim of the Organization. When it became clear that the tasks of the IMCO were expanding from merely consultative to more standard setting, it was decided in 1975 to change the Organization's name to IMO.¹⁴⁷ The IMO becomes more and more actively involved in developing the prescriptive regime for vessel safety and marine pollution prevention. This is not only due to the changing of the founding document of the IMO, but also because of the role that the LOSC assigns to the IMO.¹⁴⁸ In the LOSC there are multiple references to the "competent international organization", which indirectly refer to the IMO, as was already discussed in Chapter 1 of this thesis. Because of the fact that the LOSC is merely a framework Convention which does not lay down specific rules and obligations for States, it is necessary that more specific regulations are established at another forum. That is the role the IMO fulfils within the LOSC framework. The LOSC therefore allocates a role to the IMO which gives the IMO more responsibility than originally laid down in the founding Convention of the Organization. By referring to the IMO in the LOSC, several IMO Codes and Regulations are being transformed into binding norms, due to the binding character of the LOSC.¹⁴⁹ This even applies to non-parties to the LOSC, because of the customary international law status of the majority of the Convention. Customary international law originates when a rule is repeatedly confirmed by State practice and is accompanied by *opinio juris*.¹⁵⁰ This is the case for the majority of the LOSC, as can for example be seen by statements made by a non-

¹⁴⁷ IMO Res. 1975.

¹⁴⁸ See for example LOSC art. 41; 53; 60.

¹⁴⁹ Alvarez 2005, p. 220.

¹⁵⁰ Villiger 1985, p. 38.

party to the LOSC, the United States of America, who confirmed this customary law status regarding most parts of the LOSC.¹⁵¹

These factors add to the fact that the role of the IMO has gradually changed over time. Because of the expansion of IMO's mandate, the IMO has shifted from a consultative organization to a binding law prescribing one. Dr. Balkin, IMO's Director of Legal Affairs, observed that with the expansion of the Organization's mandate to include more vessel and port security issues, several disagreements regarding the organizational competency of the IMO have also arisen.¹⁵² Some of these disagreements will be discussed in this part, by looking at certain constraints on IMO's mandate which are relevant in the discussion whether the mandatory Audit Scheme is within IMO's mandate or not. Three types of constraints can be identified. First, constraints laid down in the IMO Convention. This Convention establishes the scope and mandate of the IMO. This scope will be explained and several examples will be given where it is debatable whether the IMO stuck within this mandate when establishing certain legislation. Secondly, constraints regarding the mandate of other global bodies. Global bodies relevant for the working of the IMO are, for example, its overarching body the UN, but also a Regional Fisheries Management Organization (RFMO) is a global body that has to be taken into consideration when discussing the scope and mandate of the IMO. Lastly, the constraint regarding the domain of the overarching regime of the international law of the sea, including the LOSC, will be discussed.

3.2 The constraints on the expansion of IMO's mandate

There are several constraints on the expansion of the mandate of the IMO that can be identified.

3.2.1 Constraints laid down in the IMO Convention

According to the IMO Convention, the mandate of the IMO covers "technical matters of all kinds affecting shipping engaged in international trade; (...) maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; (...) removal of discriminatory action and unnecessary restrictions by Governments

¹⁵¹ http://www.gc.noaa.gov/gcil_los.html, visited 21 August 2015.

¹⁵² Allen 2009, p. 287.

affecting shipping engaged in international trade (...) [and] unfair restrictive practices by shipping concerns.”¹⁵³ It is the task of the IMO “to recommend to Members for adoption regulations and guidelines”¹⁵⁴ concerning aforementioned topics. As can be seen from the wording of the Convention, the mandate of the IMO only covers shipping issues, more specifically in relation to safety and pollution of the marine environment. This means it excludes, for example, marine living resources, or pollution of the marine environment from other sources than shipping. There are examples of Conventions, issued by the IMO, which bring into question how strictly the IMO sticks to this mandate laid down in its Convention.

