Part 3: Particularly Sensitive Sea Areas: an IMO Instrument to Protect Marine Areas

The third part of this treatise, comprised of Chapters 6 to 8, focuses on the PSSA concept that IMO has developed to attach increased protection to certain vulnerable marine areas under particular stress from international shipping. Chapter 6 outlines the legal and institutional context, in which IMO carries out the tasks assigned to it by the international community. Chapter 7 introduces the legal basis of the PSSA concept, namely the PSSA Guidelines, in particular its development within the last two decades and its basic prerequisites, while Chapter 8 describes protective measures that may be deployed to protect a PSSA.

Chapter 6: Protection of the Marine Environment through IMO within the System of International Institutions

The PSSA concept is one of an array of instruments governed by IMO. It would be premature to examine the implications of PSSAs without having explored the competences assigned to the IMO. Since IMO is not the only international organisation dealing with maritime matters, it is necessary to put its activities into context by precisely defining the scope of the various organisations' activities in the maritime field. It is also important to take note of the general legal principles that mould and constrain the legislative competences of international organisations. In so doing, this chapter should shed some light on the constraints IMO is subjected to in carrying out its duties.

I. International Organisations Addressing Marine Matters

There exists no single international organisation comprehensively dealing with all matters pertaining to the oceans and their use. No fewer than nine organisations share respective responsibilities that shall be outlined in this section. These organisations are part of a system that is sometimes referred to as the "UN family." However, their status in terms of how they relate to the UN, its Economic and Social Council (ECOSOC), and to one another differs. Three different types of institutions can be identified: UN specialised agencies, UN programmes and other autonomous organisations.

Specialised agencies are established independently of the UN by multilateral treaties. Pursuant to Articles 57 and 63 of the UN Charter[1], in order to become specialised agencies, they have to enter into relationship agreements with the UN through ECOSOC, to which they have, amongst others, reporting obligations.[2] Nevertheless, supervision by ECOSOC is limited – thus specialised agencies are largely independent. Of the seventeen agencies operational today, IMO is responsible for all matters relating to shipping.[3] Other specialised agencies of relevance are the Food and Agricultural Organization (FAO), the UN Educational, Scientific and Cultural Organization (UNESCO) and the UN Industrial Development Organization (UNIDO), which are responsible for fisheries, maritime science and maritime technologies respectively.

FAO has its headquarters in Rome and was founded in 1943. It was established as an international organisation by the first FAO conference in 1945, which adopted the constituent treaty.[4] Its general purpose is to achieve food security for all people. By recourse to a wide range of means, FAO is to contribute to raising levels of nutrition and improving agricultural productivity to better the lives of rural populations and thereby help the world economy to grow. The major programme on fisheries aims at promoting the sustainable development of responsible fisheries and contributing to food security.[5] UNESCO maintains an Intergovernmental Oceanographic Commission (IOC), whose purpose, according to Article 2 of its statute, is "to promote international cooperation and to coordinate programmes in research, services and capacity-building, in order to learn more about the nature and resources of the ocean and coastal areas and to apply that knowledge for the improvement of management, sustainable development, the protection of the marine environment, and the decision-making processes of its Member States."[6] The IOC was established in 1960 by Resolution 2.31 adopted by the General Conference of UNESCO at its eleventh session. UNIDO, in its endeavour to improve marine technologies, focuses on fisheries and water and coastal zone management.[7] Its overall aim is to fight poverty through the promotion of competitive industrial production, international industrial partnerships

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1 Adopted on 26 June 1945, in force as from 24 October 1945, 1 *UNYB* (1946-47) 831.

2 Ignaz Seidl-Hohenveldern and Gerhard Loibl, *Das Recht der Internationalen Organisationen*, Seventh Ed. (Köln Berlin Bonn München: Carl Heymanns Verlag 2000), para. 0813 et seqq.; A. LeRoy Bennet and James K. Oliver, *International Organizations – Priniciples and Issues*, Seventh Ed. (Upper Saddle River: Prentice Hall 2002), p. 305 et seqq.

3 For an account of the scope of IMO's activities see, *infra*, Sec. III. of Chapter 6.

4 Constitution of the Food and Agricultural Organization, adopted on 16 October 1945, in force as from 16 October 1945. The text is reproduced, as amended on 26 November 1991, in FAO, *Basic Texts of the FAO*, Vol. 1 (Rome: FAO Publication 1992).

5 A general overview is available from <http://www.fao.org/fi/default.asp>; (accessed on 30 September 2006).

6 Cf. Doc. IOC/INF-1148. The text is reproduced in UNESCO, *IOC Statute* (Paris: UNESCO Publishing 2000).

7 See further information available from <http://www.unido.org/doc/5073?language %5f code=en>; (accessed 30 September 2006).

and sustainable industrial development.[8] UNIDO, succeeding the UN Centre for Industrial Development (CID), was established by UN General Assembly Resolution 2152 (XXI), adopted on 17 November 1966 as a subsidiary body of the UN General Assembly. This resolution was superseded by the 1979 constitution of UNIDO.[9]

Further institutions addressing maritime matters can be found amongst the so-called United Nations Programmes. UN programmes have been established in order to reach certain narrowly defined objectives through the co-ordination of overlapping competences of organisations within the UN family.[10] Legally they are established as subsidiary organs of the General Assembly as envisaged in Articles 7(2) and 22 of the UN Charter. Two UN programmes are of relevance: the UN Development Programme (UNDP) and the UN Environment Programme (UNEP). UNDP's purpose is to foster sustainable economic growth by assisting states in identifying, using and improving the use of their resources.[11] Its work in the maritime sector focuses on coastal development; a current priority topic in this respect is the Strategic Initiative for Ocean and Coastal Management (SIOCAM), which seeks to harness the knowledge and skills of those involved in this work in order to enhance the effectiveness of ocean and coastal management projects in promoting sustainable human development, in particular in poor countries.[12] UNDP's headquarters are based in New York. It came into being on 1 January 1966, following the adoption by the UN General Assembly of Resolution 2029 (XX).[13] Within the UN system, UNEP "acts as a catalyst, advocate, educator and facilitator to promote the wise use and sustainable development of the global environment."[14] Since the time it was set up in 1972, one of its priority issues are marine and coastal areas. It has developed programmes such as the International Coral Reef Action Network (ICRAN) and the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities (GPA). Arguably the most influential scheme is the so-called regional seas programme, explained in more detail in Chapter 5[15], which promotes regional cooperation for the protection and development of the shared marine environment.

Autonomous organisations include the International Hydrographic Organization (IHO) and the International Seabed Authority (ISA). Even though these inter-

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8 Philippe Sands and Pierre Klein, *Bowett's law of International Institutions*, Fifth Ed. (London: Sweet & Maxwell 2001), para. 3-070.

