Implications of the EU Maritime Policy for Developing Land-Locked States: A Critical Analysis

Master Thesis

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God Bless You All!

Tessema Elias Shale
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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CBBDRC</td>
<td>Common but Differentiated Responsibilities and Respective Capabilities</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EMAA</td>
<td>Ethiopian Maritime Affairs Authority</td>
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<td>ESLSE</td>
<td>Ethiopia Shipping Lines and Logistics Service Enterprise</td>
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<td>EU</td>
<td>European Union</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>IOC</td>
<td>International Oceanographic Commission</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>LLS</td>
<td>Landlocked State</td>
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<td>MARPOL</td>
<td>International Convention for the Prevention of Pollution by Ships</td>
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<td>MOU</td>
<td>Memorandum of Understanding</td>
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<td>PSC</td>
<td>Port State control</td>
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<td>SOLAS</td>
<td>International Convention on the Safety of Life at Sea</td>
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<td>SOX</td>
<td>Sulfur Oxides</td>
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<td>STCW</td>
<td>Convention on Standards of Training, Certification and Watch-keeping for Seafarers</td>
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<td>UN</td>
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OPERATIONAL DEFINITION

“Developing Countries/States” in this dissertation refer to “least developed countries/States” according to UN list of least developed Countries.
Abstract

Due to its dominant position and interests in global maritime market, the EU plays a dominant role in international maritime governance. Accordingly, the EU has comprehensive maritime policies and strategies some aspects of which have implications for third States. So, it is crucial to assess implications of the EU maritime policy for third States. Particularly, it is imperative to examine its implications for developing landlocked States (LLSs) due to their lowest bargaining power in international maritime arena owing to their economical and geographic position. Hence, the objective of this dissertation is to examine the implications of the EU maritime policy for developing LLSs. After making assessment of doctrinal sources and empirical evidence from Ethiopia, it is argued that the EU maritime policy, *inter alia*, its port State control regime and maritime market access regulations could possibly make international maritime trade through the EU waters as well as global maritime trade impossible for developing LLSs. Therefore, in view of inherent problems of developing LLSs and the economic interest of these States in maritime field, it is submitted that there is a need to accord differential treatment schemes in the maritime field to these States at global as well as at EU level.

**Key Words:** EU Maritime Policy, Developing Landlocked States, UNCLOS, Port State Control, Implications, EU Maritime Regulations, Standards
1. INTRODUCTION

More than 80% of the world trade is conducted by seas and about 90% of developing countries’ international trade by volume is seaborne.\(^1\) The European Union (EU) transports 90% of its external trade and 40% of its internal trade by sea.\(^2\) EU ship owners alone control 40% of the global fleets with high competitive quality.\(^3\) Four of the top ten ship owning countries of the world are located in Europe.\(^4\) In addition, one third of global shipping has EU ports either as origin or destination.\(^5\) Moreover, EU ports alone entertain 3.5 billion tons of cargos and more than 400 million passengers per a year.\(^6\) So, it can be said that the EU has a dominant share in the international shipping market as ship owning nations as well as coastal or port nations. Due to its dominant position and interests in global maritime market, the EU plays or intends to play a dominant role in international maritime governance.\(^7\)

The EU, as ship owning nations, strives to enhance a global playing field for its shipping industries like: open maritime market, access to cargoes and free competition with third States. To this end, EU has passed several regulations. The EU’s maritime market access strategy aimed at enhancing competitiveness of its internal maritime market, ensuring development of open market worldwide and to “take the lead to promote alignment of its substantive competition law

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\(^3\) Ibid

\(^4\) UNCTAD, \textit{Review of Maritime Transport}, 47


\(^6\) Ibid

\(^7\) See for example, Commission of the European Communities, “Progress of the EU’s Integrated Maritime Policy”, \textit{Final Report from the Commission to the European Parliament} (2012), the Council, the European Economic and Social Committee and the Committee of the Region. One of the objective of EU as reflected under this official report runs, “At global level, the EU has pushed for more ambition in the resolutions on oceans and the law of the Sea and on sustainable fisheries, promoting global membership of maritime governance instruments....” See also EU, ‘Commission Communication on Strategic goals and recommendations for the EU’s maritime transport policy until 2018 COM (2009)8 final, 2009, Brussels. (available at: \url{http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52009DC0008&from=EN}), last visited November 17,2016. One of the strategic goals stated that “the Commission will take the lead to promote alignment of substantive competition laws globally”
globally. In this sense, it can be said that the EU has a strategy to extend its legal norms in maritime field to international level.

The EU, as coastal or port States nations, places a high emphasis on maritime safety, security and environmental protection. In this respect, the EU determined to remove sub-standard vessels from its waters as well as likely from international waters thereby advocating progressive advancement of the standards. In order to achieve this, the EU enforces IMO rules and standards thereby transposing in to its legislations. In addition, the EU exercises its coastal and port States jurisdictional powers and adopts its own standards to foreign vessels operating in its waters or visiting its ports. The later move has raised an international law of sea issue of jurisdictional balance among port, coastal and flag States. In light of this, there is long rooted and growing body of debate on the legitimacy or otherwise of introducing unilateral regulations to international shipping. In this regard, the EU is known for adoption and application of its regional regulations and standards for foreign vessels in its waters or visiting its ports.

Even though the EU’s regulatory activation is appreciated for bringing an effective enforcement regime, it is also criticized for being challenge to uniform adoption and application of international shipping regulations. At this juncture, it is crucial to assess implications of the EU maritime policy for third States. Particularly, it is imperative to examine its implications for developing landlocked States (LLSs) due to their weak bargaining power in international maritime arena owing to their economical and geographic position. However, there is no a comprehensive study conducted on implications of the EU maritime policy on developing (LLSs) and hence, the objective of this dissertation is to examine the implications of the EU

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8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ¶Strategic goals and recommendations for the EU’s maritime transport policy until 2018¶, (COM/2009/0008 )final available at http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52009DC0008
9 See Philippe Boisson, ¶Development, impact and consequences of the EU maritime safety policy on maritime activities. A challenging time for the shipping industry¶, 1. available at http://www.sname.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=247f1eb7-7d17-4a26-96f5-9d2903b655d2 Boisson says, ¶... standards must be set up at the international level. This is the only way of guaranteeing a high level of safety throughout the world and preventing any distortion among shipping companies"
maritime policy for developing LLSs. Landlocked States from developed world have different realities and hence are not included within the scope of the dissertation.\footnote{LLSs from developed world, like from Europe are benefited from better infrastructure and logistic services, better bargaining position, small distance from sea coasts or ports and have regional arrangements for free access to seas.}

Methodologically, the dissertation follows both legal dogmatic/doctrinal and non-doctrinal research methods. Relevant primary and secondary sources such as: EU acquis, case laws, Ethiopian laws, international treaties, EU policy documents and review of scholarly literatures are used in the study. Empirical data gathered through in depth interview of experts and officials from Ethiopian Maritime Authority (EMAA) and Ethiopia Shipping Lines and Logistic Service Enterprise (ESLSE) in the form of interviews are also used as a supplementary source. Ethiopia has been selected for three main reasons. Frist, Ethiopia is LLS that has 53 years’ experience in international shipping transport service. This helps to understand the challenges that the country has faced which can be replicable in other developing LLS that have interests in the maritime field. Secondly, the country has signed several international treaties related to the maritime field. Finally, the writer is citizen and resident of the country and hence had easier access to information. Analyses of the data gathered are made qualitatively.

Accordingly, the dissertation is organized in six sections. The first section is an introduction to the thesis; second section starts with discussing the EU’s Integrated Maritime Policy and highlighting the organizational nature of the EU and its competence to represent Members States. In this section, the thesis attempted to show the link between the EU’s dominant position in international maritime arena with the coordination resulting from the policy and competence. The main question attempted to address under this section is; how the EU maritime policy could affect the right of developing LLSs to access and use of seas? In fact, detailed analyses of this question are to be found in section five. Under this section, general discussions on escalation of extension of coastal and port States’ sovereignty power with particular emphasis on the EU are made in light of international law, and possible implications for developing LLSs are drawn.

Section three concentrates on the EU maritime regulations that have direct impact on third States. The main question this section addresses is; how some of these regulations can impact developing LLSs? Particular focus is made on the EU Regulations on ‘‘Freedom to Provide
Service”11 and “coordinated action to safeguard free access of ocean cargos.”12 It is attempted to show possible implication of applying these regulations against developing LLSs that due to their special needs reserve cargoes to national shipping industry or otherwise protect the national industry.

After all, it is very important to assess existence of general right of access to sea for the LLSs. And hence section four assesses theoretical backgrounds and international legal frameworks for the right to access to the sea for LLSs. The basic question the section addresses is: whether there is internationally recognized right of access to sea for the LLSs? It assesses the theoretical foundations and analyzes international laws focusing on three main conventions directly dealing with the issue (the 1921 Barcelona Convention the 1965 New York Convention and UNCLOS). Particular focus is made on interpretation of UNCLOS article 125.

In section five, the implications of the EU maritime policy for developing LLSs is analyzed by taking empirical evidences from Ethiopia. Under this section, the main challenges of maritime transport sector of Ethiopia are assessed. Challenges, inter alia, international maritime transport costs and tough international competition are identified. It is also attempted to address the question; how the EU maritime policy can contribute to the aggravation of these challenges? In addressing the question, analysis of empirical data from Ethiopia and analysis of the EU maritime regulations vis-à-vis international rules or standards is made. Finally, the dissertation is completed with some concluding remarks in chapter six.

11 Regulation (EEC) No 4055 / 86
12 Regulation (EEC) No 4058/86
2. The General Overview of the EU Maritime Policy

European States are among the major maritime nations of the world. Seas and oceans are the backbone for European economy. Before the European Union (EU) developed an integrated maritime policy, each Member State had had its own compartmentalized policy on maritime governance. This fragmentation was said to have posed risk for sustainable use of maritime resources. Hence, in 2006, with the publication of the ‘GREEN PAPER’ titled ‘Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas’, a proposal was made to integrate the EU policies on seas and oceans. The document, among other things, emphasizes the economic potential of the EU maritime sector for Europeans and the EU’s intention to regulate and lead sustainable maritime development agendas in an integrated manner. Following the green paper, the EU adopted ‘Integrated Maritime Policy for European Union (IMP)’ in 2007. The IMP is a comprehensive policy accompanied by a detailed action plan for implementation of the plan. As explained by Timo Koivurova,

The term “IMP” is used … to denote the following three documents: The Integrated Maritime Policy (CEC 2007a), adopted via a Communication (the so-called Blue Book), its accompanying Action Plan (CEC 2007b) and the “environmental dimension” (CEC 2008b) of the IMP, the Marine Strategy Framework Directive (MSFD).

