

The Mandatory IMO Member State Audit Scheme-A Legal Analysis of Main Instruments Related and China's Response to the Challenges

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Abstract: The IMO Mandatory Member State Audit Scheme is an external audit mechanism introduced with the purpose of enhancing the individual Member State's insufficient capabilities and poor performance in meeting its obligations and responsibilities contained in IMO instruments to which they are parties. The IMO Instruments Implementation Code (III Code) as well as the Framework and Procedure for the IMO Member State Audit Scheme are two major related instruments under the mandatory audit scheme. IMO incorporates the III Code, as an amendment, into the main maritime convention in effect, so as to give these two instruments a legally binding force and impose compulsory audited obligations to the parties of the main maritime conventions. China, as an IMO Member State, could increase its focus on the issue of domestication of IMO mandatory audits while meeting the mandatory audit and improve the performance of its obligations. This paper also discusses the difference between the domestic maritime legislation and international maritime conventions, the issue of regulation of recognized organizations as well as China's chronic lack of strategy in fulfilling its maritime obligations.

Keywords: International Maritime Organization; voluntary audit scheme; mandatory audit scheme; Framework and Procedure for the IMO Member State Audit Scheme; IMO Member State Audit Scheme

1. Introduction

According to Article 1 of the Convention on the International Maritime Organization, the main purposes of establishing the International Maritime Organization (hereafter referred to as IMO) are limited to mainly, four subject matter areas concerning shipping: maritime trade, maritime safety, efficiency of navigation and the prevention and control of marine pollution from ships. For the above purposes, IMO tries to promote the co-operation and the exchange of information among Governments to remove discriminatory action and unnecessary restrictions by Governments as well as recommend the general adoption of the highest practicable standards set out in IMO documents.¹ Over the past 40 years since its establishment, IMO has actively taken part in setting the rules concerning shipping safety and marine pollution prevention, as well as shifting its role gradually, from an advisory and consultancy agency to a rule-making one. The root cause of IMO's role shift could be attributed to several aspects, including, fulfilling the mandate and functions of the Convention on the International Maritime Organization. In addition to this, the IMO's role as a specialized agency of the United Nations is granted under Article 57 of the UN Charter, and like, the 1982 Law of the Sea Convention, has through more than 20 articles such as Article 41, 53 and 60, indirectly been designated to assume more international responsibilities in the role of a competent international organization. And it is the rulemaking authority involved in exercising these international responsibilities that facilitates the IMO's functional change and brings up a trend of expanding the scope of rulemaking which has been critical in recent years.²

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1 IMO Convention, Art. 1(a), (b) and Art. 15(j).

2 Allen, C. H., Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention, San Diego International Law Journal, Vol. 10,

In terms of the formulation of legally binding rules, IMO can normally draft a Convention through the Resolutions of the Assembly. The adoption, amendment and withdrawal procedures of these conventions are totally in accordance with the procedures that are followed to conclude international treaties, meaning the conventions are signed and ratified by the individual Member State itself. For this reason, conventions published by the IMO are legally binding on all Contracting States. However, detailed supplementary specifications are often needed to carry out the convention during its implementation process. Usually, IMO will issue supplementary specifications in the name of Guidelines or Code to deal with this situation. On account of such supplementary specifications, which are complementary in nature and are derived from the original conventions and do not exist independently, such supplementary specifications should also be deemed to have the same binding effects as the convention. The two instruments under the framework of IMO mandatory audit explored in this paper are those of a supplementary nature. As part of IMO Conventions, they have the same legally binding force on parties to the main maritime conventions.

This paper is aimed to analyze the development and contents of IMO mandatory audit scheme, clarify the legislation and legal effect of main documents relating to mandatory audit scheme through legal methods and put forward suggestions for China to cope with the challenges occurring during the audit. As an audited state of IMO mandatory audit scheme and a big maritime power, this is of great practical importance for China.

2. The Development of IMO Mandatory Audit Scheme

2.1 IMO Member States' Poor Performance in Implementing the Conventions

Since its establishment in 1959 and as of 2020, IMO has grown into a global international organization which has 174 Member States and three Associate Members.¹ It has adopted 53 conventions and protocols concerning matters such as maritime safety and security and the protection and governance of the marine environment and up to more than 800 rules and proposals. Some of the significant conventions IMO has published cover more than 99% of the world's merchant tonnage.² While due to the large number of conventions and different levels of development and national conditions of each Member State, the implementation of IMO conventions is not as ideal as expected, which has further impacted the effectiveness of IMO's efforts on promoting the maintenance of sea voyage, maritime safety and environment protection. Just as indicated by the Former Secretary General of the IMO, the problems perceived today do not lie basically with shipping's regulatory framework or with the mechanism by which that framework is constructed, but with its implementation.³ In view of this, a series of measures, such as Port State Control (PSC), International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), International Safety Management Code (ISM) and Self-Assessment of Flag State Performance, have been adopted by the IMO to strengthen supervision over the Member States' implementation.