9 Adopted on 8 April 1979, in force as from 21 June 1985, 1401 *UNTS* 3.

10 Ignaz Seidl-Hohenveldern and Gerhard Loibl, *supra*, note 2, para. 0814b.

11 Cf. Cynthia D. Wallace, "United Nations Development Programme", *EPIL IV* (2000), pp. 1086-1089, at 1086.

12 Further information available from <http://www.undp.org/water/initiatives/ocean.html>; (accessed on 30 September 2006).

13 For an historical account of UNDP's work, see Cynthia D. Wallace, *supra*, note 11, p. 1087 et seq.

14 UNEP, *About UNEP*, available from <http://hq.unep.org/Documents.Multilingual/Default.asp?DocumentID=43&ArticleID=3301&l=en>; (accessed on 30 September 2006).

15 Sec. II.

governmental organisations do not have an official status as UN specialised agencies, they work closely together with other international institutions and UN subsidiary organs. The IHO, responsible for hydrographic services[16], is an intergovernmental consultative and technical organisation that was established in 1921 as the International Hydrographic Bureau (IHB) with its headquarters in Monaco. Its status was changed by the Convention Establishing the IHO, adopted in 3 May 1967. By co-ordinating national efforts in hydrographic services and providing for uniformity in nautical charting, IHO aims at supporting the safety of navigation and the protection of the marine environment. The ISA, which has its constitutional basis in UNCLOS Part XI and the 1994 Agreement Relating to the Implementation of Part XI of UNCLOS[17], is entrusted with administering the protection and exploitation of the international deep-sea bed. The deep-sea bed is defined as the area that lies beyond the limits of national jurisdiction; its resources are considered to be the "common heritage of mankind."[18]

Aside from the global international organisations that have been mentioned, there are further maritime institutions that have been created at the regional level. These institutions include both regional fisheries commissions and bodies governing regional marine environment protection treaties, such as the Helsinki Commission and the Black Sea Commission, referred to in the previous chapter. Especially the latter are comprehensive in scope, inasmuch as they attempt to address all possible threats and sources of pollution that may have an impact on the environment of the respective part of the sea.

Apparently, areas of concern of the aforementioned organisations overlap to quite a large extent – both horizontally, between global and regional organisations concerned with the same issues on different levels, and vertically, between global organisations addressing similar problems from a different viewpoint. It is thus interesting to contemplate how the competences of international organisations can be specified and distinguished. What come into play are the principle of cooperation and the principle of subsidiarity. The former, which was introduced, *supra*, in Chapter 4[19] as applying among states, may also guide the behaviour of other entities such as international organisations. It is today a common phenomenon that inter-organisational working groups are established to foster the coordination of organisations working on different aspects of the same topic.[20]

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[16] Further information available from <http://www.iho.shom.fr/>; (accessed on 30 September 2006).

[17] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, adopted on 28 July 1994, in force as from 28 July 1996, 33 *ILM* (1994) 1309.

[18] Art. 136 of UNCLOS.

[19] Refer to Sec. III.1. of Chapter 4.

[20] See Moira L. McConnell, "Inter-Agency Collaboration or Inter-Agency Competition – A Challenge for the UN System", in A.Kirchner (ed.), *International Marine Environmental Law* (The Hague New York London: Kluwer Law International 2003), pp. 69-91, at 87.

The latter principle, that has most prominent status in EU law[21], stipulates that a task should primarily be carried out by the smallest and most specialised entity.[22] Its application is limited by recourse to the performance of a duty: if a particular body does not have the ability to handle the task, the bigger entity may step in and act. Apart from these principles, another aspect *de facto* limits an overlap of activities: membership. States that are members of different organisations are interested in preventing a duplication of services and conflict of goals to enhance the effectiveness and efficiency of the institutions' work.[23]

As far as IMO is concerned, its constitution calls for close cooperation with other organisations. By virtue of Article 60 of the Convention on the International Maritime Organization[24], IMO is to "cooperate with any specialized agency of the United Nations in matters which may be the common concern of the Organization and of such specialized agency, and shall consider such matters and act with respect to them in accord with such specialized agency." Article 61 clearly states that co-operation may well be sought with non-UN specialised agencies, too. If need be, IMO may even take over functions, resources and obligations from other international organisations.[25] Efforts to cooperate can be identified in many of the matters IMO addresses in its work. As is obvious, IMO often touches upon issues of interest for other organisations, for instance when setting standards applicable to the workforce on vessels (ILO), or needs their assistance, for example with respect to the latest maritime technologies (IOC). The usual way of dealing with these overlaps is by means of establishing inter-agency bodies.[26] A very ambitious inter-agency coordination mechanism, UN Oceans, was set up in 2003. UN Oceans rather broadly aims to foster coherent action on oceans and coastal issues within the UN system.[27] Other prominent examples include the continuing cooperation of WHO, IMO and IOC within GESAMP and IMO's recently initiated efforts to address lost and discarded fishing gear and other marine debris

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[21] Cf. Art. 5(2) of the EC Treaty. See Hans-Joachim Koch, *Das Subsidiaritätsprinzip im Europäischen Umweltrecht* (Stuttgart: Richard Boorberg Verlag 2004), p. 15 et seqq.

[22] Ignaz Seidl-Hohenveldern and Gerhard Loibl, *supra*, note 2, para. 0800. For the underlying idea, see Hans-Joachim Koch, *supra*, note 21, p. 12 et seqq.

[23] Cf. A. LeRoy Bennet and James K. Oliver, *supra*, note 2, p. 307.

[24] Adopted on 6 March 1948, in force as from 7 January 1959, 289 *UNTS* 48; hereafter IMO Convention. The text, as modified by amendments adopted by the Assembly, is reproduced in IMO, *Basic Documents*, Vol. I (London: IMO Publication 2004), pp. 7-25.

[25] Albeit subject to a two-thirds majority vote of the Assembly: see Art. 63 of the IMO Convention.

[26] The cooperation of institutions today is a common phenomenon with respect to ocean matters: see Annick de Marffy, "Ocean Governance: A Process in the Right Direction for the Effective Management of the Oceans", 18 *Ocean Yearbook* (2004), pp 162-192, at 184 et seqq.

[27] Further information available from its website at <http://www.oceansatlas.org/www.un-oceans.org/Index.htm>; (accessed on 30 September 2006).

in conjunction with FAO and UNEP.[28] As has been observed, "[e]ach [agency] is, in a sense, specialised or has a particular focus that appears, at least on paper, to make sense and constitutes a reasonable division of effort and expertise. But this is a structure that has been built over time and reflects an ongoing process of accommodation and *ad hoc* renovation rather than design."[29] It remains to be seen whether this institutional fragmentation will be overcome at some point in the future. However, for the time being, IMO is the only competent international organisation for governing issues related to international shipping.