The IMP is meant to consolidate the EU’s power and jurisdiction in maritime areas. This scenario, the writer thinks, served as a springboard for the EU’s dominant position to influence international maritime affairs thereby consolidating powers housed scattering in individual member States. While the IMP has brought concrete benefit for European economy ‘by avoiding duplication of spending and efforts, and encouraging the sustainable development of

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14 ibid
16 Ibid, p. 4
18 Ibid, 162
maritime activities for member States’’\(^\text{19}\), it is also argued that it has negative implications for third States particularly, for developing LLSs. This is because the policy, on one hand, allowed the EU to effectively implement international law as well as to stretch its huge hand to shape international maritime regulatory frameworks. On the other hand, it gave the EU power to drive international legal frameworks and institutions like, IMO to its way making international standards very tight and unaffordable for developing LLSs which has the lowest bargaining power in international maritime arena as discussed chapter five. In addition, the policy paved the way for the EU to adopt and implement unilateral regulations and standards to international shipping thereby making their coasts and ports unaffordable to small countries engaged the international shipping service as analyzed in chapter five. Moreover, the EU moves may result in expansion of other restrictive coastal or port States trends from major maritime nations or regional blocks in which case developing LLSs might be primary victims of the fight as discussed below (sub-section 2.2.).

This chapter gives a bird’s eye view of the organizational nature of the EU and its competence, and the EU maritime policy and international law with particular reference to port State control and coastal States power. It also tries to link in a more detail manner how third States in general and developing LLSs in particular could be affected by the EU maritime policy architect.

2.1. The Organizational Nature of EU and Its Competence

Even though the scope of the dissertation does not include detail analysis of the institutional nature of EU and its competence to represent member States, it is important to highlight these aspects for two main reasons. The first reason is to assess whether the EU has legal bases to represent either exclusively or in concurrency with its member States to deal with third States on matters related to maritime transport. Particularly, assessing the EU’s external competence in maritime affairs is relevant for the dissertation because it has an impact on third States including developing States that have interest in EU waters.\(^\text{20}\) Secondly, it is claimed that the EU has

\(^{19}\) EC, Directorate-General for Maritime Affairs and Fisheries, ‘‘Progress of the EU’s Integrated Maritime Policy’’, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2012) 491 final

\(^{20}\) For example EU port State control (at EU level) bounds member States uniformly to enforce at their ports the EU regulation. This in effect makes the ‘‘port or convenience’’ option available for third States useless as all conditions and requirements to be imposed on ships visiting all EU ports are similar. See also Henrik Ringbom, The EU Maritime Policy and International Law (Boston: Martinus Nijhoff Publishers, 2008), 203.
influenced the international legal and enforcement framework in maritime field thereby using its
dominance in the area. The EU’s dominant position is obviously created due to consolidation of
power, experience and expertise housed in each Member State. These are directly linked with the
organizational nature of EU and its competence to represent member States.

The organizational nature of the EU along with its competences to represent member States in
maritime affairs has been so unique and sometimes even controversial. Timo Koivurova explains
the EU’s power in relation to ocean governance in the following manner:21

Even though the EU is acting like a federal State in many ways—in some policy areas in
an even more integrated manner than federal entities—its ocean powers differ from
those of federal States (while federal States may have constitutionally delegated many of
their powers to their sub-units in many policy areas, this does not usually apply to
maritime areas, where the federal level exercises most powers affecting areas beyond the
immediate coastal zone or territorial sea; this fundamental fact does not hold true for the
EU, which, apart from having exclusive jurisdiction over much of fisheries, has only
shared powers over many of the maritime policies).

Henric Ringbom, one of the prominent writer on European maritime safety policy, has described
the EU as ‘‘neither a conventional intergovernmental organization nor a State’’. Its power has
been characterized as to be located between a sovereign State and an intergovernmental State.22
In some respects, the EU has an exclusive competence over the Member States.23 The Court of
Justice of the European Union (CJEU) has clearly recognized this power. In Commission V.
Council (1971)24 case, the CJEU held that:

… the Community, with a view to implementing a common policy envisaged by the Treaty,
adopts provisions laying down common rules, whatever form these may take, the Member
States no longer have the right, acting individually or even collectively, to undertake
obligations with third countries which affect those rules. … the Community alone is in a
position to assume and carry out contractual obligations towards third countries affecting the
whole sphere of application of the community legal system … to the extent to which
Community rules are promulgated for the attainment of the objectives of the treaty, the
Member States cannot, outside the framework of the Community institutions, assume
obligations which might affect those rules or alter their scope.

This ruling shows that the EU has an exclusive external jurisdiction on areas affecting common
policy defined by the EU including some aspects of maritime transport.

21 Koivurova, Integrated Maritime Policy of the European Union, 161
22 Ibid., 57
23 Ibid., 57
24 Commission V. Council (1971) ECR, Case no. 22/70, 263. See also detail analysis by Ringbom, The EU Maritime
Policy and International Law, 57-70.
The Treaty on Functioning of European Union (TFEU) describes the EU competence in three categories – Exclusive competence,\textsuperscript{25} shared competence between EU and Member States,\textsuperscript{26} and competence to support, coordinate or supplement the actions of the member States.\textsuperscript{27} Except for ‘the conservation of marine biological resources under the common fisheries policy’ which clearly fall under the EU exclusive jurisdiction, the Treaty does not make crystal clear the category of the EU’s competence in maritime field.\textsuperscript{28} In fact under article 4(3) of TEFU, there is general duty of Member States to sincere cooperation. ECJ, in Commission v. Greece (2009) case where Greece had submitted an independent proposal to the IMO, ruled that Greece failed to fulfill its duty to sincere cooperation obligation. So, existing case laws and practice show that the EU has a full competence to adopt and implement laws, regulations and policies for the attainment of common EU objectives which may include maritime field.

2.2. The EU’s Exercise of Port or Coastal State Jurisdiction, International Law and Implications

A port State jurisdiction refers to the jurisdiction a State may exercise over foreign vessels visiting its port.\textsuperscript{29} In principle, according to the United Nation Convention on Law of Sea (UNCLOS) and customary international law, a flag State has a principal jurisdiction over ships flying its flag.\textsuperscript{30} Its power ranges from ships safety standard, manning, marine safety and security and seafarer’s welfare, and adopting ‘laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry’ and enforcement of the laws and regulations.\textsuperscript{31} The basic rational behind making flag States as a principal regulator of ships in international maritime law is to enhance the freedom of

\textsuperscript{25} See TFEU Article. 3. Under exclusive competence, only the EU may legislate and adopt legally binding acts and member States shall not do so unless authorized by the EU (See TFEU Article. 2 (1)).
\textsuperscript{26} TEFU, Article.3.and Article.2 (1). In the case of shared competence, the member States can act only if the EU has chosen not to act
\textsuperscript{27} TEFU, Article. 6
\textsuperscript{28} TEFU, Article. 4(d)
\textsuperscript{30} Camille Goodman, ‘The Regime for Flag State Responsibility in International Fisheries Law: Effective Fact, Creative Fiction and Further Work Required. See also UNCLOS Article. 94 and 217
\textsuperscript{31} See UNCLOS, Articles. 94 , 211 (2), 217
navigation without undue influence by coastal or port States.\textsuperscript{32} Port and coastal States’ jurisdiction is limited to exceptional circumstances.\textsuperscript{33} However, the EU port State control regime is seems to have taken this ‘‘exception as a principle.’’\textsuperscript{34} Under UNCLOS, except for the enforcement of internationally agreed rules and standards, port States does not have the right to prescribe rules and requirements for foreign vessels.\textsuperscript{35}

The EU has become major part and player of global ever escalating coastal and port states’ exercises of jurisdictions and controls. The usual justification presented by port States including the EU for the increased controls is the failure of flag States to control effectively ships flying its flag. In fact, due to expansion of artificial flags States in the world on pretext of flags of convenience, the flag States tended not to effectively control ships flying their flags. However, there is a clear remedy for the failure under Article 94 (6) of UNCLOS which reads: ‘‘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. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.’’ According to this provision, it is clear that there is no a legal room for port States to replace the flag States’ duty and what port States can do in the case of such failure is reporting to the flag State concerned.

Another justification made by the port States including the EU for the ultra virus prescriptive exercise of port State’s jurisdiction is based on a premise that ‘‘a State generally does not have a legal right to access another State’s port’’\textsuperscript{36}. In fact, this position is not without challenge atleast for three reasons.

