Port state control: a contemporary legal study

John W. Stewart
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PORT STATE CONTROL: A CONTEMPORARY LEGAL STUDY

by

John W. Stewart, Jr.

A paper submitted to the Faculty of the World Maritime University in partial satisfaction of the requirements for the award of a

MASTER OF SCIENCE DEGREE in GENERAL MARITIME ADMINISTRATION

The contents of this paper reflect my personal views and are not necessarily endorsed by the University.

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DEDICATION

To all those who lost their lives in the Liberian Civil War: "You'll Never Walk Alone."
ACKNOWLEDGEMENTS

In the course of writing this paper I found it necessary to make some difficult demands and unusual requests on so many of my family, friends and professional acquaintances, now I take this small, but warm hearted space to say thanks. To my Mother, Mrs. Casselia Liles Stewart, who has always been there through all my academic endeavors, providing all the support she could possibly give, and which she so willingly and selflessly gave, I say, thank you Mommie. To Claud, Catherine, Mawei, Oveda, Shirley, and Ruth, thanks for not disowning me when I didn’t pay attention.

To Vera, Thanks so much for all your love, understanding, and help with the typing. I hope you can forgive all those sleepless nights.

I also take this opportunity to thank Mr. Henk Hubers, and the other members of the MOU Secretariat for taking time out of their busy schedule to grant the interviews and provide materials which were of great help. In addition, I would like to thank from the US Coast Guard, Cmdr. John Parmentier, Lt. Cmdr. Larry Brooks, and all the other officers who were so graciously interviewed for many hours.

To Hon. George B. Cooper, thanks for all the guidance. Also, my thanks go to Cpt. Chadwick for providing me with the information and materials for the Liberian vessel port state control inspection follow up exercise.

To Jerry Smith and the Liberian Shipowners Council, thanks for providing the fellowship for me to study at the World Maritime University, and for all the help and materials.

To my Course Professor, thanks for all your guidance, patience and understanding, not only in this work, but throughout my stay at WMU. It has been a worthwhile experience, and I shall cherish it for a lifetime. Thanks to Dr. Frank Wiswall who co-assessed this paper and provided some of the direction for it.

There are so many others who were extremely helpful in providing valuable advice and information and eventhough they have not been named, their help is greatly appreciated.

Finally, I thank the Almighty for giving life and for sparing it. We are told not to ask why, but to be thankful in all circumstances, therefore, thank you.

J.W.S.

Malmo
Abstract

Port State Control is the enforcement by port states of accepted international rules governing the safety of navigation of vessels, safety of life and property at sea, and marine pollution prevention. This study will trace the historical development of the concept of port state control, its enforcement in Europe and the United States, legal issues arising from its enforcement, as well as its impact on open registries. This study will also discuss the future trends in port state control and will propose the regionalization of its enforcement under the auspices of the International Maritime Organization.
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CHAPTER I

INTRODUCTION

In the 1960's and seventies world shipping underwent a period of near unlimited growth. New maritime nations emerged and existing ones grew. Tonnage shifted between hemispheres and when all this activity finally settled a number of side effects were left. One of the most damaging side effects of this spur of activity in the shipping industry was that of marine pollution and marine casualties involving loss of life. Numerous international conventions dictating the responsibilities of flag states in maritime law applications were in force. However, these conventions had not tackled the problems of marine pollution and safety of life adequately.

The development of the concept of port state control occurred at the time when world shipping, particularly the oil transport trade was at its lowest social regard. This study will trace the historical development of port state control, identify current applications and problems, and propose the regionalization of Port State Control enforcement under the auspices of the IMO.

A. The Historical Development of Port State Control.

In 1967, the world was shocked when the TORREY CANYON spilled 100,000 tons of oil into the sea. The world governments came together and two years later in 1969, signed the International Convention on Civil Liability For Oil Pollution Damage. This Convention only sought to make amends for disasters, not to correct them. Consequently, on March 17, 1978, the world was shocked again when the 223,680 DWT AMOCO CADIZ spilled 230,000 tons of oil off the coast of

Brittany, thereby polluting some 400 kilometers of coastline.²

The total economic loss as a result of the AMOCO CADIZ disaster was estimated at about 290 million US Dollars in 1978. This amount is divided into several parts: (a) the loss of the vessel and cargo, loss of recreational amenities, legal and research costs, and damage to human health; (b) emergency response, cleanup and environmental restoration costs, loss of non-commercial bio-mass and seabirds, loss of income for tourist industry, loss of personal property, etc and (c) reduced income for local government. secondary effects of reduced outputs in various industries, and compensation paid by the national government to claiments for costs and loses incurred. ³ There is no doubt that such massive spills have an even greater impact on the entire world. Consequently, it is not surprising to see remedial action taken by world bodies, such as the IMO, to avert subsequent occurrences in the future.

Another most damaging side effect of the flurry of activity in the industry regards loss of life at sea. Loss of life has always been a concern in shipping. This is quantified by the fact that governments signed an International Convention on Safety of Life at Sea as far back as 1948. The problem of loss of life or safety of life in general is one deeply rooted in the maritime tradition of all established maritime nations. It is a problem which has always cut across flags and, as a result all maritime nations have to bear some responsibility for alleviating this problem. But in order to take action, the scope of the problem must be first identified.

³ Metaxis, at 98-99.
B. The Concept of the Substandard Ship.

The maritime industry, like most others, is not a homogeneous socially responsible industry. It is a diverse and capital intensive, profit oriented industry, which means, the highest priority has been given to making a profit at some risk. Ships of varying ages and sizes are maintained according to different standards by very different owners and operators. Even the national legislations of the over one hundred flag states often vary widely in terms of interpretation and enforcement of safety standards. In the last few years, much effort has been put into enforcing international regulations regarding construction, equipment and manning standards in the fight against oil pollution damage and safety of life.

The failure of ships to meet required safety standards render the ship substandard. Substandardness can sometimes be construed in terms of seaworthiness. In maritime law, seaworthiness has been defined as the "degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it." Basically, a ship must be in good repair as to hull, tackle and machinery and sufficiently fueled, ballasted and manned by efficient crew. To achieve this end, several internationally recognized minimum standards have been developed and enforced by various maritime states through conventions and special agreements to achieve global uniformity. A ship is substandard if it fails to meet these minimum standards.

The term "substandard ship" should not be confused with "open registry" or "flag of convenience" ship because the flag does not make the ship. Some studies have been

4 Lowe, A. V., A Move Against Substandard Shipping. 6 Marine Policy 326 (Oct 1982).

5 McFadden v. Blue Star Line, 1 K.B. 697 (1905), at 706.

conducted on identifying potential polluters and criteria such as flag, age and size have been used in the analysis. Of the three, the most commonly connected criteria is that of the flag. Unfortunately, the flag is the variable factor in the interpretation of the statistical information derived. The reason is simple. Vessels do not necessarily remain in the same register throughout their service life. If in any significant percentage of the cases, the culprit or culprits change flag, this would obstruct the accuracy of the information. The size of the vessel though a constant, can be misleading as well. A poorly managed VLCC is probably just as likely to cause marine pollution as a poorly maintained feeder tanker. The difference lies in the potential extent of the pollution damage that could be caused. The age of a vessel, also a constant, is by far the singularly most accurate measure of any likelihood of pollution. Old ships, like any old piece of machinery require constant and careful maintenance in order to perform properly. The older the vessel, the more accident prone it is. This does not go to say new vessels do not cause pollution damage. Indeed some of the major oil spills in the last few years have been caused by relatively new tankers. This is usually due to human error.

As was stated earlier, one of the criteria for seaworthiness is proper manning. A duly qualified crew is essential for the safe navigation of any vessel. In those casualties involving human error, the judgment calls of the master or others immediately responsible simply turned out to be erroneous. If the crew is unqualified with regard to all the circumstances of the voyage the ship is substandard. However, it cannot be concluded that a ship is made substandard by the wrong judgment of the master or crew. It must follow then, that in cases like the AMOCO CADIZ and EXXON VALDEZ the issue is not that of substandard but rather variable of function.


8 The AMOCO CADIZ was a five year tanker at the time of its loss. The EXXON VALDEZ was two years old.
Table 1

Mean fleet age for selected flags 1984.

<table>
<thead>
<tr>
<th>Flag</th>
<th>Brazil</th>
<th>France</th>
<th>Norway</th>
<th>Denmark</th>
<th>Germany</th>
<th>Sweden</th>
<th>Spain</th>
<th>Liberia</th>
<th>World</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean age</td>
<td>9.0</td>
<td>9.3</td>
<td>7.4</td>
<td>8.0</td>
<td>6.4</td>
<td>8.1</td>
<td>9.3</td>
<td>9.8</td>
<td>12.1</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Year</th>
<th>Mean age</th>
<th>Year</th>
<th>Mean age</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>16.3</td>
<td>1981</td>
<td>18.6</td>
</tr>
<tr>
<td>1976</td>
<td>18.5</td>
<td>1982</td>
<td>18.5</td>
</tr>
<tr>
<td>1977</td>
<td>20.0</td>
<td>1983</td>
<td>18.4</td>
</tr>
<tr>
<td>1978</td>
<td>19.4</td>
<td>1984</td>
<td>18.3</td>
</tr>
<tr>
<td>1979</td>
<td>19.3</td>
<td>1985</td>
<td>18.4</td>
</tr>
<tr>
<td>1980</td>
<td>18.6</td>
<td>1986</td>
<td>n.a.</td>
</tr>
</tbody>
</table>
In any event, statistics have shown that there are thousands of vessels plying the high seas which are either substandard or have potentially serious deficiencies which would render the vessels substandard. The effort to eliminate substandard ships has taken several forms. There are individual remedial and punitive actions, as well as collective actions in the form of conventions and port state control cooperative efforts. Both systems will be analyzed infra.

The elimination of substandard ships is a desirable goal for everyone, but the enforcement of the new minimum standards is not very easy. Ordinarily, responsibility for enforcing the rules lie with the flag state. However, it is often near impossible for the flag state to fully ensure that all its vessels comply with the international standards. Open registries have often been singled out in this regard because most vessels flying the flag of these states rarely call at the home port. The more accurate explanation is that most registries with large viable fleets have ships which will not call at the home port. Thus, the problem with enforcement of standards does not lie in a lack of a genuine link or inadequate inspectorate, it lies in the ever changing movement pattern of ships. No inspectorate, however large and efficient can fully enforce standards. This is evidenced by the loss ratio of the Paris Memorandum of Understanding member states, which was worse than the world's average for 1986. This analysis is not meant to defend open registries with less than admirable safety standards. It is an attempt to focus on the non-political, non-economic, non-antagonistic factors surrounding sub standard ships, and the need to eliminate them.

In Europe, three pivotal groups, shipowners, politicians and the electorate recognized the need to eliminate substandard ships from European ports. These

9 See Appendix V (iii).
10 Lowe, at 326.
11 Ibid.
Table II
Changes in loss rate for each member state pre/post 31/12/1982.

<table>
<thead>
<tr>
<th>Member state</th>
<th>Loss rate 1968-82</th>
<th>Loss rate 1983-86</th>
<th>Absolute change</th>
<th>Relative change (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>B</td>
<td>0.04</td>
<td>0.00</td>
<td>-0.04</td>
<td>-100</td>
</tr>
<tr>
<td>DK</td>
<td>0.16</td>
<td>0.03</td>
<td>-0.13</td>
<td>-81</td>
</tr>
<tr>
<td>SF</td>
<td>0.19</td>
<td>0.06</td>
<td>-0.13</td>
<td>-68</td>
</tr>
<tr>
<td>F</td>
<td>0.10</td>
<td>0.03</td>
<td>-0.07</td>
<td>-70</td>
</tr>
<tr>
<td>D</td>
<td>0.12</td>
<td>0.06</td>
<td>-0.06</td>
<td>-50</td>
</tr>
<tr>
<td>GR</td>
<td>0.98</td>
<td>1.11</td>
<td>+0.13</td>
<td>+13</td>
</tr>
<tr>
<td>IRL</td>
<td>0.17</td>
<td>0.01</td>
<td>-0.16</td>
<td>-94</td>
</tr>
<tr>
<td>I</td>
<td>0.30</td>
<td>0.11</td>
<td>-0.19</td>
<td>-63</td>
</tr>
<tr>
<td>NL</td>
<td>0.21</td>
<td>0.05</td>
<td>-0.16</td>
<td>-76</td>
</tr>
<tr>
<td>N</td>
<td>0.14</td>
<td>0.21</td>
<td>+0.07</td>
<td>+50</td>
</tr>
<tr>
<td>P</td>
<td>0.28</td>
<td>0.02</td>
<td>-0.26</td>
<td>-93</td>
</tr>
<tr>
<td>E</td>
<td>0.46</td>
<td>1.12</td>
<td>+0.66</td>
<td>+143</td>
</tr>
<tr>
<td>S</td>
<td>0.10</td>
<td>0.01</td>
<td>-0.09</td>
<td>-90</td>
</tr>
<tr>
<td>GB</td>
<td>0.11</td>
<td>0.27</td>
<td>+0.16</td>
<td>+145</td>
</tr>
</tbody>
</table>

The data were obtained from Lloyd's Statistical Tables and Lloyd's Annual Casualty Returns for the years 1968-1985; Monthly Shipping Statistics, May 1987 for the year 1986 [51].

Table 18. Loss rates for all member states 1968-1986.

