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Turkish Straits: Recent Adjustment of Transit Charges and Safety of Navigation

Selim CIGER*

Abstract

The Turkish Straits are one of the most congested and dangerous natural waterways in the world and recent developments have placed additional strain on safety of navigation. Previously, it has been argued that certain steps would improve transit safety and that the expenditure involved in realizing these measures could be financed through a proportional increase in transit charges applicable to vessels transiting through the Straits under the Montreux Convention, which have been applied since the 1980s at a heavily reduced rate by the Turkish Government. Last year, the Turkish authorities announced that the transit charges applicable under the Montreux Convention were to be increased, effective from 7th of October 2022. This short comment considers both the recent developments in the Turkish Straits and the recent decision to raise transit charges, as well as exploring the potential ramifications of the decision with regard to transit safety.

Keywords: Safety of navigation, international straits, Turkish Straits, transit charges, Montreux Convention on Turkish Straits

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The Turkish Straits, consisting of the Istanbul Strait (Bosporus), the sea of Marmara and the Canakkale Strait (Dardanelles), are among the most congested waterways in the world and safety of navigation continues to be highly topical. This short comment follows up a previous article written by the present author and will evaluate the latest developments affecting the navigational safety of vessels transiting through the Straits, as well as considering the recent increase of transit charges levied on vessels in accordance with Annex I of the Convention Regarding the Regime of the Straits (Montreux Convention).¹

The past year has seen various developments affecting the traffic and the type of vessels passing through the Straits. Undoubtedly, the most noteworthy issue is the Russian invasion of Ukraine in February 2022, which put the spotlight on the Turkish Straits once again. Shortly after the Russian military invasion, Turkey closed the Straits to naval ships of the belligerent states under Article 19(2) of the Montreux Convention, a power used for the first time since World War II.² Over the past year,

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1 Selim Ciger, 'Turkish Straits and Safety of Navigation: The Case of the Vitaspirit' (2020) 6 *Maritime Safety and Security Law Journal* 1.

2 Jared Malsin, 'Turkey Says War Exists in Black Sea, Allowing It to Block Russian Navy' *The Wall Street Journal* (27 February 2022) <www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-02-26/card/turkey-says-war-exists-in-black-sea-allowing-it-to-block-russian-navy-uDQCa9dMZsNGZLQsfWYg> accessed 20 January 2023; Nilüfer Oral, 'To Close or Not to Close the Turkish Straits under Article 19 of the 1936 Montreux Convention Regarding the Regime of the Straits' *CIL Blog* <<https://cil.nus.edu.sg/to-close-or-not-to-close-the-turkish-straits-under-article-19-of-the-1936-montreux-convention-regarding-the-regime-of-the-straits/>> accessed 20 January 2023; Muhammed Emre Hayyar, 'Can Turkey Close the Turkish Straits to Russian Warships?' 28 February 2022 <www.ejiltalk.org/can-turkey-close-the-turkish-straits-to-russian-warships/> accessed 20 January 2023.



the Turkish Straits have seen additional pressure due to military activities in the Black Sea. Although the total number of ships transiting through the Straits has decreased in comparison with the same period in the previous year³, the level of congestion is considerably worse.⁴

Certainly, the excess traffic and frequent bottlenecks in the Turkish Straits have been commonplace for the past few years due to global conditions relating to effects of the pandemic. However, most problems in relation to transit are directly related to the armed conflict in Ukraine. For example, in March 2022, traffic in the Bosphorus had to be suspended due to drifting mines.⁵ Unfortunately, this was not an isolated incident: Turkish authorities discovered and defused at least four mines⁶ last year alone.⁷ Another significant factor causing congestion was the grain corridor initiated in July 2022, which allows Ukraine to export grain and other agricultural products in order to help stabilize increasing food prices globally and prevent wide-scale famine.⁸ The initiative requires inspection of vessels by the joint inspection teams under the auspices of “The Joint Coordination Centre” (JCC) in Istanbul, which comprises representatives of Ukraine, the Russian Federation, Türkiye and the United Nations.⁹ Turkish efforts have played a central role in brokering the deal¹⁰ and Türkiye has extensive responsibilities under the initiative, including the organization and facilitation of the inspection process which takes place in Turkish waters.¹¹ However, the inspection process has been afflicted by long waiting times due to growing demand and non-compliance of vessels with the required protocols, which has led to significant congestion in the Bosphorus Strait and the Sea of Marmara.¹² Moreover, considering that many vessels involved in the Ukraine grain trade are old and some are

3 Turkish Ministry of Transportation and Infrastructure, Vessel Transit Statistics for the Turkish Straits, found at <<https://denizcilikistatistikleri.uab.gov.tr/turk-bogazlari-gemi-gecis-istatistikleri>> accessed 20 January 2023.

4 Bridget Diakun, ‘Queues to Pass Through Bosphorus Strait Worse Than Past Year’ *Lloyd’s List* (London, 1 December 2022) <<https://lloydlist.maritimeintelligence.informa.com/LL1143219/Queues-to-pass-through-Bosphorus-Strait-worse-than-past-year>> accessed 20 January 2023.

5 ‘Turkey Briefly Stops Traffic in Bosphorus Strait to Defuse Mine’ *Al Jazeera* (27 March 2022) <www.aljazeera.com/news/2022/3/27/turkey-briefly-stops-traffic-in-bosphorus-strait-to-defuse> accessed 20 January 2023.

6 There are also multiple reports of mines found and defused by Romanian authorities off the Black Sea coast, see Talha Ozturk, ‘Romania Destroys Mine Found Floating Off Black Sea Coast: Defense Ministry’ *Anadolu Agency* (28 March 2022) <www.aa.com.tr/en/russia-ukraine-war/romania-destroys-mine-found-floating-off-black-sea-coast-defense-ministry/2548282> accessed 20 January 2023; ‘Romania Defuses Drifting Mine Off Black Sea Coast’ *Reuters* (1 August 2022) <www.reuters.com/world/europe/romania-defuses-drifting-mine-off-black-sea-coast-2022-07-31/> accessed 20 January 2023.

7 ‘Stray Naval Mine Found In Black Sea Detonated Safely By Turkey’ *Marine Insight* (8 April 2022) <www.marineinsight.com/marine/stray-naval-mine-found-in-black-sea-detonated-safely-by-turkey/> accessed 20 January 2023; ‘Turkish Ministry Says Stray Mine in Black Sea Defused’ *Daily Sabah* (19 October 2022) <www.dailysabah.com/turkey/turkish-ministry-says-stray-mine-in-black-sea-defused/news> accessed 20 January 2023.

8 Black Sea Grain Initiative, ‘Beacon on the Black Sea’ <www.un.org/en/black-sea-grain-initiative> accessed 20 January 2023.

9 Black Sea Grain Initiative, ‘Joint Coordination Centre for the Black Sea Grain Initiative’ <www.un.org/en/black-sea-grain-azainitiative/background> accessed 20 January 2023.

10 Laura Pitel and Max Seddon, ‘Russia and Ukraine Sign Grain Deal to Avert Global Food Crisis’ *The Financial Times* (22 July 2022) <www.ft.com/content/126de7b0-cf7a-4703-9429-6c63cb162b02> accessed 20 January 2023.

11 See Black Sea Grain Initiative – Procedures For Merchant Vessels, <www.un.org/sites/un2.un.org/files/jcc_shipping_procedures_26_aug_2022.pdf> accessed 20 January 2023.

12 See JCC, ‘Information Note on Inspections Conducted by the Joint Coordination Centre’ 7 October 2022 <www.un.org/en/black-sea-grain-initiative/information-note-7-october-2022>; Bridget Diakun, ‘Grain Corridor Requires 25 Daily Inspections to Solve Ship Backlog’ *Lloyd’s List* (12 October 2022) <<https://lloydlist.maritimeintelligence.informa.com/LL1142567/Grain-corridor-requires-25-daily-inspections-to-solve-ship-backlog>> 20 January 2023.



registered to flags of convenience due to elevated risks and expenses¹³, the bottleneck seems to have contributed to a notable increase in frequency of incidents¹⁴ in the past few months.¹⁵

In an article previously published in this journal, I evaluated the safety of navigation in the Turkish Straits by focussing on an accident involving a bulk carrier transiting through the Bosphorus and the solutions proposed in the aftermath of the accident to reduce the risk of similar incidents.¹⁶ I argued that out of all the solutions proposed, employing a fleet of stand-by tugs positioned in strategic locations ready to provide assistance to vessels experiencing mechanical failure stands out, because it offers a practical and efficient solution that can be realized in the near future, as well as not posing any risk of upsetting the legal regime set out by the Montreux Convention. I also suggested that the costs and expenditure involved in realising this measure could be financed through charges due under the Montreux Convention. Indeed, the Convention allows Türkiye to levy charges or taxes for sanitary controls, lighthouses or lifesaving services¹⁷, and these have been charged at a heavily discounted rate since the 1980s.¹⁸ Since the term 'life-saving services' under the Montreux Convention¹⁹ lends itself to broad interpretation, there is an argument for a proportionate increase in charges applicable to vessels navigating through the Turkish Straits in order to cover the costs of stand-by tugs ready to intervene in emergencies.²⁰

On 29 August 2022, the Turkish Ministry of Transportation and Infrastructure announced that the tolls to be levied for transit passage through the Turkish Straits would be raised starting from the 7 October 2022; and that the amounts are to be reconsidered every year on the 1st of July.²¹ As was

13 Richard Meade and Bridget Diakun, 'Ukraine Grain Exports Reliant on Small Old Blacklisted Ships' *Lloyd's List* (19 October 2022) <<https://lloydslist.maritimeintelligence.informa.com/LL1142240/Ukraine-grain-exports-reliant-on-small-old-blacklisted-ships>> accessed 20 January 2023.

14 Nidaa Bakhsh, 'Vessels Suffer Technical Issues Along Ukraine Grain Corridor' *Lloyd's List* (London, 5 September 2022) <<https://lloydslist.maritimeintelligence.informa.com/LL1142126/Vessels-suffer-technical-issues-along-Ukraine-grain-corridor>> accessed 20 January 2023; Mikhail Voytenko 'Freighter With Corn From Ukraine Ran Aground, Refloated, Bosphorus' *FleetMon* (2 September 2022) <www.fleetmon.com/maritime-news/2022/39389/freighter-corn-ukraine-ran-aground-refloated-bosph/> accessed 20 January 2023; Mikhail Voytenko, 'Bulk Carrier Failed to Transit Bosphorus After Engine Breakdown' *FleetMon* (9 September 2022) <www.fleetmon.com/maritime-news/2022/39449/bulk-carrier-failed-transit-bosphorus-after-engine/> accessed 20 January 2023; Bridget Diakun 'Bosphorus Traffic Flow Halved Following Vessel Grounding' *Lloyd's List* (London, 16 January 2023) <<https://lloydslist.maritimeintelligence.informa.com/LL1143602/Bosphorus-traffic-flow-halved-following-vessel-grounding>> accessed 20 January 2023.

15 Bridget Diakun, 'Collisions in Istanbul Anchorage as Congestion Worsens' *Lloyd's List* (London, 19 October 2022) <<https://lloydslist.maritimeintelligence.informa.com/LL1142642/Collisions-in-Istanbul-anchorage-as-congestion-worsens>> accessed 20 January 2023; Bridget Diakun, 'Collision in Tightly Packed Istanbul Anchorage' *Lloyd's List* (London, 5 December 2022) <<https://lloydslist.maritimeintelligence.informa.com/LL1143243/Collision-in-tightly-packed-Istanbul-anchorage>> accessed 20 January 2023.

16 Ciger (n 1).

17 Montreux Convention, Annex I, para 1.

18 Ciger (n 1) 15-17.

19 Montreux Convention, Annex I, para 1(c).

20 Ciger (n 1) 17-18.

21 Merve Özlem Çakır, 'Türk Boğazları'ndan geçiş ücretlerinde esas alınan "Altın Frank" değeri her yıl güncellenecek' *Anadolu Agency* (29 August 2022) <www.aa.com.tr/tr/ekonomi/turk-bogazlarindan-gecis-ucretlerinde-esas-alinan-altin-frank-degeri-her-yil-guncellenecek/2671849> accessed 20 January 2023.



explained in the previous article, the charges applicable under the Montreux Convention are based on gold franc, which is consisted to be 0,290323 grams of pure gold and Türkiye, for the purposes of calculation, had fixed the value of one gold franc at USD 0,8063 in 1983, applying an approximate discount of 80% over the maximum amounts that were permitted under the Montreux Convention at the time²²

Accordingly, the rate of discount was reconsidered last year and the value of one gold franc was set at USD 4,08, resulting in the first increase in transit fees for the Turkish Straits in forty years.²³ Despite the fact that some sources dubbed this as a fivefold rise²⁴, this only holds true in nominal terms. Indeed, the value of gold has substantially increased since the 1980s; however, this has never been accounted for in the past. Currently, 1 gold franc is worth around USD 17,99²⁵ and the increased tariff sets the discounted rate at USD 4,08, which implies that Türkiye, despite the increase, is still charging around only 22.5% of what the Montreux Convention would allow.²⁶ This means that the current price hike merely takes the figure of discount (77.5%) closer to the levels of 1983, when the Turkish Government introduced the discount for the first time at approximately 80%.²⁷ Therefore, when the real value of gold franc is taken into consideration, the actual increase in transit fees is quite modest, at 2.5%, in comparison to the last time the rate was adjusted.

Nevertheless, the recent decision to adjust the rate of discount applicable to transit charges is to be welcomed. Indeed, a price hike had been due for a long time and there had been widespread calls to the government in the Turkish legal sphere for reconsidering the rate of discount, reiterated by many commentators who had written on the subject since the issue was first highlighted in 1982, by the late Professor Tahir Çağa.²⁸ Although there had been a number of high profile statements from government authorities in the past that a price increase was possible, none of these had actually been followed through until now.²⁹ Nevertheless, it is submitted that the decision is timely in light of the

22 Ciger (n 1) 16-17.

23 'Türkiye Hikes Strait Transit Fees to \$4 Per Tonnage' *Daily Sabah* (Istanbul, 29 August 2022) <www.dailysabah.com/business/transportation/turkiye-hikes-strait-transit-fees-to-4-per-tonnage> accessed 20 January 2023.

24 *ibid.*

25 According to current exchange rate of GAU/USD at 61.996 <www.investing.com/currencies/gau-usd> accessed 29 January 2023.

26 cf Sezer Ilgın, 'Montrö Boğazlar Sözleşmesi Gereğince Türk Boğazlarından Geçiş Yapan Ticaret Gemilerinden Altın Frank Esası ile Alınması Gereken Rüşum ve Harçlar Uygulamasının ve Konuya İlişkin Son Gelişmelerin İnceleme ve Değerlendirilmesi' (2022) 1 Piri Reis University Journal of Maritime Law 301, 331-332.

27 Therefore, with respect, it is difficult to agree that the price raise was excessive, see David Glass, 'Greek Owners up in Arms Over Turkish Straits Transit Charge Hikes' *SeaTrade Maritime News* (31 August 2022) <www.seatrade-maritime.com/ship-operations/greek-owners-arms-over-turkish-straits-transit-charge-hikes> accessed 20 January 2023; indeed, there are already reports that the impact would be minimal on freight rates in certain trades, see Masha Belikova, 'Turkey to Hike Black Sea Straits Transit Fee, Impact on Freight Seen as Minimal' *Fastmarkets Agricensus* (30 August 2022) <www.agricensus.com/Article/Turkey-to-hike-Black-Sea-straits-transit-fee-impact-on-freight-seen-as-minimal-24221.html> accessed 20 January 2023.