\textsuperscript{32} Ibid, Article. 91. In addition to the recognition of general international law principle that treats a ship as a floating territory of a flag State, enhancing freedom of navigation is the basic principle of the international law of the sea.
\textsuperscript{33} Both prescription and enforcement of rules and requirements for a vessel principally rests under the power of the flag State (UNCLOS Article. 94 and 217 respectively). However, only part of the enforcement of internationally agreed rules and requirements that may go to a port or a coastal State jurisdiction.
\textsuperscript{34} The common way of interpreting laws is by considering exceptions narrowly. This principle seems to have been reversed in the case of the EU port State control regime.
\textsuperscript{35} See for example UNCLOS, Article. 218 and revised MARPOL Annex VI Regulation 15
\textsuperscript{36} Henrik Ringbom, \textit{The EU’s Exercise of Port and Coastal State Jurisdiction}, Scandinavian Institute of Maritime Law, Yearbook, 2006. Henrik Ringbom and other European writers hold that port States do have a full ‘‘…right to deny ships access, or make that access dependent on the fulfilment of certain conditions.’’
First, without a right access to ports, the principle of freedom of navigation, which is enshrined
in international law, would be from a shipping perspective meaningless.37 In Necaragua v. USA
(1986), the International Court of Justice (ICJ) extended the right to innocent passage in the
territorial sea zone to passage to and from internal water to access ports.38 The ICJ decided in
this way on the ground of the international customary law that obliges a State “not to interrupt
peaceful maritime commerce” and on the ground of UNCLOS article 18 (b).39 The court
interpreting article 18 (b) of UNCLOS noted:

“... it is true that in order to enjoy access to ports, foreign vessels possess a customary
right of innocent passage in territorial waters for the purposes of entering or leaving
internal waters; Article 18, paragraph I (b), of the United Nations Convention on the
Law of the Sea of 10 December 1982, does no more than codify customary
international law on this point.”40

The right of access to internal waters, which is extended by the court, is not different from the
right of access to ports from perspective of sovereignty right of port States.41 Hence, according to
this judgment, it can be said that port States cannot arbitrary deny access to their ports or internal
waters to foreign vessels engaged in a peaceful maritime commerce. However, the right to access
to ports can be denied if ships that claim the access fail to fulfill requirements or conditions set
by the port or flag states as case may be. Article 2 of the 1923 Convention on the International
Regime of Marine Ports provides for a quid pro quo or reciprocity for the access and if member
States to this convention fail to accord reciprocal obligation, it may also be a ground for the
denier of the access. Though application of this convention is limited to the member States and
the rule does not acquire a customary international law status, it may show a trend of
international law.

Secondly, in order for land locked States (LLS) to exercise their rights under international law
of sea, it is logical that they must have a right to access ports or need to justifiable cause for the

37 See UNCLOS Articles 17, 125, 148, 69, 38, 137 and 87. In order for land-locked States to transit, trade and enjoy
the freedom of high sea (res communis), right to access territorial sea including access to ports of transit States is
inevitable.
38 In Necaragua v. USA (1986), I.C.J. 14, para. 213, P.101. See also detail explanations by Bernardo Sepulveda
39 Ibid
40 Necaragua V. USA, Ibid. para 214, p. 101
41 See the UNCLOS Article. 2(1) cumulating with Article. 18 (b)
In this respect article 131 of UNCLOS provides for, “Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.” Thirdly, even though ports are under the exclusive jurisdiction of Sovereign States, the right to deny access to the port or impose unreasonably strict requirements to deny access cannot be justified under UNCLOS. This is true the fact that, had legislative intention of the convention been to confer port States the right to deny access to their ports to foreign vessels, it would have provided for this clearly. In addition, access to ports is closely related to use of the seas and hence, the prerogatives of the Sovereignty right of a port State over its port should somehow be understood as compromised by the State by virtue of signing the convention.

Given historical and theoretical foundation of States rights on seas as discussed in section four, it seems absurd to apply, as some literatures do, solid territoriality or extra-territoriality sovereignty principles to sovereignty rights related with use of seas. Moreover, according to principles of interpretation of treaties provided in Vienna Convention, good faith, purpose and object of the treaties shall be taken into consideration. And one of the core purposes of the UNCLOS as provided in the beginning of the preamble is, “...desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world.” This presupposes that State parties to the convention must be considerate and mutual cooperative in the use of sea related rights including sovereignty right over their ports. So, there is little or no legal ground for coastal or port States arbitrarily to deny access or provide unjustifiable preconditions/standards for the access of their ports against foreign vessels engaged in peaceful commerce. And prescribing a

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42 UNCLOS, Article. 125, 148 and 38 (1). See also The 1965 New York Convention 1965 On Transit Trade of Land Locked States. Most of EU members are also members to this convention and bound to give ‘‘to ships flying the flag of that State (Land Locked) treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to seaports and the use of such ports...’’ (Preamble of the Convention)

43 While the UNCLOS clearly provides under Article 217 for the power of a flag State to prohibit a vessel flying its flag or registry, the convention does not give the same power to a port State under Article. 218.

44 See preamble of the UNCLOS. Even if the convention recognizes sovereignty of member States, fairness, cooperation, equity and efficient utilization of seas and oceans resources are core principles of UNCLOS that should also be dealt with.


standard by a port State exceeding international standard on the same issue would likely be unjustifiable and against principle of freedom of navigation.

Coming back to the main purpose of this sub-section of the dissertation, what are the possible implications of the EU’s growing prescriptive port States jurisdiction or controls for developing LLSs?

Basically, the EU has united interests as coastal and port States as well as union of flag States. So, If the EU continue its excessive port or coastal State jurisdictional schemes by setting its own different standards to foreign vessels, there is a high probability that other major port or coastal States may exercise countermeasures in their capacity as port States or regional integrations for port State control. The probability seems inevitable because international trade, including shipping is highly determined by competitive or bargaining position of the actors. This probability can also be inferred from the comment made by the International Chamber of Commerce and International Shipping Federation on the EU’s Strategic Goal until 2018 as follows:

…we believe the Commission should think very carefully before proposing any adjustment of the current balance between flag States and coastal States rights. Other coastal States around the world could potentially use any new entitlement to override current flag State rights for motives unconnected with safety and environmental protection, especially where evolving geo-political circumstances may lead to new perspectives.47

There have already been several other regional integrations for the port State control and some individual powerful maritime States that have different port State control schemes.48 If major port or coastal States or regional blocks, unnecessary expand their port or coastal State powers as EU has done, then what this mean for developing LLSs? For example, If a certain port State takes an excessive control against another port State’s ships flying its flag, then that State may counteract or retaliate by using its power as a port State on its own port by prescribing and

47 International Chamber of Commerce and the International Shipping Federation Comment on ‘Strategic goal and Recommendations for the EU’s Maritime Transport Policy until 2018

48 For example, regional integrations like: Tokyo Memorandum of Understanding (MoU) on Port State Control (for Asia-Pacific States), Latin America MoU on port State control, Caribbean MoU on port State control, Port State Control in Mediterranean region, MoU for the Black Sea, Abudja MoU on port State control (for west Africa), Riyadh MoU on port State control for Gulf region, and at individual State level US Coast Guard and possibly other powerful port States may have its own scheme for port State control.
enforcing strict requirements.\textsuperscript{49} This may happen due to the fact that international maritime trade, \textit{inter alia}, determined by the bargaining position of the actors and the bargaining position of States is determined by economic, diplomatic and geo-political position of the States. But developing LLSs cannot do this simply because they do not have ports or sea coasts or have the lowest bargaining position. There is no a preferential treatment or longer compliance period scheme available in the EU system for least developed LLSs which makes the situation worse. So, it is submitted that the EU port State control system might result in completely ousting of least developed nations, which cannot meet the standards or requirements, from using EU ports. Moreover, the increasing EU’s port State control may give rise to another more port States controls from other major port or coastal States which in effect will inevitably have very possible negative implications for developing LLSs’ interest in maritime field.

\textsuperscript{49} One of the key rational for the integrated port State control including EU PSC is competition consideration. And hence, each port State inevitably takes competitive advantage of its own against other maritime States. In this case least developed State in general and land locked States in particular, which do not have any bargaining power, will be the primary victim of the fight.
3. EU Maritime Regulations on Market Access in Relation with Third States: A Critical Overview

3.1. Objectives of the EU Maritime Regulations and their Enforcement Framework

A regulation under the EU legal system is secondary legislation which has general application and automatic binding effect in all member States. Unlike EU directives which basically need to be transposed by the national legislator of a member State, EU regulations are binding regardless of the transposing act as explained as follows:

Regulations are of general application, binding in their entirety and directly applicable. They must be complied with fully by those to whom they apply (private persons, Member States, Union institutions). Regulations are directly applicable in all the Member States as soon as they enter into force (on the date stipulated or, failing this, on the twentieth day following their publication in the Official Journal of the European Union) and do not need to be transposed into national law. They are designed to ensure the uniform application of Union law in all the Member States. Regulations supersede national laws incompatible with their substantive provisions.

EU maritime market access regulations are aimed at enhancing competitiveness of internal maritime market and ensuring development of open market worldwide. The EU has regulated the maritime market access in three dimensions: -Freedom to provide service, unfair pricing and free access to ocean trades.

The EU’s internal maritime market access strategy is geared towards strengthening capacity of EU shipping industry so as sustain its ‘dominance’ in global market. One of the main issues addressed by the 2009 EU strategic goal was ‘EU Maritime Space without Barrier’. The focus was made on EU short shipping, cabotage and competition in internal market. But the long term strategy as can be seen from the EU strategy is internationalization of maritime law and practice.

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50 See Article. 288 of Treaty on Functioning of European Union (TFEU) which runs “… A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”


52 See for example, EU, “Progress of the EU’s Integrated Maritime Policy”, Final Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2012. One of the objectives of EU as reflected under this official report runs, “At global level, the EU has pushed for more ambition in the Resolutions on Oceans and the Law of the Sea and on Sustainable Fisheries, promoting global membership of maritime governance instruments…” See also EU, ‘Commission Communication on Strategic goals and recommendations for the EU’s maritime transport policy until 2018 COM (2009)8 final, 2009, Brussels. (Available: http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52009DC0008&from=EN ), last visited November 17,2015. One of the strategic goals Stated that “the Commission will take the lead to promote alignment of substantive competition laws globally”.

53 EU Strategic Goals and Recommendations, 3
from EU perspectives. This can be seen from the position boldly provided under the strategic
document. It says, ‘the Commission will take the lead to promote alignment of substantive
competition law globally’.\(^{54}\) So, it is possible to say the EU’s exercise at home has usually
something to do with global application. This can also be seen from the EU’s strategic interest in
membership of International Maritime Organization (IMO). It says, ‘...formalizing the EU co-
ordination mechanism and granting formal observer status, if not full membership, to the EU at
IMO.’\(^ {55}\)

The basic aim of this section is not to focus on the EU’s ‘indirect’ policy objective and its
implication. Rather the direct regulations that affect the interest of developing land locked
countries. There are three EU regulations which have direct effect on third countries. These are:
*Regulation 4057/86* (unfair pricing)\(^ {56}\) – ‘concerns dumped freight rates by shipping companies of
non-EU States’, ‘*Regulation (EEC) No 4055 / 86*’\(^ {57}\) - dealing with freedom to provide service,
and ‘*Regulation (EEC) No 4058/86* - concerning coordinated action to safeguard free access to
cargoes in ocean trades.’\(^ {58}\)

The former regulation does not have that much immediate effect on the least developed nations
for obvious reason that these States do not have capacity to dump goods and services yet. Hence,
the focus is made on the latter two regulations.