<table>
<thead>
<tr>
<th>Year</th>
<th>GRT lost (1000)</th>
<th>GRT registered (1000)</th>
<th>GRT lost x 100 GRT registered</th>
</tr>
</thead>
<tbody>
<tr>
<td>1968</td>
<td>263,391</td>
<td>86,943</td>
<td>0.30</td>
</tr>
<tr>
<td>1969</td>
<td>382,044</td>
<td>92,311</td>
<td>0.41</td>
</tr>
<tr>
<td>1970</td>
<td>213,831</td>
<td>98,123</td>
<td>0.22</td>
</tr>
<tr>
<td>1971</td>
<td>429,279</td>
<td>107,231</td>
<td>0.40</td>
</tr>
<tr>
<td>1972</td>
<td>201,145</td>
<td>114,357</td>
<td>0.18</td>
</tr>
<tr>
<td>1973</td>
<td>246,780</td>
<td>121,765</td>
<td>0.20</td>
</tr>
<tr>
<td>1974</td>
<td>314,969</td>
<td>129,617</td>
<td>0.24</td>
</tr>
<tr>
<td>1975</td>
<td>300,002</td>
<td>139,098</td>
<td>0.22</td>
</tr>
<tr>
<td>1976</td>
<td>229,644</td>
<td>147,373</td>
<td>0.16</td>
</tr>
<tr>
<td>1977</td>
<td>307,659</td>
<td>151,655</td>
<td>0.20</td>
</tr>
<tr>
<td>1978</td>
<td>905,175</td>
<td>154,965</td>
<td>0.58</td>
</tr>
<tr>
<td>1979</td>
<td>696,932</td>
<td>149,237</td>
<td>0.47</td>
</tr>
<tr>
<td>1980</td>
<td>667,356</td>
<td>149,147</td>
<td>0.45</td>
</tr>
<tr>
<td>1981</td>
<td>521,176</td>
<td>147,593</td>
<td>0.35</td>
</tr>
<tr>
<td>1982</td>
<td>450,801</td>
<td>142,070</td>
<td>0.32</td>
</tr>
<tr>
<td>1983</td>
<td>608,720</td>
<td>129,815</td>
<td>0.47</td>
</tr>
<tr>
<td>1984</td>
<td>677,153</td>
<td>115,447</td>
<td>0.59</td>
</tr>
<tr>
<td>1985</td>
<td>375,159</td>
<td>98,010</td>
<td>0.38</td>
</tr>
<tr>
<td>1986</td>
<td>416,100</td>
<td>90,717</td>
<td>0.46</td>
</tr>
</tbody>
</table>

N.B. For the years 1968-1973 and 1976-1980 inclusive, no loss data were available for IRL. Therefore GRT lost and GRT registered for these years are exclusive of IRL. The data have been obtained from Lloyd's Statistical Tables and Lloyd's Annual Casualty Returns for the years 1968-1985; Monthly Shipping Statistics, May 1987 for the year 1986.
groups recognized that a collective effort was needed in view of the above consideration and identified the following motivating factors for immediate implementation:

(a) economic pressure on the European shipping community from more efficient or cheaper competitors;

(b) growing awareness of the detrimental economic and political effects of environmental pollution in industrialized countries of Europe;

(c) globalization of commerce and industry, which has intensified and thus forced politics to internationalize too. ¹²

An independent assessment of the above factors lead to some rather interesting hypotheses regarding the lucid movement by the European states toward a concerted effort to enforce international safety standards. The economic pressure on the European shipping community can be attributed to the comparative cost advantage of flagging out, over tonnaging and protectionism.¹³ The comparative advantage of flagging out lies in the lower crew costs and minimal or no taxation and minimum regulation. It is now well documented that crew from third world countries such as the Philippines and Ghana cost far less than crew from Western European countries, both in terms of actual wages and benefits. The most attractive aspect of such crew lies in the strength of labor organizations. Labor unions in the west are more organized and can pool greater collective bargaining strength than their third world counterparts. Flagging out gives the shipowner the opportunity to slash his operating costs and avoid confrontation with powerful unions at the same time. Similarly, by flagging out the owner can avoid high taxes and undue commercial regulation

¹² Tintz, at 191.

virtually all aspects of shipping, particularly safety. The lack of serious competition for many years has led to a complacency in European shipping. Suddenly faced with a major crisis, the European shipowners, unlike the market oriented Americans, failed to see that shipping today is not so much about "cost-efficiency without sacrificing safety or quality" but rather "the ability to manage, market and finance" that will determine whether a company can survive this market. 14

Another burden faced by the European shipowners was the "greening" of Europe. Following numerous incidents of environmental pollution, both land and sea-based, industries in Europe became increasingly aware of the detrimental economic and political effects of environmental pollution. Green organizations launched impressive anti-pollution campaigns, states passed numerous anti-pollution legislations and the electorate preferred environmentally conscious candidates for political office. One of the industries hit hard by this new anti-pollution fervor was the shipping industry. Shipowners were forced, by new safety regulations to employ expensive safety and anti-pollution measures which drove their operation costs higher. As indicated earlier, human error accounts for a majority of the large scale marine pollution; here too, technical solutions were found to correct human error.

The third motivation for implementing port state control was the intensification of globalized commerce and industry, and the resulting internationalization of politics. Here again, the European shipowner was ill-prepared to tackle new rules of the trade. European Governments were first to recognize this new trend and went ahead to forge new relationships. What was lacking was innovative ways to reconstruct national structures to effectively compete in the new global market. This was most

14 Wilhemsen, W., Is There a Future for the European Shipowner—Yes and No, Money and Ships in the City, Seatrade Conference, Barbican Centre, March 20-22, 1985, at 16.
In Europe, the need to eliminate substandard ships was recognized and such effort was marked for success at the outset. Although the need was clear and concerted action was necessary, the motivating factors which eventually spurred this action were misguided. The revival of shipping in Europe would not entirely rest on uniformity of rules or applications. European competitors need to reassess their relative position in the market and work toward improving their competitive edge. The application of technical requirements on shipowners is necessary in so far as the underlying reasons relate solely to the safety of life and property at sea and marine pollution prevention, and not commercial or political gains.

Substandard ships are still a major concern in the global market because the potential harm of such ships nearly always have far-reaching consequences. The efforts to eliminate them have taken the right direction, in that national governments are taking the initiative, both collectively and unilaterally, to identify such ships, and restrict their movements in port states within the scope of the relevant international conventions and IMO regulations.

15 Liang, M. H., Hong Kong Shipowners—Past, Present and Future, Money and Ships in the City, Seatrade Conference, Barbican Centre, March 20-22, 1985, at 64.
A. The Nationality of Ships.

As early as 1905 the question of what determines the nationality of a ship was settled. In the Muscat Dhows case the Permanent Court of Arbitration at the Hague held that the ship's flag and registry, not its ownership, determined the nationality of the ship.\(^\text{1}\) In that case sailing dhows owned by the sultan of Muscat but flying the French flag were held entitled to do so even though Muscat was at the time a British protectorate.\(^\text{2}\) This holding reinforced a practice dating back to the 19th century or earlier.\(^\text{3}\)

Today, it is a common principle of international law that states have the exclusive right to grant nationality. International law\(^\text{4}\) also requires that ships on the high seas possess a national character and the criteria by which national character is conferred is a matter of domestic law. In \textit{Lauritzen v. Larsen}, the U.S. Supreme Court held, "each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it."\(^\text{4}\) The ship's flag and registration papers are evidence of its nationality.\(^\text{5}\)

\(^{1}\) The \textit{MUSCAT DHOWS}, Hague Court Reports 93 (1916).

\(^{2}\) Ibid.


\(^{4}\) 345 U.S. 571 (1953).

\(^{5}\) Ibid.
Although the unilateral grant of nationality is in the category of the political "act of state" doctrine, thus requiring recognition by other states, the practice is often criticized in so far as the use of open registries or flags of convenience is concerned. The debate centers around whether the act of registration denotes the grant of nationality or whether there need be a meaningful or "genuine link" between the ship and the flag. Originally proposed by the International Law Commission, this vague undeterminable concept has found its way into Article 5 of the Convention on the High Seas, 1958, which entered into force on September 30, 1962, as well as the United Nations Convention on the Law of the Sea, 1982 and the United Nations Convention on Conditions for the Registration of Vessels, 1986, neither of which has entered into force.

The roots of the genuine link doctrine can be traced to the Nottebohm case, in which the International Court of Justice upheld the decision by the Government of Guatemala to decline recognition of Liechtenstein's claim of diplomatic immunity for its national, Freidrich Nottebohm on the grounds that Nottebohm's naturalization was fraudulantly obtained and he had no genuine connection with Liechtenstein since he lived in Guatemala for thirty four years and had not disavowed his German citizenship. In cases involving dual nationality, preference is given to the real and effective nationality relying on the criteria of the Nottebohm case. However, the transfer of the ratio decidendi of the Nottebohm case to that of the grant of national character to ships is suspect. Guatemala's

7 Ibid.
8 Ibid., at 59.
underlying defense that case was Nottebohm’s fraudulent acquisition of Liechtenstein nationality whilst retaining his German nationality. In the general case of the grant of national character to ships states have the same exclusive right to determine the relevant criteria as they have in relation to the grant of citizenship to persons. It follows, then, that in exercising their sovereign rights to grant nationality, the satisfaction of the established domestic criteria entitles recognition by other states. But the Convention on the High Seas states:

There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.\(^ \text{11} \)

The lack of a clear definition of the genuine link has led to serious disagreements among scholars. Professor Myres McDougal has been quoted as saying that the only purposes served by the genuine link concept "are those of disruption, controversy and anarchy", on the other hand Professor Boczek believes the problem lies in Article 5 of the Convention since it does not consider the issue of beneficial ownership.\(^ \text{12} \) Notwithstanding, the practice of open registries and flags of convenience continue to flourish. This traditional approach to the grant of nationality to ships based on the act of state doctrine remains firmly entrenched in customary international law but the issue of the genuine link continues to loom over the legitimacy of the practice.\(^ \text{13} \)

\(^ {11} \) Convention on the High Seas, 1958 Article 5. Reproduced in McDougal and Burke 1153 et seq.


\(^ {13} \) Ibid., at 62.
B. Jurisdiction over ships.

The Convention on the High Seas declares in Article 6 that ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. This provision is a clear reaffirmation of the sovereignty of the sea principle embodied in customary international law. Previously, this sovereignty denoted an absolute political sovereignty comparable to that enjoyed by a state in regard to its territory. Today the principle has been redefined as a freedom to exercise jurisdiction to the exclusion of all other authorities, subject to national law or international law limitations, which is, in fact, a restriction or denial of absolute sovereignty. In the global over-extended political and commercial atmosphere of today's world, states are assuming more and more responsibility for occurrences leading to an interwinding of roles, rights and duties. The net result is a realization that absolute sovereignty is undesirable, and should be replaced by rules of application to effectively regulate the increasing "interdependence and ordered cooperation" among states.

The Convention recognizes the need to maintain the public order of the high seas and in Article 22 provides certain exceptions to the exclusive jurisdiction rule. This Article states that unless a treaty provides otherwise, a warship which encounters a merchant ship on the high seas may board the merchant ship if there are justifiable grounds for suspicion that the ship is engaged in piracy, slave trading or in reality belongs to the same nationality as the warship.

Piracy is defined by Article 15 of the Convention as illegal acts of violence, desertion or depredation committed

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15 Ibid.
16 Ibid.
by crew or passengers of a private ship for private gains against another ship on the high seas or outside the jurisdiction of any state, as well as cooperating with a pirate ship or aiding and inciting acts of piracy. Customary international further expounds on the types of acts which would constitute piracy but they will not be discussed here.

Slave trading which is an attack against human dignity has long been recognized as a crime against humanity and has been universally denounced in several international conventions. Therefore all states have an obligation under the authority of existing conventional law to suppress slave trading.

A third basis for intervening with foreign flag vessels on the high seas lies in the case of oil pollution damage or the threat thereof. The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, which entered into force on May 6, 1975, institutionalizes a claim made by some coastal states to interfere with foreign flag vessels on the high seas involved in casualties which could cause damage to their coaslines and private property.

Other than the above exceptions no other authority exists under customary international law to further restrict the sovereign exercise of jurisdiction by flag states over vessels flying their flag on the high seas. Where states find a necessity based on national security concerns to interfere with foreign flag vessels on the high seas the usual means of seeking legal exercise of jurisdiction is through bilateral agreements. A number of such agreements probably already exist and with the escalation of international criminal acts such as the international

17 McDougal and Burke, at 1157. References to aircraft are irrelevant here, thus they have been omitted.


19 McDougal and Burke, at 1086-87.
trafficking of drugs another exception to the sovereignty of the high seas rule is likely to take hold, not necessarily as a further development of customary international law but in the form of an internation convention.

C. Jurisdiction of Port States.

International law recognizes the right of port states and coastal states to exercise concurrent jurisdiction over foreign flag vessels in the territorial sea regarding events relating to matters affecting those states' interests. However as shall be discussed further infra, in the exercise of jurisdiction regarding the protection of those interests port states and coastal states impose environmental and safety obligations on foreign flag vessels entering their territorial waters and ports, thereby affecting either directly or indirectly the internal order of the ship's affairs.

The United Nations Convention on the Law of the seas (UNCLOS) codifies three categories of power already claimed by port states in the exercise of jurisdiction over foreign flag vessels in the territorial sea. These are the prevention of passage that is not innocent, the exercise of criminal jurisdiction over persons and events on board, and the enforcement of local environmental and safety regulations.

These three categories can easily be interrelated in that the states' interpretation of criminal activities which may render passage not innocent is broad. Similarly, the wilful discharge of pollutants into the territorial sea or exclusive economic zone may be construed to be a criminal act.

In the exercise of port state control, however, states have generally relied on the enforcement powers embodied in

20 Dempsey and Helling, at 64.


These Conventions ascribe certain standards for merchant ships and empowers port states to enforce the provisions on foreign flag vessels entering their ports. Although some state have in the past claimed certain rights of enforcement under customary international law, the legality of such actions has always been suspect. This is not to say that port states have never had any rights of enforcement under customary international law. For example, in the Wildenhus case the U.S. Supreme Court upheld a state court ruling that local authorities may exercise jurisdiction over events on board a vessel of such a grave nature or disorder to disturb the "tranquility and public order on shore or in the port." Similarly, in the case

22 In re Wildenhus, et al., 120 U.S. 1 (1887), at 18. In that case the Supreme Court rejected the claims of Belgium that local authorities in New Jersey had no authority to arrest a crew member who killed another crew member below deck of a Belgian vessel which was tied up at the New Jersey pier. The Court reasoned that the very nature of the act of murder disturbs the community's peace
of Compania de Navegacion Nacional (Panama) v. United States, the court allowed the arrest of a vessel which, on her prior visit to port incurred liabilities for a collision. The applicability of this case has since been limited by Article 20 of the Territorial Sea Convention, 1958, which permits arrest only in case of liability arising out of current visits to port or in the territorial waters of the port state.

D. International Conventions and IMO Resolutions adopting Port State Control.

The Convention on the Territorial Sea and Contiguous Zone, 1958 (TSC '58) is the first convention to clarify the ambiguities of customary international law regarding the jurisdiction of port states over foreign flag merchant vessels. The relevant provisions are Articles 14 to 20 on innocent passage, levy of fees, criminal and civil jurisdiction on persons and events on board. For the purposes of the exertion of civil jurisdiction, the provisions of Article 14.4 can be interpreted to include the enforcement of port state safety and environmental protection regulations. However, the broad interpretation of Article 14.4 can lead to several different applications of national law to persons and events on board vessels to whom the plain meaning of the Convention was not intended.

The above provisions, nevertheless have a place in the public order of the seas, and consequently, they were embodied into the United Nations Convention on the Law of the Sea, 1982 (UNCLOS). UNCLOS goes further in adopting innovative extensions of port state jurisdiction in safety of navigation and environmental protection matters. Article 21 gives port and coastal states the discretion to adopt

nature of the act of murder disturbs the community's peace and quiet, thus it was a disorder under international law.

23 6 R.I.A.A. 382 (1933).

24 Article 14.4 provides that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state."
Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collision at sea.

Article 21.2 is similarly written to require ships entering the territorial sea of port states to comply with "generally accepted international rules or standards. The Convention is clearly cognizant of the achievements of the maritime community in creating effective standards for the safety of life at sea and marine pollution prevention. In so far as marine pollution prevention is concerned, Articles 216, 218 and 220 give port states the jurisdiction to require foreign flag vessels to comply with international rules and standards and authorize port states to enforce these rules and standards, which include numerous safeguards to protect foreign vessels from undue burdens and to prevent the usurpation of flag state jurisdiction. Article 227 bars discrimination against foreign flag vessels and Article 231 requires the port state to promptly notify the flag state and other states of actions taken against foreign flag vessels. Article 225 gives the guidelines for the physical inspection of foreign flag vessels which include a prohibition on undue delay and facilitation of repairs or correction of deficiencies. These provisions indicate an intention towards the remedial, rather than penal application of safety and environmental protection rules and standards. UNCLOS recognizes the need for states to cooperate in achieving safe seas and a pollution free marine environment, but more importantly, though not yet in force, UNCLOS forms a new bedrock for the development of conventional international law regarding the rights, duties and relationships of flag states and port states in the ever expanding world of shipping. Additionally, UNCLOS puts a vital stamp of approval of the world community on the efforts of the maritime community to take responsibility for its activities, because the effects are felt by everyone on the globe.

Another convention on port state jurisdiction which was embodied into the UNCLOS was the 1969 Intervention
Another convention on port state jurisdiction which was embodied into the UNCLOS was the 1969 Intervention Convention. That convention extends the authority of port or coastal states to intervene on the high seas to protect their coastlines or other interests. Some states have long claimed this right as a further restriction on the sovereignty of flag states, but the emergence of this convention was the result of the TORREY CANYON disaster, which devastated the coastlines of France and Britain. The gravity of that disaster, at that time, led the maritime world to provide for the early intervention of threatened states in cases of maritime casualties on the high seas to avert a similar occurrence.