II. Legal Framework of IMO Efforts to Protect the Marine Environment

As has been indicated in the previous section, IMO has, over the years, developed an abundance of instruments that cover almost every aspect relevant to the regulation of international shipping. Among its various committees, the Marine Environment Protection Committee (MEPC) is responsible for initiating and maintaining the mechanisms that IMO deploys in order to prevent, reduce and minimise damage to the environment caused by vessels. IMO instruments are either enshrined in multilateral treaties or adopted as resolutions of the Assembly or one of the committees respectively. To examine the extent to which these rules have to be complied with, one needs to take a look at the competences of international organisations in binding their member states. I shall subsequently determine, first, in which circumstances international organisations are allowed to legislate and to what extent states are obliged – by virtue of international law – to comply with these acts. Turning to IMO, I will, secondly, dwell upon the legal basis for its various activities.

1. Legislative Competences of International Organisations

Under domestic legal systems, the legislature is free to enact any provision it considers necessary for governing, and securing the functioning of, society. If the majority votes in favour of a rule, even the minority is bound by the decision. In other words, everyone must follow the adopted regulations, for they are subject to the acts of the sovereign. Moreover, even if the enactment of certain rules is prohibited by a constitutional provision, there are procedures by which this provision might be changed by the legislature – albeit not by a simple majority – if this is deemed necessary. Public international law, by contrast, is governed by the consent principle rather than the majority principle. Therefore, a state is never bound by a multilateral instrument unless it has given its consent, namely signed and ratified it. This reflects the fact that the prime foundation pillar of public international law is national sovereignty, even though practice in international

[28] See MEPC 53/24, *Report of the Marine Environment Protection Committee on its Fifty-Third Session*, 25 July 2005, para. 11.51. Further examples are given by Moira L. McConnell, *supra*, note 20, p. 89 et seqq.

[29] *Ibid.*, p. 88.

policy, in particular concerning amendments to treaties, sometimes deviates from the prerequisite of an explicit articulation of consent.[30] These basic principles find their expression in the 1969 Vienna Convention on the Law of Treaties[31] and are unquestionably obvious to every scholar of international law. It is, however, worth bringing them to mind again, since a comparison of municipal and international legislative systems permits the drawing of some conclusions regarding international organisations which are established through multilateral treaties (to which the Vienna CLOT expressly applies[32]). As international organisations are established by multilateral treaties, it is within the framework of international law that they acquire competences to enact rules and standards aimed at universal applicability. By consenting to the constituent treaty of an international organisation, states waive certain sovereign rights, as they cede specific powers to the institutions authorised to act on their behalf. Hence states attach high importance to the proper application and interpretation of the constituent treaty: if the international organisation is allowed to issue binding legal acts, they are bound by an act although they might have voted against it. And even if an international organisation has no competence to adopt binding acts, states might not be pleased that the organisation addresses a delicate issue in the first place. To provide a general overview of the issue, I shall in the following section explore the means by which international organisations may contribute to the fabric of international law and then clarify why some acts may be legally binding for states.

a) Means of Establishing Rules and Standards

As already pointed out above, there is a fundamental difference between treaties concluded by individual states following an initiative, and under the auspices of, an international organisation and those legal acts that are adopted by an organ of an international organisation. With respect to treaty-making, international organisations do not act in their own capacity; they merely provide a forum for plenipotentiaries of states to negotiate the treaty. While most treaties are drafted by one of the organisations' organs, the treaty-making process is often not limited to the organisation's member states, but is open to all members of the UN. Although these treaties are adopted within an organisation, member states retain complete freedom as to the approval or disapproval of the treaty.[33] Since the instruments elaborated are multilateral treaties within the meaning of the 1969 Vienna CLOT, the process is governed by the consent principle. With the notable exception of the ILO, that applies special procedures for the adoption of an

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[30] José E. Alvarez, *International Organizations as Law-Makers* (Oxford: OUP 2005), p. 274 et seqq.; see also, *infra*, Sec. II.1.a) and III.1 of this chapter.

[31] Done at Vienna, adopted on 23 May 1969, in force as from 27 January 1980, 8 (1969) *ILM* 679; hereafter Vienna CLOT.

[32] Art. 5.

[33] Philippe Sands and Pierre Klein, *supra*, note 8, para. 11-030; Julia Sommer, "Environmental Law-making by International Organizations", 56 *ZAöRV* (1996), pp. 628-667, at 634.

international labour convention[34], international organisations assume the same functions as diplomatic conferences in other contexts. Hence, states are only bound by a treaty if they expressly accept its rules. This binding effect extends to rules and standards set out in the annexes to multilateral treaties, inasmuch as they are integral parts of a treaty.[35]

As regards those legal acts that international organisations are – to varying extents – authorised to adopt through their organs, elements of the consent principle are gradually replaced by parliamentary features, reflecting the fact that issues they touch upon are more technical and less political. In attempts to systematise these acts, three different types have been identified: quasi-legislation, resolutions and legislative fact-finding, all of which have peculiar characteristics briefly set out below.

Although states often feel the need to amend existing treaties, it can take years for an amendment to be elaborated under traditional amendment procedures. Many international organisations have therefore been assigned the duty to review and, if necessary, amend treaties in order to allow a fast and flexible response to problems that have recently arisen. These law-making powers have been called *legislation* or *quasi-legislation,* because they are essentially a hybrid between legislation and treaty-making.[36] By using this technique – called "tacit acceptance" – amendments are adopted with a majority of votes of the parties, which can vary from a simple majority to a nine-tenth majority vote, and enter into force unless a certain number of states object to the decision. Amendments thereby do not require an express act of approval by each state to become bound.[37] Thus, the slow working pace of states is used in a progressive manner in favour of the enactment of rules. Most amendment procedures are, however, supplemented by safeguards such as "opting-out" procedures or prohibitive *quora* to protect states from becoming bound too easily against their interests.[38] In contrast to these treaty-related procedures, *resolutions* adopted by the organs of international organisations (assemblies, commissions, committees, etc.) emphasise the parliamentary character of international institutions.[39] They represent the prime technique by which international organisations elaborate rules and standards – mostly in the

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[34] Cf. Philippe Sands and Pierre Klein, *supra*, note 8, para. 11-030, and further literature cited there.

[35] Astrid Skala, *Internationale technische Regeln und Standards zum Umweltschutz: ihre Entstehungsarten und rechtlichen Wirkungen* (Köln et al: Carl Heymanns Verlag 1982), pp. 138 et seqq.

[36] Charles Henry Alexandrowicz, *The Law-Making Functions of the Specialised Agencies of the United Nations* (Sydney: Angus and Robertson 1973), p. 6 et seqq.

[37] For details on the impact of tacit acceptance procedures on the work of IMO, see, *infra*, Sec. III.1 of this chapter.

[38] Julia Sommer, *supra*, note 33, p. 645.