28 See Tahir Çağa, 'Gemilerden Altın Frank Esası Üzerinden Alınan Resimlere Dair', (1982) 3 İdare Hukuku ve İlimleri Dergisi (Journal of Administrative Sciences and Law) 35, 36-37; also see Ciger (n 1) 16, fn 93.

29 'Altın Frank ile ilgili çalışmalar sürüyor' *Deniz Haber* (12 January 2011) <www.denizhaber.net/altin-frank-ile-ilgili-calismalar-suruyor-haber-32320.htm> accessed 20 January 2023; 'Turkey May up Straits Fees on Oil Tankers to Cut Traffic' *Seaneews* (10 January 2011) <www.seaneews.com.tr/turkey-may-up-straits-fees-on-oil-tankers-to-cut-traffic/48221/> accessed 20 January 2023.



recent developments that put additional strain on the Turkish Straits. Indeed, on top of extraordinary congestion levels, shifting trade patterns also introduce new challenges relating to navigational safety in the Straits: widespread sanctions against the Russian energy exports, primarily by the EU and the US, have led to the proliferation of tanker trade worldwide.³⁰ As Russia is no longer able to pipe its oil to Europe, it has been amassing a sizeable tanker fleet³¹ and the crude output to be carried by sea is increasing notably.³² Indeed, the data shows that the number of tankers which passed through the Bosphorus is higher compared to the same period last year.³³ Coupled with the fact that most vessels used in tanker trade to skirt sanctions tend to be vessels nearing the end of their commercial life or that would otherwise be sold for scrap, the risks posed by the increase in tanker traffic through the Turkish Straits are all too apparent.³⁴

As a result, there is an increasing need for additional measures improving the navigational safety in the Straits. As previously argued, expanding the fleet of tugboats has a significant potential for decreasing the risk of accident in the near future.³⁵ The stand-by tugs have become even more important in the context of current risks the Straits are facing in terms of the significantly increasing average age of vessels transiting through the Bosphorus.³⁶ Since the older vessels are statistically more likely to experience machinery problems or malfunctions, the effect of regulatory measures in controlling the risk of accident is limited, although these have significantly improved the safety of navigation in the Straits since their introduction some twenty-five years ago.³⁷ Indeed, in such cases, despite it being one of the most effective measures a vessel can take to safely navigate through the Straits, even a pilot on board cannot wholly avoid an accident, as *The Vitaspirit* incident demonstrates.³⁸ However, the stand-by tugs are particularly efficient in emergency situations, capable of intervening swiftly and

30 Nidaa Bakhsh, 'Shifting Trade Flows Bode Well for Product Tanker Market' *Lloyd's List* (London, 11 May 2022) <<https://lloydslist.maritimeintelligence.informa.com/LL1140778/Shifting-trade-flows-bode-well-for-product-tanker-market>> accessed 20 January 2023; Julia Payne and Jonathan Saul, 'Russian Oil Sanctions Fuel Boom for Old Tankers' *Reuters* (5 December 2022) <www.reuters.com/business/energy/russian-oil-sanctions-fuel-boom-old-tankers-2022-12-05/> accessed 20 January 2023.

31 Jackie Northam, 'Russia has Amassed a Shadow Fleet to Ship its Oil Around Sanctions' NPR (21 January 2023) <www.npr.org/2023/01/21/1149745629/russia-oil-shadow-fleet-sanctions?ft=nprml&f=> accessed 20 January 2023.

32 Lionel Guetta-Jeanrenaud and others, 'Russian Crude Oil Tracker' *Bruegel* (16 December 2022) <www.bruegel.org/dataset/russian-crude-oil-tracker> accessed 20 January 2023.

33 Turkish Ministry of Transportation and Infrastructure, Vessel Transit Statistics for the Turkish Straits, found at <<https://denizcilikistatistikleri.uab.gov.tr/turk-bogazlari-gemi-gecis-istatistikleri>> accessed 20 January 2023.

34 'Russian Oil Sanctions are Approaching: What Does it Mean for Tankers and LNGs?' *Hellenic Shipping News* (30 November 2022) <www.hellenicshippingnews.com/russian-oil-sanctions-are-approaching-what-does-it-mean-for-tankers-and-lngs/> accessed 20 January 2023; see Michelle Wiese Bockmann, 'Dark Fleet Danger as Accident-Prone Elderly Tankers Anchor Off Malaysia' *Lloyd's List* (London, 4 November 2022) <<https://lloydslist.maritimeintelligence.informa.com/LL1142833/Dark-fleet-danger-as-accident-prone-elderly-tankers-anchor-off-malaysia>> accessed 20 January 2023; also see for the recent standoff between the Turkish authorities and P&I Clubs over additional guarantees regarding the insurance cover of transiting tankers: 'Turkey Reaches Deal Over New Crude Tanker Insurance Regulations' *Reuters* (13 December 2022) <www.reuters.com/markets/commodities/eight-oil-tankers-wait-pass-through-istanbul-strait-agency-2022-12-13/> accessed 20 January 2023.

35 Ciger (n 1) 13.

36 Skytek Limited, 'Bosphorus Strait: Marine Congestion Report' *Satellite Club* (30 October 2022) 4 <<https://satellite-club.skytek.com/wp-content/uploads/2022/11/20221030-Bosphorus-Congestion.pdf>> accessed 26 January 2023.

37 Ciger (n 1) 9.

38 *ibid.*, 3.



preventing disabled vessels from drifting or running aground.³⁹ As a matter of fact, the Directorate General of Coastal Safety already possesses a large fleet of tugs and tows which have successfully intervened and prevented accident in a number of incidents in recent years.⁴⁰ It is also understood that the Directorate is actively considering improving the operational capacity of tugs by both expanding the fleet and increasing the number of locations the tugs will be on duty.⁴¹ From the perspective of navigational safety in the Turkish Straits, these are welcome developments as the stand-by tugs propose a straightforward and efficient accident prevention mechanism which supplement the existing measures by providing an added safeguard.

Overall, it is submitted that the reconsideration of the charges applicable to vessels transiting through the Straits was long overdue, given they had remained the same for the last forty years. Moreover, the decision is timely in that it follows a period of heightened risk of accident brought about by the recent military activity in the region. Densely populated shores of the Bosphorus Strait and the adjacent urban areas of Istanbul are home to more than 15 million people. Needless to say that any accident taking place in the Straits has the potential to prove disastrous; the stakes are high. Nearly half a million ships have transited through the Straits in the last ten years and it takes a huge effort to coordinate continuous traffic and facilitate the safe passage of vessels.⁴² The past year has seen increased tanker traffic, frequent bottlenecks and drifting mines that represent just some of the additional difficulties in an already perilous waterway. Therefore, the recent increase in transit charges applicable to the vessels transiting through the Turkish Straits comes at an important time, when the need for additional measures improving navigational safety is pronounced.

Postscript

It was mentioned above that the transit charges applicable to vessels transiting through the Turkish Straits were to be reconsidered every year on 1st July. After this article was accepted for publication, the Turkish Government announced that the amounts due are to be increased and the value of gold

³⁹ *ibid*, 12.

⁴⁰ 'Turkish Vessels Avert Tanker Accident in Bosphorus' *TRT World* (12 April 2020) <www.trtworld.com/turkey/turkish-vessels-avert-tanker-accident-in-bosphorus-35339> accessed 20 January 2023; 'Tanker Disabled in Bosphorus Taken Under Control' *Hurriyet Daily News* (14 March 2022) <www.hurriyetdailynews.com/tanker-disabled-in-bosphorus-taken-under-control-172174> accessed 20 January 2023; Burak Akay, 'Çanakkale Boğazı'nda arızalanan gemiye müdahale edildi' *Anadolu Agency* (29 August 2022) <www.aa.com.tr/tr/gundem/canakkale-bogazinda-arizalanan-gemiye-mudahale-edildi/2661381> accessed 20 January 2023.

⁴¹ See the Director General's presentation before the Grand National Assembly of Turkish Republic, The Committee on State Economic Enterprises on 11 May 2022, available at <www5.tbmm.gov.tr/develop/owa/komisyon_tutanaklari.goruntule?p-TutanakId=2953> 8.

⁴² Kareem Fahim and Zeynep Karatas, 'A Devil's Current, a Hairpin Turn: Aboard a Tanker in the Risky Bosphorus Strait' *The Washington Post* (Washington DC, 9 January 2022) <www.washingtonpost.com/world/2022/01/09/bosphorus-strait-canal-istanbul-erdogan/> accessed 20 January 2023; Zeynep Cermen, 'Turkey's Round the Clock Efforts to Prevent Accidents in Bosphorus Strait' *Xinhuanet* (27 February 2022) <<https://english.news.cn/20220227/bec0d53338f44cb8bcb8d586900b5469/c.html>> accessed 28 January 2023.



franc is going to be set at \$4.42 for purposes of calculation, effective from 1st July 2023.⁴³ Despite the increase, the updated figure is still rather modest as it merely amounts to 24.8% of the maximum total of charges allowed under the Montreux Convention, up from around 22.5%.⁴⁴ Nevertheless, the recent price raise signifies the clear abandonment of the past transit charge regime under which the amounts due were applied at a heavily discounted rate.

43 'Türkiye raises fees for int'l vessels transiting Turkish straits' *Hürriyet Daily News* (İstanbul, June 11 2023) <www.hurriyetdailynews.com/turkiye-raises-fees-for-intl-vessels-transiting-turkish-straits-183866> accessed 28.06.2023.

44 According to the current exchange rate of GAU/USD at 61.414 <www.investing.com/currencies/gau-usd> accessed 28.06.2023.

Some Reflections on the EU-Russia Partnership After the 1994 Corfu Agreement, with Specific Reference to Maritime Affairs

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Abstract

The aggression by the Russian Federation against Ukraine in 2022 has rewritten the EU-Russia partnership that had developed over the last thirty years. In those thirty years, both the EU and the Russian Federation became maritime powers. This paper offers an analysis of the main dynamics that have brought about the developments of the EU-Russia partnership, with specific reference to maritime affairs. It focuses on the challenges these dynamics pose from a historical perspective. Indeed, specific attention is paid to the 1994 Corfu Agreement that marked a new stage in EU-Russia relationships and, still today, is the main legal basis of their relations. This research contributes to highlighting the evolution of EU competences and its policy actions as a global maritime actor. Accordingly, it explores the progressive developments of its maritime-related relations with the Russian Federation, as shown by the adoption of the 2009 Agreement on fisheries cooperation in the Baltic Sea. In any case, EU-Russia relations have never been easy. Finally, by looking at the most recent developments, this paper addresses the question of compatibility of EU sanctions with the Corfu Agreement and their impact on EU-Russia maritime affairs.

Keywords: European Union; Russian Federation; maritime affairs; trade and investment; sanctions; security.

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1. Introduction

The Agreement on Partnership and Cooperation between the European Communities and its Member States and the Russian Federation was signed on the occasion of the Corfu European Council in June 1994 (Corfu Agreement or PCA).¹

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¹ The URSS's collapse dramatically changed the balance of power, including in Europe, while, at the same time, the adoption of the Treaty of Maastricht laid down the foundations of the European Union as we know it today (Treaty on European Union [1992] OJ C191/1). This changing international scenario called for a new approach to future European relations with the Russian Federation. Consequently, bilateral negotiations with Russia began at the end of 1992 and were completed in the first half of 1994 with the adoption of the Corfu Agreement (Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, on one side, and the Russian Federation, on the other [1997] OJ L 327/3). A few years before the USSR's collapse, the two powers had already established partnership and cooperation which would have strengthened and widened their relations, i.e. the Agreement between the European Economic Community and the European Atomic Energy Community, on the one hand, and the Union of Soviet Socialist Republics, on the other, on Trade and Commercial and Economic Cooperation [1990] OJ L 68/3. The Russian Federation being the continuing State of the former USSR, the Corfu Agreement had automatically become an agreement with the Russian Federation. On the other side, the EU has replaced and succeeded the European Community in line with art 1.3 of the Treaty on the European Union (TEU) and art 217 of the Treaty on the Functioning of the European Union (TFEU). Consequently, since the entry into force of TEU and TFEU (1 December 2009), the EU exercises all rights and assumes all obligations of the European Community, while continuing to exercise the existing rights and assume the existing obligations of the EU. Consolidated Versions of the Treaty on European Union and of the Treaty on the Functioning of European Union [2012] OJ C326/47.



The PCA signature reflected the achievement of an ambitious result due to international efforts to promote peace, stability, and prosperity on the continent of Europe.²

In contrast to an association agreement, which generally serves as the basis for implementation of the accession process to the EU by a third country, the PCA serves to gradually strengthen political and economic freedoms in Russia. Today, as then, these freedoms constitute the very basis of the EU-Russia partnership,³ the effective implementation of which presupposes the continuation and accomplishment of Russia's political and economic reforms.⁴ Accordingly, the Corfu Agreement refers to 'Russia's progressive integration'⁵ not into the EU in terms of its membership, but 'into the open international trading system.'⁶

In this sense, the Corfu Agreement reflects a framework for enhancing political dialogue;⁷ supporting the efforts made by Russia to strengthen its democracy and developing its economy towards a market economy;⁸ and encouraging trade and investment,⁹ including in maritime sectors.

Soon after the PCA was signed, diplomatic efforts regarding 'Russia integration' were thwarted because of the outbreak of violent military tensions in the northern Caucasus. The procedure for ratification of the Corfu Agreement was suspended.¹⁰ The Corfu Agreement entered into force on 1 December 1997.¹¹

The ups and downs that characterize the relationship between the EU and Russia are not a new phenomenon. Two years after the Corfu Agreement came into force, an armed conflict was launched once more in Chechnya (1999-2000).

This paper offers an analysis of the main dynamics that have impacted developments in the EU-Russia partnership, with specific reference to maritime affairs. It focuses on the challenges these dynam-

2 Amongst others, see the Conference on Security and Cooperation in Europe 'Final Act' (Helsinki 1 August 1975), and subsequent meetings; the Meeting of Heads of State or Government of the countries participating in the Conference on Security and Cooperation in Europe (CSCE) 'Charter of Paris for a New Europe' (Paris, 19–21 November 1990); the Organization for Security and Co-operation in Europe (OSCE) 'The Challenges of Change' (10 July 1992).

3 Preamble PCA (n 1), para 3. In addition, paramount importance is placed on the respect of the rule of law and human rights, as well as the establishment of a multi-party system and economic liberalization. See also art 2 PCA.

4 *ibid* para 8.

5 *ibid* para 12.

6 *ibid*.

7 PCA (n 1) Title II.

8 *ibid* art 3 includes an 'evolution clause' on the establishment of a free-trade zone in the case that the economic preconditions in Russia have been fulfilled.

9 *ibid* art 1.

10 Tensions led to the Russia's military intervention in Chechnya from December 1994 to August 1996, when peace negotiations were finalized and Russian troops withdrew from Chechnya. European Commission, 'The European Union and Russia: The Future Relationships – A Strategy Designed by the European Commission' [1995] IP/95/533 <https://ec.europa.eu/commission/presscorner/detail/en/IP_95_533> accessed 3 May 2023.

11 Following enlargement, an Additional Protocol was signed with Russia a few months earlier, on 21 May 1997, so as to enable Austria, Finland and Sweden to become members of the Corfu Agreement alongside the other twelve Member States.



ics portray from a historical perspective. Accordingly, the analysis begins with the study of specific provisions of the 1994 Corfu Agreement related to maritime affairs, especially transport and trade.¹² There follows a study of the most relevant legal and political factors that have contributed to advancing EU-Russia maritime-related developments. In particular, attention is paid to the first decade of the Corfu Agreement implementation (1997-2007). It then focuses on the main initiatives and legal instruments adopted from 2008 to 2014 that were aimed at expanding the EU-Russia cooperation on maritime affairs, with specific reference to the 2009 EU-Russia Agreement on fisheries cooperation in the Baltic Sea and other initiatives.¹³

While EU-Russia relations have never been easy, the 2014 illegal annexation of Crimea and the 2022 invasion of Ukraine rewrote the EU-Russia partnership that had formed over the previous thirty years.

