Generally Accepted International Rules, Regulations, Procedures and Practices" in accordance with the United Nations Convention on the Law of the Sea 1982 and the IMO Mandatory Instruments in Regards Maritime Safety

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ABSTRACT

Proposed research aims the promotion of relationship between the conventions of International Maritime Organization prescribed as Mandatory instruments by IMO itself on the one hand and the UN Convention on the Law of the Sea on another. In order to evaluate such a comprehensive standing of relationship several research methodology will be combined, especially one of a historical and empiric nature and methods of interpretation will be based on teleological approach. Legal doctrine develops in the space and time and shall be able to reflect most recent developments in order to be effective.

To the extent mentioned above, maritime safety is certainly, one of the main concerns of United Nations Convention on the Law of the Sea in a much broader sense and therefore attempts to underline necessity of exercising effective jurisdiction over the Ships by the flag State. Exceptionally, for the manner of such a "package deal" convention, those Articles dealing with nationality of ships (Article 91), duties of the Flag State (Article 94), pollution from ships (Article 211), enforcement by flag State (Article 217), enforcement by port State (Article 218), enforcement by coastal State (Article 220) and measures to avoid pollution arising from maritime casualities (Article 221) are of a necessary norm creating character.

One of the biggest challenges to be addressed in proposed research project is reflected in the following difficulty, whether a "package deal" LOSC 1982 tried to challenge exclusive jurisdiction of a flag State in the matters of such cross-jurisdictional business as maritime trade.

The research project will further serve as a deterrent measure for Georgia in order to develop its national maritime transport concept for the sake of better implementation of its duties as a flag State, also as a member State of UN and the IMO.

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Last but not least, I want to dedicate my thesis to my beloved and beautiful country Georgia, which is my motivation to keep my unwavering commitment for further sustainable development.

LIST OF ACRONYMS

Abuja MoU - The Memorandum of Understanding on Port State Control for West and Central African Region

Acuerdo de Viña del Mar - the Latin American Agreement on Port State Control of Vessels

Black Sea MoU - The Black Sea Memorandum of Understanding on Port State Control

BLTP - Barcelona Traction, Light and Power Company Limited

CS - Classification Society

COLREG 1972 – IMO, Convention on the International Regulations for Preventing Collisions at Sea, 1972.

Caribbean MoU - The Memorandum of Understanding on Port State Control in the Caribbean Region

DOALOS - Division of Ocean Affairs and the Law of the Sea

EC - European Commission

EU - European Union

EEZ – Exclusive Economic Zone

FAL - The Facilitation Committee

FS - Flag State

FSC – Flag State Control

FSI - flag State Implementation

FoC - Flag of Convenience

GAIRS - Generally Accepted International Regulations, Procedures and Practices

GDP - Gross Domestic Product

Geneva Convention - 1958 Geneva Convention on the High Seas

GISR - Georgian International Ships Registry

GSC - Georgian Shipping Company

GoG - The Government of Georgia

IACS - International Association of Classification Societies International Register of Shipping

ICJ – International Court of Justice

III - Sub-Committee on Implementation of IMO Instruments

III Code - Instruments Implementation Code

ILC - International Law Commission

ILO - International Labour Organization

IMCO - Inter-Governmental Maritime Consultative Organization

IMO – International Maritime Organization

IMSAS – Mandatory IMO Member State Audit Scheme

Indian Ocean MoU - Indian Ocean Memorandum of Understanding

INGO's – International non-governmental organizations

ISM Code - International Management Code for the Safe Operation of Ships and for Pollution Prevention

ITCP- Integrated Technical Co-operation Program

ITF - International Tribunal for the Law of the Sea International Transport Workers' Federation

ITLOS – International Tribunal on the Law of the Sea

HSC - International Code of Safety for High-Speed Craft

LL 1966 - IMO, International Convention on Load Lines, 1966

LEG – Legal Committee

LOSC - 1982 United Nations Convention on the Law of the Sea

LRIT – Long range identification and tracking

MSC - Maritime Safety Committee

MEPC - Maritime Environment Protection Committee

MARPOL 73/78 - The International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/1978

MARAD – Maritime Administration

MESD – Ministry of Economy and Sustainable Development of Georgia

MRDI - Ministry of Regional Development and Infrastructure of Georgia LEPL Maritime Transport Agency

MTA – LEPL Maritime Transport Agency of the Ministry of Economy and Sustainable Development of Georgia

MarCode - Maritime Code of Georgia

Mediterranean MoU - Regional Memorandum of Understanding on Port State Control for the Mediterranean Countries

MLC 2006 - Maritime Labour Convention 2006

MoU - Memorandum of Understanding

PSC – Port State Control

PSCO - Port State Control Officers
Paris MoU - The Paris Memorandum of Understanding on Port State Control

QMS - Quality Management System

Res. – Resolution

Riyadh MoU - The Riyadh Memorandum of Understanding on Port State Control in the Gulf Region

SOLAS 1974 – IMO, International Convention for the Safety of Life At Sea, 1974

SAR 1979 – IMO, International Convention on Maritime Search and Rescue, 1979

SASEPOL - Development of Security Management, Maritime Safety and Ship Pollution Prevention for the Black Sea and Caspian Sea

STCW – IMO, International Convention on Standard of Training, Certification and Watchkeeping, 1978 (as amended)

TC –Technical Cooperation Committee

TONNAGE 1969 - International Convention on Tonnage Measurement of Ships, 1969

Tokyo MoU - Memorandum of Understanding on Port State Control in the Asia-Pacific Region

TS – Territorial Sea

UNCCRS - United Nations Convention for Conditions and Registration of Ships

UNCLOS I - the First United Nations Conference on the Law of the Sea

UNCLOS III - Third United Nations Conference on the Law of the Sea

UNCTAD - United Nations Conference on the Trade and Development

USSR - The Union of Soviet Socialist Republics

UTA - United Transport Administration

Vienna Convention - Vienna Convention on the Law of Treaties

VIMSAS - Voluntary IMO Member State Audit Scheme

VTS – Vessel Traffic Services

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INTRODUCTION

"And the sea will grant each man new hop, as sleep brings dreams of home"[1]

Christopher Columbus

The oceans and seas cover nearly 71 percent of the Earth's surface.[2] Therefore oceans and seas have always been subject to human activities. They are a precious resource, essential not only to humanity, but also to the function of our planet as well as they are essential for transportation purposes.

Global economic growth as a key economic indicator is clearly derived from international shipping. Depending on the fact that nearly 90% of goods traded across borders to peoples and communities all over the world are being transported by sea, maritime transport is considered as a backbone of the international trade and the global economy. Therefore, shipping is an industry, which has had the most impact on growth of global economy. In other words this industry makes up the lifeblood of global markets. It goes without saying that international shipping as the first truly international industry still continues to serve humanity.[3] Shipping is a lifeline for everybody.[4] It is the most efficient and cost-effective method of international transportation for most goods; it provides a dependable, low-cost means of transporting goods globally, facilitating commerce and helping to create prosperity among nations and peoples. World trade relies on maritime transport more than any other means of transportation. Therefore shipping is an international business and it has been, and remains, the cheapest, efficient and most reliable form of transportation

International maritime transport requires global regulations to continue functioning as the principal vehicle for the movement of global trade.[5] It has to be acknowledged that without rule of law world will be unable to reach and provide the stable expectations, which is so necessary for economic development and sustainability.

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[1] The Journal of Christopher Columbus (during His First Voyage, 1492-93) and Documents Relating to the Voyages of John Cabot and Gaspar Corte Real.
[2] "Ocean" Encyclopedia Britannica Ultimate Reference Suite 2004.
[3] Ivane Abashidze, Maritime Safety and Classification Society, Lambert Academic Publishing, 2015. p.16.
[4] Welcome and introduction – Presentation of the vision of Sustainable Maritime Development by Mr. Koji Sekimizu, Secretary-General, International Maritime Organization Rio+20 IMO side event 20 June 2012 Rio de Janeiro, Brazil.
[5] Available from: http://www.un.org/en/ecosoc/newfunct/pdf13/sti_imo.pdf

Law of the sea is as old as nations, and the modern law of the sea is virtually as old as modern international law. For three hundred years it was probably the most stable and least controversial branch of international law.[6]

The sources of the Law of the Sea include customary international law as well as a range of conventions, treaties and agreements. In the context of regulating international shipping there exists delicate balance of the rights and obligations between States in their flag, coastal and port State jurisdictions which is therefore regulated by the United Nations Convention of the Law of the Sea 1982 [7]. The mentioned convention is a result of the Third United Nations Conference on the Law of the Sea (hereinafter referred as UNCLOS III).[8] LOSC is a comprehensive code of rules of international law on the sea and mainly shapes contemporary law of the sea by governing the regulation of the ocean space. The elements of LOSC that are most relevant to this Study are generally held to be declaratory of customary international law.

The history of the law of the sea that may be referred as an oldest branch of public international law has been a continuous struggle between the States that asserted special rights with respect to areas of the sea and the States insisting upon the freedom to use oceans. Since the Roman Empire, usage of the world's oceans has operated on the basic but unwritten notion of freedom of the seas, which provided unrestricted access for the common activities such as navigation and fishing.

Prior to the 20th century, the oceans were subject to the doctrine of the freedom of the seas – limiting each nation's rights and jurisdiction over the ocean to a narrow area surrounding its coastline. The issue of sovereign control over the oceans became a growing concern in the mid-20th century. Historically, ships have always enjoyed the "freedom of the seas". A hundred years or more ago many ship owners were also ship's masters and traders. Their business was often inherited from their families and almost all commercial transactions were handled with private organizations. Therefore human relationship with ocean was governed by a philosophy that was devoid of moral or ethical dimensions[9]. In early 17th century Hugo Grotius Dutch jurist and

[6] L. Henkin, "How Nations Behave: Law and Foreign Policy", published for the Consular Foreign Relations by Praeger, New York, United States, 1979.
[7] *The Law of the Sea,* United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea, United Nations Sales No. E.83.V.5 UN: New York, 1983
Available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
[8] Available from: http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Third%20Conference
[9] Awni Behnam , Tracing the Blue Economy, Lumen Monograph Series, Volume 1, Foundation de Malta Publishing, 2013 p.65

philosopher, the father of modern international law, published fundamental principle of the law of the sea - *Mare Liberum*[10] in which he codified the generally accepted principle of freedom of the seas, giving States identical and free access to the oceans and the ocean resources .It is known as the traditional regime of the high seas which was based on the principle convinced at that time by pirates to serve piracy – designated ocean space for external plunder under a false premise of limitless and inexhaustible resources.[11] *Mare Liberum* regime dominated the governance of ocean for centuries.

Freedom of the seas remained the principal guiding force of the development of international maritime law until the Second World War. The recognition of the need for a uniform international maritime regulatory regime led to the First United Nations Conference on the Law of the Sea[12] (hereinafter UNCLOS I) in 1950s were on 29 of April 1958 four separate conventions were adopted. These conventions were considered as a success at that time, they were heralded as a model for new international order, although it failed to define some major issues.

Consequently in 1960s in the time of the cold war was the Second United Nations Conference on the Law of the Sea was held but without any result or any new agreement. Finally in 1970s the Third United Nations Conference on the Law of the Sea was conveyed, which resulted the most recent Convention on the Law of the Sea concluded in Montego Bay, Jamaica on 10th of December 1982, by the contribution and input of more than 160 sovereign States in its creation, UNCLOS III negotiated on the basis of consensus, as a package deal with the understanding that no reservations to the Convention be permitted. It took nearly 20 years of debate for the UN to adopt LOSC, a universal document encompassing a wide range of political, geographical, and legal viewpoints. LOSC is a true reflect of already existing four 1958 treaties.[13] UNCLOS III adopted a unified governance regime of the rights of nations to the world's oceans. After adoption it was immediately signed by delegations form 119 States however UNCLOS III took 12 years to come into force. Members were reluctant to ratify it due to Article 309, which prohibits nations from taking out reservations to any party of the treaty. However, LOSC has been widely ratified which gave result on 16th of November 1994 when it came into force.

[10] The Free Sea or The Freedom of the Seas, from: http://site.ebrary.com/lib/soton/detail.action?docID=10439246
[11] Awni Behnam , Tracing the Blue Economy, Lumen Monograph Series, Volume 1, Foundation de Malta Publishing, 2013 p.66
[12] http://legal.un.org/diplomaticconferences/lawofthesea-1958/lawofthesea-1958.html
[13] http://legal.un.org/diplomaticconferences/lawofthesea-1958/lawofthesea-1958.html

Nowadays, treaty is almost universally accepted, it has 164 member States. This unprecedented level of immediate international support is indicative of the universal agreement on the need for an international maritime regulatory regime.[14] This convention, with its 320 articles and 9 appendixes that address lots of topics, is one of the most important international agreement in the human history.

LOSC in other words may be defined as an umbrella convention[15] - constitution for the oceans[16] - regulating the resources and use of the oceans and the seas. It was the most comprehensive legal guideline governing oceanic affairs and the law of the sea mostly consist of the provisions that are not self-executing and accordingly can only be implemented through other treaties, which establishes rules governing all uses of the oceans and their resources. It is considered as a framework agreement upon more specialized treaties, so all other international maritime conventions and organizations operate within the framework created by LOSC. It is one of the most important law-building conventions in history.[17]

In 2012 the international community officially celebrated the 30th anniversary of the opening for the signature of LOSC. Since its adoption and during these years LOSC along with its implementing agreements have provided efficient legal framework to address ongoing law of the sea challenges. Providing stable legal regime in oceans features its main contribution to mankind's future.[18]

The idea that the LOSC is comparable to constitution is retained in the annual reports of UN Secretary- General on Oceans and the Law of the Sea:

> *"Emphasizing the universal and unified character of the Convention Reaffirming that the Convention sets out the legal framework within which all activities in the oceans and seas must be carried out and is of strategic importance as the basis for national,*

[14] J. S. Hobhouse, Int'l Conventions and Commercial Law: The Pursuit of Uniformity, 106 L.Q. REV. 530, 534 (1991).
[15] David Joseph Attard, Malgosia Fitzmaurice, Norman A. Martínez Gutiérrez "The IMLI Manual on International Maritime Law: The Law of the Sea" Volume I, Oxford University Press, 2014, Chapter 9.7. p.273.
[16] T. B. Koh "A Constitution for the Oceans" in UN, Law of the Sea – Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, New York, 1983, p. xxiii.
[17] Myron H. Nordquist, Tommy T.B. Koh, John Norton Moore. Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention 2009. p.7
[18] Ibid p.9

regional and global action in the marine sector, and that its integrity needs to be maintained …"[19]

LOSC establishes: the right of all nations to freedom of navigation on the high seas and the right of innocent passage[20] in territorial waters. It also deals with delicate issues such as the rights of all ships[21] to use international straits. Apart from enshrining the principle of global maritime rules, it is a legally binding convention on the rights, obligations and responsibilities of flag, port and coastal States with respect to the proper ocean governance and order in the world's oceans and seas.

The scope of LOSC is extremely broad. It seeks to reconcile a range of competing interests including the rights of coastal States, land-locked States and flag States. Part of this balance is achieved through the division of the sea into maritime zones. In fact, LOSC is the only international convention, which stipulates a framework for state jurisdiction in maritime spaces. Since its adoption Convention has restructured, the character of the marine sector, it clearly distinguishes between different areas in the sea. Prior to UNCLOS III, jurisdiction in the oceans was a simple black and white issue. Following a period of expanding coastal State claims over the sea and its resources Conference brought major changes. Accordingly an agreement was reached for accurate definition of maritime zones. As a result a new treaty established specific jurisdictional limits on the ocean area. It prescribed five separate jurisdictional zones in order to classify oceans and seas. The geographic boundary of those areas is determined with respect to the distance to the coast therefore the point from where the zones are measured is baseline.[22] Each State has right to draw its own baseline in a reasonable way in order to define its coastline. The baseline is either the line reached by the sea during the lowest tides, or geometric straight lines linking capes.

1. Territorial Sea[23] - an area of the sea that has an outer limit extending 12 nautical mile form baselines;

[19] UN A/RES/69/245, Dec 29, 2014. Para. 4. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/245
[20] Article 17 of the LOSC
[21] Whenever the term ship or vessel are used it refers to a merchant ship/vessel, nothing in this work refers to warship and issues related therein. The definition of warships is given in the Article 29 of the LOSC.
[22] Pursuant to Article 5 of the LOSC, "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large scale charts officially recognized by coastal State."
[23] Article 3 of the LOSC

2. Contiguous Zone[24]- maritime zone adjacent to the territorial sea that may not extend beyond 24 nautical miles from the baselines;
3. Exclusive Economic Zone (EEZ)[25] - the area beyond and adjacent to the territorial sea which does not extend more than 200 miles from the territorial sea baseline;
4. Continental Shelf[26] - submerged prolongation of the land territory of the coastal State - the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin, or to a distance of 200 nautical miles where the outer edge of the continental margin does not extend up to that distance;[27]
5. High Seas[28] - the area of the ocean that falls beyond any one country's EEZ.

Hence the sovereign rights are phased down through several zones, as well as obligations of States and different enforcement measures for those maritime zones, which therefore serve as a stability measure, and a new order of the oceans. In this regard importance of LOSC concerning the use of the oceans and seas cannot be ignored. It specifies the territorial limits of a country and defines whether a vessel is under the laws of its flag State or those of the State whose waters it is lying in. All maritime regimes, be they based on the LOSC or derived from this fundamental document, be they regional or local, shall ensure or, in critical circumstances, enforce compliance with this globally accepted document.

After adoption of LOSC the economic interests of each State applies not only to land and territorial waters but also to Exclusive Economic Zone, which may be claimed at 200 nautical miles off States coast. It is noteworthy that the Exclusive Economic Zone (EEZ) was a significant innovation of LOSC. Previously, territorial waters, which are defined as extending up to 12 nautical miles, had been used as the basis for economic activity. It is also worth noting that prior to adoption of the LOSC, customary international law evolved so called Exclusive Fishing Zone, which is still in existence for those States who have not yet ratified LOSC, like UK before its accession to LOSC.

The negotiations were characterized by the traditional dichotomy between coastal States and the major maritime powers that has always shaped the law of the sea. The consensus ultimately

[24] Article 33 (2) of the LOSC
[25] Article 55 of the LOSC
[26] Article 76 of the LOSC
[27] See: http://www.un.org/depts/los/clcs_new/continental_shelf_description.htm
[28] Article 86 of the LOSC

reached reflects a carefully constructed balance, which reflects both legal doctrine and political realities. The historical roots of the EEZ lie in the trend of coastal States after 1945 to assert rights and jurisdiction over an increasing area of seabed driven by a belief that an abundance of natural resources lay beneath. This was exactly first important assertion of exclusive jurisdiction over marine resources beyond the territorial sea made by the United States of America in the Truman Proclamation of 28 September 1945 on the continental shelf.[29] The Proclamation states that "having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control".

During the UNCLOS III negotiations commenced in 1973, the maritime powers were willing to recognize a coastal State's claims to extended rights and jurisdiction in waters off their coasts provided that access to the seas and freedom to use the seas were preserved to the greatest extent possible.[30] Consequently, they agreed that the breadth of the territorial sea could extend from 3 nautical miles to 12 nautical miles, provided that all ships and aircraft had the right of innocent passage in the territorial seas as well as an unimpeded and non-suspendable right of transit passage through and over straits used for international navigation.[31] With respect to an EEZ, Conference recognized that coastal States, especially developing coastal States, constituted a majority at the conference and were not going to retract from claims to exclusive rights to the natural resources in the waters in a zone adjacent to their coast. The maritime powers agreed to recognize this development, provided that the new zone was not under the sovereignty of the coastal State, and provided that the traditional freedoms of the high seas were preserved in the new zone.

Section V of LOSC is dedicated to EEZ regime. The key provision is Article 55, that acknowledges that EEZ is a special, *sui generis* regime because the EEZ is a regime that is neither under the sovereignty of the coastal State nor part of the high seas. The coastal State has exclusive - "sovereign rights" – a) to explore and exploit the natural resources in the EEZ as well as other "activities for the economic exploitation and exploration of the zone, such as the

[29] R. Churchill and A.V. Lowe "The Law of the Sea"; 3rd edition; 1999, Juris Publishing, Manchester University Press, p. 143-144
[30] L. Dolliver M. Nelson, "Reflections on the 1982 Convention on the Law of the Sea" in David Freestone, Richard Barnes and David Ong, The Law of the Sea: Progress and Prospects, United States, 2006, p.29
[31] See Part II of the LOSC

production of energy from water, currents and winds".[32] b) Jurisdiction as provided for in international law with regard to the establishment and use of artificial islands, installations, and structures, marine scientific research, and the protection and preservation of the marine environment, and (c) other rights and duties provided for under international law. In exercising its rights and performing its duties in the EEZ, the coastal State shall have "due regard" to the rights and duties of other States. Second, coastal States shall act in a manner compatible with the provision of LOSC.[33]

The rights and duties of other States in EEZ is further enshrined by Article 58 of LOSC, which provides that in the EEZ all States enjoy:

"the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention"

Extremely important aspect EEZ is its relationship with other maritime zones. Extending up to 200 nautical miles EEZ overlap both 12 nautical miles of territorial sea and next 12 nautical miles of the contiguous zone. In this case relations with the EEZ are distinguished by a sort of complementarities having its bases in essentially economic function of the EEZ were the State only exercises sovereign rights concerning the management of biological recourses, while in the territorial sea and in the contagious zone sovereignty is expressed in full.[34]

Along with abovementioned changes LOSC also established two new international institutions in order to control the use of the maritime territory and settle disagreements between countries.

The International Tribunal for the Law of the Sea (hereinafter referred as ITLOS)[35], based in Hamburg, Germany, which is an independent intergovernmental organization responsible for settling disputes between countries who is party to the LOSC. It is made up of 21 judges elected by the state parties.[36]

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[32] Article 56 (1a) of the LOSC
[33] Article 56 (2) of the LOSC
[34] David Joseph Attard, Malgosia Fitzmaurice, Norman A. Martínez Gutiérrez "The IMLI Manual on International Maritime Law: The Law of the Sea" Oxford University Press, 2014, p.208
[35] Annex VI of the LOSC
[36] For further information please visit: https://www.itlos.org/en/the-tribunal/

The International Seabed Authority[37] is a special body established to control the activities of mining minerals in the international seabed as defined by LOSC and therefore beyond the limits of national jurisdiction. It has been created in 1994, although its assignments are defined in the 1982 conference. The Authority has its headquarters in Kingston, Jamaica.[38]

"A State may assume a number of roles in a maritime context dependent upon its location, function, sovereignty, boundaries, and relationship with vessels of another State. Some of these maritime associations are reflected in the LOSC such as coastal, flag, port … States"[39]

Convention sets up institutions and balances the rights and interests of States with the interests of the international community. Provided regimes are fundamental to maritime safety and security, namely the regime of consecutive maritime zones and the jurisdictional trinity of flag, coastal and port State control. Concerning safety regulations the notion of jurisdiction is essential in general international law.

Given the global nature of the shipping industry along with the different jurisdictions of the States, the Chapter One of the present thesis will be devoted to analyses and examination of the LOSC in regards Flag, Port and Coastal State jurisdictions seeing that LOSC governs the rights a State enjoys over the sea area adjacent to its coastline and contains detailed provisions on the extent of the States' jurisdiction across a number of different maritime zones. In order to exercise jurisdiction and control over shipping LOSC elaborates the concept of effective jurisdiction and control by specifying the duties of flag States. Profound historic development of the LOSC will be further intensely examined by this section.

Analysis of the LOSC with regards the jurisdictions will be launched by discussing international law of the sea puzzle with analyzing flag State jurisdiction in general, for the reason that section B of the Chapter one, Part One comprehensively deals with this subject. When comprehending the Flag State responsibilities international community faces critical questions regarding existence of the 'Genuine Link' between the vessel and its flag State. Therefore it is significant to identify what is meant by the term 'Genuine Link' and for what it stands for. In order to find

[37]Article 156 of the LOSC
[38]For further information please visit: https://www.isa.org.jm/authority
[39] J.N.K. Mansell "Flag State Responsibility: Historical Development and Contemporary Issues". London, Springer Dordrecht Heidelberg, 2009, p.18

appropriate response to the questions above, firstly this paper intent to suggest appropriate definition to the aforementioned term, also aims to discuss the origins of this term under various topics and issues addressed within. Taking into consideration the fact that until today there is not attained consensus among States or researchers to define above-mentioned term, this section will try to exercise international law approach by interpreting the relevant international treaties, as well as, applicable case law of International Court of Justice and International Law of the Sea tribunal, including latest judgments. Herewith, Section B will attempt to consider positions of international forums.

Next part of the Chapter One discusses the challenges for the definition of the LOSC in respect 'Generally Accepted International Regulations, Procedures and Practices'. In order to evaluate such a comprehensive standing of relationship several research methodology will be combined, especially one of a historical and empiric nature and methods of interpretation will be based on teleological approach. Hereby Section A will present an overview of the 'competent international organization' through which LOSC calls on member States to establish international rules and standards as well as it will answer question whether how the most important international maritime institution develops international conventions. Therefore IMO mainly focuses on improving safety at sea, and this organization is the main player in the maritime safety regulatory regime. As it is noticeable form the title of the present thesis study is determined on maritime safety, hence next section of the Chapter Two of Part One will focus on defining maritime safety. Secondly, this part of the study therein will give comparative analysis between the relevant provisions of the LOSC and provisions of some of the IMO Conventions relating to maritime safety.

Part Two of present thesis is examining the tools for implementation of IMO instruments offered by Organization itself. In particular this section A of Chapter One will offer analysis IMO III Code in respect mandatory IMO instruments as well as it will try to give analysis whether mandatory IMO instrument are generally accepted rules or not, in this regard examination – survey will be carried out by interviewing both, representative of international maritime organization and a member State.

The goal of this Section B of this Chapter is to provide an analysis for setting up a process of the maritime administration; the role of United Nations General Assembly and its resolutions will

also be examined. It will also consider the role of IMO in the process of supporting developing States in the process of establishing effective maritime administration.

By the last Chapter present document will represent historical background overview: reforms undertaken organizing maritime transport in Georgia. It will analyze current enforcement mechanisms for violation of principles obligation derive from the United Nations convention on the Law of the Sea 1982. It will also present the General overview - gap analysis of Georgian maritime legislation.

In Conclusion thesis will emphasize areas for improvement and will try to advice Government of Georgia how to implement its obligations to be in line with binding international maritime instruments.

Part one

Chapter 1

Analysing Flag, Port and Coastal State Obligations in the context of UN Convention on the Law of the Sea, 1982

Section A

Examining Flag, Port and Coastal State Obligations

The Law of the Sea, as reflected in LOSC, has struck a balance among the powers of flag States port States and coastal States. Dynamic in the conflict between the interest of port or coastal and flag States is especially remarkable. Nevertheless, a State may consider one of these roles more important than the other due to its economic, geographical and environmental interests. However, this type of binary division is practically impossible because a country may be a port State while simultaneously being a coastal or flag State.

Significance of identifying the appropriate jurisdiction to be imposed in respect of acts or incidents on board of the vessels in international waters is one of the most crucial aspects in the international law of the sea. While the LOSC confirms State's sovereignty over their internal waters and territorial seas,[40] it also imposes number of limitations that distinguish jurisdiction on States' maritime zones form jurisdiction over their land territory. Basically Jurisdiction of States can be broadly divided into two categories: prescriptive or legislative jurisdiction and enforcement jurisdiction. Prescriptive or legislative jurisdiction is a State's competence to prescribe substantive standards. On the other hand, the power to prevent or punish any violation of substantive standards is its enforcement jurisdiction. Generally, a State enjoys an unrestricted prescriptive or legislative jurisdiction over its internal and territorial waters. In these areas, States can prescribe national standards. In the territorial sea, this right is limited by the right of innocent passage of other States. Ships enjoy the right of innocent passage through the territorial sea and international strait. A coastal State shall not intervene in the passage so long as it is not prejudicial to the peace, good order or security of the coastal State. For the exclusive economic zone, national standards shall be in conformity with the "generally accepted international standards".

As already stressed out States involved in maritime activities fall into three, exclusive categories – flag States, port States, and coastal States, which form a compendium of three prime jurisdictions. They together, have a collective responsibility to ensure the maintenance of international standards at sea.[41]

For every seagoing vessel mandatory attribute is flag. Usually in order to obtain the right to fly one States flag, vessel has to be registered. Flag State refers to the country where a vessel is registered". Historically, the flag embodied the idea of national protection.

[40] Article 2 of the LOSC
[41] John Hare, Port State Control: Strong Medicine To Cure A Sick Industry, 26 GA J. INT'L & COMP. L. SUMMER 1997 p. 571-72.

"Symbols are sacred things, and one of the chief that every man holds dear is the national flag. Deep down in our nature is the strong emotions that swells the heart and brings the tear and makes us follow the flag and die around it rather than let it fall into the hands of an enemy. This is no new emotion, no growth of a few generations, but an inheritance from ages before history began."[42]

With regard to the navigation, the opinion that a ship belongs to a legal system is given practical form in the flag principle. According to this principle, ships are subject to the law of the State whose flag they fly. The process of registration enables ships to be identified. They are listed in a register, which is held by the State in accordance with its own national legislation. Registration invests in the State a responsibility for ensuring that ships comply with its laws, which shall be in compliance with the international legislation. The Ship registration can be traced from the ancient Rome, which became widespread in Italian city-States prevalent of medieval centuries.[43]

As Churchill and Lowe have had pointed out the Flag State is: *"the State which has granted to a ship the right to sail under its flag".*[44]

This is quite unfeasible keeping in mind, the amount of business a ship is involved with The flag State's primary role is to enforce the standards set in international maritime conventions, not only through incorporation into national legislation, but also through the implementation of adequate regulatory framework and maritime authority to enforce the standards upon ships registered under its flag.[45] Maritime safety is traditionally based on the role of flag States.

Flag State responsibility forms an important component of Part VII of the LOSC. The Flag State's responsibility on the high seas is perhaps most clearly described in the LOSC. Concerning this role and duties the LOSC basically refined and updated the provisions of the 1958 Geneva Convention on the High Seas which was the first legally binding international instrument to set out the rights and responsibilities relating to flag State jurisdiction. The rights of flag States have remained largely unchanged since the original evolution of the concept, however the list of their responsibilities has been developed. The main message developed by 1958 Geneva Convention

[42] Gordon, 1915
[43] N. P. Ready, Ship Registration. 3rd Edition, 1998, London Hong Kong, p. 2
[44] R.R. Churchill and A.V. Lowe "The Law of the Sea"; 3rd edition; 1999, Juris Publishing, Manchester University Press, p. 208.
[45] Z. Oya Özcayir, *Flags of Convenience and the Need for International Cooperation*, 7 INT'L MAR. L.J. (2000) p. 111.

on the High Seas –was to ensure safety at sea what nowadays is being provided by the LOSC as the foundation for understanding Flag State Jurisdiction.

"LOSC Article 91

Right of navigation

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas."

According to the above mentioned article of the LOSC the basis of the preservation of order on the high seas has rested upon the concept of the nationality of the ship, and the consequent jurisdiction of the flag State over its vessels.

Under LOSC article 91, all vessels shall adopt the nationality of a State by registering under and flying a State's flag. It means that a State has granted ships its nationality through the registration process. Moreover the State with which a vessel is registered is known as the flag State. Maritime legal regime created by LOSC does not apply to non-state actors but Article 91 of LOSC applies to all ships whether it is merchant or warship.

All States, whether coastal or land-locked, have the right to fix conditions for the grant of their nationality to its vessels, for the registration of ships in their territory, and for the right to fly their flag.[46] Under articles 91 and 92 of LOSC the flag State has an exclusive jurisdiction over all vessels flying its flag on the high seas except in exceptional cases provided for in international treaties or in the LOSC. It means that Article 91 of the LOSC sets only specific condition for granting nationality, it says that there must exist the genuine link between the flag State and the ship, which should fly the flag of that State. It only is and shall be subject to its exclusive jurisdiction on international waters.[47]

Further, article 94 of the LOSC, sets forth the basic flag State responsibilities, the necessary elements to effectively exercise its jurisdiction and control over those vessels, which are flying under ones flag in administrative, technical, and social matters, apart from where treaty provisions deem otherwise. This article lays down certain requirements for the flag States in

[46] Articles 90 - 91 of the LOSC
[47]The content of the obligation of a 'genuine link' seems nevertheless not very clear and unresolved questions are around this phrase, this competence is subject of the analysis in the next section.

order to effectively maintain the jurisdiction and control upon their vessels. It determines the measures that may be taken by the Flag State in order to ensure safety at sea, in respect to the construction, equipment and seaworthiness of ships; manning of ships, labour conditions and the training of crews; and the use of signals, maintenance of communication and prevention of collisions. According to the same article, States are required to maintain a register of ships flying their flag.

Further obligations are provided in Articles 98 to 101, concerning the duty to render assistance, the prohibition of the transport of slaves, and the repression of piracy. Hereby all States are subject to the provisions on prevention and control of marine pollution and resources conservation.

The Flag State duties, as listed under Article 94 of the LOSC with respect to the vessels registered under ones flag, are not meant to be exhaustive. Flag States are required to conform to generally accepted international regulations, procedures and practices. It means that the flag State responsibilities are complemented by the international laws and regulations and practices adopted by the relevant international organizations. The international community develops a set of uniform standards to promote the safety of shipping, as most States are reluctant to impose stricter safety legislation on their ship-owners.[48] The internationally accepted maritime safety rules, regulations and standards mainly relate to the seaworthiness of ships, procedures for collision prevention, manning training standards, and navigational aids. These are the mandatory minimum standards, and Flag States can, at will, establish more stringent requirements aboard their vessels.

Most importantly, Article 217 imposes flag State responsibilities for compliance and enforcement in relation to these rules and standards, it describes the actions that may be taken by the flag State to enforce the standards set out in Article 94, which specifies that a procedure shall be established to ensure compliance of there vessels with applicable international rules and regulations as well as to provide for effective enforcement of those rules, regardless of where the violation occurs. In addition, the flag State shall provide for immediate investigations and proceedings in the event that a vessel is found to be in violation of these standards. Internationally accepted standards are also relevant in relation to marine pollution. Article 211 of

[48] R.R. Churchill and A.V. Lowe "The law of the sea"; 3rd edition; 1999, Juris Publishing, Manchester University Press, p. 265.

LOSC includes detailed requirements relating to pollution from vessels. Article 228(1) of the LOSC states that if flag State repeatedly disregards its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels" the port or coastal State does not have to suspend its own proceedings against this kind of vessel.[49]

The principle of flag State jurisdiction is one of the most widely acknowledged in international maritime law, yet it remains one of the most controversial. The general inadequacy of flag State implementation has been an ongoing issue affecting maritime safety and the marine environment. Accordingly under the LOSC flag State is responsible to effectively control maritime safety and marine pollution and to ensure good order in high seas. This challenge can be fulfilled by an adequate flag State Control and by implementing and enforcing internationally accepted standards and regulations by the vessels. In this case existence of proper 'Genuine Link' between a vessel and its flag State is of vital importance. Usually problem with the existence of genuine link is being caused by Flags of Convenience, which can be defined as open flags, or open registries that belong to the countries allowing registration of vessels upon payment of a fee, by owners who do not reside or have any greater business interests with the State in questions.[50]

Boczek has defined it as the:

"*flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels"*[51]

Open registry states allow foreign ship owners to register their ships under their flag state. The foreign owners then abide by the safety regulations in the jurisdiction where the ship is registered. This system provides financial benefits for both the State with open registry (due to an increase in the number of vessel registrations) as well as the ship owner (most open registry States have relaxed tax regulations and decreased costs due to more relaxed safety, labour and environmental regulations).

[49] Anderson, David, Nijhoff, Martinus; Modern Law of the Sea: Selected Essays, Martinus Nijhoff Publishers, Boston, 2008, p. 256.
[50] Jan Hoffman, Ricardo J Sanchez and Wayne K Talley, "Determinants of Vessel Flag," in Shipping Economics, ed. Kevin Cullinane Boston: Elsevier, 2005 p. 15.
[51] B.A. Boczek "Flags of convenience: an International Legal Study". Harvard University Press, Cambridge, MA, 1962 p.2

The use of open registries states began in 1920, when American shipping companies used Panama's flag to avoid the prohibition regulations for cruise ships in the USA.[52] Open-registry states have grown in number significantly since then.

Today, Panama, Liberia and the Marshall Islands are the largest open registry nations in terms of gross registered tonnage.

Such systems exponentially complicate jurisdiction, accountability and oversight. These kinds of registries usually are not willing or incapable of exercising any form of jurisdiction or control over the vessels flying their flag. As already noted above, generally accepted international rules regulations and standards are necessary to set a benchmark, which all flag States should meet, to avoid the development flags of convenience.

Flag State has freedom on high seas as a starting point. It only has to follow its obligations under international law. Referred freedom may be reduced at the maritime zones of another State. Notwithstanding the decision to leave enforcement primary to the Flag State, LOSC contains a provision that appears to be an important signal of dissatisfaction with many flag States.

As we have seen in particular, Articles 94 and 217 - primary duties of the flag State - greatly contribute to a comprehensive understanding of how a flag State can and/or should work within the system. Effectiveness of flag State jurisdiction, and the extent of responsibility should, be effectively met by flag State in order ensure compliance of international standards when operating throughout the world. As indicated above, under LOSC the flag State has primary responsibility over its ship, including criminal jurisdiction, even when the ship is outside the flag State's territorial waters.[53] The subsequent Articles of the LOSC make similar provisions with regard the port States.

It goes without saying, that Port State jurisdiction became progressively more and more widely known as a remedy to the failure of flag States to exercise effective jurisdiction and control over their flagged vessels.

[52] B. A. Boczek. International Law: A Dictionary. Lanham, MD: Scarecrow Press, Inc. 2005, p.14.
[53] Article 27 of the LOSC.

