Issue Cluster

Prevention of Shipping Accidents

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Maritime accidents often do catastrophic harm to the marine environment that takes a very long time to be remedied. Examples from recent years include the sinking of the *Erika* oil tanker off the coast of Brittany in 1999 and that of the *Prestige* off the Galician coast in 2002. Growth of the fleet, the entry into service of very large carriers for the transport of both passengers and freight and the exponential growth in shipping operations will significantly add to pressures on maritime safety.[1]

Conserving the marine environment demands the highest possible standards of maritime safety. This partly relate to requirements as to how vessels are built, as with the use of double-hull tankers for carrying oil, and partly to ensuring safe navigation. A key element in international maritime safety is the monitoring of compliance with prevailing requirements. The International Maritime Organisation (IMO) has broken new ground in this regard with the IMO Member State Audit Scheme. Since the sinking of the *Erika*, the EU has adopted a broad package of measures to improve accident prevention.

IMO Member State Audit Scheme

The (so far) voluntary IMO Member State Audit Scheme[2] serves the objective of implementing existing IMO instruments to promote maritime safety and security and protection of the marine environment. It aims to provide audited states with a comprehensive assessment of how effectively they implement the mandatory IMO instruments covered by the scheme. These include obligations under three core international conventions – SOLAS[3], MARPOL[4] and COLREG[5] – to be complied with by

[1] "Increasing the number of open and navigable waters will inevitably attract traffic through the so-called Northern Sea Route with its special requirements. An expansion of the Suez Canal would mean larger vessels and more traffic across the Mediterranean with bigger risks." Commission Communication of 21.1.2009, Strategic goals and recommendations for the EU's maritime transport policy until 2018, COM(2009) 8 final, p. 7.

[2] See IMO, Voluntary IMO Member State Audit Scheme, Resolution A.946(23), 27.11.2003, URL: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D27122/A946%2823%29.pdf (accessed 17.08.2010) and IMO, Framework and Procedures for the Voluntary IMO Member State Audit Scheme, Resolution A.974(24), 01.12.2005, URL: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D27240/A974%2824%29.pdf (accessed 18.08.2010).

[3] International Convention for the Safety of Life at Sea.

[4] International Convention for the Prevention of Pollution from Ships.

[5] Convention on the International Regulations for Preventing Collisions at Sea.

each IMO member state in its capacity as flag state, coastal state or port state.[6] Auditing is carried out by an IMO audit team selected on the basis of nominations from member states and comprising a mix of nationalities.[7]

IMO expects that the audit scheme will bring about many benefits for its own work and for audited member states. For example, the audit scheme can reveal where the provision of assistance by IMO to member states would have the greatest effect. Member states themselves receive feedback to assist them in improving their capacity to put the IMO instruments into practice. Generic lessons learned from audits can be provided to all member states to promote the implementation of IMO instruments in general.[8] The scheme can also enhance the attractiveness of reputable flags and heighten flag state responsibility world-wide.[9]

So far, IMO has only carried out audits under the scheme after receiving and agreeing to requests from member states. The aim is to establish a binding scheme by 2015.[10] Until such a binding scheme is in force, EU member states are required to have their administration audited by IMO once every seven years and to publish the audit outcome subject to compliance with national legislation on confidentiality.[11]

The EU ERIKA III package

With the adoption and subsequent implementation of the Third Maritime Safety Package (ERIKA III)[12], the EU has one of the world's most comprehensive and advanced regulatory frameworks for shipping.[13] The European Commission's ERIKA III package featured five proposed

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[6] IMO, Code for the Implementation of Mandatory IMO Instruments, Resolution A.973(24), 01.12.2005, paragraph 6 and paragraphs 15 ff (flag states), 45 ff (coastal states) and 50 ff (port states), URL: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D27239/A973%2824%29.pdf (accessed 17.08.2010). There are moves to extend the scope of the audit scheme; see IMO, Future Development of the Voluntary IMO Member State Audit Scheme, Resolution A.975(24), 01.12.2005, URL: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D27241/A975%2824%29.pdf (accessed 18.08.2010).

[7] See IMO, Framework and Procedures for the Voluntary IMO Member State Audit Scheme, Resolution A.974(24), 01.12.2005, URL: http://www.imo.org/includes/blastDataOnly.asp/data_id%3D27240/A974%2824%29.pdf (accessed 18.08.2010), Appendix II, Part II, Procedures for the IMO Member State Audit, item 4.

[8] See http://www.imo.org/safety/mainframe.asp?topic_id=841 (accessed 17.08.2010).

[9] *Jenisch*, Prävention zur Vermeidung von Unfällen und von Umweltverschmutzung auf See, in: NuR 2007, S. 392 (393).

[10] See IMO Council, 102nd Session, 29 June – 03 July 2009, Summary of Decisions, URL: http://www.imo.org/includes/blastData.asp/doc_id=10622/1.pdf (accessed 18.08.2010).