Finally, by looking at the most recent developments, this paper addresses the question of compatibility of EU sanctions with the Corfu Agreement, as well as their impact on EU-Russia maritime affairs.¹⁴

In conclusion, this paper argues that economic interests in oceans and seas might constitute a crucial point to be addressed in diplomatic efforts regarding resolution of the current crisis.¹⁵

2. Specific Provisions of the Corfu Agreement Related to Maritime Affairs

The Corfu Agreement asserts the importance of granting each other national treatment no less favorable than that accorded to any third country.¹⁶ The ‘treatment no less favorable’ is also applied within the context of maritime affairs, especially in relation to transport¹⁷ and trade,¹⁸ while specific reservations are adopted for the fisheries sector.¹⁹

More specifically, article 30 PCA regulates the conditions affecting the establishment and operation of companies, including shipping companies.²⁰ Indeed, these conditions are for bringing about the freedom

12 Section 2.

13 Section 3.

14 Section 4.

15 Section 5.

16 PCA (n 1) Title II, Political Dialogue, arts 6-9.

17 *ibid* chapter II, Conditions affecting the establishment and operation companies, arts 28- 35.

18 *ibid* chapter III, Cross-border supply of services, arts 36-43.

19 *ibid* annex 3 and Annex 4.

20 *ibid* art 30 (h) (2) considers that, with regard to international maritime transport, shipping companies are beneficiaries of the provisions of Chapters II and III PCA. Furthermore, it has to be specified that art 38 PCA states that the ‘treatment no less favorable’ as established by art 28 PCA does not apply to air transport, inland waterways transport and maritime transport. However, it adds that, as for activities undertaken by shipping agencies for the provision of services to international maritime transport, including intermodal transport operations involving a sea-leg, each Party permits to the companies of the other Party to have a commercial presence in its territory in the form of subsidiaries or branches, under conditions of establishment and operation no less favorable than those accorded to its own companies or to subsidiaries or branches of companies of any third country.



of the establishment of the shipping industry operating in international maritime transport and include their right to take up economic activities by means of the setting up of subsidiaries and branches in Russia or in the EU, respectively.²¹ In this sense, the Corfu Agreement specifies that shipping companies established outside the EU or outside Russia, but controlled by nationals of Member States or Russia, are also beneficiaries of these conditions if vessels are registered in that Member State or Russia, respectively.²²

In addition, article 39 PCA refers to the principle of unrestricted access to the international market and traffic on a commercial basis²³ in accordance with a freely competitive environment.²⁴ It also specifies that commercial principles and related freedoms to provide services to maritime transport between Member States and Russia do not prejudice the rights and obligations in relation to shipping lines arising under other international instruments, i.e. the United Nations Convention on a Code of Conduct for Liner Conferences (Code of Conduct).²⁵

This reference to the Code of Conduct implies a normative coordination between the Corfu Agreement and the international regulatory framework for shipping conferences. This coordination acquires particular importance by means of rules on access to share of trade by ship owners established in the territories of State Parties to the Code of Conduct, which serves mutual foreign trade. In any case, the Code of Conduct contains no provision allowing EU accession. However, the EU avoids normative conflicts and possible breaches of its rules of competition through requirements that Member States have to fulfil when ratifying the Code of Conduct, or when acceding thereto.²⁶

At this point, it is worth briefly underlining that the Corfu Agreement does not make any reference to the international shipping regulations of the International Maritime Organization (IMO).²⁷ Furthermore, the fact that the EU is not a member of the IMO does not seem to prevent its external competence in international shipping being indirectly exercised through its Member States, which

21 Art 30 (a-h). In more general terms, see also art 1 PCA.

22 *ibid* art 30 (h) (2-3).

23 *Ibid* art 39 (1).

24 *ibid* (b).

25 United Nations Convention on a Code of conduct for Liner Conferences (Adopted 6 April 1974, entered into force 6 October 1983) 1334 UNTS 15. On the other side, the Corfu Agreement establishes, at its art 39 (1) (a), that non-conference lines are free to operate in competition with a conference as long as they adhere to the principle of fair competition on a commercial basis.

26 Already at the end of the 1970s, the EU recognized that maritime affairs covered by the Code of Conduct were of importance not only to the Member States but also to the EU. It was considered important to adopt a common position in relation to this Code, thus stabilizing the role of Liner Conferences in ensuring reliable services to shippers, while avoiding possible breaches by conferences of the rules of competition laid down in the then EEC Treaty. To this aim, a specific Regulation was adopted concerning the application of those rules to sea transport that provided for requirements that Member States had to fulfil when ratifying the Code of Conduct, or when acceding thereto. See Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences [1979] OJ L 121/1. Regulation (EC) No 1490/2007 of the European Parliament and of the Council of 11 December 2007 repealing Council Regulation (EEC) No 954/79 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences [2007] OJ L 332/1.

27 The Convention on the International Maritime Organization (IMO) (adopted 6 May 1940, entered into force on 17 May 1958) 289 UNTS 3. As is well known, the IMO general scope falls mainly within regulating international shipping, preventing marine pollution by ships and handling matters of maritime security. It reserves full membership only for States, and Russia is one of its State Parties.



are also State Parties to the IMO.²⁸ This is because the transport sector was one of the EU's first common policy areas towards the creation of a common transport market, allowing freedom to provide services, and the opening up of transport markets.²⁹ The maritime transport sector has been of particular importance for trade between Member States and between them and third countries, particularly those from the European Economic Area and Eastern and Central Europe.³⁰

Returning to the maritime provisions of the Corfu Agreement, article 39 specified that each Party grants, amongst others, a 'treatment no less favorable' than that accorded to a Party's own vessels, for vessels used for the transport of goods, passengers, or both, and flying the flag of the other Party, with respect to access to ports open to foreign vessels, the use of infrastructure and auxiliary maritime services of those ports, as well as related fees and charges, customs facilities and the assignment of berths and facilities for loading and unloading. Nevertheless, nothing prevents Parties from making additional special agreements on maritime transport following the entry into force of this Partnership³¹

Finally, as for the fisheries sector, specific reservations on the 'treatment no less favorable' are indicated by both Annex 3 and Annex 4 of the Corfu Agreement, respectively adopted by the EU and Russia. According to the EU reservation, the access to and use of the biological resources and fishing grounds situated in the maritime areas under the sovereignty or within the jurisdiction of Member States remains restricted to fishing vessels flying the flag of Member States and registered in Community territory, unless otherwise provided for.³² As for the Russian reservation, it indicates that authorization from the respective governmental body is necessary for fishing.³³

At this point it is important to underline that the aforementioned EU reservation was made in accordance with its exclusive competence in fisheries conservation. Since the 1970s, this applies to waters under national fisheries jurisdiction and to the high seas. According to the Court of Justice of the European Union (Court of Justice or CJEU), Member States are 'no longer entitled to exercise any power in the matter of conservation measures,'³⁴ neither internally nor externally. Indeed, the CJUE affirmed that in any matter where the EU had internal competence, there was a parallel external com-

28 Claudia Cinelli, 'Law of the sea framework. Is EU engagement a sine qua non for influence?' in *Ramses Wessels and Jed Odermatt* (eds), *Research Handbook on the EU's Engagement with International Organizations* (Edward Elgar Publishing 2019).

29 It is worth mentioning that the way forward to common legislation in the transport sector was cleared by the case that Parliament brought before the Court of Justice of the European Union against the Council for failure to act with regard to transport policy. The Court of Justice condemned the Council for failing to ensure free provision of international transport services or lay down conditions enabling non-resident carriers to operate transport services within a Member State. The Court urged the Council to act and thus to start developing a genuine common transport policy. Case C-13/83 *European Parliament v. Council of the European Communities* [1985] ECR 1556, paras 68-69. The TFEU does not include sea transport within the EU transport policy, which applies to transport by rail, road and inland waterway (art 100.1), although the European Parliament and the Council 'may lay down appropriate provisions for sea and air transport' (art 100.2).

30 Commission, 'Progress towards a common transport policy-Maritime transport' (Communication) COM (1985) 90; Id. 'Towards a new maritime strategy' (Communication) COM (96) 84.

31 According to Art 39 PCA. See also Annex 5 PCA which regards cross-border of supply service and includes insurance of risks relating to (i) maritime shipping covering any or all of the following: persons being transported, the goods being exported from or imported to, the same vehicle transporting the goods and any liability arising therefrom; (ii) goods in international transit; and (iii) accident and health insurance; and personal motor liability insurance in the case of cross-border movement.

32 PCA (n 1) annex 3, para 2.

33 *ibid* Annex 4.

34 Case C-804/79 *Commission v. United Kingdom* [1981] ECR 1045, para 17.



petence,³⁵ including in maritime sectors, such as maritime transport, which is a shared competence.³⁶ When the EU exercises its shared competence, Member States are then prevented from exercising theirs.³⁷ Furthermore, the CJEU observed that ‘from the very duties and powers [to take fisheries conservation measures] which Community law has established and assigned to the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea’.³⁸

On this legal basis, and guided by the Corfu Agreement legal framework, over the years the EU has adopted a body of maritime legislation and developed policy actions contributing to further developments of EU-Russia maritime relationships.

3. Legal and Political Factors that Brought about Further EU-Russia Maritime-Related Developments

The legal nature of the Corfu Agreement does not substantially diverge from the model used for other cooperation agreements between the EU and third countries, such as association agreements, which are typically broad instruments, providing a framework for further and deeper cooperation. They are also susceptible to producing direct effects.³⁹ Hence, one should bear in mind that, according to settled case-law, some provisions of the Corfu Agreement are regarded as directly applicable. According to the Court of Justice, provisions guaranteeing the non-discrimination of legally employed Russian workers in EU Member States establish a clear and precise obligation which is not subordinated, in its performance or in its effects, to the intervention of any further act.⁴⁰ As for the direct effect of the Corfu Agreement’s provisions related to maritime affairs, they have not yet been tested before the CJEU.

In any case, differently from the association agreements, the Corfu Agreement does not aim to integrate the Russia Federation in the EU legal system, but instead refers to more modest ambitions of political and economic cooperation.

35 Case C-22/70 *Commission v. Council* [1971] ECR 264.

36 TFEU (n 1) art 4. For a more detailed discussion of the EU’s competences and related references, see Robin Churchill, ‘The European Union as an Actor in the Law of the Sea, with Particular Reference to the Arctic’ (2018) 33 *The International Journal of Marine and Coastal Law* 290.

37 TFEU (n 1) art 2.2.

38 Joined Cases 3, 4 and 6/76, *Officier van Justitie v. Kramer* [1976] ECR 1279, para 33. See also Case C-405/92 *Mondiet SA v. Armement Islais SARL* [1993] ECR I-6133, paras 11-16; Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635, para 109.

39 Case C-113/97 *Babahenini* [1998] ECR I-183, para 17, and Case C-162/96 *Racke* [1998] ECR I-3655, paras 34-36. Case C-149/96 *Portugal v Council* [1999] ECR I-8395, para 34; Case C-63/99 *Gloszczuk* [2001] ECR I-6369, para 30; ase C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301, para 54.

40 Case C-265/03 *Igor Simutenkov v. Ministerio de Educación y Cultura e Real Federación Española de Fútbol* [2005] ERC I-2596, para 28.



To this end, an institutional framework of political dialogue is laid down in the Corfu Agreement⁴¹ and includes regular EU-Russia summits, twice a year, alternatively on Russian and EU territory.⁴²

This Section combines legal and political factors in order to offer a study related to the most relevant historical developments in the cooperation (or lack thereof) between the EU and Russia in the maritime sectors in accordance with the Corfu Agreement implementation through the political dialogue. In particular, subsection 3.1 analyses the first decade of implementation of the Corfu Agreement from 1997 to 2007, while subsection 3.2 focuses on further developments, especially the 2009 EU-Russia Agreement on fisheries cooperation in the Baltic Sea, until the unlawful Crimea annexation by the Russian Federation in 2014.

3.1 Towards a 'Common Strategy' and Others Policy Actions Led by the EU (1997-2007): Implications for Maritime Cooperation with Russia

The Corfu Agreement entered into force in 1997. It was the same year as Russia's accession to the United Nations Convention on the Law of the Sea (LOSC).⁴³ Accordingly, one year later, the Russian Federation established the status and legal regime of its internal waters, territorial sea and contiguous zone.⁴⁴

In parallel, according to LOSC accession rules, the EU made a Declaration setting out the extent of its maritime competence.⁴⁵ The EU Declaration specifies the nature and extent of the EU maritime competences. In particular, as for maritime transport, the Declaration specifies that it has exclusive competence only to the extent that specific provisions of the LOSC, or legal instruments adopted in implementation thereof, affect common rules established by the EU.⁴⁶ When its rules exist but are not affected, in particular in cases of provisions establishing only minimum standards, the Member States have competence to act in this field, without prejudice to EU competence.⁴⁷

The exercise of the maritime competences that the Member States have transferred to the EU is,

41 Link <<https://russiaeu.ru/en/basic-documents>> accessed 3 May 2023.

42 PCA (n 1) art 7.

43 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

44 The Russian Federation ratified the LOSC on May 12, 1997. See Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation, 17 July 1998; Federal Act on the exclusive economic zone of the Russian Federation, 2 December 1998.

45 Council Decision (98/392/EC) of 23 May 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof OJ L 179/1. See the text of the Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention (Declaration made pursuant to article 5(1) of annex IX to the Convention and to article 4 (4) of the Agreement) at <<https://treaties.un.org>> accessed 3 May 2023.

46 *ibid.* With regard to the provisions on maritime transport, safety of shipping and the prevention of marine pollution contained *inter alia* in Parts II, III, V, VII and XII LOSC.

47 [2005] ERC I-2596 (n 40).



by its very nature, subject to continuous development.⁴⁸ Indeed, the conferral of competence upon the EU follows the development of its legal order towards affirming its ambitious leading role in improving international ocean governance,⁴⁹ with direct and indirect implications for the EU-Russia maritime-related relationship.⁵⁰

In the meantime, Yeltsin's so-called period of liberal pluralism ended with the manifestation of a large majority of Russian support for Putin's policies.⁵¹ Putin aspires to affirm Russia's global standing in a multipolar world, something that has been clearly shown by its foreign policy in, for example, Chechnya, Georgia, Crimea and, most recently, the aggression against Ukraine.

In parallel with Putin's rise to power, in 1999 the EU began to assume an increasingly proactive role in managing its relationship with Russia. Accordingly, two main policy actions led by the EU acquired specific importance: on the one hand, the Common Strategy of the European Union on Russia;⁵² and, on the other hand, the Northern Dimension Policy (NDP).⁵³

The Common Strategy of the European Union on Russia was adopted by the European Council in 1999,⁵⁴ which set out political objectives, as well as the means to be used by the Union in taking forward the Corfu Agreement implementation. The overall goal was to promote the integration of Russia into a wider area of cooperation in Europe, as well as through creating the necessary conditions for the future establishment of a free trade area.⁵⁵ Russia's response to the Common Strategy of the EU highlighted its refusal of EU interference in its internal matters and thereby asserted the Russian position to defend its national interests,⁵⁶ as the second war in Chechnya clearly showed.