3.2. The EU Regulations on Freedom to Provide Service, Free Access to Ocean
Cargoes and Countervailing Actions

Regulations (EEC) No 4058/86 and *Regulation (EEC) No 4055 / 86* are basically intended to act
against restrictions imposed by third countries that EU believe negatively affect the community
shipping industry. The Regulation (EEC) No 4058/86 applies to nationals of member States
regardless of whether they are established inside or outside the Community.\(^ {59}\) As explained in
the legislative summary, ‘this Regulation applies when action by a non-Community country or

\(^{54}\) Ibid. p.4

\(^{55}\) Ibid., p. 6


\(^{58}\) Council Regulation (EEC) No 4058/86

\(^{59}\) Rosa Greaves, ‘EC Maritime Transport Policy and Regulations’, *Duke Journal of Comparative and
by its agents restricts free access to the transport of liner cargoes, bulk cargoes or other cargoes by shipping companies of member States or by ships registered in a member State. It provides for counter measures in the form of ‘coordinated action by the community following a request made by a Member State to the Commission. Such action might include diplomatic representation to non-Community countries and countermeasures directed at the shipping companies concerned’.61

The aim of EU under both Regulations is clear that it wants to enhance a free playing field for EU shipping industries by avoiding protectionism and restrictions from third States.62 However, they fail to take at least two important things in to consideration. First, without firm base, the regulations presuppose the existence of internationally free market.63 The truth, however, is different. States in the world are at different stages of liberalizing their markets including their maritime service market. Specially, service sectors in general and maritime sector in particular have not yet been liberalized in most developing countries.64 Secondly, the regulation failed to take the concern of small countries in to consideration. It is true that EU has shipping industries with high quality and experience capable of competing globally. But before the EU industries reached this stage, they had been protected by their respective States. Even these days, the EU has maintained a state aid scheme for maritime transport. On the other hand, shipping industries from third developing countries cannot compete globally unless they are protected either by way of subsidy or cargos reservation systems or otherwise. Worse of all, The regulations may subject developing LLSs that due to their special need, reserve cargoes to national shipping industry or otherwise protect the industry. In these countries, shipping industries are very infants and transit

61 ibid
62 See Rosa Greaves, P. 130. Rasa summarized the objective of these regulations as:-

‘The 1986 package focuses primarily on the threat to Community shipping from the protectionist policies and practices of nonmember States. Free and nondiscriminatory access to cargoes for EC ship owners and fair competition on a commercial basis in trade to, from, and within the Community are the overriding principles of the 1986 legislation’

63 Unless States are committed and bound under international agreements framework, for example commitment to liberalize under WTO, there is no obligation to make their market free or stop protectionism. This matter may also depend on a type of political economy a State may follow. In fact, possibly, EU might have relied on its dominance on maritime industry. That means, third States do not want to lose EU maritime market which has huge economic implication.

64 For example, almost all service sectors including shipping industry in Ethiopia are operated by government. Most of African States have not yet liberalized its service sector.
related costs are already very high. Unless there is some kind of protection, they could not compete with the EU industries. For example, Ethiopian shipping company’s survival in international shipping service is only due to aid from the State including reservation of imports to the company.65

So, unless the EU rethink its regulations thereby making specific focus on the EU equivalent third competitor States or devising some kind of special or differential treatments to small countries, the general approach which may subject even the small States to its countervailing measures obviously have negative implications for these States. The worst impact would be inevitable for small LLSs that have the lowest bargaining power in global maritime market due to transit related challenges and economic capacity related problems.

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65 Interview with Ato Mekonnen A bera, director of Ethiopia Maritime Affairs Authority, June 4, 2017

A land-locked State (LLS) is a State with no direct sea-coast. This time, there are forty four landlocked States (LLSs) in the world which approximately make up 22% of the total States in the world. Most of these States are the least developed. This is directly linked, among other things, with transit related challenges that the LLSs face. Several studies have identified these challenges. For example, the study conducted under World Bank by Kishor Uprety has summarized the challenges as follows:

The LLDCs (Land-locked developing countries) face additional transport bottlenecks in international trade. The distances from their principal towns to the main ports vary from 670 kilometers to 2,000 kilometers... The international trade of these countries is dependent on the transit-transport infrastructures and services along the routes through their transit neighbors, over which they have little control. Furthermore, the ability of the transit countries to improve, from their own resources, transit-transport infrastructures and services in the ports and along the transit corridors is very limited because many of them are themselves developing countries...Transport costs (which include storage costs along the transit routes, insurance costs, costs due to extra documentation, and so forth) are in many cases quite significant because the facilities available are inadequate... The implications of being landlocked are severe because production, input use, consumption, and exportation are greatly influenced by the cost and reliability of transport to and from the outside world.... In general, then, the majority of LLS are among the poorest countries of the world. The absence of seacoast and their distance and isolation from international markets aggravate their economic situation and constitute the main reason for their underdevelopment.

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66 Kishor Uprety, ‘‘The Transit Regime for Land-Locked States: International Law and Development Perspectives’’, Law, Justice and Development Series No.34771 (2006):4. See also UNCLOS, Article. 124 (1) (a). The UNCLOS defines the LLS as ‘‘a State which has no sea-coast’’


69 See Uprety, Transit Regime for Landlocked States, 19.
Another study conducted by the United Nations Conference of Trade and Development (UNCTED) has also confirmed that distances, travel times and costs (transit related problems) had been the main challenges for land locked developing countries.\textsuperscript{70}

Michael Faye has identified transit related challenges of land-locked developing States in four dimensions: - \textit{dependence on sound political relations with transit States, dependence on neighbors’ peace and stability, and dependence on administrative practices of the transit States.}\textsuperscript{71}

In short, now it has already come to common knowledge that the main cause for the underdevelopment of the land locked developing States is directly linked with access to seas. Then, the most important question lies here on how effectively the international law addressed this problem. This chapter focuses on theoretical foundation and the international legal framework of access to sea for land locked States.

4.1. The Theoretical Foundations

4.1.1. Theory Based on Freedom of Transit

This theory is based on whether a State has a general duty to grant the right of transit through its territory. There are two diverging views under this theory. The views are in between those who advocate that a State is duty bound to grant the right of transit to another State suffering from an unfavorable geographic position, and those who believe that such right to be dependent up on the consent of the State granting the transit.\textsuperscript{72}

Supporters of the former view argue that subjecting the transit right to a sovereign State’s consent is absurd. According to this theory, economic interdependence of States justifies the importance of juridical basis for recognizing the transit rights.\textsuperscript{73} Lauterpacht, as cited in Uprety, holds that ‘‘...States may legitimately claim “the right of transit” when there exist two fundamental conditions. First, the State claiming the right of transit must be capable of proving the merits and necessity of the right. Second, the exercise of the right must not cause disturbance

\textsuperscript{71} Faye, “The Challenges Facing Landlocked Developing Countries,” 31
\textsuperscript{72} Uprety, \textit{Transit Regime for Landlocked States}, 28
\textsuperscript{73} Ibid
or prejudice to the transit State (littoral State)" 74 In fact, *necessity* in the case of the LLS seems so apparent and hence it can be held that, according to this view, the LLS can claim the transit as of right when such right does not cause disturbance or prejudice to the coastal State.

On the other hand, opponent of this view advocate the subjectivity of the transit right to consent of sovereign littoral States. As cited in Uprety, “leading international lawyers like McNair and Hyde believe that the transit right of LLS is not a principle recognized by international law but rather a right governed by agreements concluded with coastal States”. 75 Coastal States usually stick on their sovereign right to deny the transit freedom of LLS. Mipazi Sinjela summarized this position as follows:

The major obstacle to development of a guaranteed right of access to the sea for land-locked countries has been the claim of territorial sovereignty by coastal States. These nations have consistently argued that principles of State sovereignty allow them to approve or disallow all transit through their territories. Their position is that rights of access for land-locked countries are not properly resolved through a single international rule, but are instead a matter for bilateral or regional agreements. Countries of transit argue that sovereign jurisdiction over all activities within their territories includes the prerogative of denying the traffic of land-locked countries as a matter of security 76

However, this view doesn’t have acceptance from LLS as it subjects their right to political will of the transit States. 77

4.1.2. Theory Free Access and the Principle of Freedom of the Seas

This theory opposes the idea of exclusive use of oceans by a State against the use right of another State. It is built on the premises that the oceans particularly high sea fall under *res communis* common for all navigators of international community. Pounds, as cited in Uprety noted: “If the ocean is open freely for all humanity (*res communis*), it is reasonable to suppose that each will have access to the shore of the ocean and the right to navigate and discharge the goods on all

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74 Ibid, 29
75 Ibid, 28
navigable rivers, since they are only but natural prolongation of the free high sea.” 

Mpazi Sinjela associated ‘the principle of freedom of high sea’ with ‘principles of natural law.

Sinjela noted:

The claims of land-locked States were originally founded on principles of natural law. It was argued that the right of free transit was conferred on every land-locked country by its very sovereignty a necessary corollary to accepted notions of freedom of the high seas. This view maintained that, because the oceans are open to all nations, littoral and land-locked alike, the latter must be entitled to free transit in exercise of their equal rights within the res communis.

According to this principle, in order to enjoy rights and freedom of high seas, the LLS must have right to pass through land, port infrastructure and territorial water of coastal States.

4.1.3. Right Compensating for Geographical Inequalities

This view is emanated from the spirit of the law of the sea which centers cooperation and mutual understanding among State parties. Professor Rene-Gean Dupuy strengthened this by dubbing the law of the sea as a ‘situationalist’ law that takes particular situation of a single State into account. Kishor Uprety links this view, among other things, with the UN obligation to create ‘…conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations.’ Right of access to sea in this respect is particularly linked with economic development needs of developing LLS. The UN Charter article 25 obliges international community to ‘…pay special attention to the particular needs and problems of the least developed among the developing countries,…’ It is also linked with the principle adopted by UNCTAD in the 1965 New York Convention which provides for “the cognition of right to every LLS to free access to the sea constitutes a principle indispensable for the expansion of international trade and economic development.”