In 2001, the IMO issued its International Convention on the Control of Harmful Anti-Fouling Systems on Ships (Anti-fouling Convention), after calling a Conference on the matter.¹⁵⁵ The main obligation laid down on the State parties to this Convention is that the party should try and develop anti-fouling systems¹⁵⁶ that are “effective and environmentally safe”¹⁵⁷ in order “to reduce or eliminate adverse effects on the marine environment and human health caused by anti-fouling systems.”¹⁵⁸

On the one hand, one could argue that this Convention was created under IMO’s mandate over pollution of the marine environment from shipping. Anti-fouling systems fall under the definition of “pollution”, as defined in the LOSC,¹⁵⁹ since it is the indirect introduction of substances in the marine environment. Further, anti-fouling systems are indeed placed on ships to make sure it stays streamlined when in navigation. It therefore seems to fall under IMO’s mandate. However, on the other hand, the preamble of the Convention describes a much broader goal of the Convention, by stating: “Recognizing the importance of protecting the marine environment and human health from adverse effects of anti-fouling systems.”¹⁶⁰ The goal of the Convention as described in the preamble is not only related to protecting

¹⁵³ IMO Convention, art. 1.

¹⁵⁴ *Ibid.*, art. 15(j).

¹⁵⁵ Anti-fouling Convention.

¹⁵⁶ In the Convention, an anti-fouling system is described as: “a coating, paint, surface treatment, surface, or device that is used on a ship to control or prevent attachment of unwanted organisms.” According to Anti-fouling Convention, art. 2.2.

¹⁵⁷ Anti-fouling Convention, art. 1.5.

¹⁵⁸ *Ibid.*, art. 1.1.

¹⁵⁹ LOSC, art. 1.4.

¹⁶⁰ Anti-fouling Convention, preamble.

the marine environment, but also closely connected to preservation of the marine living resources, since the living organisms are the ones being particularly harmed by anti-fouling, which is excluded from the mandate of the IMO. One could argue that marine living resources are included in the mandate of the IMO as well, since it falls under the protection of the marine environment. However, it can also be stated that marine living resources were purposely led out of the specific mandate of the IMO in order for its mandate not to overlap too much with the mandate of RFMOs. Therefore, the IMO should be reticent when dealing with marine living resources as not to step into the place of the mandate of RFMOs.

A more apparent example where the IMO might have exceeded its mandate can be seen in the Ballast Water Convention. The International Conference on Ballast Water Management adopted in 2004 the International Convention for the Control and Management of Ships' Ballast Water and Sediments (Ballast Water Convention). The IMO initially planned on adding a separate annex to the MARPOL Convention to deal with this issue, but after debate decided on a separate treaty instead¹⁶¹

The main goal of the Ballast Water Convention is to prevent and eliminate the transfer of harmful organisms through the taking and releasing of a ships' ballast water.¹⁶² The IMO refers to these harmful organisms as "one of the greatest threats to the world's oceans".¹⁶³ The World Summit on Sustainable Development of 2002 in Johannesburg also referred to this problem and called on all States to develop measures to deal with the issue, and it specifically urged the IMO to tackle this problem by creating new legislation.¹⁶⁴

However, the mandate of the IMO is only with regard to "pollution" from ships.¹⁶⁵ There is no reference in the IMO Convention that the IMO has a mandate to tackle general "threats" to the world's oceans. The question to be posed in this context is therefore whether invasive species should be regarded as being pollution. One would

¹⁶¹ Molenaar 2014, p. 274.

¹⁶² Ballast Water Convention, art. 2.

¹⁶³

<http://www.imo.org/en/OurWork/Environment/BallastWaterManagement/Pages/BWMConventionandGuidelines.aspx>, visted on 13 August 2015.

¹⁶⁴ http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf, p. 19.

¹⁶⁵ IMO Convention, art. 1.

assume that at least the IMO regards invasive species as pollution, because of the fact that the Organization would otherwise act outside of its mandate by developing legislation with regard to this threat. However, the Convention is not specifically stating that invasive species should be regarded as pollution.