48 The CJEU has played a significant part in determining the powers of the EU in various areas of the law of the sea. Gemma Andreone, 'Rapport General. Jurisprudence: Convergence ou Divergence?', in INDEMER (ed), *Droit International de la Mer et Droit de l'Union Européenne. Cohabitation, Confrontation, Cooperation?* (Pedone 2014). The EU currently exercises maritime exclusive competence in relation to 'the conservation of marine biological resources under the common fisheries policy' (art 3.1 d TFEU), and also in other sea-related sectors such as international trade (art 206 TFEU), as well as development cooperation policies (arts 208-214 TFEU). Additionally, the EU has shared maritime competence in relation to other aspects of fisheries (for example, research and technological development and development cooperation) with regard to environment, transport, energy and research (art 4 TFEU).

49 Henrik Ringbom, *The EU Maritime Safety Policy and International Law* (Martinus Nijhoff 2008); Commission and the High Representative of the Union for Foreign Affairs and Security Policy, 'International Ocean Governance: An Agenda for the Future of Our Oceans' [Communication] Join (2016) 49 final.

50 This is also a consequence of the EU enlargement policy which has led the EU presence in regional sea-basins, such as the Arctic Ocean, Baltic Sea and the Black Sea, thus strengthening its cooperation with and between the EU Member States and third coastal States of the aforementioned basins, including the Russian Federation. See Section 3.2.

51 Elena Dundovich, 'The Russia of Yeltsin Looks to Europe' (2019) 2 *De Europa* 35.

52 European Council (EC) 1999/414/CFSP Common Strategy of the European Union of 4 June 1999 on Russia [1999] OJ L 157/1.

53 The Northern Dimension Policy was initiated in 1999 and renewed in 2006 <<https://northerndimension.info/about-northern-dimension/>> accessed 3 May 2023.

54 TEU (n 1) article 13.

55 *ibid* 1, 3, 8.

56 Hiski Haukkala, 'The Making of the European Union Common Strategy on Russia' (2000) 28 *Upi Working Papers* 1; Dov Lynch, 'Russia's Strategic Partnership with Europe' (2004) *The Washington Quarterly*. Maurizio Massari, 'Russia and the EU Ten Years On: A Relationship in Search of Definition' (2007) 42 *The International Spectator* 1. At this point it is important to mention that, as will be better analyzed below, article 99 of the Corfu Agreement considers the possibility of taking any measures which a Party considers necessary for the protection of its essential security interests. See Section 4.



In any case, the outbreak of the second war in Chechnya had no relevant impact on EU-Russia relations within a long-term perspective. As the EU enlarged, the EU and Russia became even closer neighbors and their relationship of even greater importance. Soon, the idea was reaffirmed of creating an EU-Russia free-trade area in terms of 'Russia's progressive integration' into the European cooperation and open international trading system.

In this sense, the NDP contributed to fruitful political cooperation in terms of EU-Russia multi-sector cooperation that had already been established under the Corfu Agreement. More specifically, it was a regional initiative which involved the Russian Federation jointly with Norway and Iceland to address problems in the Baltic Sea, which also included cooperation on maritime transport and logistics.

In any case, the Russian Federation intended to strengthen its positions as a great maritime power. A few years after the NDP, in 2001, Russia's Naval Doctrine was adopted. It has been generally directed to establish a favorable logistics and economic environment contributing to the development and maintenance of the fleet and coastal port infrastructure at a level that guarantees economic independence and national security of the Russian Federation State, a reduction of shipping costs and increases in foreign trade, including with the EU.⁵⁷

At the 2003 St. Petersburg Summit, a decision was made to create four EU-Russia 'common spaces' which cover economic issues and the environment, including maritime trade and marine environment; issues of freedom, security and justice; external security, including crisis management and non-proliferation; and research and education, including cultural aspects.⁵⁸

Despite the low relevance of the Corfu Agreement's implementation, after the largest enlargement in 2004,⁵⁹ the European Commission affirmed that the Corfu Agreement remained valid, considering it to be neither outdated nor exhausted. The Commission specified that there is no limit in scope for EU-Russia cooperation and that its implementation through the Corfu Agreement institutions needs to become more operational and flexible.⁶⁰

In 2007, the Corfu Agreement was due to expire. Since neither party notified the other of its withdrawal, it was automatically renewed for one year.⁶¹

57 Russia Maritime Studies Institute, *Maritime Doctrine of the Russian Federation* [2015]. English translation by the U.S. Naval War College Foundation.

58 At the 2003 St. Petersburg summit, the EU and Russia decided to reinforce their cooperation already established under the Corfu Agreement by creating four 'common spaces' in the long term: (i) common economic space, (ii) common space of freedom, security and justice, (iii) common space of cooperation in the field of external security; (iv) common space of research and education, including culture. Joint Statement 9937/03 [2003] (Presse 154) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/75969.pdf> accessed 3 May 2023.

59 Erkki Liikanen, Member of the European Commission, 'The Enlargement of the EU: Impact on the EU-Russia bilateral cooperation' (Speech at the 5th EU-Russia Industrialists' Round Table Moscow, 1 December 2003).

60 European Commission, 'Communication from the Commission to the Council and to the European Parliament on relations with Russia' (Communication) COM (2004) 106.

61 PCA (n 1) art 106.



The aforementioned policy actions led by the EU within the first decade of the Corfu Agreement implementation had no direct implications on further developments of EU-Russia maritime cooperation. However, they constituted important steps forward in increasing political dialogue which progressively led to the implementation and expansion of the scope of application of the Corfu Agreement, including those provisions with specific reference to maritime affairs.

3.2 Expanding Bilateral Cooperation on Different Maritime Sectors (2008-2014)

In 2008, the negotiation process for a new EU-Russia Agreement to replace the PCA was launched. The EU and the Russian Federation agreed for the Corfu Agreement to remain in force until replaced by a new one that would provide a comprehensive framework for EU-Russia relations for the foreseeable future and help to develop the potential of their relationship.⁶²

In the meantime, the EU has set out steps to affirm itself as a global maritime actor with a new vision for the oceans and seas,⁶³ which involves the adoption of the EU Integrated Maritime Policy.⁶⁴ In order to influence international debate on maritime affairs and to reap all the benefits of its own integrated policy, in 2009 the Commission presented its strategy to strengthen global governance of seas and oceans.⁶⁵

The EU has become increasingly concerned about maritime regional activities mainly devoted to the protection of fragile and vulnerable sea basins. While the negotiation of a new EU-Russia comprehensive agreement was on standby, they promoted the adoption of sectorial maritime initiatives concerning regions of interests to both the EU and the Russian Federation, in particular the Black and Baltic, and most recently, Arctic marine regions.

With the aim of intensifying its maritime relations with Russia, the EU launched the Black Sea regional cooperation framework⁶⁶ Indeed, the Black Sea region comprises several EU Member States (Bulgaria, Greece and Romania), the candidate country Turkey and European Neighbourhood Policy (ENP)⁶⁷ partners (Armenia, Azerbaijan, Georgia, the Republic of Moldova and Ukraine), as well as the Russian Federation as a strategic partner.

62 Permanent Mission of the Russian Federation to the European Union, Russia-EU Partnership and Cooperation Agreement turns 20 [2017] <<https://russiaeu.ru/en/news/russia-eu-partnership-and-cooperation-agreement-turns-20>> accessed 3 May 2023.

63 European Commission, 'Green Paper. Towards a future Maritime Policy for the Union: A European vision for the oceans and seas' (Communication) COM (2006) 275 final.

64 European Commission, 'An Integrated Maritime Policy for the European Union' (Communication) COM (2007) 575 final.

65 European Commission, 'Developing the international dimension of the Integrated Maritime Policy of the European Union' (Communication) COM (2009) 536 final.

66 European Commission, 'Black Sea Synergy – A new regional cooperation initiatives' (Communication) COM (2007) 160.

67 The ENP has evolved over time. It was launched in 2003 by the European Commission, 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Communication) COM (2003) 104 final. Revisions took place and were renewed in 2011 and 2015. See, respectively, Commission, 'A new response to a changing Neighbourhood' (Communication) COM (2011) 303 final; European Commission, 'Review of the European Neighbourhood Policy' (Communication) JOIN (2015) 50 final. For a general overview, see Sara Poli (ed), *European Neighbourhood Policy – Values and Principles* (Routledge 2016).



The EU has been successful in pursuing its global interests in general, and its agenda in the Black Sea in particular. Indeed, in 2009 the EU and the Russian Federation signed the Agreement on co-operation in fisheries and the conservation of the living marine resources in the Baltic Sea (Baltic Agreement), guided by both the LOSC principles and provisions and Corfu Agreement framework⁶⁸

The objective of the Baltic Agreement is to ensure close co-operation between the EU and the Russian Federation on the basis of the principle of equitable and mutual benefit for the purposes of conservation, sustainable exploitation and management of straddling, as well as associated and dependent stocks in the Baltic Sea.⁶⁹ It sets out provisions on joint management measures⁷⁰ licensing,⁷¹ compliance with conservation and management measures and other fisheries regulations,⁷² control enforcement cooperation,⁷³ including inspections, arrest and detentions of vessels.⁷⁴ To this end, there was agreement to establish a Joint Baltic Sea Fisheries Committee which examines the development and dynamics of fish stocks in the Baltic Sea, supervises the implementation of the agreement, and serves as a forum for the amicable resolution of any disputes regarding the interpretation or application of the agreement.⁷⁵

Therefore, the Baltic Agreement helped strengthen EU-Russia partnership in maritime affairs, namely curbing illegal fishing activities in the Baltic, thus providing a framework for close co-operation between the Parties to ensure the conservation and sustainable exploitation and management of fish stocks in the Baltic Sea. However, the Russian Federation preferred not to extend the geographical scope of the 2009 Agreement beyond the Baltic.

Over the last ten years, the EU as a global maritime actor has also tried to be present in the Arctic Ocean. After much discussion, it has now taken on the role of 'observer in principle' of the Arctic Council. The EU's permanent observer status in the Arctic Council has been opposed by Russia, given EU sanctions following the annexation of Crimea and the situation in Ukraine.⁷⁶

Despite this opposition, the EU participates directly in other regional fora where the Russian Federation is present too, such as the Barents Euro-Arctic Council,⁷⁷ and it played a relevant role within

68 Agreement between the European Community and the Government of the Russian Federation on cooperation in fisheries and the conservation of the living marine resources in the Baltic Sea [2009] OJ L129/2 (Baltic Agreement).

69 *ibid* art 4.

70 *ibid* art 5.

71 *ibid* art 7.

72 *ibid* art 8.

73 *ibid* art 9.

74 *ibid* arts 10-11.

75 *ibid* art 14.

76 The Arctic Council 'receive[d] the application of the EU for observer status affirmatively, but defer[red] a final decision on implementation until the Council ministers are agreed by consensus . . . the EU may observe Council proceedings until such time'. Arctic Council Secretariat, Kiruna Ministerial Meeting Documents [2013] <<https://oaarchive.arctic-council.org/handle/11374/1569>> accessed 3 May 2023.

77 The Barents Council is the official body for inter-governmental co-operation in the Barents Region. For more information see the Barents Council web page <<https://barents-council.org/>> accessed 3 May 2023.



the negotiation process for the adoption of the multilateral Agreement for preventing unregulated fishing in the high seas of the central Arctic Ocean.⁷⁸

From 2008-2014, EU-Russia maritime cooperation experienced a significant expansion in maritime affairs, from trade and transport to fisheries and marine environment. Despite this, the illegal annexation of Crimea and the recent aggression in Ukraine by the Russia Federation have raised the question of compatibility of EU sanctions with the Corfu Agreement and their impact on EU-Russia maritime affairs.

4. The Question of Compatibility of EU Sanctions with the Corfu Agreement and their Impact on EU-Russia Maritime Affairs

The relations between the EU and Russia have been strained since the 2014 illegal annexation of Crimea and the city of Sebastopol by the Russian Federation and its destabilizing actions in eastern Ukraine. In response to these serious internationally wrongful acts, the EU imposed a number of restrictive measures against Russia, including individual sanctions, economic sanctions and diplomatic measures.⁷⁹

At the same time, the EU also decided to suspend bilateral talks with the Russian Federation on the new comprehensive agreement which was to replace the Corfu Agreement. However, the Corfu Agreement was not suspended.

As is well known, the EU adopted sanctions against the Russia Federation concerning export prohibitions and restrictions on access to the EU capital market. The legal questions that have consequently arisen regard the compatibility of EU sanctions with relevant international agreements, especially the Corfu Agreement. The Corfu Agreement established a sort of 'security exception' according to which prohibitions or restrictions on goods in transit can be imposed if justified, inter alia, on grounds of public security or protection of health and life of humans, or protection of intellectual, industrial, or commercial property, and to protect essential security interests.⁸⁰

More specifically, article 99 of the Corfu Agreement does not prevent a party from taking measures

78 The International Agreement to Prevent Unregulated Fishing in the High Seas of the Central Arctic Ocean prevents commercial fishing by the Parties in the high seas of the Arctic Ocean for the next 16 years. Parties are: Canada, Iceland, the Kingdom of Denmark, Norway, the United States and the Russian Federation, as well as China, Japan, South Korea and the European Union. See Council Decision (EU) 2019/407 of 4 May 2019 on the conclusion, on behalf of the European Union, of the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean [2019] OJ L 73/1; Agreement to prevent unregulated high seas fisheries in the Central Arctic Ocean [2019] OJ L 73/3.

79 Council Decision 2014/512/CFSP of 31 July 2014, concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine [2014] OJ L 229/13; Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine [2014] OJ L229/1. See, Elena Sciso, 'La crisi ucraina e l'intervento russo: profili di diritto internazionale' (2014) *Rivista di diritto Internazionale* 992; Sara Poli, 'The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law' [2017] 54 *Common Market Law Review* 1799; Id. *Le misure restrittive autonome dell'Unione europea* (Editoriale Scientifica 2019) 45 ss.

80 PCA (n 1) arts 19 and 99.



that it considers necessary for the protection of its essential security interests, including in the event of serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war.⁸¹

At this point, it is important to understand to what extent the imposition of EU sanctions against Russia could be considered 'necessary for the protection of its essential security interests,' including in the event of 'serious internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war' that do not affect directly the territory of the EU.

On the other hand, the Russian Federation, on occasion of the twentieth anniversary of the Corfu Agreement, considered that many of the mechanisms of EU-Russia dialogue developed under the Corfu Agreement 'fell prey to short-sighted Western policies.'⁸² Furthermore, Russia argued that the EU-imposed sectoral sanctions against Russian companies were in breach of the provisions of the Corfu Agreement.⁸³

In particular, the question of the compatibility of EU sanctions with the Corfu Agreement was addressed by the CJUE in the *Rosneft case*.⁸⁴ The Court declared that the restrictive measures are compatible with the Corfu Agreement. It considers that the EU sanctions clearly contribute to achieving the objective pursued by the EU to protect its security interests and to promote a peaceful settlement of the crisis in Ukraine, consistently with the overall goal of maintaining peace and international security.⁸⁵

In addition, the Court specified that the wording of article 99 of the Corfu Agreement does not require that the 'war' or 'serious international tension constituting a threat of war' refer to a war directly affecting the territory of the EU. Accordingly, events which take place in a country bordering the EU, such as those which have occurred in Ukraine, are capable of justifying measures designed to protect essential EU security interests and to maintain peace and international security.⁸⁶

In recent years, several channels of cooperation have been frozen. In particular, after the Russian invasion of Ukraine in February 2022, the EU adopted additional restrictive measures that build on, and expand, the earlier aforementioned sanctions.⁸⁷

Amongst others, they prohibit the entry into EU ports of any Russian registered vessels, as well as

81 *ibid* art 99 (1) (c-d).