78 see, Uprety, Transit Regime for Landlocked States, 30
80 ibid
81 See the first paragraph of UNCLOS preamble which runs as, ‘…… desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world.’
83 See Uprety, Transit Regime for Landlocked States, 36. See also UN Charter, Article 55
84 See also detail analysis by Aprety, Ibid, 37
In short, the above view justifies the recognition of right of access to sea for LLS in general and developing LLS particular based on the principle of compensating geographic and economic imbalances.

4.1.4. Theory of International Servitude.

An international servitude is a limitation on territorial sovereignty right of a State called “servient State” in favor of permanent use the territory by another State called “dominant State”. It is derived from the Roman private law concept of a limited right of ownership of a property. Sinjela illustrates the concept and its relationship with the right of access to sea as follows:

If A’s land were located in such a way that it was necessary to cross B’s land before he could enjoy his own land, A was said to have a natural servitude across B’s property. From this it may be argued that land-locked States have a similar servitude to traverse neighboring States, a logical and necessary extension of the sovereignty they exercise over their own territory.

However, it is controversial as to whether this private law concept applies analogically to public international law or not. Proponents of right of access to sea as an International Servitude argue that LLS can claim this right against coastal State based on the fact of their geographic position. Meanwhile, the opponents of this view counter argue that the theory of international servitude compromises the sovereign right of transit States. They also hold that it is totally improper to use such private law concept in public law. However, there is a general international law that prohibits “a State from taking any measure likely to modify the natural course of a waterway that passes through several States.” Some writers like, Uprety links this with existence of right of access to sea on the ground of international servitude.

4.2. International Legal Frameworks

In the above section, it is clear that there have been strong theoretical bases on the right of access to sea for LLSs in general and developing LLSs in particular. Against these theoretical...
backgrounds, it is argued that there have been no strong international rules that adequately secure this right for the LLSs. It is also said that international law of sea tends to focus more on expansion of coastal States’ territorial sovereignty over seas thereby diminishing interests of landlocked and geographically disadvantaged States.\textsuperscript{95} Hence, this section of the study assesses how far the international laws of sea responded to the quest of the right of access to sea by the LLSs. I believe that it is important to assess whether there is a recognized right of access to sea for LLSs in international law of sea. This is because in order to explain implications of EU maritime policy for LLSs’ right of access to sea, it is crucial to establish the very existence of such right in the international law of sea. This sub-section focuses on three main conventions that directly deal with the right of access to sea by the LLS.\textsuperscript{96} These are: the 1921 Barcelona Convention, the 1965 New York Convention and the 1982 UNCLOS.

4.2.2. The 1921 Barcelona Convention

Barcelona convention is the pioneer convention to recognize the freedom of transit. Particularly, article 2 of the convention obliges States party to the convention to facilitate the freedom of transit. However, the Member States do not have obligation to grant the freedom of transit to non-member States. The States parties also have the right to prevent the freedom of transit of passengers and goods prohibited in the territory of the States when public, animals and plants interests so requires.\textsuperscript{97} So, it can be said that the convention was aimed at balancing of the recognition of the freedom and sovereignty interests of transit States.\textsuperscript{98} However, this convention

\textsuperscript{95} Helmut Tuerk, ‘‘Landlocked and Geographically Disadvantaged States,’’ In \textit{Oxford Handbook, eds.} Donald Rothwell et al (Oxford Handbook Online: Oxford University Press, 2015) p. 327. Tuerk explains the tendency of the international law of sea in favor of coastal States as follows:
A major shift thus occurred towards more national authority over maritime areas, leading to a diminution of the extent of the high seas and an attenuation of its freedoms, which has been called a transition from a ‘law of movement’ to a ‘law of territory and appropriation’. This development directly affected the landlocked States as well as other States in a less favourable geographical position with respect to the seas and their resources, which would subsequently call themselves ‘geographically disadvantaged States’. These two groups of countries came to realize that they would have little or nothing to gain from an extension of sovereign rights and jurisdiction over vast, valuable maritime areas. On the contrary, this trend placed them in an increasingly disadvantageous position with respect to maritime uses, as they were facing the loss of rights they had hitherto enjoyed either in practice or at least theoretically

\textsuperscript{96} In fact there are several other conventions like, GATT, the 1958 Convention on High Sea and other UN resolutions that directly or indirectly touch up on the right of transit for LLS. However, this study only focuses on: The 1921 Barcelona Convention, the 1965 New York Convention and the 1982 UNCLOS.

\textsuperscript{97} See, the 1921 Barcelona Convention of Freedom of Transit, Article. 5

\textsuperscript{98} See also the preamble of the Barcelona Convention which runs, ‘‘Recognizing that it is well to proclaim the right of free transit and to make regulations thereon as being one of the best means of developing co-operation between States without prejudice to their rights of sovereignty or authority over routes available for transit,’’
has been criticized for its failure to offer strong and all inclusive legal bases on freedom of transit for LLS. Mpazi Sinjela correctly summarized the criticism on the convention as follows:

Although the Barcelona Conference provided a promising start for securing an internationally recognized right of transit, from the land-locked States' point of view several deficiencies were evident in its scope and coverage. First, it would have served these countries well had the right of transit been declared of universal application, rather than confined to States party to the convention. A second major limitation was that the Convention only applies to railway and waterway transport. The failure to address road transport excluded extensive portions of Africa and Asia which are largely dependent on overland routes to and from the sea. Another criticism of the Convention was directed at the great prominence it accorded transit problems of land-locked countries in Europe, thereby failing to take sufficient account of the distinct position of States in the new world.\(^9\)

### 4.2.3. The 1965 Convention on Transit Trade of Land-Locked States

The 1965 Convention on Transit Trade of Land-Locked States (New York Convention) is the first convention that attempted to provide international legal bases for the right of transit to LLS. It, first time in the history attempted to recognize the ‘right’\(^1\) of LLS of free access to sea thereby setting following couple of principles in its preamble:

**PRINCIPLE I**

*The recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development.*

**PRINCIPLE II**

*In territorial and on internal waters, vessels flying the flag of land-locked countries should have identical rights and enjoy treatment identical to that enjoyed by vessels flying the flag of coastal States other than the territorial State.*

**PRINCIPLE VII**

*The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause.*

In addition to the above principles, article 2 of the same convention provide for the freedom of transit and prohibit any discrimination based on ‘origin, departure, entry, exit or destination or on any circumstances relating to the ownership of the goods or the ownership, place of


\(^1\) Unlike the 1921 Barcelona Convention which deals only with ‘‘Freedom’’, the New York Convention, deals with the “right” of free access.
registration or flag of vessels, land vehicles or other means of transport used.''

The convention also prohibit imposition of custom duty on goods in transit.

In light of the above principles and rules, it can be said that the New York Convention recognized the right of LLS to access seas. However, the convention systematically takes this right away from the LLS thereby either subjecting it to consent of coastal States or employing a quid pro quo system to the access. This is true the fact that five of the eight principles provided under the preamble of the convention, directly or indirectly, subject the right in question to consent of coastal States or reciprocal obligation of the LLS. Particularly, the Convention provides for pre-conditions like ‘common agreement’ and ‘reciprocity’ in addition to

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101 See the exact wordings of Article 2 (1) of the New York Convention, ‘‘Freedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport. Subject to the other provisions of this Convention, the measures taken by Contracting States for regulating and forwarding traffic across their territory shall facilitate traffic in transit on routes in use mutually acceptable for transit to the Contracting States concerned. Consistent with the terms of this Convention, no discrimination shall be exercised which is based on the place of origin, departure, entry, exit or destination or on any circumstances relating to the ownership of the goods or the ownership, place of registration or flag of vessels, land vehicles or other means of transport used.’’

102 See New York Convention, Principle IV and Article 3

103 See for example:

PRINCIPLE III

In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea. To this end States situated between the sea and a State having no sea-coast shall by common agreement with the latter and in conformity with existing international conventions accord to ships flying the flag of that State treatment equal to that accorded to their own ships or to the ships of any other State as regards access to seaports and the use of such ports.

PRINCIPLE IV

In order to promote fully the economic development of the land-locked countries, the said countries should be afforded by all States, on the basis of reciprocity, free and unrestricted transit, in such a manner that they have free access to regional and international trade in all circumstances and for every type of goods. Goods in transit should not be subject to any customs duty. Means of transport in-transit should not be subject to special taxes or charges higher than those levied for the use of means of transport of the transit country.

PRINCIPLE V

The State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind.

PRINCIPLE VI

In order to accelerate the evolution of a universal approach to the solution of the special and particular problems of trade and development of land-locked countries in the different geographical areas, the conclusion of regional and other international agreements in this regard should be encouraged by all States.

104 See New York Convention Article 2(2) and the Principle III. According to this provision, in order the LLS enjoy the freedom of transit, it has to secure consent from the coastal States.

105 Ibid, Principle IV clearly provides that the LLS owe reciprocal obligation to coastal States in order to claim the right of access to sea via the coastal States.
common public interest exceptions. These requirements highly conditioned the right of LLS to access sea.

In short, it can be said that the New York Convention gives the right of access to sea for LLS with a spoon and takes it away with a shovel.

4.2.4. The 1982 UNCLOS

The 1982 UNCLOS was, *inter alia*, result of development from several conferences and Conventions. Particularly, three preceding conferences and four consequent conventions had a direct contribution to the contents of the Convention. In addition, customary international law, international courts and arbitration tribunals, States practices and opinions of authors were also said to be core contributors to the contents of the 1982 UNCLOS.