Other conventions which mandate the imposition of rules and standards enacted provisions giving port states the authority to apply the convention to vessels flying the flag of states not parties to those conventions include SOLAS '74 Chapter I Regulation 19, regarding the validity of certificates and corresponding equipment; MARPOL '73, '78 Articles V, and Articles IV and VI regarding port state control and operational control, STCW Article X Regulation I regarding licenses and minimum age, and Load Lines Article XXI. COLREGS and ILO 147 have been interpreted to authorize port state control administrative action although not expressly provided for. ILO 147 does, however, provide for the enforcement of the convention on non-party foreign vessels.

The UNCCORS 1986 makes only one minor reference to port states by recommending that ships carry proper documentation and make same available to port state authorities. The reason for this is said to be the result of a compromise between the Group of 77 countries and China on one hand, and the Group B countries on the other. The Group of 77 argued that port state control was only a temporary remedy or supplement to flag state control but could never

25 Article 6(4).
the flag state responsibility, and port state control did not "tackle the basic economic and social problems of open registry shipping perceived by the Group." Nevertheless, there were some references to port state control in the drafts and the Group B countries seized the opportunity to strengthen the wording of those drafts by insisting on the institutionalization of port state control. As a result, the above compromise was reached but all sides have criticized the Convention for failing to address fundamental issues regarding port state jurisdiction.

In addition to conventions the IMO Assembly has passed several resolutions involving port state control and cooperation between members regarding casualties and pollution prevention, the most important being Resolution A.466 (XII) 1981 on Procedures for the Control of Ships and Resolution A.542 (XIII) 1983 on Procedures for the Control of Ships and Discharges under Annex 1 of MARPOL 73,78. Resolution A.466 was the culmination of the work of the Maritime Safety Committee to develop a set of procedures to assist flag states in controlling ships which do not comply with the SOLAS and Load Lines Conventions. In reaffirming its commitment to maritime safety the resolution invites member governments and contracting governments to provide information on services available in each country for carrying out port state control and inform the IMO of action taken against ships found to be deficient. The procedures for control are detailed in the annex to the Resolution. Resolution A.542 (XIII) also invites member governments and contracting parties to implement the procedures as well as provide information on action taken in this respect. The Annex to Resolution A.542 details the technical requirements for compliance, including IOPP certificates and oil record books.

27 Ibid.
28 Ibid.
29 Ibid., at 566.
30 Resolutions A.466 (XII) and A.542 (XIII) are reproduced in Appendix I.
E. The "no more favorable treatment" Clause.

The legal basis for applying the provisions of the above conventions lie in the port states acceptance and enforcement of the convention as part of its national law. In each case the provisions for control or applicability gives the guidance for the exercise of jurisdiction. In some cases this guidance is quite clearly specified while in other cases it can only be found by interpretation. To avert the possibility of double standards, especially in the application of the provisions of the convention to ships of non-contracting states the concept of the "no more favorable treatment" wound its way into succeeding conventions. 

MARPOL '73 was the first to incorporate the clause which reads:

With respect to ships of non-parties to the convention, the parties shall apply the requirements of the convention as may be necessary to ensure that no more favorable treatment is given to such ships. (emphasis mine). Art. 6.

Similar clauses later found their way into the 1978 Protocol to SOLAS and the STCW. Today, the "no more favorable treatment" clause is arguably the clearest and most extensive assertion of the jurisdiction of port states, which does not supercede the flag states, but is concurrent with it. Out of this clause has grown a number of practices involving port state control but although the exercise of this jurisdiction has gained wide spread acceptance, criticisms persist and reservations regarding the fair enforcement of port state control remain.

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CHAPTER III

PORT STATE CONTROL ENFORCEMENT

A. The Paris Memorandum of Understanding on Port State Control.

Following the 1976 signing of the ILO 147 regulating social and working conditions on board vessels, eight European states decided to enter into an agreement to enforce the provisions of safety oriented international conventions on all foreign vessels entering their ports, and on March 2, 1978 the Hague Memorandum was signed.1 Exactly fifteen days later on March 17, 1978, the AMOCO CADIZ ran aground off the coast of Brittany. The members to the Hague Memorandum realized the need for greater participation as that memorandum had very little impact on shipping.2

The environmental, economic and political pressures as well as the AMOCO CADIZ casualty, which spurred European politicians, shipowners and the electorate into what was hitherto considered impossible concerted action to eliminate substandard shipping resulted in an effort by the Commission of the European Communities to develop for member states a directive on the enforcement of safety and pollution prevention regulations on all ships entering the community ports.3


2 Lowe, A. V., A Move against Substandard Shipping. 6 Marine Policy 326 (Oct 1982).

Consequently in January 1982, the drafting group of the present Memorandum of Understanding on Port State Control (MOU) submitted a draft to a ministerial conference of fourteen European states, namely, Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom, which adopted the draft text; it was then signed by the maritime representatives of the fourteen states and entered into force on July 1, 1982. The method of entering into such an agreement with international implications deserves comment. A basic principle of international law is that states have the right to enter into agreements with other states either to restrict or expand their sovereign rights to the extent permitted by such agreements. A number of ways of entering such agreements have been developed over the years, with varying degrees of enforceability. Treaties or conventions are the most common and the most powerful in terms of enforcement because when states become parties to these agreements they agree to bound themselves to its provisions. Other types of multilateral agreements which are less powerful than treaties include the diplomatic notes verbale, memorandums of understanding and communiques. First of all, several considerations led the ministers concerned to choose a memorandum of understanding rather than a multilateral convention. Juridically conventions are much more powerful instruments than memorandums, with a mandatory effect for the states parties and those to whom the conventions apply. However, the choice of a simple memorandum of understanding was more acceptable to the ministers because unlike international conventions,


memorandums do not require tedious ratification processes, entrusted to the unpredictable whims of parliaments and they do not require the "extensive adoption of national legislation, necessary to enforce such conventions" or to amend them. It was therefore necessary for the ministers to settle for a simplified agreement in order to use the momentum that had been gained to seek workable solutions to the substandard shipping problem. The negative side is that the member states are not bound by any obligation to do anything. All that is involved is a moral undertaking by the maritime authorities of the fourteen states to cooperate in a regional plan of port state control in accordance with the provisions of the agreement with a hope that the harmonization of procedures can be achieved.

Under the terms of the MOU the partners undertake to conduct port state control "without discrimination as to flag" on foreign flag vessels entering their ports, with a target to inspect at least 25% of all vessels entering each port within a twelve month period. A control feature of the MOU is the reporting and cooperation and exchange of information between the authorities. The relevant instruments for the purposes of the MOU are:

1. The International Convention on Load Lines, 1966;

2. The International Convention for the Safety of Life at Sea, 1974 (SOLAS '74)

3. The Protocol of 1978 relating to SOLAS '74;

4. The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the

7 Ibid.

8 Following is a summary of the substantive provisions of the MOU. The text of the MOU is reproduced in Appendix III.
Protocol of 1978 (MARPOL 73,78);

- The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW 78);

- The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS); and

- The Merchant Shipping (Minimum Standards) Convention, 1976 (ILO 147).

Currently, all the authorities apply the provisions of the above instruments as the states to which they belong are parties thereto, except Ireland which has not acceded to MARPOL 73,78. In addition, not all states concerned are parties to the optional annexes to MARPOL 73,78, and as such, their authorities will not apply those. As all of these conventions apply substantially to vessels of 500 gross tons or above, the parties will, particularly in the case of the carriage of dangerous goods, apply the conventions to the extent permitted or will ensure that such vessels are not hazardous to safety, health or the environment. Section 2.4 provides that the relevant instruments be applied so that no more favorable treatment is given to foreign flag vessels belonging to states not parties to those instruments.

Section 3 provides that inspections be carried out on board in order to check the validity of relevant certificates and documents, the lack of which is considered to be prima facie evidence that the ship is substandard. The absence, non-compliance or substantial deterioration of machinery or equipment or the hull is also prima facie evidence that the ship is substandard. Vessels which have been inspected by a participating authority within the prior six months may be exempted unless clear grounds exist for reinspection.
Clear grounds include submission of a written complaint or information from crew, passengers, associations or professional bodies, others with interest in the ship's safety and other port states. The procedures on receiving such information and after control include notifying the flag state and classification society, avoiding undue delay of the ship, notifying IMO in accordance with SOLAS '74 Chapter I Regulation 19 and Load Lines Article 21. All determinations of deficiencies are subject to the professional judgment of the port state control inspector who should be well qualified to conduct inspections.

The MOU has a simple organizational structure designed to maintain a clear separation of tasks. The executive body of the MOU is the Port State Control Committee (PSC Committee) which is comprised of the representatives of the fourteen participating maritime authorities, the commission of the European Communities, the International Maritime Organization and the International Labor Organization. The PSC Committee meets twice a year to deal with harmonizing port state control procedures, uniformity in interpreting and applying convention provisions, review of the Memorandum and financial matters.9

A three member permanent Secretariat comprising of the Director, the Legal Officer and a Technical Officer, situated at the Ministry of Transport and Public Works of the Netherlands in Rijswijk, and functions under the direction of the PSC Committee. The Secretariat prepares the meetings, drafts reports, organizes seminars, provides documentation to interested parties, monitors the inspection file in cooperation with the Computer Center and does public relations.10

The Computer Center of the MOU is situated at St. Malo, France, where all the inspection records are sorted and

10 Ibid.
filed. This information is accessible for verifying and updating records as well as statistical analysis. All MOU partners have a linkup to the Center and use the facility as an electronic mailbox system which has proven its effectiveness over the last three years.11

Finally, there are the surveyors, the highly qualified experts, each working directly for his maritime authority, who will conduct the actual inspections. Most are said to be qualified as shipmasters or chief engineers with considerable seagoing experience. Annual seminars are conducted for surveyors with the aim of helping them become au current with changes in the MOU and advancements in the industry as well as the harmonization of the inspection procedures.12

Although total harmonization of procedures is impossible to achieve a general pattern for the inspection procedure has been established. First, a list of vessels expected in port and due for inspection is prepared, preferably each morning, taking note of those vessels with a history of past deficiencies.13 The inspector may choose to inspect those vessels first. The initial inspection is a cursory one enroute to the Captain’s office for a look at the relevant certificates and documents on board. If clear grounds exist, a detailed inspection of all life-saving and fire fighting equipment, passageways, accommodation spaces, galley, pantry, engine room, alarms, navigational charts and equipment, and radio, etc. may ensue.14 Otherwise the inspection ends. If, however, deficiencies are found, the surveyor has the discretion to

11 Ibid. See also, Kasoulides, G., Paris Memorandum of Understanding: Six Years of Regional Enforcement. 20 Marine Pollution Bulletin 255 (1989), at 256.


14 Ibid., at 122.
determine the time scale for rectification, which, depending on the severity of the deficiency, may involve a delay or permission to rectify the deficiency at the next port of call. However, in the case of dangerous deficiencies the vessel will be subject to the capital sanction of detention until the deficiency is removed. Section 4 of the MOU provides that all inspections be reported.

Although the MOU provides a safeguard against discriminatory enforcement this is effective in institutional matters only. The broad discretion granted the individual inspector may afford MOU states a legal loophole through which they can discriminate according to flag, because simple verbal pointers may suffice for such discrimination to take place. If this roundabout route is employed on a moderate to wide scale, the MOU safeguard becomes meaningless and confidence in port state control will erode. The continued training and upgrading of port state control inspectors, through seminars, is the most effective way of maintaining the ideal of the concept and preventing the use of port state control by unscrupulous inspectors to harass and inconvenience shipping.

Another possible conflict is in the MOU states' enforcement of ILO 147. The 1989 Amendments to Annex 1 extend control to articles of agreement, repatriation, shipowner's liability in cases of sickness, injury or death of seafarers and trade union rights. Although the amended section only provides for the transmission of deficiencies regarding the above to the flag states, etc.,

15 Ibid.

16 Huibers, Memorandum of Understanding on Port State Control, at 15.


18 Memorandum of Understanding on Port State Control Secretariat letter ref. S/MP-10.048/89 and attachments concerning the Amendments to Annex 1 Section 4 of the MOU, March 13, 1989.
it is not difficult to see that the MOU is slowly progressing beyond matters relating to safety of life and property at sea and pollution prevention, into the realm of social conditions on board vessels which is a direct intervention into the internal order of the ship's affairs.

Notwithstanding these problems, according to the 1988 Annual Report the MOU's chief concern is still marine safety and pollution prevention. Appendix V (i) that although the numbers of individual ships and inspections were down in 1988 from the previous year the number of delays/detentions and percentages of individual ships increased. For delays/detentions per ship's type the biggest change is a 4% decline for dry bulk carriers in 1988 from 1987, with a corresponding decline in cargo vessels. Unfortunately, the figures for tankers/combined carriers climbed by 3% in 1988. In 1988, far more safety and pollution related deficiencies were reported than crew related deficiencies.

Eight years on, MOU authorities have given the program the thumbs up. Although the target of 25% still eludes the partners (1988 calculated at 18.2%), they see the general situation balancing itself out with the lax partners beefing up their inspections.19 The annual seminars are successful and the electronic mailbox is helping to add to the efficient selection of vessels to inspect. There is one concession though, "the battle to eliminate substandard ships is a long and hard one."20

B. Port State Control Enforcement in the United States.

A good example of unilateral port state control applying more stringent measures is the United States Coast Guard inspection program. Although the United States first enacted legislation on the control of foreign and domestic vessels in 1917, it was not until 1972 that significant


20 Huibers, Memorandum of Understanding on Port State Control, at 16.
moves to promote tanker safety were initiated. Finally in 1977, following the ARGO MERCHANT incident the Coast Guard Tanker Boarding Program was established.

Several legislative enactments have over the years expanded the Coast Guard's duties to administer maritime laws related to the safety of vessels, marine environment protection, licensing of operating personnel, inspection of vessels to ensure compliance and the protection of merchant seamen. The international conventions enforced on foreign flag vessels include MARPOL 73, 78, SOLAS 74 and the Protocol of 78, Load Lines, COLREGS, and most recently ILO 147. It has been suggested that effective enforcement of ILO 147 would require the Coast Guard to increase its size just to handle the large number of complaints expected to arise, and the budgetary constraints facing the organization would not permit this. ILO 147 is discussed in some detail in Chapter VI.

The arm of the Coast Guard Charged with the responsibility of implementing the United Statesd Marine Inspection Program is the Merchant Inspection and Documentation Division, which serves as the program manager and administers the program for the improvement of standards including inspection of vessels, development of improved inspection compliance standards, and the development and enforcement of the Outer Continental Shelf Safety Program, etc. These duties are delegated in part to the


23 The Statutes giving rise to Coast Guard administration can be found in United States Coast Guard, Coast Guard Legal Authorities, Commandant Publication (COMDTPUB) P5850.2 (1986).

24 Ibid.

25 Loree, at 33.

Marine Safety Division of the District Office, and further to the Marine Licensing and Vessel Inspection Branch, which administers the District Marine Safety Offices (MSO) and Marine Inspection Offices (MIO). In each major port there is a Captain of the Port (COTP) and an Officer in Charge of Marine Inspection (OCMI) who will be responsible for the actual field inspections. The inspectors report to the COTP or the OCMI.

All foreign flag vessels trading in US waters are subject to annual inspections and semi-annual monitoring. Arriving vessels must provide 24 hours advance notice of arrival to the Coast Guard and the vessel's history is then obtained through the Marine Safety Information System (MSIS). This history includes last annual inspection date and compliance history, including violations, oil spills and other discrepancies. The inspection procedures follow a prescribed form which requires the inspector to check the various certificates, navigational equipment including charts, hazardous cargo carried in bulk or packaged, pollution prevention equipment and provides for follow-up action. (See Appendix VI). Tankers which are in compliance with the regulations are issued a "Letter of Compliance." The most common types of deficiencies generally involve US nautical charts which are required for every foreign flag vessel entering United States waters.