An argument in favour of the statement that invasive species should be regarded as pollution, is the fact that some of these species - such as the Chinese Mitten Crab - are potentially very harmful for the marine environment due to their ability to wipe out complete ecosystems as a result of their dieting and borrowing habits.¹⁶⁶ On the other hand, the LOSC describes pollution of the marine environment as “the introduction by man, directly or indirectly, of substances or energy into the marine environment (...).”¹⁶⁷ It is hard to argue that living organisms can be regarded as “substances or energy” and therefore invasive species would not fall under the definition of “pollution” as laid down in the LOSC.

3.2.2 Constraints regarding the mandate of other global bodies

An important constraint on the mandate of the IMO is the mandate of other global bodies.¹⁶⁸ The IMO has first and foremost an advisory and consultative role. This means its resolutions can legally be trumped by another global body with a mandate to lay down binding legislation on its Members. When this is taken into account, it is likely that other global bodies with a more extensive law-prescribing mandate would get priority over the IMO in case of overlap with a mandate. This means that the IMO cannot easily expand its mandate over issues that are already covered by other global bodies.

This legal argument furthermore entails a valid political argument that can be made in this context. Due to the merely advisory mandate of the IMO, it is likely many IMO Member States are unwilling to support the side of the IMO when its mandate clashes with that of another international body, due to the fact that the international society might view the role of the IMO as being less strong than that of other international bodies.

¹⁶⁶ WWF 2009, p. 5.

¹⁶⁷ LOSC, art. 1.4.

¹⁶⁸ Molenaar 2014, p. 282.

An example that can be used in this context is the mandate of RFMOs with regard to marine living resources in the EEZ and on the high seas. Even on issues regarding this subject that fall under the IMOs mandate today - such as the construction and equipment of the fishing vessels and their navigation - it is not always possible for the IMO to use its mandate over such issues since the issue is also covered by RFMOs, whose mandate is more law-prescribing than that of the IMO.

It is possible for the IMO to not use its mandate in some cases and let the issues be taken up by another global body. An example of this is, according to Molenaar, “the IMO’s mandate relating to “discriminatory action and unnecessary restrictions” and “unfair restricted practices”, which has remained unused by IMO but (...) has been taken up by UNCTAD.”¹⁶⁹

In order to create an understandable overview of the law for the international society, it would be most coherent to have as few international bodies dealing with international shipping and environmental protection as possible. Therefore one could argue it would be advantageous to expand IMO’s mandate in order to give it also law-prescribing powers over issues such as fisheries, the winning of petroleum, and discriminatory action and unnecessary restrictions. If the IMO would have more prescriptive powers over these issues, it would not be necessary for other international bodies to take up these issues, and this would benefit the international society because it will clarify the law greatly.

3.3 Consequences when mandate is exceeded

After discussing the constraints on the mandate of the IMO, and listing several examples where the IMO might have - almost - exceeded this mandate, one can pose the question what the consequence for the IMO as an organization is when it does not act in conformity with its own Convention. Can such a breach result in a wrongful act, triggering responsibility for the IMO?

¹⁶⁹ Molenaar 2014, p. 282.

According to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001 ILC Draft Articles) by the International Law Commission (ILC), an internationally wrongful act is an act of omission attributable to the State under international law which constitutes a breach of an international obligation of the State.¹⁷⁰ According to Klabbers, not only States can be responsible for committing a wrongful acts, but so can international organizations.¹⁷¹ Klabbers furthermore states that any kind of wrongful act that amounts to a breach of a treaty or customary international law rule triggers responsibility of the organization.¹⁷² This means that if the IMO issues a treaty contrary to its own mandate, this could theoretically trigger a wrongful act. However, in order for this to have any consequences, there should be a party - a Member State, for example - who is disadvantaged because of the exceeding of this mandate. Such a victim State could bring the case to Court. In conclusion it can therefore be said that in order for the IMO to avoid this scenario, it should always be aware of the position of its Members.¹⁷³ There will be no consequences to exceeding its mandate if there is no victim State disadvantaged by such an action.