82 Permanent Mission of the Russian Federation to the European Union (n 62).

83 *ibid*.

84 The Rosneft Oil Company OJSC (Rosneft) is a company that conducts its exploration and production activities in the key hydrocarbon provinces of Russia and the Russian Continental Shelf, including include in waters deeper than 150 meters and in shale formations. Rosneft requested a preliminary ruling that relates to the validity of restrictive measures. Case C-72/15, *The Queen (PJSC Rosneft Oil Company) v. Her Majesty's Treasury* [2017] ECLI:EU:C:2017:236.

85 *ibid* para 108-117.

86 *ibid* esp. para 112. Poli, *Le misure restrittive autonome dell'Unione europea* (n 79).

87 For an overview of meetings, press releases and policies of the Council of the EU and the European Council in relation to the EU's response to Russia's military aggression against Ukraine, including a detailed description of restrictive measures, see European Council, Council of European Union, Russia's war on Ukraine, <www.consilium.europa.eu/en/topics/russia-s-war-on-ukraine/> accessed 3 May 2023.



prohibiting the sale, supply, transfer or export of maritime navigation goods and technology to any person or entity in Russia, for use in Russia or for the placing on board of a Russian-flagged vessels.⁸⁸

In accordance with the aforementioned CJUE jurisprudence, the EU current sanctions are compatible with the Corfu Agreement.⁸⁹

In any case, under specific authorizations, derogations are granted for agricultural and food products, humanitarian aid, and energy. Currently, the EU ban only includes imports of caviar and caviar substitutes, along with crustaceans such as crab and shrimp. Other seafood products, like Alaska Pollock and cod, are not affected by the measures.⁹⁰

In addition to sanctions, some of the EU policy frameworks of regional cooperation on maritime affairs have been suspended with Russia, such as the Baltic Sea Regional Transitional cooperation programme.⁹¹ Nevertheless, the 2009 EU-Russia Baltic Agreement is not suspended and its objective and scope do not fall directly within the scope of current sanctions.

Theoretically speaking, sanctions can be expanded to include all Russian fishing vessels and all seafood, banning all fish and seafood originating in Russia or caught by Russian-flagged or Russian-owned vessels, regardless of its route to the EU market, and refusing access by Russian-flagged and Russian-owned fishing vessels into EU waters and ports.

In this case, the question of compatibility of these sanctions with the 2009 Baltic Agreement would assume relevance because the treaty-text does not include 'security exceptions.' However, it includes a saving clause according to which nothing affects or prejudices in any manner the positions or the views of either Party with respect to 'any question relating to the Law of the Sea.'⁹² Hence, the wording 'any question relating to the Law of the Sea' does not seem to exclude matters of maritime security, allowing each Party, i.e. the EU, to take appropriate measures to contribute to maintaining the peace and international security in accordance with the LOSC, which is consistent with the UN Charter and rules and principles of general international law.

Furthermore, general interpretation rules of treaties provide a mechanism of inter-systemic interpretation between same States parties to same treaties, i.e. the EU and Russia to the Corfu and

88 Related technical or financial assistance and brokering or other services are also prohibited. as listed in Annex XVI of Regulation (EU) 833/2014.

89 Note that sanctions are applicable to 500 GT and beyond (from smaller to the biggest) sailing commercially in international shipping. Hence, a fishing vessel certified in accordance with the most relevant international instruments (SOLAS, MARPOL or Load Lines Conventions) has to be considered as a 'ship' for the purposes of EU Regulation (EU) 833/2014 and falls within the scope of the ban.

90 Guidance for Member States <https://finance.ec.europa.eu/system/files/2022-09/faqs-sanctions-russia-export-import-guidance_en.pdf> accessed 3 May 2023.

91The EU joined members of the Council of the Baltic Sea States (CBSS) in suspending Russia and Belarus from the Council's activities. See also EEAS Press release, 'Russia/Belarus: Members suspend Russia and Belarus from Council of the Baltic Sea States' (05 March 2022) <www.eeas.europa.eu/eeas/russiabelarus-members-suspend-russia-and-belarus-council-baltic-sea-states_en> accessed 3 May 2023.

92 Baltic Agreement (n 68) Art 14.



Baltic Agreements. Indeed, this mechanism of inter-systemic interpretation asks States to take into account, together with the treaty context, any relevant rules of international law applicable in the relations between the parties.⁹³ Hence, these could include 'security exceptions' due to article 99 of the Corfu Agreement.

Furthermore, this inter-systemic integration between the Corfu and Baltic Agreements is evident from the Preamble of the latter, which recalls the Corfu Agreement as a general framework which has guided both Parties to intensify their relations. This led to enrich bilateral cooperation on trade and investment fields, including maritime transport, with more specific sectors related to conservation, sustainable exploitation, and management of Baltic fisheries.

Since the Baltic Agreement does not exclude explicitly the applicability of 'security exceptions,' it is here argued that in case of the adoption of extended sanctions that might fall under the Baltic Agreement scope of application, they would be, in principle, compatible with the latter.

Presently, however, most concerns are not focused on the Baltic Sea. Current EU interests and concerns involve to a greater extent the Black Sea where States bordering the Black Sea are NATO and EU members (Bulgaria, Greece and Romania), which is of geostrategic importance for the energy security of the EU.

Furthermore, because of its geostrategic importance, a safe maritime humanitarian corridor was opened in the Black Sea, i.e. the Black Sea Grain Initiative. In July 2022, the Black Sea Grain Initiative was signed by the UN, Ukraine, Russia and Türkiye, and has transported close to 10 million metric tonnes of grain from three Ukrainian ports along agreed routes.⁹⁴ Indeed, it was adopted to facilitate the safe navigation of export of grain, foodstuffs, and fertilizers from Ukraine. After of a temporary suspension of the aforementioned initiative by Russia,⁹⁵ most recently positive and significant developments led to the confirmation by the Russian Federation to continue its participation in the Black Sea Initiative.

5. Conclusion

The Corfu Agreement is the primordial legal basis for the subsequent development of EU-Russia maritime cooperation. It includes specific provisions related to maritime affairs, especially regarding transport and trade sectors in accordance with the 'treatment no less favorable' standard. Reservations on the 'treatment no less favorable' standard are instead made in relation to the fisheries sectors.

93 General rules of interpretation codified by the Vienna Convention on the Law of Treaties between States [1969] 1155 UNTS 331 and by Convention on the Law of Treaties between States and International Organizations or between International Organizations [1986] are today considered customary law. Ibid art 31 (3) (c).

94 For more detail see <www.un.org/en/black-sea-grain-initiative> accessed 3 May 2023.

95 The European Union condemns Russia's suspension of Black Sea Grain Initiative and urges Russia to reverse its decision and to immediately resume the implementation of the UN Black Sea Grain Initiative: EEAS Press release, 'Food security: Statement by the High Representative on the extension of the Black Sea Grain Initiative' (17 November 2022) <www.eeas.europa.eu/eeas/food-security-statement-high-representative-extension-black-sea-grain-initiative_en> accessed 3 May 2023.



During the first decade of the Corfu Agreement implementation (1997-2007), the development of the EU-Russia maritime cooperation was negligible. At the end of the 1990s the Russian Federation experienced a dramatic political change with important implications for the EU-Russia relationship in general, and for maritime cooperation in particular. However, the 1999 EU Common Strategy and other policy actions led by the EU might be appreciated in terms of engaging in dialogue with the Russian Federation. In any case, both the EU and the Russian Federation aspired to be global maritime powers. Once they succeeded, the EU and the Russian Federation focused on marine regions of mutual interest, such as the Baltic, Black and Arctic regions. Accordingly, they expanded their maritime cooperation from transport and trade to fisheries and marine environment sectors.

Despite a general context of difficulties for adopting a new agreement which would replace the PCA, in 2009 they adopted the Agreement on fisheries conservation in the Baltic Sea that aims to ensure close cooperation between the EU and Russia based on fair and mutual benefits for the purpose of conservation, sustainable use, and management of marine living resources that migrate between zones under their respective jurisdiction.

This shows that the EU and the Russian Federation can adapt to each other to meet evolving challenges and demonstrates the continuing strength and promise of bilateral cooperation.

However, EU-Russia relations have never been easy. Flexibility and perseverance met an escalation of tension because of the Crimea annexation in 2014 and the invasion of Ukraine in 2022. The EU adopted economic sanctions against Russia, which are compatible with the Corfu Agreement, according to its article 99.

The EU-Russia maritime relationships are today a matter of security concern where only diplomacy can play a crucial role. The geostrategic and economic importance of oceans and seas might become a relevant point to be addressed in diplomacy for reducing the current crisis, as shown by the recent positive outcome in relation to the Black Sea Grain Initiative. According to the UN Secretary General, '[e]ven in the darkest hours, there is always a beacon of hope and an opportunity to find solutions that benefit everyone.'⁹⁶

⁹⁶ Secretary-General's press encounter on the Black Sea Initiative 'Beacon on the Black Sea' <www.un.org/en/black-sea-grain-initiative> accessed 17 May 2023.

Ensuring the Quality of ISM Audits - The Role and Adequacy of the Legal Framework of Auditing

Deepak Raj SHARMA and Sigmund SIMONSEN*

Abstract

Maritime safety and thus ISM (International Safety Management Code)-audits are directly or indirectly regulated by a host of regulatory instruments. These regulations set the standards for verification, certification, and auditing mechanisms. Intrinsically, these legal regulations influence, or at least should influence, the quality and effectiveness of this auditing mechanism. The legal regulatory framework of the auditing mechanism of maritime safety management has been sparsely researched. Therefore, the understanding and adequacy of the legal framework may not be optimal.

The aim of this paper is thus to identify, clarify and discuss the current legal framework of ISM audits. The intended outcome will be an enhanced and clarified understanding of the underlying legal framework governing flag state audits as well as Port State Control in the context of maritime safety management. We also examine if the current legal framework of ISM audits is adequate to ensure quality and effectiveness of auditing mechanisms in meeting the objectives. The regulatory framework of safety management of other domains will also be compared with the maritime domain to identify and discuss best practices.

Keywords: maritime safety, safety management, ISM code, auditing, audit quality, maritime law

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1. Introduction

The international legal framework concerning safety at sea is extensive and consists of multiple legal instruments and requirements. The ship, shipping company and the crew onboard must comply with applicable rules and regulations. The shipping company is required to develop and implement a Safety Management System (SMS) within the company's shore organization and onboard each ship in order to identify, control and mitigate risks, and to ensure compliance with legal requirements and the SMS itself.

Maritime safety systems, consisting of regulations and requirements to ensure a proper level of safety and an acceptable risk at sea, commenced with the adoption of the Convention on Safety of Life at Sea (SOLAS) in 1914 following the *Titanic* disaster¹. Mr William O'Neil, the then Secretary General of the International Maritime Organization (IMO) highlighted that initial attempts to improve shipping safety had been directed at improving the hardware of shipping – the construction of ships and equipment and that, subsequently, focus shifted to the way shipping companies were managed with the introduction of the International Safety Management (ISM) Code².

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1 Zdzisław Kopacz, Waław Morgaś and Józef Urbański, 'The Maritime Safety System, its Main Components and Elements' (2001) 54 *Journal of Navigation*, 199.

2 Phil Anderson, *ISM Code: A Practical Guide to the Legal and Insurance Implications* (Informa Law from Routledge 2015).



The SMS encompasses all relevant maritime rules and regulations. The SMS is thus an essential and powerful tool for the shipping company and the crew on board in ensuring safety at sea. It provides a holistic mechanism for ensuring, verifying and certifying compliance of all existing safety regulations by the ship's crew and the shore-based companies operating these ships. There is a lack of consensus among scholars about the effectiveness of the ISM Code in achieving the intended objectives³. However, it is generally accepted that the implementation of the Code enhanced the levels of maritime safety by plugging a gap in regulatory framework and addressing organizational and human factors through safety management principles by introducing a systemic approach towards risks and safety at sea⁴.

Verification of compliance of all regulations on all the ships, and the issuance of necessary certifications then became an important component of the regulatory framework. Flag states are obliged to ensure that companies and crews implement an SMS through auditing, inspections, certification etc., on ships flying their flags. International regulations set the standards for flag states verification, certification and auditing mechanisms. Intrinsically, these legal regulations influence, or at least should influence, the quality and effectiveness of this auditing mechanism.

Clear rules and regulations, as well as clarity and consensus in interpretation of these rules, are therefore an important factor in ensuring effective audits of good quality in practice, in addition to ensuring global harmonization of the international framework and a level playing field. However, the standards are vague, and the open-ended nature of the rules and regulations may lead to differences in practice. Differences in procedures adopted by various national maritime administrations may also lead to variation in the quality of the outcome of such auditing mechanisms. Moreover, the legal regulatory framework of the auditing mechanism of maritime safety management has not been extensively researched. Therefore, the knowledge and understanding of the role and adequacy of the legal framework governing ISM audits may require improvement.

The aim of this paper is thus to identify, clarify and discuss the current legal framework of ISM audits, its content, role and adequacy. The intended outcome is an enhanced and clearer understanding of the underlying legal framework governing flag state audits, as well as Port State Control in the context of maritime safety management. We also ask if the current legal framework of ISM-audits is adequate to ensure quality and effectiveness of auditing mechanisms. Identified challenges are also discussed.

The legal framework of ISM-audits is analysed in line with international legal methods, where the most prominent sources of law are international conventions, codes and other documents, as well as literature. There is no international case law addressing the issue. The role, rules and practices of authorization of Recognised Organisations (ROs) for auditing are also investigated.

First, we provide a brief overview of the legal framework concerning safety at sea, and some jurisdictional issues. Then, we identify and describe the legal framework of ISM-audits using various legal instruments. This is followed by a comprehensive discussion about the role and adequacy of these auditing-rules. Finally, the safety management regulatory framework of other domains is compared with the maritime domain in order to further identify and discuss best practices.

3 Syamantak Bhattacharya, 'The Effectiveness of the ISM Code: A Qualitative Enquiry' (2012) 36 *Marine Policy*, 528.

4 Bjørn-Morten Batalden and Are Kristoffer Sydnes, 'Maritime Safety and the ISM Code: A Study of Investigated Casualties and Incidents' (2014) 13 *WMU Journal of Maritime Affairs*, 3.



2. The Legal Framework of Maritime Safety

2.1 Public International Maritime Law

Maritime safety and thus ISM audits are directly or indirectly regulated by a host of regulatory instruments. The international legal framework for all marine and maritime activities is based on the United Nations Convention on the Law of the Sea (UNCLOS). The rules and principles of UNCLOS are then spelled out in greater detail in other conventions. The SOLAS, MARPOL, STCW and Maritime Labor Convention (MLC) are commonly regarded as the four main pillars of public international maritime law⁵. The four conventions lay out requirements and standards surrounding safety procedures, pollution prevention practices, seafarer training and qualification, and labour laws of the maritime industry. Other conventions, like COLREG, the Load Line Convention and the Ballast Water Management Convention, to name a few, add to this vast legal framework. These legally binding conventions are then supplemented by rules and regulations that fall into one or more of the following categories: protocols, codes, annexes, directives, instructions, memoranda of understanding (MOUs), resolutions, guidelines, standards, recommendations, practices, or generally any other measure that specifies, prescribes, encourages, mandates, recommends or enforces practices that may impact on maritime safety⁶. Some of these instruments are legally binding per se (hard law), while others are recommendatory and guiding (soft law).

2.2 UNCLOS and the Responsibilities and Obligations of Flag States for Maritime Safety

The regulatory framework of maritime safety is, as has been mentioned, founded on UNCLOS. UNCLOS is considered as ‘the constitution’ of the world’s oceans and described as an ‘umbrella’ convention because it sets out the basic framework for states to exercise jurisdiction over most activities at sea⁷.

