



# *International Foundation for the Law of the Sea*

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## **Current Challenges for the International Maritime Organisation**

“Maritime Talks 2013”, 9<sup>th</sup> of March, 2013

Conference Proceedings

by *Jens Theilen*

On the 9<sup>th</sup> of March, 2013, the International Foundation for the Law of the Sea (IFLOS), in cooperation with Bucerius Law School (BLS) and the Federal Maritime and Hydrographic Agency (*Bundesamt für Seeschifffahrt und Hydrographie*, BSH), held its yearly Maritime Talks at the International Tribunal for the Law of the Sea (ITLOS) in Hamburg. This year's Maritime Talks, the ninth such conference organised by the IFLOS, were devoted to discussing current challenges for the International Maritime Organisation (IMO). The conference was supported by the Edmund Siemers-Stiftung and the German Shipowners' Association (*Verband Deutscher Reeder*).

### **I. Welcome and Opening Address**

H.E. Judge *Shunji Yanai*, President of the ITLOS, welcomed the participants and emphasised the by now “customary status” of the Maritime Talks. He introduced the topic by way of a historical overview: Beginning with Pompey's famous remark that “*navigare necesse est, vivere non est necesse*” (navigation is necessary, living is not) and touching on its prevalence in the Hanseatic League, he concluded that the dichotomy between navigation and survival is no longer valid today. Nonetheless, navigation remains a dangerous business and safety precautions are needed. The IMO is at the centre of efforts to implement these safety measures and the diversity of areas it works in, the President remarked, is reflected in the topics of the conference's speeches.

Following the President's introductory remarks, Prof. Dr. *Doris König*, Chair of the IFLOS and professor for public international law as well as dean at BLS, gave a warm welcome to the conference's participants on behalf of the IFLOS and the co-organisers. She gave some background information on the work of the foundation, which was founded in 2003 to increase public awareness of the ITLOS and to further dialogue between its judges, academics, and those working in the field of the law of the sea. Prof. König laid special emphasis on the Foundation's Summer Academy, which will take place for the seventh time this year and will include an open lecture on deep seabed mining on the 2<sup>nd</sup> of August, 2013.

Dr. *Rosalie Balkin*, Assistant Secretary-General of the IMO and Director of its Legal Affairs and External Relations Divisions, then gave the opening address, treating the participants to a *tour de force* overview over various challenges currently facing the IMO. She began with the need to regulate the carbon footprint of shipping: Although the contribution of shipping to the global carbon footprint is comparatively low, it is expected to grow with increasing world trade unless properly regulated. The IMO has contributed to tackling this issue for example by adopting the new chapter 4 to the MARPOL Annex VI Regulations for the prevention of air pollution from ships, which entered into force on the 1<sup>st</sup> of January this year – the “first ever mandatory global greenhouse gas reduction regime for an international industry sector”.<sup>1</sup> This is in line with this year's World Maritime Day theme: “Sustainable Development: IMO's contribution beyond Rio+20”.

Dr. Balkin then elaborated on the IMO's work to regulate navigation in the polar regions. With these areas becoming more accessible to humans due to ice loss, there are new opportunities for trade, shipping, and tourism – but also unique difficulties such as the severe weather conditions and the relative lack of good charts. The IMO is currently developing a Draft International Code of Safety for Ships Operating in the Polar Regions. As opposed to the guidelines already issued in 2009, this Code is to be a mandatory legal instrument. A particular difficulty, Dr. Balkin remarked, stems from the fact that it will probably not be adopted as a new treaty, but rather incorporated into various existing IMO conventions.

As regards piracy, the IMO seeks primarily to foster regional agreements that take counter-piracy measures, a successful example of which is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) dealing primarily with piracy in the Malacca Straits. More recently, the Gulf of Aden and the Gulf of Guinea have been in the IMO's focus. Although recent figures suggest that this work is beginning to pay off, Dr. Balkin stressed that there is no room for complacency and that piracy's changing face makes it a topic that remains relevant.

Finally, Dr. Balkin gave some insight into the work of the IMO Legal Committee which will be celebrating its 100<sup>th</sup> session in April 2013. Whilst created in 1967 as an *ad hoc* body, its work has by now led to the adoption of an entire, comprehensive network of liability and compensation treaties. Another challenge to the IMO is to ensure the entry into force of all these treaties. To this end, the Legal Committee continues to provide guidance of a legal and practical nature to States in order to ensure ratification.