In 1960, a case dealing with this issue pended before the ICJ. In this Constitution of the Maritime Safety Committee of the IMO (IMCO at the time of the judgment), the ICJ issued an advisory opinion on an issue arising as a result to the composition of the Maritime Safety Committee within IMCO.¹⁷⁴ In this case, the ICJ stated that the words laid down in the IMCO Convention “must be read in their natural and ordinary meaning, in the sense which they would normally have in their context.”¹⁷⁵ The ICJ furthermore quoted a reasoning they had used in an earlier case¹⁷⁶ by stating that: “It is only if [...] the words of the Article are ambiguous in any way that resort need be had to other methods of construction.”¹⁷⁷ These statements from the ICJ are quite general. It is neither explained in the judgment what “natural and ordinary meaning” entails, nor what is meant with “ambiguous”. It is therefore difficult to use this advisory opinion generally in other cases where the IMO might have exceeded its

¹⁷⁰ 2001 ILC Draft Articles, art. 2.

¹⁷¹ Klabbers 2009, p. 281.

¹⁷² *Ibid.*, p. 283.

¹⁷³ *Ibid.*, p. 285.

¹⁷⁴ ICJ 1960.

¹⁷⁵ *Ibid.*, p. 13.

¹⁷⁶ ICJ 1950, p.8.

¹⁷⁷ *Ibid.*, p. 14.

mandate.¹⁷⁸ The ICJ has simply said that the IMO should interpret its Convention in its natural and ordinary meaning, but does not elaborate on what happens if the IMO does not stick to this meaning and exercises its mandate over a broader spectrum of subjects. Without a specific case regarding this subject brought to Court - for example the legality of the Ballast Water Convention - it will be merely a case of interpretation whether the IMO has stuck to its mandate or not.

In 1962, the ICJ judged on another case relating UN organs. In the *Certain Expenses* case, the ICJ concluded that: “each organ must, in the first place at least, determine its own jurisdiction.”¹⁷⁹ This can be interpreted as meaning that it is possible under international law and the UN Charter to change the mandate of the IMO, but that this has to be done by amending the IMO Convention, which takes a two-thirds majority vote of the Assembly and the Member States.¹⁸⁰

3.4 IMO’s mandate and the mandatory Audit Scheme

The last question that has to be answered before a general concluding answer to the research question can be formulated, is the question whether the mandatory Audit Scheme is exceeding IMO’s mandate.

As can be read in this thesis, the mandate of IMO is limited by its constituting Convention. In this Convention, it is stated that the function of the IMO is still merely a recommendatory one, rather than a law creating one,¹⁸¹ despite the adjustments to the Convention in 1977, which broadened the mandate of the IMO to some extent. This means it is not within the mandate of the IMO to prescribe the law to its Member States. This has as a consequence that the audit should still be subject to authorization of the Member State before it can be carried out.¹⁸² Once this authorization is granted by the Member State, the Member State is bound by the rules regarding the Audit Scheme. In the case of the Audit Scheme, taking into account the fact that the Scheme is included in several of the mandatory IMO instruments, authorization of the Member State is implied by a State’s ratification of such

¹⁷⁸ Klabbers 2009, p. 215.

¹⁷⁹ ICJ 1962.

¹⁸⁰ IMO Convention, art. 66.

¹⁸¹ IMO Convention, art. 2(b).

¹⁸² Liejun 2013, p. 15.

instruments, unless the Member State specifically objects to being bound by the Audit Scheme.

This puts the term “mandatory” Audit Scheme somewhat in perspective. Even though the rules regarding the Audit Scheme - such as the before discussed III Code - are made mandatory via amendments in the major IMO Conventions, the Member State can always decide for itself whether it wants to grant its consent to being audited or not. If a State decides not to grant this consent - for example by specifically objecting the amendments made to the major IMO Convention - the IMO has no means of forcing a State to be audited anyway.¹⁸³

¹⁸³ Liejun 2013, p. 14.

Conclusion

In the concluding chapter of this thesis, the research question will be reviewed.