The flag State jurisdiction is not only regulated by obligations imposed upon the flag State but can also be intercepted by two other types of jurisdiction, namely coastal and port State jurisdiction. It is significant to emphases that port State and coastal State jurisdictions are not a stand-alone system; it represents part of a larger puzzle that covers the responsibility of the flag State jurisdiction as well. Port State Control is an important complement to the flag State jurisdiction and plays vital role. In order to fill the gap caused by flags of convenience, coastal and port States have been entrusted and mandated by the LOSC with additional prescriptive and enforcement powers for ensuring safety at sea, marine environmental protection and sustainable utilization of marine living resources, safeguarding marine biodiversity and combating international terrorism.

Though the primary responsibility of the flag State, a ship will also be subject to coastal State jurisdiction. As ports usually lie within the territory of the coastal State, the concept of port State jurisdiction is only relevant when the Coastal State exercise jurisdiction in relation to its ports. When a State exercises its jurisdiction over foreign vessel navigating in the different maritime zones, adjacent to its coastline, the State acts in the capacity of Coastal State. There are no definitions given in the LOSC for the terms - port State or Coastal State.

As stated in the Article 11 of the LOSC in particular, a port is a place sheltered due to natural conditions and/or artificial installations, namely harbor works. The ports in question are those used by seagoing vessels, as opposed to airports or ports dealing solely with inland trade. Basically port States are the States in which ships arrive to deliver the goods and avail themselves of the services of one of the country's ports. Ports lie wholly within a State's territory and therefore fall under its territorial sovereignty.

As stated the port State regime came into being because – owing to the obvious deficiencies in law enforcement by several flag States[54] as well as legal efforts made radical changes with regard to the enforcement jurisdiction by port States under the LOSC.

Port State jurisdiction concerns first of all foreign flagged vessels. Under international law any foreign flagged vessel entering the port is subject to the territorial jurisdiction. Port State's wide

[54] Awni Behnam " Ending Flag State Control? " in A. Kirchner Ed., International Maritime Environmental law, Institutions, Implemantation and Inovationas, Kluwer Law International, The Hague, 2003, pp. 123-135

discretion is in exercising extensive jurisdiction over visiting foreign vessels in its ports[55] as long as it stays there. However Vessel's right of access to the ports is only a presumption not an obligation.[56]

Particular rules on access to the ports were enshrined in the 1958 Convention on the Territorial Sea and the Contiguous Zone[57]. This is one of the four agreements negotiated at the UNCLOS I thus represented customary international law even before LOSC was negotiated.[58] Whereas the idea of the port State as a "distinct jurisdictional entity" came into prominence only in the text of the LOSC. Many participants at UNCLOS III argued in favor of an alternative approach to ensure compliance of vessels with international obligations. LOSC although elaborating on these traditional rules, introduced an altogether new concept emphasizing the role of the ports in ocean governance.[59] During the deliberations, it was ultimately decided to vest port States with certain competences regarding enforcement and legislation that extend the usual competences of the coastal States. The powers that port States enjoy do not resemble jurisdiction over specific area that are applied to individual vessels. Thus the port State regime is usually seen as an enforcement instrument to ensure compliance with obligations under international law.[60]

Ports as a part of national security, certainly represent and obvious place to verify if visiting foreign flagged vessels are in compliance with international standards, or if they have engaged in certain illegal behavior in the port State's (in its capacity as coastal State) own maritime zones and in the maritime zones of other States, or on the high seas. It means that particular ship is subject to the laws, regulations and rules of the port State and the port State itself is entitled to enforce them. This is, *inter alia*, confirmed by Article 25(2) of the LOSC which explicitly states that " in the case of ships proceeding to internal waters or a call at a port facility outside internal waters, coastal State has the right to take the necessary steps to prevent breach of the conditions for entry. 'Necessary steps' indicates the full range of enforcement powers but, importantly, these should be proportional to the breach involved. It also allows a port State to deny foreign vessels access to its port as well as less intrusively, to set or to impose additional specific

[55] Erik Jaap Molenaar, "Port State Jurisdiction: Toward Comprehensive Mandatory and Global Coverage", Ocean Development and International Law, 38, 2007, p.227.
[56] Ted L. Mcdorman, "Regional Port State Control Agreements: Some Issues of International Law", Ocean and Coastal Law Journal 5, 2000, pp. 217-218
[57] https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-1&chapter=21&lang=en
[58] Vaughan Lowe, "The Right of Entry into Maritime Ports in International Law", 14 San Diego L. Rev. 1977, pp. 597-622
[59] Z. Oya Ozcayir, "Port State Control", London: LLP 2001 p. 80
[60] Markus J. Kachel "Particularly Sensitive Sea Areas: The IMO's Role in Protecting Vulnerable Marine Areas" Doctoral Thesis, University of Hamburg, Springer-Verlag Berlin Heidelberg publishing 2008 p.80.

requirements/conditions to the vessels for the entry into their ports. Foreign flagged vessels therefore have no right of access to ports. Widely acknowledged exceptions to this general rule are ships in distress or in *force majeure* situations. Even in these cases, however, the specific circumstances may be such that the (environmental) interests of the port State override those of the ship.

The LOSC gives to the port State the right to exercise control on a visiting vessel and its master. Port State jurisdiction grants the power to board, inspect and where appropriate detain a foreign flagged merchant vessel. As already emphasized the main aim of port State control is to ensure compliance of ships with all applicable international or national maritime safety standards. Therefore, Port State jurisdiction does not just serve as the immediate national interest but it offers opportunities to further the interests of the international community.

Consequently, Articles 216 and 218 of the LOSC enable a port State to enforce international anti-dumping and anti-pollution measures. Article 218 contains an important jurisdictional tool. This article sets out the measures for enforcement by Port State. This Article allows port State to investigate regarding discharges in violation of international rules and standards, outside of the port State's territorial waters.

Article 219 of the LOSC (Measures relating to seaworthiness of vessels to avoid pollution), expands port State authority to include administrative proceedings initiated due to the violation of international standards regarding ship seaworthiness or pollution prevention. Ships may be detained until the causes of the violation have been removed, after which the vessel may continue on its way.

Port State authority "involves the powers and concomitant obligations vested in, exercised by, and imposed upon a national maritime authority by international and/or national legislation".[61]

It has to be stressed out that LOSC clearly recognizes that behind the flag State and the port State jurisdictions the coastal States also play a secondary role. Moreover it may be assumed that the port States are often coastal States. Coastal States itself are the States that have coastlines, near to which merchant ships often fly. Under LOSC a coastal State enjoys full jurisdictional

[61] John Hare, Port State Control: Strong Medicine To Cure A Sick Industry, 26 Ga. J. Int'l & Comp. L. Summer 1997, p. 571.

sovereignty over its internal waters – territorial sea. The sovereignty extends beyond States land territory and internal waters to that adjacent belt of sea measured from the territorial sea baselines to the maximum of 12 nautical miles. This sovereign right has an exception it shall allow foreign ships the right of innocent passage[62]. This rule reflects general customary international law, and thus applies to every coastal State, whether Party to the LOSC or not.[63] Under article 33(1) LOSC additionally gives a State the right to enforce its customs, fiscal, immigration, and sanitary laws and regulations in Contiguous Zone, which is over an additional twelve-mile buffer zone beyond the territorial sea. Hence States have authority to assert their judicial jurisdiction over an area not exceeding twenty-four miles of the ocean from the territorial sea baselines.

Under the Article 21 of the LOSC the coastal States are required to adopt laws and regulations, which comply with the international rules in the purpose of ensuring the innocent passage of foreign vessels. Herewith coastal States have the rights to establish their contiguous zone, which is adjacent to the territorial sea. The establishment of contiguous zone aimed at preventing violation of laws and regulations within its territory.

According to the Article 77 of the convention the coastal State has exclusive rights in the sense that the other States may not explore or exploit in the continental shelf unless there is expressed consent of the coastal State. In addition, the right of coastal state over the continental shelf does not depend on occupation, effective or notional, or any expressed proclamation. However, this provision indicates that the exercise of rights of the coastal state over the continental shelf shall not infringe on freedom of navigation, or on other rights and freedom of foreign states.

Within the EEZ, a coastal State enjoys sovereign rights over its natural resources. These sovereign rights pertain to exploration, exploitation, conservation and management of these resources.[64] It can exercise its jurisdiction over certain activities for the purpose, among others, of protecting the environment. But it is also obliged to respect the rights of other States. The Convention itself states that the EEZ is subject to a specific legal regime. The EEZ remains an innovation of the LOSC that rapidly found acceptance in customary international law, notwithstanding the elaborate, provisions in balancing the sovereign rights and jurisdiction of the

[62] Articles 17-26 of the LOSC
[63] R.R. Churchill and A.V. Lowe "The law of the sea"; 3rd edition; 1999, Juris Publishing, Manchester University Press, p 80.
[64] Article 56 of the LOSC

coastal State with ongoing freedom by all States within the zone, especially with respect to navigation.

The coastal state therefore can take action to prevent infringement by third parties of its economic assets in this area including, *inter alia*, fishing, bio prospecting and wind farming. In order to safeguard these rights, the coastal state may take necessary measures including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the international laws and regulations. In order for a coastal State to exercise control beyond the territorial sea and into the EEZ, it shall contact the subject vessel's flag State to fulfill flag State obligations, or develop and exercise port State jurisdiction. Eventually, the ship will have to call at a port.

As the freedom of navigation is of utmost importance for all, according to the LOSC no State has jurisdiction over the foreign flagged ships in the high seas. The High Seas, which lie beyond 200 nautical miles from shore, are to be open and freely available to everyone, governed by the principle of equal rights for all. In agreeing to LOSC, all State parties acknowledged that the oceans are for peaceful purposes as the Convention's aim was to maintain peace, justice and progress for all people of the world. On the High Seas, no State can act or interfere with justified and equal interests of other states.

The Flag State, Coastal State and Port State jurisdictions are being prescribed to provide a regime, providing an equitable balance between the maritime and coastal interests.

To sum in relation to the jurisdictional issues, the rational serves to the:

- Flag State Jurisdiction - full jurisdiction over all ships flying its flag. Pursuant to LOSC, States Parties are under the obligation to exercise jurisdiction over ships flying their flag, irrespective of the maritime zone where the ships may be. The differences in the rights and obligations of States in the various maritime zones do not change the obligations on flag States to implement measures on board their vessels. This typically includes management of vessel registration: effective jurisdiction and control over vessels including inspection, detention and arrest as necessary and ensuring vessel conformity to generally accepted international rules and standards. The flag State is obligated to adopt national laws that at the minimum meet international law obligations and standards and to

enforce these laws in the maritime zone of another state as well as in the high seas. For the flag State the global rules and standards constitute the minimum standard, which it shall adopt for vessels flying its flag, though any regulations imposed cannot be lower than the internationally agreed standards. Ships under a State flag shall be subject to exclusive jurisdiction on the high seas[65]. This rights and duties are subject to exceptions set out in various international bilateral or multilateral conventions

- There is no prohibition of concurrent jurisdiction under LOSC, and vessels therefore can be subject to the jurisdiction of states besides the flag State in certain circumstances, such as entering their maritime zones and ports. The existence of maritime zones is relevant, however, in determining the jurisdiction of a coastal State over foreign vessels. The prescriptive power of coastal States can be seen as a way to control the condition of ships navigating lawfully in their territorial seas. LOSC lays down rules for enforcement powers by coastal States toward vessels in their maritime zones, specifically in their territorial sea, and specifies the measures a coastal State can take to ensure peace and good order in its territorial sea. In their territorial sea, coastal States have general jurisdiction may adopt stricter rules and standards than the generally accepted global standards, so long as such standards do not apply to the design, construction, manning or equipment of foreign ships, nor hamper innocent passage. In the exclusive economic zone, the generally accepted international rules and standards established through the competent international organization shall be applied, except where the coastal State has adopted more stringent measures pursuant to article 211(6) of the LOSC.

- Port State jurisdiction coexists with flag State jurisdiction. Unlimited jurisdiction over all ships in port, as long as regulation is in accordance with the general principles of non-discrimination, good faith and non-abuse of right. Under the port State jurisdiction, State has the Right to interfere with the navigation of the foreign vessel voluntarily in its ports. As in the case of coastal State jurisdiction, port State jurisdiction is not customary law but entirely a treaty law notion. It is regulated in treaties. It is also restricted to clear procedures. Its purpose is to correct deficiencies resulting in non-compliance with international treaties. It has a right to inspect and control foreign vessels while within its

[65] For example Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)

jurisdiction to ensure compliance with international maritime safety and pollution standards.

Exceptionally, for the manner of such a comprehensive "package deal" convention, those Articles dealing with nationality of ships (Article 91), duties of the Flag State (Article 94), pollution from ships (Article 211), enforcement by flag State (Article 217), enforcement by port State (Article 218), enforcement by coastal State (Article 220) and measures to avoid pollution arising from maritime causalities (Article 221) are of a necessary norm creating character.

LOSC is remarkably successful in providing a stable and flexible framework governing uses of the seas. It grappled with the development of multiple maritime zones and set out an extensive framework to regulate the exercise of legislative and enforcement jurisdiction over ocean space.[66] As shearer observed in 1986:

"there is no one theory of jurisdiction that underlines the various powers and competences accorded to States under the LOSC and various elements, including "territorial sovereignty, nationality and protective and universal principles of jurisdiction... are intertwined with special functionally-based State competences".[67] LOSC brought certainty to the jurisdictional capacities of flag, port and coastal States within the various maritime zones.

Wider understanding of the LOSC will bring yet wider application and contribute to bringing international stability of the oceans order. That is why one of the biggest challenges to be addressed further in this research paper is reflected in the following difficulty, whether such a "package deal" convention - LOSC tried to challenge exclusive jurisdiction of a flag State in the matters of such cross-jurisdictional business as maritime trade.

[66] David Freestone "The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas", Leiden; Boston, Martinus Nijhoff Publishers, 2013.
[67]Ivan Shearer "problems of jurisdiction and Law Enforcement Against Delinquent Vessels", 1986 35 International and Comparative Law Quarterly pp. 320, 343.

Section B

Nationality of Ships

Notion of Genuine Link in the Context of UN Convention on the Law of the Sea, 1982 and the Position of UN General Assembly and International

International maritime law is always facing correlation of jurisdictions that is why it is very important to review flag State jurisdiction in further details. The nationality of ships is the basis upon which the international maritime regime is ordered. As it was already mentioned in previous section according to the Article 90 of LOSC **every State** has the right to have a merchant fleet under its flag, and the vessels in this fleet are entitled to use the high seas. It means that jurisdiction of the Flag State in high seas is not only the right but also the obligation. Under the Article 91 of LOSC every State has the ability, to grant its nationality to ships, which then recognize the nationality of the State whose flag, they are entitled to fly. The only restriction that LOSC makes is that "*there must exist a genuine link between the State and the ship."* That is why the proper definition of the nationality of ships is of a vital importance.

Article 91 (1) of LOSC provides:

"Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. ***There must exist a genuine link between the State and the ship.****"*[68]

Recognizing the breadth and complexity of maritime law it is noteworthy that the 'Genuine Link' has often been the subject to the international fictions and disputes. It is difficult to claim that the 'Genuine link' has no independent meaning, In fact Genuine link is surrounding both relations between the State and the ships interests before nationality is conferred and afterwards.[69] It often is considered as redundant in its terms and purpose, as well as made-up as a measuring method and a convenient tool served as a requirement for the control and maintenance

[68] Emphasis added
[69] Vincent P. Cogliati-Bantz '*Means of Transportation and Registration of Nationality: Transportation Registered by International Organizations'* New York, NY United States: Routledge, 2015, p. 67.

of public order on the high seas, which is necessary to maintain the safety of navigation. It could be also perceived as precondition test for registration of the vessel and imposing obligations upon Flag States.

'Genuine Link' as a term can be found both in LOSC Article 91(1) and 1958 Geneva Convention on the High Seas (hereinafter Geneva Convention), which came into force on 30th of September 1962. Geneva Convention currently has 63 parties.[70] These Conventions equally state that there must exist a 'Genuine Link' between the State and the ship claiming to grant its nationality upon the vessel, but they do not exactly describe what is meant by it, non of the Conventions specify what consequences may arise when there is lack of 'Genuine Link'. Although Article 311 (1) of LOSC states that "This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 of April 1958". The Geneva Convention remains essential because number of States such as USA, Turkey, etc., have not yet became parties to the LOSC, but they are parties to Geneva Convention.

The phrase 'Genuine link' firstly was recorded and officially adopted by Geneva Convention. Before the Geneva Convention there was no earlier history of the use of this or similar term in treaties dealing with the identification of the nationality of the ships. More specifically article 5(1) (one in force) of the aforementioned convention reads:

"Art. 5(1)

Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. ***There must exist a genuine link between the State and the ship;***[71] *in particular, the State must effectively exercise its Jurisdiction and control in administrative, technical and social matters over ships flying its flag".*

This exact wording, with the exclusion of the last requirement, is repeated in Article 91(1) of the LOSC, it means that Article 5 served as the basis for drafting "nationality of ships" in LOSC.

As mentioned above principle 'Genuine Link' was initially born in the Geneva Convention and it is clear that exactly what is required to constitute a 'Genuine Link' is not completely obvious. Besides there are no provisions in the Geneva Convention dealing with the requirements for

[70] http://legal.un.org/avl/ha/gclos/gclos.html
[71] Emphasis added

granting the nationality including the consequences if it turns out that there is no 'Genuine Link'. In order to clearly understand what stands at the origin of this term, one has to go deep to Travaux Prepartoires and consider discussions carried out by UNCLOS I and International Law Commission (hereinafter ILC) a body of independent legal experts established by the United Nations General Assembly in 1947 to "initiate studies and make recommendations for the purpose of … encouraging the progressive development of international law and its codification"[72]. These two institutions can be considered as the founders of the term 'Genuine Link'.

Negotiations were held by ILC, which originally started in 1950 and went through 1956. In 1958 ILC presented the draft of the convention to the UNCLOS I for discussions and hence for approval.

It is not surprising that the first draft of Article 5 of the Geneva Convention (Nationality of Vessels) have been modified several times, because of the wording disagreement. Remarkably, in 1951, during the ILC session the Special Rapporteur on the topic of the Law of the Sea, Mr. François (appointed by ILC in 1949), emphasized that, if there was **no real connection**[73] between the Flag State and the crew and owner of the vessel, it would be difficult for the flag State to manage the vessel properly. He also referred to the work of the Institute of international law, which in 1896 had suggested that, in order to obtain the right to fly the flag of a State, more than half of the ship have to be owned by nationals or a national company of the State concerned.[74] Mr. François's very reasonable interpretation obtained significant support from ILC itself and at the end of the 1951 session consensus was reached. In 1955 ILC produced the Articles on High Seas including Article 5, which was as follows:

"Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other States, a ship must either:

1. Be the property of the State concerned; or

2. Be more than half owned by:

[72] http://legal.un.org/ilc/
[73] Emphasize added
[74] Yearbook of the International Law Commission, 1951, Vol. II, pp. 75-76

(a) Nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or

(b) A partnership in which the majority of the partners with personal liability are nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or

(c) A joint stock company formed under the laws of the State concerned and having its registered office in the territory of that state". [75]

Record shows that the initial draft nevertheless does not contained the term 'Genuine Link', but it undoubtedly exposed minimum criteria to the vessel in order to identify its nationality. ILC circulated aforementioned draft to the States for the commentaries, which was mainly supported by States. It should be emphasized that two countries stand out regarding this issue were Netherlands and United Kingdom of Great Britain and Northern Island. United kingdom proposed there version of Article 5 were they highlighted two aspects, first was recognition by other States and another establishing the obligation for State to exercise effective jurisdiction and control over the vessels flying its flag. Statement of United Kingdom of Great Britain and Northern Island is following:

"Article 5:

A ship has the nationality of the State whose flag it is entitled to fly. A State may not, however, allow a ship to fly its flag, nor need others States recognize the ship as entitled to do so, unless, both under its own domestic law and under international law, the flag State is in a position to exercise, and does exercise, effective jurisdiction and control over ships flying its flag, and the right to fly its flag is limited and regulated accordingly by its domestic law. A State may permit a ship that would be entitled to fly its own national flag under domestic law, to fly the flag of another State, provided the requirement of the ***exercise of effective jurisdiction***[76] *and control on the part of that other State is fulfilled."*[77]

Netherland, which may maintained as one of the author of the Article 5 of Geneva Convention, offered own version of the Article which was divided in "a" and "b" sections, in this particular

[75] Yearbook of the International Law Commission, 1955, Vol. II, p. 22
[76] Emphasis added
[77] Yearbook of the International Law Commission, 1956, Vol. II, p. 81

case paper will focus on "5a", were Netherlands highlighted the requirement of existence of the **'Genuine Connection'**[78] which was as follows:

"Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine connection between the State and the ship."[79]

Meaningfully, the Dutch and English contributions contained an instrument by which States could refuse to recognize the nationality of vessels considered redundant for fulfilling the precondition of 'Genuine Connection' or 'effective jurisdiction and control.'

After proper discussions in 1956 the final draft of Article 5 of Geneva Convention was approved by ILC and transferred under Article 29(1) were the concept of the 'Genuine Link' was firstly recorded. In 1958 it was presented to the delegates at UNCLOS I. The text of an aforementioned article reads as follows:

"29(1)

Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a 'Genuine link' between the State and the ship". [80]

Finally, in 1958 at UNCLOS I, State views separated dramatically, although the majority of them earlier decided on submitted wording. As a result no actual agreement was reached as to what requirements should be exposed as a minimum criterion to the vessel in order to identify its nationality. Group of States consisting of open flagged countries (as generally opposed implementation of the term 'Genuine Link' what was not unexpected from them, because it may be considered that the introduction of the requirement of a genuine link was intended to restrict the insufficiency caused by flags of convenience. They even considered it as hypothetical and in case of an acceptance of 'Genuine Link' concept they predicted conflicts both in public and private law. There main statement emphasized that the requirement of a 'Genuine Link' - "for

[78] Emphasis added
[79] Yearbook of the International Law Commission, 1956, Vol. II, pp. 62-63
[80] Yearbook of the International Law Commission, 1956, Vol. II, pp. 259-260

the purposes of recognition of the national character of the ship by other State" was needless and inappropriate. Abovementioned position was carried out by deletion of the wording, which was removal of an intention to determine the consequence of the lack of a 'Genuine Link'.

Some considered that the matter of 'Genuine Link' between State and the vessel warranted exhaustive study by appropriate bodies and further elaboration. Generally this group of States thought that it was not appropriate platform for the discussion of this issue and it had to be carried out in a different forum.

Those States supporting the requirements for 'Genuine Link' stressed out the value of the setting criteria's, and emphasized that it was principal aspect, which would have served as a requirement for the control and maintenance of public order on the high seas[81] were the essential element would have been effective jurisdiction and control by the applicable flag State. As a consequence in order to strengthen this position second amendment had been carried out after 'Genuine Link' the following phrase was added: *"in particular, the State must exercise effective jurisdiction and control in administrative, technical and social matters over ships flying its flag."*[82]

"The whole of the text of article 29 submitted by the International Law Commission, as amended, was adopted by 40 votes to 7, with 11 abstentions."[83]

As a result Conference amended presented version of the article 29 (Nationality of Ships) and adopted it as an Article 5 of the Geneva Convention which specifies that such a link shall enable the State to exercise effective jurisdiction and control in administrative, technical and social matters over the ships flying its flag.

To sum up the decision of the Conference in previous paragraph the distinction had been drawn between the ILC draft and the wording, which had been adopted by UNCLOS I. It is certain, that by the final text that is the one in force, they agreed on a poor wording. This added further ambiguity, but the idea lying behind the new language was apparently the similar, specifically ownership of the vessel.

[81] R.R. Churchill and A.V. Lowe "The law of the sea"; 3rd edition; 1999, Juris Publishing, Manchester University Press, p. 257
[82] United Nations Conference on the Law of the Sea, Official Records, Vol. IV,
[83] United Nations Conference on the Law of the Sea, Official Records, Vol. IV, p. 75

In 1960 there was an article by Myers McDougal in American Journal of the International Law were he criticized introduction of the 'Genuine Link' Concept. He expressed in particular the great concern over the introduction of the term as a precondition for determining the nationality of ships:

"The dangers for the free and ordered use of a great common resource on the basis of equality and certainty of expectations, which such an ill- conceived innovation as the "genuine link" requirement creates, can hardly be exaggerated. As the Mexican delegate at the Geneva Conference emphasized, by conceding to other States the right to decide for themselves whether there was a genuine link between the ship and the flag State, the Com- mission had opened the door to the creation of insoluble problems…

The dangers inherent in according the States an uncontrollable unilateral discretion to question and deny other States' ascription of nationality to their ships are manifold. It might lead to the treating on the high seas of ships of other States as stateless with all the consequences which attach to ships without nationality; it might permit some states arbitrarily to de prive other States of their hitherto universally recognized equal right to sail ships on the high seas; it might lead to the denial of the right of in-nocent passage through the territorial sea to such ships and the exclusion from access to internal waters and ports, and it would certainly encourage discrimination in international sea commerce." [84]

Scholars think that the wording of Article 5 of the Geneva Convention has been obviously influenced and guided by the 1955 ICJ decision on Nottebohm Case, Lichtenstein v Guatemala.[85] Present judgment clearly defined nationality and introduced the concept of Genuine Connection:

Nottebohm Case with its judgment established Genuine Connection between and individual and a State in granting its nationality which afterwards became extremely relevant in understanding the significance of the notion of 'Genuine Link'.

As mentioned above notion of Genuine link was born and created during the discussions of ILC and UNCLOS I in 1956, approximately a year after ICJ ruling Netherlands introduced same

[84] Myres S. McDougal, William T. Burke & Ivan A. Vlasic, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 Am. J. Int'l L. 25-116 (1960) p.41.
[85] The Nottebohm Case (Lichtenstein v Guatemala), Second Phase, Judgment of 6 April 1955; [1955] ICJ Reports 1955, p. 4 -16

phrase ‘Genuine Connection’ which was exposed in their proposal and afterwards formed as ‘Genuine Link” and reflected Geneva Convention.

Moreover it raises questions as to why we are bringing these two topics together. That is why we should review Nottebohm Case in details.

Fredrich Nottebohm was born in Germany in 1881 as a result he possessed German nationality. From 1905 he moved to Guatemala and carried out his business activities in Guatemala. He lived there until his arrest 1943, but before arrest and the war between Germany and Guatemala he visited his brother from time to time in Lichtenstein were he applied for citizenship. The requirement to accumulate the three years residence in order to grant nationality has been waived and sooner by naturalization he obtained nationality of Lichtenstein.

After Guatemala declared war on Germany, Mr. Notebohm was arrested and his property has been confiscated. In 1951, the government of Liechtenstein brought the application to ICJ against Republic of Guatemala. It claimed restitution and compensation on the ground that the Government of Guatemala had acted toward the citizen of Liechtenstein Mr. Nottebohm and his property, a citizen of Liechtenstein, in a manner contrary to international law. The question raised was whether Liechtenstein had the right to exercise diplomatic protection on behalf of one of its nationals, ICJ based its decision on Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws which States that domestic nationality legislation shall be recognized by other States only if it is coherent with international law and custom and with the principles of law generally recognized with regard to nationality. The Court found that Liechtenstein was not entitled to exercise diplomatic protection against Guatemala as there was insufficient connection between Nottebohm and Liechtenstein for the latter to be able to exercise diplomatic protection on behalf of Mr. Nottebohm’s vis à vis Guatemala.

The Court noted that while under international law it was up to each State to lay down rules governing the grant of its nationality, there should exist: the legal bond of nationality accord with the individual’s genuine connection with the State which assumes the defense of its citizens by means of protection as against other States.

“Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred [...] is in fact more closely connected with the population of the State conferring

nationality than with that of any other State. Conferred by a state, it only entitles that state to exercise protection *vis-à-vis* another State, if it constitutes a translation into juridical terms of the individual's connection with the state which has made him his national"

This decision of ICJ was completely different from the previous court practice as an example I will bring the 8 of August 1905, Hague Permanent Court of Arbitration ruling on the Case of the Muscat Dhows between Great Britain and France[86] The Case on Behalf of the Government of His Britannic Majesty and of His Highness the Sultan of Muscat regarding the granting of the French flag to Muscat Dhows Arbitration said that – *Generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules covering such grants*[87] which openly reflected right of individual States to fix the conditions for the grant of nationality to merchant vessels.

It should be noted that in next years ICJ did not changed the approach and with its decisions mostly avoided itself to give real definition to the 'Genuine Link' as when the essence, the main motive and the subject of dispute was exactly the same to determine whether there exists genuine link between the State and ship.

The next case the paper will exercise is IMCO[88] case although Assembly of IMCO with its resolution adopted at its 11th meeting held on 19th of January 1959 decided to request for the advisory opinion of ICJ.[89] There is a notion that closely it has laid the foundation for aforementioned approach. Initially, the Maritime Safety Committee of IMCO was constituted by 14 Members. According to the original article 28(a) of the IMCO Convention, MSC shall consist of 14 members elected by the Assembly, including at least 8 of the largest ship-owning nations.

The article 28 provides that:

"ARTICLE 28 (a)

[86] Muscat Dhows Case, France v Great Britain, Award, (1961) XI RIAA 83, ICGJ 406 (PCA 1905), 8th of August 1905, Hague Permanent Court of Arbitration Available at - http://www.haguejusticeportal.net/index.php?id=6926
[87] R.R. Churchill and A.V. Lowe "The law of the sea"; 3rd edition; 1999, Juris Publishing, Manchester University Press, p. 257
[88] International Maritime Organization (hereinafter referred as an IMO) from 1948 until 1982 known as Intergovernmental Maritime Consultative Organizations IMCO see - http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx
[89] IMCO Case, Advisory Opinion of 8 June 1960 on the Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization, International Court of Justice (ICJ Reports, 1960) p.150, 171.
Available at - http://www.icj-cij.org/docket/files/43/2419.pdf http://www.icj-cij.org/docket/files/43/9239.pdf

The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas[….]."

The question was as to whether or not the Maritime Safety Committee had been elected in accordance with the Article 28 of Convention of the Intergovernmental Maritime Consultative Organization[90] by the IMCO Assembly on 15th of January 1959.

The question basically concerned the interpretation of the article during the composition of the Maritime Safety Committee of the Organization, because at that time largest shipping tonnage flags such as Panama and Liberia were not selected as the members of the Committee. The Assembly elected the United States, United Kingdom, Norway, Japan, Italy, Netherlands, France and Germany as the largest ship-owning nations. The majority of the IMCO Assembly according to Article 28 of the convention for establishment of the organization had felt that these two States' (Panama and Liberia) registered tonnage alone did not qualify them to be considered as largest ship-owning nations, Liberia and Panama seriously objected the inclusion of France and Germany because both Liberia and Panama have larger ship-owing interests than France and Germany. Assembly asserted and argued that there is lack of the 'Genuine Link' between Liberia and Panama and their registered vessels, but ICJ considered differently in comparison with the Assembly by nine votes to five in its advisory opinion of 8th of June 1960, Court stated that exactly the core conditions to be used in electing the largest ship-owning nations in the Maritime Safety Committee has to be made solely according to the registered tonnage, because there was no other practical test for ship-owning nations, and that ships belong to the State in which they are registered and the Assembly had failed to comply with Article 28 (a) of the Convention and the concept of the 'Genuine Link' was irrelevant for answering this issue.

In the light of these findings, ICJ should have considered that it was required to investigate the significance of the 'Genuine Link' as contained in article 5 of the Geneva Convention, which

[90] Convention of the Intergovernmental Maritime Consultative Organization, March 6, 1948 Article 28

was adopted 2 years earlier than ICJ IMCO Case decision. There have not been noticed any assessment of the 'Genuine Link' in this case except, Judge Moreno Quintana, who had observed that:

"the ownership of a merchant fleet […] reflects an international economic reality which can be satisfactorily established only by the existence of a genuine link between the owner of a ship and the flag it flies".

Regrettably, the opportunity was not taken of considering problems arisen from flags of convenience or giving definition to the notion of the 'Genuine Link'.

Another ICJ judgment made on 5th of January 1970 is the Barcelona Traction Case[91] (Belgium v. Spain), which dealt with diplomatic protection and the nationality of corporations. Barcelona Traction, Light and Power Company Limited (hereinafter referred as BTLP) mostly owned by Belgian Companies was utility company, which had its HQ and was incorporated in Toronto, Canada since 1911. BTLP operated light and power utilities in Spain. Spanish government refused to allow BTLP to transfer currency to pay bondholders the interest they were due, as well as took actions against the company. On behalf of Belgian, Belgium sued Spain on the premise that Spain was responsible for acts in violation of international law that had caused injury to the Canadian corporation and its Belgian shareholders. ICJ rejected Belgium's claim and the Court found that Belgium lacked *jus standi* to exercise diplomatic protection on behalf of the Belgian shareholders of BTLP, because such right belongs to the State of incorporation, in this case Canada in whose territory the company had its HQ, in other words Court decided that the 'Genuine link between Belgium and BTLP was not applicable to this case. It is clear that ICJ judgment did not refer the question of the nationality of ships, relevance of this case with the Concept of 'Genuine Link' can be found in the separate opinion of Judge Jessup[92] were he made some references about the 'Genuine Link' concept, he actually proved that the concept of genuine link was common to the nationality of individuals, ships and corporations, and in case of absence of the 'Genuine Link' third States could challenge the grant of nationality. He also assumed that:

[91] Barcelona Traction, Light and Power Company, Limited Case, 2nd phase (Belgium v. Spain), Judgment of 5 February 1970, International Court of Justice (ICJ Reports 1970)
[92] ICJ Barcelona Traction Case - Separate opinion of Judge Philip C Jessup
Available at http://www.icj-cij.org/docket/files/50/5401.pdf

"If a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction and control, other States are not bound to recognize the asserted nationality of the ship…"

Unfortunately, ICJ with the decision on Barcelona Traction Case all over again was unsuccessful to uncover new dimensions.

Second codification of the 'Genuine Link' concept occurred in 1982 UN Convention on the Law of the Sea resulted from the third United Nations Conference on the Law of the Sea (hereinafter referred as UNCLOS III), which took place between 1973 and 1982 In comparison with the travaux préparatoires of the Geneva Convention, the travaux préparatoires of the LOSC shed very little light on 'Genuine Link' concept overall, because the debate over the safety of shipping transferred its focus from open registries to the issue of substandard ships in general. As negotiations shows, it was not necessary to reopen the debate over the 'Genuine Link' in this connection and in 1974 during Second Session UNCLOS III Article 5 of the Geneva Convention was included without any changes in working paper called Main Trends *as* 140 provision.[93] As a result, LOSC as it entered into force on 16th of November 1994,[94] mainly replaced 1958 Geneva Convention herewith Article 91 (1) of the LOSC is identical with Article 5 of Geneva Convention, excluding the following phrase:

"…in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

The requirement for a State to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag is found in both the Geneva Convention and LOSC. However, the provisions are considerably expanded in the LOSC, especially with respect to safety at sea and qualifications of masters and crew

As already mentioned in previous section of this paper article 91(1) speaks of the relationship between the ships and flag States. It indicates how the obligation of result has to be fulfilled by requiring that the flag State maintain a proper connection with the vessel and the interest in the vessel that enables it to exercise effective jurisdiction and control over the vessels flying its flag.

[93] http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_121.pdf
[94] http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm

The notion of a 'Genuine Link' at is one, which the State shall be in a position to sustain before it grants its nationality and shall maintain thereafter.

However, aforementioned wording had not been removed, it can be found in article 94 (1) of LOSC, which elaborates the provisions of the article 10 of the Geneva Convention with further indication of such link between the flag State and ships flying its flag. In light above statements, LOSC sets out the duties of flag State in a greater detail than previous convention. First of all, Article 94 (1) provides that every State is required to "*effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."* But LOSC goes further and prescribes in the subsequent Paragraphs of Article 94 a duty of Flag State to maintain regular inspections upon the seaworthiness of ships, to ensure that crews are properly qualified, to hold investigations into shipping casualties, to effectively exercise jurisdiction and control over their ships, to maintain a register of ships, to take measures to ensure safety at sea with regard to the construction, equipment and seaworthiness of ships, the manning of ships, labour conditions and the use of signals, the maintenance of communications and the prevention of collisions. It elaborates the concept of effective jurisdiction and control by specifying the duties of flag States. *"This corresponds to, and amplifies the general statement of the powers and duties of the flag State and appears to suggest that the observance of this obligation is also relevant to the question of the existence of a 'Genuine Link"*.[95]

Similarly, Article 217 of LOSC sets out the obligation of flag State for the effective enforcement of international rules, standards and regulations irrespective of where a violation occurs. However, flag State cannot exercise jurisdiction over a foreign vessel, which has caused pollution beyond the limits of any State's territorial jurisdiction. Therefore, Article 218 of LOSC embodies port State jurisdiction to close this gap. Furthermore Articles 211, 217 and 222 of LOSC contain more thorough obligations for the flag State concerning the implementation and enforcement of rules with respect to the prevention of the pollution of the marine environment by ships flying its flag. With this LOSC has as well as strengthened the enforcement jurisdiction of coastal States and port States over ships flying the flag of other States. Exceptionally, for the manner of such a "package deal" convention, those Articles dealing with nationality of ships (Article 91), duties of the Flag State (Article 94), pollution from ships (Article 211), enforcement by flag State (Article 217), enforcement by port State (Article 218), enforcement by coastal State

[95] Nordquist, Myron H. et al (eds); United Nations Convention on the Law of the Sea 1982 – A Commentary, Martinus Nijhoff Publishers, The Hague, 1995, Volume III. pp. 108, 144 and 150.

(Article 220) and measures to avoid pollution arising from maritime causalities (Article 221) are of a necessary norm creating character.

Likewise as Geneva Convention, LOSC does not define criteria for establishing the existence of a 'Genuine link' and what is not meant by 'Genuine Link' nor does it specifies what consequences follow in the absence of such a link. LOSC basically refined and reorganized the provisions of the 1958 Convention on this issue. Overall it can be said that in comparison with Geneva Convention, LOSC presented a considerable developments and elaborated framework convention involving many complicated issues.