The 1982 UNCLOS is the first instrument that comprehensively regulates all parts of oceans’ spaces, uses and resources in a single document. Hence, it is often dubbed as ‘’Constitution for Oceans’’. At the time of this study, 168 States including the EU are parties to the UNCLOS among which 28 are from LLSs. Out of the 28 LLSs, 20 members are from developing countries. Currently, there are 44 LLSs in the world and remaining sixteen States from LLSs including Ethiopia have not yet been member to the Convention. One of the core aims of the Convention was to strike a balance between the rights or claims of coastal States and the

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106 The New York Convention, Article.11 and 12
107 The three UN Conferences preceding the 1982 UNCLOS are: the 1958 First UN Conference on the Law of Sea (UNCLOS I), the 1960 Second UN Conference on Law of Sea (UNCLOS II) and The 1973-1982 third UN Conference on Law of sea (UNCLOS III)
111 Ibid, 337
113 Developing LLSs parties to the UNCLOS are; Chad, Lesotho, Lao People’s Democratic Republic, Malawi, Mali, Mongolia, Nepal, Niger, Paraguay, Republic of Moldova, Swaziland, The former Yugoslav Republic of Macedonia, Uganda, Zambia, Zimbabwe, Armenia, Azerbaijan, Bolivia, Botswana and Burkina Faso,
freedoms of seas enjoyed by all other coastal or landlocked States. The main aim of this sub-section of the dissertation is to assess how far the 1982 UNCLOS recognized the rights and interests of land-locked developing states.

To begin with, the preamble of the convention recognizes special interests and needs of developing States including LLS as:

Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.

There are also few articles in the Convention which provide for rights of LLS and preferential treatment for developing countries. Particularly, under part X of the Convention, provisions 124-132 directly address the ‘right’ of access to and from the sea and freedom of transit. Article 125 (1) provides for LLSs’ ‘right’ of access to and from the sea and freedom of transit through territory of transit states by using all means of transport. In this regard, the UNCLOS avoids quid pro quo system that was adopted in the New York Convention. Article 127 prohibits imposition of taxes, custom duty or other charges on traffic in transit with exception of charges levied for specific services; similarly, it provides to the effect that the LLSs shall not be discriminated in terms of taxes or other charges levied on ‘the means of transport in transit’ they may use. The UNCLOS also provides for possibility of agreement between LLSs and transit States so that the transit States could grant greater transit rights than the convention does. To this effect, the Convention excludes such agreement from the application of the most-favoured-nation clause. In addition, it provides for ‘Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.’ So, LLSs have a possibility to invoke the most-favoured-nation clause in relation to maritime port services including access to the ports.

Apart from the provision under Part X, there are several other provisions that deal with rights of LLSs. For example, article 17 provides for right of LLSs to innocent passage in territorial zones

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114 Tuerk, “Forgotten Rights? Landlocked States and the Law of the Sea,” 338. See also paragraph four preamble of the UNCLOS.
115 See The UNCLOS, Preamble par. 6
116 The UNCLOS, Article. 132.
117 Ibid, Article. 126
118 Ibid, Article 131
of coastal States. Article 18 (1)(b) of the Convention extends the right of innocent passage to ‘proceeding to or from internal waters or a call at such roadstead or port facility.’ Moreover, subject to some limitations and exceptions referred therein, Article 69 of the UNCLOS grants LLSs ‘a right’ to participate ‘on an equitable basis’ in the exploration and exploitation of the living resources of EEZs of coastal States of the same sub-region or region. Furthermore, according to article 87 of the convention, high seas are open for all States, whether coastal or landlocked and article 90 provides for right of LLSs to navigate ships flying their flags on the high sea

Coming back to the main inquiry of this sub-section of the dissertation; i.e. the assessment of how far the 1982 UNCLOS recognized the right of access to sea for LLSs, the key provision of the Convention that deals with the issue is article 125 which reads:

1. ‘Land-Locked states shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, Land-Locked states shall enjoy freedom of transit through the territory of transit states by all means of transport.’

2. ‘The terms and modalities for exercising freedom of transit shall be agreed between the Land-Locked states and transit states concerning through bilateral, sub-regional or regional agreements.’

3. ‘Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take to all measures necessary to ensure that the rights and facilities provided for in this Part for Land-Locked states shall in no way infringe their legitimate interests.’

This article is the main provision that deals with the ‘right’ of access to sea for LLSs. However, whether it automatically grants the right of free access to and from the sea to the LLSs or not has been controversial. There have been diverging interpretations made by scholars on this article.

Uprety argues that ‘Article 125 does not grant any new rights to LLS...This article constitutes, indeed, a clear recognition of the principle. In practice, however, the modalities called for in paragraphs (2) and (3) must involve substantial qualifications’119 Tuerk partly shares the above interpretation by saying; ‘the right of access is made contingent upon bilateral, sub-regional, or regional agreements between the landlocked States and transit States, laying down the terms and modalities for exercising freedom of transit.’120 But Tuerk partly departs from Uprety’s position

119 Uprety, Transit Regime for Landlocked States, 87
120 Tuerk, ‘Landlocked and Geographically Disadvantaged States,335
by arguing that such preconditions of the provision were made to ‘‘strike a balance between the interests of landlocked States on one hand and those of transit States on the other, (and the provision ) can be considered a significant achievement by the landlocked countries.’’

Sioussouras argue that in order to activate the right provided under article 125 of the Convention, ‘‘preliminary agreement stage -pactum de contrahendo or pactum de negotiando’’ between the LLSs and transit States is needed.122 But Sioussouras does not deny that the transit States are duty bound to give consent to the agreement. According to this writer, ‘‘a special agreement is required prior to the implementation of the free transit right, despite the fact that in the case of a pactum de contrahendo the consent of the transit state is compulsory.’’123 Faye also describes the subjectivity of the right of access to sea under the article 125 to consent of concerned transit states as; ‘‘Although there is a legal basis for rights of landlocked transit as outlined in Article 125(1)… in practice, this right of access must be agreed upon with the transit neighbor (Article 125(2) and (3))…’’124 Endalkachew Baye shares Taye’s position by holding that the right provided under article 125 of the UNCLOS is ‘‘contingent upon the agreement between the landlocked and costal states.’’125

However, there other group of writers who believe that article 125 of UNCLOS automatically grants the right of free access to and from sea irrespective of the consent of transit States. Rana is one of those writers persuasively analyzes the article as follows:

This article (Article 125 of the UNCLOS) does four key effects. First, it guarantees the right of free access to and from the sea to landlocked states. Second, it also guarantees to them freedom of transit without any prerequisite if this freedom is to be exercised in relation to the right of free access to and from the sea. Third, it does not require a bilateral treaty with the transit state to be able to exercise the right of free access and freedom of transit. Only the derailed provisions of a technical character regarding the terms and modalities provisions of a technical character regarding the terms and modalities for exercising freedom of transit have to be agreed upon with the transit state. However, the actual right to exercise this freedom is itself no longer dependent on a bilateral agreement

121 ibid
123 Ibid, 317
124 Faye, ‘‘The Challenges Facing Landlocked Developing Countries,’’ 45
125 Bayeh, ‘‘The Rights of Land-Locked States under the International Law’’, 30
with the transit state, fourth, breaking from the Barcelona tradition, it eliminates the requirement of reciprocity. According to the above interpretation, article 125 (2) refers only to technical aspects dealing with how the right of access to and from the sea is implemented. Otherwise this sub article was not meant to set precondition for the access right itself.

To sum up, article of UNCLOS 125 is susceptible to two different categories of interpretations. The first line of interpretation is the right of access to the sea and freedom of transit granted for LLSs are subject to and dependent on an agreement between the LLSs and transit States. According to this line of interpretation, LLSs do not have an automatic right of access to and from the sea unless they secure consent from transit States. Second line of interpretation is the article guarantees free and automatic access to and from the sea to LLS without any preconditions. So, the article 125 is an ambiguous provision.

Then, how should it be interpreted? Permanent Court of International Justice in Turkey v. Iraq (1925) opined that, “if the wording of the treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the parties should be adopted.” Obviously, LLSs are geographically disadvantaged States and due to this these States are facing huge transit related problems. On the other hand, transit States are relatively in a better position in this respect. In line of this, article 125 should be interpreted so as to benefit the LLSs. In addition, since the LLSs are in a lower bargaining position when compared with transit States, benefit of doubt must be accorded to them.

Moreover, Article 31 of Vienna Convention on Law of Treaties states, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. As long as good faith and context are concerned, it is not reasonably expected from States Parties to UNCLOS to unfairly subject the right of access to consent of transit States. This is true the fact that during prior UN Conferences, LLSs put their voices and grievances and that they need to secure the right to free access to and from the sea.

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126 Ramesh Kumar Rana, “Right of access of land-locked state to the sea by the example of bilateral agreement between land-locked state- Nepal and port state – India” (Master’s Thesis, University of Tromsø Faculty of Law, 2010), 12
127 On one hand, nearly all of the world superpowers are coastal States on the other hand, nearly most of the LLSs are least developed nations.
Furthermore, the use of ‘shall’ in both sub-articles (125 (1) and 125 (2) of the UNCLOS makes the provisions mandatory. Hence, by applying ‘ordinary meaning’ interpretation provided by the Article 31 of Vienna Convention, it can be concluded that the LLSs have a recognized right of access to and from the sea, and coastal States are duty bound to agree on modalities and terms of how this right be exercised. But the subject of this requirement could not be on allowing or denying the access right. Rather, the agreement should be on how and on what ways or modalities such right could be exercised. If both a LLS and a coastal State fail to agree on the terms and modalities, the most probable way out could be resorting to available dispute settlement mechanisms.

5.1. Introduction

Ethiopia is among the least developed but fast growing economies in the world. It has the second largest population in Africa next to Nigeria.\textsuperscript{128} Ethiopia has become a landlocked State since May 1991 when Eritrea separated from the country and become an independent State. The country had been one of the major maritime nations in the horn of Africa before it lost its outlet, port Assab, to Eritrea.\textsuperscript{129} The country started shipping business in 1964 with a fleet of three State owned ships. Despite the fact of being the landlocked, the country has not stopped its engagement in the international maritime commerce. Rather, it continued engaging in the maritime business thereby making the port of Djibouti as a main outlet to the sea through a bilateral agreement.\textsuperscript{130}

Now a day, a State owned company called ‘‘Ethiopian Shipping Lines and Logistics Service Enterprise (ESLSE)’’\textsuperscript{131} operating international shipping business with eleven owned vessels\textsuperscript{132} and by using slot chartering of vessels from major global carriers such as; MAERSK, ALP and MSC. All vessels that are owned and run by the ESLSE are registered and fly Ethiopian national flag. The ESLSE is the only company in the country that renders internal, coastal and international maritime transport services.