Despite the efforts made by IMO and based on past practical experience, there were still many deficiencies that could be found in those measures. For instance, the Port State Control Officer (PSCO) listed in PSC had not received fair training and there were no consistent operational procedures for them to follow, in the end leading to the lack of uniform standards for port state inspection. And during the implementation of STCW, it had also been found that IMO only conducted a desk review, rather than a substantial one, of the Seafarer's Certification submitted by the Member States, which had resulted in several inappropriate situations like fabricating the certificates and issuing of such certificates by unqualified training organizations. As to the ISM, the main problem occurring during its implementation was that documentation had been used as the very method to conduct an audit. But the shipping

p. 271-272, 284 (2009).

1 Member States, IGOs and NGOs, IMO, <http://www.imo.org/en/About/Membership/Pages/Default.aspx>.

2 For more information about the Conventions and Protocols, please refer to: IMO, Status of IMO Treaties (July 3, 2020), IMO, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf>.

3 Mansell, J. N.K., *Flag State Responsibility-Historical Development and Contemporary Issues*, Germany: Springer-Verlag Berlin Heidelberg press, 2009, p. 143.

companies were only satisfied with obtaining the certificates and cared about nothing else, hence resulting in general formalism. Not to mention the documentation would have increased the workload of the ship's crew. It should be admitted that the mechanism of Self-Assessment of Flag State Performance had urged the Flag States to strengthen their performance by means of internal self-assessment reports.¹ However, Self-Assessment of Flag State Performance relied entirely on the internal self-assessment conducted by the Flag State, which could cause credibility concerns towards those reports. The disadvantages of such mechanisms with no external control could be detected very soon.²

2.2 Voluntary Audit Scheme

The deficiencies mentioned above have caused IMO Member States' inefficiency in meeting their obligations and responsibilities, which in turn has brought up the long existing global problem of sub-standard ships. The IMO Council, at its eighty-eighth session in June 2002, considered and approved, in principle, a proposal by nineteen Member States, including the United Kingdom, the United States and Norway, for the development of an IMO Model Audit Scheme, which drew on the model of the ICAO Universal Safety Oversight Audit Programme.³ With the joint efforts of IMO and its Member States, in November 2003, the Assembly at its twenty-third session endorsed the decisions of the Council and adopted Resolution A.946(23) entitled "Voluntary IMO Member State Audit Scheme" (VIMSAS)⁴, which originally was IMO Model Audit Scheme. In addition to confirming the voluntary audit scheme, Resolution A.946(23) has also illustrated the following two points. First, in order to guarantee the effective implementation of IMO's main maritime conventions, the Resolution particularly used the term "the States" in place of "Flag States". By doing so, it intended to expand the audit scope to include flag, coastal and port states. Second, the Resolution made it clear that the development of a Voluntary IMO Member State Audit Scheme in such a manner did not exclude the possibility in the future of it becoming mandatory.⁵ This would also preset a benchmark for the establishment a mandatory audit scheme.

IMO has officially adopted a quality management system and introduced an external performance audit mechanism for its member states in the form of an audit.⁶ Looking back to the development history of IMO Member State Audit Scheme, we can see that the Voluntary IMO Audit Scheme was adopted by the Assembly at its twenty-fourth session in 2005⁷ and conducted from 2006 to 2013. The Voluntary IMO Audit Scheme could be regarded as an improved version of Self-Assessment of Flag State Performance. However, since it was fully launched in 2006, the amount of member states that voluntarily applied for the audit scheme was very limited and most of them were developed countries. This could be due to its voluntary nature, which apparently lacked coercive force. Moreover, such a voluntary scheme had no appropriate punishment, which was replaced by a paper review, thus did not create equal overwhelming force on each member state. As a consequence, its implementation and enforcement could only rely on the moral compliance of the member states.⁸

1 IMO Resolution A.912 (22), Self-Assessment of Flag State Performance, 29 November 2001.

2 HE Zhaoting & ZHANG Chaoyang, An Analysis on Voluntary IMO Member State Audit Scheme, *Ship & Shipping Newsletter*, June 2010, Issue NO. 78, p.21.

3 Lawrence D. Barchue, Sr., The Voluntary IMO Member State Audit Scheme: An Accountability Regime for States on Maritime Affairs, *WMU Journal of Maritime Affairs*, Vol. 8:1, p. 61, 64 (2009).

4 IMO Resolution A.946 (23), Voluntary IMO Member State Audit Scheme, [http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.946\(23\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.946(23).pdf).

5 The original statement in the Resolution A.946(23) comes as follow: The development of a Voluntary IMO Member State Audit Scheme in such a manner as not to exclude the possibility in the future of it becoming mandatory.

6 Molenaar, E. J., Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region, *Ocean Development and International Law*, Vol. 45, p. 282 (2014).

7 IMO Resolution A.974 (24), Framework and Procedure for the Voluntary IMO Member State Audit Scheme, [http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.974\(24\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.974(24).pdf).

8 Lawrence D. Barchue, Sr., Making a Case for the Voluntary IMO Member State Audit Scheme, p. 5, Paper delivered at a seminar on: Auditing Flag States: New Directions for Smaller Maritime States, Malmo, World Maritime University (October 17-19, 2005).