There are generally four types of action available to the Coast Guard for deficiencies. They are permitting the vessel to sail to the next port of call to effect repairs if

27 Ibid., at 4.1.29-30 and 36.
29 The information regarding the procedures involved in the actual survey of vessels was obtained through personal interviews with Lt. Comdr. Larry Brooks, Port Safety Officer, Group New York and other Coast Guard officials at USCG HQ in Washington, DC during the period March 12-23, 1990.
30 Robinson, at 5.
such deficiency is not very serious and the repairs can more readily be carried out at the next port of call, detention for the sole purpose of rectifying the deficiency, the imposition of a monetary penalty as a deterrent, which is provided for by United States administrative law principles, and informing the flag state for appropriate action pursuant to the relevant international instruments. In the case of monetary penalties, the Coast Guard notes that this is a national law provision distinct from the remedial basis of the relevant conventions. However, the imposition of such penalties is a demonstration of the incompatibility which sometimes arise when two different avenues are selected to achieve a single end. The Coast Guard ends up fulfilling the domestic requirements at the expense of international rules of application. This is further reinforced by the fact that half of all penalties addressed by the Coast Guard for deficiencies involved nautical charts, which in fact sometimes involved relatively minor violations. The Coast Guard recognize that they often take such strict actions when their purposes could have been served by less stringent measures, and would be in line with the international rules. In the latter case the Coast Guard is empowered to enter into special agreements with flag states which permit direct contact with the consul of the flag state to speed up compliance by delinquent vessels. Such an agreement currently exists between the Coast Guard and the Liberian Bureau of Maritime Affairs.

Events of environmental concern tend to prompt keen interest in a particular industry’s activities and the operation of vessels is no different. The incidents which prompted the United States to begin port state control enforcement were tanker related. Not surprisingly, the Coast Guard’s activities in this area place a greater emphasis on tanker safety than freight vessels. The recent grounding of the EXXON VALDEZ gave rise to certain major new technical requirements for tankers such as double bottoms.

31 Ibid.
32 Ibid
33 US Coast Guard COMDTINST M5400.7C, at 4.1.37.
The enforcement of these new requirements will no doubt rest with the Coast Guard again, and may require additional personnel to handle the new increased workload. Fortunately, the Coast Guard has recognized the need to reevaluate its enforcement measures, reputed to be the strictest in the world, water them down and place a greater emphasis on aiding compliance rather than the deterrence sought by punitive measures. This move, which is not necessarily a relaxation of standards, is essential to enable the Coast Guard to enforce the new tanker safety regulations as well as reports of complaints which would arise under ILO 147.

34 Robinson, at 5-6.
CHAPTER IV
PORT STATE CONTROL
AND OPEN REGISTRIES

A. The Legal Rights and responsibilities of Open Registries
Regarding Port State Control Enforcement Problems.

Numerous definitions have been offered for the term "open registry" and UNCTAD even went to the extent of offering a distinction between "open registry" and "Flag of Conveniance" by reporting open registry as a country with a declared open policy of conferring nationality on vessels regardless of ownership, control or manning.¹ Because of continued confusion over the differences between open registries and flags of convenience the terms are used interchangeably. To add to the confusion are the development of two other types of registries, namely the "offshore register" and the second or "international register", both of which stem from the closed or regulated registry. The closed registry is that in which ships are beneficially owned and manned by nationals of that state. Vessels in such registries are subject not only to administrative, technical and social regulations, but also commercial regulations as well. Today, some of these registries have offshore and international registers to cope with competition from open registers. Offshore registers such as the Cayman Islands, Gibraltar and the Isle of man belong to countries like the UK while France and Norway have set up international registers. Each of these registers have one or more attractions to keep their beneficially owned tonnage at home. Such registers are likely to adopt the same safety standards as the mother registry and rely on the mother registry's established network for enforcement purposes. The

¹ UNCTAD, Review of Maritime Transport 1972/73, paras 39/42.
net result of these "experiments" are mixed because if differences regarding the functions of each.

It is necessary to note here that the establishment of off-shore and second registers was spurred by the adoption by UNCTAD of the 1986 UNCCORS, which institutionalized the practice of open registries. But the industrialized countries were not the only ones joining this band wagon. Before 1986 there were less than fifteen (15) open registries; by the time UNCCORS was adopted the list had grown to more than thirty. (See Table III). This proliferation of open registries has led to increased debate on the pros and cons of the open registry system and its impact on industrialized countries.

As indicated earlier, the most ardent critics of the open registry system, those industrialized countries suffering most from the shift of tonnage from their flags to foreign flags, and the general competitive edge of the system, turned their attention to the widely publicized shortcomings of the system, which was reinforced by the increase in open registries. As was discussed in Chapter I, supra, the shift in arguments against open registries stemmed from the decision of the International Court of Justice at the Hague which upheld the right of Liberia and Panama to become members of IMO’s Maritime Safety Committee, and rejected the arguments of other member states linking the obscurity of the genuine link concept to the IMO’s definition of tonnage ownership.

The shortcomings of the open registry system can be found in Metaxis’ hypothesis on flags of convenience and social costs:


<table>
<thead>
<tr>
<th>Countries</th>
<th>1930-1986</th>
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<tbody>
<tr>
<td>Antigua and Bermuda</td>
<td>Isle of Man&lt;sup&gt;1&lt;/sup&gt;</td>
</tr>
<tr>
<td>Bahamas&lt;sup&gt;2&lt;/sup&gt;</td>
<td>Kerguelen Islands</td>
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<tr>
<td>Barbados</td>
<td>Lebanon</td>
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<sup>1</sup> Parts of the British register.

<sup>2</sup> These States were classified as major open registry fleets by UNCTAD 1964. Cyprus, Panama, and Bahamas are the countries with the most rapidly expanding fleets according to OECD (1984).

Flags of convenience led to the formation of a "regime of immunity" in the shipping world and in the long run to higher real costs and freight rates than would have been the case had the World merchant fleet consisted only of units registered under national flags, which presupposes the maintenance of a minimum safety and economic regulation.

In analyzing the above, Metaxis identifies marine pollution from ships, casualties and loss of life at sea and discusses their impact on the world community. Notwithstanding the other sources of marine pollution, the contribution of ships is significant enough to warrant major concern. Metaxis puts that figure at about 30% and shows that the spillage of oil from operational sources has a negative impact on public health, the marine environment, fisheries, way of life, tourism, etc. He then calculates potential pollution by flag to apportion actual spills and concludes that the emerging residual problems with marine pollution, giving the tremendous success of the IMO regarding technical safety and anti-pollution matters, "are of capital importance and that the appropriate concept should be that of a substandard registry rather than that of a substandard ship.

With regard to marine casualties, Metaxis relies on a 1976 study to show a stark relationship between flags of convenience and casualty rates, with smaller fleets showing worse safety records. His obvious conclusion is that their real costs of operation are therefore much higher and exit from the market under adverse conditions are facilitated by

5 Ibid.
6 Ibid., at 89-90.
7 Ibid., at 92.
the regime of immunity.\textsuperscript{8}

As for loss of life, Metaxis has few concrete figures to rely on and consequently presupposes that, based on unreliable figures mortality rates on flag of convenience vessels are considerably higher than regulated vessels.\textsuperscript{9} In his scathing attack on open registries Metaxis failed to fully discuss the social benefits of the system nor created a scale either in favor or against the system. Also he did not take into account the mechanisms in place which provide for the compensation of damages or loss from oil spills and loss of life, or the regulations in force to protect against marine casualties.

Open registries are the result of innovative attempts to save world shipping from varying stages of international difficulties such as wars and economic recessions. The international nature of the shipping industry necessitated protection from regulations which satisfy local anxieties at the expense of the wider global interest. Open registries today have been fine tuned to meet the needs of an international market which has cut across practically every national boundry. The de-regulation of commerce leaves shipowners to become creative and the focus of the industry is now on the ability of the shipowner to manage, market and finance in order to survive. To achieve this, safety has not been compromised because the basic safety principles found in the various international conventions still apply and flag states are aware of this. The open registry system makes jobs available to all seafarers where ever located. It is true that most shipowners who go to open registries employ third world seafarers for less wages than their western counterparts. This fact does not in itself make the system exploitative. First of all, shipowners have no need to employ third world seafarers if they have to pay these seafarers the same wages they would otherwise pay their own nationals. Secondly, those jobs represent a significant

\textsuperscript{8} Ibid., at 93, 97.

\textsuperscript{9} Ibid., at 99.
proportion of employment for most of the labor supplying countries, which generally have very high unemployment rate. This does not go to say some shipowners do not exploit the seafarers. In such case, action must be taken against such shipowners. The object is to benefit from a system which makes competition easier, not to promote forced labor, therefore, competitive wage scales can be employed and inserted into freely negotiated collective bargaining agreements to ensure the protection of seafarers; indeed this is already being legislated by some open registries and should expand to others as well.

A number of conventions are in force regarding liability regimes for oil pollution damage, loss of life and marine casualties. In addition to the safety conventions, these conventions complete the network of the international protective regime which is, in most cases, adequate for the stated purpose. In cases of loss of life there can never be an adequate regime of compensation because it is impossible to put a value on human life. This is true in other industries as well. However, the conventions concerned aim to provide at least some compensation to help ease the damages and pain caused by such loss.

Not everyone is concerned with arguments of which is substandard, the ship or the flag. In a discussion on substandard ships at Seatrade's Money and Ships in the City 1985 Conference, a number of points were raised as the reasons for the continued sailing of substandard ships in spite of the enforced international regulation. Delegates to that Conference commented on the failure of classification societies, including IACS members to stringently enforce standards. There are today more than 30 classification societies and IACS' decision to get tough on substandard ships is bound to lead to major problems.

10 Seatrade, Money and Ships in the City, Barbican Centre, March 20-22, 1985 at 124-25.
11 Ibid., at 124.
12 Ibid.
The delegates were painfully aware that there had not been the kind of improvement in standards because of "substandard owners" who inevitably run substandard ships. Economic pressure has been blamed for this stagnation both from owners and the societies, all of whom are trying to survive in this fiercely competitive industry. The resolution of this problem will not be easy because there are relief valves available, particularly for small scale owners, registers and classification societies looking for an easy solution. Such owners will continue to seek relief in small impotent registries and unscrupulous classification societies which must class substandard vessels just to stay in business. This is not to write off the efforts of IACS. On the contrary, the improvement of service will clearly be of eminence value in the inspection and certification of vessels, particularly in those parts if the vessel where port state control inspectors are limited or otherwise restricted from inspecting. Also, seemingly standard vessels with fraudulent or unthorough certification will not get away with defects.

Although the industry has been fair in assessing the causes for the lack of significant improvement in standards over the years, the primary responsibility remains with the flag state. All relevant international conventions recognize the unequivocal responsibility for flag states to ensure that their vessels comply with internationally acceptable standards. The most eloquent assertion of this responsibility, to date, is UNCLOS Article 94, which mandates that the flag state exercise effective jurisdiction and control over vessels flying its flags, take measures to ensure safety of life and property at sea, ensure that the vessel is regularly inspected and the crew are properly trained and qualified, and ensure that all vessels flying its flag conform to generally accepted international conventions. Article 94 also requires that flag states investigate reports of violations transmitted by other

13 Ibid., at 125.

14 Ibid.
states and provide remedy. Article 94 further mandates that flag states conduct inquiries into all marine casualties and marine pollution, especially where interests of another state are involved, and to cooperate with such states in such investigations or inquiries.

What is necessary for flag states to effectively enforce these provisions is an adequate infrastructure of administrative, and technical proportions totally out of the reach of small flag states, especially small open registries. In the case of the small, developing national register, several different factors prevent the effective enforcement of flag state jurisdiction. The national infrastructure may be too poorly organized to ensure that the vessels satisfy the requirements of the convention regarding international standards, or for political economic reasons the register may be forced to turn away from international regulations which may be considered too stringent and economically detrimental to the fledging fleet. This may be the reason why countries like India, South Korea, Bangladesh, Spain and Turkey constantly show up in pollution likelihood analysis (PLA) by flag as some of the worst flags.  

The problem with open registries may include the above, but in spite of that, many of the ships registered in open registries seldom or never call at the home port, and, given the size of the countries concerned (open registries tend to be small developing countries) they lack enforcement capability. This is of great advantage to owners operating substandard ships. However, the lack of an enforcement capability should not be considered synonymous to the lack of a mighty navy to enforce international standards. Once the registry has ratified or acceded to the relevant international instruments a two prong approach to enforcement can be considered.

Firstly, an adequate marine safety sector must be

established with computerized functions for adequate record keeping and updating. Secondly an adequate inspectorate needs to be established. This can consist of qualified marine officers of the flag state who can be available in or travel to different ports to inspect vessels, or the use of the services of the classification societies. A combination of both is also possible. Classification societies, competition between them aside, will enforce the flag state's standards only to the extent authorized and no further. Hence, the flag state, whether open or not, has the capability to adequately fulfill its obligation under the conventions.

The above analysis shows that Professor Metaxis may have been partially right in referring to substandard flags, but was wrong in encircling open registries alone. The problem is not an open registry problem but a political economic problem which each flag state must come to grips with. The problem of substandard ships cut across all the traditional maritime battle lines, therefore the continued drawing of those lines will only exacerbate the problem even more. To illustrate, Gibraltar and the Isle of Man, which were presumed to adopt the standards of the mother flag, the UK, rank sixth and ninth respectively in delays detentions per flag in 1988 while the mother flag, the UK was also listed, though last. This shows that every flag state, even those regarded as the best are susceptible to infiltration by substandard ships.

All of the figures in the debate on substandard ships lead to the conclusion that port state control, while not a substitute for flag state responsibility, is a sensible supplement to it. However, a number of questions arise when the enforcement of port state control is mentioned but, in the case of open registries two questions bear the most weight, the extent of the concurrent jurisdiction of the port state and the application of such control without prejudice.

As was expounded on in Chapter II, port state jurisdiction is concurrent with the flag state jurisdiction, however, the exercise of the jurisdiction can also be
equated with a restriction on the sovereign jurisdiction of the flag state. In other words, the more extensive the exercise of port state jurisdiction the more restricted the sovereign jurisdiction becomes. Although port state jurisdiction is a recognized principle of international law, the extent of that jurisdiction is still the subject of intensive debate. Port state jurisdiction, unchecked by international regulations can easily extend to the internal order of the ship's affairs. This is clearly a serious threat to all flag state and open registries in particular, because one of the major attractions of open registries is the non-commercial regulation of shipping.

The second threat to open registries as a result of port state control is the possible discriminatory application of such control against open registry vessels. When states become parties to the relevant international conventions they agree to be bound by the provisions of these conventions and to have their vessels subject to the limited control afforded those port states parties to such conventions. The maritime community has concluded that all sea-going vessels must comply with the provisions of the aforementioned conventions. Hence, the exercise of port state control within the framework of these conventions should equally apply to all vessels irrespective of flag. Indeed, port state control authorities stress the non-discriminatory inspections they conduct. Unfortunately, the criticisms against open registries as avoiding standards and permitting the registration of substandard ships, which may have been true in some cases, was founded on economic pressures, environmental concerns and global commercialization. If port state control is politicized it will become discriminatory and would self-destruct, thereby creating political tension which would inevitably hamper the adoption of future conventions that invoke port state


17 Kasoulides, at 556.

18 Tintz, at 191.
control enforcement. In addition, Port state control inspectors will often make subjective judgments while enforcing conventions like the vague ILO/147. With this background it is not difficult to see the reality of the threat of discriminatory control, and its damaging impact on the open registry system.