The call for a definition of the 'Genuine Link" continued' - The limited attention at UNCLOS III to the concept of the 'Genuine Link can be justified with one more factor – the another reason why there was hardly any discussion on the 'Genuine Link' concept in 1974, this issue had been put on the United Nations Conference for Trade and Development (hereinafter referred as UNCTAD) agenda for the further elaboration of the aforementioned concept. UNCTAD contribution in this issue was encouraged by developing States (not having open registries) to increase their share of world tonnage in order to help their economic progress. The UN Conference on Conditions of Registration of Ships, under the auspices of the and UNCTAD held negotiations on the draft of United Nations Convention for Conditions and Registration of Ships[96] (hereinafter referred as UNCCRS) between July 1984 – July 1985 and on 7th of January 1986 a diplomatic conference adopted the UNCCRS. The vast increase in open registry States and their connection with substandard conditions drove the UN to establish strict regulations on ship registration. This convention deals with the concept of the 'Genuine Link' in economic terms. It interprets 'Genuine Link' as an economic connection between the vessel and its flag State. As for 2015 UNCCRS has only 15 State parties and it is not yet in force, because according to the 19 article of the convention it will enter into force 12 months after the date on which no less than 40 States, combined tonnage of which to at least 25 percent of the world tonnage have becoming contracting parties. Unexpectedly 15th member to the convention recently in 2005 became Liberia, which raised glimmer of hope to the future success of the UNCCRS. In any case, the Registration Convention has received extremely few ratifications, and

[96] United Nations Convention on Conditions for Registration of ShipsGeneva, 7 February 1986. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-7&chapter=12&lang=en

has never come into force. As Convention is not in force still it cannot be taken into account while interpreting Geneva Convention and/or LOSC and the open registry status quo remains.

"For the first time an international instruments now exists which defines the elements of the genuine link that should exist between ship and the State whose flag it flies".[97]

The convention attempted to define the mandatory requirements for registration of vessels in a national registry. Apart form the 'Genuine Link' concept provisions include references to an ownership, management, accountability and the role of the flag State.

UNCCRS itself claims that it is an international instrument, which for the first time defines the *'Genuine Link'* that should exist between a vessel and the State whose flag it flies with. Convention was intended to resolve ambiguity, which is around 'Genuine Link' concept. It attempts to deal with the flags of convenience issue. According to the Article 1, it recognizes and strengthens relationship of the 'Genuine Link' and effective control and jurisdiction of the flag State over ships flying its flag with regard to identification and accountability of ship-owners and operators, and to administrative, technical, economic and social matters.

UNCCRS strengthens the implementation of the 'Genuine Link' responsibilities between a State and ships flying its flag.

UNCCRS itself reflects differing aims and interests. Its central feature is the State responsibility for ships. Consequently a prerequisite for registration is a 'Genuine Link' between the flag State and a Ship. Conditions for granting nationality and guarantying effective control and jurisdiction of the flag State are presented in 5-11 articles of the convention. Evaluating those articles, we can say that the Convention is considerably ambiguous due to the use of the language e.g. *'adequate', 'appropriate', 'satisfactory'* and *'sufficient'* in its text.

Under UNCCRS, each Member State is required to have a national maritime administration supervising and co-ordination the administration of shipping and the implementation of international rules concerning shipping. Article 7 of the convention is dedicated to the levels of participation by nationals in the ownership and/or manning of the ships and may be regarded as

[97] UNCTAD Information Unit, UN Doc.No. TAD/INF/1770, 7 February 1986.

the key-enabling instrument to accomplish the aim of the UNCCRS. Nevertheless, by articles 8, 9, and 10 sets out the levels of participation within general parameters and minimal requirements, that is left to the discretion of the parties to define.[98] The UNCCRS adopted requirements concerning the nationality of ownership[99] and crew[100] of ships as an element of registration with the flag State, but the requirements are linked to effective jurisdiction and control, and are not really a stand-alone 'Genuine Link' criterion.

Subsequently, UNCCRS expanded the role of flag States respecting the registration of ships. It adopted the language of LOSC respecting the freedom of navigation and granting of nationality to ships,[101] but also requires a State to ensure that ships flying its flag have, at the very least, a representative who can meet the shipowner's responsibilities in accordance with the laws of the flag State.[102] Requiring an implementing "body" is important, but moves the focus to whether, and to what extent, the national laws in fact implement flag State responsibilities.

The reason for the weak language and optional provisions adopted is that the UNCCRS is the result of a concession between developing States (not having open registries) willing to increase control over their exports, and developed States, now allied flags of conveniences opposing the economic approach to 'Genuine link', this change in the position of some developed States on the issue is to some extent due to the increase of national ship-owners registering their vessels with Flags of Convenience States[103] as for 1985 one third UNCCRS provisions are effective to be familiar with the consequent change of perspective of the international community with regard to the 'Genuine Link' issue since 1950s. The main reason behind the drive for the establishment of strict regulations on registration was the proliferation of open registries, their equation with substandard and hazardous conditions and efforts from developing countries to participate equally in the management of maritime transport. The conclusion is that the convention failed to clarify the most critical issues and reinforced the status quo of open registries. Even if UNCCRS is eventually brought in force it is unlikely that the Convention would result in the elimination of the open registries system, because in the areas of the ownership, manning and management of the ships and/or ship-owners the UNCCRS leaves much

[98] Yvonne Batz "Maritime law – Maritime and Transport Law Library" Third edition. Informa Law from Routledge 2014 p. 84
[99] Article 8 of the UNCCRS
[100] Article 9 of the UNCCRS
[101] Article 1 through 5 of the UNCCRS
[102] Article 10 of the UNCCRS
[103] R.R.Churchill, The Meaning of the "Genuine Link" Requirement in relation to the Nationality of Ships, International Transport Workers' Federation (ITF) (2000) p.14.

of the detailed implementation articles to the discretion of the contracting States, that it would be possible for States to frustrate the object of the 'Genuine Link' articles without contravening their terms.[104]

Therefore in general conventional type of generalization still has not resolved notion of 'Genuine Link'. Codification system was unsuccessful, neither conventions Geneva Convention, LOSC, or UNCCRS gave obvious definition and answers to the questions arisen around this concept.

In addition it is noteworthy to consider one more clear example which shows that the courts are reluctant to give definition to the notion of the 'Genuine Link' between State and a vessel is the 1st July 1999 ITLOS[105] Judgment[106] on M/V "SAIGA" Case (No.2) (Saint Vincent and the Grenadines v. Guinea). By delivering such authoritative decision ITLOS rejected the chance of granting its support to the requirement of a genuine link. The case concerned the arrest of St. Vincent and Grenadine flagged (provisional registration previously registered in Malta) oil tanker M/V SAIGA by Guinean authorities on October 27, 1997 for violation of Guinea's laws. Tanker with Ukrainian officers and crew was owned by a Cypriot company managed by a Scottish one, chartered to a Swiss company used for supplying gas oil to fishing vessels off West Africa. St Vincent and Grenadines argued that the arrest was contrary to international law, Guinea objected, *inter alia*, to the admissibility of such claim because of the absence of a genuine link between the ship and its flag State, further asserting that as a consequence it was not bound to recognize the Vincentian nationality. Tribunal rejected Guinea's objection on the basis that: *"the evidence adduced by Guinea is not sufficient to justify its contention that there was no genuine link between the ship and St. Vincent and the Grenadines at the material time."* and found that there was a genuine link between the ship and the flag State at the time under discussion. It declared that the LOSC provisions of a genuine link are not proposed to challenge

[104] Iain S. Goldrein, "Ship Sale and Purchas" Sixth Edition 2012 p.18
[105] International Tribunal for the Law of the Sea - one of the principal dispute settlement mechanisms established by the United Nations Convention on the Law of the Sea, 1982
[106] The M/V "SAIGA" (No. 2) Case (St. Vincent and Grenadines v Guinea) ITLOS Judgment of 1st of July 1999 Available at - http://www.un.or/Depts/los/ITLOS/Saiga_cases.htm

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the registration and granting of nationality of ships, but to secure more effective exercise of jurisdiction and control of the flag State.

The Tribunal interpreted that: "the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States. " the judgment affirms that the 'Genuine Link' is not precondition for registration of a vessel although it serves to guarantee the effective exercise of jurisdiction and control of the flag State over the ship.

The Tribunal also noted that there is nothing in article 94 of LOSC to permit a State, which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State:

"… there is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State…. The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States."[107]

From my point of view ITLOS judgment could be seen as qualifying the relevance of the Nottebohm doctrine regarding ships nationality. The interpretation of the ITLOS appears to be pragmatic, but is feared to have diminished the very meaning of the genuine link intended by the draftsmen of the LOSC. It seems that for ITLOS 'Genuine Link' actually means the exercise of jurisdiction and control by flag State under Article 94 of the LOSC.

The 'Genuine link' formula, as the direct approach against the flags of convenience, has not worked as well as expected. However all these shortcomings open up the profitable business of these kind of flag States at the cost of maritime safety and environmental protection.

[107] The M/V "SAIGA" (No. 2) Case (St. Vincent and Grenadines v Guinea) ITLOS Judgment of 1st July 1999 p.26 Para 82. Available at - https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf

In 1992 IMO recognized that something was superficial need to have done to improve the standard of flag States implementation. In order to measure such performance, and to tight application of generally accepted international regulations, International Maritime Organization decided to establish a new Sub Committee on flag State Implementation (hereinafter referred as FSI) as for today it is renamed and is called Sub Committee on Implementation of IMO Instruments (hereinafter referred as III Sub Commitee). In consequence, the indirect approach has been increasingly employed by encouraging flag States to implement international standards on the one hand and strengthening coastal/port State competence on another. By taking such measures, the flag States are required to conform to generally accepted international regulations, procedures and practices whereby some related conventions and protocols of the IMO and the ILO are meant.

Moreover, in June 2002 at 88th session of the IMO Council, the nineteen member States proposed the development of and IMO model Audit Scheme by the recommendations submitted by an aforementioned Sub-committee. In December 2004 IMO by its resolution A.946[108] (23), approved the establishment of Voluntary Member State Audit Scheme described that is a tool to achieve harmonized and consistent global implementation of IMO standards. It aims to determine the extent to which member States give full and complete effect to their obligations and responsibilities contained in a number of IMO treaty instruments provide and are. The audit of all Member States will become mandatory from 1 January 2016.

In 2003 General Assembly by its resolutions 58/240[109] and 58/14[110], invited the International Maritime Organization and other relevant agencies to study, examine and clarify the role of the 'Genuine link' in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels. In response to these requests, IMO convened an Ad Hoc Consultative Meeting of senior representatives of international organizations on the subject of the 'Genuine Link', which met at IMO headquarters on 7 and 8 July 2005. On 23 June 2006 by its letter the Secretary-General of the International Maritime Organization addressed the United Nations Secretary-General and provided the report of the Ad Hoc Consultative Meeting of senior representatives of international organizations on the 'Genuine Link' in the report it was noted

[108] IMO A23/res.946 Feb. 25, 2004. Available at: http://www.imo.org/blast/blastDataHelper.asp?data_id=27122&filename=A946(23).pdf
[109] UN A/RES/58/240 Dec. 23, 2003. para.28 Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/58/240
[110] UN A/RES/58/14 Nov. 24, 2003. para.22 Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/58/14

that it was not within their competence to provide a definition of the term 'Genuine Link'. In their view, this was a matter to be determined by States and international and domestic courts and tribunals on the basis of provisions contained in the LOSC and other applicable international instruments. The organizations considered that the question of the role of the 'Genuine Link' under the LOSC is a different question and is directly related to the issue of the effective exercise of flag State obligations. The Meeting also noted the introduction by IMO of the Voluntary IMO Member State Audit Scheme. [111]

The right for States to confer their flag to a vessel is therefore unconditional. However, it is not unlimited, consequently on 27th of February 2014 United Nations General Assembly with its 68/70 Resolution, [112] reaffirmed and further defined necessity of effective administration of merchant fleet of any State:

"Urges flag States without an effective maritime administration and appropriate legal frameworks to establish or enhance the necessary infrastructure, legislative and enforcement capabilities to ensure effective compliance with and implementation and enforcement of their responsibilities under international law, in particular the Convention, and, until such action is taken, to consider declining the granting of the right to fly their flag to new vessels, suspending their registry or not opening a registry, and calls upon flag and port States to take all measures consistent with international law necessary to prevent the operation of substandard vessels."

ITLOS once again confirmed existing, obscure situation in its latest 14, April 2014 judgment the M/V Virginia G Case (Panama v. Guinea-Bissau)[113] the dispute concerned the M/V Virginia G, an oil tanker flying Panama flag, which was arrested on 21st of August 2009 by Guinean for carrying out refueling operations for fishing vessels in Guinea-Bissau's exclusive economic zone. The vessel was released after 14 months without imposing any penalty, but the cargo of gas oil was confiscated. Panama therefore claimed reparation for the damages suffered by the Virginia G during 14 months, however Guinea-Bissau counter memorial.[114] In its Judgment, the Tribunal rejected the objections raised by Guinea-Bissau to the admissibility of Panama's claims based on the alleged lack of genuine link between the *M/V Virginia G and Panama*, the

[111] UN A/61/160 Jul.17, 2006. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/61/160&Lang=E
[112] UN A/RES/68/70, Feb. 27, 2014, Para. 146 http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/70
[113] The M/V 'Virginia G' (Panama/Guinea-Bissau) Case, ITLOS Judgment of 14 April 2014, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14.04.14_corr2.pdf
[114] David Joseph Attard, Malgosia Fitzmaurice, Norman A. Martínez Gutiérrez "The IMLI Manual on International Maritime Law: The Law of the Sea" Oxford University Press, 2014, chapter 9.4.2. p.251

nationality of claims and the alleged failure to exhaust local remedies. It is discouraging that the tribunal considered it had "no reason to question" whether Panama exercised effective jurisdiction and control over the tanker Virginia G at a time when the UN General Assembly is admonishing flag States that cannot meet their obligations to exercise effective jurisdiction and control over their vessels, and the International Maritime Organization Assembly seeks to ensure flag States meet their obligations by making the formerly voluntary audit scheme mandatory, ITLOS appears willing to allow flag States to meet their effective jurisdiction and control obligation by reviewing applications, issuing the required documents and technical certificates and delegating annual safety inspections to third parties.[115]

Further examples can be reviewed. e.g. in May 2006 Review Conference[116] on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[117] (further referred as a Fish Stock Agreement) had recommended in it recommendation 32(h)[118] to examine and clarify the role of the 'Genuine Link (which has not been yet clearly defined) in relation to the duty of flag States to exercise effective control over fishing vessels flying their flag. Unfortunately in further review conference held in May 2010 they entirely does not addressed the notion of the 'Genuine Link' as such.[119]

Further more in June 2009 in the Food and Agriculture Report of the Expert Consultation on Flag State Performance it was noted that the:

"Flag States should, prior to registration, make comprehensive enquiries into a vessel's history and its ownership. Vessels with a history of non-compliance should not be registered, unless there is a change of ownership and the previous non-compliant owners have no continuing legal or beneficial interest in the fishing vessel […] The flag State should have the ability to exercise control even when a vessel is at sea. Many open registers do not require individuals (such as the owners of a vessel) to be nationals of their flag State. In such instances, immediate control by the

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[115] UN A/RES/68/70, Feb. 27, 2014, Paras. 113-118.
Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/70
[116] http://www.un.org/depts/los/convention_agreements/review_conf_fish_stocks.htm
[117] The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks Available at: http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm
[118] UN A/CONF.210/2010/INF/1 p.9.
Available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/312/82/PDF/N1031282.pdf?OpenElement
[119] UN A/CONF.210/2010/7. Available at - http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/465/87/PDF/N1046587.pdf?OpenElement

flag State is almost impossible as the owner is of a different nationality, or based in a different jurisdiction, or (more frequently) hidden behind a maze of front companies."[120]

As noted above, the concept of 'genuine link' as it applies to flag States and ships has not been defined in international law or practice, and has come to signify the duty of a flag State to effectively implement its responsibilities. Taken as a whole it should be said that any attempts that have been used over this years on every level or platform in order to finally give globally accepted definition to the notion of a 'Genuine Link' was ineffective. Consequently, global efforts are rather made in defining specific performance requirements for Flag State than trying to define the genuine link in a legally binding way.[121] The uncertainty around the concept of such link undoubtfully mistreats its status and questions the need for its existence.[122]

Recalling H. Meyers's central propositions back in 1970s concerning the 'Genuine Link' is that it 'has been prescribed for the sole purpose of safeguarding the necessary authority of the flag State in the best possible manner'. Without this requirement of necessary authority the concept of nationality of ships is largely a fiction and public order at sea is impossible.[123]

Chapter 2

Maritime Safety as a Core Foundation Stone for International Maritime Organization

Section A

Analysing UN Convention on the Law of the Sea, 1982 in Respect Generally Accepted International Regulations, Procedures and Practices

[120] FAO Fisheries and Aquaculture Report of the Expert Consultation on Flag State Performance. No. 918 p.44
Available at - ftp://ftp.fao.org/docrep/fao/012/i1249e/i1249e00.pdf
[121] Churchill, R .R., Lowe A.V.; The Law of the Sea, 3rd ed., Manchester University Press, Manchester, 1999, p. 257.
[122] Ivane Abashidze, Maritime Safety and Classification Society, Lambert Academic Publishing, 2015. p.15
[123] H. Meyers, op. cit., p. 244. See also H. Meijers EEG op Zee - Vrije Vestiging voor Vissers Deventer, Kluwer, 1973, pp. 48, 53, 249.

In 2012 the international community celebrated the 30th anniversary of the opening for the signature of the one of the humanity's great achievements to have adopted - a universal constitution for the governance of oceans namely United Nations Convention on the Law of the Sea. Entry into force of the LOSC in 1994 reflected the continuing evolution of the rules and regulations governing international maritime trade and travel, while also recognizing the keystone role of freedom of the high seas. Depending on the fact that LOSC like as its preceding Geneva Convention contains merely general kind of legal norms, the provisions which are mainly not self-executing, from where law of the sea is being shaped, in addition includes other treaties, customary international law and national legislation, accordingly this can only be implemented through specific operative regulations in other international treaties such as treaties adopted by *"competent international organization".*

Article 10 of the Geneva Convention stipulates that every State shall take measures for the ships under its flag in order to ensure safety at sea and in taking such measures States are required to conform to *"generally accepted international standards".* The corresponding provision in the LOSC in particular requires conformity of national measures to *"generally accepted international regulations, procedures and practices*".[124]

As a framework Convention, LOSC provides for, and/or mandates the further development of international rules and regulations. Despite global regulation grounded in the international Law of the Sea, furthermore, as stated in its preamble "*Matters not regulated by LOSC continue to be governed by the rules and principles of general international law"*.

If we go deeper LOSC calls on States to establish international rules and standards through: *"competent international organization"* or *"organizations"* or *"general diplomatic conference"*, and to re-examine these rules and standards from time to time as necessary. States are required by LOSC to*"take account of",* "*conform to", "give effect to"* or *"implement"* the relevant international rules and standards, which depending on the context are referred to either as *"applicable international rules and standards"*, "*internationally agreed rules, standards and recommended practices and procedures", "global rules and standards", "generally accepted international rules and standards", "generally accepted international regulations", "applicable*

[124] Article 94(5) of the LOSC

international instruments", or *"generally accepted international regulations, procedures and practices"*.

LOSC tried to incorporate by reference of those existing as well as future instruments to adopted and the Convention is riddled with terms of reference such as 'applicable international rules and standards', 'generally accepted international rules and standard'. There is much uncertainty as to the precise meaning of these rules of reference.[125] Further, the lack of clarity as to the meaning of these terms may give rise to disputes as to where the obligations have been complied with.[126]

Accordingly the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations (hereinafter referred as DOALOS), pursuant to General Assembly Resolution 49/28 of 6 December 1994[127] has prepared the table identifying the obligations of States under the LOSC and other instruments establishing the international standards, rules, regulations, practices and procedures referred to in the LOSC, as part of its going efforts to provide assistance to member States in fulfilling their obligations under LOSC and to contribute to a better understanding of the implications of the LOSC for organizations and bodies both within and outside the UN system dealing with marine affairs within their respective field of competence.[128] The table lists subjects and articles in the sequence in which they appear in the LOSC, together with the corresponding competent organizations.

As far as, nowadays development of world largely depends on international shipping (e.g. global food security is dependent on a safe and secure delivery method etc.), it is characterized by efforts to promote safety, security, and protection of the environment from damage by accident, as well as harmonization and uniformity in international maritime law and standards. Over the years, two aspects relating to technological change in shipping are very evident. The size of ships has become considerably bigger; and ship speed has steadily increased. As world seaborne trade has increased and shipping competition has intensified, bigger ships have been built aimed at achieving economies of scale. Indeed an industry that looks after 90% of the global trade definitely requires a highly disciplined and an organized managing body. Keeping this issue in

[125] AK. J Tan " Vessel-Source Marine Pollution - The Law and Politics of International Regulation. Cambridge University Press, Cambridge, 2006. p.195.
[126] Ibid p.203
[127] UN GA/RES/49/28, Dec 6 1994. Available at: http://www.un.org/documents/ga/res/49/a49r028.htm
[128] Division for Ocean Affairs and the Law of the Sea of the Office of Legal "Law of the Sea Bulletin No. 31" United Nations, New York, 1996. pp. 79-95 Available at: http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE31.pdf

mind, in modern shipping law, the key legislation to comply with is developed and regulated by the International Maritime Organization (hereinafter referred as an IMO), a specialized agency in the United Nations system, in the fields of shipping and the effect of shipping on the marine environment[129], which was formed under the name of Inter-Governmental Maritime Consultative Organization (hereinafter referred as an IMCO) in 1948 during an United Nations Maritime Conference in Geneva held form 19th of February to March 6, which adopted a convention[130] formally establishing IMO. IMO is explicitly mentioned in only one of the articles of LOSC[131]. However provisions in umbrella convention firmly acknowledges IMO by when it refers to the "competent international organization" in singular, which has to adopt international shipping rules and standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution form vessels and by dumping. Bearing in mind the global mandate of the organization in such expression used in LOSC certainly applies exclusively to IMO. IMO instruments, addresses a whole lot of topics. Some of the main ones are navigation, protection of the environment against pollution, trading, military operations, fishing and harvesting minerals.

The scope of work of IMO is precisely described in Article 1 of the Convention on the International Maritime Organization, namely paragraph (a) of the mentioned Article describes: the purpose of the organization is:

"to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article."

IMO mandate is further reaffirmed in the declarations issued by the ratifying States of the IMO Convention, for example, Spain upon ratification clearly indicated, that:

[129] Article 59 of the Convention on the International Maritime Organization.
[130] Convention on Maritime Organization, 1948 (1984 edition). Sales numbers:Reprint: IMO-017A, ISBN 92-801-5001-4; IMO-018C
[131] Article 2 of the Annex VIII of the LOSC

"The Inter-Governmental Maritime Consultative Organization may not extend its activities to economic or commercial questions but must limit itself to questions of a technical character."

Under article 3 (a) of the IMO convention IMO is entrusted with the drafting of the conventions, agreements, of other suitable instruments and with the making of recommendations upon, inter alia, the encouragement of the general adoption of the highest navigation and the prevention and control of marine pollution from ships.

The IMO has its headquarters in London, United Kingdom of Great Britain and Northern Island. Presently, IMO has 171 Member States and 3 Associate Members[132] representing all regions of the world. Organization has 5 regional offices (Côte d'Ivoire, Ghana, Kenya, the Philippines and Trinidad and Tobago). All States are eligible to become Members of the organization.[133] United Nations members are allowed to become members of the organization by joining as a party to the IMO Convention following deposit of the instrument to the Secretary-General of the United Nations. There is an elaborate mechanism for gaining membership for the States, which are not members of the United Nations.[134]

Since 1959, the IMO is exclusively devoted to maritime affairs. Its Main aim is to make a regulating body of international rules and standards that governs the shipping industry. Organizations main task has been to develop and maintain a comprehensive regulatory framework for shipping. Its remit today includes safety, environmental concerns, legal matters, technical cooperation, maritime security and the efficiency of shipping. Therefore it has been providing a forum for cooperation among Governments in the field all kinds shipping engaged in international shipping, it deals with a wide range of issues related to international shipping, in order to enhance maritime safety, security and environmental protection by developing and adopting international rules, highest practicable standards that are followed by all shipping nations.

The IMO - a principle body that prepares international instruments affecting international shipping - acts as secretariat for the most international maritime conventions and facilitates their

[132] Member States http://www.imo.org/en/About/Membership/Pages/Default.aspx last accessed September, 2015
[133] Article 4 of the IMO Convention.
[134] Further see Article 5 of the IMO Convention

implementation through the adoption of respective instruments aimed at facilitating the proper implementation of international rules and standards. Ever since its creation, IMO has been busy in formulating and promoting new conventions and updating existing conventions related to maritime affairs. Since 1959 the main achievements of IMO in its field of competence have been the adoption of more than 50 international conventions and protocols and well over 800 codes, resolutions, recommendations and guidelines relating to these international instruments. Certainly the mentioned factors indicate the wide acceptance and legitimacy of IMO's universal mandate.

The IMO's structure follows the familiar international IGO model, with an Assembly consisting of all member States, a Council elected by the Assembly and a Secretariat, which operates under the direction of the Organization's Secretary-General. Organizations official languages are Arabic, Chinese, English, French, Russian and Spanish), however it has three working languages (English, French and Spanish).

IMO has gone through many structural changes in respect of its institutional framework, nevertheless, the organizational development and reform of IMO is truly remarkable.

Initially, IMO had only four organs: the Assembly, Council, Maritime Safety Committee and Secretariat As for today As for today IMO has seven main bodies concerned with the adoption or implementation of conventions. The Assembly and Council are the main organs, and the committees involved are the Maritime Safety Committee, Marine Environment Protection Committee, Technical Cooperation Committee, Legal Committee and Facilitation Committee as well as secretariat.

Assembly[135] is the supreme, the highest governing body of the organization. It consists of all member States of the IMO.[136] It has a role in the election of other organs, approval of budget, approval of work programme, and overall control of the activities of the organization.[137] This organ has a specific role in recommending Members States' for adoption and amendment of the regulations and guidelines regarding maritime safety, prevention and control of marine pollution from ships and other matters concerning the effect of shipping on the marine environment.[138]

[135] Emphasize added.
[136] Article 12 of the IMO Convention.
[137] Article 15 of the IMO Convention.
[138] Article 15 (J) of the IMO Convention.

However, the Assembly usually passes resolutions cutting across committee lines on the basis of the recommendations from other organs of the organization with specific responsibilities. Recommendations of the assembly are not legally binding. However, it is common that these recommendations are incorporated in national legislation as they are treated as "international standards".

The Assembly's function also includes taking decisions for convening international conference or following any other appropriate procedure for the adoption and amendments of international conventions, one have been developed by the organs of the IMO.[139] It meets once every two years in regular sessions, but may also meet in an extraordinary session if necessary. The Assembly also elects the Council.

Council[140] is the second organ in the IMO hierarchy with an executive functions. There were many amendments regarding membership of the Council. Initially, Council as an executive organ of IMO was mainly dominated by developed maritime States. Like other international organizations IMO Member States are also deeply divided into developed, developing and least developed States. This type of division has existed from the very beginning of the organization. Despite the scope for equal participation in most of the IMO organs[141] developed countries mainly dominate IMO.

At present, the Council consists of 40 members elected by the Assembly. In electing the Council members, the Assembly has to ensure the representation of the following members: ten members with "the largest interest in providing international shipping services"; ten members "with the largest interest in international seaborne trade"; and 20 members with "special interests in maritime transport or navigation" ensuring the representation of all major geographic areas of the world.[142]

The Council is responsible for all the functions of the IMO Assembly between sessions of the Assembly, except making recommendations under article 15 (j) regarding adoption of regulations and guidelines.[143] It is responsible, under the Assembly, for supervising the work of the Organization. It coordinates the activities of the organs of the Organization. The Council is

[139] Article 15 (I) of the IMO Convention.
[140] Emphasize added.
[141] AK. J Tan " Vessel-Source Marine Pollution - The Law and Politics of International Regulation. Cambridge University Press, Cambridge, 2006. p.74.
[142] Article 17 of the IMO Convention.
[143] Article 26 of the IMO Convention.

entrusted with the responsibility of considering budget estimates and work programmes of different IMO organs, and with submitting those to the Assembly.[144] The Council is also responsible for receiving reports, proposals and recommendations from other IMO organs and communicating the same to the Assembly and, if the Assembly is not in session, to the Members for information with comments and recommendations.[145] The Council is empowered to appoint the Secretary-General subject to approval of the Assembly. It is also responsible for appointment of other administrative and technical staff members of the organization,[146] as well as in charge for establishing relationships with other organizations that is subject to approval by the Assembly.[147]

Secretariat[148] is one of the original organs of the IMO that consists of Secretary General and international personnel. Presently, the IMO Secretariat is supported by more than 300 international personnel.[149] Respective Secretariat is responsible for assisting member States and caring out the overall administrative activities of an organization, including record keeping. Secretary-General is the chief administrative officer of IMO.

The committees at IMO have gradually developed to deal with growing issues and complexities surrounding international shipping.

Maritime Safety Committee's (MSC) [150] is the highest technical body of the IMO work concentrates principally around maritime safety and security; its work also has some relevance for the prevention of marine pollution. MSC consists of all Members of the organization.[151] MSC considers any matter concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, logbooks navigational records, marine causality investigations salvage and rescue. The Committee is also required to provide machinery for performing any duties assigned to it by the IMO Convention or any duty within its scope of work, which may be assigned to it by or under any international

[144] Article 21(A) of the IMO Convention.
[145] Article 21(B) of the IMO Convention.
[146] Article 22 of the IMO Convention
[147] Article 25 of the IMO Convention
[148] Emphasize added.
[149] http://www.imo.org/en/About/Pages/Structure.aspx last accessed in September 2015
[150] Emphasize added.
[151] Article 27 of the IMO Convention.

instrument and accepted by the IMO. MSC also has the responsibility for considering and submitting recommendations and guidelines on safety for possible adoption by the Assembly.[152]

Marine Environment Protection Committee (MEPC)[153] is at the forefront of IMO's activities for the prevention of pollution of the marine environment from ships. It also consists of all Member States. Committee is empowered to consider any matter within the scope of the Organization concerned with prevention and control of pollution from ships. In particular it is concerned with the adoption and amendment of conventions and other regulations and measures to ensure their enforcement. It also promotes cooperation with regional organizations in respect of marine environmental matters.[154]

The MEPC was first established as a permanent subsidiary body of the Assembly in 1973 and raised to full constitutional status in 1985.

The MSC and MEPC are assisted in their work by a number of sub-committees, which are also open to all Member States:

- Sub-Committee on Human Element, Training and Watchkeeping (HTW);
- Sub-Committee on Implementation of IMO Instruments (III);
- Sub-Committee on Navigation, Communications and Search and Rescue (NCSR);
- Sub-Committee on Pollution Prevention and Response (PPR);
- Sub-Committee on Ship Design and Construction (SDC);
- Sub-Committee on Ship Systems and Equipment (SSE); and
- Sub-Committee on Carriage of Cargoes and Containers (CCC).[155]

Technical Cooperation Committee (TC)[156] is required to consider any matter within the scope of the IMO concerned with the implementation of technical cooperation projects for which the Organization acts as the executing or cooperating agency and any other matters related to the Organization's activities in the technical cooperation field.[157]

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[152] Article 28 of the IMO Convention.
[153] Emphasize added.
[154] Article 38 of the IMO Convention.
[155] http://www.imo.org/en/About/Pages/Structure.aspx last accessed in September 2015
[156] Emphasize added.
[157] Article 43 of the IMO Convention.

As other committees it consists of all Member States of the IMO, was established in 1969 as a subsidiary body of the Council to facilitate technical cooperation for implementation of IMO instruments and was institutionalized by means of an amendment to the IMO Convention, which entered into force in 1984.

The Legal Committee (LEG)[158], which consists of all Member States of the IMO, is empowered to deal with any legal matters within the scope of the Organization. The establishment of the committee in 1967 as subsidiary body under the IMO Council is linked to the Torrey Canyon oil spill disaster[159]. It was created in order to identify the relevant legal issues surrounding this incident.[160]

The LEG plays an instrumental role in adopting IMO legal instrument. These legal instruments will be discussed in the next Section of the present chapter. The Legal Committee is also empowered to perform any duties within its scope, which may be assigned by or under any other international instrument and accepted by the Organization. The LEG like other Committees of the IMO meets at least once a year.[161]

The Facilitation Committee (FAL)[162] was established as a subsidiary body of the Council in May 1972, and became fully institutionalized in December 2008 as a result of an amendment to the IMO Convention. It consists of all the Member States of the Organization and deals with IMO's work in eliminating unnecessary formalities and "red tape" in international shipping by implementing all aspects of the Convention on Facilitation of International Maritime Traffic 1965[163] and any matter within the scope of the Organization concerned with the facilitation of international maritime traffic. In particular in recent years the Committee's work, in accordance with the wishes of the Assembly, has been to ensure that the right balance is struck between maritime security and the facilitation of international maritime trade.

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[158] Emphasize added.
[159] http://www.itopf.com/in-action/case-studies/case-study/torrey-canyon-united-kingdom-1967/ last accessed in September 2015
[160] R. P. Balkin "The establishment of and work of the IMO Legal Committee. In: Nordquist MH, Moore JN (eds) Current maritime issues and the International Maritime Organization". Martinus Nijhoff Publishers, The Hague, 1999 p. 291.
[161] Article 35 of the IMO Convention.
[162] Emphasize added.
[163] Convention on Facilitation of International Maritime Traffic, opened for signature 9 April 1965, 591 UNTS 265 (entered into force 5 March 1967).

Through its committees and subcommittees, the IMO seeks to facilitate cooperation among the member States on technical and legal matters relating to international shipping. In addition, through its three dedicated "universities," the IMO provides a global forum for teaching and research in international maritime law and policy.[164]

Nowadays IMO's objectives are considered in the following statement:

"The mission of the International Maritime Organization (IMO) as a United Nations specialized agency is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation. This will be accomplished by adopting the highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships, as well as through consideration of the related legal matters and effective implementation of IMO's instruments with a view to their universal and uniform application."

Developments in shipping and other related industries are discussed by Member States at IMO bodies, and the need for a new convention or amendments to existing conventions can be raised there. Adopting of the conventions is the part of the process with which IMO as an international organization is most closely involved. All Governments participate on an equal footing. The majority of conventions adopted under the auspices of IMO or for which the Organization is otherwise responsible fall into three main categories - maritime safety, prevention of marine pollution, and liability and compensation, especially in relation to damage caused by pollution. There are number of other minor conventions dealing with facilitation, tonnage measurement, unlawful acts against shipping and salvage etc.

IMO Convention created room for three types of entities to participate in the IMO law-making process. These are member states (including associate members), inter-governmental organizations as observer organizations, and international non-governmental organizations as organizations with consultative status. Therefore in addition to the Member States, there are two types of observer organization with IMO IGOs and INGOs in total 140 observers.

[164] The IMO established the World Maritime University (WMU) in Malmo, Sweden in 1983 and the International Maritime Law Institute (IMLI) in Malta in 1988. Information available at: http://www.imo.org/en/About/Pages/WMUandIMLI.aspx

Regarding **intergovernmental organizations**[165] the IMO Convention provides that IMO shall cooperate with any specialized agency of the United Nations on matters of common concern.[166] It also presents that organization may cooperate with other intergovernmental organizations whose interests and activities are related to its purpose.[167] These organizations may be specialized organizations from the maritime sector or regional organizations' active in maritime sectors. Intergovernmental organizations work closely with the IMO in the governance of international shipping. For example, the International Labour Organization (hereinafter referred as ILO)[168] has played a seminal role in the establishment of minimum basic standards for seafarers' rights In accordance with these provisions IMO has signed agreements of cooperation with 64 intergovernmental organizations.[169]

The participation of ***international non-governmental organizations (INGOs)***[170] in IMO is much more apparent than many other similar international organizations because they represent a variety of different types of shipping interests. They certainly play an important a role in the IMO law-making process despite not having any voting rights in IMO organs. IMO is empowered to make suitable arrangements after consultation and cooperation with INGOs on matters within the scope of IMO.[171] The contribution of the INGOs to the work of IMO is reviewed periodically by the Council to determine whether the continuance of their status is necessary and desirable.

"IMO is so instrumental to maritime trade and occupies such an important place in the international law of the sea that should it not have existed by now it would have to be created"[172]

The issue of establishing such an organization was arisen long before the LOSC was created and adopted. The problem of setting up competent organization on an international level was discussed in Washington in the end of 19th century at forum related to the exchange of information in and the discussion of mutual problems in the field of international shipping[173] and at the conference held in St. Petersburg in the beginning of 20th century.

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[165] Emphasize added.
[166] Article 60 of the IMO Convention.
[167] Article 61 of the IMO Convention.
[168] http://www.ilo.org/global/about-the-ilo/lang--en/index.htm
[169] See: http://www.imo.org/en/About/Membership/Pages/IGOsWithObserverStatus.aspx last accessed in September 2015.
[170] Emphasize added.
[171] Article 62 of the IMO Convention.
[172] First Edition "The Oxford Handbook of the Law of the Sea" edited by Donald R Rothwell, Alex G Oudeelferink, Karen N Scott, Tim Stephans, Oxford University Press, 2015 p.437
[173] David Joseph Attard, Malgosia Fitzmaurice, Norman A. Martínez Gutiérrez "The IMLI Manual on International Maritime Law: The Law of the Sea" Volume I, Oxford University Press, 2014, p.571

The IMO traces its origins back to the 1926 Vienna Conference of the International Law Association, the United Maritime Authority (established in 1944), the United Maritime Consultative Council (1946), and the Provisional Maritime Consultative Council (1947).