## **II. The Changing Face of the IMO**

Dr. *Henning Jessen*, Associate Professor at the University of Hamburg's Maritime Law Institute, then took the floor to discuss whether changes from a technical to a more political Organisation have made the IMO “change its face”. His answer to this question was a resounding “yes”. The main issues then became how and why this change takes place.

Dr. Jessen began by taking the participants back in time to the year 1948, when the IMO was founded under the name of IMCO (Intergovernmental Maritime Consultative Organisation). As Dr.

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1 <<http://www.imo.org/MediaCentre/pressbriefings/pages/42-mepc-ghg.aspx>>.

Jessen explained, the original name implies a different, less political agenda, in line with Art. 2 of the IMCO Convention 1948 which spoke of “consultative and advisory” functions.

A further restriction on the IMCO's work was that it was perceived in the 1960s as a “rich men's club” for ship owners. Dr. Jessen argued that this was in part due to its institutional structure: For example, the eight largest shipping nations in the world were continuously represented in the Maritime Safety Committee. Since the Committee had only 14 members, this led to a *de facto* power of veto – a fact that was not changed until 1978 when the Committee was reformed to also include a large number of other States (“Category C”) and give all member States a right to participate. Following these and other changes, a better balance of power was achieved, leading to what Dr. Jessen called a process of democratisation. He maintained that it was this process that now allows the IMO (as the IMCO was renamed in 1982) to take on a more political role besides its traditional role as a technical advisor. He also stressed the importance of drastic outside events such as the *Torrey Canyon* incident or the terrorist attacks of 9/11 for the IMO's political work. Based on this approach, he developed an “events”-based approach of categorisation for the IMO's development to stand alongside *Agustín Blanco-Bazán's* “law of the sea”-based approach.

Lastly, Dr. Jessen turned to the relationship between the IMO and the United Nations Convention on the Law of the Sea (UNCLOS), explaining that there are more than 25 references in the UNCLOS to “the competent international organisations” or “the competent international organisation” and remarking that in each case, the IMO needs to decide whether it is included in this reference and whether it has exclusive or shared competency. Such references highlight the ever-changing, political face of the IMO. Dr. Jessen submitted that the determination of their exact meanings will be one of the IMO's future challenges, but also referred to a helpful document in which the IMO has developed an extensive position on the matter.<sup>2</sup>

### **III. Greenhouse Gas Emissions and the IMO**

The political nature of the IMO was further revealed during the next presentation, in which *Andreas Chrysostomou*, Chairman of the IMO's Marine Environment Protection Committee and Head of the Maritime Policy, Multilateral Affairs, Standards and Informatics Division of the Department of Merchant Shipping Cyprus, discussed the regulation of greenhouse gas emissions. Focussing on CO<sub>2</sub>, he returned to Dr. Balkin's earlier point that shipping causes only 2.7% of global emissions,<sup>3</sup> constating that shipping currently constitutes the most efficient mode of transport. However, Mr. Chrysostomou stressed that if no progressive regulations were put in place, the other modes of transport would soon become more efficient by comparison, so that the need to take action nonetheless exists. An update of the prior study, which included data up until 2007, is currently in progress (using the same methodology to ensure comparability) in order to capture the effect of the global financial crisis on CO<sub>2</sub> emissions.

The IMO, since 2003, pursues a double-pronged approach: technical and operational measures on the one hand, and market based measures (such as an emissions trading system or a “carbon tax”) on the other. Mr. Chrysostomou stressed that through the work of the IMO, shipping is currently the only industry in the world which has mandatory technical regulations on the international level (in

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2 <<http://www.imo.org/OurWork/Environment/PollutionPrevention/PSSAs/Documents/leg2008.pdf>>.

3 <[http://www.imo.org/blast/blastDataHelper.asp?data\\_id=27795&filename=GHGStudyFINAL.pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=27795&filename=GHGStudyFINAL.pdf)>.

the form of the Energy Efficiency Design Index and the Energy Efficiency Management Plan adopted into MARPOL, see above). To raise awareness of emissions, the implementation of a third approach, the so-called MRV (Monitoring, Reporting, Verification) is being planned.

In order to demonstrate the political nature of these measures which might, at first glance, appear to be merely technical, Mr. Chrysostomou referred to the IMO's 2003 Resolution A.963(23), a response to the fact that the Kyoto Protocol mandated the IMO with limiting the reduction of greenhouse gas emissions from ships. He painted a vivid picture of the heated discussion preceding this resolution, pointing out that while it was finally passed unanimously, this only became possible after many contentious proposals were dropped and the resolution had shrunk to half its original size. At this point, at the very latest, it became clear that greenhouse gas emissions are a highly political matter.