2.3 Mandatory Audit Scheme

For the purpose of dealing with the scheme's delinquencies brought by its voluntary nature, the IMO Assembly adopted Resolution A.28(1068) "Transition from the Voluntary IMO Member State Audit Scheme to the IMO Member State Audit Scheme" at its twenty-eighth session. The document indicated that the period from 2013 to 2015 was the IMSAS Transition and IMO Member States were greatly encouraged to continue applying for the audit on a voluntary basis.¹ In addition, two main instruments were endorsed at the IMO Assembly's 28th session. They were Resolution A.28(1067) "Framework and Procedures for the IMO Member State Audit Scheme" and Resolution A.28(1070) "IMO Instruments Implementation Code (III Code)" respectively, both of which were considered as the audit norms and standards. According to the audit cycle and schedule, all Member States shall conduct mandatory audit scheme at periodic intervals not exceeding seven years, from 2016.²

3. The Scope of Mandatory Audit Scheme and the Content of Two Main Documents

3.1 The Scope of Mandatory Audit Scheme

The specific scope of mandatory audit scheme is limited to ten mandatory documents, including six main maritime conventions and its annexes (hereafter referred to as main maritime conventions). For particular audited states, the conventions applicable are restricted to the one(s) to which they are party to. Table 1 is the List of the Scope of Conventions on IMO Mandatory Member States Audit Scheme.

Table 1 List of the Scope of Conventions on IMO Mandatory Member States Audit Scheme

English	Chinese	Contracting Party	Percentage of Global Merchant Tonnage
International Convention for the Safety of Life at Sea, 1974			
International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974)	经修正的《1974年海上人命安全国际公约》	166	99.98%
Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT 1978)	关于《1974年海上人命安全国际公约》1978年议定书修正案	121	97.85%
Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS PROT 1988)	关于《1974年海上人命安全国际公约》1988年议定书修正案	122	97.95%
International Convention for the Prevention of Pollution from Ships, 1973			
International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended (MARPOL 73/78)	关于《1973年防止船舶污染国际公约》1978年议定书修正案	159	99.95%

- 1 IMO Resolution A.1068 (28), Transition from the Voluntary IMO Member State Audit Scheme to the IMO Member State Audit Scheme, [http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.1068\(28\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.1068(28).pdf).
- 2 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 5 December 2013, p. 12, <http://www.imo.org/en/OurWork/TechnicalCooperation/Documents/A%2028-Res%201067.pdf>.

Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 relating thereto (MARPOL PROT 1997)	关于《1973年防止船舶污染国际公约》1997年议定书修正案	96	96.72%
International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978			
International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW 1978)	经修正的《1978年海员培训、发证及值班标准国际公约》	165	99.03%
International Convention on Load Lines, 1966			
International Convention on Load Lines, 1966 (LL 66)	《1966年船舶载重线国际公约》	163	99.03%
Protocol of 1988 relating to the International Convention on Load Lines, 1966 (LL PROT 1988)	关于《1966年船舶载重线国际公约》1988年议定书	118	98.00%
International Convention on Tonnage Measurement of Ships, 1969			
International Convention on Tonnage Measurement of Ships, 1969 (Tonnage 1969)	《1969年船舶吨位丈量国际公约》	158	98.94%
Convention on the International Regulations for Preventing Collisions at Sea, 1972			
Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended (COLREG 1972)	《1972年海上避碰规则国际公约》	160	99.03%

Source of data: organized by the author based on IMO Resolution A.973(24), Code for the Implementation of Mandatory IMO Instruments, p. 4; IMO, Status of IMO Treaties (July 3, 2020), IMO website, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf>.

3.2 The Content of III Code

Three strategies are recommended in III Code for the Member States' consideration to fulfil the performance. Specifically speaking, a State should develop an overall strategy to ensure all IMO documents are implemented, should establish a methodology to monitor and assess whether the content of III Code have been put into effect and should continuously review whether the strategy has achieved the goal set in IMO documents.¹ Despite requesting the Member States to take the initiative to fulfil the performance, III Code additionally introduced an external audit mechanism to conduct the audits of IMO audited states by auditors in accordance with nine standards, listed in the following Table 2.

For IMO Member States, since the content of III Code is meant to help facilitate the

¹ IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4, [http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.1070\(28\).pdf](http://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Assembly/Documents/A.1070(28).pdf).

implementation and enforcement of the Member States' obligations and responsibilities set out by IMO documents, the Contracting Parties who have signed the main maritime conventions are legally bounded and obliged to follow III Code. While for the IMO Member States that have not yet endorsed the main maritime conventions, both the three methods specified in III Code with regard to implementation the IMO and the audit standards applied by IMO auditors towards audited states are only suggestions for them.

Table 2 List of Audit Standards for IMO Member States

Audit Standards	Audit Priority
Jurisdiction	The status of domestic maritime jurisdiction of IMO Member States
Competent Authority	The establishment of maritime organization and authority
Legislation, Rules and Regulations	The domestication of IMO mandatory documents and the legislation on maritime safety
Promulgation of IMO Documents	Whether there is any promulgation on maritime safety specified in IMO Assembly Resolution
Enforcement of Arrangements	The implementation of agreements between IMO and its Member States
Capacity Construction on Maritime Control	IMO Member States' capacity construction on maritime control, survey, inspection, audit, verification, approval and certification functions
Appropriacy of Recognized Organizations and Nominated Surveyors	The appropriacy of IMO Member States' selection, recognition, authorization, empowerment and monitoring of recognized organizations and nominated surveyors
Reporting Mechanism of the Investigation on Maritime Personnel	Whether the investigations are required to be reported to the competent organization (including IMO)
The Follow-up of Maritime Reports	The reports and follow-up on maritime situation to IMO Member States' competent authorities and organizations

Source of date: organized by the author based on IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 5.