Is the IMO competent to adopt a mandatory Audit Scheme under its Convention and which measures could the Organization and its Member States take to enforce such a scheme?

The competence of the IMO follows first from its founding Convention, and secondly from the LOSC. According to the IMO Convention, the function of the Organization is first and foremost an advisory one, in which the IMO recommends upon matters to its Members. Its output is generally non-binding, with the exception of IMO Conventions, which are binding upon the Member States ratifying and implementing these Conventions. With regard to the LOSC, this Convention makes several references to the IMO, granting legislative powers to the Organization, thereby broadening the competence of the IMO. This means that IMO legislation can be binding on LOSC Member States if this legislation is seen as GAIRAS. This does not mean, however, that there is no relevance for IMO Member States to ratify and implement the underlying IMO Conventions, because of the fact that the LOSC has a general character and can therefore not provide regulation detailed enough to deal with all shipping and security issues.

The thesis identified several constraints on the expansion of abovementioned mandate of the IMO. The first constraint is related to the mandate of the IMO as laid down in its Convention, which states that the Organization's mandate is restricted to international shipping. The second constraint has to do with the mandate of other international bodies, and means the IMO cannot threaten into the place of other international bodies when creating legislation.

If the IMO exceeds this mandate by creating legislation outside of its competence, there will only be consequences for the Organization if there is a victim State disadvantaged by such legislation. The IMO should therefore always make sure that its legislation is in line with the view of its Member States. If this is the case, its

legislation does not necessarily have to be within the competence as laid down in the IMO Convention and the LOSC. In order to prevent such uncertainty, the IMO could adopt changes in its Convention to broaden its mandate, but this takes a two-thirds majority vote of the Assembly and the Member States.

The Organization does not have any enforcement powers with regard to its issued legislation. Accordingly, in order to research what the possibilities are to lay sanctions on IMO Member States, one has to look outside of IMO law and more to general international compliance law. The thesis describes three options in general international law regarding enforcing IMO legislation. First, the port State can deny access to ships it deems not acting in compliance with IMO legislation. Secondly, once a ship is into port, the port State can execute inspections and, when necessary, detain the ship until repairs necessary for acting in compliance with IMO legislation are carried out. Lastly, classification societies can deny a ship safety certificates, which has as a result that a ship will internationally not be regarded as being safe for navigation, and will therefore be port bound.

The disadvantage of these possibilities are, first, that a ship physically has to get into port before a port State can take measures to force a ship to comply with IMO standards, and, secondly, classification societies work independent from the IMO and therefore the IMO has no possibility of monitoring the work of these classification societies.

There are several reasons listed in this thesis why the Audit Scheme will still contribute to a better general compliance with IMO legislation, despite the fact that the IMO and its individual Member States do not possess many possibilities of enforcing the Scheme. First, a State values its reputation and will therefore be willing to abide by international law instruments, even if such instruments lack an effective compliance mechanism. Secondly, the Audit Scheme is of a holistic nature, which means that if a flag State were not to comply with the Scheme, it would damage the reputation of the entire shipping industry of a State rather than only the flag State itself. Lastly, IMO Member States indicated themselves their willingness to be monitored and showed to be open to external auditing. There is therefore no reason

why Member States would not comply with the Audit Scheme once it comes into force.

To which extent States will comply with the Audit Scheme remains up for debate. The Audit Scheme will only enter into force in 2016, which means that the conclusion of this thesis is only based on theory and speculation. The actual implications of the Audit Scheme and its impact on IMO Member State compliance with regard to IMO instruments will become apparent once the Audit Scheme has entered into force.

Bibliography

◆ Books and articles

Allen 2009

Allen, C. H. "Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention", in: *San Diego International Law Journal*, 2009 vol. 10, pp 265-334.

Alvarez 2005

Alvarez, J.E. *International Organizations as Law-Makers*, University Press Oxford, 2005.

Anianova 2006

Anianova, E. "The International Maritime Organization (IMO) - Tanker or Speedboat?" in: Ehlers, P.; Lagoni, R. (Eds.), *International Maritime Organisations and their Contribution towards a Sustainable Marine Development*, Lit Verlag Hamburg, 2006.