[39] Cf. Henry G. Schermers, "International Organizations, Resolutions", *EPIL* Vol. II (1995), pp. 1333-1336, at 1333; Igor I. Lukashuk, "Recommendations of International Organisations in the International Normative System", in W.E. Butler (ed.), *International Law and the International System* (Dordrecht Boston Lancaster: Martinus Nijhoff Publishers 1987), pp. 31-45, at 34 et seqq.

form of a coherent set of rules – as a result of their consultative function. Whether member states, or indeed non-member states, are bound by those acts is a different question, which will be addressed in the next section. The terminology is far from being consistent: resolutions may be entitled recommendations, guidelines, general provisions, codes, decisions or codes of conduct, with the binding effect not necessarily deducible from the term used. Resolutions are also used to adopt procedural rules, which belong to the internal law of the organisation. A further category is *standard-setting* or *legislative fact-finding*. Although often adopted in the form of a resolution, legislative fact-finding is different from that particular category. While resolutions may be understood as legal acts in the form of conventions, legislative fact-finding denotes decisions upon the mere technical aspects of an issue without elaborating on the legal context of how and when these standards should be applied.[40] To that end, international organisations rather fulfil the role of experts in their respective area of technical expertise. Examples include the WHO, IMO and IAEA.[41] Certain treaties, such as UNCLOS[42], the 1974 Safety of Life at Sea Convention[43] or the 1972 London Dumping Convention[44], call for international organisations to implement norms by elaborating definitions or standards which are to be regarded as an internationally agreed lowest common denominator.

b) Determination of the Legal Quality: Binding and Recommendatory Acts

Since they are governed by the consent principle, rules that have been laid down in a treaty by means of traditional international law-making are undoubtedly binding for all contracting parties. The same applies to amendments of treaties implemented by an organ of an international organisation that is entitled to do so, although these amendment procedures are not entirely guided by the consent principle: where tacit acceptance procedures are employed, states that do not opt out are bound by the respective treaty as amended. However, it is much more difficult to determine the binding effect of other legal acts. In principle, as with resolutions or decisions of international organisations, even though they might have been adopted unanimously, they are not binding on member states. This is not necessarily a weakness, since their soft-law form provides certain advantages to multilateral treaty-making, such as easier implementation on the national and

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[40] See Frederic L. Kirgis, "Specialized Law-Making Processes", in O. Schachter and Ch.C. Joyner (eds.), *United Nations Legal Order, Vol. II* (Cambridge: ASIL and CUP 1995), pp.109-168, at 139 et seqq.

[41] *Ibid*.

[42] Cf. DOALOS, "'Competent or Relevant International Organizations' under the United Nations Convention on the Law of the Sea", 31 *LOSB* (1996), pp. 79-95.

[43] In force 25 May 1980, 1184 *UNTS* 2; hereafter SOLAS. Chapter V of the annex refers to standards set by the IHO.

[44] In force as from 30 August 1975, 1046 *UNTS* 120; see Annex II(D) and Art. VI para. 1(a).

local level and more flexibility in adapting to changing technology.[45] In some circumstances, however, legal acts acquire binding effect.[46] This is generally the case if norms contained in a non-binding resolution can be associated with "traditional" sources of international law.[47] In other words, a resolution "is legally binding when its violation constitutes a breach of international law."[48]

A principal distinction must be drawn between acts aimed at regulating the internal course of procedures and acts that aim to become effective outside the organisation's legal order. Instruments containing internal rules, such as rules of procedure or the exertion of budgetary powers, are of mandatory character because they are either based on express provisions in the constituent treaty or established by recourse to so-called "implied powers."[49] With respect to measures aimed at the external sphere, most importantly and most obviously, a binding effect can also be established by recourse to the constitutional instrument, which limits the organisation's area of responsibility or – expressed in a positive manner – represents a general justification for its activities. Concerning competences to adopt legal acts, existing constitutional treaties include numerous different provisions regarding procedure, scope and the legal effect attached to it. The prime example is the Security Council of the UN, whose decisions – pursuant to Article 25 of the UN Charter – have mandatory character. Other treaties establishing international institutions also allow for adoption of measures binding upon member states. Prominent examples include regulations of the World Health Organization[50] and standards adopted by the ICAO Council.[51]

Given that each international institution is constrained by its respective constitutional treaty, it is not an incorrect assumption to contend that the organisation has no competences beyond what the text provides for. However, it would be pre-

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45 Alan E. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law", 48 *ICLQ* (1999), pp. 901-913, at 902 et seqq.; Diane Shelton, "Introduction", in D. Shelton (ed.), *Commitment and Compliance* (Oxford: OUP 2000), pp. 1-18, at 12.

46 For an overview, see José E. Alvarez, *supra*, note 30, p. 219 et seqq.; Astrid Skala, *supra*, note 35, p.176 et seqq.; Jochen Abr. Frowein, "The Internal and External Effects of Resolutions by International Organizations", 47 *ZAöRV* (1987), pp. 778-790, at 784 et seqq.

47 Philippe Sands and Pierre Klein, *supra*, note 8, para. 11-051; likewise Rainer Lagoni, "Resolution, Declaration, Decision", in R. Wolfrum and Ch. Philipp (eds.), *United Nations: Law, Policies and Practice,* Vol. 2 (München and Dordrecht: C.H.Beck and Martinus Nijhoff Publishers 1995), pp. 1081-1091, at 1084.

48 Rainer Lagoni, *loc.cit.*

49 Philippe Sands and Pierre Klein, *supra*, note 8, para. 11-032 and 14-031 et seq. These competences are based on the recognition that international organisations must be allowed to regulate their own administrative matters even if the constituent treaty does not include respective express provisions.

50 Art. 21 and 22 of the 1948 WHO Constitution, cf. Monika Vierheilig, *Die rechtliche Einordnung der von der Weltgesundheitsorganisation beschlossenen regulations* (Heidelberg: R. v. Decker 1984), pp. 60 et seqq.

51 Art. 37, 38, 54 lit. (l), 90 lit. (a) of the 1944 Chicago Convention; cf. Ludwig Weber, "Convention on International Civil Aviation – 60 Years", 53 *German Journal of Air and Space Law* (2004), pp. 289-311, at 297.

mature to stop here, as there are further factual or legal settings where international organisations' decisions acquire binding force. First of all, an act may be considered to have a binding effect if it aims at "stating, restating, clarifying or supplementing the provisions of the constituent instrument on particular activities or situations falling within the competence of the organisation."[52] It may be seen as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" in the sense of Article 31 (3) c) of the 1969 Vienna CLOT.[53] A norm pronounced in a recommendation may also be binding if it can be regarded as expressing customary international law. Moreover, a binding effect may also derive from a vote that is cast in favour of a recommendatory instrument regarding the norms enunciated in this institutional act.[54] However, a number of authors rightly argue that voting patterns must not be taken into account, because a mere vote does not represent any kind of contract the state enters into.[55] Last but not least, a "factual" binding effect can flow from a state of necessity that forces states to comply with institutional acts that are not binding *per se*.[56]

To sum up, resolutions adopted by international institutions can take various forms. Although these acts may in some circumstances become binding without the consent of the individual states, international organisations are not in the position to rescind the fundamentals of public international law. They largely depend on their member states to reach agreement on disputed issues and subsequently to implement and enforce the agreed rules in good faith.

