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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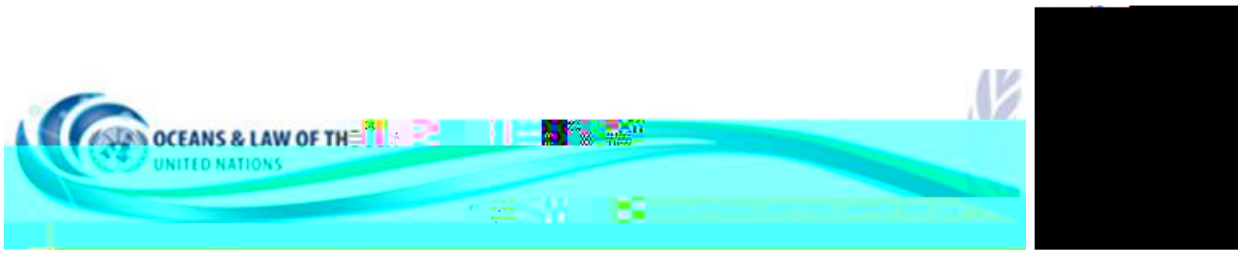

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Proposed research aims the promotion of relationship between the conventions of International Maritime Organization prescribed as Mandatory instruments by IMO itself on the one hand and the UN Convention on the Law of the Sea on another. In order to 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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LIST OF ACRONYMS

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

Acuerdo de Vina 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 Socie Li36.85 709.86o1 0 Qq0.00000912 0 612 792 reW*nBT/F1 12 Tf1 0 0 1 197.58 637.2 T

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INTRODUCTION

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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

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:

> *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

regional and global action in the marine sector, and that its integrity needs to be

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

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:

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

Extremely important asp7( )-1038 Tm0 gu Tf1 01uI81 01uI81 Tfu3(t)7n103(i)7(m)12 792 re0tF103(i)7(m2 Tfc

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]

function, sovereignty, boundaries, and relationship with vessels of another State. Some of these maritime associations are reflected in the LOSC such as coast [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/author-41<0050>:0 G[(38)]0 g0 G[(ons)7(s)-6( )-82(s)h80009912 0 612 792 reBT/F1 12 Tf1 0 0 1 461.7 1

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 L

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.

Right of navigation

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

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

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. Ig, o9(Ig)-20F[he and;f1 0 0 1 72.025 156.8 Tm0 g0 G[(vi)7(ol)7(a)7(t)-13(i)7(on 720(,)-20(r

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*

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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 obli( )-22 revess onl501.65 Tm4

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

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.

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 ship

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

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. Francois (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]

(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

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

its flag. Nevertheless, for purposes of recognition of the national character of the ship by other States, the [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:

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:

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As a result Conference adopted text of 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 me8oC*nBT/F7 8 Tf1 0 0 1 BTBT.d Tm0 g0 7(ppl)7(i)-s andtnt fng (a)7(nd g..00000912 0 612 792 reW*nBT/F1

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 a 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*

assuring that they meet such tests as management, ownership, jurisdiction and control, other

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

(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:

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

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

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 Feb. 23, 2003 para. 28 Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/58/240

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

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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]

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.

entrusted with the responsibility of considering budget estimates and work programmes of

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]

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 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.

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[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
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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 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

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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

¶ Article 60 and article 80 refer to the “generally accepted international standards established by the competent international organization”

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 proÁ M pro[D] A ⅃ ememMwhi

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

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

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[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

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:

elationship 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[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.

first private international law). It also has had its own public law and public international
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International maritime law, which relates t

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

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

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

- 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, inconcongoods; ps

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.

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

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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.

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:

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

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[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:

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 work 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

economies or the depth of their maritime traditions. But the rights bring with them
[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.

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,

"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

especially the developing ones cannot yet give full and complete effect to . 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 ca

"...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*

[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

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 TQq0.00000917(nt)7(a)-89F2( )-62(foc)6(us)-6(e)7(d)-62(on)-82

December 2013 adopted resolutions on the Framework and Procedures for the IMO Member

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);

international maritime organization –

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

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.

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

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. Osterreichische zeitschrift fur offentliches 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

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 relevanto strati

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.

ation, which

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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

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

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 enforc(T)7(he)7(re)6( )] TJETu7(.

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

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 -

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 [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

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 Contro

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

1. The right to fly (to sail under) the national flag of Georgia shall be assigned to a ship upon its registration in (r)-6(at)7(i 612 792 a Tf1ge)7(i 67ge)724000091F7 12 TfET80 g0 Gcp9ionagistr 0 6.45 y0 Gr

- 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

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.