3.3 The Content of Framework and Procedures for the IMO Member State Audit Scheme

3.3.1 Preparation

The Framework and Procedures for the IMO Member State Audit Scheme has specified the preparation, conduct of the audit and the reporting requirements.¹ According to the audit cycle and schedule, all IMO Member States shall adopt mandatory audit scheme at periodic intervals not exceeding seven years from 2016 and shall conduct the audit in accordance with the following three principles. The first principle is that, IMO will randomly select one from the Member States who have not completed an audit under the voluntary Scheme to conduct mandatory audit, which will be followed by the audit conducted by the Member States who have completed a voluntary audit. The second one is that, the Secretary-General will notify the audited Member States about the audit schedule in advance - not less than 18 months. The last one is that, the request to postpone an audit by the audited Member States should be submitted in writing at least six months prior to the audit date and should be considered and determined by the Council.² If calculating, based on the current number of the Member States,

1 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 11.

2 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 12.

namely 174 Member States and three Associate Members, at least 25 states need to be audited each year during the seven-year audit cycle. Document C. 116/6 of the 116th Session of IMO Council held in May 2016 showed that there were 19 States in 2016, 23 States in 2017, 22 States in 2018 and 22 States in 2019, scheduled to accept the mandatory audit cycle, while China and Hong Kong were scheduled to conduct audit in 2021.¹ Furthermore, in order to clarify the responsibilities and the scope of audited conventions, the audited member States should include a Memorandum of Cooperation with the Secretary-General before proceeding to audit.²

3.3.2 The Selection Criteria of Auditors

The selection criteria of auditors set in the Framework and Procedures for the IMO Member State Audit Scheme has been expanded, which is quite different from the one stipulated in Voluntary Audit Scheme. Auditors can be nominated by IMO Member States as long as they have passed one of the following three courses: management system auditor training course, ISM Code auditor training course and IMO Member State auditor training course. Then IMO Secretary-General will determine the final list of IMO auditors in line with factors including nominees' essential capabilities, language capabilities (IMO official languages and others) and representation from different geographical regions and nationalities.³

3.3.3 The Standard and Procedure of Conducting an Audit

As to the scope of main maritime conventions audited as required by the IMO Convention, the standard applied by IMO auditors lies in whether the Contracting Party has met IMO's criteria in the course of administrative, legislative and judicial development with respect to the above mandatory conventions. There are three specific auditing ways for the auditors' reference: the first is interviewing relevant maritime staff of audited states; the second is reviewing documents of performance results provided by audited states; the last is participating in relevant activities of audited states' maritime authorities.⁴

For the audited states with poor performance, IMO will make an early briefing to the audited states based on the findings relating to the audit in advance of the closing meeting. At the same time, IMO auditors will put forward suggestions regarding a corrective action plan at the audit closing meeting.⁵ At the final stage of the audit, IMO auditors will prepare audit reports with respect to the audit findings and observations as well as the feedback, including the corrective action plan, from the Member State.⁶

4. The Legislation and Legal Effects of the Main Instruments Related to IMO Mandatory Audit Scheme

4.1 The Legislative Model of IMO Mandatory Audit Scheme

The time from the year 2013 to 2015 was a transition period for the IMO's Audit Scheme shifting from voluntary to mandatory, during which the priority work of the IMO was to complete the legislative procedures of the amendment to the mandatory audit scheme before the mandatory scheme was fully adopted on 1 January 2016.

In terms of the legislative model, IMO presents the resolutions of the Assembly and the sub-committee on the mandatory application of the III Code in the form of amendments and

1 IMO C 116/6, IMO Member State Audit Scheme: Progress Report on the Implementation of the Audit Scheme, 9 May 2016, Annex, p. 4, 6.

2 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 4.2.1 & 4.2.2.

3 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 12-13.

4 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 6.4.2.

5 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 6.5.3.

6 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, part II, para. 7&8.

respectively incorporates them into the main maritime conventions that have already been in effect.¹ By doing so, the Mandatory Audit Scheme is directly applicable to all contracting parties to the main maritime conventions to be reviewed. For example, the International Convention for the Prevention of Pollution from Ships, 1973 (hereafter referred to as MARPOL 73), one of the main maritime conventions formulated by IMO, which, as a legally binding international convention covers 159 contracting parties and more than 99.95% of the global merchant tonnage measurement of ships. IMO has directly incorporated the resolution of Marine Environment Protection Committee on IMO Instruments Implementation Code (III Code) mandatory, in MARPOL 73 as an amendment. As long as no more than a third of the contracting parties of MARPOL 73 or no more than 50% of the global tonnage measurement of merchant ships raise objections, the amendments to III Code are applicable to all contracting parties (which means they are obliged to be audited) and more than 99.95 % of the global tonnage of merchant ships.² And absolutely, some individual contracting parties to MARPOL 73 have the right to contest against the amendments and not to comply with them.