These issues are of paramount concern to open registries but they do not necessarily warrant the abolition of port state control. The mechanisms which are currently in force to regulate port state control authorities have so far been successful in averting serious confrontation between flag states and port states and, with increasing cooperation between flag states and port states confrontation is not likely to occur.

B. A Liberian Perspective.

Liberia began its maritime program in 1948 supported by American interests primarily interested in tankers. The registry grew consistently from that time until it peaked at over 81 million grt in 1978. Since then it has stabilized at about 51 million grt. Liberia has consistently maintained the general policy that attracts shipowners to open registries and is continually adapting its laws and regulations to the ever changing and demanding needs of the industry.20

Today, the Bureau of Maritime Affairs is headed by a Commissioner directly under the executive office of the President. This eliminates the risk of politicizing the registry. Furthermore, the day to day operations are carried out by a private corporation based in the United States, under contract to the Government. Government appointed


Liberian Deputy Commissioners perform senior administrative and ministerial tasks within the corporation. This system has proven its worth over the years as domestic political wranglings have not affected the registry. Liberia earned a net income of 18 million from the registry in 1989.

In a detailed treatise on a Liberian perspective on port state control Dr. Frank Wiswall outlines the basic legal notions regarding the traditional and contemporary development of port state jurisdiction with the conclusion that today it finds its basis in "IMO originating safety legislation" which flag states alone can enforce in terms of the substantive provisions, but taking into consideration that the limited enforcement authority granted to port states by such legislation can only be exercised within the framework of the national law which is enacted for that purpose. Dr. Wiswall notes that Liberia’s move toward enforcement of IMO originating safety legislation was prompted by public focus on the registry following the TORREY CANYON disaster in 1967, casualties of the OCEAN EAGLE in 1968 and the ARROW in 1969, as well as the ALLEGRO/PACIFIC GLORY collision in 1970.

Following is a summary of some of the features of the Liberian Safety Program.

The Liberian Safety Inspection Program was inaugurated on May 8, 1971. In 1974 the Marine Safety Department was created and Liberia began to properly enforce IMO originating safety legislation. Presently Liberia is a party to, and enforces all major IMO conventions. Liberia recognizes all major classification societies which are members of IACS. Any vessel dropped from class is immediately suspended from the Registry. Today the Registry

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21 Wiswall, Port State Control Enforcement, at 7. Dr. Wiswall was Admiralty Counsel for Liberia for over 20 years before retiring to private practice in 1989.

22 Ibid., at 8. See also, Carlisle, R., Sovereignty for Sale, Annapolis, Naval Inst. Press, 1981, at 175-76.

23 Ibid., at 9 et seq. The summary following is taken from Dr. Wiswall’s paper, with updated information drawn from the author’s own association with the Liberian Bureau of Maritime Affairs.
employs some 270 nautical inspectors worldwide, none of whom regularly work for the above mentioned societies. The inspectors report to regional safety offices in London, Rotterdam, Piraeus and Hong Kong. The computerized Safety Evaluation Division sorts all inspection reports and transmits results to agents and operators for any remedial action necessary. Also, advance notice is given to each vessel where ever trading to report to pre-designated ports along its routes for mandatory annual inspections. The age of the vessel and the type of trade it is engaged in will determine the frequency of interval inspections. The Safety Analysis Division constantly searches the computer for unusual safety difficulty and adjustments are made in anticipation of problems rather than after a casualty occurs. This system has been so successful that Liberia's safety record since the late 1970's has improved to the extend that the Liberian casualty record is today better than the world's average and Liberia has not been listed in the MOU list of detentions/ delays per flag exceeding the average percentage for the past five years.24

Dr. Wiswall then turns his attention to two points from which even the most efficient registry cannot escape. First, no matter how finely tuned the infrastructure is there is bound to be the presence of vessels which do not comply with safety regulations because as long as so-called substandard owners are around substandard vessels will continue to infiltrate every flag state, including those with mighty navies. 25 Secondly, some flag states do not have the administrative ability to enforce standards either for political or economic reasons and where flag states lack this ability it becomes necessary for port state control to supplement and support the flag state in order to provide more muscle in the drive for the uniform implementation of international standards. 26

24 See, The MOU Annual Reports for the years 1984-88.
25 Wiswall, at 11. See also, Smith, J., at 15.3.
It is, therefore the policy of Liberia to support the concept of port state control with non-discrimination as to flag. Being aware that its vast administrative and technical control network is not fool proof, Liberia has in place a Marine Investigation Division within the Marine Safety Department. All casualties of Liberian ships are by law investigated and formal inquiries are held in cases of loss of life, serious injury or serious damage, furthermore all investigations into marine casualties are published in compliance with SOLAS Chapter I Regulation 21. It has been suggested that aside from very serious casualties, no other government publishes casualty investigation reports in the regular press. Notices of violations submitted by port state authorities are also investigated upon receipt. Some reports are received through informal telephone consular contacts while detentions are handled officially, either by direct consular contact or through diplomatic channels. Upon completion of all investigations the Commissioner issues a published decision with the report of the preliminary investigation attached. Action is then taken, in accordance with the national policy to remedy the situation and prevent further occurrence. All information contained in a notice of deficiency from a port state authority is also fed into the computer for proper record keeping. See Appendix VII for an exercise into a deficiency notice and follow-up action involving a Liberian flag vessel.

Liberia will continue to support port state control based on non-discrimination and will continue to cooperate with port state authorities as long as the exercise of port state jurisdiction is not abused. Liberia considers port state control to be beneficial to the maritime world in this respect, but recognizes the need for other flag states to begin to exercise proper control over their vessels in order to create a proper balance in vessel safety and environmental pollution prevention regulation among all flag states.

27 Smith, at 15.3.

28 Dr. Wiswall reaches the same conclusion at 11-12.
CHAPTER V

LEGAL LIABILITY ISSUES ARISING FROM THE DETENTION OF VESSELS

A. Civil Liability of Shipowner or Maritime Carrier for loss of or Damage to cargo as a result of Detention.

It is not the intent of this study to engage in a detailed discussion on the subject of the maritime carriage of goods nor the relation of marine insurance thereto. This chapter will only take a general look at some features of these two subjects in so far as liability for damages as a result of detention is concerned.

The basis for detaining a vessel as a result of port state control inspection lies in the type and extent of the deficiency found. If the deficiency is so serious and presents a threat to the safety of persons on board, for example, the vessel may be detained until the deficiency is corrected which can take a few days. Although this time frame is not very long there are instances when the consignee of cargo carried on board may be adversely affected as in the case of perishables and seasonal or holiday goods, which demand prompt delivery or else they rot or become useless.

Carriage of goods contracts like the Hague Visby Rules\(^1\) specify certain duties on the part of the carrier to make the vessel seaworthy and exclude certain

\(^1\) The International Convention for the Unification of certain rules of law relating to Bills of Lading, 1924, as amended by the Protocol of 1968, also know as the Hague-Visby Rules.
fortuitous events from liability therefor. The Hague-Visby Rules specify in Article IV paragraph 2 excepted perils for which "neither carrier nor the ship shall be responsible". Subparagraph (g) excepts "arrest or restraint of princes, rulers or people or seizure under legal process". This excepted peril appears to cover governmental actions such as port state control detention, and would thus leave a cargo owner without legal redress unless recovery can be had under some form of cargo insurance. Another loophole exists through which a possible claim could be brought. Article III subparagraph (a) imposes a duty on the carrier to exercise due diligence to make the vessel seaworthy in all respects for the purpose for which it is intended to serve. In addition, the holds, refrigeration system, cargo spaces, cargo handling equipment, crew and supplies must be fit for the intended purpose. If a substandard vessel is detained by reason of deficiencies and cannot fulfill its responsibility under the contract of carriage the liability provisions of the Hague Visby Rules, become operative. The issues arising thereunder would be whether the cargo owner can recover damages for losses incurred by reason of the delay. Two points are of importance when dealing with this issue. First of all, the delay must be covered under the basis of liability of the Hague Visby Rules, and secondly there must be a nexus between the loss and the deficiencies which rendered the vessel unseaworthy for the intended purpose.

In the first instance, it appears to be the case that such delay would fall into the category covered by the Rules, provided notice of the loss or damage is given the carrier or his agent at the port of discharge before delivery. In the second instance, the operative article is

2 The United Nations Convention on the carriage of goods by sea, 1978 also known as the Hamburg Rules, includes some similar provisions for assigning liability. The Convention is not yet in force.

Article 4. It provides that the carriers would not be liable for unseaworthiness related damages regarding the above specified areas of the ship, except for want of due diligence; of course the burden of proof is on the person claiming the defense. In such a case there is not likely to be any question that the seaworthiness of the vessel led to the detention which caused the loss, but such cases hinge on proximate cause, and when two intervening causes are involved, the proximate cause must be the most immediate cause which is proximate in efficiency. Except in cases of the most serious deficiencies, such as hull structural problems, the vessel is likely to seaworthy in respect of the holds, cargo spaces, etc., but deficient in so far as navigational aids or ship's certificates are concerned. Under such circumstances, the most probable outcome in this case would be that the detention, not the unseaworthiness was the proximate cause of the loss. If however, proximate cause is established or the above excepted peril is found to be inapplicable, liability would then rest with the shipowner and the cost of operating a substandard ship would be borne by the real offender.

The purpose of assigning liability usually includes, inter alia, the societal need to punish certain acts or omissions to act. The rule of limitation of liability serves to ensure that the potential extent of some damage claims do not expose the shipowner to ruin, and insurance is the most common medium by which the shipowner protects his exposure to risk. Of course, situations do arise as evidenced by “exclusion clauses” of insurance contracts when the societal need to punish outweighs the industry’s desire for

4 See, Chorleys and Giles, Shipping Law at 200-01 for a more detailed explanation of the intricacies of the applicability of this rule to the shipowner and the charterer.

5 The MISS JAY JAY (1897) 1 Lloyds Rep. 32, at 39.

shipowner’s protection or when the cargo owner or a third intervening force is at fault.

Today, marine insurance schemes cover virtually every aspect of liability arising out of the ownership and operation of vessels. The proponents of liability limitations argue that limitation does not cheat claimants. As for but the unscrupulous owner who fails to maintain his vessel and is simply cutting cost limitation proponents resist a linking of standards and limitation of liability by arguing:

Limitation is highly relevant to the insurance of shipowner’s liabilities but it has little or no influence on ship standards; rather these are affected by changes in the international consensus on low ships should be run and the attitude of the particular owner.

What this assessment fails to take into consideration is that there does exist, however, a close connection between the consequences of substandard operation and limitation, especially when the amount of the claims exceed the limits. Take the grounding of The EXXON VALDEZ for example. The EXXON VALDEZ cannot be said to be substandard although one might be tempted to argue that the fact that the accident occurred is evidence that the vessel was substandard. In any event, simply focusing on the claims, the various relevant international conventions on shipowner liability which would otherwise bind Exxon provides for incurable limits of One Hundred Sixty-Six Million Dollars plus Seventy-Five Million Dollars in supplements, while the


8 Limitation of Shipowners Liability: The New Law, at 163-64.
Exxon VALDEZ claims are likely to be in the Billions of Dollars when it is finally settled. The Question which hunts the industry is, "what if that accident involved a small single ship company?" The obvious answer is that society will be saddled with an unacceptably high cost not only for the clean-up but also for the extensive loses suffered by the people of Valdez.

This is not meant to be construed as an argument in favor of higher limits or unlimited liability, it is simply meant to underscore the broader scope of a problem the proponents of limitations ignore. The substandard owner keeps his operation afloat by selecting the cheapest way to make a profit, that is to operate a substandard ship. Such owners will continue to undercut more responsible owners and put lives and the environment at unnecessary risk. The easing of the legal burden on cargo owners plus the extension to shipowners of liability arising out of port state control detention will increase the cost to substandard owners and could be another weapon, albeit from the commercial side, in the battle against substandard ships.

B. Liability of the Port State for Loss of or Damage to Cargo as a result of Detention.

A subject which appears to be very sensitive to port state control inspectors is, "what if a vessel is unduly detained and I suffer a loss, can I recover monetary damages under your Law?" Chapter II discussed the legal regimes which gave rise to port state control and its legal enforcement. Inherent in the right of the coastal or port state is the right to regulate the safe navigation of its territorial sea and inland waterways. The acts employed by the port state in this respect are sovereign by their very nature, however, the extent of the state's right to regulate shipping has been restricted in the sense that international conventions which authorize the port state to exercise control over ships generally provide that the port state should apply the provisions of those conventions to foreign flag vessels in such a way that no more favorable treatment
is given to such vessels. Additionally, a prohibition against undue delay is provided. The issue which then arises is whether the violation of this prohibition is ground for a shipowner or cargo owner to cover monetary damages. Article 232 of UNCLOS provides in pertinent part that states shall be liable for damage or loss arising from enforcement measures when those measures exceed reasonably required action in light of the available information. Additionally, the Article requires states to "provide for recourse in their courts for actions in respect of such damage or loss". Although the Convention is not yet in force, the provision is a clear indication of the concern states have for the necessity of safeguards to protect against wrongful detentions. The provision is also a modern day manifestation of the limitation of the sovereignty concept even as it relates to the jurisdiction of states over their territorial seas and internal waters. Notwithstanding this requirement for legal recourse, some states exercising port state control have instituted an appeal process where the master of a ship might be in disagreement with an inspector’s decision. The UK provides this appeal mechanism in the Merchant Shipping Act of 1894 section 460. The United States Coast Guard has an appeal process which allows the master to go all the way to the Commandant of the Coast Guard. The MOU does not provide for an appeal process because the enforcement aspect is left to the individual administrations and it is their responsibility to provide this appeal mechanism. One thing is certain, though, in most cases the length of detentions amount to only a few days and the only immediate cost is that of rectifying the deficiency. In contrast, an appeal may run a few extra days and the costs would be even higher. The logical thing to do then is to simply comply and get it over with.

For such short term detentions and long term detentions to rectify what may be wrongly construed as major

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deficiencies the possibility of recovering damages for losses incurred is not only more attractive than the administrative appeal process, it is more important as well. Of course this is aside from the fact that some jurisdictions require the exhaustion of administrative remedies before resorting to the judiciary. Because of the differences in the two types of remedies sought and the competence to provide these remedies it is important that states take cognizance of the need for legal recourse in cases of loss of or damage to cargo as a result of detention.

Port state control authorities would undoubtedly oppose such a move by arguing it would cause inspectors to hold back on their professional judgment in difficult cases. Also if there were an influx of claimants to the courts port state control inspectors would have to acquire the second skill of technical witnesses in a flood of cases.

These are undeniably serious concerns but they are not enough to justify the denial of the right of recourse where there is a legitimate claim. First of all port state control should be remedial, not punitive. If this is the case then the process should be open enough for mistakes and undue delays to be both corrected and compensated. As it stands now all the duties rest with the ship and that can be construed by the unscrupulous inspector as a carte blanche to do whatever he pleases. There is no doubt that in a right of recourse jurisdiction inspectors will be more dedicated in the exercise of their duties. At the same time those inspectors who already maintain the highest degree of professionalism would see no need to change. In cases where the enforcement is so stringent so as to make it punitive, there would be a need to normalize the enforcement in an effort to reflect the requirements of the convention. Secondly, port state control inspectors already or should already be experts in their craft and the call to testify in court would not constitute any undue burden on them. Indeed, in some jurisdictions, the people responsible for port state control have additional duties for which they may be legally
liable. For example, in the United States, the Federal Tort Claims Act and the suits in Admiralty Act provide the basis for actions against the Coast Guard which range from the Coast Guard's failure to maintain navigation lights to its standard of care to ensure that vessels are safe for navigation. Surely, the potential liability of the Coast Guard in the exercise of its other duties, have not reduced, but rather enhanced its performance of those duties, and port state control is no different. The possibility of the right of recourse becoming a floodgate for court actions is diminished by the fact that the more rationally remedial the inspection process becomes, the less likely are there to be legal challenges to the inspector's decisions.