After World War II the United Nations began studying the problem of establishing a permanent intergovernmental organ for the coordination of efforts of the States in the field of shipping.[174]

Afterwards the United Nations Economic and Social Council convened United Nations Maritime Conference, which therein recommended the establishment, through the machinery of the United Nations of permanent shipping organization and adopted IMO Convention in 1948, which entered into force in 1958, and the new organization started its journey. IMCO conveyed its first meeting the following year with 21 member States.[175] According to the article 2 of IMO convention IMCO at that time had and advisory character and was mainly consultative body in charge of producing recommendations to be implemented by the member States through the national legislation. Later at the end of 1970s in the Working Group on Amendments to the IMCO Convention arose the initiative by representative of the Government of the Federal Republic of Germany to change the name IMCO to IMO.[176] The new name became operative on 22 of May 1982. The reason for changing name was not "superficial" during UNCLOS III very first drafts of what was to become the LOSC[177] made it plain that "competent international organizations" would have to take over numerous specific tasks, or at least the implementation of the a range of conventions with technical or maritime aspects they had been framing or would create in the future to serve as models or instruments for implementation of the new rules of the law of the sea. It was, however, much more than a "cosmetic" change of the Organization's name, and the reasons for it reflected IMO's increasingly important role in implementing the developing body of international maritime law. This crucially important role was emphasized in the beginning of 1973s, when the Third United Nations Conference on the Law of the Sea considered a comprehensive restatement of that body of law. Therefore under the LOSC, the IMO has a global legislative entity mandate to further regulate maritime issues on the basis of many of its provisions.

[174] International marine organizations essays on structure and activities: Kamil A. Bekiashev and Vitali V. Serebriakov Martinus Nijhoff, The Hague, 1981 p.39
[175] A. Blanco-Bazan, "IMO - Historical Highlights in the Life of a UN Agency", 6 Journal of the History of International Law 2, 2004, p. 259
[176] IMCO Res. A.358 (IX) adopted in 1975. See also "The New International Maritime Organization and Its Place in Development of International Maritime Law", Journal of Maritime Law and Commerce, Vol.14, No. 3. July 1983, pages 305 to 329.
[177] U.N. Doe. A/CONF.62/W.P.8 1975.

An intense treaty making activity was in progress at IMO well before the UNCLOS III but only after this conference, IMCO had moved from being merely a consultative intergovernmental body to relatively well-established treaty making organization.[178] The Law of the Sea Conference was increasingly willing to delegate responsibilities to IMCO and, on occasion, even conferred upon it the role of a mediator. It is noteworthy that at the end of UNCLOS III deliberations most important IMO treaties had been adopted. Some of them were considered as the "generally accepted". As already emphasized above by the time IMO came into existence, several important international conventions had already been developed. IMO was made responsible for ensuring that the majority of these conventions were kept up to date as well as it was also given the task of developing new conventions as and when the need arose. The creation of IMO coincided with a period of tremendous change in world shipping and the Organization was kept busy from the start developing new conventions and ensuring that existing instruments kept pace with changes in shipping technology. The period of 1973 through 1982 may be considered as the most prolific in the history of IMO. During this period the most important IMO treaties were adopted.[179]

International conventions did exist prior to the formation of the IMO, however there was no international body responsible solely for maritime safety concerns. The League of Nations developed the Convention and Statute on the International Regime of Maritime Ports in 1923. Members to the Convention agreed to allow all ships the freedom to treat ships equally, regardless of the nationality of the ship. This important notion forms the common expectation in international law of equal treatment in maritime ports, and still prevails throughout the IMO.

As for today the most principal IMO treaties are being implemented worldwide by states representing together between 95 and 99 percent of the gross tonnage of the worlds merchant fleet.[180] These conventions will be further and intensely discussed in the next section of this chapter.

The task of the negotiators during UNCLOS III was to prepare a new comprehensive legal order for the oceans which would accommodate and reconcile the many and varied interests in the

[178] A. Blanco-Bazan, "IMO - Historical Highlights in the Life of a UN Agency", 6 Journal of the History of International Law 2, 2004, p.267
[179] Blanco p.278
[180] United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (ICP), 10th Session. "Discussion panel. Implementation of the Consultative Process, including a review of its achievements and shortcomings in its first none meetings" Provisional notes for the oral presentation by Augustin Blanco-Basan, Senior Deputy Director, Legal Affairs, International Maritime Organization (IMO) p.1. Available at: http://www.un.org/Depts/los/consultative_process/documents/10_A.Blanco-Bazan.pdf

oceans.[181] The Secretariat of IMCO actively contributed to the work of the UNCLOS III in order to ensure that the elaboration of IMO instruments conformed to the basic principles guiding the elaboration LOSC. Overlapping or potential conflict between IMO's work and LOSC have been avoided by inclusion of provisions in several IMO conventions which particularly state that their text does not prejudice the codification and development of the law of the sea at LOSC or any current or upcoming claims and legal views of any State with reference to the law of the sea and the nature and extent of flag, port and coastal State jurisdictions.

Adoption of an umbrella convention and the inclusion of the IMO as the *"competent international organization"* responsible further development of international shipping standards, certainly expanded IMO's competence. LOSC became reference for the work of the Organization, it means that the basic jurisdictional framework governing the adoption and implementation of IMO safety and antipollution treaties and recommendations is the LOSC. Moreover after 1994 when LOSC moved from its customary status to that of a treaty in force, IMO instruments rather than simply taking into account LOSC had to conform to its regulations. Herby in all IMO treaties there is an explicit reference to the LOSC as source of obligations for State Parties. IMO undertakes tasks and responsibilities that the LOSC will confer upon the Organization, both expressly and implicitly. It is indeed true that IMO is nowhere expressly named, but many years' discussions and negotiations have brought about a consensus that IMO is in connection with safety of navigation and protection of the marine environment whenever a "competent international organization" is referred to, at least when, significantly, "organization " is used in the singular. Therefore IMO is undeniably the "competent international organization" referred in LOSC in connection with the development of global shipping rules on safety of navigation and prevention of marine pollution.

It also has to be sad that following to the adoption of LOSC the IMO secretariat held consultations with the Office of the Special Representative of the Secretary General of the United Nations and later with the DOALOS in connection with several matters relating IMO's work to the LOSC. The UN General Assembly in its resolution 49/28 paragraph 18, invited the "Competent International Organizations" to assess the implications of the entry into force of the LOSC in their respective fields of competence and to identify any additional measures that might

[181] IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc LEG/MISC.8 30 January 2014.

need to be taken as a consequence of entry into force of LOSC with a view to ensuring a uniform, consistent and coordinated approach to the implementation of its provisions. By paragraph 19 UN Secretary General requested to prepare comprehensive report on the impact of the entry into force of the LOSC on related existing or proposed instruments and programmes for the fifty-first session of the UN General Assembly. Therefore DOALOS established a list of focal points for the law of the sea matters in those competent organizations. Therein IMO Council has considered the significance of the entry into force of LOSC and the specific measures undertaken by the UN secretary-General to maintain appropriate cooperation between IMO and DOALOS including cooperation to assess the implications of the entry into force of the LOSC for the various competent international organizations. Since in many areas the LOSC recognizes IMO as the "competent International organization" and IMO standards are regarded as "generally accepted international standards" the entry into force is also of particular significance for States parties to the LOSC, which are not member states of IMO, or parties to the IMO conventions. The Council stressed out the role of the organization for the UN system and therefore for the LOSC in the field of shipping and its effect on the marine environment 46. However in order to effectively fulfill IMO's role the clear identification was required of the LOSC relevant provisions as well as their relationship to IMO instruments, programmes and activities. IMO secretariat prepared a detailed study of the LOSC in relations to IMO instruments, programmes and activities. Therefore IMO secretariat with the consultations with DOALOS biennially provides a comprehensive overview of the work of the IMO as it relates to the LOSC. "IMPLICATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA FOR THE INTERNATIONAL MARITIME ORGANIZATION"[182] was originally prepared in 1987 and the present version is elaborated in 2014.[183] This paper presents detailed analysis of the relationship of IMO and LOSC it also speaks about their correlation in particular with regard the mandate of an IMO. LOSC as a jurisdictional framework for the development of the IMO conventions is also exercised within this document etc..

Therefore as a specialized agency of the UN, the IMO works closely with the UN Secretariat. Each year, the IMO submits a report to the UN Secretary-General describing its undertakings for the year. The IMO report is appended to the Secretary-General's annual law of the sea report to

[182] Hereinafter referred as an 'IMO Study'.
[183] IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc LEG/MISC.8 30 January 2014.

the General Assembly,[184] and is available for consideration in the annual UN Open-ended Informal Consultative Process on Ocean Affairs and Law of the Sea.[185] The IMO also serves as the depositary for most maritime safety and marine pollution prevention conventions.[186]

Normally the suggestion about drafting and adoption of international instrument is first made in one of the Committees, since these meet more frequently than the main organs. If agreement is reached at the Committee, the proposal goes to the Council and, as necessary, to the Assembly. The drafting and adoption of a convention in IMO can take several years to complete although in some cases, where a quick response is required to deal with an emergency situation, Governments have been willing to accelerate this process considerably. The draft convention, which is agreed upon, is reported to the Council and Assembly with a recommendation that a conference be convened to consider the draft for formal adoption. Before the conference opens, the draft convention is circulated to the invited Governments and organizations for their comments. The draft convention, together with the comments thereon from Governments and interested organizations is then closely examined by the conference and necessary changes are made in order to produce a draft acceptable to all or the majority of the Governments present. The convention thus agreed upon is then adopted by the conference and deposited with the Secretary-General who sends copies to Governments. The convention is open for signature by States, usually for a period of 12 months. Signatories may ratify or accept the convention while non-signatories may accede.

Each convention includes appropriate provisions stipulating conditions that have to be met before it enters into force. These conditions vary but, generally speaking, the more important and more complex the document is, the more stringent are the conditions for its entry into force. Flag States are still in dominance of the IMO, not only during the decision making, but also, more importantly, for the entry into force, implementation and enforcement of international

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[184]Reports of the UN Secretary General available at : http://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm See also Tullio Treves, The General Assembly and the Meeting of States Parties in the Implementation of the LOS Convention, in Stability and Change in the Law of the Sea: The Role of the LOS Convention 55 (Alex G. Oude Elferink ed., 2005)

[185] Following the recommendation of the Commission on Sustainable Development, the UN General Assembly, by its resolution 54/33 of November 24, 2000, established the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS). Consistent with the legal framework provided by the LOSC and the goals of chapter 17 of Agenda 21, the consultative process was established to facilitate the review by the General Assembly of developments in ocean affairs and the law of the sea by considering the annual reports of the Secretary-General on oceans and the law of the sea. The consultative process also identifies areas where coordination and cooperation at the intergovernmental and inter-agency levels should be enhanced. Information available at: http://www.un.org/Depts/los/consultative_process/consultative_process.htm

[186] http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202015.pdf

conventions. IMO conventions often use a specific formula imposing a certain standard for entry into force (x member States with y% of the world tonnage). This can be considered as the main obstacle for some IMO conventions to enter into force promptly. Hence IMO Conventions need to be ratified by Member State governments, along with implementation and enforcement of them in practice. The Organization has no powers in this respect. Therefore the adoption of IMO Conventions by Diplomatic Conferences is only one part of the story.

Under LOSC, member state obligations are clearly determined how they should apply to IMO rules and standards. As observed by the IMO study the following LOSC articles and provisions are of particular relevance in this context:

- "Article 21(2) refers to the "generally accepted international rules or standards" on the "design, construction, manning or equipment" of ships in the context of laws relating to innocent passage through the territorial sea; article 211(6)(c) refers to the "generally accepted international rules and standard" in the context of pollution from vessels; article 217(1) and (2) refers to the "applicable international rules and standards" in the context of flag State enforcement; and article 94(3), (4) and (5) requires flag States to conform to the "generally accepted international regulations, procedures and practices" governing, inter alia, the construction, equipment and seaworthiness of ships, as well as the manning of ships and the training of crews, taking into account the "applicable international instruments";
- Articles 21(4), 39(2), and by reference article 54 refer to "generally accepted international regulations" in the context of prevention of collisions at sea;
- Aarticle 22(3)(a) refers to the "recommendations of the competent international organization" (IMO) in the context of the designation of sea-lanes, the prescription of traffic separation schemes (TSS), and their substitution. In the same context, articles 41(4) and 53(9) provide for the referral of proposals by States to the "competent international organization" (IMO) with a view to their adoption;
- Article 23 refers to the requirements in respect of documentation and special precautionary measures established by international agreements for foreign nuclear-powered ships and ships carrying nuclear or inherently dangerous or noxious substances;

- Article 60 and article 80 refer to the "generally accepted international standards established by the competent international organization" (IMO) for the removal of abandoned or disused installations or structures to ensure safety of navigation (paragraph 3); the "applicable international standards" for determination of the breadth of safety zones; the "generally accepted standards" or recommendations of the "competent international organization" (IMO) where the breadth exceeds a distance of 500 meters (paragraph 5); and the "generally accepted international standards" regarding navigation in the vicinity of artificial islands, installations, structures and safety zones (paragraph 6);
- Article 94(3), (4), and (5), which regulates the duties of flag States, and article 39(2), which concerns the duties of ships in transit passage, refer to the "generally accepted international regulations, procedures and practices" for safety at sea and for the prevention, reduction and control of pollution from ships;
- Article 210(4) and (6) refers to the "global rules, standards, and recommended practices and procedures: for the prevention, reduction and control of pollution by dumping; article 216(1) refers to the enforcement of such "applicable rules and standards established through competent international organizations or general diplomatic conference";
- Article 211 refers to the "international rules and standards" established by "States acting through the competent international organization" (paragraph 1) and "generally accepted international rules and standards established through the competent international organization" (paragraphs 2 and 5) for the prevention, reduction and control of pollution of the marine environment from vessels. Article 217(1) and (2), article 218(1) and (3), and article 220(1), (2) and (3), dealing with enforcement of anti-pollution rules, refer to the "applicable international rules and standards". Articles 217(3) and 226(1) refer to the certificates (records and other documents) required by international rules and standards in the context of pollution control;
- Article 211(6)(a), in connection with pollution from vessels, refers to such international rules and standards or navigational practices are made applicable, through the "competent international organization"- IMO, for special areas;
- Article 211(7) requires such "international rules and standards" to include, inter alia, those relating to prompt notification to coastal States whose coastline or related interests

may be affected by incidents, including maritime casualties, which involve discharges or probability of discharges;

- Articles 219 and 226(1)(c) refer to "applicable international rules and standards" relating to seaworthiness of vessels, while article 94(5) refers to "generally accepted international regulations, procedures and practices" governing seaworthiness of ships."[187]

It is obvious that during this period LOSC created a dynamic opportunity for IMO to develop international regulations over the years, IMO showed a clear indication to make proper use of this scope. As previously deliberated LOSC established jurisdictional rules that set up general terms, therefore in IMOs regulatory conventions are containing technical provisions that lay down the obligations of the contracting parties. Herewith the Law making function of the IMO is extremely complicated and widespread. This includes instruments of "soft law" and "hard law" character. Non-binding instruments are often described by the term "soft law", as opposed to "hard law" which defines binding instruments.[188] The main soft law instruments are resolutions and guidelines, codes, recommendations, however multilateral treaties (hard law instruments) constitute the main legal source in the law of the sea. Recommendations are not legally binding. They do, however, carry considerable moral force as an expression of internationally agreed guiding principles. (Some of these guidelines have the same legal value as the conventions themselves).

The simple approach to make differentiation between soft and hard law is to characterize it as a mandatory or recommendatory - treaty instruments and non-treaty instruments which relate to a plethora of forms. For this reason distinction should be made between the two main types of IMO instruments: on the one hand, the recommendations adopted by the IMO Assembly, the MSC and the MEPC, and on the other the rules and standards contained in IMO treaties. The distinctions between this type of rules are always clear-cut however they frequently have cross-references. The specific form of such application relies to a great extent on the interpretation given by member states to the LOSC to the expressions "take account of", "conform to", "give effect to" or "implement" in relation to IMO provisions. In order to assist States in defining

[187] IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc LEG/MISC.8, 30 January 2014, pp.8-10.
[188] H. Ringbom "*The EU Maritime Safety Policy and International Law*", Leiden, Martinus Nijhoef Publishers 2008. pp.23-24.

criteria that would have helped to identify, which instruments are mandatory for implementation and *vice versa*, IMO decided to establish and promptly established through the MSC special working group to assist deliberations and draw up a list of relevant expressions. As a general rule, it was stated that expressions such as "shall comply with"; "in accordance with"; "taking into account"; "having regard to"; "based on"; were indicative recommendations only. Although some of this documents are regarded by IMO as of equal importance to treaties and to be incorporated by the member States into their national legislation. Formal acceptance of conventions is called ratification. It is very often when a decision is made by a Member State to convert soft law (which in the international domain is a soft law, because it is a recommendation or a resolution) into hard law - by making it part of the national legislation.

By using the term 'rules and standards', these provisions widened the scope of the application of the IMO instruments. The authority that is to be accorded to these rules and standards *vis-à-vis* the enactment of national laws and standards varies in LOSC according to the type of activity being regulated. For example, the IMO Assembly or the MSC or the MEPC may adopt a resolution introducing certain technical rules and standards not included in IMO treaties. According to the IMO study, 'these resolutions are normally adopted by consensus, which therefore reflect worldwide agreement by all IMO Member States. State parties to LOSC are expected to conform to these rules and standards, bearing in mind the need to adapt them to the particular circumstances of each case. Moreover, national legislation implementing IMO recommendations can be applied with binding effect to foreign ships'.[189]

On the other hand, after ratification IMO conventions and protocols are binding to contracting parties like any other legally binding international instruments. However, there is scope for national legislation implementing IMO treaties to apply with binding effect to foreign ships, even if the flag State is not party to a particular treaty. In some instances, port states can require all countries' ships to comply with certain conventions as a condition for entering their ports. This is because these treaties represent generally accepted rules and standards in certain circumstances and is possible where LOSC creates a scope for application of generally accepted rules and

[189] Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.7 (19 January 2012).

standards to foreign ships. The application of IMO conventions should be guided by the provisions enclosed in articles 311 and 237 of the LOSC.

A ship of a particular State throughout its whole life span moves from one jurisdiction to another. This issue is very important in implementing international conventions as a flag, coastal or port State. One of the impressive features of IMO regulations is that once they enter into force they are genuinely applied to ships on a global basis through a combination of Flag State Inspections and Port State Control. The IMO's official position is that:

"while LOSC defines flag, coastal and port State jurisdiction, IMO instruments specify how State jurisdiction should be exercised so as to ensure compliance with safety and shipping anti-pollution regulations".[190]

The general degree of acceptance of these shipping conventions arises mainly from their implementation by flag States, which is strengthened by the fact that, under the principle of "no more favorable treatment", port States which are Parties to these conventions, respectively, are obliged to apply these rules and standards to vessels flying the flag of non-party States. In this regard, LOSC introduced some rules of reference which vary depending on the subject of the rules of reference, particularly with respect to the "generally accepted international rules and standards"

As already highlighted in previous chapter requirements contained in Article 94 of the LOSC that every State *"shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag*" is of paramount for implementation of IMO regulations. Furthermore comprehensive set of references included in the same article to the duty of the flag State to implement generally accepted international regulations are without opposition recognized as IMO shipping rules and standards.

Regarding coastal or port State they may prescribe and enforce some standards contained in particular IMO conventions which has attained 'sufficiently general acceptance', even if the flag State of a particular foreign ship is not a party to that convention. Finally, the country shall ensure that ships flying its flag adhere to similar types of standards contained in some

[190] IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc LEG/MISC.8 30 January 2014 p.12.

international instruments, whether the State is party to those conventions or not. This makes the role of IMO so critically important.

IMO's innovative approach in the international law-making process is not wholly inspired by or governed by LOSC. The principle that a port State can enforce the requirement of an international legal instrument against a foreign ship voluntarily visiting its port has been recognized by IMO legal instruments even before the adoption of LOSC.[191] The 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC) included a provision that a port State party of this convention shall ensure that foreign vessels visiting its port shall have insurance or other security required by this convention.[192] This approach was further expanded in the MARPOL Convention in 1973.[193] This approach initially faced fierce opposition from some States because an international treaty cannot impose obligations on third parties or adversely affect the rights of third parties or non-party States.[194] IMO treaties do not regulate the nature and extent of coastal State jurisdiction. In this regard, the degree to which coastal States may enforce IMO regulations in respect of foreign flagged vessels in innocent passage in their territorial waters or navigating the EEZ is provided by LOSC.

It is important to note that currently technology and techniques in the shipping industry modify very rapidly. As a result, not only new international instruments are required but existing ones need to be kept up to date. Technical rules and standards contained in several IMO treaties can be updated through a procedure based on 'tacit acceptance' of amendments. Through 'tacit acceptance' procedure, process enables amendments to conventions come into force on a date selected by the conference or meeting at which they are adopted unless, within a certain period of time after adoption, they are explicitly rejected by a specified number of Contracting Parties representing a certain percentage of the gross tonnage of the world's merchant fleet. Most of IMO conventions now have a provision for 'tacit acceptance'. "Tacit acceptance" procedure provides that an amendment shall enter into force at a particular time unless before that date, objections to the amendment are received from a specified number of parties. This procedure is

[191] T.A. Mensah "Prevention of marine pollution: the contribution of IMO. In: Basedow J, Magnus U editions Pollution of the sea- prevention and compensation". Springer, Heidelberg, 2007 p. 41.
[192] International Convention on Civil Liability for Oil Pollution Damage, opened for signature 29 November 1969, 973 UNTS 3 (entered into force 19 June 1975) (this convention is being replaced by 1992 Protocol).
[193]International Convention for the Prevention of Pollution from Ships, opened for signature 2 November 1973, 12 ILM 1319 (1973) as modified by the Protocol of 1978 to the 1973 Convention, opened for signature 17 February 1978, 1341 UNTS 3 (entered into force 2 October 1983) (MARPOL 73/78). For most recent version see MARPOL: Consolidated Edition 2011 (IMO, London, 2011) (hereinafter MARPOL 73/78).."
[194] T.A. Mensah "Prevention of marine pollution: the contribution of IMO. In: Basedow J, Magnus U editions Pollution of the sea- prevention and compensation". Springer, Heidelberg, 2007 p.58.

very useful in expeditiously updating technical regulations contained in the IMO conventions. IMO treaties and amendments to those treaties are normally adopted by consensus.

This concept was pioneered by IMO in early 1970s.[195] It was promoted for the reason that many of the initial amendments to the IMO instruments never came into effect because, in most cases, ratification or acceptance of at least two-thirds of the parties was needed. In the beginning, it was very challenging to enforce technical regulations in any IMO instruments. This was although the requirement for rapid change in the technical standard stemming from the emerging maritime safety concerns. This procedure ensured prompt entry into force of technical regulations contained in IMO legal instruments. However, the legality of this procedure has been intensely debated at IMO. The 'tacit acceptance' procedures also created a major contest for least developed countries. Due to lack of resources and technical expertise, it is very difficult for developing countries to keep pace with rapid development in international standards and regulations.

The emerging role of international organizations as "lawmaking" bodies was extensively described in the American Society of International Law study on The United Nations Legal Order.[196] That report distinguishes between the specialized agencies of the United Nations and other international organizations.[197] The authors conclude that some of those specialized agencies, including the IMO, exercise technical amendment powers under the tacit acceptance procedure that can be described as "quasi-legislative."[198] Those quasi-legislative powers can be found in both the LOSC, which assigns functions to "competent international organizations," and in the family of treaties developed under the auspices of the IMO.

The technical and especially the nautical standards adopted by IMO and embodied in various conventions and other instruments are being considered as the yardstick of applicability for many basic provisions of international law and of the limitations on the law-making competence in the maritime field of individual, particularly coastal, States. In various instances, international regulatory competences have been deliberated upon IMO. LOSC prescribes that such laws and regulations shall be adopted in conformity with it and other rules of international law, States may

[195] *Ibid.*
[196] Vol 1 "UNITED NATIONS LEGAL ORDER" edited by Oscar Scachter and Christopher C. Joyner, American Society of International Law, Cambridge University Press, 1995.
[197] L. Frederic Kirgis Jr, "Specialized Law-Making Processes", in Vol 1 "UNITED NATIONS LEGAL ORDER" Edited by Oscar Scachter and Christopher C. Joyner, American Society of International Law, Cambridge University Press, 1995, p. 109.
[198] *Ibid* p.121.

not always be fully aware of the convergence of rights and duties emanating from a number of conventions. Accordingly it is noteworthy to emphasize that the LOSC provides clear endorsement for the important aspects of the work undertaken by IMO in the development of the law of the sea.

Depending on above mentioned IMO's role in the development of the international legal framework is crucial since it is recognized as one of the most successful 'competent international organizations' in developing international law for international shipping.

The IMO's focus has broadened over time. As stated its initial objective was to develop a comprehensive body of conventions, codes and recommendations to improve the safety and security of an international shipping as well as to prevent pollution from ships. Once a number of significant conventions were in force, the IMO moved its focus on promoting, monitoring upgrading and implementing these instruments.

As it was said by Rudiger Wolfrum it is obvious that:

"The relationship between the UN Convention on the Law of the Sea and the IMO is not static but, rather, dynamic. The Convention establishes a legal framework for States (flag States, port States and coastal states) and international organizations to fill. The IMO has made use of this opportunity most effectively. It was particularly successful in designing its decision-making process in a manner, which allowed it to exercise prescriptive powers and to respond effectively and flexibly to the current challenges of marine safety and protection of the marine environment."[199]

Therefore IMO is the global standard-setting authority for the safety, security and environmental performance of international shipping. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented that serves for safe, secure and efficient shipping on clean oceans.

[199] R. Wolfrum "IMO interface with the Law of the Sea Convention. In: Nordquist MH, Moore JN editions Current maritime issues and the International Maritime Organization". Martinus Nijhoff Publishers, The Hague, 1999, p.223.

Section B

IMO Maritime Safety Instruments and their Respective Role in Organizing International Maritime Transport

The international nature of maritime navigation makes it imperative to adopt global standards in order to ensure maritime safety. For hundreds of years the high seas have furnished a way to safety for those in fear of their lives, and a gateway for others desperately in search of a better life. Widespread concern about the need for global action for protection of shipping is a relatively recent experience. General public awareness of the dilemma concerning to safety of shipping, navigation and the need for harmonized multilateral action to address these problems was not evident even a few decades ago. With the wider dissemination of information relating to the ever-increasing challenges, international concern has matured increasingly over the being. Some inter-state efforts to address problems relating to the oceans date back to the nineteenth century, but many problem areas relating to the shipping remained to be addressed. These early international efforts were reasonably uncoordinated. Consequently during the centuries the sea has been always considered a potentially hazardous and dangerous working environment. Today, following the significant changes that took place in international trade and transport, ship operators face new factors as well as pressures. The structure of the global marketplace requires that goods and materials be delivered not only to the geographical location where they are required, but also within a very precise timeframe. Goods in transit are carefully factored-in to the supply chain and, as therefore, the transportation industry, which embraces both shipping and ports, has become a key component of a manufacturing sector which sets its store by providing a complete "door-to-door" service.

"maritime law is a complete legal system, just as the civil law and the common law are complete legal systems. Maritime law incidentally is much older than the common law and probably contemporaneous with the advent of the civil law. That maritime law is a complete legal system can be readily seen from its component parts. For centuries maritime law has had its own law of contract - of sale (of ships), of service (towage), of lease (chartering), of carriage (carriage of goods by sea), of insurance (marine insurance, being the precursor of insurance ashore), of agency (ship chandlers), of pledge (bottomry and respondentia), of hire (of masters and seamen), of compensation for sickness and personal injury (maintenance and cure) and risk distribution (general average), etc., etc. It is and has been a national and an international law (probably the

first private international law). It also has had its own public law and public international law."[200]

International maritime law, which relates to matters associated to the distribution and exercise of rights, duties and obligations by the States, as well as a legal affairs between States and individuals, and/or among States, mainly may be grouped into three categories, explicitly maritime safety, marine pollution prevention and maritime security.

As previously stated, during the second half of the last century, considerable progress had been made in harmonizing public international maritime law through inter-governmental organizations. The rights and duties of flag States, port States and coastal States have been embodied in various international regulations or conventions adopted by "competent international organizations".

In order to understand international maritime law, it is essential to have a basic grasp of general international law, because it is apparent that International maritime law is a subset of general international law.

An international law in general has been developing over a long period of time. The principal judicial organ of the United Nations, the International Court of Justice by the very nature of its functions, played and plays a significant task in the development of international law.

ICJ Statute[201] by its jurisdiction, specifies that it:

"...comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force..."[202]

The United Nations' Charter further stipulates that all members of the United Nations are ipso facto parties to the ICJ Statute[203]. Besides decisions, the ICJ is authorized to render advisory opinions on any legal question, when requested by the General Assembly or the Security Council. Other organs of the United Nations and specialized agencies may also request advisory opinions of the ICJ on legal questions arising within the scope of their activities, when authorized by the United Nations General Assembly.[204] Accordingly, the sources of law relied

[200] Q.C. William Tetley, "Maritime Law as a Mixed Legal System (with particular reference to the distinctive nature of American Maritime law, which benefits from both its civil and common law heritages)" 1999.
[201] Charter of the United Nations and Statute of the International Court of Justice San Francisco 1945. Available at: https://treaties.un.org/doc/publication/ctc/uncharter.pdf
[202] Aticle 36(1) of the Statute of the International Court of Justice.
[203] Article 93 of the Statute of the International Court of Justice.
[204] Article 96 of the Statute of the International Court of Justice.

upon by the ICJ are pertinent when examining the sources of international law and, consequently, the international maritime law.

The Statute of ICJ sets out the following sources of international law – the ICJ may rely upon to determine the law applicable to a case brought to its attention: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for determination of rules of law.[205] The sources listed in the first paragraph of the present article are regarded as the authoritative sources of international law, and thus also of international environmental law.

The Statute establishes a practical hierarchy of sources of international law in settling of disputes.[206] First, relevant treaty provisions applicable between the parties to the dispute shall be employed. In the event that there are no applicable treaty provisions, rules of "customary international law" should be applied. If neither a treaty provision nor a customary rule of international law can be identified, then reliance should be placed on the general principles of law recognized by civilized nations. Finally, judicial decisions and writings of highly qualified jurists may be utilized as a subsidiary means of determining the dispute. It is important to remember that in many cases, due to the absence of any unambiguous rules, the ICJ has had to rely on multiple sources.

Today, treaties are the major mechanism employed by states in the conduct of their relations with each other. They provide the framework for modern international relations and the main source of international law. A treaty is binding only among its parties. The starting point for determining what constitutes a treaty is to be found in a treaty itself, called the Vienna Convention on the Law of Treaties[207] (herein after referred as a 1969 Vienna Convention), in other words it is a treaty on treaty law. It was concluded in 1969 and entered into force in 1980. Whilst as for 2015 United Nations has 193 Member States,[208] the Vienna Convention has only 114 parties.[209] Although the 1969 Vienna Convention is not a treaty with global participation, it is widely acknowledged that many of its provisions have codified existing customary

[205] Article 38 (1) of the Statute of the International Court of Justice.
[206] Article 38 of the Statute of the International Court of Justice
[207] N.18232 Multilateral Vienna Convention on the Law of Treaties (with Annex). Concluded at Vienna on 23 May 1969 Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf
[208] Data available at http://www.un.org/en/members/growth.shtml
[209] https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

international law. Other provisions may have acquired customary international law status. Since customary international law and treaty law have the same status at international law, many provisions of the Vienna Convention are considered to be binding on all states.

1969 Vienna Convention defines a treaty as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[210] Accordingly, the designation employed in a document does not determine whether it is a treaty. Regardless of the designation, an international agreement falling under the above definition is considered to be a treaty.

The term "treaty" is the generic name that encompasses, among others, the terms convention, agreement, pact, protocol, charter, statute, covenant, engagement, accord, exchange of notes, modus vivendi, and Memorandum of Understanding. As long as an instrument falls under the above definition, it would be considered to be a treaty and, therefore, binding under international law. International organizations are also recognized as capable of concluding treaties, depending on their constituent instruments.

Even though the sources of international law are not hierarchical, treaties gain some degree of primacy among the sources of international law. Treaties serve different purposes. Some treaties have far reaching political impact. Others though less political involve relationships between governments or government agencies and affect private parties. Realty is formed by the express consent of its parties. A treaty's text may permit some reservations, thus allowing a greater number of States to enter into a treaty at the sacrifice of certain objectives and purposes of the treaty.

As already affirmed LOSC as a main international maritime convention is a legal and political confirmation to the regulatory regimes. Accordingly Member States are required to cooperate at the global, and as appropriate, on a regional basis, directly or through 'competent international organizations', in formulating and elaborating international rules, standards, regulations, practices and procedures, while providing the principles on which action should be based.[211] The LOSC generally recognizes two forums for developing complementary international agreements:

[210] Article 2(1a) of the Vienna Convention on the Law of Treaties.
[211] Article 38 of Statute of the International Court of Justice

diplomatic conferences and "competent international organizations" [212] this are standing international organizations that offer their participating members institutional expertise, a professional secretariat and the benefits of longer term relationships among the diplomatic and technical delegates. It also provides a forum for periodically reassessing the legal regime, monitoring their implementation and compliance, and developing appropriate responses.

The above-mentioned concept made a limited appearance in the Geneva Convention. However it plays a much superior role in the LOSC. As stated in previous chapter LOSC makes references to the Competent International Organization using the singular form[213] and in other places the plural form, [214] but never including a definition of the phrase. Over the years, several organizations have sought to define this term. The IMO Study was first issued in 1986, provides a detailed discussion on the role of such an organization.[215] The Law of the Sea Committee of the International Law Association's American Branch proposed a series of definitions for the relevant "Competent International Organizations", which vary according to the article in which the phrase is used.[216] For example, the committee proposed that, as used in article 22 (sea lanes and traffic separation schemes in the territorial sea), article 41 (same, for international straits), and article 60 (standards relating to abandoned structures in the Exclusive Economic Zone, or EEZ) of the LOSC the relevant "Competent International Organization" is the IMO[217] and etc.

Nowadays the primary challenge in maritime world is to protect all elements of the maritime domain in order to ensure safe and secure use of the sea. Since the ratification of LOSC, it is obvious that international shipping has increased dramatically. According to scholars, the LOSC places an obligation for States with respect to two spheres namely: safety of navigation and protection of the marine environment.[218] LOSC is already complemented by a number of legal instruments. As a consequence cooperation among States has over the past thirty years led to the adoption of a significant number of global and regional instruments. These international regulations are elaborated to be followed by every shipping nation in order to ensure improvement of maritime safety and marine environment.

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[212] Article 211 of the LOSC
[213] Articles 41, 53, 211, 217–218, 223 of the LOSC.
[214] Articles 197–202, 204–208, 210, 212–214, 216, 222, 242, 244, 266, 268, 275, 278. of the LOSC.
[215] IMO Doc. LEG/MISC.1 1986
[216] George K. Walker, Defining Terms in the 1982 Law of the Sea Convention IV: The Last Round of Definitions Proposed by the International Law Association (American Branch) Law of the Sea Committee, 36 CAL. W. INT'L L.J. 2005 p. 133
[217] Rule 10 of the COLREGS which makes mandatory compliance with traffic separation schemes.
[218] P. Boisson, "Safety at Sea: Policies, Regulations and International Law", D. Mahaffey, Trans, Paris: Bureau Veritas, 1999. p.156.

Depending on the ideas declared above Maritime safety is certainly, one of the main concerns of LOSC. However during the 20th century the identified need for standardization in the maritime processes guided to the increased level of the safety measures therefore number of International Organizations has been established aiming to create a regulatory framework for maritime transport.

Following the above stated and taking into consideration the global character of maritime transport as well as the significant number of increasing maritime safety concerns leads to the demand for creation of a permanent international maritime body – IMO by the shipping nations in the last decade of the nineteenth century. The main activities and tasks of IMO since its establishment have been to develop and maintain a comprehensive regulatory framework for international shipping. Its mandate was originally limited to safety-related issues, but very soon it has been expanded to include other issues closely interrelated with shipping such as environmental, legal matters, technical co-operation and many topics affecting the overall efficiency of shipping. Herewith IMO remit, through its founding Convention, relates to maritime transport, safety of shipping and prevention of marine pollution.

IMO instruments itself are divided in several groups, the first group is concerned with maritime safety; the second with the prevention of marine pollution; and the third with liability and compensation, especially in relation to damage caused by pollution. Outside these major groupings there are a number of other conventions dealing with facilitation, tonnage measurement, unlawful acts against shipping and salvage. Particularly to clearly understand the law-making competence of IMO it is pertinent to consider the context of the maritime safety law-making process. The actors who influence this process are various, including both state and non-state actors.

As already pointed out, in general, maritime sector has the biggest share in global transportation. From the very beginning, this movement or commerce has always been a very profitable business and source of income and has engaged the concern of the international community since its inception.[219]

[219] A.Y. Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of *Law* Slavery and the Slave Trade under Customary International Law', 39 *Virginia Journal of International*, 1999, p. 303.

The volume of maritime trade is therefore expected to increase significantly as the world economy and population continues to expand. Without cost efficient maritime transport, the movement of raw materials, energy in bulk to wherever they are needed, the transport of manufactured goods and products between the continents, which are the prerequisites for growth and development would simply not be possible. Maritime transportation itself obviously brings out various related risks. The unpredictability of the weather and the vast power of the sea make it clear that for centuries people have considered shipping as a high-risk industry and seafaring as one of the most dangerous occupations worldwide. It means that, ship-owners, governments and others have been concerned for years about the safety of ships, their crews, cargoes and passengers.

Maritime safety certainly affects everyone, from blue-collar factory workers and school children, to journalists and company chief executives. The global population depends on a safe and efficient shipping trade network for modern day living to continue unchecked. As far as Maritime Safety is principally concerned with ensuring safety of life at sea, safety of navigation and the protection and preservation of the marine environment, the shipping industry has a predominant role in that regard: vessels must be safely constructed, regularly surveyed, appropriately equipped and adequately manned. The crew must be well trained, cargo must be properly stowed and an efficient communication system must be on board.