The concept of the flag state is a significant aspect in maritime law. Article 94 of UNCLOS defines duties of the flag state, which include general obligations and supervision of ships flying its flag. It specifically mentions their responsibilities regarding maritime safety. While paragraphs 3 and 4 specify various technical and operational measures including construction and seaworthiness of ships, manning and competence of crew, and provisioning of necessary navigational equipment and publications, paragraph 5 obliges conformance to generally accepted international regulations, procedures, and practices in this regard.⁸ The generally accepted international regulations are first and foremost the IMO conventions, like SOLAS, MARPOL, STCW and so on.

The auditing or verification for ensuring compliance of regulations is not mentioned specifically in Article 94 of UNCLOS. However, paragraph 1 requires the flag state to

‘... effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.’

⁵ For more information: <www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/presentation/wcms_229914.pdf> accessed 17 February 2023.

⁶ Harilaos N. Psaraftis, ‘Maritime safety: To be or not to be proactive’ (2002) 1 WMU Journal of Maritime Affairs, 3.

⁷ UK International Relations and Defence Committee, *2nd Report of Session 2021-22 ‘UNCLOS: The law of the sea in the 21st century’* (HL Paper 159, published 1 March 2022).

⁸ United Nations Convention on Law of the Sea: Article United Nations Convention on the Law of the Sea [1982] 1833 UNTS 3 [UNCLOS], art 94.



This clause caters for flag state's periodic supervision or verification of maritime safety measures on ships including their SMS. The mechanisms of surveys, inspections and audits related to maritime safety could then be derived from here, as it might be argued that for the flag state to effectively control their ships, an adequate regime of control and auditing must be in place.

The ISM code not only places significant obligations on the shipping companies, the owner or a managing company, but also subjects them to audits by the flag states. The jurisdiction over ensuring compliance on ships also inherently includes jurisdiction of the flag state over managing companies that control and operate these ships. Thus, in order to effectively exercise their jurisdiction on ships flying their flags as envisaged in Article 94 of UNCLOS, the flag states can also exercise their jurisdiction on companies managing ships for the purposes of certification and ensuring compliance of regulations on their ships. This is the case even if these companies are not located on the flag state of the ship.

Interestingly, prevention of pollution or environment protection is not explicitly included in Article 94, which only refers to traditional safety at sea measures. However, Article 94 is clearly not intended to be exhaustive. Rather, it should be interpreted dynamically, sensitive to the development of international maritime law. Today, it is commonly agreed that safety at sea is composed of two main components: safety of human life and property at sea, and prevention of pollution of the maritime environment by ships⁹. Therefore, maritime safety and marine environment protection are inextricably linked, as envisaged in the holistic approach of the ISM-code¹⁰.

Interestingly, Article 217 brings into focus duties of the flag state related to the prevention, reduction and control of pollution of the marine environment from vessels¹¹. It is specifically relevant in subsequent discussions on maritime safety management under the ISM-code which inherently encompasses environmental protection.

2.3 UNCLOS and the Responsibilities and Obligations of the Port State for Maritime Safety

The jurisdiction of the port state on foreign ships within the coastal state's waters and their ports has been another important development in international maritime law and supplements flag state control. Port state jurisdiction has been utilized in various IMO Conventions to develop a framework of enforcing maritime safety through Port State Control (PSC), especially when confronted with the failures of flag states to adequately regulate and control their ships¹².

UNCLOS provides extensive territorial and extra-territorial jurisdiction to port states, especially related to pollution from ships. However, the discussion in this paper will be limited to the PSC regime acting as a safety net to complement effective maritime safety administration by flag states¹³.

9 Kopacz et al, 'The Maritime Safety System, its Main Components and Elements' (n 1).

10 Ronald Amaniyire, 'Safety management in shipping- an historical comparison to the state of art' (Masters Thesis 2007).

11 Nivedita M. Hosanee, *A critical analysis of flag state duties as laid down under article 94 of the 1982 United Nations convention on the law of the sea, Division for ocean affairs and the law of the sea office legal affairs. The United Nations* (New York, 2009).

12 Cedric Ryngaert and Henrik Ringbom, 'Introduction: Port State Jurisdiction: Challenges and Potential' (2016) 31 *The International Journal of Marine and Coastal Law* 379.

13 Maximo Q Mejia 'Evaluating the ISM Code Using Port State Control Statistics' (PhD Thesis, Lund University 2005).



Article 94, Para 6 provides for

'A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State.'

This enables all states including coastal and port states to report any deficiencies in the exercise of jurisdiction and control by the flag states over their ships.

Article 219 mandates, as quoted below, a port state to take administrative measures to prevent a vessel from sailing if it threatens the environment:

'...a vessel within one of their ports or at one of their offshore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing.'

This is the core component of the maritime safety regime beyond the conventional flag state jurisdiction. Compliance checks under the PSC regime could be considered as an additional verification mechanism for maritime safety management under the ISM Code, though it forms a broader part of such checks for the compliance of various regulations. However, they are primarily focused on checking the validity of statutory ISM certificates of ships.

Since the PSC Officer is not carrying out a safety management audit of the SMS during a PSC inspection, the term 'clear grounds' is not applicable in the context of the ISM Code¹⁴. The term 'clear grounds' means that the ship's condition or its equipment substantially deviates from the certificates and from generally accepted standards. A detailed inspection should then be carried out. However, this only applies for technical or operational related deficiencies. Any technical and/or operational related deficiencies found during this inspection, individually or collectively considered by the PSCO to indicate a failure, or a lack of effectiveness, in the implementation of the ISM Code, could still result in recommendations for an additional ISM audit by the flag state.

Incidentally, evolution of regional cooperation agreements for exercising PSC through Memorandum of Understandings (MoUs) has been found to be a very effective tool in reducing the number of substandard ships, as well as improving maritime safety and pollution prevention¹⁵.

2.4 SOLAS

The obligations of flag states entailed in UNCLOS are then specified in several international instruments, most notably the SOLAS. Chapter IX of SOLAS regulates Management for the safe operations of ships through safety management requirements imposed on the company and the ships, rendering compliance of the ISM Code mandatory. The details of the Code are described in a separate paragraph, arguably being one of the most significant regulatory instruments regarding the ensuring and auditing of maritime safety management.

¹⁴ Paris Memorandum of Understanding on Port State Control (Paris mou), 'Guidelines for the port state control officer on the ism code' Port State Control Committee instruction 56/2023/05.

¹⁵ Jaime Rodrigo De Larrucea and Cristina Steliana Mihailovici, *The Port State Control Inspections and their Role in Maritime Safety: Specific Case – Romanian Naval Authority* (2010).



Chapter IX, Regulation 6 concerns the verification and control of the safety management system, and states that

‘The Administration, another Contracting Government at the request of the Administration or an organization recognized by the Administration shall periodically verify the proper functioning of the ship’s safety management system.’

Thus, it obliges the flag state, or an organization recognized by the flag state, to verify the proper functioning of the ship’s safety management system.¹⁶ The proper functioning is the essential legal requirement, which means that SMS should not only be formally in place on paper. The SMS must also be functional and working in practice. That means that the SMS must be adapted to the needs of the company, the ship and their activities, as well as meeting the objectives of the ISM Code.

The clause regarding ‘an organization recognized by the Administration’ is quite significant because it authorizes the delegation of the statutory responsibility of the flag state for verification to another entity – a Recognized Organization (RO).

Furthermore, Regulation 4 concerns certification. A company complying with the requirements of the ISM Code is issued a Document of Compliance (DOC). Without a valid DOC, a company cannot legally manage ships, and their ships can no longer sail. In addition, a Safety Management Certificate (SMC) is to be issued to every ship belonging to the company after verifying that the company and its shipboard management operate in accordance with the approved SMS. Without a valid SMC, the ship is not allowed to sail. Thus, the DOC and the SMC are arguably, as intended, among the most important certificates in maritime law/industry. Consequently, both shipping companies and ships must meet certain minimum standards, invoked to ensure compliance with all other safety standards.

2.5 ISM Code

Though the ISM Code was brought into force through incorporation in Chapter IX of SOLAS, the code is examined independently because the code is a separate legal instrument which elaborates SOLAS and entails more detailed requirements.

2.5.1 Structure and Requirements

The ISM Code recognizes that shipping companies and the conditions of the operation of the ships have a wide variance. The Code therefore include broad principles and objectives enabling the companies to formulate their own functioning SMS. Among other provisions, the Code requires the company to develop procedures for identifying and managing risk, maintenance of ship and equipment, emergency preparedness and the reporting of workplace incidents, as well as self-critical elements such as regular internal audits and reviews of the current system¹⁷.

The flag state of each ship is also required to conduct periodical audits of the company, in addition to each ship operated by them, to ensure that the shipping company and the crew onboard have implemented a ‘properly functioning’ SMS and that they adhere to it.

¹⁶ International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention).

¹⁷ Bhattacharya S, ‘The effectiveness of the ISM Code: A qualitative enquiry’ (2012) 36 Marine Policy 528.



While Part A of the ISM Code deals with implementation, Part B specifies requirements for certification and verification¹⁸.

Section 13 of the ISM Code regulates certification and periodical verification in detail and specifies procedures for validations and periodical checks. The validity of the DOC and the SMC is five years. Annual verifications are required for continued validity of the DOC. However, only one intermediate verification, preferably between the second and third years, is necessary for continued validity of the SMC.

Section 14 of the ISM Code addresses interim certification to facilitate initial implementation of the ISM Code. This could be when a company is newly established or new ship types are added to an existing DOC, or when a ship changes her flag. The procedures are like those mentioned in Section 13 with certain changes.

Section 15.1 of ISM Code states that

'All verifications required by the provisions of the Code should be carried out in accordance with procedures acceptable to the Administration, taking into account the guidelines developed by IMO'

The clause 'procedures acceptable to the Administration' provides for the flag state to design its own process, procedure and framework for the verification or auditing for compliance with the ISM Code. Respective flag states may, at their discretion, include certain additional provisions for the ships flying their flags.

However, a minimum requirement derived directly from SOLAS Chapter IX, Regulation 6, is that the audit should at least be effective and adequate to ensure the 'proper functioning' of the SMS.

Section 15.1 also requires the flag state to 'take into account' the guidelines promulgated by the IMO. The administration's procedures should thus be effective and adequate, and in conformity with relevant IMO guidelines on the subject. Thus, the flag state does not have complete discretion because audits must be of a certain quality.

2.6 IMO Guidelines on the ISM Auditing Framework

The latest version of IMO guidelines on the implementation of the ISM Code by administrations provides comprehensive information about the procedures, processes and practices for conducting audits for verification of compliance of the Code¹⁹. It also describes the process of preparation and execution of the audits.

Furthermore, a significant measure towards quality control of the auditing is included in the form of the Appendix to the Guidelines which includes standards on ISM Code certification arrangements. It describes the standards for competence and independence of the auditing organization and states that

Para 2.1, 'Organizations managing verification of compliance with the ISM Code should have, in their own organization, competence in relation to...'

¹⁸ IMO, 'International Management Code for the Safe Operation of Ships and for Pollution Prevention' (International Safety Management Code (ISM) Code) (amended by Resolution MSC.353(92), entered into force 1 January 2015).

¹⁹ IMO, 'Revised guidelines on the implementation of the international safety management (ISM) code by administrations' (10 January 2018) A 30/Res.1118.



Para 2.3, ‘...ensure personnel providing consultancy services and those involved in the certification procedure are independent of one another.’

In addition, standards for competence of the auditing team personnel conducting the verification are also mentioned with respect to their qualifications, experience and training, and it states that:

Para 3.2, ‘... personnel should have at least five years’ experience in areas relevant to the technical or operational aspects of safety management and a minimum of formal education comprising the following...’

Para 3.3.1, ‘...a person authorized to carry out ISM audits must have completed at least four training audits under the supervision of suitably qualified and experienced auditors and in accordance with the following criteria...’

Thus, there has been significant focus by the IMO on the suitability of the auditing organization and the auditing team conducting ISM audits, in terms of expertise and neutrality.

Organizations conducting audits are also required to implement a system for ensuring the above requirements and a standardized system for the certification process.

IMO guidelines reiterate that the Administration is responsible for verifying the compliance with requirements of ISM Code and issuing DOC and SMC. However, it also highlights that administrations can authorize organizations to act on their behalf as per SOLAS Chapter 1, Regulation 6 entrusting these Recognized Organizations (ROs) to undertake verification²⁰.

It is interesting to note here that such a legal framework for authorizing the ROs is not limited to the ISM but also includes other provisions of SOLAS. Furthermore, it also exists in other IMO conventions including MARPOL, Load Lines, Tonnage and Anti Fouling²¹.

2.7 Regional Legal Instruments of Maritime Safety Management

There are some additional regulatory arrangements at regional level which impose supplementary requirements over the international safety regulations. European Union (EU) action in the field of Maritime Safety regulation generates significant added value to the international framework by continuously improving and strengthening international standards within the EU and EEA²². EU regulation regarding maritime safety management is largely based on IMO regulations. The ISM Code is implemented by the EU in the EU Regulation No 336/2006 on the implementation of the ISM Code within the Community²³. However, this regulation makes the requirements more stringent in several ways, for example by making them applicable to ships on domestic voyages. Furthermore, the standards of competence and independence of auditing organizations and competence of audit team personnel, mentioned in the non-mandatory IMO guidelines, have also been made mandatory within the EU/EEC. However, the provisions regarding verification and certification, as mentioned in the ISM Code, have been retained hitherto. Therefore, in this context, the EU regulations have

²⁰ *ibid.*

²¹ IMO, ‘Legal Framework on Recognized Organizations (ROs) in IMO Conventions’ <www.imo.org/en/OurWork/IHIS/Pages/Recognized-Organizations.aspx> accessed 3 November 2022.

²² Ljupco Sotirovski, ‘The EU and International legal Framework in Maritime Safety’ (2016) 25 *International Journal of Sciences: Basic and Applied Research*, 297.

²³ Regulation (EC) n 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation [2006] OJ L 64.



limited additional influence on the standards of auditing mechanism or its quality and effectiveness. No other regional framework of significance on the level of the EU is available to our knowledge.

2.8 Guidelines on Safety Management by National Maritime Administrations

The national administrations of the flag states have also issued their own guidelines for the guidance of auditors, usually based on IMO guidelines, and amplifying certain procedures and processes. For example, the Marine Survey Instructions for the Guidance of Surveyors (MSIS) No. 02 on ISM Code, issued by the UK Maritime and Coast Guard Agency (MCA), is modelled on the recommendations in the IMO guidelines.

These instructions also include comprehensive details for operational implementation for verification and certification, stipulating the UK policy of interpretation of all the provisions of the ISM Code²⁴. Incidentally, Chapter 6 of these instructions addresses the reporting and quality control procedures. However, these are limited to reporting audit information and updating related databases. Further procedures for quality control or monitoring of these audits are not defined. Given that these instructions are intended for surveyors conducting the audits, they may not be involved in quality control procedures which may be handled by other personnel at MCA. Similar guidelines are usually issued by other flag states.

2.9 Guidelines by Other Organizations on Safety Management

A large number of classification societies have been authorized as ROs by various flag states to conduct verification and certification on their behalf. The International Association of Classification Societies (IACS), which is a non-governmental organization with observer status at the IMO, has 11 members out of more than 50 classification societies worldwide.