The right of recourse provision in UNCLOS is a pragmatic move to ensure that the port state remain responsible in the exercise of its rights under both customary international law and the conventions giving rise to port state control. It is only fair and proper that states heed this restriction on their sovereignty and provide the means for this recourse to be easily exercised because in the final analysis everyone bears part responsibility for the international effort to improve the standards of ships and everyone stands to benefit from a balanced application of those standards.

A. The Current Success of Port State Control.

When Port State Control was introduced in Europe in 1982, it was suspiciously viewed by some parts of the industry while others whole heartedly welcomed it. The real assessors of port state control are the shipowners, seafarers and labor organizations, and affected flag states. Of course port state control authorities have taken the lead in an overall positive assessment of the concept, with a general acquiescence from shipowners.

Initially, the International Shipowners Association (INSA) condemned it as illegal and detrimental to shipping interests.\(^1\) INSA's reasons were undoubtedly linked to the economic benefits shipowners inure under the open registry system. However, a few years earlier, the reaction of American shipowners was the opposite when the United States Coast Guard introduced the unilateral tanker boarding program following the 1977 ARGO MERCHANT casualty, calling it a necessary means to supplement flag state control.\(^2\) This endorsement was limited to cover safety matters and marine pollution prevention, and did not extend to ILO 147 related control. American Shipowners immediately saw the potential destructiveness of port state control by contrasting safety and pollution related conventions which are relatively easy to administer, with the more subjective


ILO 147, which leaves inspectors in their discretion to consider whether conditions such as food quality, shipboard living conditions and exploitation of crew are deficiencies which may be deemed hazardous to the crew's health and safety. Today, European shipowners probably agree with their American counterparts in light of the economic motivating factors which brought the various interested European parties close enough to successfully launch port state control. The problem of ILO 147 continues to loom over an otherwise favorable prognosis, particularly in the United States where that Convention will be included in the Coast Guard inspection program. In Europe, the MDO was further amended in 1989 for the purpose of enforcing ILO 147, and guidelines for the inspection of vessels were inserted in the accompanying annex. The new amendments cover articles of agreement, repatriation of seamen, shipowner's liability and trade union rights, but the failure of the vessel to be covered is not a detainable offense and may only be referred to the flag state with a copy to the ILO. Although this action will not alleviate all of the concerns of shipowners regarding interpretation of the Convention it will not dampen shipowners enthusiasm about port state control, in general. INTERTANKO, another shipowners organization which welcomed port state control when it was introduced in Europe in 1983, has gone even further to urge states to ratify and enforce the relevant safety conventions.

In contrast, labor projects a different view of port state control in so far as ILO 147 is concerned. Port state control, in its entirety is beneficial to seafarers because the safety conventions as well as ILO 147 have a direct bearing on the crew's health and welfare. The pollution prevention conventions also have a strong bearing on crew

3 Ibid., at 32-33.

4 Memorandum of Understanding on Port State Control Secretariat letter ref S/MF-10.046/89 and attachments. Annex 4.7 et seq.

safety although it could be argued that there is less of a
direct effect where the marine environment is concerned. In
any event, while labor praise port state control in so far
as the campaign against substandard ships is concerned, they
do not give high enough ratings where their chief concern,
that is the enforcement of ILO 147, lies. ILO 147 is a
complex convention for port state control purposes. It is
an umbrella convention which provisions can only be
satisfied by the implementation of the provisions of several
other conventions contained in its annex. These include
minimum age, medical examination, accident prevention,
accommodation of crews, qualifications of crew, medical care
and benefits, food and catering, articles of agreement,
repatriation and trade union rights. The first five
categories fall within the realm of the technical safety
related matters on board, which in some cases overlap with
other existing safety conventions and can be easily enforced
and interpreted. The others relate to the internal
management of the ship’s affairs and are considered too
subjective for port state control enforcement. With regard
to these categories of ILO 147 seafarers have indicated
their disappointment. As discussed above, the enforcement
of social welfare regulations is a very difficult exercise,
and the fact that the MDO states only came to agreement on
ILO social provisions in 1989 - more than ten years after
that convention sparked off European port state control with
the Hague Memorandum - is proof of the scope of this issue.
The concerns of the shipowners regarding ILO 147 were not
even to deter them from supporting its adoption in 1976.
Similarly, these concerns cannot be viewed as sufficient to
resist its enforcement in port state control today. All the
benefits said to inure to the shipowner as a result of port
state control, i.e., improvement of ship’s safety, uniform
enforcement of international regulations and potentially
less frequent boardings for inspection, also benefit the

Port State Control, Report of a Conference, New York, Center for

7 Ibid., at 23.
crew without added cost or inconvenience to the shipowner. The only lack of attention given to ILO 147 by port states, particularly the MOU states, is in relation to the social welfare provisions and this will probably change with the 1989 amendments. Until then labor will continue to be dissatisfied with the success level of port state control.

Flag states responded to European and unilateral port state control with mixed emotions. Those flag states with control infrastructures welcomed port state control as a complementary mechanism to their own enforcement. Other flag states which have done little to enforce international standards were vehement in their objection to it. All flag states, however, were affected by Dr Wiswall's eloquently demonstrated non-discrimination caveat which was discussed in Chapter IV supra. Today, with the wider acceptability of port state control, particularly with shipowners organizations move flag states have accepted the inevitable.

In so far as the non-discrimination caveat is concerned port state control figures, particularly in Europe, have shown that from the outset the MOU states have upheld their commitment to apply port state control without discrimination as to flag. Unfortunately, this does not invalidate the concerns of open registries because although the movement against substandard ships is increasingly successful, the other conditions which prompted European port state control remain. With the exception of Norway, Europe is still struggling with its shipping business because the economic pressure from cheaper and more efficient competitors is still strong, environmental


10 See Huibers, at 443.
awareness is even more dictating political and economic events, and the continued internationalization of business and politics is still affecting Europe’s relative strength in world shipping.\textsuperscript{11} As the MOU states and unilateral port state control authorities move toward the total implementation of ILO 147 developing flag states and open registries, especially those refusing to accept ITF demands will be at even greater risk for discrimination, which could lead to a loss of confidence in the integrity of port state control. The only solution to this potentially explosive situation is greater commitment on the part of MOU states and unilateral port state control authorities to enforce ILO 147 in the strictest sense, that is to exercise the absolutely limited authority granted by Article 4, and report related deficiencies to flag states instead of exercising control over the internal management of the ship’s affairs.

The fourth assessors of the success of port state control are the enforcing authorities themselves. When the MOU was signed in 1982 its goal was to harmonize port state control inspections among the fourteen states and to target 25% of all foreign flag vessels calling at MOU ports within a twelve month period thus leading to a region wide 100% coverage. Revised estimates for 1988 showed only on 18.2% inspection percentage with 70% coverage.\textsuperscript{12} Nevertheless, the MOU Secretariat interpreted these figures to show:

\textit{It is a satisfactory development that the contributions of the individual port States to the summarized inspection percentage of 18.2% continue to equalize, so that the inspection efforts per participating Maritime Authority are gradually ‘balancing out’.}\textsuperscript{13}

For the same period under review the number of

\textsuperscript{11} Tintz, M., Port State Control versus Marine Pollution. 16 Maritime Pol. Mgmt. 189 (1989), at 191.

\textsuperscript{12} MOU on PSC Annual Report 1988, at 20.

\textsuperscript{13} Ibid.
deficiencies decreased and, apparently based on the reduction of individual ships calling at MOU ports, the number of inspections also decreased.\textsuperscript{14} Despite the confusing numbers, the MOU authorities say they are successful. They refer to the change in tone from the skeptics with phrases such as "regionalistic policy" and "that gloomy sounding phenomenon" to an acknowledgement that port state control is, after all "not superfluous."\textsuperscript{15} Also, the MOU authorities note that the industry is now largely supportive and other flag states have requested statistical information and other publications.\textsuperscript{16}

The failure to reach its targets have been blamed on lack of human resources and inadequacy of data processing by some members which is being alleviated but more significantly defects are being detected.\textsuperscript{17} One conclusion as to the success of the MOU indicated a "thinning" of the substandard ship from Europe.\textsuperscript{18} If this conclusion is true then it is possible that this thinning is a result of flight of substandard ships from Europe and not necessarily an improvement in overall world shipping standards. In any event, the MOU partners are undoubtedly aware that all substandard ships have not been banned from Europe, therefore, more needs to be done to ensure that there is a steady decline in the number of detentions.

This can only be attained through the globalization of port state control with increased cooperation between enforcement authorities and the creation of more port state control networks under the auspices of the IMO.

\textsuperscript{14} See Appendix V (i).

\textsuperscript{15} Huibers, at 443.


\textsuperscript{17} Newbery, R., Implementation of Port State Control. Excerpts from a paper delivered to the Honorable Company of Master Mariners, October 10, 1984, at 123-4.

\textsuperscript{18} Ibid. at 124.
B. Cooperation between Port State Control Authorities.

A number of other countries are currently undertaking port state control inspections of various kinds, most notably the United States, Canada, Australia and Japan. Each of these states operate under varying forms of legislative authority with different degrees of enforcement capabilities. Shortly after its inception, the MOU partners saw the need to establish a form of cooperation with other maritime authorities and in 1984 exchange of information began with Japan, followed by the United States Coast Guard in 1986 and the Canadian Coast Guard in 1987. The form of the cooperation usually include exchange of information regarding port state control guidelines, inspection reports, reciprocal participation in seminars, conferences, technical meetings, etc.

There is also a need for an extension of this form of cooperation between the MOU partners and other maritime authorities as well, because there is a recognized need for port state control to extend beyond Europe and North America to the oil ports of the Middle East as well as African, Asian, Caribbean and Latin American ports. This is extremely important in view of the fact that any decline of substandard ships from one region of the world which is merely the result of flight to another region does not aid in the improvement of world standards. In order to move toward a global concerted effort to eliminate substandard ships, port state control networks must be set up in other regions, thus weaving a tighter noose around the necks of substandard owners. When virtually every port state is part of a network substandard ships will likely disappear. Of course the effective implementation of such a global scheme depends on a harmonized plan of action based on

19 Kasoulides, at 260.
20 MOU on PSC Annual Report 1988, at 4-5.
21 Kasoulides, at 260.
22 Ibid. See also, Rafgard, at 104.
internationally acceptable standards.

C. The Regionalization of Port State Control under the Auspices of the IMO.

Presently, two basic forms of port state control infrastructure exist. There is the unilateral model which accommodates the United States strict enforcement and regional port state control in the form of the MOU. Both forms have advantages and disadvantages which do not coincide. For example unilateral control is not concerned with the difficult task of harmonization or extensive cooperation. On the other hand regional control does not require a massive infrastructure nor the accompanying high budgetary costs. Only countries controlling significant proportions of the world seaborne trade, such as the United States, can afford to implement strict unilateral control without losing significant amount of its trade. Still, unilateral control invites arbitrarily imposed regulations which go beyond accepted international conventions and can "cause retaliatory action". In any event, unilateral control authorities will likely seek cooperation with other authorities as has been the case with the United States Coast Guard and the MOU partners. The choice for other maritime authorities, particularly developing countries, clearly lies in the form of regional networks. Each such network should develop on its own, taking into account its own needs. Although the MOU format is a good basis for this purpose it need not be copied verbatim. The first phase in this process involves those parties already participating in or currently developing port state control. They need to come together in an informal forum to discuss ways of implementing port state control on a regional basis under the auspices of the IMO. The IMO must at all times be the central link in this process because the object will always remain the cooperation of the various parties and the harmonization of the standards, all of which, apart from ILO 147, originated in the IMO. The IMO has constantly set the

23 Huibers, at 444.
24 Kasoulides reaches the same conclusion, at 261.
pace for the uniform enforcement of the standards set by the international conventions and is best suited as a forum where port state control authorities can work together to ensure that the relevant instruments are being uniformly interpreted to prevent discriminatory or incompetent application of the standards.25

The global application of the standards is the goal of both the IMO and those who enforce the regulations. This being the case, one could then argue that full harmonization can only be attained under one international port state control network with the IMO as the international control center. Unfortunately, there are two inherent fallacies in this approach. First of all, the IMO is not an intergovernmental regulatory body charged with the responsibility of enforcing international standards, and port state control, though recognized by the IMO as an effective complement to flag state control,26 is being successfully enforced by port states themselves. Secondly, harmonization is only as effective as the size of the harmonizers. For example, the MOU partners are a small group of sovereign states covering the small geographical area of Western Europe and, although the MOU is open to new members, they recognize that harmonization is already a major concern for the members, so instead of expanding, which is in itself a worthwhile thought, they chose the path of cooperation and exchange of information with other authorities while insisting that the IMO play a pivotal role in the setting of standards, which will ensure that no one region takes a different position from the rest of the IMO member states.27

Invariably, one of the major items on any agenda for the establishment of regional port state control networks will be the lack of ratification of the relevant international conventions by developing countries. But this should not be seen as a stifling factor for the networks.

25 Mensah, at 27.
26 Ibid.
27 Maier, at 133.
It could even lead to an advantage for the networks because the various national regimes to be set up would be based on a harmonized approach from the start. Once the region is identified and the network created, the participants must then sit down and address the important technical and other requirements and adopt a "realistic and pragmatic approach" which would most certainly lead to the speedy ratification of the relevant instruments.\(^2^8\)

The second phase in the process is the task of identifying the various regions for the networks. Again, this shows the importance of using the IMO as the central link because the members of the IMO comprise virtually every port state and the members account for over 96% of the world's tonnage. Although the IMO does not sponsor regional affiliations at its meetings, it has cooperated with other organizations such as UNCTAD which do and that helps add to the possible choices. The easiest way is to look for existing regional economic cooperation groups such as CARRICOM in the Caribbean Sea area or maritime cooperation groups such as the Ministerial Conference of West and Central African States on Maritime Transport (MINCOMAR). Another possibility might be to identify certain sea routes which run along a series of national coastlines. This latter approach appears to be the picture rationale of the MOU because if a line were to be drawn from Scandinavia to the Mediterranean virtually every port in that part of the Western hemisphere would fall under the MOU. Once a decision is made as to the delineation of the various "International Control Regions" steps must be taken to ensure that the number of participants in the regional network do not exceed a reasonable number. Of course, in keeping with the spirit of the Law of the Sea Convention (UNCLOS) those landlocked states whose economies depend on

\(^2^8\) Kasoulides at 261. Kasoulides recognized that once the participants agreed on their plan of action each was eager to push for the ratification of the relevant conventions. In comparison, other types of such moves have occurred as in the case of Liberia which ratified the Facilitation of Maritime Traffic Convention years ago but did not implement it until a very successful seminar was held in Monrovia in 1989 which showed how easily the standard forms could be assimilated into the existing national regulatory framework at little extra cost to Government, and made everyone's work a little easier.
the use of certain ports should be invited to participate in a reasonable manner in the control of vessels carrying cargo for trans-shipment to or from such states.