In order to regulate and avoid risk factors, maritime is differentiated in two diversions - maritime safety and maritime security. For the purposes of present work maritime safety in general needs to be distinguished from maritime security because it is very often when these two terms are confused.

The IMO has addressed questions of maritime safety and security under MSC since the 1980th. In this context distinction has been drawn between maritime safety and security.[220]

Safety obviously serves for prevention or minimization of accidents in oceans and at seas. Maritime world often uses safety at sea and/or maritime safety, this term in both contexts is the material state resulting from the absence of exposure to danger, and the organization of factors intended to create or perpetuate such a situation.[221]

[220] Klein, Natalie; *Maritime Security and the Law of the Sea*, Oxford University Press, Oxford, 2011, p.8.
[221] P. Boisson, "Safety at Sea: Policies, Regulations and International Law", D. Mahaffey, Trans, Paris: Bureau Veritas, 1999. p.31.

Maritime safety is the combination of preventive and responsive measures intended to protect the maritime domain against, and limit the effect of, accidental or natural danger, harm, and damage to environment, risks or loss.[222]

Security along with safety stands for the protection against unlawful and deliberate acts that occur in oceans and seas. It is the combination of preventive and responsive measures intended to protect the maritime domain against threats and intentional unlawful acts.[223]

Maritime safety is a broad concept. It includes measures affecting everything from worldwide transport systems to the individual seafarer. An appropriate starting-point for creating a good maritime safety culture is the insight that a high level of maritime safety will always be profitable.

Lately, there has been increasing concern about marine causalities. Marine accidents bear's significant risk for human lives and economic interests together with environmental impact. This is illustrated clearly by the fact that although various governments and the shipping industry have made significant and continuing efforts to improve the situation of safety at sea, serious maritime accidents have occurred from time to time and such examples are unfortunately frequent. Accordingly various incidents have proved that it has been not only devastating but also permanent. As a consequence, safety and efficiency have become two sides of the same coin: accidents are not only undesirable outcomes in themselves; they also have a negative impact on the supply chain that is at the heart of the new global economy. The enormous loss of lives and properties, and the damage to the environment have made it clear that safety of ships have to be given top priority of consideration in the shipping industry. Therefore decreasing risks in maritime transportation can be considered in two main parts. One is the safety of ships and seas, the other part would be maritime safety in ports and coasts – that is safety related not to the condition of ships but to their movement and navigation in areas with dense maritime traffic.

Safety at sea has very deep roots and exists as long as navigation over the water has been invented by the human being and has been advancing throughout the centuries together with the development of sea borne trade. Primitive water tight floating objects, due to their resilient nature to sustain and float over the water, can be described as the very first steps towards the development of technology which would enable a human being to use the sea for concrete

[222] Lutz Feldt, Dr.; Peter Roell, Ralph D. Thiele; ISPSW Strategy Series: "Focus on Defence and International Security Maritime Security Perspectives for a Comprehensive Approach", Issue No. 222, 2013, p. 2.
[223] Ibid.

purposes, such as trade, war, etc. However, since the earliest times, navigation at sea has always been synonymous to, what in modern day world is described as maritime perils.[224]

Necessity of advanced safety has always been influenced in the wake of accidents and disasters,[225] resulting in the development of understanding of sea by the human and evolving new standards and regulations reflecting safety of life, ship and the cargo. It may be said, that due to the quite primitive nature of the craft used in navigation during the ancient times the gravity of disaster was relatively smaller. However, it was extremely dangerous and insecure.[226] Consequently, from the ancient times maritime safety, regardless of its official recognition as a term, was not distinguished from maritime security and the perils of the sea was broader in a sense that it was including piracy as part of navigational or maritime safety.

The most authoritative ancient source in regards maritime safety Lex Rhodia periculum mares[227] are common to all those who take part in the maritime venture.[228]

In the early stage of shipping practice with sailing vessels, it was a common assumption that little could be done to make shipping safer. It was not until the beginning of the nineteenth century when the first steam engine was used on the vessel "Charlotte Dundas"[229] that the fatalistic attitude towards safety began to change. Along with the industrial revolution of the nineteenth century, more and more efforts have been made to ensure the safe delivery of passengers and cargoes by sea. Especially second half of the twentieth century made the shipping industry increasingly safe because of the changes that have taken place in shipping regulation and management internationally and nationally. Today international shipping may be considered as the safest, most efficient and most environmentally friendly means of transportation.

It has always been recognized that the best way of improving maritime safety at sea is by developing international rules, regulations and standards. Among other the following conventions are significant international instruments elaborated by IMO in regards maritime transport safety:

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[224] P. Boisson, "Safety at Sea: Policies, Regulations and International Law", D. Mahaffey, Trans, Paris: Bureau Veritas, 1999. p. 45.
[225] Ibid
[226] Ibid
[227] Maritime peril
[228] Gofas, Dimitri C., The Lex Rhodia De Iactu, in Nordquist, Myron H. (ed.) Moore, John Norton (ed.), Entry Into Force of the Law of the Sea Convention, Martinus Nijhoff Publishers, The Hague, 1995, p. 34.
[229] T. Rinman and R. Brodefors, "The commercial history of shipping", Gothenburg, Sweden, Rinman and Linden AB, 1983, p.25

- International Convention for the Safety of Life at Sea (SOLAS), 1960 and 1974 as amended, Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT (amended) 1978) and Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS PROT (HSSC) 1988);
- International Convention on Load Lines (LL), 1966 and Protocol of 1988 relating to the International Convention on Load Lines, 1966 (LL PROT 1988);
- Convention on Facilitation of International Maritime Traffic (FAL), 1965;
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978 (as amended);
- International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 1995 (STCW-F)
- International Convention on Maritime Search and Rescue (SAR), 1979;[230]
- Convention on the International Regulations for Preventing Collisions at Sea (COLREG), 1972 as amended;
- The International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE 1969).
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), 1988, and Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf (and the 2005 Protocols);
- Convention on the International Maritime Satellite Organization (IMSO), 1976;
- The Torremolinos International Convention for the Safety of Fishing Vessels (SFV), 1977, superseded by the The 1993 Torremolinos Protocol; Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol relating to the Torremolinos International Convention for the Safety of Fishing Vessels;
- Special Trade Passenger Ships Agreement (STP), 1971;

[230] United Nations, Treaty Series, vol. 1405, No. 23489

- International Convention for Safe Containers (CSC), 1972.
- From the listed conventions IMO itself prescribed some of them as mandatory IMO instruments hereby for the purposes of present document only those conventions that are prescribed as mandatory will be discussed.
- It may be said that the international legal framework that protects life at sea mainly comprises of three international legally binding instruments; the LOSC, SOLAS and SAR together with their various annexes and resolutions. This framework imposes obligations on State Parties. According to Art.21(2) coastal States may issue laws and regulations relating to innocent passage in the territorial sea, however, such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to "generally accepted international rules and standards...". The generally accepted international rules and/or standards in this paragraph are basically contained in the SOLAS as well as in LL Conventions.
- LOSC restates long-standing maritime duty and tradition, which was firstly codified in 1910s. More than 100 years have passed since the loss of the RMS Titanic (April 1912), therefore the maritime industry has worked steadily to improve safety performance and specifically the International Convention on Safety of Life at Sea, also known as SOLAS, which is IMO's basic forum dealing with maritime safety firstly adopted way back in 1914 in response to the famous Titanic disaster. The main source of legislation regarding navigation and in a more general view maritime safety is SOLAS, 1974 as amended. SOLAS convention in its successive forms is generally regarded as the most important of all international treaties concerning the safety of merchant ships. Since its first adoption SOLAS has been regarded as the most important treaty dealing with maritime safety for shipping nations. The first version suggested the minimum number of lifeboats and other emergency equipment required to be maintained by merchant ships. The second and third versions of the treaty were introduced in 1929 and 1948 respectively. A conference convened by the IMO in 1960 adopted new SOLAS to replace an earlier instrument. The convention covered a wide range of measures designed to improve the safety of shipping, including subdivision and stability; machinery and electrical installations; fire protection, detection, and extinction; lifesaving appliances; radiotelegraphy and radiotelephony; safety of navigation; carriage of grain; carriage of dangerous goods; and nuclear ships. A new convention, incorporating amendments to the 1960 agreement, was adopted in 1974

and entered into force in 1980. The SOLAS convention was updated with the SOLAS Protocol of 1978, which entered into force in 1981, and with the SOLAS Protocol of 1988, which entered into force in February 2000. In recent years amendments have become more frequent, it is in response to developments in technology as well as it is an answer to the partly in response to major shipping casualties. The last amendment was carried out on 22 May 2014 that will enter into force on 1st of January 2016.[231]

The number of very serious accidents that occurred during the late 1980's was manifestly caused by human errors, with management faults also identified as contributing factors. At its 16th Assembly in October 1989, IMO adopted resolution[232] Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention. The purpose of these Guidelines was to provide those responsible for the operation of ships with a framework for the proper development, implementation and assessment of safety and pollution prevention management in accordance with good practice.

The Guidelines recognized the importance of the existing international instruments as the most important means of preventing maritime casualties and pollution of the sea and included sections on management and the importance of a safety and environmental policy.

After some experience in the use of the Guidelines, in 1993 IMO adopted the International Management Code for the Safe Operation of Ships and for Pollution Prevention (hereinafter referred as the ISM Code).

Through SOLAS Chapter IX "Management for the Safe Operation of Ships" the ISM Code was made mandatory in November 1993. It came into force on 1 July 1998.[233] The objective was to ensure safety, to prevent human injury or loss of life, and to avoid damage to the environment, in particular, the marine environment, and to property. The Guidelines were based on general principles and objectives so as to promote evolution of sound management and operating practices within the industry as a whole. Implementation of the ISM Code is obligatory in all the Member States.

[231] IMO, document MSC. 365(93)
[232] IMO, Assembly Resolution A.647(16)
[233] IMO, Assembly Resolution A.741(18).

In 1994, IMO adopted the International Code of Safety for High-Speed Craft (hereinafter referred HSC Code)[234], which was developed following a revision of the Code of Safety of Dynamically Supported Craft.[235]

Also in 1994, IMO adopted a new SOLAS chapter X - Safety measures for high-speed craft, which makes the HSC Code mandatory high-speed craft built on or after 1 January 1996. The Chapter was adopted in May 1994 and entered into force on 1 January 1996.

The HSC Code applies to high-speed craft engaged on international voyages, including passenger craft which do not proceed for more than four hours at operational speed from a place of refuge when fully laden and cargo craft of 500 gross tonnage and above which do not go more than eight hours from a port of refuge. The Code requires that all passengers are provided with a seat and that no enclosed sleeping berths are provided for passengers.

During 1992 and 1993, the Legal Committee and an ad hoc informal working group reporting to the Committee considered legal issues regarding the adoption of mandatory ship reporting to vessel traffic services (hereinafter referred as VTS), bearing in mind the basic framework established by LOSC. These deliberations paved the way for the adoption of a new SOLAS regulation on mandatory ship reporting.

General principles for ship reporting systems and ship reporting requirements are contained in IMO resolution. [236] It contains guidelines for establishing VTS, including guidelines on recruitment, qualifications and training of VTS operators.

Since 1st of July 1999 depending on 997 amendments regulation V/11 enables States to adopt and implement mandatory ship reporting in accordance with guidelines and criteria developed by IMO. The regulation made it mandatory for ships entering areas covered by ship reporting systems to report to the coastal authorities giving details of sailing plans.[237]

[234] IMO, document MSC.36 (63)l
[235] IMO,resolution A.373(X).
[236] IMO resolution A.851(20)
[237] IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc LEG/MISC.8 30 January 2014 p.35.

Another important subject: SOLAS regulation V/19-1 on Long Range Identification and Tracking (hereinafter referred as LRIT) of ships, adopted in 2006,[238] established a multilateral agreement for sharing LRIT information amongst SOLAS Contracting Governments for security and search and rescue purposes. SOLAS Contracting Governments might also request, receive and use LRIT information for safety and marine environment protection purposes.

After numerous amendments, the current version of the SOLAS Convention mainly deals with fixing minimum standards for the construction, equipment and operation of ships, compatible with their safety. It also suggests flag States to ensure that marine vessels under their flag comply with minimum safety standards in construction, equipment and operation. The SOLAS Convention is divided into XIV chapters that cover general obligations, amendment procedures and other important areas of the treaty. SOLAS is among those maritime safety conventions, which received the largest number of ratification. 162 States representing approximately 99% gross tonnage of the world's merchant fleet have ratified it.[239]

Likewise SOLAS first Load Line convention 1966 was adopted much earlier than IMO was formed. 1930 Convention was based on the principle of reserve buoyancy, although it was recognized then that the freeboard should also ensure adequate stability and avoid excessive stress on the ship's hull as a result of overloading. Nowadays it determines the minimum freeboard to which a ship may be loaded, including the freeboard of tankers, taking into account the potential hazards present in different climate zones and seasons. The Convention includes three annexes. Various amendments were adopted in 1971, 1975, 1979, and 1983 but they required positive acceptance by two-thirds of Parties and never came into force. However 1988 Protocol, adopted in November 1988, entered into force on 3 February 2000.

LOSC provides the framework for legal action, the detail of any search and rescue obligations is to be found in SOLAS and SAR. It defines "rescue" as involving not only "an operation to retrieve persons in distress, provide for their initial medical or other needs" but also to "deliver them to a place of safety". Therefore specific legal framework for the obligations relating to search and rescue is SAR. This Convention requires member States to establish services for search and rescue of persons in distress, although these are limited to the area around the

[238] IMO, Document MSC.202(81)
[239] IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc LEG/MISC.8 30 January 2014 p.12.

coasts.[240] For this purpose, SAR includes regulations on the establishment of search and rescue regions within which the coastal State is responsible for the provision of search and rescue services. Parties to SAR are required to co-ordinate their search and rescue services with those of neighboring States.

SAR after its entry into force was firstly amended in 1998 and lastly amended by 2004 amendments – 'persons in distress at sea'[241]

In its resolution 69/245[242] on Oceans and the Law of the Sea, the General Assembly calls upon States to ensure that masters on ships flying their flag take the steps required by relevant instruments to provide assistance to any persons in distress at sea. It urges States to cooperate and to take all measures necessary to ensure the effective implementation of the amendments to SAR and SOLAS relating to the delivery of persons rescued at sea to a place of safety, as well as of the associated IMO Guidelines.

"Calls upon States to ensure that masters on ships flying their flag take the steps required by relevant instruments[243] to provide assistance to persons in distress at sea, and urges States to cooperate and to take all measures necessary to ensure the effective implementation of the amendments to the International Convention on Maritime Search and Rescue[244] and to the International Convention for the Safety of Life at Sea[245] relating to the delivery of persons rescued at sea to a place of safety, as well as of the associated Guidelines on the Treatment of Persons Rescued at Sea[246]";

In addition to SOLAS and SAR mentioned codes, the IMO adopts also other measures that may impact maritime safety, either directly or indirectly. Examples are the STCW Convention the, COLREG. As SOLAS includes regulations for all the components of navigation: construction and stability of ships to avoid sinking even after damages to the hull, fire protection, life-saving appliances, radio communications, safety of navigation, carriage of cargoes and especially dangerous goods, special provisions for nuclear ships, high-speed vessels or bulk carriers, and

[240] Chapter 2.1.1 of SAR Convention
[241] Information available at:
http://www.imo.org/en/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/SARConvention.aspx
[242] UN A/RES/69/245, Dec 29, 2014 para. 144.
[243] The International Convention for the Safety of Life at Sea, 1974, the International Convention on Maritime Search and Rescue, 1979, as amended, the United Nations Convention on the Law of the Sea, 1982, and the International Convention on Salvage, 1989.
[244] IMO, document MSC 78/26/Add.1, annex 5, resolution MSC.155(78).
[245] IMO, document MSC 78/26/Add.1, annex 3, resolution MSC.153(78).
[246] IMO, document MSC 78/26/Add.2, annex 34, resolution MSC.167(78).

measures to facilitate the identification and inspection of ships. COLREG adds navigation rules (or "rules of the road") to the previous ones in order to prevent collisions between vessels whereas STCW sets minimum qualification standards for merchant ships' crew (officers, masters, watch personal), in terms of training, certification and watchkeeping. It was the first attempt to provide international standards for seafarers. Although a milestone in itself, it became apparent by the early 1990s that it required major revisions if the number of shipping accidents caused by human error were to be reduced. It was significantly revised in 1995 and one of the more important changes was to give the International Maritime Organization authority for the first time to judge whether the training, qualification and certification given to seafarers by a country that is party to the Convention matched up to required standards. STCW was once again revised in 2010 by Manila Amendments in order to bring the Convention and Code up to date with new developments.

In addition to that, IMO also issues guidelines on navigation issues and performance standards for ship borne equipment. It is perceived that quality shipping through a breed of competent seafarers can be achieved through a practical, uniform, standardized training and certification system. Every State, in exercising its sovereign power, may exempt itself from any standardization attempt but such action will defeat the purpose of STCW Convention and similar international understandings. A quality system requires specific responsibilities and traceability, which are currently being incorporated into the country's legal system.

It might be said that IMO goal has been already achieved the responsibility under LOSC to develop technical safety, security and pollution prevention standards related to maritime transport. As it was noted by United Nations General Assembly during its 69th session in 2013, most significantly IMO's work during these decades certainly made significant changes:

"... international shipping rules and standards adopted by the International Maritime Organization in respect of maritime safety, efficiency of navigation and the prevention and control of marine pollution, complemented by best practices of the shipping industry have led to a significant reduction in maritime accidents and pollution incidents."[247]

[247] UN GA Res/68/70 on the Oceans and the Law of the Sea, 2013, para.147.

Nowadays, considerable progress has been achieved with the regulatory framework implied from IMO. A number of mandatory conventions, codes and regulations, developed by IMO without question have significantly contributed to IMO meeting its mandated objectives. Therefore there is no question that today worldwide acceptance of IMO conventions and regulations have significantly contributed or not to IMO accomplishing it objectives. However, there is still the room for further improvements since not all countries comply with the regulations and international standards on maritime safety. Nevertheless the main challenge still remains the following to ensure timely ratification and uniform and effective implementation of IMO Instruments. It means that IMO's main path in accomplishing its objectives through the adoption of maritime conventions and regulations includes the one more process - "implementation" process of the respective conventions and regulations by Member States. In particular it will be the subject for the discussion provided by next chapter.

Maritime Safety matters are front and center more and more at IMO, which can only be interpreted as society expressing its expectations for shipping to protect safety at sea. Therefore overall goal of the international community regarding international shipping is to maintain protect and enhance the quality of maritime safety. Meanwhile in order to achieve the aforementioned goal, worldwide commitments are necessary to be fulfilled.

As stated by Secretary General of IMO:

"Is the [international regulatory regime] system working? I believe that the improvements in safety, the reduction in casualties and the record of achievement of IMO over the years would indicate that the answer is yes. If, as a corollary, you asked if it could work better, the answer would also be yes...I believe that the problems perceived today do not lie basically with shipping's regulatory framework or with the mechanism by which that framework is constructed, but with its implementation. Inherent in a system based on international consensus such as that which is developed through IMO are both rights and responsibilities. All IMO Members have the right to a voice in defining standards and regulations that will be applied to international shipping and that right is equal for all regardless of the size of their fleets, the strength of their

economies or the depth of their maritime traditions. But the rights bring with them responsibilities and accountabilities that are commensurate with the rights."[248]

Part two

Chapter 1

Principles of Implementation of Generally Accepted International Regulations, Procedures and Practices into National Legislation

Section A

Analysing IMO III Code in respect of Mandatory IMO Instruments

Shipping being an international business requires international maritime legislation as a means of control. It is always quick to say that shipping is the most efficient form of transportation for this reason IMO continues to address the important and difficult issues of international shipping. While IMO's first priority was to adopt international treaty instruments incorporating global standards for maritime safety, security, efficiency of navigation and pollution prevention it promptly became obvious that, by themselves, these legal instruments were of little use unless they were properly put into effect. The IMO recognizes that the ultimate effectiveness of its instruments depends on their wide, uniform and effective implementation.

[248]An extract from a speech by the Secretary General of the IMO in 2001 O'Neill W, Raising the Safety Bar – Improving Marine Safety in the 21st Century, speech to the Sea trade Safe Shipping Conference, Royal College of Surgeons, London, 10 April 2001.

In order to operate efficiently, the international shipping industry certainly depends on the global, well-established and comprehensive international regulatory framework provided by IMO for safe and environmentally sound maritime transportation, delivering by far the world's cleanest, least polluting service for the mass transport of cargoes, and with industry actors committed to environmental protection. As it was already emphasized conventions adopted by IMO, which number more than fifty, significantly contribute to safe, secure and environmentally sound shipping. Therefore, the vast majority of these conventions have been widely ratified by countries throughout the world. For this reason the effective implementation of IMO Conventions is of vital importance. The alternative would be disorder and market distortion, as well as inferior levels of safety and environmental protection. In case when the level of implementation is not consistent throughout the world it may lead to the prevention to full realization of the effectiveness of the conventions'. Therefore Member States representing as flag, port and coastal States have the major duty and responsibility to fulfill their obligations by implementing and enforcing these rules and standards in order to enjoy those rights and to protect national interests of States.

Jurisdictional powers and duties of the States indicated under LOSC create certain problems when it comes to implementation and enforcement. It goes without saying that for any international convention to be effective and fit its purpose, the States that have signed on to that Convention shall also commit themselves to effectively implement it.

The IMO Mission Statement very succinctly and clearly states that IMO "is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation." Therefore international community is very well aware why this process is important.

The former Secretary General of IMO, Efthimios E. Mitropoulos back in 2000s noted that industry does not need more treaties and more regulations, the main focus should be placed on achieving uniform implementation of generally accepted rules regulations and standards developed by IMO.[249] Only effective way to regulate such a diverse and truly international industry, as shipping is IMO's work that has demonstrated beyond doubt that international standards have to be developed, agreed, implemented and enforced. This was indeed very

[249] W O'Neil, Welcoming remarks in M H Nordquist and J N Moore eds, "Current Maritime Issues and the International Maritime Organization, Nijhoff The Haague 1999 pp. 3-4.

challenging time, all Member States should have proved that - maritime safety and environmental concerns were still on the top of their agendas and need to be addressed via increased acceptance and implementation of relevant IMO standards convinced that cooperation for achieving common good, peace and prosperity will be impossible without direct participation in international forums - IMO, therefore the Member State Governments still should attach paramount importance to the cooperation with IMO.

One of the dominant features of the 21st century jurisprudence has been the recognition of law as a tool for change. An important feature of an effective legal system is its capacity to reflect the changing needs and demands of a society in which it operates. Although legislation is not the only means of social control, it definitely is one of the most powerful vehicles of change and development. Continuous law making becomes a natural response of a developing legal system to new challenges and needs. Today, almost every area of national legislative concern is affected in one way or another by international treaty standards. While an international framework of rules and standards is important, one should not disregard the importance of national legislation, a fundamental link in the fulfillment of the international law making. In an effort to give legal recognition to normative rights, States follow different practices in internationalizing treaty norms, that is, incorporating treaties within the State's legal structure so that state authorities can implement the provisions.

International law can regulate all matters, even such as are normally regulated by national law only and hence considered as ‘domestic’ matters.

National rules, regardless of individual national capacities or other national considerations, shall be established and they shall be at least as effective as the global rules and regulations. LOSC provides States to enact laws and they shall ‘at least have the same effect’ as the international standards. This means that the international standards are merely a minimum threshold for the States, which may thus prescribe standards that are more stringent.[250]

The relationship of international law to national law rests on two principal schools of law. The dualists regard international law and national law as separate and national legislation can apply international law only when it has been incorporated into national law. Incorporation can result

[250] Jin-Tan, Alan Khee; Vessel-Source Marine Pollution; Cambridge University Press, Cambridge, 2006 p. 179.

from an act of parliament or other political act, or given effect by the courts. On the other hand, monists regard international law and national law as parts of a single legal system. According to this theory, national legislation is subservient to international law. Therefore it can be said that the maritime legislation of any country is derived from two sources: International Conventions and National Laws.

Merchant shipping legislation is an essential requirement to ensure satisfactory maritime development, and to provide effective enforcement of appropriate maritime safety standards particularly in developing countries.

In general it is acknowledged that the "implementation" of international treaties is the duty of the State that has ratified them. According to the article 26 of the Vienna Convention, international instruments such as conventions and protocols are determined by the common law rule of pacta sunt servanda, meaning "every treaty in force is binding upon the parties to it and shall be performed by them in good faith". Every international treaty describes the State obligations which is not only the implementation of the convention provisions into their national legislation, but also the maintenance of the safety, security, environmental standards laid down in those international instruments.

When a State becomes a party to an international convention by the process of ratification or accession, the legal effect of it is that the State then becomes bound by the convention and is therefore obliged to implement it by incorporating its provisions into national legislation. If the State fails to implement this rules, it is nevertheless still bound by the convention vis a vis other State parties, but it cannot enforce the convention against them, unless that convention becomes part of its law by whatever legal process applicable in that State's jurisdiction. The implementation of an international convention to which a State has become a part is therefore an essential step without which the State Party cannot benefit insofar as the application of that law within its jurisdiction is concerned. The problem arises when the flag State does not conform to the above mentioned standards. With respect to enforcement, the differences in the enforcement of international technical treaties can create challenges for the stakeholders of the industry.

"Control remains in the hands of States, which react spontaneously as soon as their interests are hurt by violation of an international convention"[251]

Apparently as more and more developing countries began building up their own fleets, IMO considered necessary and useful to provide appropriate advice and technical cooperation to these States.

Within few years of coming into being IMO devised a technical cooperation programme, the main purpose of which is to assist developing States in order to ratify generally accepted rules regulations and standards and to implement them properly. This may be considered as the one of the most important tools for implementing obligations derived from international instruments.

The first technical advisory mission took place in 1966. In 1970s, the programme assumed much greater importance and in 1977, IMO became first UN agency to institutionalize its TC Committee. Nowadays the committee is required to consider any matter within the scope of the Organization concerned with the implementation of technical co-operation projects for which the Organization acts as the executing or co-operating agency and any other matters related to the Organization's activities in the technical co-operation field.

Although the international maritime prescriptions are developed within the IMO, it is the responsibility of State governments to implement and enforce the rules and standards. Enabling the "willing but unable" States is the goal of the IMO's capacity-building and technical assistance efforts. The UN General Assembly has long acknowledged the need for capacity building measures to enable some States, particularly developing States, to implement and carry out their obligations under international legal instruments promoting maritime safety, security and protection of the marine environment.[252] The Committee's work has ripened into an ambitious Integrated Technical Co-operation Program (ITCP), in order to assist States in building up their human and institutional capacities and to address the maritime needs of developing States to response affective implementation of IMO instruments.[253] The ITCP's rationale and mandate statement asserts:

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[251] P. Boisson, "Safety at sea: policies, regulations and international law", D. Mahaffey, Trans, Paris: Bureau Veritas, 1999, pp. 144 -147.

[252] A. Res. 62/215, supra note 232, para. 10 (listing among the capacities that must be "built up" economic, legal, navigational, scientific, and technical skills).

[253] See IMO Res. A.847(20), supra note 245; David Edwards, Technical Assistance: A Tool for Uniform Implementation of Global Standards, in CURRENT MARITIME ISSUES AND THE INTERNATIONAL MARITIME ORGANIZATION, supra note 18, at 391. The IMO cites its ITCP

"many countries—especially the developing ones—cannot yet give full and complete effect to IMO's instruments. Because of this, and as mandated by the Convention which created IMO, the Organization has established an Integrated Technical Co-operation Programme (ITCP), the sole purpose of which is to assist countries in building up their human and institutional capacities for uniform and effective compliance with the Organization's regulatory framework."[254]

The ITCP thus embraces three priorities: advocacy of global maritime rules and standards, institutional capacity building, and human resource development.[255] The TCC plays the leading role in the program. Funding is obtained from a variety of sources, including the IMO Technical Co-operation Fund, multi donor trust funds, and bilateral arrangements with providers, and one-time cash donations. Subsequently of the TC Committee is allocating the resources and delivering of TC programs to those States which need assistance. The emphasis of much of IMO's technical cooperation work is on training as well as conducting national and regional seminars or trainings financially supported by IMO in order to provide assistance for global and uniform implementation and enforcement standards. The best examples of this are the two institutions WMU and IMLI established with the aim to provide advanced training in maritime administration, maritime law, and education and shipping management. The programs offered by these institutions are undoubtedly a highpoint of IMO's capacity-building programme and particularly of its maritime education and training programme, and the largest and most valuable technical cooperation project of the Organization.

It is worth mentioning that the establishment of the Global Integrated Shipping Information System (GISIS) which may be considered as a another tool, which gathers and collects information on reporting requirements under various conventions, is in harmony with the objective of IMO Resolution A.912(22), and that the database launched by the Organization, *inter alia*, supports the Organization "in its efforts to achieve consistent and effective implementation of IMO instruments" The goal of GISIS as stipulated in its disclaimer section is

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as part of the Organization's contribution to achieving relevant Millennium Development Goals (MDG). See IMO, The Linkage Between the Integrated Technical Co-operation Programme and the Millennium Development Goals, IMO Res. A.1006(25) (Nov. 20, 2007).

[254] See IMO, Rationale and Mandate for IMO's Technical Co-operation Programme

[255] See IMO, IMO and Technical Co-operation in the 2000s, IMO Res. A.901(21), Annex (Nov. 25, 1999).

"...to allow on-line access to information supplied to the IMO Secretariat by Maritime Administrations, in compliance with IMO's instruments".[256]

Today IMO is brought to a greater visibility and it is established that the organization can be not only the venue where the States discuss the standing maritime issues but to achieve its main goal to be a reliable partner to a Member State in the process of implementation in its international undertakings, herewith IMO has to be considered as leading forum for developing international maritime law in order to ensure cleaner and competitive shipping over world oceans, and facing the main challenges of the modern shipping industry

On the other hand United Nations General Assembly by its resolutions tries gives recommendations to States to ratify or accede to and implement the conventions and protocols and other relevant instruments of the IMO relating to the enhancement of maritime safety and protection of the marine environment from marine pollution and environmental damage caused by ships, and urges the IMO to consider stronger mechanisms to secure the implementation of IMO instruments by flag States.

"*Recognizes that international shipping rules and standards adopted by the International Maritime Organization in respect of maritime safety, efficiency of navigation and the prevention and control of marine pollution, complemented by best practices of the shipping industry, have led to a significant reduction in maritime accidents and pollution incidents, encourages all States to participate in the Voluntary International Maritime Organization Member State Audit Scheme, and notes the decision of the International Maritime Organization to institutionalize the Audit Scheme, with the expected mandatory use of the International Maritime Organization Instruments Implementation Code (III Code) from 1 January 2016."*[257]

To a large extent, the existing IMO regulations are very specific and deterministic. Specifically divergent interpretation and uneven implementation of the international instruments have led to the introduction of this kind of oversight control to assess how effectively flag administrations discharge their responsibilities. The idea of harmonized and uniform implementation of IMO treaties has been realized in the introduction of the Voluntary Member State Audit Scheme (hereinafter referred as VIMSAS). Principles of the VIMSAS as a mechanism to establish "an assessment platform", and the performance criteria for the State to measure the level of delivery

[256] http://gisis.imo.org/Public/Shared/Public/Disclaimer.aspx
[257] UN GA Res/69/245 on Oceans and the Law of the Sea, 2014, para 157.

of its obligations at national and international levels and in pursuit of enhancement of safety and environmental protection were deliberated. It was expected that VIMSAS would facilitate uniform and consistent implementation among IMO members.

However this problem has arisen long before VIMSAS was introduced. Since the 1990's, enhanced focus on implementation of existing requirements. In 1992 IMO introduced the special Sub-Committe on Flag State Implementation to improve performance of governments.

After the maritime disasters of the late 1980s[258] the IMO came to grips with an urgent need to improve maritime safety. Therefore in April 1992 the MSC reaffirmed the Urgent need to address more strict and uniform application of IMO instruments. Submissions calling for development of standards for effective implementations of IMO instruments by flag States were considered from a number of leading maritime nations.[259] A Joint MSC/MEPC Working Group on Flag State Compliance was established at the 60th Session of the MSC in 1992[260] to prepare the groundwork for new Sub-Committee on Flag State Compliance. As a result in late 1992 a new sub committee was established under the joint coordination of MSC and MEPC to find ways assisting administrations in implementing and more importantly enforcing IMO instruments.[261] This organ was to deal with implementation of IMO instruments, flag, port and coastal State matters, surveys and certification, and to analyze casualty statistics. Therefore, through establishment such Sub-Committee, IMO took one step forward toward improving the performance of Governments by providing guidance and recommendations to States on how to implement and enforce IMO instruments effectively. This Sub-committee was also to consider the status of the LOSC at every Session with a view to determining what impact developments relating to this convention could have upon its work.[262] The primary objective of the Sub-committee was identification of measures necessary to ensure effective and consistent implementation of global instruments, including the consideration of difficulties faced by developing countries in their capacities as a flag, port or coastal State. One of the most urgent tasks of the first meeting of FSI in 1993 and the first resolution drafted was a direct reflection of its *raison* d'etre: the developmet of guidelines and minimum standards for organizations acting

[258] Hoppe H IMO: The Work of the Sub-Committee on Flag State Implementation 2000 p.3.
[259] Hoppe H IMO: The Work of the Sub-Committee on Flag State Implementation 2000 p.2.
[260] Marten-Castex B "The Work of the Sub-Committee on Flag State Implementation: An Overview, (2003 – up to and including FSI 11)", 19 January 2004 p.1
[261] Hoppe H IMO: The Work of the Sub-Committee on Flag State Implementation 2000 p.2
[262] Marten-Castex B "The Work of the Sub-Committee on Flag State Implementation: An Overview, (2003 – up to and including FSI 11)", 19 January 2004

on behalf of maritime administrations. This resolution[263] codifies the longstanding practice of delegation of flag State jurisdiction and control[264]. The resolution notes that:

"…Administrations are responsible for taking the necessary measures to ensure that ships flying their State's flag comply with the provisions such conventions including surveys and certification "[265]

Implementation and enforcement of IMO instruments and indirectly the requirements of the LOSC are sole responsibility and duty of the flag State and heavily upon proper exercise of flag State Jurisdiction and control as required by article 94 of the LOSC.

Toward that end, the FSI developed formal guidelines for flag State implementation, which the IMO Assembly adopted in 1997.[266] In November 2001, IMO Assembly adopted Resolution A.914(22), "measures to further strengthen flag State Implementation", requesting MSC and MEPC Committee to "focus their attention on developing a safety culture and environmental conscience in all activities undertaken by the Organization" and " to consider measures to further strengthen flag State implementation as part of the development of a safety culture and environmental conscience".[267] Despite the fact that IMO assured that the results of submitted self-assessment forms introduced will be "treated with the utmost and strictest confidence", few countries showed interest in submission of it. The tenth and eleventh sessions of the Sub-Committee on Flag State Implementation published the results of the self-assessment forms received through documents FSI 10/4 and FSI 11/10 respectively). One of the problems of the result of Self-assessment forms was that it was vague and difficult to perceive the areas of weaknesses or strengths no proper feedback was provided to the State. It was merely a table without further explanation. Due to recommendatory characteristics of Resolutions and Guidelines, it was felt that IMO was still not able to convince its Member States to adhere to the requirements of treaties to which they are party through voluntary evaluation of their own performance. In January 2002, the 'Ministerial Conference on Transport-A New Challenge for Environmentally Friendly Transport' was held in Japan. Participants were from Australia, Austria, Belgium, Canada, Denmark, France, Germany, Greece, Italy, Japan, Luxembourg,

[263] IMO Assembly Resolution A.739(18) November 1993 "Guidelines for the Authorization of Organizations acting on behalf of the Administration"
[264] Through reference in resolution to the provisions of reregulation I/6 of SOLAS 74; article 13 of LL66; Reg4 of Annex I and Reg10 of Annex II of MARPOL 73/78 and Article 6 of Tonnage 69.
[265] IMO Assembly Resolution A.739(18) preamble.
[266] See IMO, Guidelines to Assist Flag States in the Implementation of IMO Instruments, IMO Res. A.847(20) (Nov. 27, 1997).
[267] IMO, Measures to Further Strengthen Flag State implementation, IMO Res. A.914(22) (Nov. 29, 2001).

Netherlands, Norway, Portugal, Republic of Korea, Singapore, Spain, Sweden, the United Kingdom, the United States, IMO, and the European Commission. The participants, in response to the request of Resolution A.914 (22), on strengthening of flag state implementation, agreed that "an important measure to implement this resolution is the development and initiation of an audit programme on flag State implementation" In May 2002, nineteen IMO member States[268] put forward the proposal to establish the IMO Model Audit Scheme, inspired by the measures taken by the International Civil Aviation Organization in 1995 by establishing the ICAO Safety Oversight Programme[269].

IMO assembly approved the Voluntary Audit Scheme at its twenty-third session in November 2003 when it adopted resolution A.946 (23) *Voluntary IMO Member State Audit Scheme.* The resolution also mandated the further development of the scheme to be implemented on the voluntary basis, and requested the IMO Council to develop, as a matter of high priority procedures and other modalities for the implementation of the scheme. .