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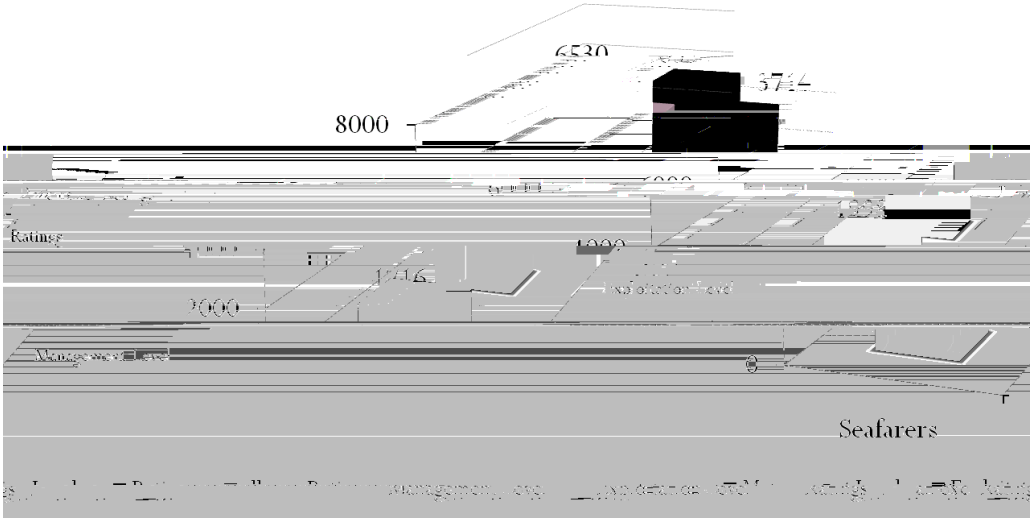


Figure 1.

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 Guir tñ3468.2 13.-332(o0912 0 6125p 61

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

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.

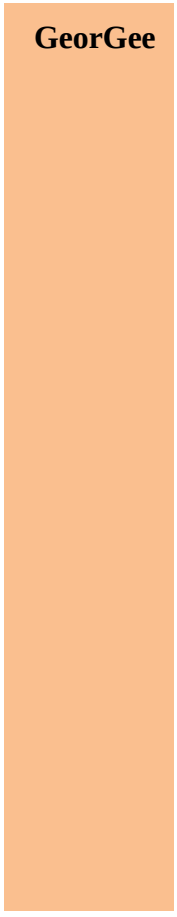
Furthermore since 2011 Georgia actively participates in various international fora such as IMO,

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.



[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"

	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	

HNS PROT 2010

OPRC/HNS 2000

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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

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:

> *.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* [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 o

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,

> *(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

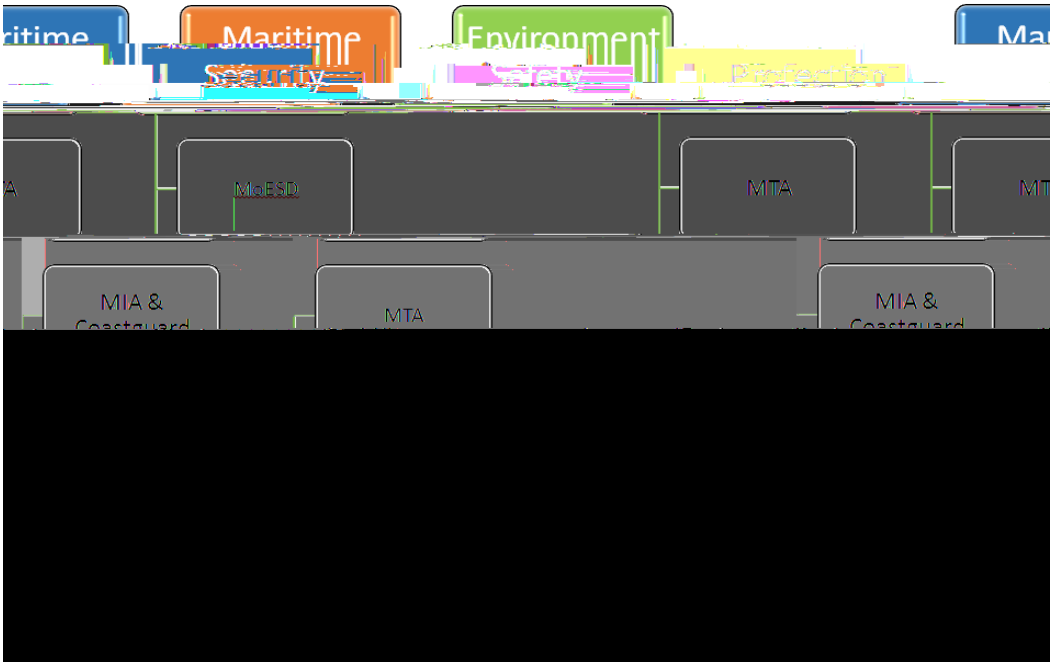
the inspections and surveys either to surveyors nominated for the purpose or to organizations recognized by it.

(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 -82(as)-6( )-82(s)-6(e)7(t)7( )-82(f)n12 ffc


Maritime
Security
Environment
Safety
Protection
MoESD
MTA
MIA &
MTA
MIA &

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

019	16/02/2010 №1/ 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

025

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		

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.Chr3tW*nBT/F1 12 Tt(0*nQq0.00000912 0 612 792 reW*nBT/F1 12 Tf1 0 0 1 108.05 3

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”.
-

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

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

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

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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