IACS has issued guidelines related to the certification for the ISM Code for compliance by their member organizations. However, these guidelines are not formally part of the legal framework for the ISM-auditing regime. IACS standards carry considerable weight as established and broadly accepted good practices. As such, they influence the interpretation of legal rules and RO practice, and thus have considerable impact on quality of the outcome of the verification mechanism or auditing. We therefore need to examine the content of these guidelines to study and clarify any such implications.

IACS Recommendation No. 41 about 'Guidance for Auditors to the ISM Code' is primarily intended to promote audits' consistency and uniformity among ISM Code auditors, which is usually modelled on the IMO guidelines²⁵.

However, it provides specific guidance regarding objective evidence to demonstrate compliance with each provision under ISM Code with examples for the purposes of verification. These guidelines describe practical operational activities to be undertaken by auditors while they conduct the verification.

Further, IACS Procedural Requirement No. 9 about 'ISM Code Certification' provide procedures and criteria for the conduct of audits to verify compliance with the requirements of the ISM Code²⁶. Incidentally, it also provides the procedures governing the actions to be taken by classification so-

24 UK Maritime and Coastguard Agency, 'Instructions for the Guidance of Surveyors on International Management Code for the Safe Operation of Ships and for Pollution Prevention (The ISM Code)' (2020).

25 IACS Recommendation No. 41 'Guidance for IACS Auditors to the ISM Code' (2019).

26 IACS, 'Procedural Requirements for ISM Code Certification' (2012).



cities when deficiencies associated with the ISM Code are identified by Port State Control Officers (PSCOs). It includes the competence and independence requirements related to the auditing organization and the audit team envisaged in the IMO guidelines as referenced above in Para 2.6.

Thus, it is clear from the examination of these guidelines that in addition to conforming to the legal framework and the IMO guidelines on the subject, they specify good practice and describe the process of audit in great detail with practical and operational interpretations of the provisions of the ISM Code for conducting verification and certification. It surely encourages uniformity and consistency among the work undertaken by IACS members and thereby, to some extent, ensures a certain degree of quality assurance and equal application.

Guidelines issued by shipping industry organizations, such as the International Chamber of Shipping (ICS), are not relevant for discussion here because they usually describe procedures and guidance to be followed by shipping companies for internal control and implementation of the ISM Code. Thus, they do not have any direct role on the quality of verification and certification mechanisms, or auditing conducted by the flag state or RO²⁷.

2.10 Summary of the Regulatory Framework

To summarize, the described regulatory framework defines the overall structure for ISM audits. The loosely defined obligation of the flag state in UNCLOS, to ensure compliance of all safety regulations on its ships, is subsequently specified through IMO regulations in SOLAS and the ISM Code, describing in more detail the framework for ISM audits.

The regional and national legislative framework usually conforms to the IMO regulations. Furthermore, the operational practices and other nuances for interpretation of various provisions of ISM Code have been laid down in IMO guidelines and guidelines issued by IACS and respective national maritime administrations. Although these guidelines are non-mandatory, the recommendations identify good practice and should thus influence and guide the interpretation of binding rules, as well as the quality and effectiveness of auditing mechanisms because they are actual practices followed by the auditors or surveyors conducting ISM audits and verifications. Before we investigate the adequacy of this regulatory framework, we need to review its characteristics.

One significant feature of the regulatory framework is the flag state's delegation of ISM audits to ROs. Many flag states have delegated their responsibilities to ROs.

Secondly, the key elements impacting quality of audits regarding the competence of the auditing organization and audit team personnel have been included as guidelines instead of being part of binding law. Similarly, the principle of independence applicable to the auditing organization, more relevant in case of delegation to ROs by flag state, is also only a guideline. Interestingly, certain other IMO guidelines regarding the monitoring or supervision of the duties delegated to ROs acting on behalf of flag states could also be relevant with respect to the quality of auditing in maritime safety management because much of the ISM work is undertaken by the ROs²⁸.

Furthermore, the PSC regimes contribute to the robustness of the safety management framework by ensuring the flag states' compliance through monitoring and checks.

27 International Chamber of Shipping, 'Guidelines on the Application of the IMO International Safety Management (ISM) Code' (2019) vol 5th edition.

28 IMO, 'Code for Recognized Organizations' (RO Code) (21 June 2013) Resolution MSC.349 (92).



3. Discussions about Elements in the Regulatory Framework Affecting Quality of ISM Audits

In this part, we will critically examine the influence of some aspects of the regulatory framework identified in the previous section on the quality of ISM audits.

3.1 Provisions for Quality Evaluation of Auditing Mechanisms

The audit for the verification of the implementation of the ISM Code is a significant component of the maritime safety management architecture. Audits not only ensure compliance of mandatory legal provisions, but also act as a safeguard to regularly scrutinize the shipping companies and ships' safety practices and procedures. Therefore, the quality and effectiveness of the audits are essential, and the procedures and methods adopted during the audit should be of the highest attainable standard.

However, the ISM Code and various IMO guidelines do not prescribe any standards or procedures to evaluate the quality of the audit conducted. Hence, no formal mechanism exists in the maritime context for examining the quality and effectiveness of audits in achieving the desired objectives.

3.2 Delegation of Verification to Ros by Flag States

The delegation of responsibility to ROs for conducting verification of compliance and conduct of audits under the ISM has been a prominent aspect in implementing statutory requirements by a non-governmental entity. This is a unique arrangement prevalent in the maritime domain. The impact of this arrangement on quality can be investigated under following aspects:

3.2.1 Systemic Approach for Compliance and Verification

The ISM Code was introduced to address the human factors and organizational or management influences in safe management and operations of ships thereby focusing on a holistic and systemic approach aiming to integrate verification of compliance of all technical and safety regulations through the concept of safety management²⁹. Therefore, the Code aims to support and encourage the development of a safety culture within the shipping industry whilst improving compliance with the requirements of international conventions³⁰.

However, the issue of authorization to ROs has been dealt with in accordance with the procedure in vogue for IMO instruments that are more focused on technical aspects. Due to this, there is a limitation in the regulatory framework regarding enabling an overall control mechanism under direct supervision of the flag state for the purposes of compliance with ISM regulations. Distinct delegation criteria and processes for integrated supervision of RO delegated tasks, suited specifically to ISM work, have neither been designed nor considered. This may be due to a lack of appropriate resources and expertise in the administrations because all major technical work and even day-to-day running of flag state responsibilities, like ship registries in some cases, are delegated to ROs³¹. Thus, the systemic approach in the ISM framework is missing from the compliance and verification mechanisms.

²⁹ IMO, 'Revised Guidelines on Implementation of The International Safety Management (ISM) Code by Administrations' (6 December 2018) Resolution A.1118 (30).

³⁰ UK MCA (n 24).

³¹ N'Hoboutoun Santa, 'An analysis of the delegation of authority to the recognised organisations acting on behalf of the flag state: a case study on the Togolese flag' (Masters Thesis, World Maritime University 2018).



3.2.2 Principles of Conflict of Interest

The classification society is engaged and paid for by a shipowner to carry out inspections and certifications of ship conditions. Thus, this service is performed under a private contract with the shipowner³². However, while acting as ROs on behalf of the flag states for statutory inspections and certifications, they also act under public contract, i.e., a contract delegating public powers to a private company. This may be problematic as it implies an inherent conflict of interest in the two functions performed by these ROs.

The IMO has addressed this by providing specific provisions in the guidelines related to ROs work and independence. The IMO guidelines state that any organization performing verification of compliance with provisions of ISM Code should ensure that 'the personnel providing consultancy services and those involved in the certification procedure are independent of one another'³³. Further, Part 2 of IMO Code for ROs specifies in Para 2.3 that the RO and its staff shall not engage in any activities that may conflict with their independence of judgement and integrity in relation to their statutory certification and services. Moreover, the RO and its staff responsible for carrying out the statutory certification and services shall not be the designer, manufacturer, supplier, installer, purchaser, owner, user, or maintainer of the item subject to the statutory certification and services, nor the authorized representative of any of these parties³⁴.

However, it is quite common in other domains that the entities engaged in statutory audits are refrained or discouraged from being involved in other services for the auditee as per principle of independence and ethics. The European directive on statutory audits of annual accounts and consolidated accounts in respect of financial auditing identifies the provision of additional non-audit services to the audited entity as one of the threats to the independence of a statutory auditor or audit firm³⁵.

3.2.3 Implied Safety and Quality Assurance by Administrations

The examination of data about the delegation or authorization of the ISM verification to ROs by administrations reveals some interesting information about their perception of safety and quality assurance of the auditing mechanism.

Preliminary research of the data available on the Global Integrated Shipping Information System (GISIS) of the IMO shows the biggest flag states, which are usually small countries with limited resources and expertise for monitoring large merchant fleets, have authorized many ROs. This ranges from 31 by Panama to 12 by Bahamas and Malta. Most other countries have also delegated the ISM audits to ROs. However, some countries like Poland and UK have not authorized any ROs for ISM-audits, some have specifically exempted passenger ships (Denmark, Norway), while others have only authorized ROs for SMC and not DOC related work (France, Belgium, India).

32 Lia Carolina Barroso Rojas, 'Open registries and registries and recognized organization: synergy or dysfunction' (Masters Thesis, World Maritime University 2019).

33 IMO, 'Revised Guidelines on the Implementation of the International Safety Management (ISM) Code by Administrations' (29 November 2001) Resolution A.913 (22), para 2,3 of Appendix.

34 IMO, RO Code (n 28), part 2 para 2.3.

35 Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC [2006] OJ L 157, 9.6.2006, p. 87–107, Para 11.



Furthermore, the comparison of delegation of work to ROs for ISM and other regulations also reveals interesting findings. The table below provides examples of some selected flag states to illustrate the contrasting approaches:

Sl	Flag state	RO's authorized under various IMO regulations	RO's authorized for ISM audits	
			DOC	SMC
1	Japan	4	4	3
2	South Korea	3	1	1
3	France	5	2	3
4	USA	7	5	5

In some cases, a country has distinctively authorized ISM-audits to certain ROs only and denied them to others. Japan authorizes three out of four ROs for both DOC and SMC work but restricts one (DNV) to only DOC. The Republic of Korea limits authorization to one out of three ROs and France authorizes BV for limited work on SMC, full work to DNV and RINA but no work to KR and LR. USA also only authorizes five out of seven ROs for ISM audits.

There is no research study available on whether these variations have any impact on quality or safety. Thus, there is no direct evidence that there is a difference in the quality of audits undertaken by various ROs and the flag state administrations.

Assumingly, some of these decisions may have been motivated by practical considerations, in so far as the administration lacks auditing competence and capacity, while the ROs have better capacity and expertise. Furthermore, political backgrounds, reciprocal arrangements, and other considerations could also be possible causes.

However, exemption of passenger ships from audits by ROs indicates implied recognition of greater quality assurance by the administrations regarding their own ability rather than those of ROs because the administration presumably aims for greater safety for these passenger-carrying vessels. On the other hand, it may simply be a way to divide the work between the administration and the ROs. More research is needed to examine such implied safety and quality assurance considerations regarding the maritime administrations.

3.2.4 ROs as a Contributor to Unique Safety Regimes

The delegation to ROs may also have a positive influence on the quality of audits. The historical development of classification societies can be traced to the necessity of standards for evaluating the safety of ships for insurance purposes. This practice subsequently led to the development of standards for design, construction, and maintenance of ships³⁶. Thus, the system for class certification for ships predates statutory regulations for safety, as well as most maritime administrations. Therefore, classification societies have inherent expertise and competence in these areas.

The unique safety regime of ROs still supplement statutory regulations on hull strength and machinery reliability, which are usually addressed by the class certification³⁷. Further, due to their in-

³⁶ Jurgen Basedow and Wolfgang Wurmnest, 'The Role of Classification Societies in the Shipping Industry', *Third party liability of classification societies - A comparative perspective* (Springer-Verlag 2005).

³⁷ Hartmut Hormann, 'Classification societies-What is Their Role, What is Their Future?' (2006) 5 WMU Journal of Maritime Affairs 5.



volvement as ROs for statutory work about most of the technical aspects related to the ship regarding safety and environment protection, ROs may in some cases be better suited to perform ISM audits.

ROs knowledge about technical aspects of the ship and involvement with shipowners on classification issues may enable ROs to have better oversight on systemic deficiencies or limitations in the context of safety management. Therefore, the maritime domain arguably benefits from the expertise from organizations such as classification societies. Their work as ROs may enhance the overall quality of safety management auditing.

3.3 Integration of Auditing Principles Ensuring Quality in the Regulatory Framework

The quality and effectiveness of audits in various domains including the management systems also draw on basic auditing principles. While objectivity and independence were identified as fundamental principles of quality audits³⁸, a larger review of literature on auditing revealed integrity, impartiality, independence and competence as common principles, sometimes referred to as a code of ethics, among a host of other names³⁹.

The regulatory framework of maritime safety management does incorporate principles of competence and independence from auditors, though as a guideline rather than a legal requirement. However, these principles are assumingly usually taken seriously by the national maritime administrations and the ROs. Despite a lack of harmonized standards of qualification, knowledge and training, there is an attempt to achieve a certain level of competence and independence. Furthermore, in some cases, as in EU member states, these guidelines are part of legal instruments and are, therefore, mandatory.

Therefore, in practice, the regulatory framework conforms to the fundamental principles of quality in auditing mechanisms.

Interestingly, the general requirements for ROs as per the RO Code, referred to under SOLAS Chapter XI-1, Regulation 1, includes independence, impartiality, integrity, competence, responsibility, and transparency in the mandatory Part-2 of the Code about 'Recognition and Authorization Requirements for Organizations'. However, no such provisions are applicable for flag state administrations when they act as auditing organizations. Moreover, being the governmental administration, these principles are presumably followed in practice and included in other national regulations.

Therefore, the auditing principles can be considered to be an integrated part of the legal framework in respect of ROs and in practice for administrations⁴⁰.

3.4 Internal and External Quality Control of Auditing Organizations

3.4.1 Oversight of Ros ISM Work by Flag States

Globally, a large proportion of the ISM auditing is undertaken by ROs authorized by the flag states on their behalf. Thus, regular, and effective monitoring or oversight of the work done by ROs by flag states is necessary to ensure auditing quality. However, the regulations in Part-3 of the RO Code regarding

38 Stanislav Karapetrovic and Walter Willborn, 'Quality assurance and effectiveness of audit systems' (2000) 17 *International Journal of Quality and Reliability Management* 679.

39 Costel Mironeasa and Georgiana Gabriela Codina, 'A new approach of audit functions and principles' (2013) 43 *Journal of Cleaner Production* 27.

40 IMO, RO Code (n 28).



oversight of ROs are not mandatory under SOLAS Chapter XI-1, Regulation 1 and are only provided as a recommendation to the flag states. These provisions include supervision of duties delegated through additional ship inspections, audits, inspections and audit observations by the flag state.

The implementation of an effective quality management system by ROs has been made mandatory in Part-2 of the RO Code. However, the EU has incorporated the requirements for independent quality assessment and certification to be undertaken by ROs and their assessment every two years by the EU and the member state in the legal framework⁴¹.

Furthermore, and importantly, the national administrations usually incorporate the supervision of the ROs in the class agreement while delegating the duties to them⁴². However, in most large flag states, the limitations in expertise available make it challenging to implement an effective oversight program of work delegated to ROs.

3.4.2 Quality Control by IACS

According to the RO Code, the ROs are required to have a quality management system with regular certification by an accredited organization. Incidentally, IACS members have implemented a Quality System Certification Scheme (QSCS) which is audited by independent Accredited Certification Bodies (ACBs)⁴³.

Recently, the International Quality Assessment Review Body (IQARB) has commenced offering to the IACS members the service of reviewing the certification process of the quality management systems as an independent body under a trial stage⁴⁴. These internal quality control measures not only address their work as classification societies but also the statutory work undertaken on behalf of the flag states.