Balkin 2006

Balkin, R. "The International Maritime Organization and Maritime Security", in: *Tulane Maritime Law Journal*, 2006 vol. 30, pp. 1-34.

Barchue 2009

Barchue, L.D. "The Voluntary IMO Member State Audit Scheme: An Accountability Regime for States on Maritime Affairs", in: *World Maritime University Journal of Maritime Affairs*, 2009 vol. 8, pp. 61-70.

Barchue 2006

Barchue, L.D. Making a Case for the Voluntary IMO Member State Audit Scheme, as found on: <http://www.imo.org/es/OurWork/MSAS/Documents/Voluntary.pdf>, 2006.

Blanco-Bazán 1999

Blanco-Bazán, A. "IMO Interface with the Law of the Sea Convention", in: Nordquist, M.H.; Moore, J.N. (Eds.), *Current Maritime Issues and the International Maritime Organization*, Martinus Nijhoff Publishers Dordrecht, 1999.

Guzman 2002

Guzman, A.T. "A Compliance-Based Theory of International Law", in: *California Law Review*, 2002 vol. 90, pp. 1823-1887.

Kirgis 1998

Kirgis, F.L. "Shipping", in: Schachter, O.; Joyner, C.O. (Eds.), *United Nations Legal Order, volume 2*, The American Society of International Law, University Press Cambridge, 1998.

Klabbers 2009

Klabbers, J. *An Introduction to International Institutional Law*, University Press Cambridge, 2009.

Liejun 2013

Liejun, Y. "Implications and Impacts of Making Mandatory the Voluntary IMO Member State Audit Scheme: From Legal and Practical Perspectives", A dissertation submitted to the World Maritime University in partial fulfilment of the requirements for the award of the degree of Master of Science in Maritime Affairs, 2013.

Mansell 2009

Mansell, J.N.K. *Flag State Responsibility - Historical Development and Contemporary Issues*, Springer-Verlag Berlin Heidelberg, 2009.

Molenaar 2014

Molenaar, E.J. "Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region", in: *Ocean Development & International Law*, 2014 vol. 45, pp. 272-298.

Mukherjee & Brownrigg 2013

Mukherjee, P.K.; Brownrigg, M. *Farthing on International Shipping*, Springer-Verlag Berlin Heidelberg, 2013.

Park 2012

Park, J.C. "A Study on the Oversight Scheme over Recognized Organizations Under the International Instruments", A dissertation submitted to the World Maritime University in partial fulfilment of the requirements for the award of the degree of Master of Science in Maritime Affairs, 2012.

Sadler 2013

Sadler, "The role of classification societies, Recognized Organizations and IACS", in: BIMCO Bulletin, Volume 108, 2013, pp. 86-88.

Schachter & Joyner 1995

Schachter, O.; Joyner, C.C. *United Nations Legal Order Volume 2*, University Press Cambridge, 1995.

Sinclair 1984

Sinclair, I. *The Vienna Convention on the Law of Treaties, Second Edition*, Manchester University Press, 1984.

Takei 2012

Takei, Y. "Institutional Reactions to the Flag State That Has Failed to Discharge Flag State Responsibilities", in: *Netherlands International Law Review*, 2012 vol. 59, pp. 65-90.

Tanaka 2009

Tanaka, Y. "Reflections on Reporting Systems in Treaties Concerning the Protection of the Marine Environment", in: *Ocean Development & International Law*, 2009 vol. 40, pp. 146-170.

Villiger 1985

Villiger, M.E. *Customary International Law and Treaties*, Martinus Nijhoff Publishers Dordrecht, 1985.

◆ Conventions

Anti-fouling Convention

International Convention on the Control of Harmful Anti-fouling Systems on Ships (5 October 2001, entered into force 17 September 2008) ATS 15/AFS/CONF/26.

Ballast Water Convention

International Convention for the Control and Management of Ships' Ballast Water and Sediments (13 February 2004, not yet in force) IMO Doc. BWM/CONF/36.