One recurrent subject of dispute is the concept of Common But Differentiated Responsibilities. Mr. Chrysostomou submitted that applying CO<sub>2</sub> emission schemes only to those ships flying the flag of a developed country (Annex I of the Kyoto Protocol) would mean applying them to only three meaningful fleets (those of Cyprus, Malta and Greece); and even those fleets would soon reflag. Such a regulation, Mr. Chrysostomou maintained, would therefore be highly ineffective. It would also be in violation of the IMO's principle of non-differential treatment. After a "long and painful discussion" for three years within the IMO, however, the adoption of rules pertaining to technical and operational measures in 2011 turned out to be easier than expected, with the developing countries acting as a catalyser due to their preference for a global framework.

In conclusion, Mr. Chrysostomou established that while the IMO has been presenting itself as a technical organisation free of politics, there are a number of political considerations at play in its work. It has, he maintained, "quietly changed" to adapt to new challenges, but it should not hide its new, political face behind a merely technical front. Finally, he mentioned that a future challenge for the IMO will be to find appropriate partners for cooperation: Since it is currently the only international organisation working within a mandatory regime of CO<sub>2</sub> regulation, it is difficult to find partners within a similar framework.

#### **IV. Ship Recycling and the IMO**

Dr. *Nikos Mikelis*, Head of the IMO's Marine Pollution Prevention and Ship Recycling Section until 2012 and now Non-Executive Director of GMS Inc. and Mikelis Consulting, then turned to a topic which he introduced as "much simpler" than CO<sub>2</sub> emissions: the recycling of ships. Despite the many benefits of recycling, the working standards and environmental considerations of recycling yards leave much to be desired. Dr. Mikelis described the first attempt for international common standards that was made following political pressure on these points: use of the Basel Convention, which is already in force for 179 States. However, since it deals primarily with the protection against hazardous wastes and not with ship recycling, the structure of the Basel convention cannot always be adapted in a useful way (e.g. when the "State of Export" is understood as referring the State in which a transboundary movement of a ship begins, rather than the flag State).

The IMO was therefore invited to develop a new, mandatory regime specifically for ship recycling. Following resolution A.981(24), a working group was convened in 2006 which led to the adoption in 2009 of the so-called Hong Kong Convention (International Convention for the Safe and

Environmentally Sound Recycling of Ships) which is intended to apply both to ships flying the flag of a State party and to recycling yards located in a State party.

The Hong Kong Convention has been opposed by some, in particular the NGO Shipbreaking Platform, who instead favour the continued use of the Basel Convention. Dr. Mikelis took the stance that their criticism is unfounded. To demonstrate this, he first offered some background information on ship recycling: 97% of the world's recycling yards are located in just five States (China, India, Bangladesh, Pakistan and Turkey), the main reason for this being that scrap steel is domestically utilised there whereas the EU, for example, is a major exporter of steel. Depending on the location, different methods are used: tidal beaching (66%), non-tidal beaching (4%), alongside or floating (28%) or drydock (the preferred method of many NGOs, but in use only in very few cases).

Given these figures, Dr. Mikelis submitted that the most important precondition for a workable and effective system is the accession by those States in which the most ship yards are located: accession of all five main States would mean universal application. Due to the heavy use of tidal beaching, a complete ban would have been impossible to accomplish, which is why the Hong Kong Convention focusses instead on risk reduction. Similarly practical considerations explain why ships are not required to arrive in developing countries pre-cleaned of hazardous materials (as required under the Basel Convention): Since pre-cleaned ships are practically unseaworthy, it would have been impossible to implement such a pre-cleaning before the ships take their final voyage to the scrap yard. Only by taking such a realistic stance, Dr. Mikelis maintained, will it be possible to achieve global standards for ship recycling. The IMO is working to assist the main recycling States on their way to ratification so that the treaty may enter into force (Art. 17).

Dr. Mikelis ended by noting that a proposal for regulation of ship recycling is currently in the process of being developed within the EU. It is based on the Hong Kong Convention, which will be able to replace it once in force. However, some MEPs are supporting a ban on beaching for EU flagged ships which would, according to Dr. Mikelis, counteract the Hong Kong Convention's efforts.

## **V. The Polar Regions and the IMO**

In a presentation befitting the wintery weather in Hamburg, Judge *Vladimir Golitsyn* at the ITLOS then turned the participants' attention to the polar regions. He began by emphasising that while both polar regions share some common attributes such as the harsh weather conditions and vulnerable ecosystems, there are also substantial differences: The Antarctic is a continent surrounded by oceans while the Arctic is an ocean surrounded by continents, and different legal and political regimes are applicable. Judge Golitsyn focussed mainly on the Arctic region.