In fact, during the legislation process when IMO planned to take III Code mandatory as amendments into the main maritime conventions, each contracting party was entitled to voice out against the compulsory issues that would immediately undermine the sovereignty of the member states. However, during that period, only Finland and the United States had made sounds by reason that the imperfection of their own national procedural requirements would prejudice state sovereignty but then announced withdrawing the objections after the required domestic legislative process was complete.³

4.2 The Legal Status of the Main Instruments of Mandatory Audit Scheme

IMO has developed a model of mandatory application of the III Code amendments in the main maritime conventions in order to impose on the member states the obligation of accepting the mandatory audit scheme. Since the contents of the amendments are only resolutions of the IMO Assembly or its council to adopt the mandatory audit scheme, the specific operation would depend on the III Code and the Framework and Procedures for the IMO Member State Audit Scheme. In this case, both of these two instruments will play the role of audit specifications and standards.

The legal status of these two main instruments, that is to say the III Code and the Framework and Procedures for the IMO Member State Audit Scheme, shall be analyzed from two aspects. Firstly, for the contracting parties to the main maritime conventions, the purpose of these two main documents is to implement the main maritime conventions and their related amendments. Therefore, while complying with the obligations of the main maritime conventions and its relevant amendments, the contracting parties shall also need to follow these two main instruments as well. In other words, such relevance between the contracting parties and the above two instruments has endowed the latter with the legally binding force on the former.

Secondly, for States that are members of IMO but not parties to major maritime conventions, the two main instruments, in theory, are not a form of organizational charter for IMO member states but only soft laws that are of a suggestive nature rather than a legally binding one. For example, Party A was an IMO member state but not a contracting party to the International Convention for the Safety of Life at Sea, 1974. In this situation, the 1974 Convention and its relevant amendments have no legally binding force on Party A and the two above-mentioned main instruments certainly have no legally

1 The main maritime conventions that have incorporated the amendments of the III Code include The International Convention for the Safety of Life at Sea, 1974, International Convention for the Prevention of Pollution From Ships, 1973, Amendments to the Annex of the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, International Regulations for Preventing Collisions at Sea, 1972, The International Convention on Load Lines, 1966, Protocol of 1988 relating to the International Convention on Load Lines, 1966 and The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978.

2 This amendment refers to Resolution MEPC.246(66) adopted in 2014 and has entered into force on January 1, 2016. See IMO, Status of IMO Treaties (July 3, 2020), p. 165, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf>.

3 See IMO, Status of IMO Treaties (July 3, 2020), p. 62, 106, 165, 179, 219, 226, 418, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202020%20June.pdf>.

binding force on Party A's implementation of the 1974 Convention neither. Strictly speaking, as a member state of IMO, Party A's compliance with the conventions has certain practical significance. Compliance with international soft law can help to win a country the reputation, which contributes to the establishment of positive legal and cooperative relationship between Party A and other international subjects. Such kind of pressure is the main reason that prompts Party A to follow the soft law voluntarily when it is only a member state of IMO but not a party to the main maritime conventions.¹

Lastly, viewing from an overall perspective, we can see that the objectives of III Code and the Framework and Procedures for the IMO Member State Audit Scheme are both to enhance global maritime safety and protection of the marine environment.² However, the contents of these two main documents are comparable to those of common law and special law. The content of III Code is similar to that of common law and it is intended to help the IMO member states effectively achieve the implementation objectives of all the instruments issued by IMO. However, its content is not targeted at the IMO mandatory audit scheme, but provides the IMO member states the opportunities to have a greater role as a coastal State or a port State than as a flag State and illustrates how to correctly and effectively implement the general compliance principles (including legally binding and non-legally binding documents) of all documents issued by IMO.³ The content of the Framework and Procedures for the IMO Member State Audit Scheme is similar to that of special law, which specifically regulates the audit preparation, conduct of the audit, reporting requirements and other relevant details related to the IMO mandatory audit scheme.⁴

4.3 The Possible Impacts of Non-compliance with IMO Mandatory Audit Scheme

In the mandatory audit scheme, the verification and record of the audited member state's final report should be available only to the audited Member State. So, for the member states, whether they have passed the audit or not is of great significance. Apart from the impact on a country's reputation for conforming to international commitments, for flag states that have not met the audit standards, their failure to live up to the requirements of mandatory audit scheme might result in suffering economic loss deriving from sanctions imposed by Port States' control measures. As for the sanction mechanism of non-compliance with the instruments, IMO, as an advisory and consultative organization, has no right to interfere in the exercise of sovereign power of a state, let alone impose sanctions on states that have poor performance. In this way, the sanctions for the audited states' non-compliance with the mandatory audit scheme could only be taken, in practice, through the voluntary controls by Coastal States. In general, the Port States would enact domestic laws to deny access to their ports for ships flying the flag of States that do not meet the standards required by IMO mandatory instruments,⁵ or even team up with other Coastal States to sign a memorandum of understanding in the form of regional co-operation to ban blacklisted ships from entering into their ports.⁶ In case of any unqualified ship entering into the port state, the port state may detain the ship and order for its improvement as advised. The ship should not be released until it meets the standards required by the port state's domestic maritime authorities and IMO. From the contracting parties to the main maritime conventions, there is a legal basis for such practices of prohibiting the entry, investigating, detaining and ordering for improvement of unqualified ships. For example, in Article 4 of MARPOL 73, providing remedy for violation of the requirements of the said convention, has clearly entrusted the competent authorities of Coastal States with administrative and judicial jurisdiction over unqualified ships. And Article 21 of the International Convention on Load Lines, 1966, concerning the port state control, provides that the Port State Government shall ensure such