In recognition of ongoing frustrations with ineffective flag State implementation and enforcement of IMO instruments a proposal was tabled at the eleventh session of FSI in 2003 to revise and update Resolution A.847(20), Guidelines to assist flag States in the implementation of IMO instruments, and to introduce a Voluntary flag State Audit Scheme to provide a comprehensive and objective assessment. The IMO decided to replace the guidelines with a more formal code. Building on an extensive 2004 report by the Consultative Group on Flag State Implementation,[270] the FSI developed a draft Code for the Implementation of Mandatory IMO Instruments, which was adopted by an IMO At its twenty-fourth session, held in November-December 2005[271] The Code focused on ten mandatory IMO instruments in its list of some 700 standards.[272] The Code was organized into four parts that break down by respective roles of States: (1) common areas (subjects common to flag, port, and coastal States), (2) flag States, (3) coastal States, and (4) port States. Five annexes followed them. The first four annexes covered the obligations of contracting parties and the fifth includes tables on instruments made mandatory under the IMO conventions. Although the Code addressed the obligations of States in

[268] Australia, Canada, Cyprus, Denmark, Finland, Germany, Hong Kong China, Indonesia, Italy, Japan, the Netherlands, Norway, the Republic of Korea, Marshall Islands, Singapore, Spain, Sweden, the United Kingdom and the United States)
[269] For more information see: http://www.icao.int/safety/cmaforum/documents/flyer_us-letter_anb-usoap_2013-08-30.pdf
[270] The Secretary-General, Oceans and the Law of the Sea: Consultative Group on Flag State Implementation, paras. 11, 21, delivered to the General Assembly, U.N. Doc. A/59/63 (Mar. 5, 2004), corrected by Corrigendum, U.N. Doc. A/59/63/Corr.1 (Mar. 21, 2005).
[271] IMO, Code for the Implementation of Mandatory IMO Instruments, IMO Res. A.973(24), Annex (Dec. 1, 2005)
[272] IMO, Code for the Implementation of Mandatory IMO Instruments, IMO Res. A.973(24), Annex para 6.

their capacities as flag, port, and coastal States, the IMO Assembly resolution adopting the Code made it clear that it is flag States that have the "primary responsibility" to have in place an adequate and effective system to exercise control over ships flying their flag and to ensure they comply with the applicable rules and standards for maritime safety, security, and protection of the marine environment.[273] The Code, which the Assembly revised and approved in 2007,[274] formed the basis for the Voluntary IMO Member State Audit Scheme, by identifying for member States and VIMSAS auditors the areas to be audited. Therefore compliance with the III Code became voluntary,[275] but it was envisaged that it will later be made as mandatory.[276]

There is no doubt the first pillars of VIMSAS were put by these two resolutions. In fact the latter, is the essence of what today is known as the 'Code for the Implementations of Mandatory IMO Instruments' in Resolution A.996(25). Resolution A.847(20) asserts that flag States aiming at discharging their responsibilities in an effective manner, *inter alia*, should implement policies, establish support infrastructure and enforce them by taking all necessary steps to guarantee observance of international rules and regulations. This resolution was such a comprehensive manual in a manner that it proposed "possible framework for maritime legislation concerning the main IMO Conventions.

In this context, the Assembly, at its twenty-seventh session in November 2011, adopted resolution A.1054(27) on the Code for the Implementation of Mandatory IMO Instruments , which replaced the previous one. In this regard, the FSI Sub-Committee had developed the III Code, which was adopted by the Assembly at its twenty-eighth session in December 2013 (resolution A.1070). Code for the Implementation of Mandatory IMO Instruments, which provides the audit standard and provides flag States with guidance for the implementation and enforcement of IMO instruments, in particular with the identification of the auditable areas of the IMO mandatory Conventions. Amendments are being developed for adoption in order to make use of the III Code and the audit mandatory from 1st of January 2016 to determine the extent to which they give full and complete effect to their obligations and responsibilities contained in a number of IMO treaty instruments. In this context, the Assembly at its twenty-eight session in

[273] Code for the Implementation of Mandatory IMO Instruments, 2007, IMO Res. A.996(25), pmbl., para. 6 (Nov. 29, 2007).
[274] IMO, Code for the Implementation of Mandatory IMO Instruments, 2007, IMO Res. A.996(25) (Nov. 29, 2007).
[275] The voluntary nature of the Code must not be confused with the binding obligation for States parties to comply with any obligations established by the underlying international instruments addressed by the Code.
[276] See Sub-Committee on Flag State Implementation (FSI), 11th Session: 7–11 April 2003.

December 2013 adopted resolutions on the Framework and Procedures for the IMO Member State Audit Scheme (A.1067), on Transition from the voluntary IMO Member State Audit Scheme to the IMO Member State Audit Scheme (A.1068), on 2013 Non-exhaustive list of obligations under instruments relevant to the III Code (A.1077).

However, what IMSAS looks for and tries to achieve is manifested in safety, which promotes continuous improvement, efficiency and effectiveness.

The former Secretary-General of the IMO stated that,[277]

"*Safety culture is one of those terms that tend to slip through the fingers when you try to pin a formal definition on it. It is perhaps far easier to agree on a definition of what a safety culture is not. It is not a culture of unthinking compliance. It is not a culture in which the principal objective of a shipping company's safety manager is simply to ensure that his ships meet all the prescribed standards and all the necessary certificates are up-to-date and in place. It is much, much more than that. Compliance is, of course, a pre-requisite – a starting point, if you will. But, beyond mere compliance is a mindset in which safety managers plan and set their own performance standards and goals – actively managing safety as a routine part of their everyday work rather than just responding to external events. This is the beginning of a safety culture."*

Flag states should participate in the IMO Member State Audit Scheme in order to identify areas for possible improvement with regard to the implementation of IMO instruments, and which may benefit from IMO technical assistance programmes. In the interests of transparency and continuous improvement, the industry organizations believe that flag states should publish the results of the IMO audits for the benefit of the industry as a whole.[278]

The VIMSAS and III Code hold considerable promise to do that, but only if backed up by a carefully balanced combination of meaningful incentives and sanctions.

If IMO member States are truly committed to restoring public confidence in the safety, security, and environmental protection record of the shipping industry, as its strategic plan asserts, the Organization cannot be seen to be dragging its feet on the call to get tough on scofflaw ship operators and the flag States that enable them.[279]

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[277] O'Neil (2000),
[278] (ISF 2006, p.11)
[279] Efthimios E. Mitropoulos, Improving Shipping's Image, IMO NEWS, No. 3, 2007, p. 4.

The objective of the III Code is to: guide flag State implementation and enforcement measures as well as to provide a standard against which a member State can be audit; Enhance global maritime safety and protection of the marine environment and assist States to implement the IMO instruments. Code was developed to form the basis of the audit standard and has identified all relevant obligations of Parties to IMO instruments. States view III Code according to their own circumstances and are bound only to implement those instruments to which they are Contracting Governments or Parties.

Therefore III Code sets the mandatory instruments Strategy of a member State and overviews the specific flag, port and coastal State obligations.

According to the III code the following Areas are to be addressed when developing policies, legislation, associated rules and regulations and administrative procedures to implement and enforce State obligations and responsibilities:

- Jurisdiction;
- Organization and authority;
- Legislation, rules and regulations;
- Promulgation of the applicable international mandatory instruments, rules and regulations;
- Enforcement arrangements;
- Control, survey, inspection, audit, verification, approval and certification functions;
- Selection, recognition, authorization, empowerment and monitoring of R/Os and nominated surveyors;
- Investigations required to be reported to IMO Reporting to IMO and other Administrations.

IMO itself by the III Code prescribed the following instruments, as the Mandatory instruments for member States to implement in other words this are the Ten Commandments, ten maritime safety and pollution prevention international instruments:

1. The International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974);

2. The Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT 1978);

3. The Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT 1988);

4. The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended (MARPOL 73/78);

5. The Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended (MARPOL PROT 1997);

6. The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW 1978);

7. The International Convention on Load Lines, 1966 (LL 66);

8. The Protocol of 1988 relating to the International Convention on Load Lines, 1966 (LL PROT 1988);

9. The International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE 1969);

10. The Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended (COLREG 1972).[280]

Moreover there is still room for improvement the recent adoption of new instruments, the continued effort to bring conventions into force, the advent of the mandatory audit scheme and the trends to more goal based standards, IMO is on the right track and continues to answer the call of society to ensure the maritime industry is safe, secure, environmentally sound and efficient.

Survey

In order to determine whether mandatory IMO instrument are generally accepted rules or not, in this regard examination – survey has been carried out by interviewing both, representatives of

[280] Emphasis added.

international maritime organization – UN DOALOS and IMO Legal Affairs & External Relations Division and a Member States – Georgia, United Kingdom and Republic of Malta.

Name and position: Ivane Abashidze

Head of Legal and International Relations Departments

LEPL Maritime Transport Agency of the Ministry of Economy and Sustainable Development of Georgia

1. What is meant under IMO mandatory Instruments?

IMO Mandatory instruments are those instruments that are defined under IMO Instruments Implementation Code. Namely, the Code seeks to address those aspects necessary for a Contracting Government to give full and complete effect to the provisions of the applicable international instruments to which it is a Contracting Government or Party, pertaining to:

.1 safety of life at sea;

.2 prevention of pollution from ships;

.3 standards of training, certification and watchkeeping for seafarers;

.4 load lines;

.5 tonnage measurement of ships; and

.6 regulations for preventing collisions at sea.

2. Are IMO Mandatory Instruments "Generally Accepted Rules Regulations and Practice"s as prescribed in UN LOSC or it is just prescribed as mandatory by IMO?

I believe etymology of the terminology Generally Accepted Rules Regulations and Practice's as prescribed in the UN Convention on the Law of the Sea needs to be analyzed in light of the needs and development of maritime industry and ocean governance at large. Taking into consideration evolving standards, rules and regulations under the auspices of UN and its specialized agency IMO, it should be noted that linkage between Oceans Constitution and the IMO instruments becomes even more important. UN LOSC mentions on several occasions

competent international organization, which undoubtedly in today's world is International Maritime Organization.

Considering the development of international maritime law, evolving standards often required lengthy ratification procedures in members States of IMO. However, the demand for harmonization in maritime sector was and is very high. There are several instruments in LOSC and IMO mandatory conventions how to address the substandard shipping and how to establish harmonized technical regulation of shipping worldwide. By saying this it is almost impossible to do not mention the role of the Port State Control mechanism, without which Flag State and Coastal States would remain as ineffective mechanisms. However harmonization is almost impossible without effective mechanisms for entry into force said conventions. Tacit acceptance principle therefore plays an important role in developing and timely regulation of maritime sector globally. However, States will always remain primary source of a treaty implementation and their creation in general.

I believe in the context of above mentioned, one cannot differentiate and underestimate the linkage between UN LOSC and the IMO Mandatory Instruments, one without another cannot be a level playing field. LOSC as a package deal convention constitutes in most of the cases codification of customary international law, decisive element of which is Opinio Juris, therefore belief of a State that the rule is mandatory to be executed. Both LOSC and IMO Mandatory Instruments remain on the same level of ratification, more than 170 States have consented to be bound by the provisions LOSC and IMO Mandatory Instruments.

3. If IMO Mandatory Instruments are "Generally Accepted Rules Regulations and Practice"s are LOSC Member States obliged to implement and ratify these instruments immediately? or it is up to every sovereign State whether it ratifies convention or not, beside the fact that it is prescribed as mandatory and recognized as Generally Accepted Rules Regulations and Practices.

I believe the question is of a more practical nature, rather than a legal one. Once we talk of implementation of the LOSC, we already mentioned previously, that we need to take into consideration whether the treaty provisions are concrete enough to emanate special rights and duties. Regardless of the fact that LOSC is general, so called, umbrella convention one cannot disregard existence of treaties, which on their part contain ratification procedures. Therefore, first answer to the question posed, will be No – States cannot bound themselves with the provisions of treaties to which they have not consented. However, IMO always emphasizes on

the role of effective implementation of treaties, SOLAS, LL, MARPOL, etc. remain technical in nature, in the context of globalization of maritime trade and introduction of non-favored treatment mechanisms, within the context of port State control it will be almost impossible to navigate with the vessels which do not comply with strict conventional requirements on safety of life at sea and prevention of marine pollution.

United Kingdom

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1. What is meant under IMO mandatory Instruments?

IMO instruments are conventions and protocols, which have been adopted by the IMO and have entered into force by virtue of the required ratifications by member states.

2. Are IMO Mandatory Instruments “Generally Accepted Rules Regulations and Practice"s as prescribed in UN LOSC or it is just prescribed as mandatory by IMO?

IMO instruments become mandatory when these are ratified by a member state, thereby requiring the member state to implement and enforce the instrument. These are not the "Generally Accepted Rules Regulations and Practices" as prescribed in UN LOSC.

3. If IMO Mandatory Instruments are “Generally Accepted Rules Regulations and Practice"s are LOSC Member States obliged to implement and ratify these instruments immediately? or it is up to every sovereign State whether it ratifies convention or not, beside the fact that it is prescribed as mandatory and recognized as Generally Accepted Rules Regulations and Practices.

The responsibility of ratification lies entirely with the member state although the IMO and other organizations like the Chamber of Shipping promote ratification. However when an instrument enters into force, internationally trading ships would be expected to comply irrespective of whether the flag state has ratified or not, due to the "no more favourable treatment" principle. If the vessel visits a port of a member state, which has ratified the convention, the vessel would be expected to comply even if the flag state had not ratified the instrument.

Republic of Malta

During the interview of Representative of Republic of Malta to the IMO Mr. Carmel (Lino) Vassalo stated that Mandatory IMO instruments are generally accepted rules regulations and practices, but it is up to every sovereign State to decide ratify them or not. From he's point of view States should ratify them but States are not obliged to immediately implement and ratify this instruments. It has been also stated that if States are not compiling with Generally accepted rules regulations and practices they are not meant as the member of big maritime family and they have no voice in the development of this field.

UN DOALOS

1. Are IMO Mandatory Instruments "Generally Accepted Rules Regulations and Practice"s as prescribed in UN LOSC or it is just prescribed as mandatory by IMO?

The IMO Study on the Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization (LEG/MISC.8), states that:

UNCLOS is acknowledged to be a "framework convention". Many of its provisions, being of a general kind, can be implemented only through specific operative regulations in other international agreements. This is reflected in several provisions of UNCLOS which require States to "take account of", "conform to", "give effect to" or "implement" the relevant international rules and standards developed by or through the "competent international organization" (i.e. IMO). The latter are variously referred to as "applicable international rules and standards", "internationally agreed rules, standards, and recommended practices and procedures", "generally accepted international rules and standards", "generally accepted international regulations", "applicable international instruments" or "generally accepted international regulations, procedures and practices".

2. If IMO Mandatory Instruments are "Generally Accepted Rules Regulations and Practice's are LOSC Member States obliged to implement and ratify these instruments immediately? or it is up to every sovereign State wether it ratifies convention or not, beside the fact that it is prescribed as mandatory and recognized as Generally Accepted Rules Regulations and Practices.

According to the aforementioned IMO Study:

The degree of implementation of IMO rules also tends to vary depending on the interpretation given by States Parties to UNCLOS to the expressions found in the Convention, such as "give effect to", "implement", "conform to" or "take account of", in respect of IMO rules and

standards. States Parties should, in each case, assess the context of the UNCLOS provisions establishing obligations in this regard and the specific IMO treaty and corresponding rules and standards referred to in UNCLOS.

The decision as to whether to become party to a treaty remains a sovereign right of every State.

IMO Legal Affairs & External Relations Division

'Ratification of IMO Mandatory Instruments is a matter of should not the shall' this was stated by the representative of IMO.

To summarize aforementioned survey, it goes without saying that IMO mandatory instruments are Generally accepted rules regulations and practices but still process of ratification is a matter of interpretation, therefore it rests to the member State decision which is sovereign right of a member State whether it becomes party to IMO Mandatory Instruments or not.

Section B

Importance of Maritime Administration in the Process of Facilitation International Maritime Transport

The world strives to develop and implement a global maritime regime that is optimal in its prescriptions and level of compliance, herewith IMO continues to play an increasingly important role. The Organization deserves praise for its impressive record of achievement as a forum for developing a sound international prescriptive regime and facilitating its effective implementation and enforcement.

As it has been discussed IMO has a significant role in establishing international regulations, but national regulators are also important. Influential nations can affect the impact of international rules through their implementation speed or by the nature of their national regulations. Ratification and implementation of international instruments requires a great deal of preparation at the national level, from both a technical and a legislative perspective. An important part of IMO's engagement with its Member States is to provide assistance with that process. Therefore in general implementation as a tool however is a collective responsibility governments and industry. Unless all of them play their part, implementation process will not be effective.

LOSC expounds, inter alia that the "flag State shall have a competent and adequate national maritime administration ...and shall implement applicable rules and standards concerning, in particular, the safety of ships and persons on board and the prevention of pollution of the marine environment."[281] However, an important challenge for the shipping industry today is that whether the stakeholders of the industry, especially IMO member States, embrace the proactive safety, environmental attitude in the administering of their responsibilities toward international rules regulations and standards.

In this connection, the role of the stakeholders of this industry was brought into attention. Among all the stakeholders of the shipping industry, the role of the maritime administration, as the" bare bone" of the image of shipping cannot be overstated. Quality is a long-term goal, which is as a result of a series of well thought out initiatives by all parties involved. The maritime industry is no exception. In order for the maritime administration to ensure high quality as a

[281] M.J. Hubbard, and H. Hoppe, "Possible Framework for a Model Maritime Administration" 2001, p.8.

maritime nation, quality maritime management should be the number one priority of the maritime administration. This should be achieved through the policies developed for economic, safety and environmental issues and enforced by regulations in the various services. Thus quality-shipping services require quality thinking by quality managers within a maritime administration and by all interested parties in the maritime sector. Quality shipping services require quality thinking not only by the Maritime Administration, but by all parties involved in the maritime business. The need for an integrated relationship is also evaluated, as it is realized that, in order for quality to be maintained within the maritime administration, the support of all parties involved is required in maritime business both nationally and internationally. The economic benefits would not come easily without having an effective means of managing the vast resources obtained from maritime features by controlling different maritime activities such as shipping, transport, trade, fishing and etc.. Apart from traditions and practices of this sector, the most effective tool in doing so is the legal regime, which comprised of international and national rules and regulations

Despite the fact that hundreds of years ago shipping was initiated mainly by private practitioners, shipowners, seafarers and traders are frequently confronted with rules and regulations enacted by States, government intervention has always existed throughout the evolution of the shipping industry in order to respond to the collective needs and general public interests. As it was already noted most of the regulations and standards with respect to safety and pollution prevention have already been established at the international level. The responsibility of implementation and enforcement of international maritime binding treaties in to national legislation lies with the maritime administration as its major legislative activity. Maritime administration is recognized as a key element in the process of economic development in any coastal State. Historically, every traditional maritime country has been heavily dependent on maritime transportation for both international and national services.

With regards the importance of maritime sector of any maritime nation, obviously the government of a particular nation in administering the maritime affairs has got one among the crucial tasks in developing such a country. Today, national maritime authorities of States are deeply involved in the maritime industry. The Government of that State must be in a position to implement and enforce its provisions through appropriate national legislation and to provide the necessary implementation and enforcement infrastructure. Governmental policy with respect to

shipping can be seen mainly as the promotion of industry, participation in international shipping and more importantly the implementation of international obligations under international laws. Given the significance to shipping, there is no uncertainty that effective and efficient State maritime authority is required to facilitate maritime trade all over the world in a safe, sustainable and environmental friendly manner. Maritime administration is the part of the State government and has the role of safety regulator of the State. Maritime administration is not only part of the overall public administration of a State, but also the specialized executive arm of the maritime government irrespective of whether it is developed country or developing country, with the emission to implement or enforce the regulatory functions embodied in the national maritime legislation, especially those pertaining to registration of ships, maritime safety, marine personnel, maritime casualty investigations and protection of the marine environment.[282] It has a leading position in developing a new blueprint to revitalize the industry. Therefore, maritime administrations should be set up in such a way to ensure harmonized and uniform implementation generally accepted rules regulations and standards. In recent years the scope of duties for Maritime Administrations has expanded considerably through new international maritime conventions developed primarily by IMO[283], through technical developments in shipping industry and through the public expectations. Its objective under the framework of a country's overall public administration, and within the States general policy, is to provide the government with the machinery which enables it to adequately and efficiently undertake those functions embodied in the national maritime legislation. The organizational arrangement of such administration in various countries reflects the particular constitutional, political, social and historical characteristics, for that reason structurally a national maritime administration may[284] be formed in different options depending on the consideration of the country's political systems traditional practices or otherwise where it fits best in the Government structure. For instance it could be a project or division within a ministry, a department of a ministry, statutory authority or an executive Agency. The most common mode used in many countries, which also has got particular interest in this work, is of the statutory authority, in which an administration has acquired more autonomy. Such an administration could be self-supporting or supported by the

[282] P S Vanchiswar, The Establishment and Administration of Maritime Matters-with particular reference to developing countries, Malmö, World Maritime University, 1996, p.61.
[283] Also by the International Labour Organisation.
[284] P S Vanchiswar, The Establishment and Administration of Maritime Matters-with particular reference to developing countries, Malmö, World Maritime University, 1996, p.6.

Government but not limited by the public service conditions. In that mode it is believed that decision-making process is more facilitated.

The expression 'maritime administration' in general means the administration of essential matters pertaining to the maritime sector. It encompasses the whole range of governmental administrative functions *vis-a-vis*, the maritime industry. These functions are broadly divided between safety and developmental aspects.

Public international maritime law forms the basis on which the maritime administration has been established and mandated. But it can be effective only when national law has been enacted and implemented. Since maritime law has been well developed at the international level, the key issue is the State's progress in implementation and enforcement.

Generally speaking, the term "Administration" can be defined in both negative and positive ways.[285] In the negative definition "Administration" is any activity by the State that is neither legislation nor jurisdiction." The positive definition of the term is that "Administration is any activity aimed at the practical implementation of State functions, and it is the enforcement of laws by all non-judicial organs."

Maritime Administration is the role of the government concerning the maritime affairs of a country.[286] These aspects includes such issue as economic, safety and marine environmental protection matters, which are usually addressed through policy formulation, preparation of rules and national legislations and provision of services. The maritime body of a State is expected to give advice to the government regarding policymaking. It therefore should: ensure implementation of policy, carry out the mandated specialized functions and execute its administrative duties.

Herewith maritime administration has a clear responsibility to formulate policies where, review existing policies, recommend amendments where necessary, ensure that the policies are implemented and assist in any evaluation exercise where it is required. Most important and

[285] G. Winkler, " Zum Verwaltungsbegriff. Österreichische zeitschrift fur öffentliches recht", 1958, pp. 66-86.

essential role of the Maritime Administration is the development and administration of national legislation and regulations on what it relies on. This is indeed one of the main governmental organizations responsible for the establishment and maintenance of the national maritime legislation, the body of laws that govern maritime activities. The success and effective functioning of States maritime authority can be assured when the laws are in place. For the legislation to be effective, it needs to be in a position to address the national conditions as well as to meet the international standards. The institutional framework of the maritime administration has to provide the mandate to effectively oversee all the operators of the maritime sector on the one hand. On the other hand it Member State.

Basically, for a particular State, ratification of international instruments involves both privileges and obligations but before ratifying, a Party shall be in a position to meet the requirements of the Convention. In particular, the regulations have to be met before a Convention certificate can be issued. Other Parties to the Convention will have to accept this certificate (unless there are good reasons to suspect that the ship does not meet the Convention requirements) and allow the ship to trade freely to their ports. This fundamental principle of cooperation to ease international trade should not be lost at the time of developing formulae for the designing of an efficient Model Maritime Administration. As a member state of IMO, it is needed to prove that what was agreed by signing and ratifying was properly implemented by one' s own administration. Otherwise said, the administration needs to prove that the requirement of the compulsory IMO instruments and the provisions of the community legislation in the maritime transport field have been correctly implemented and are functioning efficiently

The significance of a successful public administration is highlighted in Resolution 52/277 of the UN General Assembly on Public Administration and Development mentioning that "an efficient, accountable, effective and transparent public administration, at both the national and international levels, has a key role to play in the implementation of internationally agreed goals…."[287]

Bearing in mind the fact that shipping and maritime activities in general are international issues, and in order to fulfill the responsibilities as a flag State and a port State effectively and in an efficient manner the Government of the flag State should pass a comprehensive legislation for the control and regulation of shipping with respect to the registration of ships, the employment

[287] UN GA Res/57/277 on Public administration and development.

and certification seafarers and the safety of shipping. Also such legislation should provide for the establishment of a competent Maritime Administration and prescribing its objects and functions. The government should also consider accession to and implementation of relevant International Instruments for the improvement of maritime safety and prevention of pollution.[288]

It goes without saying that general maritime international instrument LOSC, is the blueprint covering all aspects of the functions of the maritime administrations. Convention contains the different provisions, which are imposing duties to control maritime activities for either a flag port or a coastal State. Detailed requirements are described in the "generally accepted international regulations" established by the IMO – "competent international organizations".

In order for a State to meet its international obligations, a strategy should be developed, covering the issues as listed below:

1. Implementation and enforcement of relevant international mandatory instruments;

2. Adherence to international recommendations, as appropriate;

3. Continuous evaluation, review and verification of the effectiveness of the State in respect of meeting its international obligations; and

4.The achievement, maintenance and improvement of overall organizational performance and capability.

In implementing the strategy, the guidance given in the III code should be adhered to.

Main functions of respective maritime administration maybe broken down into different areas, namely Flag State Control, Port State Control, search and rescue, pollution preparedness and response, and navigational services.

The flag State, as defined by the LOSC has primary duties and responsibilities for the implementation and enforcement of international maritime regulations for all ships granted the right to fly its flag. The main task of the maritime administration is aimed at ensuring that the vessels flying its flag meet the requirements imposed by Article 94 of the LOSC.

[288] Michael J Hubbard, IMO Consultant and Heike Hoppe, Technical Officer, IMO, "Possible Framework for a Model Maritime Administration" p. 10.

Paragraph 1 of Article 94 sets out certain duties, which are to be effected by the maritime administrations of States which are party to it. Each Member State is obligated, according to that Article, to establish a maritime administration to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

Ships registration - additionally, in accordance with paragraph 2 of that article, member States have an obligation to register their ships and to assume jurisdiction under their national legislation over all ships flying their respective flags.

According to the paragraph 3 of the same article, State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

a) the construction, equipment and seaworthiness of ships;

b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;

c) the use of signals, the maintenance of communications and the prevention of collisions.

Hereby, Paragraph 4 indicates another responsibility on the shoulder of State, i.e. to make sure that:

a) each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;

b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

Thereafter any maritime administration should have to maintain a register of ships, which flies its flag. The maritime administration should ensure that, the seafarers hold certificates, which are appropriate to their ranks and must comply with STCW Convention (as amended). Any Member State to this convention is required through its maritime administration to implement a quality assurance system for the certification and training of her seafarers and ensuring that they are in compliance with international standards. The human element plays a large part in quality shipping service. While it ensures the success of most endeavours, all too often it contributes to accidents with grave consequences for those involved. The administration is responsible to ensure that seafarers are qualified and competent according to the provision of STCW Convention. Manila Amendments have an innovative measure that provides transparency to the States maritime administration, as well as the training and certification resources given by an administration. This is ensuring that standards of competency is not varying widely from State to State as well as that certificates issued by each State can be relied upon.

The importance of Flag State Performance and the image of flag administration and the criteria utilized by the shipping industry organizations in determination of quality Flag State have to be highlighted. There is a consensus that uniform, coherent and effective implementation of international instruments is a key in "quality shipping"[289] and a response to IMO's ambition of "safe, secure and efficient shipping on clean oceans".

In other words flag State represents mainly the characteristic of adapting to national legislation and implementing to one's own ships the provisions of IMO Convention. This means institutional constructions and qualified personnel capable to apply and implement conventions and agreements to which the flag State by adherence to these instruments became a signatory part. Mainly, the ships of the flag State which are subjected to IMO Conventions must satisfy all requirements and national and international norms.

Even more UNCCRS as well highlighted the value of an adequate and competent national maritime authority for controlling and regulating different maritime activities. Convention provides inter alia that:

[289] A.Winbow, " Implementation of IMO Conventions – The key to the quality flag State", Mare Forum, 19 and 20 September 2002. Athens, Greece. p.4.

"The flag State shall have a competent and adequate national maritime administration, which shall be subject to its jurisdiction and control."[290]

The text above shows the importance of having a competent and adequate national maritime administration for any maritime nation in controlling and regulating different maritime activities

Applying international requirements to one's own ships and their technical certification is done by using one's own qualified personnel and by delegating competences, by a special mandate, to Recognized Organizations. The national maritime administration of a particular State have a duty to conduct a programme of surveys to its flagged ships in ensuring that they must comply with the requirements of all applicable international conventions, statutes and regulations with respect to ship safety and protection of the marine environment. It is directly committed to ensure that all surveys and inspections are conducted in an efficient and expeditious manner in accordance with the international safety standards to ensure the facilitation of shipping. Normally many maritime administrations delegate certain surveys, inspections and certification activities to Recognized Organizations - Classification Societies; however the responsibility and accountability always remains with them.

Compliance of one's own ships with international requirement and norms is controlled and imposed through a mechanism called Flag State Control (hereinafter referred as FSC) the body of experienced and highly trained professionally inspectors. The role of the FSC body of inspectors is to determine how one's own ships fulfill and satisfy technical and operational requirements applicable. An FSC service well organized and aware of the importance of fulfilling the obligations assumed by the flag State by adhering to IMO Conventions and Protocols may and shall contribute to the accession of the specific flag state, on the white list of the memorandums of understandings. This serves for getting a preferential status of the flag in the worldwide shipping industry with image and also important economic advantages.

The member state has the obligation, through the flag State, to communicate to the International Maritime Organization one's own technical norms corresponding to IMO Conventions to which one adhered but where the administration must issue one's own norms meant to satisfy

[290] Article 5 (1) of UNCCRS

requirements. The provision of the convention only stipulates, for the satisfaction of the Administration.

The Administration may grant to individual ships exemptions or equivalents of a partial or conditional nature provided that the Administration has taken into account the effect such exemptions and equivalents may have upon the safety of all other ships.

Every ship to which mandatory requirements applies shall be provided with an appropriate minimum safe manning document or equivalent issued by the Administration as evidence of the minimum safe manning considered necessary to comply with the provisions.[291]

Training and certification of the maritime personnel is also an obligation of the flag State. All training curricula for future maritime officers in specialized maritime institutions are controlled and certified by the competent authority of the flag State. The trainings in maritime education institutions must correspond for duration (number of hours) and content with the conventional requirements and Model Courses adopted by the International Maritime Organization.

Maritime Administration has the duty to inspect and control the manner in which maritime education institutions satisfy all requirements in view of the accreditation. This activity of verification is performed by the auditor's body of Maritime authority of the State through periodical audits and unannounced controls. The manner in which future maritime officers are trained is very important for the safety of navigation and the training level required shall be provided through the mechanism of the flag State.

As we can observe in order to effectively discharge their responsibilities and obligations, flag States through their Maritime Administrations undertake to implement, delegate as necessary and enforce the international conventions requirements and in particular:

1. Implement policies through the issuance of national legislation and guidance that will assist in the implementation and enforcement of the requirements of all safety and pollution prevention conventions and protocols they are party to;

[291] IMO resolution A.890 (21)

2. Assign responsibilities within their Administration to update and revise any relevant policies adopted, as necessary; and

3. Establish resources and processes capable of administering a safety and environmental protection programme that as a minimum, should consist of the following:

• Administrative instructions to implement applicable international rules and regulations as well as develop and disseminate any interpretative national regulations that may be needed;

• Resources to ensure compliance with the requirements of the mandatory IMO instruments using an audit and inspection programme independent of any administrative bodies issuing the required certificates and relevant documentation and/or of any entity (ROs) which has been delegated authority by the flag States to issue the required certificates and relevant documentation;

• Resources to ensure compliance with the requirements of the STCW Convention, as amended ensuring ships entitled to fly their flag are sufficiently and efficiently manned, taking into account the Principles of Safe Manning adopted by IMO.

• The development, documentation and provision of guidance concerning those requirements that are "to the satisfaction of the Administration", found in relevant mandatory IMO instruments; and

• Resources to ensure the conduct of investigations into casualties and adequate and timely handling of cases of ships with identified deficiencies.

The flag States should, on a periodic basis, evaluate their performances with respect to the implementation of administrative processes, procedures and resources necessary to meet their obligations as required by the conventions to which they are party. IMO Assembly resolutions on this issue including the submission to IMO of the Self Assessment Forms will help to ascertain the levels of effective implementation by individual IMO members.

Measures to evaluate the performance of the flag States may include, inter alia, the internal and external criteria indicators identified in the relevant IMO recommendations, such as port State control detention rates, flag State inspection results, casualty statistics, communication and

information processes, annual loss statistics and other performance indicators as may be appropriate, to determine whether staffing,

Most national maritime administrations have other roles as well, in their capacity as port and coastal States, which may involve the enforcement of regulations with regard to visiting foreign ships. However, in the context of the regulation of shipping, it is a nation's role as a flag State that is the first line of defense against potentially unsafe or environmentally damaging shipping.

Coastal State is required as a maritime administration of the Member State to make effort for providing complete safety in navigation without any discrimination, for all ships navigation in the jurisdiction and responsibility area of that particular coastal State. This means that the coastal State must comply with the relevant IMO conventions for a series of matters related to safety in navigation and saving lives at sea. Coastal States have certain rights and obligations under various mandatory IMO instruments. When exercising their rights under the instruments coastal States incur additional obligations. In order to effectively meet their obligations, coastal States should implement policies and guidance, which will assist in the implementation and enforcement of their obligations; and assign responsibilities within their Maritime Administration to update and revise any relevant policies adopted, as necessary.

In particular, the Administration should ensure existence of national legislation implementing the "force majeure" provisions of SOLAS article IV.

The requirements that should be provided by coastal States are as follows: Voyage system ship reporting systems, coast watching and for the rescue of persons in distress, investigating reported incidents of pollution, shipping and pollution prevention legislation applicable to its EEZ, navigation maps, promulgating navigational warnings and dangers to navigation, the establishment and maintenance of any navigational aids within waters for which it has responsibility and how information relating to these are promulgated nautical publications, hydrographic services: notices to mariners, traffic separation schemes, lighthouses, meteorological services state. State is also responsible to develop and submit mandatory reports to IMO. Coastal States are in charge to establish sanctions for violations of mandatory IMO instruments within its jurisdiction. Therefore coastal State is responsible for enforcing maritime regulations while the flag state is responsible for ensuring compliance with international regulations.

The main responsibilities of a Maritime Administration in a capacity of a coastal State as required under the SAR convention is to provide a comprehensive search and rescue service for those reported in trouble on water and for those reported missing. The fully integrated organization of search and rescue co-coordinators and search and rescue units using a comprehensive communications infrastructure provides a well-developed search and rescue model. This includes the mobilization, organization and tasking of an adequate resources to respond to persons either in distress at sea or to persons at risk of injury or death on the shoreline of the State.

Hereby, Port State Control (hereinafter referred as PSC) also plays important role it may be considered as a main vehicle when safety is concerned. Port States have certain rights and obligations under various mandatory IMO instruments. When exercising their rights under the instruments, port States incur additional obligations.

Port States can play an integral role in the achievement of maritime safety and environmental protection, including pollution prevention. The role and responsibilities of the port State with respect to maritime safety and environmental protection is derived from a combination of international treaties, conventions, and national laws, as well as in some instances, bilateral and multilateral agreements.

As already stated in the first chapter of the present thesis foreign ships in a States ports are inspected to ensure that they have the relevant certificates required under international conventions and that the condition of the ship is substantially in conformance with the respective certificates. Ships found with defects or deficiencies may be detained in port and may not be allowed to sail until the defects or deficiencies have been rectified. These actions are to ensure that foreign ships do not pose a threat to the interests of the State with respect to the safety of life and property and are not a hazard to the marine environment in the State's waters.

Inspections should be carried out by qualified officers of the States Maritime Administration and in the event that a ship has to be detained, the action must be based on a sound knowledge of all the factors. PSC officers (hereinafter referred as PSCO’s) have to keep informed all the parties

concerned.[292] When exercising their right to carry out port State control, a port State should establish processes to administer a port State control programme consistent with the relevant resolution adopted by the IMO Port State control should be carried out only by authorized and qualified port State control officers in accordance with the above resolutions. In general, it may be said that Government surveyors normally perform port State inspections and general inspections are either performed either by Government surveyors or by private organizations (other than Classification Societies) or individual surveyors appointed by the Administration. Classification Societies are not normally used for PSC inspection purposes as it may be considered improper to have them checking on the standards on board a ship for which they might have dealt with the statutory surveys.

PSCO's and persons assisting them should have no commercial interest, either in the port of inspection or the ships inspected, nor should the port State control officers be employed by or undertake work on behalf of RO's or classification societies.

The sinking of the MV Amoco Cadiz in 1978[293], a vessel flying a Liberian flag, sparked the beginning of PCS Regimes. Due to the political and public outcry over this vessel, the Paris Memorandum of Understanding[294] (hereinafter referred as Paris MoU) was signed, introducing PSC.[295] Ships in international trade became subject to inspection by the states that they visited. This made it difficult to escape inspection and helped incentivize regulatory compliance. The Paris MoU was followed by the implementation of several other regional MoUs.

The PSC is considered as the most important tool of the Administration to fight against substandard foreign flagged ships. Although it had been usually regarded as quite a modern innovation, its origins go back to the 1929 SOLAS Convention. Presently, it is reaffirmed in subsequent revisions and expansions of the SOLAS 1960 and 1974 Conventions. Its main function is supervision of foreign ships calling at the ports within a State and the officer ensuring that those ships are safe, and not likely to cause pollution to the environment or endanger the lives of passenger and crew. It is however viewed to a large extent as a reflection of the failure of

[292] The Procedures for port State control IMO resolution A.787 (19), as amended by resolution A.882(21)) and by Resolution A.1052(27).
[293] 'Amoco Cadiz' was a very large crude carrier (VLCC) under the Liberian flag owned by Amoco.
[294] The Paris MoU, is an administrative agreement between the maritime authorities of twenty-seven European countries and Canada the world principle sea areas including Europe and North Atlantic States.
[295] Secretariat of the Paris Memorandum of Understanding on Port State Control . "A short history of the Paris MOU". Paris: Paris Memorandum of Understanding on Port State Control. Available at: http://web.archive.org/web/20100406081207/http://www.parismou.org/ParisMOU/Organisation/About+Us/History/default.aspx

other tiers in the implementation of safety standards, such as flag States, Classification Societies, etc..