Due to the Arctic becoming more accessible as more ice melts, new opportunities for the energy industry are coming within reach and numerous new trade routes are opening up. As a result, new logistic systems and with them new regulations and standards are needed. The UNCLOS refers this task to “competent international organisations”, meaning primarily the IMO (with an important limit being the right of coastal States to legislate for the ice-covered areas in their exclusive economic zone in accordance with Art. 234 UNCLOS).

Turning to the IMO's activities, Judge Golitsyn first gave an overview of the relevant provisions contained in Chapter 5 of the International Convention for the Safety of Life at Sea (SOLAS) and in the International Convention for the Prevention of Pollution from Ships (MARPOL). The Antarctic has been designated as a "special area" requiring a higher level of protection within the meanings of Annexes 1, 5 and 7 of MARPOL, which the Arctic area has not. The IMO's Maritime Safety Committee also introduced a new, mandatory ship reporting system for the Barents Sea in 2012, which will enter into force on the 1<sup>st</sup> of June this year.

Regulations more specifically tailored to ice-covered waters and aimed at mitigating the risks of operating in these areas are contained in the IMO's Guidelines for Ships Operating in Polar Waters, first adopted in 2002 for the Arctic area and revised in 2009 to include the Antarctic. One point that was criticised by Judge Golitsyn are the arbitrarily drawn boundaries of application for these guidelines which, in his view, in no way reflect the natural realities. Following a recommendation by the Arctic Council that mandatory international standards be established, the IMO began work on a new code, now rescheduled to be completed in 2014. This new code is to cover both polar areas, a fact which has been criticised by some IMO member States who maintain that a special code should be developed for the Arctic waters. A further development in the Arctic area discussed by Judge Golitsyn is the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, concluded in 2008 by eight Arctic States on the initiative of the Arctic Council – the first legally binding instrument negotiated under its auspices.

Finally, Judge Golitsyn discussed the implications of territorial claims by coastal States on various routes such as the North-West passage, the North-East passage, and the Northern Sea Route. He noted that while some Russian scholars argue that the straight baselines drawn in some straits during the time of the former Soviet Union preclude the application of the international regime of straits since they were never used for international navigation, this does not mean that the Russian Federation is not interested in navigation taking place in these straits, so long as it is in accordance with its regulations.

## **VI. The Fight against Piracy and the IMO**

Captain *Hartmut Hesse*, former Special Representative of the Secretary-General for Maritime Security and Anti-Piracy Programmes and now Senior Advisor to the SASG on Counter-Piracy (IMO), went on to discuss the IMO's contribution to the fight against piracy. He began by detailing a wide range of relevant provisions, both inside and outside the IMO, before focussing in particular on the Maritime Safety Committee's discussion concerning arms on board ships. In this regard, he maintained that the IMO's position has not changed over the years: It still discourages the use of private armed personnel due to the potential for escalation. However, recognising the reality that many ship owners do make use of armed guards in recent years, it has also provided guidance on training and certification.

Captain Hesse emphasised that while the IMO is able to orchestrate efforts to combat piracy and take a leading role within those efforts, it cannot do so alone and is dependent on cooperation with other international organisations and with States. He also stressed that while piracy as such is a global issue, global responses to which have been articulated, it is also necessary to develop particular strategies for certain regions based on their specific situations and problems. The IMO

therefore develops guidance at a global level (e.g. the Best Management Practices<sup>4</sup>) as well as supporting regional agreements such as ReCAAP or the Djibouti Code of Conduct (DCoC). The importance of this last fact is highlighted by recent figures: While global piracy experienced an overall decrease of 40% in 2012, the situation in some areas is less encouraging (in particular, there has been a sharp increase of ship hijackings in the Gulf of Guinea). One region in which counter-piracy measures have had considerable success is the Gulf of Aden; yet the prima facie success of such measures may also have negative consequences such as the increasing use of mother-ship operations and the geographical expansion of piracy activities.

Discussing various IMO-developed measures, Captain Hesse focussed particularly on their multi-disciplinary, inter-agency approach, on the need for cooperation and the sharing of information, and on the importance of capacity building through training or technical assistance to ensure future implementation. In line with these principles, he mentioned several IMO projects which are currently in progress or planned for the future, such as the construction of a regional training centre in Djibouti, the development of a sustainable maritime sector in Somalia, and further cooperation with other UN Agencies and various navies. The IMO is furthermore in the process of adopting a Code of Conduct for the Gulf of Guinea (GoGCoC), the draft of which is due to be published anytime soon.