COLREG

Convention on the International Regulations for Preventing Collisions at Sea (20 October 1972, entered into force 15 July 1977, as amended) 1050 UNTS 16.

IMO Convention

Convention on the International Maritime Organization (adopted 6 March 1948, entered into force 17 March 1958) 289 UNTS 48.

Load Lines Convention

International Convention on Load Lines (5 April 1966, entered into force 21 July 1968, as amended) 640 UNTS 133.

Load Lines Protocol

Protocol of 1988 relating to the International Convention on Load Lines (11 November 1988, entered into force 3 February 2000) IMO Doc. HSSC/CONF/12.

LOSC

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397.

MARPOL

International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 62.

MARPOL Protocol

Protocol to amend the 1973 International Convention for the Prevention of Pollution from Ships (adopted 26 September 1997, entered into force 19 May 2005) [2007] ATS 37.

Paris MoU

Paris Memorandum of Understanding on Port State Control (26 January 1982, entered into force 1 July 1982) 21 ILM 1.

SOLAS

International Convention for the Safety of Life at Sea (1 November 1974, entered into force 25 May 1980, as amended) 1184 UNTS 3.

STCW Convention

International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984, as amended) 1361 UNTS 190.

Tonnage Convention

International Convention on Tonnage Measurement of Ships (23 June 1969, entered into force 18 July 1982) 1291 UNTS 3.

UN Charter

Charter of the United Nations (24 October 1945) 1 UNTS XVI.

WTO Agreement

Agreement Establishing the World Trade Organization (15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.

◆ IMO Resolutions & Circular Letters

IMO Res. 1975

IMO Res. A.358(IX), *Amendments to the IMCO Convention*, 14 November 1975.

IMO Res. 1985

IMO Res. A.584(14), *Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of Their Passengers and Crews*, 20 November 1985.

IMO Res. 1995

IMO Res. A.787(19), *Procedures for Port State Control*, 23 November 1995.

IMO Res. 2001

IMO Resolution A.912(22), *Self-Assessment of Flag State Performance*, 29 November 2001.

IMO Res. 2005.

IMO Res. A.974(24), *Framework and Procedures for the Voluntary IMO Member State Audit Scheme*, 1 December 2005.

IMO Circ. 2013

IMO Circular Letter No. 3425, 5 December 2013.

IMO Res. 2013

IMO Resolution A.1070(28), *IMO Instruments Implementation Code (III Code)*, 4 December 2013.

IMO Res. 2013 II

IMO Res. A.1077(28), *2013 Non-Exhaustive List of Obligations Under Instruments Relevant to the IMO Instruments Implementation Code*, 4 December 2013.

IMO Res. 2013 III

IMO Res. A.1067(28), *Framework and Procedures for the IMO Member State Audit Scheme*, 4 December 2013.

IMO Res. 2013 IV

IMO Res. MSC.349(92), *Code for Recognized Organizations (RO Code)*, 21 June 2013.

◆ **Miscellaneous**

2001 ILC Draft Articles

Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001. As found on:

http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

ICJ 1950

International Court of Justice, Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of 3 March 1950: ICJ Reports 1960, p. 4.

ICJ 1960

International Court of Justice, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960: ICJ Reports 1960, p. 150.

ICJ 1962

International Court of Justice, Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962: ICJ Reports 1962, p. 151.

IMO Study 2012

IMO Leg/Misc.7, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization - Study by the Secretariat of the International Maritime Organization (IMO)*, 2012.

UNCTAD 2013

United Nations Conference on Trade and Development (UNCTAD), *Review of Maritime Transport*, 2013, as found on:

http://unctad.org/en/PublicationsLibrary/rmt2013_en.pdf

UNGA Doc. A/58/65

United National General Assembly, UN Doc. A/58/65, 3 March 2003.

WWF 2009

World Wide Fund for Nature (WWF), *Silent Invasion - The Spread of Marine Invasive Species Via Ships' Ballast Water*, 2009, as found on:

http://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/Study_Silent_Invasion.pdf.