Port state signify both a flag State and coastal State and an obligation for the Member State of IMO to control ships, no matter their flag, which operate in ports or ride at anchor in their roadstead's, with the purpose of evaluating their conformity with provisions of international relevant instruments. The main purpose of PSC is to eliminate from operation ships below required standards by the provisions of IMO conventions.

Eliminating from operation ships below mandatory standards contributes to enhancing safety in navigation and eradicating non-loyal competition practiced by some shipowners. They bring on the freight market technically damaged ships, with low freights, to the prejudice of serious ship owners who provide safe and properly maintained ships at the corresponding level of freights.

To make the most efficient use of resources by avoiding unnecessary inspections of the same ship and ensuring that ships which have been known to have (or be suspected of having) deficiencies, nine regional PSC Agreements for carrying out requirements of the Conventions have been adopted so far worldwide. PSC system is present worldwide and it is organized by associating IMO member States in 9 memorandums of understandings established pursuant to IMO Resolution A.682 (17) of 1991[296]:

Paris MoU, BS MoU,[297] Med MoU,[298] Caribbean MoU,[299] Tokyo MoU[300], Abuja MoU,[301] Indian Ocean MoU,[302] Riyadh MoU[303] and Acuerdo de Viña del Mar.[304]

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[296] IMO Assembly Resolution A.682(17)of November 1991, 'Regional Co-operation in the Control of Ships and Discharges'.
[297] The Black Sea MOU on Port State control is a system of harmonized inspection procedures designed to target sub-standards ships with the main objective being their eventual elimination. Implemented in Black Sea Country ports
Information available at: http://www.bsmou.org/about/
[298] Mediterranean MOU on Port State Control is signed by the Representatives of ten Countries from the Mediterranean region. Information available at: http://81.192.101.140/Home.aspx
[299]The Memorandum of Understanding on Port State Control in the Caribbean Region is signed by 15 countries from the region. Information available at: http://www.caribbeanmou.org/aboutus.php
[300] The Tokyo MOU is one of the most active regional port State control (PSC) organizations in the world. The organization consists of 19 member Authorities in the Asia-Pacific region. Information available at: http://www.tokyo-mou.org
[301] The Memorandum of Understanding on Port State Control for West and Central African Region.
Information available at: http://www.abujamou.org/index.php
[302] The Memorandum of Understanding on Port State Control for Indian Ocean Region.
Information available at: http://www.iomou.org/pscmain.htm
[303] The Riyadh Memorandum of Understanding on Port State Control in the Gulf Region.
Information available at: http://www.riyadhmou.org
[304] The Latin American Agreement on Port State Control of Vessels in the Latin American Region.
Information available at: http://www.acuerdolatino.int.ar/ciala/index.php

The States entering into the MoUs jointly seek to ensure foreign vessels calling at their ports meet international standards for safety and protection of the marine environment.

SOLAS, as modified by its 1988 Protocol, MARPOL and STCW also contain provisions that obligate port States to treat non-parties to those conventions no more favourably than those who are Parties. This means that port States are obliged to impose the conditions of the conventions on parties as well as on non-parties.

Port States should periodically evaluate their performance in respect of exercising their rights and meeting their obligations under mandatory IMO instruments.

MARPOL also highlights the importance of PSC, which enables port states to manage their coastal waters nationally by enforcing provisions of a convention on a flag state if the port state is a signatory party and the convention is in force. Shifting the enforcement of marine pollution and seafarer rights regulations to port state governments diminished the vessel owner's ability to avoid liability by the use of open registries.

The essential role of PSC in ensuring maritime safety is also underlined by UN GA resolutions:

"Recognizes that maritime safety can also be improved through effective port State control, the strengthening of regional arrangements and increased coordination and cooperation among them and increased transparency and information-sharing, including among safety and security sectors."[305]

It is important to note that PSC is, at most, a partial solution to the flag State implementation and enforcement deficit. As mentioned earlier, the PSC program does not address the need for better enforcement on the high seas and does very little with respect to foreign ships located in the coastal States' adjacent waters. Indeed, coastal States often have no way of even determining the identity of vessels in their adjacent waters, to say nothing of being able to assess their condition or other risk factors.

It is very clear that in order to effectively discharge flag State duties and responsibilities, along with those as a port and coastal State, it is necessary for there to be an effective national

[305] UNGA RES/69/245 on the Oceans and the Law of the Sea, 2014, para. 160.

maritime administration. This administration should be adequately resourced, both financially and with appropriately qualified and experienced personnel, and be embedded into the Government structure. Lack of financial resources, transfer of technology, or assistance for capacity building represents the lack the means for implementation.

The flag State, as a contracting party to Conventions, must have the political will and legal capacity to bring these Conventions into effect in its national legislation. In particular the political will of maritime States Government is a main requirement in order to effectively comply with their international and national obligations emanating from IMO instruments.

The maritime administration should have the ability and resources to register and administer the ships flying its flag on a worldwide basis, and to effectively monitor organizations to which it has delegated statutory responsibilities.

However Maritime Administrations by themselves cannot ensure quality, thus they require support from governments in seeing to the speedy ratification and implementation of conventions. States Maritime Administration should co-operate with all other agencies, governmental or private institutions, in promoting the safety at sea. Also it should develop links with other agencies that have similar interests.

Moreover Maritime Administration acts as a representative of the flag State in respect of the maritime interests with international organizations and other agencies of foreign governments who have similar interests. Therefore it should develop co-operation with all international organizations and agencies of foreign governments in their common interests in promoting safety at sea as well as protecting marine environment.

The general objective of the Maritime Administration is to improve maritime safety by establishing clear guidelines on the technical investigations to be carried out following maritime casualties and incidents. In case of marine accidents that resulted to loss of life, loss of ship or any other serious damage, States should supervise or conduct an investigation on marine casualties and incidents. The lessons learned from maritime disasters and the conclusions resulting from the investigations carried out thereof have had a major impact on the improvement of maritime safety over the years. The lack of mandatory provisions ensuring the systematic conduct of technical investigations on maritime casualties and guaranteeing an appropriate return

of experience from those investigations can be considered as a serious shortcoming of the maritime safety policy. The aim of technical investigations in the maritime area is not to determine, and far less to apportion civil or criminal liability, but to establish the circumstances and to research the causes of maritime incidents in order to draw all possible lessons from them and thereby improve maritime safety. Member States should ensure that their internal legal systems enable them and any other substantially interested Member States to participate or cooperate in, or conduct accident investigations on the basis of the provisions of the IMO Code for the investigation of marine casualties. Following several years of consideration and with limited experience, IMO adopted a resolution on the adoption of a Code for the Investigation of Marine Accidents. The code has been subsequently amended. However, applying the recommendations set out in the IMO Code on carrying out technical investigations relies on the good will of the flag States involved in maritime incidents. The fact remains that the contribution made by some flag States to improving maritime safety through appropriate management of feedback is limited, if not non-existent. Some Member States carry out this type of investigation systematically; they are carried out in a superficial and non-systematic manner in others. The extent to which IMO recommendations on technical investigations are observed varies greatly. The fact that there are no clear guidelines for a common level of commitment from all the Member States is a major deficiency. The biggest concern in the international maritime sector is still the inability of some flag States to carry out investigations directly following maritime incidents. The legal basis to carry out casualty investigations emanates from:

• Article 2 of the LOSC, establishes the right of coastal States to investigate the cause of any marine casualty occurring within their territorial seas which might pose a risk to life or to the environment, involve the coastal State's search and rescue authorities, or otherwise affect the coastal State.

• Article 94 of the LOSC establishes that flag States shall cause an inquiry to be held, by or before a suitably qualified person or persons, into certain casualties or incidents of navigation on the high seas.

It is obvious that effective and efficient flag port and coastal State should ratify mandatory and broad range IMO conventions; it has to have the ‘Genuine Link with the vessels which flies its flag. Flag State has to be capable to do inspections and surveys and perform casualty

investigations. Retaining the efficient system of certification and provide welfare to seafarers together with maintenance of an effective legal system for protection of seafarers onboard the ships under its flag is also of vital importance; Having enforcement capacities and monitoring abilities on entities acting on their behalf. Being adequately funded by the State in order to discharge its obligations.

If we have a look to the United Nations General Assembly Resolution[306], it notes, with approval, the recent initiatives at the IMO to improve flag State performance, but it annually calls upon States to develop their maritime administration and appropriate legal framework, it reaffirms and further defines necessity of effective administration of merchant fleet of any State and -

"Urges flag States without an effective maritime administration and appropriate legal frameworks to establish or enhance the necessary infrastructure, legislative and enforcement capabilities to ensure effective compliance with and implementation and enforcement of their responsibilities under international law, in particular the Convention, and, until such action is taken, to consider declining the granting of the right to fly their flag to new vessels, suspending their registry or not opening a registry, and calls upon flag and port States to take all measures consistent with international law necessary to prevent the operation of substandard vessels."[307]

The United Nations General Assembly has reaffirmed its "shape up or get out of the flag State business" resolution each year since[308], and since 2005[309] has also called upon flag and port States to "take all measures consistent with international law necessary to prevent the operation of substandard vessels."

Herewith it reaffirms that flag, port and coastal States all bear responsibility for ensuring the effective implementation and enforcement of international instruments relating to maritime safety, in accordance with international law, and that flag States have primary responsibility that requires further strengthening, including through increased transparency of ownership of vessels.

Therefore, maritime administration are required to keep vigilance and awareness of the implementation of international treaties to which they are party in a manner that safety and

[306] UNGA RES/69/245 on the Oceans and the Law of the Sea, 2014, paras. 146,156
[307] UN GA Res/64/71 on Oceans and the Law of the Sea, 2010, para 108
[308] UN GA Res/59/24, on Oceans and the Law of the Sea, Nov. 17, 2004, para. 38
[309] UN GA Res/60/30 on Oceans and the Law of the Sea, Nov. 29, 2005 para 47

environmental concerns/attitudes rank their first priorities. To this end, the IMO attempted to encourage its member States to implement and enforce the treaties to which they are a party.

During World Summit on Sustainable Development key commitments were agreed for enhancing maritime safety and protection of the marine environment from pollution: States were invited to become parties to and to implement the relevant IMO conventions and other instruments. Secondly IMO was urged to consider stronger mechanisms to secure the implementation of IMO instruments by flag States. Also Summit found out that Efforts are to be made to examine and further improve measures and internationally agreed regulations regarding safety, while stressing the importance of having effective liability mechanisms in place.[310]

Therefore, maritime administration are required to keep vigilance and awareness of the implementation of international treaties to which they are party in a manner that safety and environmental concerns/attitudes rank their first priorities. To this end, the IMO attempted to encourage its member States to implement and enforce the treaties to which they are a party.

A straightforward means of evaluating the effectiveness of the enforcement of international treaties is to look into the PSC records of ships under a flag. Therefore, the results of the flag performance in the two key PSC regimes; namely Paris, and Tokyo has to be taken into consideration as well Another means of assessing the flag performance is the ratification of major international maritime conventions Nomination of ROs to work on behalf of Maritime administrations in accordance with resolution A.739 (18)[311] is also considered a decisive factor. Submission of reports under the STCW convention as documentary evidence to show the full and effective compliance with the requirements of the convention is vital in determining flag performance. Lastly and mainly IMO Member State Audit Scheme may be considered as a primary tool for identifying performance of the Member State in implementing generally accepted rules, regulations and standards.

It goes without saying that the highly practical nature of IMO instruments, with their precise technical standards and specifications, is key to their successful implementation. There is room for improvement the recent adoption of new instruments, the continued effort to bring conventions into force, the advent of the mandatory audit scheme and the trends to more goal

[310] DOALOS/UNITAR BRIEFING ON DEVELOPMENTS IN OCEAN AFFAIRS AND THE LAW OF THE SEA 20 YEARS AFTER THE CONCLUSION OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA Wednesday, 25 and Thursday, 26 September 2002 United Nations Headquarters, New York

[311] IMO Assembly Resolution A.739 (18) adopted on 4th of November 1993.

based standards. Therefore IMO is on the right track and continues to answer the call of society to ensure the maritime industry in safe, secure, environmentally sound and efficient way.

A straightforward means of evaluating the effectiveness of the enforcement of international treaties is to look into the Port State Control records of ships under a flag. Therefore, the results of the flag performance in the two key PSC regimes; has to be taken into consideration, as well another means of assessing the flag performance is the ratification of major international maritime conventions. Nomination of ROs to work on behalf of Maritime administrations[312] is also considered a decisive factor. Submission of reports under the STCW convention as documentary evidence to show the full and effective compliance with the requirements of the convention is vital in determining flag performance. Lastly and mainly IMO Member State Audit Scheme may be considered as a primary tool for identifying performance of the member state in implementing generally accepted rules, regulations and standards.

Government authorities need to have an efficient administrative body to advise them on the adoption and implementation of maritime legislation and other regulations required for developing and operating the maritime programme of the country and for discharging the obligations of the Government under applicable international Conventions. This machinery can be provided only through a well-organized maritime administration as mentioned before

For the above reasons the establishment of an efficient Maritime Administration in all maritime nations is of paramount importance. A review of the main characteristics of the Maritime Administration individually and collectively is considered as a prerequisite of a maritime country in order to effectively implement generally accepted international rules regulations and standards. Therefore the key mission of the Maritime Administration is to foster, promote, and develop the merchant maritime industry.

[312] IMO Assembly Resolution A.739 (18) adopted on 4th of November 1993.

Chapter 2

The Experience of Georgia as a Flag, Port and Coastal State in respect Implementation of Mandatory IMO Instruments

Challenges for Georgia in implementing relevant provisions of UN Convention on the Law of the Sea, 1982

Intense and vital maritime activity takes place in the Black Sea region, boosting its potential for growth and economic development on shores of the Sea. Ensuing impacts on the marine environment and coasts could however hamper the sustainable growth of these same vital maritime activities, with undesirable socio-economic consequences. A concerted effort in policy-making is thus required in order to secure growth of sea-based activities whilst meeting environmental sustainability goals at the national and regional levels.

Georgia is a country in the Caucasus region of Eurasia. Located at the crossroads of Western Asia and Eastern Europe, it is bounded to the west by the Black Sea, to the north by Russia, to the south by Turkey and Armenia, and to the southeast by Azerbaijan. The capital and largest city is Tbilisi. Georgia covers a territory of 69,700 square kilometers, and its 2015 population is about 3.75 million. Georgia is a unitary, semi-presidential republic, with the government elected through a representative democracy.[313]

[313] Please refer to official website of the Government of Georgia: http://gov.ge/index.php?lang_id=ENG&sec_id=193 [accessed on 26.11.2015]

Georgia's role for centuries was to link by the shortest routes Asia to Europe and to be a natural gateway for the South Caucasus countries to the Black Sea and to connect with the Mediterranean.

In recent period, especially since 2004 the government has given priority to regional economic integration as a means to promote trade and overall economic growth. This refers to integration with both the EU and the countries to the east of Georgia. The goal is to provide efficient intermodal transfers as well as seamless movements across the borders with Georgia's neighbors and the countries in Central Asia.

The development of trade depends on the quality of transport and logistics services. The most important exports are agriculture, tourism and the services provided to transit cargo. In order for Georgia to compete for transit trade and to develop as a logistics hub, it is essential that these services be modernized and integrated. For imported consumer goods, improvements in the domestic distribution network are necessary to reduce the delivered cost and increase the availability of consumer goods.

Georgia as a flag State on its own right was formed in the wake of demolition of USSR. Shortly after gaining independence Georgia became party to the LOSC on 21 March 1996.[314] However before ratification of the LOSC in 1995 7th of August Georgia acceded UNCCRS[315] it means that Georgia is in those 24 States who tried to define genuine link. However accession to afore mentioned convention, beside the fact that it is not yet in force, arises obligation on the contracting party not to defeat the object and purpose of a treaty prior to its entry into force, Article 18 of the Vienna Convention on Law of the Treaties in this respect states that:

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

[314] https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en
[315] https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-7&chapter=12&lang=en

Hereby of Maritime Code of Georgia fully implements requirements of UNCCRS and states that:

"Article 29

1. The right to fly (to sail under) the national flag of Georgia shall be assigned to a ship upon its registration in the register.

2. The right to fly the national flag of Georgia shall be assigned to a ship under construction.

3. All forms of ownership provided for by the legislation of Georgia shall apply to a ship sailing under the national flag of Georgia.

4. A ship registration may be temporary, fixed-term or permanent, with the right to navigate or without the right of navigation.

5. The following ships are subject to registration in the register:

a) ships that are under state ownership of Georgia;

b) ships that are the property of natural or legal persons of Georgia;

c) ships that are the property of a foreign shipowner, who has an authorised representative in Georgia in accordance with the legislation of Georgia;

d) ships that are operating under a bareboat charter arrangement provided for by this Code.

6. Georgia does not recognise a parallel registration of a ship, except for cases provided in paragraph 8 of this article.

7. Georgia does not recognise foreign registration of a Georgian ship, unless the ship is removed from the register as prescribed by the legislation of Georgia or unless its registration is suspended.

8. In the case of a bareboat charter a ship may be registered in Georgia if at the moment of chartering, its registration is suspended in the register of the ship's flag state or if the ship is not properly registered in the register of another country.

9. If a ship is properly registered in the register of another state, the ship may be registered in Georgia only after its foreign registration is suspended, terminated or removed.

10. The liability for flying the national flag of Georgia on a ship without proper authorisation shall be determined by the legislation of Georgia."

As the part of its succession from the former USSR, Georgia inherited part of the Black Sea fleet – Georgian Shipping, which in 1997 was formed as the State owned Joint Stock Enterprise commonly known as Georgian Shipping Company (hereinafter referred as GSC), which later helped as the basis for forming the first Georgian maritime administration."

In order to effectively administer the fleet and other maritime affairs, the Maritime Transport Department as the structural unit of GSC was formed in accordance with the Order No.541, dated 30 December 1993, of the Head of the Georgian Shipping.

After the adoption of new Constitution in 1995 the State institutions were formed. Presidential Decree No.541, dated 16 August 1996, on the "*Measures for the Development of Maritime Sector of Georgia*" defined general principles applied to the early stage of development of Georgian maritime sector and repeals mentioned ordinance of the Cabinet of Ministers. The purpose of the Decree clearly states, that *"In order to increase credibility and performance of the Georgian fleet and harbours hereby I declare: […]".* The mentioned Decree was also the birth of the first independent Georgian Maritime Administration (hereinafter referred as *"MARAD"*).

However, since the first maritime administration was established frequent structural changes hampered the development of maritime Georgia and caused chaotic and misleading reforms, resulting in deteriorating what was meant to be Georgia as a Flag State.

The first maritime administration was established by commensurate Order No.20 of the State Minister of Transport of Georgia, dated 02 April 1998 on the approval of "the Statute of the Maritime Administration of Georgia of the Ministry of Transport of Georgia." Later, the order was repealed in accordance with the Decree of the President of Georgia N395, dated 1 October 2001 on the "Approval of the Measures for Assisting the Land Transport, Railway, Maritime Transport and Civil Aviation Administrations in accordance with the Law of Georgia on the "State Administration and Regulation of Transport and Communications Field". Mentioned Decree was issued in accordance with the previously adopted Laws of Georgia on the "Legal Entity of Public Law" and "State Administration and Regulation of Transport and Communications Field". Consequently, Minister of Transport and Communications of Georgia issued Order N113, dated 28 December 2001 on the "Approval of the Statute of the Legal Entity of Public Law Maritime Transport Administration". Order No. 113 of the Minister of Transport and Communications of Georgia has been repealed with the Decree of the President of Georgia

N599, dated 12 October 2006 on the "Approval of the Statute of the Independent State Regulatory Organ, Legal Entity of Public Law – National Transport Regulatory Commission of Georgia." However, mentioned Decree N599 of the President, was repealed by the new Law of Georgia on the "Regulation and Management of Transport Field" adopted on 30 March 2007, which brought the entire transport sphere under the umbrella of the Ministry of Economic Development of Georgia. Due to the adoption of new law and establishment of new oversight ministry, Minister of Economic Development of Georgia issued Order N1-1/584, dated 12 April 2007, on the "Approval of the Statute of the United Transport Administration (hereinafter referred as UTA) of Georgia of the Ministry of Economic Development of Georgia." In approximately, two years new amendments were introduced in the Law of Georgia on the "Regulation and Management of Transport Field" and oversight Ministry for the UTA became Ministry of Infrastructure and Regional Development of Georgia (hereinafter referred as MRDI)." Therefore MRDI issued Order N1/n dated 06 March 2009 on the "Approval of the Statute of UTA of MRDI." However, due to the drastic and radical reforms in the transport field introduced, on 22nd of February 2011, Parliament of Georgia adopted amendments to the Law of Georgia on "Management of Regulation of Transport Field". As the result UTA responsible for land and maritime transport and civil aviation technical regulation in Georgia, had been abolished. Bearing in mind abovementioned amendments, government of Georgia have established 3 independent technical regulators of maritime, land and civil aviation spheres. The Ministry of Economy and Sustainable Development of Georgia (hereinafter referred as "MESD") as a body carrying out the state policy is obliged to provide the effective functioning of the whole branch and its development referring to the acting state regulatory institutions. Within the limits of the above-mentioned reform on 15th of April, 2011, MESD approved "Regulation of the Legal Entity of Public Law Maritime Transport Agency of MESD" (hereinafter referred as "MTA").[316]

The maritime administration of Georgia was in the past struggling with a number of challenges. The main challenges in this field were the following:

- Reinstating the Georgian Seafarers Certificate of Competency on international level, especially by EU
- Substantial improvement of the standards of Georgian shipping

[316] Maritime Safety & Classification Society – A Georgian Prospective – Ivane Abashidze, Lambert Academic Publishing, 2014, pp. 34-35

- Improvement of the standard of shipping in the Black Sea
- Building a strong legal system

Unfortunately, the solutions that were found at that time did not result in a high level of international confidence into the maritime safety and marine environmental protection standards applied in the Georgian merchant fleet, as well as the training and education standards applied in seafarer training in Georgia. Since establishment of Georgian flag it has been for on the black list of the Paris and Tokyo MoUs for Port State Control. Moreover on November 22, 2010 European Commission adopted decision concerning the withdrawal of the recognition of Georgia as regards education, training and certification of seafarers for the recognition of Certificates of Competency. This decision was based on 2006 EMSA[317] audit held in Georgia on Maritime Educational and Training Centers and Maritime Transport Department. According to abovementioned decision Georgian Seafarers were unable to work on vessels flying European Union Member State Flags. Moreover, lots of European Union companies cooperate with Georgian seafarers but owing to this situation they were not able to employ Georgian seafarers again. Those two factors created a strong economic pressure on the maritime sector of Georgia.

Government of Georgia requested the Needs Assessment Mission of IMO in order to identify gaps and set goals for improvement and further development of maritime transport fiend. According to the findings and recommendations of IMO experts in the beginning of 2011 the Georgian Government initiated comprehensive approach towards reforms in maritime transport sector in Georgia; therefore this field has undergone substantial reforms in 2011 in order to

- Guarantee maritime safety;
- Facilitate maritime transport operations;
- Introduction of international standards in maritime transport field.

The main success was establishment of independent maritime authority –MTA under the MESD. Though the agency has quite a big extent of independence the government oversight over its activities is guaranteed in terms of legal provisions. Almost the entire staff has been replaced in the transition period from the UTA to the MTA. Due to the vital necessity of recruiting professionals particularly in the legal component of our framework, MTA devotion to bring

[317] European Maritime Safety Agency http://emsa.europa.eu

Georgia in compliance with international standards, was and is being evaluated as one of the important dimension of ongoing reforms. Since 2011 the MTA nominates Georgian candidate for several international programs for capacity building.

Structure of MTA -

Georgia is one of the oldest maritime nation with long-lasting seafaring traditions. It may be stated that Georgian seafarers are known for courage and competency ready to face the perils of the sea. As Georgia has potential to become a seafarer supply country for international labour market. Qualification and competency of the Georgian seafarers is essential for the relief of the worldwide officer crew shortage and to reduce human-related sea accidents, to ensure maritime safety and for the protection of marine environment. Re-recognition of Georgian COCs was a number one priority for MTA as it influenced thousands seafarers and their families.

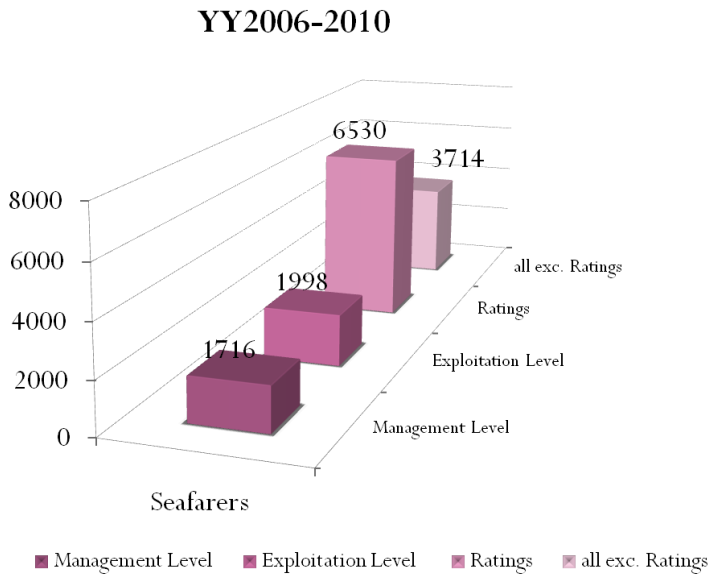

Figure 1.

To address this problem new draft law on STCW was elaborated with the help of Development of Security Management, Maritime Safety and Ship Pollution Prevention for the Black Sea and Caspian Sea" (hereinafter referred to as SASEPOL) that incorporated 2010 Manila Amendments. The New Law of Georgia on Education Certification and training of Seafarers was adopted on 9th of January 2012 by Parliament of Georgia. In order to ensure proper implementation of international standards, namely the STCW Manila amendments, the MTA has introduced implementing the by-laws regulating specific dimensions of the Law. Therefore Georgia was among the first member States, which implemented 2010 Manila amendments.

The new law introduced:

- Mandatory Quality Management Service for MTA and Maritime Educational and Training Institutions. Therefore Since 2012 both are certified as per ISO 9001:2008;
- New Seafarers Examination Rules and Procedures;
- New Seafarers Documents in line with Applicable International Standards (Joint project of MTA and Ministry of Justice of Georgia);
- New Seaman's Book as per ILO C 185, ICAO 9303 standards;
- High degree of protection of Seafarers Documents.

As a result Georgia has completely renewed its seafarer's certification system and issued refined, highly secured seafarers documents.

In 7-10 August, 2012, two inspectors of the Ministry of Labor and Communications' department of Merchant Shipping of Cyprus conducted the preliminarily EMSA audit. MTA passed the audit successfully. Afterwards Cyprus initiated to EU member states to send EMSA audit to Georgia in October 2012 EMSA was invited to carry out an inspection as the basis for an EC reassessment of STCW compliance in Georgia. The objective of the audit was to verify the overall compliance of Georgia with the STCW Convention as well as the related implementation and enforcement provisions. The audit resulted in a list of shortcomings and observations to be rectified by MTA before COCs issued by Georgian authorities could be recognized at European Union level. The MTA established respective corrective actions listed and detailed in a corrective action plan. The final version of the CAP has been submitted to EMSA in July 2013 and in parallel it has been implemented. Exactly three years after withdrawal of recognition, the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) decided to re-recognize Georgian seafarer certificates. EMSA findings made during that inspection were addressed in a subsequent corrective action plan submitted to EMSA in due course. A COSS decision to reinstate the recognition of Georgian seafarer certificates was made on 22 November 2013.

On the other hand on 1st of July 2014 Georgian flag has been up-ranked from black list to the GRAY LIST within the frames of Paris MOU on Port State Control.[318] As stated before it is

[318] https://www.parismou.org/2013-annual-report-paris-mou-psc

noteworthy, that Georgian flag since its establishment had been constantly ranked amongst worst performing Flag States and was listed in the black list since its very establishment – 1999.

Paris MoU consists of 27 participating Maritime Administrations and covers the waters of the European Coastal States and the North Atlantic basin from North America to Europe. Annually more than 18.000 inspections take place on board foreign ships in the Paris MoU ports, ensuring that these ships meet international safety, security and environmental standards, and that crewmembers have adequate living and working conditions. Ranking of each flag State depends on triennial performance, on the basis of which a State shall be ranked in Black, Gray or White lists.

Since its establishment, MTA endured to actively carry out immediate reforms necessary for complete restoration of the image of Georgia flag. To improve quality shipping under the Georgian flag the MTA terminated ships registration process in the period between May and September, 2011

For 15th of April, 2011 Georgian State Registry of Ships had 239 registered vessels, most of them outdated and substandard. To achieve success Georgia made tough decision against substandard shipping and vessels not complying with international and national standards and have been rejected / removed from the state ships registry of Georgia. MTA took reactive and proactive approach, while carrying out reforms necessary. It means that one of the main goals of the MTA was deregistration of the substandard vessels. As a result of the strict control of Georgian flagged vessels since September 2011, the Georgian state ships registry does not contain substandard tankers. Reform package aimed to creation of robust legal and institutional capabilities. Amendments to the Maritime code of Georgia introduced centralized registration system, new electronic database, new registration rules and revised fees. Furthermore Georgia have restricted the list of Recognized Organizations by Georgian Flag State to the ones recognized only by EU for vessels engaged in international trade in order to ensure quality of vessels flying Georgian flag. During intermediary period, upon entry into force amendments to the Maritime Code, it was obvious that most of Georgian registered ships could not meet strict regime of compliance and new policy. Therefore all of substandard, aged and technically defective ships were deleted.

While considering all necessary IMO mandatory instruments, MTA took into consideration European standards and Directives. As a result of the mentioned reforms, Georgia took an

obligation to recognize only EU recognized classification societies, technical performance of which has been proved to be amongst the most successful performances. At the final stage of the mentioned processes, State ships registry of Georgia has declined number of ships registered to 8 ships engaged in international voyages.

In order to effectively implement amendments made to Georgian legislation and to cope with new reality created after reduction of national tonnage, MTA developed network of flag State surveyors. Therefore, the network serves as the successful basis for the creation of new image of Georgian flag. Meanwhile, Georgian flag offered competitive approach and prices for registration of ships.

It should be also noted that within the State Maritime Administration of Azerbaijan National Data Centre of Long Range Identification and Tracking (LRIT) of Ships is being functioned, which is only data centre in the region and is in full compliance with the requirements established by the Regulation V/19 of the SOLAS Convention.

Nowadays Georgia does not have national data centre (NDC) for LRIT, which is a real obstacle for development of Georgian merchant fleet and for effective maintenance therein. Azerbaijan party has expressed their readiness in order to assist Georgia in the resolution of above-mentioned problem. As the result of negotiations, Georgia connected to the NDC of Azerbaijanian LRIT.

Georgia continues to improve its image and to rank amongst the best performing flags. Nowadays Georgia is not listed in any major MOUs on Port State Control since it has only 9 vessels involved in international Trade. Since 2012 Georgian flagged vessels have not been detained in any MOU's. Therefore Georgia has to effectively utilize its geographical location and offer to foreign shipowners incentive of the shortest corridor between Europe and Asia.

To substantially improve the standard of shipping in the Black Sea Georgia, as a port state, Port State Control System of Georgia has also undergone the reforms. Nowadays it thoroughly fulfills its obligations and all port state inspections are conducted thoroughly and are unbiased.

It should be noted, that according to the Decree of the President of Georgia No.140 dated 31 January 1996, Decree No. 328 dated 19 May 1999 and Security Board Session Protocol No.6 dated 07 June 1999 and Order of the Chief of Georgian Maritime Defence Forces No. 140 dated 17 April 2003, Georgian (Abkhazian) Marine Basin is closed for all types of external and international transitions, except the transit of humanitarian aid cargoes.

According to above-mentioned documents: Port of Sokhumi and Port of Ochamchire are closed for navigation.

Law of Georgia on "Occupied Territories" also prohibits navigation of all type of vessels, except humanitarian cargoes in the waters adjacent to occupied territory of Abkhazia, Georgia.

Nevertheless, some vessels continue sailing to the ports on which at the moment Georgian side is deprived possibility of control, therefore cannot guarantee the safety and security of navigation, as well as safety and security of ships, crews and next port of call. The ships, which consciously violate mentioned restrictions and navigate to closed Georgian ports, are subject to detention and substantial fines. View of Georgia in this regard is to condense the monitoring of such ships, as they pose a risk to the safe movement of ships in the Black Sea region, which gains even more significance in light of perspectives of Silk Road project.

In 2015 Georgia has passed IMO Member State Audit Scheme. Georgia is 77th country, which has volunteered for VIMSAS. It is worth noting that, in the closing remarks Audit team mentioned the following: Audit has been successfully concluded.

Furthermore since 2011 Georgia actively participates in various international fora such as IMO, ILO etc. in order to make Georgia active on International level, and frequently hosts' events organized by IMO and EU funded projects.

Present new developments in maritime field of Georgia are the best proof showing that the Government of Georgia has long standing goal and political will to sustainably develop aforementioned field in order to make Georgia leading maritime State in the region.

Section B

Current Legislative Status of Georgia and Gap Analysis in respect Generally Accepted International Regulations, Procedures and Practices

According to the law of Georgia on Normative Acts:

"Article 7. Relativity of the Normative Acts

1. The normative acts of Georgia are divided into the Georgian legislative acts and the Georgian by-laws that create the Georgian legislation. Constitutional agreement of Georgia and the international treaties and agreements of Georgia are also normative acts of Georgia.

2. The following shall be the legislative acts of Georgia: a. Constitution of Georgia, constitutional law of Georgia, b. Organic law of Georgia,

c. Law of Georgia, decree of the President of Georgia and regulation of the parliament of Georgia.

3. Legislative acts of Georgia, constitutional agreement of Georgia and the international treaty and agreement of Georgia shall have the following hierarchy:

a. The Constitution of Georgia, a constitutional law of Georgia; b. The Constitutional agreement of Georgia;

c. The international treaty and agreement of Georgia;

d. Organic law of Georgia;

e. Law of Georgia, decree of the President of Georgia, regulation of the parliament of Georgia. [...]

5. International agreement or treaty of Georgia, which has taken effect in compliance with the requirements prescribed in the Constitution of Georgia and in the law of Georgia on "International Treaties of Georgia", shall take precedence over domestic normative acts unless they contravenes the Constitution of Georgia and constitutional law, as well as constitutional agreement of Georgia."

As it is evidenced in above-mentioned law of Georgia on Normative Acts, international treaties ratified by Georgia are an integral part of domestic legislation and take precedence over domestic law unless the treaty contravenes the Constitution of Georgia. Thus, clearly defines the relation of international treaties to the domestic legislation.

The Constitution and the Law of Georgia on International Treaties of Georgia provide that international treaties of Georgia are directly applicable on the territory of the country provided these provisions are specific enough to emanate specific rights and obligations.

Meanwhile, Georgia acceded the conventions of IMO starting from 1993,[319] currently the Status of Georgia in regards IMO conventions is the following:

Figure 2.

Georgia	Convention	Status
	IMO Convention 48	X
	SOLAS Convention 74	X
	SOLAS Protocol 78	
	SOLAS Protocol 88	X
	SOLAS Agreement 96	
	LOAD LINES Convention 66	X
	LOAD LINES Protocol 88	
	TONNAGE Convention 69	X
	COLREG Convention 72	X
	CSC Convention 72	X
	CSC amendments 93	

[319] Ordinance of the Cabinet of Ministers of Georgia N805, dated 15 November, 1993 on the" Accession of Georgia to the Convention on International Maritime Organization and other maritime conventions adopted by the International Maritime Organization"

	SFV Protocol 93	
	Cape Town Agreement 2012	
	STCW Convention 78	X
	STCW-F Convention 95	
	SAR Convention 79	X
	STP Agreement 71	
	Space STP Protocol 73	
	IMSO Convention 76	X
	INMARSAT OA 76	
	IMSO amendments 2006	
	IMSO amendments 2008	
	FACILITATION Convention 65	X
	MARPOL 73/78 (Annex I/II)	X
	MARPOL 73/78 (Annex III)	X
	MARPOL 73/78 (Annex IV)	X
	MARPOL 73/78 (Annex V)	X
	MARPOL Protocol 97 (Annex VI)	
	London Convention 72	X
	London Convention Protocol 96	X
	INTERVENTION Convention 69	X

	INTERVENTION Protocol 73	X
	CLC Convention 69	X
	CLC Protocol 76	X
	CLC Protocol 92	X
	FUND Convention 71	
	FUND Protocol 76	
	FUND Protocol 92	X
	FUND Protocol 2003	
	NUCLEAR Convention 71	
	PAL Convention 74	X
	PAL Protocol 76	X
	PAL Protocol 90	
	PAL Protocol 02	
	LLMC Convention 76	X
	LLMC Protocol 96	
	SUA Convention 88	X
	SUA Protocol 88	X
	SUA Convention 2005	
	SUA Protocol 2005	
	SALVAGE Convention 89	X
	OPRC Convention 90	X
	HNS Convention 96	

HNS PROT 2010	
OPRC/HNS 2000	
BUNKERS CONVENTION 01	
ANTI FOULING 01	
BALLASTWATER 2004	X
NAIROBI WRC 2007	
HONG KONG CONVENTION	

Due to the socio-economical background of Georgia in 90s,[320] shipping industry at large was not receiving proper attention from the Government, meanwhile positioning of Georgia always had been the transit corridor for neighboring landlocked countries rather than developing a proper flag State and the registry conforming to international safety and security standards. However, it should be noted that first technical arrangements were in place, such as general framework document Maritime Code of Georgia adopted in 1997, the Law of Georgia on the Maritime Search and Rescue Service of Georgia, etc.