The next phase involves the choice of the form of agreement the participants will adopt and the framework for implementing the agreement. International law presupposes the right of states to enter into practically any type of agreement with other states. This includes the signing of formal treaties, memoranda of understanding, as well as communiques loosely calling for agreement on certain subjects. Different states have different national requirements as to what form their bilateral and multilateral agreements should adopt. Therefore, it is conceivable that the networks will possibly have varying grants of authorization. However, this should not hamper the ability of the authorities involved to function without interference. Similarly, no such agreement should create new regulations outside the framework of the existing relevant conventions nor should any additional regulations be imposed on the participants than that authorized by the relevant conventions. For the purpose of uniformity and harmonization the relevant instruments for all regional networks must be those instruments already recognized by the IMO and the ILO, i.e., SOLAS 74; SOLAS Protocol of 78; MARPOL 73, 78; STCW 78; COLREGS 72, Load Lines 66; and ILO 147. In addition, the agreement should provide for the extent of authority of the participants undertaking inspection procedures and authorized action regarding deficiencies including detention, a reporting system, organizational structure, etc. These provisions are also basic to the MOU but they are the basis for its implementation.

The final phase in the process is the implementation, record keeping and data interchange. In this phase several items need to be addressed. First of all each participating authority should identify possible surveyors who should have

29 Huibers, at 434.
30 Ibid.
IMO recommended levels of professional training or experience in shipboard affairs. Special training would undoubtedly be required through the central link and periodic seminars for surveyors should be organized. Training can take on several fronts from sending surveyors to port state control Courses abroad to bringing in technical experts. Next, each network should establish a small secretariat for the sole purpose of record keeping and coordinating the activities of the network. The choices range from the MOU style with one partner providing the secretariat to a mutually funded secretariat. In light of the dismal record of mutually funded regional projects the latter should be avoided. There is even the possibility of rotating the secretariat, but that could lead to some confusion and lack of continuity. All that the participants need to communicate with the secretariat is a telephone and a telex machine. Telefax and computer link-ups are excellent ideas but may not be easily obtained at the outset. The secretariat should have a computer which could be connected to the central link ideally located in a small room at the IMO headquarters. Numerous software exist that could easily be adapted to the secretariat’s needs and this should be explored by competent experts. Finally, the central link should be as easily accessible as possible to ensure that each secretariat can transmit or receive information from other secretariats and from the central link as well.

The overriding concern of most countries today relate to budgetary constraints and that is the main attraction of regional port state control. The relatively small number of participants involved, the use of personnel already performing important tasks in the national infrastructure plus the methods of processing and exchanging information at low costs is a good incentive for administrations with budgetary constraints who nevertheless demand a high return on their investments.31

31 Kasoulides, at 261.
CHAPTER VII

CONCLUSION

Port State Control in Europe was made possible by economic and environmental concerns which were stifling European shipping. The decision to move against substandard shipping, though prompted by the above concerns, was necessary to aid in the international effort to clean up the oceans and make the seas safer. Consequently, it was necessary for states to find a mechanism through which port states could exercise their jurisdiction to control foreign flag vessels and enforce the provisions of those relevant international conventions and protocols which establish minimum standards for ships. As always, this jurisdiction would supplement flag state jurisdiction, not replace it, and port state control would be the mechanism for this enforcement.

International law has always recognized the sovereign jurisdiction of coastal or port states over their territorial sea and internal waters. Hence, the inclusion of the "no more favorable treatment" clause in maritime safety and pollution prevention conventions, beginning in 1973 with MARPOL was the most convenient means to enable port states to exercise control. But this control is not absolute. The conventions clearly state the extent to which control may be exercised over foreign flag vessels, and, with the exception of ILO 147, such control may not extend to the internal management of the ship's affairs. In addition, MARPOL 73,78, SOLAS 74 and the protocol of 1978, and the STCW/78 provide for compensation to be paid for undue delay. The UNCLOS also provides for this compensation by calling for a right of recourse in the courts of the port state exercising this control.

In nearly ten years of operation European port state control has been accepted by those who are affected by it and it is considered successful. Similarly, American port
state control is also considered successful. Although the figures generated by the MOU members do not cover a long enough period for proper evaluation, a number of observations were made to support the above conclusions.

The greater percentage of ships calling at European ports were "regional" but the total number include vessels from all parts of the world. The serious deficiencies appear to involve vessels from developing countries; the open registry record is mixed with some open registries, like Liberia, showing exceptionally good records; and there is no real indication from the figures indicating a flight of substandard ships from Europe to other areas simply because of the confidentiality of such information.\(^1\)

Also, in terms of the political and technical effectiveness of port state control, the widespread acceptance of the concept demonstrates its global political success, while on the other hand, the failure of the MOU to achieve its goal indicates a need to address the problems associated with the regional fleet as well as the practical effects of the MOU on trading patterns.\(^2\) The MOU partners recognize their limitations and aim to improve their performance record as well as intensify their cooperation with other maritime authorities and organizations with a view to worldwide enforcement.\(^3\)

Other weaknesses pointed out regarding port state control in general include the failure of flag states to take appropriate action when advised by port states, the inability of the inspector to look to the structural strength of vessels and the obligation of the inspector to accept the licences and certificates of officers and crew.


\(^2\) Tintz, M., Port State Control versus Marine Environmental Pollution. 16 Maritime Pol. Mgmt. 189 (1989), at 205-06.

issued by flag states without having the ability to check the varacity of such documents. Furthermore, budgetary constraints faced by maritime authorities responsible for port state control, particularly in the case of unilateral control, may hamper the efficiency of the enforcement effort.

The most pragmatic solution to the above problems is the regionalization of port state control under the auspices of the IMO. Admittedly, the skeletal structure proposed in Chapter VI does not represent a firm enough framework for the implementation of regional port state control. However it is a starting point for the discussions which would lead to the creation of the appropriate models for each region to follow. Regionalization takes advantage of the collective strength usually found in many international undertakings. Furthermore, under regionalization the individual costs are reasonably low since the control mechanism is absorbed into an already existing maritime framework, and the individual partners can focus on the limited functions ascribed by the conventions while sharing the cost of the information system. Furthermore, regionalization will lead to greater participation by virtually all flag states which in most cases are also port states, in the improvement of standards. Flag states, including those operating open or second registers, will begin to develop a keener view of their responsibilities and the efforts of the regionalization plan would be greatly enhanced.

When all flag states begin to participate in regional port state control, the fear of retaliatory action will be diminished and port state control may become so effective, that the elimination of the substandard ship will become a reality. Once achieved, port state control may become unnecessary. Until then, it remains a viable mechanism through which flag state control can be supplemented by port states.

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RESOLUTION A.466(XII)

Adopted on 19 November 1981
Agenda item 10(b)

PROCEDURES FOR THE CONTROL OF SHIPS

THE ASSEMBLY,

RECALLING Article 16(i) of the Convention on the Inter-Governmental Maritime Consultative Organization,

RECALLING FURTHER that it had adopted by resolution A.321(IX) Procedures for the Control of Ships under Regulation 19 of Chapter I of the International Convention for the Safety of Life at Sea, 1960, and Article 21 of the International Convention on Load Lines, 1966,

NOTING that the Maritime Safety Committee as requested in resolution A.321(IX) prepared the document entitled “Sub-standard Ships: Guidelines on Control Procedures” (MSC/Circ.219),

RECALLING ALSO that with resolution A.390(X) it had urged Governments of flag States to submit information about action taken in respect of ships entitled to fly the flag of their State which were reported as not complying fully with the requirements of the above Conventions,

REAFFIRMING its desire to ensure that ships comply at all times with maritime safety standards prescribed by relevant conventions,

HAVING NOTED the continuous work of the Maritime Safety Committee on the subject of improving the Procedures for the Control of Ships, including the Guidelines, with reference to the International Convention for the Safety of Life at Sea, 1974,

HAVING CONSIDERED the recommendation made by the Maritime Safety Committee at its forty-third session,

1. ADOPTS the improved Procedures for the Control of Ships and Guidelines thereto contained in the Annex to this resolution, which supersedes the texts set out in the Annex to resolution A.321(IX) and in MSC/Circ.219;

2. INVITES Member Governments and Contracting Governments to the aforementioned Conventions to implement the improved Procedures and Guidelines;

3. REQUESTS Governments concerned to provide information on:

(a) The services available in each country for the controlling functions under the relevant Conventions and when necessary to update the information previously submitted;

(b) Action taken in respect of ships found to be deficient in relation to the above Conventions in their role as either port or flag State Government;
4. REQUESTS the Maritime Safety Committee to continue its work on this subject with a view to improving the Procedures and Guidelines further as may be necessary and progressively to extend these to cover:

(a) The Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974;
(b) The forthcoming amendments to the 1974 SOLAS Convention; and
(c) Any new conventions;
when experience has been gained with these instruments;

5. FURTHER REQUESTS the Secretariat to update when necessary the information from Member countries on inspection services available domestically and abroad, for circulation to Governments concerned.

ANNEX

PROCEDURES FOR THE CONTROL OF SHIPS

1 Introduction

1.1 Under the provisions of the applicable International Convention for the Safety of Life at Sea and the International Convention on Load Lines, 1966, the Administration (i.e. the Government of the flag State) is responsible for promulgating laws and regulations and for taking all other steps which may be necessary to give these Conventions full and complete effect so as to ensure that, from the point of view of safety of life, a ship is fit for the service for which it is intended.

1.2 In some cases it may be difficult for the Administration to exercise full and continuous control over some ships entitled to fly the flag of its State, for instance those ships which do not regularly call at a port of the flag State. The problem can be, and has been, partly overcome by appointing inspectors at foreign ports or authorizing classification societies to act on behalf of the flag State Administration.

1.3 The following control procedures should be regarded as complementary to national measures taken by Administrations of flag States in their countries and abroad and are intended to assist flag State Administrations in securing compliance with convention provisions in safeguarding the safety of crew, passengers and ships.

1.4 The procedures are intended to apply to ships which come under the provisions of the applicable International Convention for the Safety of Life at Sea and the International Convention on Load Lines, 1966.

1.5 Port States should carry out control of ships of non-convention countries and of ships below convention size, but deficiency reports should be submitted to the Administration of the country concerned and not to the Organization.

1.6 Deficiency reports under the Memorandum of Understanding between certain maritime Administrations or any similar agreement should not be sent to the Organization except if related to IMCO conventions and in conformity with the present procedure.

2 General

2.1 Regulation 19 of Chapter I of the applicable International Convention for the Safety of Life at Sea, and Article 21 of the International Convention on Load Lines, 1966, provide for control procedures to be followed by the Contracting Governments with regard to foreign ships visiting their ports. The authorities of port States should make effective use of these provisions for the purposes of identifying deficiencies, if any, in such ships which may render them sub-standard (see 3.1) and ensuring that remedial measures are taken. Such control may be initiated either:
2.1 by a visit of a control officer of the port State to verify that there are on board valid certificates; or

2.2 on the basis of information regarding a sub-standard ship submitted to the authorities of the port State in accordance with the procedures under section 4.

2.2 Contracting Governments should be aware that whereas they may entrust inspection and survey either to surveyors nominated for this purpose or to organizations recognized by them, it is preferable that the right to board and inspect ships for the purposes of control and the power to detain them should be implemented by government inspectors including those surveyors of the classification societies who, in practice, act as government officials of the port State.

2.3 Guidelines on control procedures are given in Appendix 1.

3 Identification of a sub-standard ship

3.1 In general, a ship is regarded as sub-standard:

3.1.1 if the hull, machinery or equipment such as for life-saving, radio and fire-fighting are below the standards required by the relevant Convention, owing to, *inter alia*;

.1 the absence of equipment or arrangement required by the conventions;

.2 non-compliance of equipment or arrangement with relevant specifications of the Conventions;

.3 substantial deterioration of the ship or its equipment because of, for example, poor maintenance; and

3.1.2 if these evident factors as a whole or individually make the ship unseaworthy and would put at risk the life of persons on board if it were allowed to proceed to sea.

3.2 The lack of valid certificates (or the lack of Radiotelegraph Operator's Certificates or Radiophone Operator's Certificates) as required by the relevant Conventions, will constitute *prima facie* evidence that a ship may be sub-standard and will form the basis of a decision to detain the ship forthwith and to inspect it.

3.3 It is impracticable to define a sub-standard ship solely by reference to a list of qualifying defects. The inspector will have to exercise his professional judgement to determine whether to detain the ship until the deficiencies are corrected or to allow it to sail with certain deficiencies which are not vital to the safety of the ship, its crew or passengers, having regard to the particular circumstances of the intended voyage.

4 Submission of information to a port State about a sub-standard ship

4.1 Information that a ship appears to be sub-standard may be submitted to the appropriate authorities of the port State (see 4.4) by a member of crew, a professional body, an association, a trade union or any other individual with an interest in the safety of the ship, its crew and passengers. So far as the crew is concerned, it would be advisable that the submission should be subscribed to by more than one member.

4.2 It is desirable that such information should be submitted in writing. This would permit proper documentation of the case and of the alleged deficiencies including the identification of the source of the information. When the information is passed verbally, it is preferable to require subsequently the filing of a written report, identifying for the purposes of the port State's records the individual or body providing the information.
4.3 Information which may cause an investigation to be made should be submitted as early as possible after the arrival of the ship giving adequate time to the authorities to act as necessary.

4.4 Each Contracting Government should determine which authorities should receive information on sub-standard ships and initiate action. Measures should be taken to ensure that information submitted to the wrong department should be promptly passed on by such department to the appropriate authority for action.

5 Action by port States in response to information about sub-standard ships

5.1 On receipt of information about a sub-standard ship, the authorities, after evaluating, in consultation with the master as appropriate, the seriousness of the information and the reliability of its source, should immediately investigate the matter and take the action required by the circumstances. Information judged by the authorities to be bona fide under the present procedures could constitute clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of the relevant certificates required by the applicable International Convention for the Safety of Life at Sea, or the International Convention on Load Lines, 1966, and the consequential need for inspection. Care should be taken to avoid any undue delay to the ship.

5.2 Authorities which receive information about a sub-standard ship which could give rise to intervention should forthwith notify any maritime, consular and/or diplomatic representatives of the flag State in the area of the ship and request them to initiate or co-operate with investigations. Likewise, the classification society which has issued the relevant certificates on behalf of the flag State should be notified. These provisions will not, however, relieve the authorities of the Contracting Government of the port State from the responsibility for taking appropriate action in accordance with its powers under the relevant Conventions.

5.3 If the port State receiving information is unable to take action because there is insufficient time or no inspectors can be made available before the ship sails, the information should be passed to the authorities of the country of the next appropriate port of call, to the flag State and also to the relevant classification society in that port, where appropriate.

6 Procedures to be followed after exercise of control

6.1 The authorities of port States which have exercised control giving rise to intervention of any kind, whether or not as a result of information about a sub-standard ship, should forthwith notify any maritime, consular and/or diplomatic representatives of the flag State in the area of the ship of all the circumstances unless this is already done under 5.2. If such notification is made verbally, it should be subsequently confirmed, in writing. Likewise, the classification societies which have issued the relevant certificates on behalf of the flag State should be notified.

6.2 If the ship has been allowed to sail with known deficiencies, the authorities of the port State should communicate all the facts to the authorities of the country of the next appropriate port of call, to the flag State and to the relevant classification society, where appropriate. Lists of Addresses of Administrations to which the reports should be sent and of available inspection services are given in Appendix 3.

6.3 Contracting Governments, when they have exercised control giving rise to intervention of any kind, are urged to submit to the Organization reports in accordance with Regulation 19 of Chapter I of the applicable International Convention for the Safety of Life at Sea or Article 21 of the International Convention on Load Lines, 1966. Such deficiency reports should be made in accordance with the form given in Appendix 2.
6.4 Copies of deficiency reports made in accordance with paragraph 6.3 by Contracting Governments should, in addition to being forwarded to the Organization, be sent by the port State without delay to the authorities of the flag State and, where appropriate, to the classification society which had issued the relevant certificate. Deficiencies found which are not related to the applicable International Conventions for the Safety of Life at Sea, and the International Convention on Load Lines, 1966, should be submitted to flag States and/or to appropriate organizations but not to IMCO.