\textsuperscript{128} Based on the United Nation’s latest estimate (June 26,2017), the current population of Ethiopia is 104,267,783.
\textsuperscript{130} Ethiopia and Djibouti signed and ratified a bilateral agreement in 2002 on port utilization which gave Ethiopia, \textit{inter alia}, the right to permanent utilization of the Port Djibouti. According to the 2013 World Bank Report, 93% of Ethiopian imports and exports were carried out via the port Djibouti and 84% of the Port’s traffic is in transit to and from Ethiopia. Further details can be accessed from, WB, ‘‘Transport and Logistics in Djibouti: Contribution to Job Creation and Economic Diversification,’’ Final Report No. 75145, Middle East and Northern African Region Transport Unit, February 2013.
\textsuperscript{131} The ESLSE was established by the Ethiopian Council of Minister Regulation, Regulation No.255/2011. The ESLSE is established by merger of the former three public enterprises that have until 2011 been operating separately; namely, Ethiopian Shipping Lines S.C, Maritime and Transit Services Enterprise and Dry Port Enterprise. ESLSE entrusted with duties, \textit{inter alia}, to render coastal and international maritime and internal water transport services, to give multi-modal transport services and provide logistics services. Further detail is available at the ESLSE’s Company profile, at http://www.ethiopianshippinglines.com.et/companyprofile.
\textsuperscript{132} Names of the eleven vessels owned and operated by ESLSE are: Finfine, Hawassa, Bahirdar, Assosa, Harar, Mekele, Samera, Gambella, Jigjiga, Gibe and Abay Wonz. The names of the first nine vessels correspond to names of capital cities of both the federal and regional States of Ethiopia while the names of the last two vessels correspond to the two rivers that are serving as major sources of hydroelectric power in the country.
Ethiopia is a member of IMO and signed and ratified the 1982 UNCLOS.\footnote{Ethiopia joined IMO on 3 July 1975 and signed the UNCLOS on 10 December 1982. Ratifications of some international conventions the country signed including MARPOL and the UNCLOS have not deposited in their respective depositories yet.} The country also acceded to several other international and regional conventions related to maritime sector.\footnote{For example, acceded the 1966 International Convention on Load Lines , the 1972 Convention on the International Regulations for Preventing Collisions at Sea (as amended) , the International Convention for the Safety of Life at Sea as amended and its Protocol of 1978 (SOLAS), International Convention on the prevention of Pollution from Ships 1973/78 ( MARPOL) International Convention on Standards of Training, Certification and Watch keeping for Seafarers, 1978 as amended ( STCW), International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER, 2001), International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996), International Convention on the Control of Harmful Anti-fouling Systems on Ships (2001),The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, International Convention on Tonnage Measurement of Ships, 1969 and The Revised African Maritime Transport Charter} In addition, Ethiopia is a member of International Oceanographic Commission (IOC).\footnote{IOC is a UN specialized in ocean science and services.} These partly show the country’s effort to participate in international maritime regulations and governance with a view to secure its interest. However, some of the memberships like membership to MARPOL, the writer believes, are unreasonable and more disastrous. MARPOL is an International Convention for the Prevention of Pollution from Ships. Ships flagged under all parties to the Convention are required to meet standards set by the convention regardless of the parties special circumstances. The well-known principle of international climate conventions, “\textit{Common but differentiated responsibilities and respective capabilities ("CBBDRC")}” is not recognized or given effect under the MARPOL convention. Under this convention, developing States in general and landlocked developing States in particular that have little contribution to marine pollution are put under the same basket with developed maritime nations that have substantial contribution to global air pollution including the marine pollution. Specially, MARPOL annex VI, which deals with Prevention of Air Pollution from Ships, has progressively been getting stricter from time to time through tacit acceptance amendment procedures.\footnote{For example, The MARPOL annex VI was adopted in1997 and entered into force in 2005. In 2008, substantial revision was made thereby making more significant limit on sulfur content a fuel oil used by ships which entered into force on July 1, 2010.}\footnote{Developing States, particularly, landlocked least developed States that most likely that lack or have little technical expertise due to lack of sufficient resources, skill and experience are the main victim of the IMO’s tacit acceptance amendment technique. The most likely options that these States may choose is ether reluctance or need} In the tacit acceptance procedure, an amendment to a convention is deemed to have been accepted if a State party to it does not oppose to the amendment with in a time limit provided in the convention. This technic, the writer thinks ‘fooling developing States,’\footnote{Developing States, particularly, landlocked least developed States that most likely that lack or have little technical expertise due to lack of sufficient resources, skill and experience are the main victim of the IMO’s tacit acceptance amendment technique.} is used by the IMO
particularly to amend technical rules under annexes including annexes of the MARPOL Convention.

EU has been one of the major driving forces for the progressive tightening of the IMO’s regulations either by implementing them in its water ahead of timelines set by the IMO or by using informal coordination mechanisms. In fact, the main reasons of the EU measures are insufficiency and slow move of existing IMO rules on one hand, and disastrous accidents that have occurred in the EU waters on the other hand.

However, developing counties in general and developing LLSs that have already been trapped with transit related costs and challenges in particular could not easily afford these moves. Otherwise, they need more time for implementation of these rules or needs to be accorded differential treatments. Hence, it is likely unreasonable for landlocked developing States like Ethiopia to sign this kind of instrument that does not take special circumstances of this group of nations into consideration. Anene Kejela, an International Cooperation Expert in Ethiopian Maritime Affairs Authority says that it was a big mistake to MARPOL convention. Mekonnen Abera, Director of Ethiopia Maritime Affairs Authority (EMAA), in this regard says, ‘’we did not really notice or saw in this way when we signed this particular convention; however, we signed or acceded to international maritime related conventions including our membership to IMO with intention to put our voices and to reflect our interests .‘’ In fact, this seems true in most cases of the least developed nations that are parties to this convention.

Ethiopia enacted several domestic maritime legislations, directives and stablished EMAA) as a sectorial regulator. In light of these, the country becomes one of the few developing LLSs that

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139 Ibid, 6
140 Interview with Anene Kejela, International Cooperation Expert in Ethiopian Maritime Affairs Authority, June 5, 2017
141 Mekonnen Abera, Director of Ethiopia Maritime Affairs Authority (EMAA), June 5, 2017
have long time records in international maritime affairs engagements.\textsuperscript{143} Despite these efforts, however, the country has been facing challenges in the maritime transport service sector. This chapter deals with the main challenges faced by the sector which are likely replicable to other developing LLSs. Particularly, it deals with possible challenges that shipping industries from Ethiopia or other developing LLSs may face as consequences of some aspects of the EU maritime policy.

5.2. The Main Challenges of Maritime Service Sector in Ethiopia

5.2.1. International Maritime Transport and Logistics Service Costs

According to the UNACTAD, developing countries particularly in Africa and Oceania pay on average 40 to 70 percent more for international transport of their imports than developed countries.\textsuperscript{144} The primary victim of the costs must be developing landlocked countries due to, \textit{inter alia}, huge transit related costs as discussed in chapter three.

Ethiopia spends more than two million USD per a day for transit related costs alone. The Country expends about 30\% of its GDP for logistics and transit related costs.\textsuperscript{145} In order to reduce these costs and to save time wastages in relation to trade across borders, Ethiopian government took measures like expansion of dry ports\textsuperscript{146} and introduction of a multimodal transport system.\textsuperscript{147} However, the country is ranked 167\textsuperscript{th} in the world for trading across borders according to the 2017 World Bank ease of doing business report.\textsuperscript{148} According to this report,\

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\item\textsuperscript{143} In fact, there are also several other LLSs that are actively involved in the international shipping services such as: Azerbaijan, Bolivia, Kazakhstan, Laos, Luxemburg, Moldova, Mongolia, Paraguay, Slovakia, Switzerland and Turkmenistan. Further detail explanations on LLSs participation in the international maritime services are available in, Tuerk, ‘’Forgotten Rights? Landlocked States and the Law of the Sea,’’ 339
\item\textsuperscript{145} Interview with Ato Mekonnen Abera, Director, Ethiopia Maritime Affairs Authority, June 5, 2017.
\item\textsuperscript{146} Currently there are seven dry ports in Ethiopia. These are: Mojo, Combolcha, Semera, Mekele, Kality, Diredawa and Gelan.
\item\textsuperscript{147} The multimodal system of transport was introduced by the Multimodal Transport of Goods Proclamation No. 548/2007. See also the 2012 Ethiopian Ministry of Transport Directives on Multimodal Transport of Goods.
\item\textsuperscript{148} The World Bank, ‘’Doing Business 2017: Country Profile Ethiopia’’, \textit{A Word Bank Group Flagship Report, 14\textsuperscript{th} ed. (2017) PP.76-80 Available at http://www.doingbusiness.org/~media/wbg/doingbusiness/documents/profiles/country/eth.pdf}
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Ethiopia preforms worse than Sub-Saharan regional average performance in terms of saving transport time and reducing transport costs for her imports.  

Part of the problem, as a study found, is caused due to a high freight rate that importers pay for the carriage of goods through the State’s monopolistic shipping lines (ESLSE). Ato Mekonnen Abera, Director EMAA, says that the freight rate escalation on importers is no more a big problem as the Authority scrutinizes the rates set by the ESLSE. Ato Eyasu Yimam, Commercial Department Director of the ESLSE, says that the freight rates increment connected with costs of operation. Eyasu says, ‘‘we substantially focus on imports to Ethiopia as the country’s exports are very less and hence there are lots of occasions that we sail with an empty ship relaying on cargoes to be imported.’’

In fact, the country’s exports are not reserved for the national carrier (ESLSE). This gives exporters opportunity to look for and choose lower freight rates from international shipping markets. Whereas, all imports to Ethiopia with few exceptions and exemptions, are reserved for the ESLSE. This gives the ESLSE not only an opportunity to enjoy monopoly over carriage of the country’s imports including fixing freight rates but also a chance to stay alive in the international shipping platform as discussed below.