At the same time, Georgia whilst ratifying party to LOSC had to bear in mind that the Convention includes Flag State duties in the domain of safety and also in the domain of prevention and protection of the marine environment. Therefore, according to Article 31, para. 1 of Vienna Convention on the Law of the Treaties:

[320] Please refer to Official web-page of Central Intelligence Agency of the United States of America: https://www.cia.gov/library/publications/the-world-factbook/geos/gg.html

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[321]

LOSC sets out the duties of FS in a greater detail than previous conventions, notably the High Seas Convention. First of all, Article 94 (1) provides that every State is required to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." But LOSC goes further and establishes in the subsequent paragraphs of rticle 94 a duty of FS to maintain regular inspections upon the seaworthiness of ships, to ensure that crews are properly qualified, to effectively exercise jurisdiction and control over their ships, to hold investigations into shipping casualties, to maintain a register of ships, to take measures to ensure safety at sea with regard to the construction, equipment and seaworthiness of ships, the manning of ships, labour conditions and the use of signals, the maintenance of communications and the prevention of collisions.

Regardless of the fact that Georgia is a monist country, meaning ratified treaty directly becomes part of Georgian legislation, those norms which are not of a self-executive norms of international law do further require implementation in order to ensure, that object and the purpose of the convention in question is adequately addressed by national legislation.

Considering the above mentioned, Georgia as a flag, port and coastal State needs to define several step priority - action plan how to accept and implement subsequent convention ratification and implementation procedure. So far what one can observe on the chart above is the following, Georgia is a party to SOLAS convention and subsequent 1988 protocol, at the same time Georgia is a party to LL 1966 convention, but is not a party to 1988 LL Protocol. Both protocols deal with the harmonized survey systems and deal with one and the same issue and were adopted for single purpose, however in Georgia this research could not identify any document why the LL 1988 protocol is not ratified, nor is there any policy decision, based on objective refrain that would affect Georgia's shipping industry interests. Bearing in mind what has already been told, Georgia needs to address the ratification and implementation of treaties in a systemized and coherent way, which unfortunately due to years of neglect is not adequately

[321] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.refworld.org/docid/3ae6b3a10.html [accessed 30 November 2015]

addressed. Concerns would even raise further while Mandatory IMO Member State Audit Scheme enters into force. IMO Instruments Implementation Code, so called III Code, establishes that every member States should have a maritime strategy in place, which would *inter alia* include:

> *"In order to meet the objective of this Code, a State is recommended to:*
>
> *.1 develop an overall strategy to ensure that its international obligations and responsibilities as a flag, port and coastal State are met;*
>
> *.2 establish a methodology to monitor and assess that the strategy ensures effective implementation and enforcement of relevant international mandatory instruments; and*
>
> *.3 continuously review the strategy to achieve, maintain and improve the overall organizational performance and capability as a flag, port and coastal State."*[322]

In order to effectively evaluate the meaning of mandatory instrument this research will put in the context of flag State the very nature of mandatory IMO conventions and will emphasize what is the role of growing harmonization of maritime transport within a global scale.

Mandatory IMO instruments are not *ipso facto* mandatory for implementation but require ratification of convention itself. When it comes to the effective implementation of each instrument, to which a member State is a party, different scenarios may apply. One of the most spread procedures within the IMO conventions is the tacit acceptance procedure, enabling organization to achieve its main goal harmonized technical regulation of shipping worldwide. Georgia as a member of most of the mandatory IMO instruments have chosen several ways to deal with the implementation in flag, port and coast State dimension.

First of all, Article 27 of the Maritime Code of Georgia should be examined in this respect. Article 27 states the following:

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[322] During its 28th regular Assembly of the IMO: The Assembly adopted the IMO Instruments Implementation Code (III Code), which provides a global standard to enable States to meet their obligations as flag, port and/or coastal States; the Framework and Procedures for the IMO Member State Audit Scheme; the 2013 non-exhaustive list of obligations under instruments relevant to the III Code; and a resolution on transitional arrangements from the voluntary to the mandatory scheme. The Assembly also adopted amendments to the International Convention on Load Lines, 1966; the International Convention on Tonnage Measurement of Ships, 1969; and the Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended, to make the use of the III Code mandatory in auditing Member States to determine how they give full and complete effect to the provisions of those Conventions to which they are party. The mandatory audit scheme is seen as a key tool for assessing Member States' performance in meeting their obligations and responsibilities as flag, port and coastal States under the relevant IMO treaties and then offering the necessary assistance, where required, for them to meet their obligations fully and effectively.

"Article 27

1. Civil, administrative and other relationships, considering the peculiarities of maritime navigation, if they are not regulated by this Code, shall be governed by civil, administrative and other relevant laws, by analogy of law, or by the general principles of the legislation of Georgia.

2. Maritime navigation, except for the laws referred to in paragraph 1 of this article, shall be regulated under the resolutions adopted by the International Maritime Organisation (IMO) and its agencies."

It is worth noting, that Georgian maritime code recognizes the particularity of maritime navigation and emphasise its special role in Georgian economy. Part 1 of the said article defines, that all relations that may arise under civil, administrative and other relationships shall be considered as peculiar and if they are not regulated the law opens the room for such general principles as analogy of law and general principles of law. It should be noted that this wording implies in it the wording of LOSC "Generally accepted rules, regulations and practices" under Article 94 of the Convention. Therefore, if the question arises in respect the special issues which are not addressed by the legislation of Georgia shall be understood and interpreted *per se* general principles, regulations and practices. This view however is still to be tested by courts in Georgia while addressing the issue in question. Moreover, if generally accepted rules, regulations and practices are to be addressed part 2 of the Article 27 comes into play, by stating and referring to the following:

"Maritime navigation, except for the laws referred to in paragraph 1 of this article, shall be regulated under the resolutions adopted by the International Maritime Organization (IMO) and its agencies."

Decisive element for this definition seems to be the wording of LOSC emphasize added to "generally accepted". This wording shall be underestimated in view of what had already been told.

The following IMO conventions may, on account of their worldwide acceptance,[323] be deemed to fulfil "generally accepted" requirement:

- SOLAS 1974[324] and Protocol 1988;
- MARPOL 1973/1978;[325]
- Load Lines 1966[326] and Protocol 1988;
- TONNAGE 1969;[327]
- COLREG 1972;[328]
- STCW 1978, as amended;[329] and
- SAR 1979.[330]

In its successive forms, the framework convention SOLAS is the most important of all international treaties addressing the safety of navigation and minimum technical standards for the construction, equipment and operation of ships.

MARPOL is the main international convention aimed at preventing and minimizing pollution from ships, both accidental and from routine operations. The MARPOL provisions constitute generally accepted in light of Article 211 LOSC.[331] In addition, as MARPOL has been signed by over 125 States whose market share represents almost the totality of seafaring activities, many of MARPOL's provisions have acquired the status of customary international law.[332]

In the 1966 Load Lines convention, adopted by IMO, provisions are made for determining the freeboard of ships by subdivision and damage stability calculations.

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[323] Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, Study by the Secretariat of IMO. LEG/MISC.7, 19 January 2012. <http://www.imo.org/OurWork/Legal/Documents/Implications%20of%20UNCLOS%20for%20IMO.pdf>
[324] IMO, International Convention for the Safety of Life At Sea, 1 November 1974, 1184 UNTS 3, <http://www.refworld.org/docid/46920bf32>
[325] The International Convention for the Prevention of Pollution from Ships (MARPOL) was adopted on 2 November 1973 at IMO.
[326] IMO, International Convention on Load Lines, 1966, <http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Load-Lines.aspx>
[327] IMO, International Convention on Tonnage Measurement of Ships, 1969, <http://www.admiraltylawguide.com/conven/tonnage1969.html>
[328] IMO, Convention on the International Regulations for Preventing Collisions at Sea, 1972, <http://www.imo.org/About/Conventions/ListOfConventions/Pages/Default.aspx>
[329] IMO, International Convention on Standard of Training, Certification and Watchkeeping, 1978, <http://www.imo.org/blast/mainframemenu.asp?topic_id=418>
[330] IMO, International Convention on Maritime Search and Rescue, 1979, 1403 UNTS, <http://www.refworld.org/docid/469224c82.html>
[331] ILA London Conference 2000, Committee on Coastal State Jurisdiction Relating to Marine Pollution, Final Report, available at <http://www.ila-hq.org/html/layout_committee.htm>, 39 [accessed 5 April 2014]; Posselt, Umweltschutz in umschlossenen und halbumschlossenen Meeren, 1995, 268.
[332] Proelß, *MeeresschutzimVölker- und Europarecht: Das Beispiel des Nordostatlantiks*, 2004, p. 139.

The regulations take into account the potential hazards present in different zones and different seasons. The technical annex contains several additional safety measures concerning doors, freeing ports, hatchways and other items. The main purpose of these measures is to ensure the watertight integrity of ships' hulls below the freeboard deck. All assigned load lines must be marked amidships on each side of the ship, together with the deck line. Ships intended for the carriage of timber deck cargo are assigned a smaller freeboard as the deck cargo provides protection against the impact of waves. Besides the named conventions, the IMO relies essentially on non-binding instruments such as guidelines and recommendations.[333] In this respect, what was already told it should be added, that Maritime Code of Georgia created unique possibility to achieve ongoing, sustainable compliance with Georgia's international undertakings.

However, SOLAS convention for instance, puts forward one of the most important aspects to be considered by maritime administration of ratifying IMO member States - on more than hundred occasions convention uses the wording: "To the satisfaction of administration", this apparently would imply the room for the national authorities to define the special requirements, which are not part of the convention. Even thou, such phrases in the convention can be found, it creates additional challenges for States how to address the issue. Whereas such wording is implied, one shall emphasize the role of Classification Societies[334] recognized by the Flag State, acting on their behalf. Examining this relation, it should be stressed, that the need for classification societies reflects the lack of technical expertise on very specific maritime issues worldwide. Classification Societies accumulated the knowledge and the best practices and make them available to the industry, even SOLAS convention distinguishes survey and inspection of ships. More precisely,

> *"Regulation 6 Inspection and survey*
>
> *(a) The inspection and survey of ships, so far as regards the enforcement of the provisions of the present regulations and the granting of exemptions therefrom, shall be carried out by officers of the Administration. The Administration may, however, entrust*

[333] For a survey see Pulido Begines , The EU Law on Classification Societies: Scope and Liability Issues, Journal of Maritime Law & Commerce 36 (2005), 487, 495 et seq.
[334] For further information please refer to the official web-page of International Association of Classification Societies: http://www.iacs.org.uk/default.aspx

the inspections and surveys either to surveyors nominated for the purpose or to organizations recognized by it.

(b) An Administration nominating surveyors or recognizing organizations to conduct inspections and surveys as set forth in paragraph (a) shall as a minimum empower any nominated surveyor or recognized organization to:

(i) require repairs to a ship;

(ii) carry out inspections and surveys if requested by the appropriate authorities of a port State.

The Administration shall notify the Organization of the specific responsibilities and conditions of the authority delegated to nominated surveyors or recognized organizations.

Therefore, survey for Flag State would mean survey of ships either with or without Classification Societies, but Flag State inspection would always remain with the Flag State, as the tool for defining general ongoing compliance.

While for the purposes of research the role of Classifications Societies is defined, it becomes rather important to link the SOLAS "to the satisfaction of administration" and the "Classification Society". Mainly the administration relies on the so-called "unified IACS interpretations".[335] Unified Interpretations are adopted resolutions on matters arising from implementing the requirements of IMO Conventions or Recommendations. Such adopted resolutions can involve uniform interpretations of Convention Regulations or IMO Resolutions on those matters which in the Convention are left to the satisfaction of the Administration or are vaguely worded. Interpretations are circulated to Administrations concerned or are sent to IMO for information, as appropriate.

[335] The official web page of IACS: http://www.iacs.org.uk/publications/publications.aspx?pageid=4&sectionid=4

Georgian experience in regards "to the satisfaction of Administration" is reflected in the circular of national maritime authority – Maritime Transport Agency of Georgia[336] (hereinafter referred as MTA):

"Various IMO conventions often require that shipboard equipment, materials, etc. to be "to the satisfaction of the Administration". For the proper implementation of IMO instruments MTA usually adopts national or international standards, or IACS Unified Interpretations or other IACS resolutions on matters that in the Conventions are left "to the satisfaction of the Administration". In cases where common industry practice exists, MTA may accept such practice; otherwise MTA will establish its own interpretations to provide satisfactory ways of complying with certain provisions of the Conventions; in which case, it is applied exclusively to all ships under Georgian flag. In order to facilitate such decision, Ship-owner/Shipyard is requested to provide a proposal based on a risk assessment according to recognized standards for such assessment. In any case, MTA's Recognized Organizations are required to consult with the Administration before taking action regarding provisions. Where the MTA decides to issue a specific interpretation it will be published through notice or as an individual circular letter on case-by-case basis, containing the guidelines, which define the term "to the satisfaction of the Administration".

It seems, that Georgian maritime authority relies not only on Unified IACS Interpretations but allows room for national standards and interpretations as well. Such standards and interpretations are very general or very specific and they refer not only to those standards prescribed in the convention, but reflect the general rules, regulations and practices in the sense of LOSC as well. Such general interpretations shall always bear in mind industry experience and shall therefore reflect their needs. Thus, these are called best practices.

Georgia, while being a member State of IMO and ratifying member State of most of the mandatory IMO instruments implements not only the referred conventions but also sets standardization for "to the satisfaction of administration" requirement on case by case principle. Such approach is not against the sole object and the purpose of the convention in question, but

[336] Official web-page of Maritime Transport Agency of Georgia http://mta.gov.ge/uploads/e28496201CIRCFSI2020Guidelines20for20the20interpretation20of20terms20to20the20satisfaction20of20the20Administration.pdf

tries to effectively administer such cases and adopted principles are thereafter applied to all Georgian ships.

Taking into consideration what has already been told performance of Georgia has also to be evaluated with Port and Coastal State responsibilities.

For the purposes of present thesis following chart was elaborated for Maritime Administration in Georgia:

Involved Governmental Agencies

Figure 3.

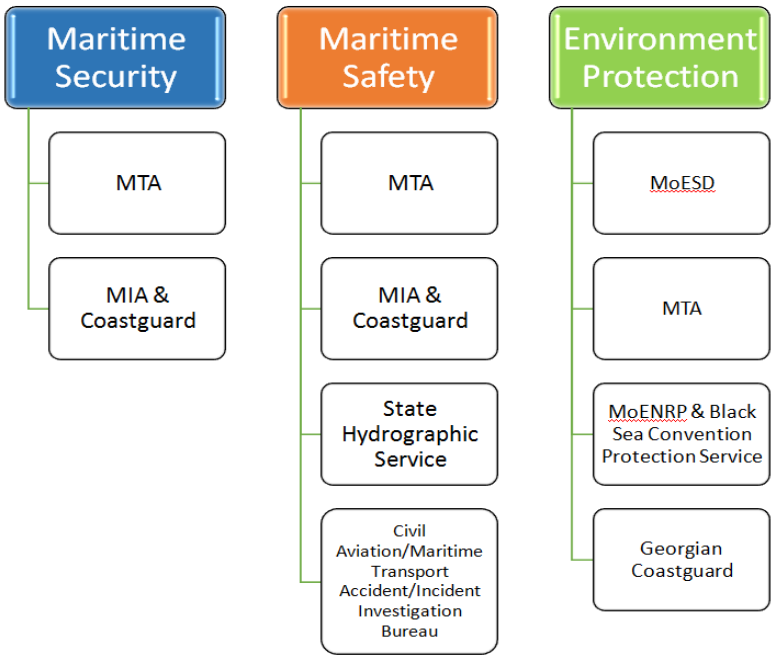

Figure 4.

Acronyms used in the chart	**MTA –** LEPL Maritime Transport Agency of the Ministry of Economy and Sustainable Development of Georgia **MoESD –** Ministry of Economy and Sustainable Development of Georgia **MIA –** Ministry of Internal Affairs **MoENRP –** Ministry of Environment and Natural Resources Protection of Georgia **Coastguard –** Coastguard Police Department of the Ministry of Internal

Affairs of Georgia

Black Sea Convention Protection Service – Service established under the provisions of The Convention on the Protection of the Black Sea Against Pollution 1992 national authority within the system of the LEPL National Environment Protection Agency of the Ministry of Environment and Natural Resources Protection of Georgia

Comprehensive legal framework is in place in Georgia to guarantee the effective administration of not only flag State, but port and coastal State responsibilities.

The laws or by-laws of Georgia adopted for this purpose are as follows:

Figure 5.

Georgian Legislation affecting Activities of Maritime Administration in Georgia

№	**Legislation Name**	**Entry into force**	**Last Amendment**
001	Constitution of Georgia	24/08/1995	4/10/2013
001-01	Organic Law of Georgia - Labour Code of Georgia	17/12/2010	27/09/2013
002	Maritime Code of Georgia	15/05/1997	2/5/2014
003	General Administrative Code of Georgia	25/06/1999	20/09/2013
004	Administrative Misdemeanors Code of Georgia	15/12/1984	29/05/2014
005	Civil Code of Georgia	26/06/1997	19/03/2014
006	The Law of Georgia on Education and Certification of Seafarers	23/12/2011	15/05/2012
007	The Law of Georgian on Regulation and Management of Transport Sphere	30/03/2007	2/5/2014

008	The Law of Georgia on Public Service	31/10/1997	29/05/2014
009	The Law of Georgia on Education and Certification of Fishermen	1/2/2013	not amended
010	The Law of Georgia on Maritime Search and Rescue	29/09/2000	2/5/2014
011	The Law of Georgia on Higher Education	21/12/2004	7/3/2014
012	The Law of Georgia on Professional Education	28/03/2007	28/06/2013
013	The Law of Georgia on Maritime Zones of Georgia	24/12/1998	27/09/2013
014	The Law of Georgia on Registration Fees	10/04/2002	5/6/2012
015	The Law of Georgia on Enforcement Procedures	16/04/1999	5/3/2014
	Government Acts		
016	N1327 on the Provisional Certification of Fishermen	21/06/2011	7/2/2013
017	No386 on the approval of State Border Regime and Securing State Border	30/12/2013	Not Amended
018	№57 Trafic Separation Schemes, Maritime Corridors and Special Maritime Districts	15/01/2014	Not Amended

Orders of the Minister of Economy and Sustainable Development of Georgia

019	16/02/2010 №1/ნ On the approval of the list of Technical Regulations relevant for the Transport Sphere	16/02/2010	18/06/2010
020	14/04/2011 №1-1/585 on the Approval of Charter of the Legal Entity of Public Law Maritime Transport Agency	14/04/2011	13/06/2013
021	15/04/2011 №1-1/592 Rules and Conditions on the Types, Terms, the Amount of Fees, also Method of Payment and Refund of Fees for the Services Rendered by Legal Entity of Public Law – Maritime Transport Agency	15/04/2011	18/11/2013
022	Order No1-1/183, on the Approval of the Rules for the Investigation of Marine Causalities/Incidents	19/07/2013	Not Amended

Orders of the Director of Maritime Transport Agency of Georgia

023	Order N 19 On the Approval of Harbor Rules	31/08/2012	9/8/2013
024	Order No31 on the Approval of the Rules of the Recognition, Issuing of Recognition Certificate, Monitoring of the Provision for the Issuance of Certificate, Supervision and for Suspension or termination of Recognition Certificate for Persons Providing Recruitment and Placement Services	31/12/2012	13/05/2014

025	Rules on Form, Production, Issuing and Usage of Seaman's Book	16/01/2012	8/8/2013
026	Rules for the acquiring and renewal of the Certificate of Competency and Certificate of Proficiency	23/01/2012 (In force 01/02/2012)	19/09/2013
027	Order №026 on the approval of the Rules of the examination for acquiring Certificate of Competency and Certificate of Proficiency	1/11/2012	Not Amended
028	Order №022 On the approval of the rules for Seafarers Training Record Book	16/10/2012	26/04/2013
029	Order N05 on the Prohibition of fishing in the waterd Adjecent to the Sea Ports	21/05/2013	not amended
030	Order №020 on the Rules for the State Registration of Ships and the Hypotheque	17/09/2012	21/10/2013
031	Order of № 51 on the Approval of Maritime Disciplinary Charter, and Rules for the Security of Sea Ports, Georgian Ships and Other Maritime Installations	12/12/2003	19/09/2012
032	Order N17 on the Approval of Minimum Requirements for Non-conventional ships Radio Installations and emergency Equipment	15/10/2013	1/11/2013
033	Standards of Medical Fitness for Seafarers	1/3/2014	not amended

Government Ordinances

034	N326 On the Approval of Technical Regulation for Minimum Safe Manning Standards for Ships Flying Georgian Flag	9/12/2013	not amended
035	N327 on the Approval of Technical Regulation for Operation of Pilotage Services and Certification and Pilots	9/12/2013	not amended
036	Order N430 on the removal of Wreck owned by the State	19/10/2012	not amended
037	N452 on the Approval of Technical Regulation for Recreational Craft	01.01.2017	not amended
038	N57 on the Traffic Separation Schemes, Maritime Corridors and Special Maritime Districts		not amended
039	on the approval of State Border Regime and Securing State Border	30.12.2013	not amended
040	N348 on the Approval of Fusion Centre	17.12.2013	not amended
041	N45 on the Approval of the List of Seaports Open for Navigation	10.01.2014	not amended

Analyzing the above Figures, it is obvious that machinery for effective administration is in place and the legislative background is comprehensive.

Regardless of the fact that under the Law of Georgia on Management and Regulation of transport field clearly defines that the role of Maritime Transport Agency of Georgia is the technical

regulation of transport field, several enforcement functions[337] have been vested by the virtue of Charter of the Maritime Transport Agency of Georgia which is adopted by the Minister of Economy and Sustainable Development of Georgia.[338]

Functions and duties of MTA as per flag, port and coastal State authorities may be summarized as follows:

- Flag State Control, survey of the vessels flying under Georgian Flag.
- Maintenance of the State Registry of Ships.
- Agency defines the terms for the registration of Vessels and Mortgages and Liens in the state registry of ships.
- Agency issues following certificates for the vessels flying under Georgian flag: Certificate of right to fly under Georgian flag, Certificate of Registry, Certificate of Ownership and Ships radio Certificate.
- MTA defines minimum safe manning standards.
- MTA defines minimum qualification Standards for radio operators of Georgian Ports.
- MTA grants Management Level and Operational level status for Georgian and non-Georgian citizens.
- Participating and assisting of investigation process of marine causalities on the vessels flying under Georgian Flag.
- MTA approves port security plan.
- Maintaining of Port State Control
- Seafarers COC issuing, amending and canceling according to STCW convention, in its up-to-date version, and Georgian law of "Seafarers Training and Certification"
- Approval of qualification standards of seafarers and issuing of COCs for management, operational and support level.
- Recognizing and monitoring of Maritime training centers.
- Recognizing of COCs issued by other countries maritime administrations according to international conventions and national legislation of Georgia.
- Maintaining of the register of seafarers.

[337] For example, Article 66 of the Law of Georgia on Education and Certification of Seafarers in Article 66 defines the administrative misdemeanor for the breach of Seafarers certification process, etc.

[338] Please see: Order №1-1/585 of the Minister of Economy and Sustainable Development of Georgia, dated April 14, 2011 "On Approval of the Charter of the Legal Entity of Public Law the Maritime Transport Agency"

- Suspensions of COCs according to national legislation.
- Maintaining of MRCC and monitoring of SOLAS convention implementation, prevention of marine pollution.
- Search and rescue operations plan approval in the port waters
- ISPS code implementation.
- Approval of Pilot service plan in Georgian ports.
- Issuing, monitoring and recognizing of certificate of responsibility of ship-owner for the prevention of pollution of black sea.
- Issuing, monitoring and recognizing of the certificate for nuclear vessel operator.
- Monitoring of nuclear vessels in internal waters, territorial sea and harbors of Georgia with other respective authorities.
- Defining of traffic separation schemes, corridors, farvaters and recommended navigational directions in Georgian territorial waters with respective authorities.
- Prevention and reducing of marine pollution according to international and national standards.
- Approval of technical regulation for the safety of passengers and their luggage carriage at sea.
- Participating in the approval process of national standards for safety, security and environmental protection.
- Cooperation with relevant international organizations and foreign maritime authorities, etc.

However, it should be noted, that several enforcement functions are divided between different entities, as shown on Figure No 3, Coastguard Police Department of the Ministry of Internal Affairs of Georgia, Black Sea Convention Protection Service of the Ministry of Environment and Natural Resources Protection of Georgia remain responsible for enforcement on COLREG related offences [339] and on marine environment pollution from ships as per MARPOL requirements. [340] However, neither entities are authorized to detain nor arrest a ship, this

[339] Please see: Ordinance of the Government of Georgia N57 on the Traffic Separation Schemes, Maritime Corridors and Special Maritime Districts and Ordinance on the Approval of State Border Regime and Securing State Border

[340] Administrative Misdemeanors Code of Georgia Article 58^2: Article 582 –
Sea contamination
"1. Dumping household garbage or other waste from land into the sea – shall carry a fine from GEL 100 to GEL 300.

responsibility still remains on the part of Maritime Transport Agency of Georgia and to its structural unit Harbor Master in order to avoid undue delay of ships.

Taking the scenario where port State responsibilities are concerned, we still have to take a closer look on the responsibilities and obligations of Maritime Transport Agency of Georgia.

In accordance with the international regulations stipulated by International Conventions in the maritime field the main responsibility for ship safe condition is addressed to the flag State – the State under which flag the ship is registered. PSC comes into the scene when shipowners, classification societies and flag State administrations have failed to comply with the requirements of the international maritime conventions. Although it is well understood that the ultimate responsibility for implementing conventions is left to the flag States, port States are entitled to control foreign ships visiting their own ports to ensure that any deficiencies found are rectified before they are allowed to sail. Port State control is regarded as measures complementary to the flag State control.[341] The rights for that control are provided by the conventions themselves. In recent years, the importance of port State control has been widely recognized and there has been important movement in various regions toward establishing a harmonized approach to the effective implementation of the control provisions. The main ideas of establishment of a regional PSC regime may be summarized as follows:

- Each member Authority establishes PSC system on national level
- Agreed relevant instruments are used for the control of ships
- Common PSC procedures are applied during PSC inspection.
- Actions against substandard ships are harmonized and coordinated
- Mutual comprehensive information exchange is provided.

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2. Contamination or sullying the sea from land with oil, chemicals, petroleum, mineral and organic fertilizers and pesticides – shall carry a fine from GEL 300 to GEL 600.
3. The action indicated in paragraph 2 of this article committed repeatedly – shall carry a fine from GEL 500 to GEL 800.
4. Dumping household (solid) waste into the sea from a ship, other water craft, platform or another man-made structure in the sea in violation of the rules laid down by the legislation of Georgia – shall carry a fine of GEL 2 000.
5. Dumping isolated ballast water into the sea from a ship with up to 20 000 tons of total capacity in violation of the rules laid down by the legislation of Georgia – shall carry a fine of GEL 5 000.
6. Dumping isolated ballast water into the sea from a ship with more than 20 000 tons of total capacity in violation of the rules laid down by the legislation of Georgia – shall carry a fine of GEL 10 000.
7. Spilling (dumping, discharge) of harmful, contaminating substances, industrial, technical or other waste and/or materials into the sea from a ship, any other water craft, platform, pipeline or another man-made structure in the sea in violation of the rules laid down by the legislation of Georgia – shall carry a fine of GEL 65 000."

[341] Please refer to official web-site of Maritime Transport Agency of Georgia: http://mta.gov.ge/eng/maritime-safety-and-security/port-state-control-bsmou

The Black Sea MOU on Port State control is a system of harmonized inspection procedures designed to target sub-standards ships with the main objective being their eventual elimination. In 2000 the Black Sea Memorandum of Understanding on Port State Control was signed by 6 Black Sea countries with the common understanding of main principles for PSC:

- PSCO: Port State control is carried out by properly qualified Port State Control Officers (PSCO), acting under the responsibility of the Maritime Transport Agency.
- Scope: The geographical scope of the Black Sea MOU region consists of ports located on Black Sea coastline.
- Structure: The Port State Control Committee is the executive body of the Black Sea MOU. The Committee deals with matters of policy, finance and administration.[342]
- Inspections: A port State control visit on board will normally start with verification of certificates and documents. When deficiencies are found or the ship is reportedly not complying with the regulations, a more detailed inspection is carried out.[343]
- Instruments: Only internationally accepted conventions shall be enforced during port State control inspections. These conventions are the so-called "relevant instruments".
- Non-parties: Flag State which is not a Party to conventions shall receive no more favourable treatment Actions against substandard ships: When serious deficiencies are found, the ship shall be detained. The captain is instructed to rectify the deficiencies before departure.

In conclusion for this chapter it should be noted, that effective administration mechanisms for maritime affairs in Georgia is in place, what is to be done to move forward in achieving maximum harmonization of this sphere to international standards is a separate discussion and requires involvement of policy makers. Either way, both technical regulation of shipping and policy making needs coherent approach in order to achieve sustainable outcome for flag, port and coastal State responsibilities.

[342] Please refer to official web-site of Black Sea MoU: http://www.bsmou.org/about/
[343] *Ibid.*

Conclusion

The present researched attempted to analyze the existence of a link between LOSC and the IMO and their respective roles in the process of effective administration of maritime, sea and ocean governance issues in a State. Regardless of the fact, that LOSC does not in mention International Maritime Organization directly, it is obvious that "competent international organization" can only be the technical body of the United Nations – International Maritime Organization. Reluctance expressed in the provisions of LOSC by not directly mentioning IMO has its historical and objective roots. It is well known, that Intergovernmental Maritime Consultative Organization - IMCO was not an effective organ, until it became IMO. Ineffectiveness was not caused by ineptitude of the system itself, rather than it was reflected the very conservative nature of maritime world itself at the time. Biggest shipping companies, Insurance companies, Classification Societies were quite skeptical in allowing government to enter their business by means of technical regulations. They were afraid to receive unproductive and unreasonably costly maritime business. However, several disasters, also growing ecological concerns in

respect marine environment, could not any longer continue without governments' help worldwide.

The role of IMCO/IMO was only adoption of new convention or their amendments, however majority of them were only adopted but not implemented. It was in late 70s and early 80s when IMO introduced new consent to be bound method so called "Tacit Acceptance" procedure. Tacit acceptance refers to an acceptance that is inferred without being openly expressed or it is provided that an amendment shall enter into force a particular time unless, before that date, objections to the amendment are received from a specified number of Parties. This development allowed the IMO to induce the governments to follow up their international undertakings, therefore LOSC principles expressed in Article 94 of the said convention, became crucially important basis for this new development. Therefore, flags of convenience could no longer deny the fact, that notion of genuine link is not only a paper work, but effective implementation and enforcement of conventional obligations expressed under each and every ratified convention.

IMO gradually advanced in the level of implementation of generally accepted rules, regulations and practices in the context of oceans foundation constitution – United Nations Convention on the Law of the Sea, 1982.

During these years IMO proved that the it can be not only the venue where the member states discuss the standing maritime issues but to achieve its main goal - to be the reliable partner to a member states in the process of implementation in their international undertakings;

• to be a leading forum for developing an international maritime legal framework;

• to ensure cleaner and safer shipping over the world's oceans; and

• to face the main challenges of the modern shipping industry.

This organization has been very successful in achieving above-mentioned goals. Turning now to the year of 2016, almost 60 years after its establishment results are exceptional, especially introduction of Mandatory IMO Member State Audit Scheme should be pointed out, which Georgia has passed in 2015. As discussed in this research IMO introduced Member State Audit Scheme, which as stated previously, implies audit of a member State for the proper implementation of their international undertakings. Thus, analyzing linkage between UN LOSC and IMO conventions is of a paramount importance.

Only by this way can a ratifying member State of IMO convention can meet the requirements set out in the LOSC.

Nevertheless Georgia is committed to its international undertakings, Georgia as a ratifying party to LOSC and Member State of IMO, therefore needs to address the issue maritime administration in a comprehensive manner. IMO, can only by a venue for adoption of technical regulation principles, but it is the member State which actually implements them. Georgia in the midst of 2013 started the development of its transport policy document, which establishes general principles for civil aviation, road and maritime transport administration. Thus, intermodal nature of international transport is to be considered as one.

As stated previously, Georgian maritime transport strategy document shall in fact analyze standing of Georgia and the role of maritime transport in its development. Fragmented reforms that may be taken in this sector needs proper evaluation and shall be part of overall strategy document, which will be based on measurable objectives. It is of course important to ratify conventions, but it is of utmost importance State to set a frame document, which will ask three basic questions: "What? How? And Why?"

The maritime policy (hereinafter referred as MP) of a country should be a part of, and in compliance with, the wider economic and transport policy of the country. MP is cross-sectoral and should present an integrated holistic approach to maritime affairs.

MP plays a vital role in contributing towards sustainable growth and employment in the maritime sector. Maritime nations of the world should use instruments of MP to preserve benefits for the citizens derived from the country's coastal position.

MP should aim to maximize sustainable use of the oceans and seas, enabling growth of the maritime economy focusing on the competitiveness of the shipping industry and the safety and security of the sector.

From the outset it has to be mentioned that Maritime Safety performance of Georgia constitutes one of the problematic areas that needs to be addressed in the short run. Georgia ratified most of the International Maritime Organization - IMO Conventions, however, in respect to the flag State implementation and port State control, Georgia still does not meet some of the standards. This brings forth the vital need to improve the national legislation in order to better conduct the flag State implementation and port State control procedures at national level, as well as liability

issues, environmental protection and coastal State obligations at large to meet European standards.

International Conventions to which Georgia is party are most often directly implemented as substitutions to missing national laws without setting up the legal national measures as required by these Conventions, therefore implementation of regulations will need to address this problem as well. Meanwhile, it should be mentioned, that some of the guidelines and regulations in respect to the Maritime Safety have been prepared and submitted, but they are still not enough for entire efficient activity in the corresponding area. Moreover, at the moment, any detailed analysis and review of the existing texts is not easy since most of them has not yet been translated into English.

All of these traces arose from the fact that in Georgia after independence, the legislative basis in the maritime area was not renewed at the appropriate level. It is almost 20 years since the Merchant Shipping Code of Georgia came into force and some of the relevant amendments have been made but still legislation in respect to Maritime Safety and especially Merchant Shipping Code have to be improved in due to comply with the latest international requirements. Moreover, given the fact that policies in the marine sphere are growing, it is vital to establish the appropriate legislation that will help realize the development of maritime industry.

Georgia's reform agenda should take into consideration mostly the following aspects:

1) Improving the liability issues in maritime safety, security and environment protection;

2) To ensure a proper implementation and enforcement of maritime liability procedures foreseen in the international conventions on maritime safety and the prevention of the marine pollution;

3) Put relevant legal instruments corresponding to IMO framework into action;

4) Increase operational and administrative capacity of all levels of Maritime Transport Agency units by obtaining qualified uniform informative system in Georgia compatible with the IMO standards;

5) Improve safety of shipping traffic, protection of human life and maritime environment in Georgian waters and the Black Sea;

6) The improvement of the availability and use of port and port reception facilities and the related enforcement procedures for pollution prevention purposes;

7) Improving the legal alignment of the Georgian legislation with the relevant international legal tools;

8) To support the Maritime Transport Agency of Georgia in the transposition and implementation of IMO mandatory requirements in the field of maritime safety, security and prevention of marine environment pollution;

9) Upgrading the administrative capacity of the Maritime Transport Agency to better implement the legislation in the field of maritime safety;

10) To strengthen the capacity of the Maritime Transport Agency of Georgia to achieve international standards of Flag State Implementation and Port State Control.

Therefore, expected results of the reform may have following output:

This shall include a comprehensive review of existing and planned Georgian legislation concerning all aspects of maritime safety, identifying gaps and possible divergence from the previous outdated legal documents. This review will then be used for drafting new legislation in relevant field. So, in brief, the outputs are:

1. Primary legislation on administrative liability (Misdemeanor Code and relevant parts of other legislation in force) in the shipping sector and relevant parts of the Criminal Code and Civil Code reviewed, amended and/or new legislation collaborated in line with the International Conventions on liability and compensation, maritime safety, maritime security and the prevention of marine pollution and submitted for further approval by the relevant authority.

The following codes and other national primary legislation should be reviewed, amended and/or elaborated:

- The relevant parts of the Administrative Misdemeanors Code and other national primary legislation should be reviewed in relation to the consistency of infringement, sanctions, procedures and other administrative and liability measures required be the International Conventions, and by Maritime Code and its underlying regulations.
- The Civil Code should be reviewed in relation with the International Conventions provisions on constitution and distribution of civil liability compensation funds.

2. Capacity, knowledge and skills of the MTA on International Conventions, civil liability matters, administrative infringements as well as criminal offences produced in the maritime

sector and procedures applied for sanctions, increased the training needs to be identified, training modules and tools should be prepared, implications on resource capacities, in particular concerning the administrative legislation and procedures should be established, trainers for further training of the MTA staff should be prepared.

This result should also be used as a methodology to study real cases on how aspects of administrative infringements and criminal offences at sea, such as non-compliance with the relevant IMO conventions lead to appropriate sanctions.

3. The upgrading, through training, of a professionally trained force to enable an effective Flag State and Port State Control system. This will result in the desired improvements in maritime safety and environmental protection and ensure better control, for safety purposes, for example of the classification societies, which are authorized to issue safety certificates on behalf of the Government of Georgia. It should also reduce the detention rate of Georgian flag vessels to the average rate of EU flags.

Intense and vital maritime activity takes place in the Black Sea region, boosting its potential for growth and economic development. Ensuing impacts on the marine environment and coasts could however hamper the sustainable growth of these same vital maritime activities, with undesirable socio-economic consequences. A concerted effort in policy-making is thus required in order to secure growth of sea-based activities whilst meeting environmental sustainability goals at the national and regional levels as established by RIO+20.

And finally it should be reiterated that if Georgia wants to become successful maritime country nevertheless has to continue its endeavors to ensure safe, secure, efficient and environmentally friendly shipping on clean oceans.

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