2. Legal Basis for the Work of IMO

The main purpose of IMO's work, according to Article 1 of the IMO Convention, is "to provide machinery for co-operation among governments in the field of governmental regulation and practices relating to technical matters of all kinds

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52 Philippe Sands and Pierre Klein, *supra*, note 8, para. 11-047.

53 Jochen Abr. Frowein, *supra*, note 46, p. 790; Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, Third ed. (The Hague London Boston: Martinus Nijhoff Publishers 1995), para. 1255.

54 Grigory I. Tunkin, "The Role of Resolutions of International Organisations in Creating Norms of International Law", in W.E. Butler (ed.), *supra*, note 39, pp. 5-19, at 11; Jochen Abr. Frowein, *supra*, note 46, p. 790.

55 E.g., Ingrid Detter, "The Effect of Resolutions of International Organisations", in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21th Century: Essays in Honour of K. Skubiszewski* (The Hague Boston London: Kluwer Law International 1996), pp. 381-392, at 391 et seq. and Ingrid Delupis, "The Legal Value of Recommendations of International Organisations", in W.E. Butler (ed.), *supra*, note 39, pp. 47-65, at 53 et seq.

56 Philippe Sands and Pierre Klein, *supra*, note 8, para. 11-045, mention guidelines adopted by the IMF Executive Directors to control exchange-rate stability. Although the guidelines are not binding *per se*, states stepping out of line would risk their economy going bust. Another example are decisions by ITU, see Jens Hinricher, "The Law-Making of the International Telecommunication Union (ITU) – Providing a New Source of International Law?", 64 *ZaöRV* (2004), pp. 489-501, at 495 et seqq.

affecting shipping engaged in international trade, and to encourage and facilitate the general adoption of the highest possible standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships."[57] It is to deal with all administrative and legal matters which may arise when pursuing its objectives.[58] Article 2 stipulates that in order to achieve these aims, IMO should either facilitate and convene diplomatic conferences to negotiate multilateral instruments, provide machinery for consultation and the exchange of information between governments, or make recommendations to be adopted by one of its organs as resolutions.

The main organ of IMO is the Assembly, which consists of all member states and meets every two years. Its functions are laid down in Article 15, including the approval of the work programme of the organisation[59], the recommendation of regulations and guidelines to members for adoption[60], and the competence to decide upon the initiation of diplomatic procedures aimed at the adoption of international conventions.[61] However, it does not enjoy the same dominant role as plenary organs of other international institutions.[62] Between the sessions of the Assembly, the Council of IMO[63] performs all the functions of the organisation, except the function of making recommendations. It consists of thirty-two members and should coordinate and supervise the work of the organisation.[64] The IMO Convention also provides for the work of the other main organs of IMO: the Maritime Safety Committee (MSC)[65], the Marine Environment Protection Committee (MEPC)[66], the Legal Committee (LEG)[67] and the Technical Co-operation Committee (TCC)[68]. The Facilitation Committee (FAL) has been established as a permanent body by the Assembly. In contrast to the other committees, which (apart from the MSC, that had been included in the original convention) have been established by amendments to the original convention, FAL has not yet been incorporated in the IMO Convention, although proposals have been made to that

[57] Art. 1 lit. (a) of the IMO Convention. See further Kamil A. Bekiashev and Vitali V. Serebriakov, *International Marine Organizations – Essays on Structure and Activities* (The Hague Boston London: Martinus Nijhoff Publishers 1981), p. 39 et seqq.
[58] Art. 1(a) and 2(a).
[59] Art. 15 lit (f).
[60] Art. 15 lit (j).
[61] Art. 15 lit (l).
[62] Philippe Sands and Pierre Klein, *supra*, note 8, para. 3-055.
[63] Art. 16-26.
[64] Art. 26.
[65] Art. 27-31.
[66] Art. 37-41.
[67] Art. 32-36.
[68] Art. 42-46.

effect.[69] Some of the committees are supported by sub-committees[70], the most important of which are the Sub-Committee on Navigation (NAV), on Ship Design and Equipment (DE) and on Flag State Implementation (FSI). Apart from the generally worded Articles 1 and 2 mentioned above, several further articles contain legal bases for activities of the Assembly and the committees. For the purpose of this treatise, it suffices to point out those provisions referring to the Assembly and the MEPC. With respect to the former, Article 15(j) allows for it to recommend to members for adoption regulations and guidelines concerning, amongst other matters, the effect of shipping on the environment; as regards the latter, Article 38(a) provides for adoption and amendments of regulations as provided for in international conventions, such as MARPOL, and Article 38(c) requires it to assemble information on the impact of ships on the environment and, as appropriate, "make recommendations and develop guidelines."

The IMO Constitution is not the only international treaty that authorises IMO activities. Other treaties make recourse to decisions by IMO and thereby incorporate its expertise in global shipping into their regimes. For instance, the 1972 Convention on the International Regulations for Preventing Collisions at Sea[71] in Rule 10 stipulates that traffic separation schemes, which were prescribed before by IMO on a purely voluntary basis, are mandatory for its parties. And SOLAS in Regulation 8 of Chapter V confers upon IMO the power to introduce mandatory ship reporting systems. In contrast to that, UNCLOS' rules of reference, described in Section III.4 of Chapter 4, do not provide an additional legal basis but simply refer to decisions that have already been taken and make them binding for parties to UNCLOS. Moreover, as has already been noted, IMO is responsible for keeping under review and amending, if necessary, various IMO Conventions, such as MARPOL and the 1965 Convention on Facilitation of International Maritime Traffic.[72] In this respect, IMO's constitutional treaty contains several provisions (one for each committee) addressing the issue in that it allows the committees to perform functions conferred upon it by other treaties and to conform to possibly different procedural requirements.[73] The competent organ thereby resembles the organisational structures of multilateral environmental agreements, many of which provide for an institutional backbone with secretariats and scientific bodies and

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[69] Christoph Ilg, *Die Rechtssetzungstätigkeit der International Maritime Organization – Zur Bedeutung der IMO bei der Weiterentwicklung des Meeresumweltrechts* (Tübingen: Campus Druck 2001), p. 16.

[70] For an overview see the organisational chart at <http://www.imo.org/includes/blastDataOnly.asp/data_ id%3D7520/What_is_Poste%E8Final_Artwork.pdf>; (accessed on 30 September 2006).

[71] Adopted on 20 October 1972, in force as from 15 July 1977, 1050 *UNTS* 16. Hereafter COLREG.