[11] Article 7 of Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag state requirements.

[12] For an overview of the ERIKA I and ERIKA II packages, see Koch/Ziehm, Schiffssicherheit und Meeresumweltschutz, in ZUR 2005, p. 16.

[13] Commission Communication of 21.1.2009, Strategic goals and recommendations for the EU's maritime transport policy until 2018, COM(2009) 8 final, p. 7.

directives relating to maritime safety, of which the following were adopted with amendments in the context in question:

- The Compliance with Flag State Requirements Directive[14], the initial proposal of which was highly controversial and questionable under international law[15] and which in the form ultimately adopted mainly relates to audit and certification requirements for national administrations;
- The Accident Investigation Directive[16], aiming to harmonise procedures and methodologies in investigating maritime accidents in the EU[17]
- Directive 2009/17/EC[18], amending the VTMIS Directive[19] adopted in ERIKA II to add further safety requirements, harmonising places of refuge and extending the SafeSeaNet information system;
- The Port State Control Directive[20];
- Directive 2009/15/EC[21] amending the Classification Societies Directive.

One of the central elements of ERIKA III is the Port State Control Directive. This has been recast, supplementing port states' powers of inspection and detention and extending such powers to all waters under their jurisdiction (Article 3). This may raise concerns with reference to the right of innocent passage under UNCLOS Article 17 et seq.[22] Article 19 of the Port State Control Directive gives port states the power to detain ships with deficiencies clearly hazardous to safety, health or the environment. Under Article 21 (1) of the Port State Control Directive, the port state may allow the ship concerned to proceed to the next repair yard subject if

[14] Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements.
[15] See Jenisch, Prävention zur Vermeidung von Unfällen und von Umweltverschmutzung auf See, in NuR 2007, p. 392 (393).
[16] Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council.
[17] Several IMO and ILO conventions stipulate accident investigations in international law but leave the choice of methodology to convention parties.
[18] Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system.
[19] Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC.
[20] Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control.
[21] Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (recast).
[22] For a discussion – based on the wording of the proposal for the Port State Control Directive, which differs from that of the directive as adopted – see Jenisch, Prävention zur Vermeidung von Unfällen und von Umweltverschmutzung auf See, in NuR 2007, p. 392 (394).

appropriate to certain conditions. As these provisions give port states greater leeway and powers of discretion than UNCLOS Article 219, they raise the question of compatibility with international law. If a ship is found to have serious deficiencies on several occasions, it is refused access – in some cases permanently – to all EU ports. The EU has also introduced a black list in which information is published both on substandard vessels and on companies that operate them. This is intended to act as a deterrent.

ERIKA III also included a recasting of the Directive on Common Rules and Standards for Ship Inspection and Survey Organisations (the Classification Societies Directive). Classification societies have the task, among other things, of ensuring on behalf of flag states that vessels comply with structural and technical standards[23] and are supervised in this by the European Commission. The aims of the directive as proposed in ERIKA III were to tighten the existing system for recognition of private classification societies, clarify the duties of such bodies, and to reform the system of penalties. The adopted Directive 2009/15/EC governs in this context the relationship between member states and recognised classification societies.[24] The Directive confers powers on the Commission to inspect classification society documents relating to confidential relationships with private customers and also encompasses ships flying flags of third countries.[25] For this inclusion of third countries to be compatible with international law, a justification legitimating such an encroachment upon the sovereignty of the third country is required from which it follows by converse inference that states may not normally interfere with the affairs of other states (the duty of non-intervention). It is at least questionable whether such justification can be found.[26] Regulation (EC) No 391/2009 supplementing Directive 2009/15/EC similarly gives rise to question under international law with regard to encroachments on third country rights.

In the Prevention of Shipping Accidents section of the conference with its two presentations – *A Cooperative Compliance Strategy: The Voluntary IMO Member State Audit Scheme* and *The Erika III Package: Progress or Breach of International Law?* – the focus is on maritime safety with special consideration of implementation and monitoring aspects. The *Working Group: Prevention of Shipping Accidents* will take an in-depth look at the interplay between the various regulatory levels. Issues to be addressed include what regulatory scope remains for the EU under international law

[23] See Jenisch, Prävention zur Vermeidung von Unfällen und von Umweltverschmutzung auf See, in NuR 2007, p. 392 (393 f).
[24] Minimum criteria for recognition, the procedure, the obligations of recognised classification socities and the available penalties are laid down in Regulation (EC) No 391/2009.
[25] See also Jenisch, Prävention zur Vermeidung von Unfällen und von Umweltverschmutzung auf See, in NuR 2007, p. 392 (394).
[26] Canditates are the principle of personality, the principle of protection, the principle of universality and the effects doctrine.

and how it can make use of that scope to further promote international maritime safety.