1 Guzman, A. T., *A Compliance- Based Theory of International Law*, California Law Review, Vol. 90, p. 1849 (2002).

2 IMO Resolution A. 1070 (28), *IMO Instruments Implementation Code (III Code)*, 4 December 2013, p. 4.

3 IMO Resolution A. 1070 (28), *IMO Instruments Implementation Code (III Code)*, 4 December 2013, p. 4-6.

4 IMO Resolution A. 1067 (28), *Framework and Procedures for the IMO Member State Audit Scheme*, 4 December 2013, p. 11.

5 Mansell, J. N.K., *Flag State Responsibility-Historical Development and Contemporary Issues*, Germany: Springer-Verlag Berlin Heidelberg press, 2009, p. 231.

6 Takei, Y., *Institutional Reactions to the Flag State that Has Failed to Discharge Flag State Responsibilities*, Netherlands International Law Review, Vol. 59, p. 84 (2012).

control is exercised as far as is reasonable and practicable and as well ensure that the ship shall not sail until it can proceed to sea without danger to the passengers or the crew. As a matter of fact, several European coastal states have applied the principle of no more favorable treatment (NMFT) enshrined in IMO instruments, prohibiting the blacklisted ships and unilaterally excluding ships flying the flag of states that have poor performance from entering into their ports.¹ It can be concluded that such voluntary port state control measures taken by developed countries will effectively necessitate the audited states attaching great importance to the mandatory audit scheme and improving the level of compliance. However, on the other side, if the audit results fail to reach the standards, it is likely that the above-mentioned countries would face a series of unilateral or regional joint port state control sanctions, which will bring about the loss of interests of sovereign countries.

5. The Challenges for China's Performance in the Audit

5.1 The Domestication of III Code Mandatory Application

As an IMO member state, China is a Category A Member of the Council² and the contracting party of main maritime conventions. According to the principle of *pacta sunt servanda* and Article 26 of Vienna Convention on the Law of Treaties, which states that every treaty in force is binding upon the parties to it and must be performed by them in good faith, to comply with their obligations under the treaties is entirely within the scope of the sovereignty of a sovereign state. For this reason, the two instruments pertaining to mandatory audit scheme, namely III Code and the Framework and Procedures for the IMO Member State Audit Scheme, should be binding on China.

But one possible problem is that at the time China applied for the Mandatory Audit Scheme, was the domestic legislation procedure complete? As for the main maritime conventions' incorporation of the amendments to III Code, it is also to be known whether the competent authorities of China have completed the domestic legalization procedures detail by detail? Whether adopting the direct mode of issuing relevant notices or announcements, or following the indirect one of transforming legislation, it should be noted that if the domestic legislative procedure was inadequate, the mandatory application of IMO Mandatory Audit Scheme would directly undermine the sovereign rights of China. This is also the main reason why Finland and the United States did not withdraw their objections against taking III Code mandatory as amendments into the main maritime conventions until the completion of their own domestic legislative procedures.

5.2 Systematization of Maritime Legal Documents

III Code's regulation on the IMO member states' observance of main maritime conventions and the legal transformation of relevant aspects are one of the focuses of mandatory audit.³ Actually, domestic maritime legislative gaps are common in audited states. Due to the different forms of implementing the maritime treaties and the diversity of legislative bodies, there appears to be serious conflicts of legislation and inconsistency of legal effects in China, which have evidently caused the dilemma of maritime legislative confusion. Such kind of issues have been raised for improvement in the reports of IMO audit teams when China participated in the Voluntary Audit Scheme in 2009. It is foreseeable that the systematization of maritime legal documents would be the key aspects reviewed by IMO auditors once China embraces the mandatory audit scheme.

If distinguished from the perspective of legislative patterns, the regulations on maritime legislation

1 LI Zhen & QIU Jianwei, Status, Trends and Challenges of Voluntary Audit Mechanism in IMO Member States (《IMO 成员国自愿审核机制的现状、趋势和挑战》), *World Shipping*, Vol. 30, No. 1, p. 41, Feb 2007.

2 The Assembly, one of whose main issues is to elect its council Members, is IMO's highest governing body and meets once every two years. The council is the executive body of the Assembly and would perform tasks on behalf of the Assembly during the intersessional period. The council members are classified into Categories A, B and C. Category A refers to 10 States with the largest interest in providing international shipping services; Category B refers to 10 States with the largest interest in international seaborne trade; and Category C refers to 20 States not elected under (a) or (b) above, which have special interests in maritime transport or navigation and whose election to the Council will ensure the representation of all major geographic areas of the world.