[72] Adopted on 9 April 1965, in force as from 5 March 1967, 591 *UNTS* 265. Hereafter Facilitation Convention.

[73] Cf. Art. 31, 36, and 41.

give far-reaching powers of COPs and MOPs respectively.[74] These COP-like decisions by IMO do not take effect immediately but need to be "approved" by a sufficient majority of states under a "tacit acceptance" procedure.

III. Instruments Established and Governed by IMO

To get a better understanding of the legal context in which the PSSA concept is embedded, a brief account should be given of both IMO conventions and non-binding instruments.

1. Multilateral Treaties: Conclusion and Amendment

With respect to multilateral treaties initiated by and adopted within IMO, it acts, as has been indicated above, merely as a forum for diplomatic conferences. IMO has a long history in convening conferences, preparing drafts of treaty instruments and promoting their adoption, mainly in the field of maritime safety, prevention of marine pollution and liability.[75]

Early examples include the 1954 OILPOL Convention[76], while a more recent convention is the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments.[77] As IMO is neither party to the treaties nor an omnipotent legislator able to bind states against their will, it has only coordinating functions with respect to multilateral treaties. Usually, treaty drafts are elaborated in one of the committees. The Council then decides whether IMO should invite all UN member states to a diplomatic conference to discuss and adopt the instrument.[78] For them to enter into force, treaties adopted within IMO must be ratified not only by a qualified number of states, but these states also have to represent a combined registered tonnage of typically 50% in order to avoid peculiar rules for just a few flag states. IMO's Secretary-General usually acts as

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[74] See Robin R. Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", 94 *AJIL* (2000), pp. 623-659, at 636 et seqq.

[75] Rainer Lagoni, "Die Internationale Seeschiffahrts-Organisation (IMO) als Rechtssetzungsorgan", in P. Ehlers and W. Erbguth (eds.), *50 Jahre Vereinte Nationen: Tätigkeit und Wirken der Internationalen Seeschifffahrtsorganisation (IMO)* (Baden-Baden: Nomos-Verlagsgesellschaft 1997) pp. 45-56, at 46 et seqq.; Peter Seidel, "IMO – International Maritime Organization", in R. Wolfrum and Ch. Philipp (eds.), *supra*, note 47, Vol. 1, pp. 734-742, p. 736 et seq.; Christian Tomuschat, "Die Internationale Seeschifffahrts-Organisation (International Maritime Organization, IMO) als Hauptakteur", in Ch. Tomuschat (ed.), *Schutz der Weltmeere gegen Öltankerunfälle – Das rechtliche Instrumentarium* (Berlin: Duncker & Humblot 2005), pp. 21-30, at 24 et seqq.

[76] International Convention for the Prevention of Pollution of the Sea by Oil, adopted on 12 May 1954, in force as from 26 July 1958; 327 *UNTS* 3.

[77] Adopted on 13 February 2004, not yet in force. See <http://www.imo.org/Conventions/mainframe.asp?topic_id=867> (accessed on 30 September 2006).

[78] Christian Tomuschat, *supra*, note 75, p. 26.

depository and some instruments allow for IMO to govern the amendment procedure. To that extent, IMO is now responsible for more than 40 conventions and protocols, which are frequently referred to as IMO Conventions.[79]

IMO's role regarding amendments of some of the IMO Conventions is of a special character that needs to be looked at in some detail. Although multilateral conventions are normally amended by a new treaty concluded pursuant to the 1969 Vienna CLOT, these conventions allow for amendments by a "tacit acceptance" procedure.[80] The amendments are negotiated by an "expanded Committee" of IMO (the competent committee inclusive of the non-IMO parties that are parties to the respective Convention) which, similar to a COP, adopts them as resolutions.[81] An amendment to one of its annexes is adopted if a two-thirds majority of the parties present votes in favour of it. It enters into force on a preselected date provided that it is not formally rejected by one third of the parties to the convention or by parties representing more than 50% of the world's gross merchant tonnage.[82] The Extended Committee thereby acts on the basis of competences acquired by the respective treaty provisions on amendment procedures. The consent principle is not waived but used in a progressive manner: unless states issue a declaration to the contrary, they are bound by the amended treaty.

The notion "tacit acceptance" constitutes enormous progress in international law. It has proved to be crucial for the development of multilateral conventions, not only by IMO but by nearly all other international institutions.[83] In recent years, amendments to IMO Conventions agreed by tacit acceptance entered into force in just 18 or 24 months after adoption.[84] In contrast, for example, "none of the amendments to the 1960 SOLAS Convention adopted between 1966 and 1973 received sufficient acceptance to satisfy the requirements for entry into force".[85] The fact that as of today no amendment has been rejected by IMO member states[86] is vital proof that the procedure is now widely accepted, as it really accelerates

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[79] Cf. information available from <http://www.imo.org/Conventions/mainframe.asp?topic_id=247>; (accessed on 30 September 2006).

[80] See generally, *supra*, sec. II.1.a) of this chapter. Some IMO Conventions only allow for the annexes, or, such as SOLAS, only for some of the annexes to be governed by a tacit-acceptance procedure. These parts contain technical regulations that need to be kept under permanent review. See Heiko Bloch, "Standardisierung im internationalen Seerecht – Moderne Regelsetzungsverfahren der IMO für die Schiffssicherheit", 51 *Vereinte Nationen* (2003), pp. 11-14, at 12.

[81] It should be noted that these "resolutions" are not resolutions in the sense set out, *supra*, in Sec. II.1.a) of this chapter, but rather acts by the governing body of the respective convention. At least in a strict legal sense, it is not IMO (or one of its committees) that has been given the competence to adopt binding resolutions; see Rainer Lagoni, *supra*, note 75, p. 52.

[82] See, for instance, art. VII of the Facilitation Convention.

[83] For an overview see Krzysztof Skubiszewski, "International Legislation", *EPIL, Vol. II* (1995), pp. 1255-1262, at 1256 et seq.

[84] Christoph Ilg, *supra*, note 69, p. 52 et seq.

[85] IMO, "Conventions", available from <http://www.imo.org/Conventions/mainframe.asp?topic_id=148# amend> (accessed on 30 September 2006).

[86] Christian Tomuschat, *supra*, note 75, p. 27.

legislative processes rather than producing premature results, as some had feared. Although questions have sporadically been raised concerning the compatibility of the tacit acceptance procedure with the IMO Convention, it is unanimously praised as being an efficient vehicle for responding quickly to new challenges while at the same time preserving the sovereignty of states.[87] Still, administering the amendment procedure cannot be equated with a truly legislative competence.