5.2.2. International Competition, Escalating Port States Controls and Coastal States Power and Implications: An Emphasis on the EU

Eyasu Yimam, former ship operation and chartering manager of Ethiopian Shipping Lines (ESL) and currently, director of Commercial Department of ESLSE, says that in 1980s and early 1990s, ESL used to operate international shipping service to and from Europe. But since 1990s, the ESL/ESLSE has stopped direct operation to Europe and shifted to China, Korea, Japan, Gulf and Indian sub-continent, Singapore, South Africa and Indonesia. In fact, 1990’s was coincides with

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149 Ibid, 80.
151 Interview with Mekonnen Abera, June 4, 2017.
152 Interview with Ato Eyasu Yimam, Commercial Department Director of the ESLSE, February 2, 2017.
153 See the 2008 Ethiopia National Bank (NBE) Directives and the 2012 Ministry of Transport Directives of Multimodal Transport (FOB Directive). In the former directive, NBE set a precondition condition for all commercial importers to use the ESLSE in order to get a letter of credit (LC) any bank in Ethiopia on which almost all importers depend. The later directive prescribes commercial importers that use ESLSE have to buy goods using a FOB term.
154 Interview with Eyasu Yimam, February 2, 2017
the time when European Commission expanded a common policy for safe seas which resulted in the adoption of many new EU regulations by the EU Parliament and the Council from 1993 till 1999.\footnote{See Philippe Boisson, “Development, impact and consequences of the EU maritime safety policy on maritime activities. A challenging time for the shipping industry”, 1} Only in few circumstances the ESLSE uses vessels charted from major global carries like Maersk, ALP and MSC, especially to Turkey and Ukraine. The main reasons pointed out by Eyasu are: high cost of operation, less availability of import cargoes as compared to countries the company shifted to and strict port requirements and controls. He says “European ports are so expensive, Suez canal costs are very high, the EU controls are unreasonably strict and their required standards for a ship are very high. Given our transit related costs and our economic position, even we are not able to afford the IMO’s standards let alone the EU’s.”\footnote{ibid}

Zenebe Asefa, Technical Department Director of ESLSE says, “our current ships fulfill basic IMO’s safety and environmental standards but EU usually requires more. For example the EU requires vessels to use fuel with sulfur content very lower than the Imo requirement which is so expensive. Generally, a small technical fault is sufficient for prohibition of entrance to EU waters or ports particularly when they target your fleets.”\footnote{Interview with Zenebe Asefa, Director, Technical Department of the ESLSE, Feb 5, 2017.}

On the other hand, Captain Getinet Abay, who has served in ESL/ESLSE for more than 20 years as a captain argues that EU’s strict PSC or requirements are not main reasons for the ESLSE’s shifting to Far East, Middle East or Indian sub-continent rather cargo volume and trends are the main factors.\footnote{Interview with Captain Getnet Abay, July 4, 2017.} “There is better cargo volume in china than Europe not only for our vessels but also for vessels of global major carriers.

Mekonnen Abera, director of EMAA, says “the main reason for ESLSE’s survival in international shipping market is commitment of Ethiopian government thereby offering protection to it through the FOB directives.”\footnote{Interview with Mekonnen Abera, June 4, 2017.} The FBO directive preserves all commercial imports with few exemptions to the ESLSE.\footnote{See the 2008 Ethiopia National Bank Directives and the 2012 Ministry of Transport Directives of Multimodal Transport (FOB Directive).} According to Mekonnen, one of the main potential challenges for Ethiopian shipping industry is tough global competition as the protection...
could not stay forever. In fact, existing studies have already shown that such protection had resulted in inefficiency and impacted importers.\textsuperscript{161}

Captain Getinet says that there are global trends that PSC from developed States including the EU’s are getting stricter and unaffordable for small landlocked States from time to time on matters related to safety, security and environment. For this matter, Getnet says even controls and inspections from developing ports States are getting worse due to their port officials want to get bribery or corruption.

Even though the EU’s effective mechanism of implementations of IMO rules thereby transposing to its legislations can be considered as beneficial for attainment of international safety, security and environmental protection, some aspects of it could be harmful for small countries interested in international shipping. Among others, the EU’s exercise of port or coastal State jurisdiction that could make maritime trade unaffordable for developing LLSs is implemented in three ways:

I. By setting more strict standards than international standards
II. Implementing international standards ahead of timelines set for the implementations of the rules
III. Serving as a major driving force for timely tightening of the IMO standards.

To give a particular example for each case, let’s take the IMO rules under MARPOL convention revised annex VI and the most recent EU directive 2016/802/EU (Sulfur directive). The current IMO regulation limit for sulfur content of fuel oil used by ships is 3.50$\%$m/m\textsuperscript{162} whereas the sulfur limit for ships at berth in the EU ports is 0.1$\%$m/m and in ‘’EU’s territorial seas, exclusive economic zones and pollution control zones falling outside SO\textsubscript{x} Emission Control Areas for passenger ships operating on regular services to or from any Union port’’ is 1.5$\%$m/m.\textsuperscript{163}

The second situation is when the EU implements international rules ahead of the timeline set therein. For example, EU declared phasing out of a single hull tanker ahead of the IMO deadline, in addition, the deadline for 3.50$\%$ sulfur content limit in the case of the IMO is January 1, 2020 whereas the EU’s deadline was 18 June 2014. Moreover, currently the IMO has been conducting

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\item \textsuperscript{161} Tilahun Esmael Kassahun, ‘’Trade Facilitation in Ethiopia: The Role of WTO Accession in Domestic Reform’’, 171.
\item \textsuperscript{162} See revised MARPOL annex VI regulation 14 (1)
\item \textsuperscript{163} See, Article 7 (1) and 6(5) of the EU sulfur directive 2016/802/EU respectively. Note that: price of fuel oil with a low sulfur content is so expensive.
\end{itemize}
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preparatory works to regulate green gas emission cap from ships while the EU had already adopted a regulation in 2015.\textsuperscript{164} This shows that the EU, in the IMO regulatory system, is not only reactive but also proactive. In light of this, it can also be deduced the EU’s behavior of driving the IMO to its way. The fact of all EU members speak with one voice and take coordinated actions helped the EU to push the IMO to increase strictness of safety, security and environmental standards.

Finally, from the above legal analysis and empirical evidences from Ethiopia, it is submitted that escalating exercises of port or coastal States jurisdictional power, \textit{inter alia}, the EU’s trends of port or coastal State jurisdictional exercise or control have negative implications for developing LLSs’. Particularly, the EU maritime measures such as: setting more strict standards than international standards, implementing the international standards ahead of the timeline set therein, and influencing the IMO to elevate international standards are capable of making participation of developing LLSs in the international shipping service unaffordable. For instance, it has already become unaffordable for Ethiopian shipping industry to undertake direct operation of international shipping to and from EU.

\textsuperscript{164} See the EU Regulation 2015/757/EU
6. Conclusion

After making analysis of legal and empirical evidence, the EU maritime policy, *inter alia*, its port State control regime could make international maritime trade through its waters impossible for developing LLSs. Particularly, the EU’s regulatory actions like: setting more strict standards than international standards to foreign ships operating in its waters or visiting its ports, and implementing the international standards ahead of timelines set for the implementations may, in absence of special treatment schemes, hamper the interest of the developing LLSs to trade through the EU waters. In this regard, the developing LLSs which have already overwhelmed by economic and transit related problems could not afford the escalating standards. And ultimately, they might withdraw from trading through the EU waters as it is evident from Ethiopian case.

In addition, it is argued that increasing EU’s port State controls may give rise to more port States controls from other major global port or coastal States. This might happen due to the fact that international maritime trade, *inter alia*, determined by the bargaining position of the actors. The bargaining position of States is determined by economic, diplomatic and geo-political position of the States. But developing LLSs cannot be in these positions because they do not have ports or sea coasts and have the lowest bargaining position in international maritime field. This in effect might, in absence of preferential or differential treatment, frustrate the developing LLSs and affect their engagement in international maritime transport service. This ultimately may result in a complete withdrawal of these States from maritime arena.

Moreover, the EU, by using its coordinated power, experience in maritime field and expertise catalyzing or driving the IMO to progressively raise safety, security and environmental protection standards. This, in absence of a preferential treatment scheme, could make the international shipping standards unaffordable to developing LLSs.

Furthermore, the EU regulations, *inter alia*, regulations on freedom to provide service and coordinated action to safeguard free access of ocean cargos are designed to apply on any third country including small States. The regulations may subject developing LLSs that due to their special needs, reserve cargoes to national shipping industry or otherwise protect the industry. Hence, it is submitted that the EU need to rethink its regulations thereby targeting on the EU equivalent third competitive States or otherwise devise some kind of special or differential treatment scheme to small countries. Otherwise, it is argued that would impact small LLSs that
have the lowest bargaining power in global maritime market due to transit related challenges and economic capacity related problems.

Finally, it is suggested that recognizing inherent problems of developing LLSs’ and economic interest of these States in maritime field, both international maritime regulations and EU maritime policy and regulations should have differential treatment schemes for the developing LLSs. Particularly, maritime environmental protection related regulations should consider the fact that these States affected much but contributed little to the pollutions and accord differential treatment scheme for these States. By according incentive schemes for these States in maritime field, it is possible to bring about global sustainable development given economic importance of seas and oceans.
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3. **International Legal Instruments**


The 1923 Convention on the International Regime of Marine Ports


The 1966 International Convention on Load Lines,

The 1972 Convention on the International Regulations for Preventing Collusions at Sea (as amended)

The International Convention for the Safety of Life at Sea as amended and it’s Protocol of 1978 (SOLAS)
International Convention on the prevention of Pollution from Ships 1973/78 (MARPOL)

International Convention on Standards of Training, Certification and Watch keeping for Seafarers, 1978 as amended (STCW)

International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER, 2001)


International Convention on the Control of Harmful Anti-fouling Systems on Ships (2001)


International Convention on Tonnage Measurement of Ships, 1969

4. **EU Legislations, Policy Documents and Reports**


Council of European Union Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods

Council of European Union Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries. OJ (1986) L 378


Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries. OJ (1986) L 378


5. **Case Laws**

Commission V. Council (1971) ECR, Case no. 22/70, 263

Commission v. Greece (2009) ECJ

Necaragua V. USA (1986), I.C.J. 14

Turkey v. Iraq (1925)

6. **Ethiopian Legislations**

Ethiopia Maritime Sector Administration Proclamation No. 549/2007


Ethiopia Council of Ministers Regulation No.37/1998