3 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4-5.

performance can be divided into six categories: laws (e.g. Maritime Traffic Safety Law of the People's Republic of China), administrative regulations (e.g. Regulation on the Prevention and Control of Vessel-induced Pollution to the Marine Environment), departmental rules and regulations (e.g. Regulation on the Prevention and Control of Pollution Introduced by Vessel and Related Operations to the Marine Environment), generally applicable normative documents, notices or announcements issued by competent departments and technical standards and ship inspection specifications. At present, there is little dispute on laws, administrative regulations and departmental rules and regulations. The main problem lies in the normative documents, notices or announcements issued by competent departments and technical standards and ship inspection specifications, all of which appear in large quantities and play as the supplements to maritime legislation. Taking the normative documents issued by the Ministry of Transport as an example, its total amount is as high as 800. But the legal status of such kind of normative documents issued by the Ministry of Department is relatively vague, which are neither technical standards nor ministerial decrees. Specifically speaking, they have no clear legal position in the law; but in the practice of relevant departments and industries to fulfill their obligations of conventions, they have legally binding force. In addition, in terms of legislative procedure, the formulation procedure of normative documents issued by the Ministry or Department is not regulated by the Legislation Law of the People's Republic of China. Therefore, in the case that the procedure of making regulations has been simplified, the overall status of normative documents appears to be abounded in quantity but lack of accuracy and systematic integration. Besides, due to the large amount, lacking rigor during the legislative process or the course of being directly incorporated as application leads to the ambiguity in legal basis even the plight of no legal basis, which results in increased restrictions and interference by higher administrative authorities and the upper laws, as well as further affecting the authority of local maritime authorities in enforcing the conventions.¹

Consequently, on the issue of sorting out maritime legal documents, it is kindly suggested that relevant authorities and departments should solve the following three main problems by reviewing relevant domestic normative legal documents in China, which range from the laws formulated by the National People's Congress and its Standing Committee to the administrative and departmental rules and regulations of the State Council, including the normative legal documents formulated by the Ministry of Transport and its Maritime Affairs Bureaus. The first problem needed to be solved is the concurrence between domestic regulations and international maritime conventions triggered by the direct application of the latter. The second is to gradually abolish the mandatory measures in violation with international maritime conventions by cleaning out the normative documents. The third is to systematically integrate normative documents issued by the Ministry or Department with the purpose of avoiding chaos in maritime law enforcement and optimizing the legal environment around the local maritime administrations.

5.3 Strengthen the Monitoring and Management of the Recognized Organizations

The authorization and monitoring of recognized organizations is one of the areas covered by the mandatory audit.² Founded in 1956,³ China Classification Society's (CCS) most important task is to formulate classification regulations based on its own experience and technical reserves, so as to provide classified ships with the minimum standards necessary for maintaining safety. Most of the standards are technical ones, but they have been gradually expanded from technical scope to management field since

1 QU Yanan, Research on the Legislative Transformation of International Maritime Conventions in China under the IMO Audit Scheme (《IMO 审核机制下国际海事公约在中国立法转化研究》), Doctoral dissertation of Dalian Maritime University, p. 38-39 (2014).

2 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 3, 6, 30.

3 Founded in 1956 and headquartered in Beijing, CCS is a full member of the International Association of Classification Societies. Authorized by the competent authorities of the flag states or regions, CCS has the right to carry out statutory surveys and provide other services approved by relevant competent authorities. Up to now, CCS has been authorized by the administrations of 40 major international shipping countries or regions to perform statutory surveys for the ships flying their flags.

the 1990s.¹ However, the law hasn't entitled CCS the power to legislate. As a professional organization, CCS was only commissioned by the Maritime Safety Administration of China (MSA) to draft the draft of the code for ships' surveys. As for the Specification for Materials and Welding and the Classification Rules of Steel Sea-going Vessel defined by CCS itself, both regulations are not legally binding.²

On the issue of authority and responsibilities, the ones of the recognized organizations are often being confused. For this reason, it is suggested that MSA should establish a complete set of legal documents and directives so as to make the authority and the responsibilities of recognized organizations commensurate with each other and establish the responsibility system, the supervision system and supporting accountability mechanism.

On the issue of act of authorization, MSA and relevant competent authorities should acknowledge the management procedures and relevant authorization acts conducted by recognized organizations. Especially for the ships flying the flag of China, it is proposed that China could provide classified ships with a comparative table of different standards under major maritime conventions and domestic laws on a voluntary basis, so that the classified ships from various countries can comply with China's maritime regulations while fulfilling the obligations of the flag states.³

To tackle the issues of unqualified personnel and certificates not meeting standard requirements being approved, the relevant maritime authorities should develop educational programs to regulate the performance of recognized organizations.⁴

5.4 Strategies to Implement the Applicable IMO Instruments

Undoubtedly, in accordance with the requirements of III Code, it is necessary for China, who has assumed a great role as a coastal State or a port State than as a flag State, to establish a set of implementation strategies to help achieve the objectives of IMO audits, which is also the key point of IMO audit.⁵ The so-called implementation strategies refer to the design and planning, that maritime administrative organizations at all levels shall take to accomplish the aim of effectively implementing the main maritime conventions. And the maritime implementation management strategy formulated by the maritime administrative organizations at all levels should systematically reflect the national implementation strategies and marine policies.⁶ At present, China has not yet developed a long-term systematically complete maritime implementation strategy. Based on this, it is suggested in this paper that the Ministry of Transport (MOT) should take the lead in formulating a complete set of performance strategies, whose contents not only include the goal, mission, vision, plan and significant measures of MOT and maritime-related organizations at all levels,⁷ but also embody a joint resolution to the above-mentioned issues of systematization of maritime legal documents and the monitoring and management of the recognized organizations. In short, this is to enhance China's international obligations and performance capacity as a flag state, a port state and a coastal state through systematic implementation strategies with targets managements.