2. Soft-Law Instruments Adopted by IMO

All decisions of IMO organs are issued in the form of resolutions. Their content can vary from simple decisions to complex and detailed guidelines and codes. In its work, IMO has adopted such a vast array of resolutions that it is virtually impossible to give a concise overview, let alone a concrete answer to the legal quality of each of the various instruments.[88] Still, some examples should be highlighted that have relevance for the subject of this treatise. The soft-law instruments IMO has developed can largely be grouped into two categories: codes and other resolutions.

Codes adopted by IMO include the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code, adopted in 1983[89]), the International Maritime Dangerous Goods Code (IMDG Code, adopted in 1965[90]) and the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code, adopted in 1983[91]). These codes are voluminous conventions that dwell upon important practical matters by providing a legal framework for achieving uniform standards for the conduct of ships' crews.[92] Because they are adopted as resolutions, they are of recommendatory nature. It is important to acknowledge that some of these codes – at least partly – have become binding through incorporation in the SOLAS Convention.[93] The most recently adopted is the International Ship and Port Facility Security Code (ISPS Code), which was developed in the wake of the terrorist attacks of

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87 Christoph Ilg, *supra*, note 69, *loc.cit.*; see further Julia Sommer, *supra*, note 33, p. 644 et seq. and Heiko Bloch, *supra*, note 80, p. 12 et seq.

88 As of September 2004, the Assembly and the committees had adopted several hundred resolutions. See IMO, *Index of IMO Resolutions, 2004 Edition* (London: IMO Publication 2004).

89 Adopted by IMO Res. A.212(VII). Text, as amended, reproduced in IMO, *IBC Code – 1998 Edition* (London: IMO Publication 1998).

90 Adopted by IMO Res. A.716(17). The current version of the code is reproduced in IMO, *IMDG Code – 2004 Edition* (London: IMO Publication 2004).

91 Adopted by IMO Res. MSC.5(48). A consolidated version can be found in IMO, *IGC Code – 1993 Edition* (London: IMO Publication 1993).

92 Note that codes are not a category of legal instrument confined to IMO; see Ingrid Delupis, *supra*, note 55, p. 48 et seq.

93 For instance, Regulations 8 to 10 of Chapter VII and Regulations 11 to 13 make mandatory ("shall comply with…") the rules contained in the IBC Code and the IGC Code respectively. Under Regulation 1.3 of Chapter VII, the carriage of dangerous goods is prohibited unless carried out in accordance with the IMDG Code.

11 September 2001 amid fears that ships and ports would become targets of similar attacks. The ISPS Code gives ample evidence of how far this particular cross-fertilisation of hard and soft law within IMO has developed. It was adopted as a soft-law, non-binding resolution by the MSC; at the same meeting, delegates accepted necessary amendments to SOLAS, by which the ISPS Code was made mandatory as from 1 July 2004.[94]

A peculiar consequence of the reference mechanism deployed in SOLAS and other IMO Conventions is that, on the one hand, individuals – master or owner of a vessel, who are not addressees of the binding convention – are only in breach of domestic law of the flag state; internationally, the vessel is a "sub-standard ship" which may be subjected to sanctions pursuant to port-state control. On the other hand, the flag state is under no obligation to conform to the standards set out in the codes, as it is not an addressee of the code, but merely needs to ensure conformity with the code by enacting respective domestic law norms.[95] It would not be far-fetched to contend that this consequence makes it easier for a number of states to agree to decisions that attach binding force to a code. However, as IMO's committees are allowed to amend codes by resolutions, these formally non-binding instruments have the potential to significantly shape international law rules governing the safety of vessels.

Resolutions which do not result in the adoption of a code represent the second category of soft-law instruments. Some of these instruments have been forerunners of multilateral conventions adopted after states had tried out rules contained in voluntary instruments.[96] Others are stand-alone rules that cover a variety of subjects, such as general provisions on ships' routeing (Res. A.572(14), as amended), performance standards for a bridge navigational watch alarm system (Res. MSC.128(75)), steering gear standards for passenger and cargo ships (Res. A.415(XI)), performance standards for radar reflectors (Res. MSC.164(78), the use of pilotage services in certain areas (e.g., Res. A.710(17) for the Torres Strait), and standards for procedures and arrangements for the discharge of noxious liquid substances (Res. MEPC.18(22), Res. MEPC.62(35)).Whatever is brought to the attention of IMO by either its member states or other international organisations is considered and decided upon, as appropriate.

Since the IMO Convention does not provide for binding resolutions either of the Assembly or the committees, their resolutions lack binding character. However, binding treaty law and customary international law do not lose their obligatory nature if included in non-binding instruments. To turn the argument on

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[94] The relevant resolutions are reproduced in IMO, *ISPS Code and SOLAS Amendments 2002* (London: IMO Publication 2003).

[95] Rainer Lagoni, *supra*, note 75, p. 52.

[96] For instance, Res. MEPC.46(30) recommending "Measures to control potential adverse impacts associated with the use of tributyl tin compounds in anti-fouling paints" was relied upon by the drafters of the 2001 Anti-Fouling Convention, and the "Guidelines for the Control and Management of Ships' Ballast Water to Minimize the Transfer of Harmful Aquatic Organisms and Pathogens", introduced by Res. A.50(31) have been the basis for the development of the 2004 International Ballast Water Management Convention.

its head, it means that whenever the content of resolutions can be linked to sources of international law pursuant to Article 38 of the Statute of the ICJ, the addressees are bound by it. Hence, as seen above[97], there may be good reasons to establish a binding effect for resolutions which qualify in terms of clarity and precision. With respect to IMO, three aspects can be identified. First, as set out in some detail in Chapter 4, soft-law IMO instruments have binding force for parties to UNCLOS if they represent "generally accepted international rules and standards" in the sense of, *inter alia*, Article 211(5) of UNCLOS. Secondly, IMO instruments may acquire a binding effect if relied upon *expressis verbis* by other treaties, as in the case of several IMO Codes. In addition, as I have argued elsewhere, the same is true of those instruments referred to in the footnotes of multilateral treaties, if the referenced regulation contains a precise and clear duty[98] and reference is made to specific documents.[99] Finally, some IMO conventions, such as COLREG, allow for the organisation to take certain binding decisions implementing their regulations. Although all IMO member states are allowed to vote, the decision is binding only for parties to the convention and not for non-parties that are IMO members.[100] It can be acknowledged that, despite the IMO Convention's proviso to the contrary, resolutions issued by IMO's organs are thus binding upon states in several circumstances.

3. Some Remarks on the Impact of IMO Instruments on Marine Environment Protection

As has become apparent, IMO is active in all sorts of marine environment matters: 42 treaties, of which 35 are in force, and numerous soft-law instruments are a vital sign of these efforts.[101] Although this chapter was devoted to international organisations, with special emphasis on IMO, and the implications of the legal

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[97] See, *supra*, sec. II.1.b) of this chapter.

[98] Frederic L. Kirgis, "Shipping", in O. Schachter and Ch.C. Joyner (eds.), *supra*, note 40, pp. 715-751, at 729 et seq.