IACS's endeavour on quality, though not required under any legal obligation, certainly contributes to enhancing the overall quality in the auditing mechanism in maritime safety management. Nevertheless, the widespread impact of such quality assurance is limited because many ROs are not IACS members.

3.4.3 Quality Control by National Maritime Administrations

The legal framework and guidelines related to maritime safety management do not prescribe any requirements for performance measurement, monitoring or quality management on audits conducted by the national maritime administrations. Incidentally, the IMO Member State Audit Scheme, which aims to promote effective implementation of IMO instruments, also focuses on the compliance with the requirements in applicable international instruments. Therefore, it only concentrates on flag states' oversight programme for monitoring ROs^{45 46}. It does not include the quality of audits

41 Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organizations [2009] OJ L 131, 28.5.2009, pp. 11-23.

42 Norwegian Maritime Authority, 'The Class agreement' (2002) Para 5.

43 IACS, 'Quality System Certification Scheme (QSCS)' (2022) <<https://iacs.org.uk/quality/quality-system-certification-scheme-qscs/>> accessed 13 November 2022.

44 IMO, 'International Quality Assessment Review Body (IQARB)' (2022) <www.imo.org/en/OurWork/IIIS/Pages/IQARB.aspx> accessed 13 November 2022.

45 IMO, 'Framework and Procedures For the IMO Member State Audit Scheme' (4 December 2013) Resolution A.1067 (28).

46 IMO, 'IMO Instruments Implementation Code (III Code)' (4 December 2013) Resolution A.1070 (28).



conducted by national administrations.

Since international instruments do not require any internal oversight or monitoring programme to be adopted by the flag state administration for the work undertaken by them, no such initiative is necessary for them. The national administrations must therefore institute such quality control initiatives of their own accord.

3.5 Recent Developments in Auditing Process – Digitalization and Remote Audits

Though the intention of expressing the ISM Code in broad terms to encourage widespread application was appropriate when it was introduced, recent developments in technology and auditing process have highlighted the challenges of this goal-based and inherently vague legal framework.

The introduction of remote audits due to the COVID pandemic has increasingly become a norm due to simplicity in terms of procedure and financial considerations. The digitalization of records and processes has also facilitated auditors in general to prepare and plan the audits efficiently. Thus, they can focus on utilizing their time effectively during the audit on identified critical areas to be addressed. However, the difference in the quality of audits conducted remotely compared to those conducted physically is apparent.

The IMO has recognized that remote audits are not foreseen in the ISM Code and the guidelines. Therefore, it has agreed to 'Development of guidance on assessments and applications of remote surveys, ISM Code audits and ISPS Code verifications' with a target completion year of 2024⁴⁷. The EU has proposed to achieve the same level of assurance and equivalence when compared to in-person audits⁴⁸. For ISM audits, the EU has recommended a hybrid approach using remote auditing methods for specified SMS activities in concert with periodical audits on board ship, rather than the sole use of remote audit.

3.6 Summary of Discussions on Quality of Auditing Mechanism in Regulatory Frameworks

Thus, we found that the existing legal framework does not have any formal mechanism for evaluating quality in maritime auditing mechanisms. Furthermore, the primary responsibility of the auditing seems to rest on the delegation of the verification and auditing by the flag states to the ROs. Though this concept is already prevalent in many other IMO regulations, this may be a mismatch given the systemic and *holistic* approach towards ensuring maritime safety entailed in the ISM Code. There is presumably a reason why leading maritime states, like the UK, which is also a pioneer for the introduction of ISM Code, has not delegated ISM auditing to ROs. Retaining ISM auditing by flag states may be a sensible way to ensure overall governmental control of maritime safety.

The regime of delegation of the flag state work to ROs also has inherent challenges in respect of conflict of interest of ROs due to their services under private contract to the shipowners for classification and public contract while working on behalf of the flag states for statutory auditing.

The variance in practices regarding delegation to different ROs and the exemption of passenger ships from auditing by ROs indicate that administrations have an apparent implied recognition of higher quality or trust in their own auditing than those conducted by ROs. On the other hand, the

⁴⁷ IMO, 'Report of the Maritime Safety Committee on its 104th Session' (19 October 2021) IMO Doc. MSC 104/18.

⁴⁸ European Union, *Development of guidance on assessments and applications of remote surveys, ISM code audits and ISPS code verifications and inspections* (2022).



historical role of the classification societies in shipping safety and their large capacity as professional expertise in technical standards in design, construction and maintenance of ships also provides an opportunity to improve auditing of maritime safety management by collaboration through the delegation regime.

The auditing framework conforms to basic principles for ensuring quality and thus offers a robust legal basis. However, the mechanism for internal and external quality control of auditing organizations has certain deficiencies. The regulations regarding oversight of ROs' work by flag states are non-mandatory, though the internal quality management requirements for ROs are incorporated as mandatory requirements. Furthermore, the focus of these quality provisions is only on ROs, while the work undertaken by flag states themselves is not included in this framework.

The impact of remote audits on audit quality is still to be assessed and is a work in progress.

4. Comparison of Safety Management Regulations in Other Domains

In order to identify the best practices and an effective safety management framework, regulations in other relevant domains will be briefly explored and discussed in succeeding paragraphs.

4.1 Civil Aviation

The International Civil Aviation Organization (ICAO) provided impetus to the safety management processes for achieving civil aviation safety by consolidating all existing provisions contained in various instruments into a new instrument dedicated to safety management⁴⁹. Annex 19 to the Convention on International Civil Aviation aims for a proactive safety strategy based on the implementation of a State Safety Programme (SSP) that systematically addresses safety risks. The safety management system obligations for a state in Regulation 3.3.2.1 require,

'...the following service providers under their authority implement a Safety Management System (SMS):

- (a) ...training organizations...*
- (b) Operators of aeroplanes or helicopters...*
- (c) ...maintenance organizations...*
- (d) Organizations responsible for type design or manufacture of aircraft, engines, and propellers...*
- (e) Air traffic services providers...*
- (f) Operators of certified aerodromes...*

Therefore, the regulatory framework for safety management in aviation appears more robust as it comprehensively covers a larger scope with the inclusion of organizations and activities related to training, aircraft operation, manufacturing and maintenance of aircraft and equipment, air traffic services and the operation of aerodromes.

In contrast, maritime regulation is limited to shipping companies and ships operated by them and does not include marine training institutions, shipyards, equipment manufacturers, vessel traffic services and ports.

⁴⁹ ICAO, 'Annex 19 to the Convention on International Civil Aviation - Safety Management' (2016).



Furthermore, the state has been mandated a larger role in risk assessment and management as defined in

Regulation 3.3.4.1: 'States shall establish and maintain a process to identify hazards...'

Regulation 3.3.4.2: 'States shall develop and maintain a process that ensures the assessment of safety risks associated with identified hazards.'

Regulation 3.3.5.1: 'States shall establish mechanisms for resolution of safety issues ...'

Interestingly, Regulation 3.4.2 mandates that

'States shall establish the acceptable level of safety performance to be achieved through their SSP'

Therefore, these provisions go beyond merely imposing responsibility for the organizations mandated to implement SMS. It aims for a systemic approach to improving safety by encouraging evaluation of safety effectiveness by the state themselves at a national level. Such overarching safety provisions are not as prevalent in the maritime domain where the responsibility for risk identification, and management to a greater extent, is entrusted to the shipping companies.

The provisions regarding the qualification, training and competence for personnel performing safety related functions and the adherence to basic audit principles of ethics and conflict of interests are also included as statutory provisions in Appendix 1. However, these provisions are only guidelines and are not statutory in the maritime domain. Therefore, civil aviation has a more robust legal framework in this respect.

Regulation 3.1 says that states

'...may delegate safety management-related functions and activities to another State, Regional Safety Oversight Organization (RSOO) or...'

This provision is similar to the authorization of ROs by flag states on their behalf in the maritime context, however, the RSOOs in aviation are established by a group of member states to collaborate and share resources to improve their safety oversight capabilities. They are not private entities. Therefore, there is no conflict in discharge of duties by RSOOs in the context of private and public functions of classification societies.

However, the provisions regarding verification and certification to be conducted by the states are not specified in the civil aviation regulations. Therefore, arguably the most significant aspect for ensuring compliance of the safety management objectives is missing, and that may have a negative impact on overall safety system compared to the maritime domain.

4.2 Railways

Rail transport is not regulated by a global intergovernmental cooperative body and is usually regulated by national authorities. However, the regional regulatory framework in EU could provide a glimpse of the safety management structure in rail transportation rather than examining a host of national regulations. The EU directive concerning railway safety⁵⁰ aims for a systemic approach and Article 4, Regulation 1 (c), requires states to,

50 Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (recast) [2016] OJ L 138.



'ensure that measures to develop and improve railway safety take account of the need for a system-based approach.'

and obliges States to also ensure implementation of safety management systems in Article 4, Regulation 1 (d),

'...infrastructure managers and railway undertakings, each for its part of the system, ...to establish safety management systems...'

Article 9 provides details about the safety management systems which usually incorporate provisions similar to those in maritime or aviation sectors, however, the provisions are more prescriptive with comprehensive details about its components. Interestingly, the competence of staff covered in Article 9, Regulation 3 (f), also includes fitness separately from training,

'... the training of staff and systems to ensure that the staff's competence is maintained and that tasks are carried out accordingly, including arrangements with regard to physical and psychological fitness'

Furthermore, the internal auditing is also explicitly mentioned as an element of SMS in the statutory provisions in Article 9, Regulation 3 (k),

'provisions for recurrent internal auditing of the safety management system'

The details regarding measurement of safety through safety indicators and safety targets to be achieved is also included in the statutory provisions, while such issues are not prescribed in maritime safety management frameworks and are left for each shipping company to adopt a design and implementation best suited to them.

The verification and certification mechanism by the states of the safety management systems of the infrastructure managers and railway undertakings are prescribed in this legislation in Article 10,

'... access to the railway infrastructure shall be granted only to railway undertakings which hold the single safety certificate issued by the Agency ... or by a national safety authority..'

and these are similar to the provisions in ISM Code. Therefore, the compliance measurement framework is considered to be as effective as in the maritime domain.

The adherence to the basic principles of auditing is also intended in Article 16, Regulation 1,

'... authority shall be independent in its organization, legal structure and decision-making from any railway undertaking, infrastructure manager, applicant or contracting entity and from any entity awarding public service contracts.'

Incidentally, these provisions are statutory in the railway framework, the aviation framework and are applicable to national authorities. In the maritime context, it is only statutory for ROs authorized by the flag states and only recommendatory for national maritime administrations.

We underscore that the above discussion provides an insight into the railways' regulatory framework, although it may not be representative of such regulations in all countries.



4.3 Chemical Industry

Safety management in chemical industry is also not regulated at an international level by any single regulation, though a high level of safety is ensured through national regulatory frameworks. However, the EU framework could again be used for looking at the regulatory structure as a model for national frameworks. The EU directive on control of major accident hazards involving dangerous substances has a high focus on preventing major accidents and limiting their consequences⁵¹. Therefore, Article 8, Regulation 1 obliges,

'... the operator to draw up a document in writing setting out the major-accident prevention policy (MAPP) and to ensure that it is properly implemented. The MAPP shall be designed to ensure a high level of protection of human health and the environment'

It also obliges the operator to produce and send a safety report in accordance with Article 10, Regulation 1 (a),

'demonstrating that a MAPP and a safety management system for implementing it have been put into effect...'

and other requirements related to risk management, emergency preparedness, etc. Furthermore, it needs to be periodically reviewed and updated at least every five years and after a major accident. This compliance requirement, of a periodic self-assessed report on safety over and above the verification or inspection regime, is unique in this framework when compared to the three discussed above.

The verification or inspection mechanism is part of the statutory provisions in Article 20 and focuses on systemic examination in Regulation 2,

'... sufficient for a planned and systematic examination of the systems being employed at the establishment, whether of a technical, organizational or managerial nature...'

The elements of SMS are also prescribed in comprehensive detail in statutory regulations in Annex III, which obliges the consideration of all hazards, however, specifically highlights determination and implementation of MAPP. The provisions for internal audits and review are also specified.

Therefore, the framework is similar to the maritime structure except with a special focus on major accidents, for obvious reasons.

4.4 Summary of Discussion about Comparison of Regulations of other Domains

To summarize, the structure of the regulatory framework of the maritime safety management systems compares well with other domains and incorporates the important elements necessary for a robust and effective implementation to achieve its objectives.

However, the systemic approach in aviation, which adopts a more comprehensive framework covering all areas having a direct impact on safety rather than only the operators of transportation, appears more robust in design than maritime structure. Furthermore, the obligation on states to evaluate effectiveness of safety at a national level also seems to go beyond the maritime context where they largely have only an enforcement role rather than a direct participant in safety endeavours.

⁵¹ Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC Text with EEA relevance [2012] OJ L 197.



Similar systemic approaches to safety are used in railway and chemical industries. The statutory provisions are more comprehensive and prescriptive in other domains on basic audit principles, elements of SMS, internal auditing, and reporting. However, explicit statutory provisions about verification and certification by states are missing in aviation, although they are part of railway and chemical industry safety.

5. Conclusion

The legal framework governing ISM audits has a pivotal, although maybe not a prominent, role in international maritime law in ensuring safety at sea. It obliges flag states to verify and ensure that shipping companies identify, control and mitigate risks, and comply with requirements of the ISM code and the SMS itself. The role of this legal requirement is critical as it addresses and brings together fundamental aspects of shipping companies' role in safety. Indeed, the SMS encompasses all relevant maritime rules and regulations, and thus employs a holistic approach towards identifying and mitigating risks and ensuring compliance and safety on board. The framework also encompasses a variety of instruments other than the ISM code. Audits, verification and certification mechanisms significantly contribute to ensuring implementation of and adherence to the vast legal framework. ISM-audits periodically monitor implementation by shipping companies, as well as crews and the proper functioning of the SMS, and through that, contributing towards the safe management and operations of ships.

The examination of prominent features of the framework reveals that although the overall aim was the systemic and holistic approach towards risks and safety at sea, with a focus on organizational and human factors and the companies' responsibilities, the design of the framework and the way the framework has been implemented in maritime law may not be optimal and fully adequate. That may in turn pose challenges to the effectiveness and quality of ISM audits, and thus safety at sea.

First, ISM has been considered and implemented in the same manner as other technical IMO regulations. In other selected domains, a systemic approach, as well as a much larger and comprehensive role of states, is envisaged, with safety management principles applied to all parts of the system rather than only operating companies.

We also found that the regime of authorization or delegation of statutory work for verification and certification to ROs as private entities is unique to the maritime domain. This is due to the traditional role of classification societies. Although delegation to ROs enables flag states to utilize existing expertise in the private sector, it brings with itself inherent challenges with respect to quality considerations, governmental control and potential conflict of interests.

In view of the analysis of the maritime safety management regulatory framework and its comparison with other domains, the following aspects in the governing legal framework might enhance the overall quality of ISM audits:



- (a) Inclusion of a systemic approach to safety management by committing, to a greater extent, that all relevant stakeholders have direct impact on safety apart from shipping companies.
- (b) Implement more direct responsibilities for flag states in conducting auditing.
- (c) Consider establishing more stringent statutory internal and external oversight mechanisms for all auditing organizations, including flag states themselves.
- (d) Establish a statutory periodic evaluation scheme for the monitoring by flag state about quality and effectiveness of auditing.

However, further research is needed to examine the impact of delegation of ISM work to ROs on quality and effectiveness, which is critical in analysing the adequacy and practical implementation of the legal framework governing ISM audits.