## **VII. The ITLOS and the IMO**

Last but not least, H.E. Judge *Shunji Yanai*, President of the ITLOS, gave a presentation on the relationship between the Tribunal and the IMO. He began by giving a detailed overview of the dispute settlement procedures provided for by the UNCLOS as well as the 20 cases decided by the ITLOS until now, noting that there have been nine prompt release cases (so far, all related to fishing and not marine pollution), seven provisional measures, five cases on the merits and one advisory opinion (by the Seabed Chamber).

President Yanai remarked that these figures reflect a common misunderstanding that the ITLOS was established only to deal with urgent cases. Referring to its first maritime boundary delimitation case, he argued that this understanding is slowly being rectified, and mused that in the future, the ITLOS will assumedly be called upon a good deal more to give advisory opinions and to adjudicate in cases concerning the seabed or the marine environment.

Regarding the relationship between the ITLOS and the IMO, President Yanai noted their different functions as a judicial body and a UN Specialised Agency, respectively. However, he also emphasised their complementarity, identifying five main areas in which cooperation is possible: firstly, the IMO encouraging States to make use of the ITLOS for dispute settlement, for example by including a reference to the ITLOS in the conventions it develops; secondly, the ITLOS settling disputes by interpreting the IMO Convention itself; thirdly, the IMO giving assistance and advice to the ITLOS on technical matters; fourthly, cooperation in terms of training and capacity building (as is already in place e.g. with Fellows of the Tribunal's Nippon Training Programme visiting the IMO); and finally, the exchange of information on new developments in the law of the sea, expanding on the Administrative Arrangement already in place between the Tribunal's Registry and the IMO's Secretariat.

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4 Currently BMP 4 – MSC.1/Circ.1339.

### **VIII. Is the IMO Ready to Face these Challenges?**

To round off the day, a panel discussion was held by all the speakers, led by Prof. König.

The first question was posed by Friedrich Catoir, former member of the German Diplomatic Service, and related to the concept of burden-sharing in order to finance the efforts of combatting piracy. In particular, Mr. Catoir enquired after the possibility of introducing a tax on tonnage. Captain Hesse responded that while burden-sharing is, to some extent, already taking place within the regional cooperation against piracy, a direct levy would, in his opinion, stand no chance of success due to the opposition by the shipping industry. Mr. Chrysostomou added that the administrative burden of collecting the money would be too great.

Prof. Dr. Dr. h.c. Peter Ehlers then commented on the distinction between technical and political matters, which he found to be misleading since a political component is always included. Regarding the IMO, however, he maintained that this political component is balanced out by its great technical expertise, this balance being one of the IMO's great strengths. In light of this fact, he asked the panel whether the IMO's competence should be expanded to non-shipping activities such as offshore energy production, or whether the IMO might even merge with other international organisations to create one very powerful maritime organisation. There was a broad consensus on the panel that such a "super-organisation" does not seem very probable, inter-agency cooperation being, for the moment, the preferred method. Dr. Balkin noted, though, that an expansion of the IMO's competence is already taking place. She referred to it as "creeping jurisdiction", pointing out, for example, that the Ship Recycling Convention concerns matters taking place ashore but was never challenged as being outside the IMO's mandate.

However, Dr. Balkin also emphasised the limits of the IMO's political role. Responding to a question on the IMO's stance on the UN Security Council's financial sanctions, she remarked that the IMO had a policy of "minding its own business". Such political disputes, she said, are left to the Security Council while the IMO limits itself to technical matters. Similarly, while the case of the ARA Libertad was initially brought up within the IMO, it was promptly referred to the ITLOS which was seen as the competent institution.

The final question was posed by Prof. König who enquired after the IMO's budget and staff, asking whether they are seen as adequate in light of the IMO's expanding competences. Dr. Balkin responded that while the budget is tight, the IMO has always succeeded in making ends meet. A key component in this regard, she elaborated, is cooperation with participating States, e.g. specifically trained lawyers being sent along for the elaboration of conventions. Prof. König then thanked the speakers and the participants for their valuable contributions before closing the discussion.

All in all, both the presentations and the ensuing discussion highlighted the wide range of issues being dealt with by the IMO. They may be best summarised by the IMO's slogan which was included in several presentations: "Safe, secure and effective shipping on clean oceans".