[99] The critical issue is clarity. As long as the parties know to what rules and standards they agree, this drafting technique does not contradict public international law. It is not sufficient, for instance, to refer to "various resolutions and recommendations of the International Hydrographic Organisation" as is the case in Regulation V/9(3) of SOLAS. See Markus J. Kachel, "Competencies of International Maritime Organisations to establish Rules and Standards", in P. Ehlers and R. Lagoni (eds.), *International Maritime Organisations and their Contribution towards a Sustainable Marine Development* (Münster: LIT 2006), pp. 21-51, at 36. This view is shared by Malgosia A. Fitzmaurice, "Modifications to the Principle of Consent in Relation to Certain Treaty Obligations", 2 *ARIEL* (1997), pp. 275-317, at 276, and, in more general terms, by Hermann E. Ott, *Umweltregime im Völkerrecht* (Baden-Baden: Nomos-Verlagsgesellschaft 1998), p. 273 et seqq.

[100] Frederic L. Kirgis, *supra*, note 40, p. 138.

[101] Relevant IMO measures are outlined in IMO, "IMO – Towards Sustainable Development at Johannesburg 2002", *IMO News* (2002), No.2, pp. 10-13, at 11 et seqq. Up-to-date information on the status of IMO Conventions is available from <http://www.imo.org/Conventions/mainframe.asp?topic_id=247>; (accessed on 30 September 2006).

acts they initiate or adopt, it should not be forgotten that what really matters in the end is whether the results are what they were hoped to be. Hence, regardless of the form of the instruments and their legal status, it should be asked if they contributed positively to the protection of global oceans. Space does not permit an in-depth evaluation of this issue, but it is nevertheless useful to stress some aspects.

The number and scope of the instruments is undeniably impressive. And some statistics, such as the declining number of ship accidents and oil spills[102], are indeed indicative of substantial progress that has been achieved over the last four decades: stricter global requirements have contributed enormously to safer ships, even though a direct causal link is hard to establish.[103] More recent instruments, such as the Anti-Fouling Convention, still have to produce verifiable results. The density and – at least for some conventions – almost universal acceptance of IMO's regulations is, however, in stark contrast to the number of vessels actually complying with them. A significant number of vessels are still considered to be sub-standard ships. IMO is aware of these shortcomings, but faces difficulties that are inherent in the present law of the sea system.[104] The enforcement of CDEM standards lies almost solely with the flag state, whereas interested third states can only act on their behalf if vessels call at their ports voluntarily. Generally, it has been observed that states in non-compliance with international standards are not necessarily reluctant to comply; they are often not able to achieve full compliance due to a lack of financial capacity or technical expertise.[105] This is arguably the case in shipping matters, too. And although growing environmental awareness has made flag states more conscious of the importance of compliance control, the problem of sub-standard shipping is a persistent one. IMO has addressed these matters in its work with several initiatives to strengthen technical expertise, especially in developing countries,[106] and close cooperation in regional port-state

[102] See statistics compiled in ITOPF, *Oil Tanker Spill Statistics* (2005), available from <http://www.itopf.com/stats05.pdf>; (accessed on 30 September 2006).

[103] Christoph Hinz, "50 Jahre Vereinte Nationen – Tätigkeit und Wirken der Internationalen Seeschifffahrtsorganisation (IMO)", in P. Ehlers and W. Erbguth (eds.), *supra*, note 75, pp. 15-21, at 17.

[104] Another problem, the slow process of ratification, is raised by Joseph J. Angelo, "The International Maritime Organization and Protection of the Marine Environment", in M.H. Nordquist and J.N. Moore (eds.), *Current Maritime Issues and the International Maritime Organization* (The Hague Boston London: Martinus Nijhoff Publishers 1999), pp. 105-111, at 108 et seqq.

[105] Malgosia A. Fitzmaurice and Catherine Redgwell, "Environmental Non-Compliance Procedures and International Law", XXXI *NYIL* (2000), pp. 35-65, at 40.

[106] Aref Fakhry, "Capacity-Building in International Marine Environmental Law: Perspectives of Developing Countries" in A. Kirchner (ed.), *supra*, note 20, pp. 93-99, at 95 et seq., and Annick de Marffy, *supra*, note 26, p. 189. However, IMO does not have a regular budget allocation to finance its technical cooperation activities; see David Edwards, "Technical Assistance: A Tool for Uniform Implementation of Global Standards", in M.H. Nordquist and J.N. Moore (eds.), *supra*, note 104, pp. 391-416, at 406 et seqq.

control regimes is increasingly cracking down on non-compliance[107], but sustained success still remains an exception.

To add to that, other problems pertaining to the marine environment and its biodiversity still remain. The state of the marine environment is generally deteriorating, with vessel-source pollution being just one part of the problem.[108] The desolate overall picture is largely a result of continuing land-based pollution, which IMO has no powers to deal with. Yet it is clear that even within IMO a lot of work is still to be done. Whether the PSSA regime is a mechanism that could possibly contribute to strengthening measures aimed at curbing vessel-source environmental damage by expanding coastal states' competences to legislate and enforce respective rules will be examined in the following chapters.

Chapter 7: Development and Structure of the PSSA Concept: Implementation and Coordination of Protective Measures

The previous chapters have illustrated the deteriorating state of the marine environment and how far states are allowed, under international law, to respond by deploying regimes that subject specific marine areas to enhanced protection. While the PSSA concept was still being drafted, Friends of the Earth International, who were strongly involved in and dedicated to the process, noted that the PSSA regime should "be developed as a means of harmonizing existing international conventions and other legal instruments relating to the protection of marine areas with protective measures provided by IMO Conventions."[109] Even though it is not a premature observation to note that these demands have been met, it is the aim of this treatise not just to sum up the concept roughly but also to reveal its subtle strengths and weaknesses. Thus, in the following sections, I shall shed light on the main components of the PSSA concept as it was developed by IMO within the last two decades. It will become clear that this remarkably open concept stands out for a number of reasons, even though it is restricted in that it only addresses vessel-source environmental threats.

A PSSA is defined as "an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by

[107] Regional MOUs also develop inter-institutional ties on administrative and technical levels, cf. Tokio MOU, *Annual Report on Port State Control in the Asia-Pacific Region* (2005), available from <http://www.tokyo-mou.org/ANN05.pdf>; (accessed on 30 September 2006), p. 8 et seq.

[108] See, *supra*, Chapters 1 and 2, further SRU (ed.), *Marine Environment Protection for the North and Baltic Seas – Special Report* (Baden-Baden: Nomos-Verlagsgesellschaft 2004), p. 33 et seq.

[109] MEPC 23/16/1, as cited by Gerard Peet, "Particularly Sensitive Sea Areas – A Documentary History", 9 *IJMCL* (1994), pp. 469-507, at 476.