6. Conclusion

- 1 CHEN Yingqiu, The Standard System of China Classification Society and the Development Direction of Related Scientific Research (《中国船级社的规范体系与相关科研发展方向》), China Ship Survey, Vol. 2, p. 5, April 2000.
- 2 QU Yanan, Research on the Legislative Transformation of International Maritime Conventions in China under the IMO Audit Scheme (《IMO 审核机制下国际海事公约在中国立法转化研究》), Doctoral dissertation of Dalian Maritime University, p.39-40 (2014).
- 3 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 8.
- 4 Lihua Ling, China's New Strategy to Cope with the Mandatory Transformation of IMO Audit Scheme (《我国应对IMO 审核机制强制化转变的新策略》), China Maritime Safety, Vol. 2, p. 33, Feb 2016; IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 9.
- 5 IMO Resolution A. 1070 (28), IMO Instruments Implementation Code (III Code), 4 December 2013, p. 4.
- 6 IMO Resolution A. 1067 (28), Framework and Procedures for the IMO Member State Audit Scheme, 4 December 2013, p. 29.
- 7 ZHOU Yu & SHA Zhengrong, Considerations on IMO Audit and the Construction of the Management System of Maritime Performance (《关于IMO 审核与海事履约管理体系建设的思考》), China Water Transport, Vol. 7, July 2011, p. 15.

The instruments adopted by IMO can be classified into three categories. The first is resolutions on internal matters, which refer to the regulations concerning activities related to IMO internal organizational matters issued by the IMO Assembly through Resolutions which are legally binding with IMO and its affiliate bodies.¹ The second is resolutions concerning IMO member states, which refer to the rules concerning the member states issued by IMO Assembly through Resolution and often presented in the name of a Guideline or Code and have no legally binding force in general. In principle, these rules are not legally binding on IMO member states, but as vital documents approved by IMO, which has reflected high degree consensus among the member states, they are highly valued and followed by all Member States.² The third is conventions and refer to the international maritime conventions that are legally binding on the contracting parties and decided to be drafted by IMO through the Assembly's resolution.

According to the above classification, the main maritime conventions mentioned herein are the third category of legally binding conventions adopted by IMO, while the two main instruments concerning the implementation of the mandatory audit scheme, Framework and Procedures for the IMO Member State Audit Scheme and III Code, belong to the second category documents involving the member states. In theory, these two main instruments are soft laws, which have no binding effect on IMO member states. However, in order to tackle the long-term issue of member states' poor performance in complying with IMO instruments, IMO granted compulsory obligations on the audit scheme. Therefore, on the legislative mode, IMO has modified the legislative technique slightly, incorporating amendments to III Code into the main maritime conventions that have been in effect and imposing the mandatory audited obligations on the contracting parties of main maritime conventions. In other words, IMO has incorporated the second category of resolution documents related to the member states into the conventions in the form of amendments to the main maritime documents.

China, as an IMO member state and a contracting party to main maritime documents, should fulfill the mandatory audit obligation. In the face of such challenges on the audit, this paper puts forward the following suggestions. Firstly, to analyze the domestication of the application of III Code, mandatory in China, so as to avoid the lack of legal source or the announcements of competent authorities when China accepts the external audit from IMO auditors. Lacking legal source and announcements aforesaid will lead to the situation that there is no legal basis for China's maritime authorities and personnel to go through the audit, which will cause the sovereign acts of China to be infringed upon, directly by the compulsory obligations of IMO mandatory audit scheme. Secondly, to systematically sort out the domestic maritime legal documents and narrow the gap between domestic maritime legislation and international maritime conventions. It is a great project and should be deemed as the long-term objectives of complying with IMO instruments. Thirdly, to solve the long-term issues such as ill-defined rights and responsibilities, obscure authorization and inadequate monitoring and management of the recognized organizations. Fourthly, it is suggested that the Ministry of Transport (MOT) should take the lead in formulating a complete set of performance strategies, with the purposes of not only enhancing China's international obligations and performance capacity as a flag state, a port state and a coastal state, but also simultaneously planning solutions to the issues of systematization of maritime legal documents and the monitoring and management of the recognized organizations.

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- 1 Anianova, E., *The International Maritime Organization-Tanker or Speedboat?* in Ehlers, P. & Lagoni, R. eds., *International Maritime Organizations and their Contribution toward a Sustainable Marine Development*, Germany: Lit Verlag Hamburg press, 2006, p. 83.
- 2 Kirgis, F. L., *Shipping*, in Schachter, O. & Joyner, C.O. eds., *United Nations Legal Order*, The American Society of International Law, University Press Cambridge, Vol. 2, p. 727 (1998).