6.5 On receipt of such deficiency reports, the Administration of the flag State and/or, where appropriate, the classification society through that Administration, in addition to initiating any remedial action, is urged to forward comments to the Organization as soon as possible, preferably within three months after receipt. Such comments should be made in accordance with the form given in Appendix 2.

6.6 In the interest of making information regarding deficiencies and remedial measures generally available, a summary of such reports which have been received six months prior to every session of the Maritime Safety Committee should be prepared by the Secretariat, for consideration by the Maritime Safety Committee at every session, together with comments, if any, provided by the Administration of the flag State, which should include the reports of the classification society, if any. Copies of the reports should be circulated also to Contracting Governments which are not Members of IMCO.

6.7 In the summary of deficiency reports an indication should be given (flag State action) as to whether a comment by the flag State concerned is outstanding (comment). Deficiency reports upon which expected flag State comments are outstanding shall be repeated in consecutive summaries of deficiency reports until such comments have been received. Before repeating such deficiency reports in subsequent summaries, the Secretariat should remind flag States concerned of any outstanding comments.

6.8 While Article 21 of the International Convention on Load Lines, 1966, does not provide for the submission of deficiency reports to the Organization, it is recommended that such reports should be made and submitted in accordance with the Procedures for the Control of Ships and the Guidelines on Control Procedures, where failure to comply with the convention requirements has led to an intervention by a port State.
RESOLUTION A.542(13)

Adopted on 17 November 1983
Agenda item 12


THE ASSEMBLY,

RECALLING Article 16(j) of the Convention on the International Maritime Organization concerning the functions of the Assembly in relation to regulations concerning marine pollution,

RECALLING FURTHER that the Parties to the International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), have undertaken to give effect to its provisions in order to prevent the pollution of the marine environment by the discharge of, inter alia, oil or oily mixtures in contravention of that Convention,

RECALLING ALSO that it had adopted by resolution A.391(X) Procedures for the Control of Discharges under the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended in 1962 and 1969,

REAFFIRMING its desire to ensure that ships comply at all times with the marine pollution standards prescribed by MARPOL 73/78,

NOTING that the provisions of MARPOL 73/78 relevant to the port State control of ships and discharges will be strengthened by the development of procedures to implement these provisions,

HAVING CONSIDERED the recommendation made by the Marine Environment Protection Committee at its eighteenth session,

1. ADOPTS the Procedures for the Control of Ships and Discharges under Annex I of MARPOL 73/78 as set out in the Annex to this resolution which supersedes the Procedures contained in resolution A.391(X);

2. INVITES Member States and Parties to MARPOL 73/78 to implement the procedures and thereby to contribute towards the attainment of the objectives of that Convention;

3. REQUESTS Governments concerned to provide information on action taken in respect of ships found to be deficient in relation to MARPOL 73/78 in their role as either port or flag State administration;

4. FURTHER REQUESTS the Secretariat to collect and update when necessary the information referred to above for circulation to the Governments concerned;

5. REQUESTS ALSO the Marine Environment Protection Committee to continue its work on this subject with a view to improving the procedures further as may be necessary and to extend its work progressively to cover amendments to MARPOL 73/78 and experience gained from implementation and enforcement of the Convention.
ANNEX


PREAMBLE

1. The Parties to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78) have undertaken to give effect to its provisions* in order to prevent the pollution of the marine environment by the discharge of, inter alia, oil or oily mixtures in contravention of that Convention.

2. The provisions cover the design and equipment of ships, the execution of surveys and inspections in order to ensure that the design and equipment comply with the relevant international standards and cover the operations of ships in so far as this concerns the protection of the marine environment.

3. The primary responsibility for securing that objective in relation to any particular ship rests with the Administration of the flag State. No attempt is made in this document to lay down guidelines for Administrations in this respect.

4. In some cases, and this applies especially to the operational provisions, it may be difficult for the Administration to exercise full and continuous control over some ships entitled to fly the flag of its State. Such ships for instance may not call regularly at ports or offshore terminals under the jurisdiction of the flag State.

5. The problem can be and has been overcome partly by appointing inspectors at foreign ports or authorizing classification societies to act on behalf of the flag State. In addition MARPOL 73/78 includes a number of provisions for States other than the flag State to exercise control over foreign ships visiting ports or offshore terminals under their jurisdiction. Guidelines, supplementary to these provisions, on specific control procedures have also been developed by the Organization. This document brings together the provisions and the guidelines for port and coastal State control referred to above.

6. Parties should make effective use of the opportunities that port State control provides for identifying deficiencies and substandard operations, if any, in visiting foreign ships which may render them pollution risks and for ensuring that remedial measures are taken. The purpose of these guidelines is to assist Parties to exercise effective port and coastal State control and thereby to contribute towards the attainment of the objectives of MARPOL 73/78.

7. Nothing in these guidelines should be construed as derogating from the powers of any Party to take measures within its jurisdiction in respect of any matter to which MARPOL 73/78 relates or as extending the jurisdiction of any Party.

8. For the inspections carried out under these control procedures Article 7 of MARPOL 73/78 applies in that:

* In this document the provisions of MARPOL 73/78 include proposed amendments contained in MEPC/Circ.97 and MEPC/Circ.99.
.1 All possible efforts shall be made to avoid a ship being unduly detained or delayed; and

.2 when a ship is unduly detained or delayed by the control procedures it shall be entitled to compensation for any loss or damage suffered.
MEMORANDUM OF UNDERSTANDING ON PORT STATE CONTROL

The Maritime Authorities of

Belgium
Denmark
Finland
France
Germany (Federal Republic of)
Greece
Ireland
Italy
Netherlands
Norway
Portugal
Spain
Sweden
United Kingdom of Great Britain and Northern Ireland hereinafter referred to as 'the Authorities'

Recalling the Final Declaration adopted on 2 December 1980 by the Regional European Conference on Maritime Safety which underlined the need to increase maritime safety and the protection of the marine environment and the importance of improving living and working conditions on board ship;

Noting with appreciation the progress achieved in these fields by the International Maritime Organization and the International Labour Organisation;

Noting also the contribution of the European Communities towards meeting the above mentioned objectives;

Mindful that the principal responsibility for the effective application of standards laid down in international instruments rests upon the authorities of the State whose flag a ship is entitled to fly;

Recognizing nevertheless that effective action by port States is required to prevent the operation of substandard ships;

Recognizing also the need to avoid distorting competition between ports;

Convinced of the necessity, for these purposes, of an improved and harmonized system of port state control and of strengthening cooperation and the exchange of information;

have reached the following understanding:

Section 1 Commitments

1.1 Each Authority will give effect to the provisions of the present Memorandum and the Annexes thereto, which constitute an integral part of the Memorandum.

1.2 Each Authority will maintain an effective system of port state control with a view to ensuring that, without discrimination as to flag, foreign merchant ships visiting the ports of its State comply with the standards laid down in the relevant instruments as defined in section 2.

1.3 Each Authority will achieve, within a period of 3 years from the coming into effect of the Memorandum, an annual total of inspections corresponding to 25% of the estimated number of individual foreign merchant ships, hereinafter referred to as 'ships', which entered the ports of its State during a recent representative period of 12 months.

1.4 Each Authority will consult, cooperate and exchange information with the other Authorities in order to further the aims of the Memorandum.
Section 2 Relevant Instruments

2.1 For the purposes of the Memorandum 'relevant instruments' are the following instruments:
- the International Convention on Load Lines, 1966;
- the International Convention for the Safety of Life at Sea, 1974;
- the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974;
- the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto;
- the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978;
- the Convention on the International Regulations for Preventing Collisions at Sea, 1972;
- the Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention 147).

2.2 With respect to the Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention 147), each Authority will apply the standards specified in Annex 1.

2.3 Each Authority will apply those relevant instruments which are in force and to which its State is a Party. In the case of amendments to a relevant instrument each Authority will apply those amendments which are in force and which its State has accepted. An instrument so amended will then be deemed to be the 'relevant instrument' for that Authority.

2.4 In applying a relevant instrument for the purposes of port state control, the Authorities will ensure that no more favourable treatment is given to ships entitled to fly the flag of a State which is not a Party to that instrument.

2.5 In the case of ships below 500 tons gross tonnage the Authorities will apply those requirements of the relevant instruments which are applicable and will to the extent that a relevant instrument does not apply take such action as may be necessary to ensure that those ships are not clearly hazardous to safety, health or the environment, having regard in particular to Annex 1.

Section 3 Inspection Procedures Rectification and Detention

3.1 In fulfilling their commitments the Authorities will carry out inspections, which will consist of a visit on board a ship in order to check the certificates and documents relevant for the purposes of the Memorandum. In the absence of valid certificates or documents or if there are clear grounds for believing that the ship does not substantially meet the requirements of a relevant instrument, a more detailed inspection will be carried out. Inspections will be carried out in accordance with Annex 1.

3.2 The Authorities will regard as 'clear grounds' inter alia the following:
- a report or notification by another Authority;
- a report or complaint by the master, a crew member, or any person or organization with a legitimate interest in the safe operation of the ship, shipboard living and working conditions or the prevention of pollution, unless the Authority concerned deems the report or complaint to be manifestly unfounded;
- other indications of serious deficiencies, having regard in particular to Annex 1.

3.3 In selecting ships for inspection, the Authorities will pay special attention to:
- ships which may present a special hazard, for instance oil tankers and gas and chemical carriers;
- ships which have had several recent deficiencies.

3.4 The Authorities will seek to avoid inspecting ships which have been inspected by any of the other Authorities within the previous six months, unless they have clear grounds for inspection.
3.5 Inspections will be carried out by properly qualified persons authorized for that purpose by the Authority concerned and acting under its responsibility.

3.6 Each Authority will endeavour to secure the rectification of deficiencies detected.

3.7 In the case of deficiencies which are clearly hazardous to safety, health or the environment, the Authority will, except as provided in 3.8, ensure that the hazard is removed before the ship is allowed to proceed to sea and for this purpose will take appropriate action, which may include detention. The Authority will, as soon as possible, notify the flag State through its consul or, in his absence, its nearest diplomatic representative or its maritime authority of the action taken. Where the certifying authority is an organization other than a maritime administration, the former will also be advised.

3.8 Where deficiencies referred to in 3.7 cannot be remedied in the port of inspection, the Authority may allow the ship to proceed to another port, subject to any appropriate conditions determined by that Authority with a view to ensuring that the ship can so proceed without unreasonable danger to safety, health or the environment. In such circumstances the Authority will notify the competent authority of the region State where the next port of call of the ship is situated, the parties mentioned in 3.7, and any other authority as appropriate. Notification to Authorities will be made in accordance with Annex 2. The Authority receiving such notification will inform the notifying Authority of action taken.

3.9 The provisions of section 3.7 and 3.8 are without prejudice to the requirements of relevant instruments or procedures established by international organizations concerning notification and reporting procedures related to port state control.

3.10 The Authorities will ensure that, on the conclusion of an inspection, the master of the ship is provided with a document, in the form specified in Annex 3, giving the results of the inspection and details of any action taken.

3.11 When exercising control under the Memorandum, the Authorities will make all possible efforts to avoid unduly detaining or delaying a ship. Nothing in the Memorandum affects rights created by provisions of relevant instruments relating to compensation for undue detention or delay.

Section 4 Provision of information
Each Authority will report on its inspections under the Memorandum and their results, in accordance with the procedures specified in Annex 4.

Section 5 Operational Violations
The Authorities will upon the request of another Authority, endeavour to secure evidence relating to suspected violations of the requirements on operational matters of Rule 10 of the International Regulations for Preventing Collisions at Sea, 1972 and the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978, relating thereto. In case of suspected violations involving the discharge of harmful substances, an Authority will, upon the request of another Authority, visit in port the ship suspected of such a violation in order to obtain information and where appropriate to take a sample of any alleged pollutant.

Section 6 Organization
6.1 A Committee will be established, composed of a representative of each of the Authorities and of the Commission of the European Communities. An observer from each of the International Maritime Organization and the International Labour Organization will be invited to participate in the work of the Committee.

6.2 The Committee will meet once a year and at such other times as it may decide.
8.3 The Committee will:
- carry out the specific tasks assigned to it under the Memorandum;
- promote by all means necessary, including seminars for surveyors, the harmonization of procedures and practices relating to inspection, rectification, detention and the application of 2.4.;
- develop and review guidelines for carrying out inspections under the Memorandum;
- develop and review procedures for the exchange of information;
- keep under review other matters relating to the operation and the effectiveness of the Memorandum.

8.4 A secretariat provided by the Netherlands’ Ministry of Transport and Public Works will be set up and will have its office in The Hague.

8.5 The secretariat, acting under the guidance of the Committee and within the limits of the resources made available to it, will:
- prepare meetings, circulate papers and provide such assistance as may be required to enable the Committee to carry out its functions;
- facilitate the exchange of information, carry out the procedures outlined in Annex 4 and prepare reports as may be necessary for the purposes of the Memorandum;
- carry out such other work as may be necessary to ensure the effective operation of the Memorandum.

Section 7 Amendments

7.1 Any Authority may propose amendments to the Memorandum.

7.2 In the case of proposed amendments to sections of the Memorandum the following procedure will apply:
- the proposed amendment will be submitted through the secretariat for consideration by the Committee;
- amendments will be adopted by a two-thirds majority of the representatives of the Authorities present and voting in the Committee. If so adopted an amendment will be communicated by the secretariat to the Authorities for acceptance;
- an amendment will be deemed to have been accepted either at the end of a period of six months after adoption by the representatives of the Authorities in the Committee or at the end of any different period determined unanimously by the representatives of the Authorities in the Committee at the time of adoption, unless within the relevant period an objection is communicated to the secretariat by an Authority;
- an amendment will take effect 60 days after it has been accepted or at the end of any different period determined unanimously by the representatives of the Authorities in the Committee.

7.3 In the case of proposed amendments to Annexes of the Memorandum the following procedure will apply:
- the proposed amendment will be submitted through the secretariat for consideration by the Authorities;
- the amendment will be deemed to have been accepted at the end of a period of three months from the date on which it has been communicated by the secretariat unless an Authority requests in writing that the amendment should be considered by the Committee. In the latter case the procedure specified in 7.2. will apply;
- the amendment will take effect 60 days after it has been accepted or at the end of any different period determined unanimously by the Authorities.

Section 8

8.1 The Memorandum is without prejudice to rights and obligations under any international Agreement.
8.2 A Maritime Authority of another State may, with the consent of the Authorities participating in the Memorandum, adhere to the Memorandum. For such an Authority the Memorandum will take effect upon such date as may be mutually agreed.

8.3 When the Memorandum takes effect, it will supersede the 'Memorandum of Understanding between Certain Maritime Authorities on the Maintenance of Standards on Merchant Ships', signed at The Hague on 2 March 1978.

8.4 The Memorandum will take effect on 1 July 1982.

8.5 The English and French versions of the text of the Memorandum are equally authentic.

Signed at PARIS in the English and French languages, this twenty-sixth day of January one thousand nine hundred and eighty-two.
Appendix IV

Organisational structure under the Memorandum of Understanding on Port State Control

Maritime Authorities

Port State Control Committee

Secretariat MOU

C.A.A.M.*
storage: for statistical purposes
six months ships
file: for daily use

IMO

ILO

MOU Port State:
Maritime Authority
District/Port
Shipping Inspection
Surveyor

Flag State:
Maritime Authority
Embassy/Consulate
Ship/Master

Classification Society

*Centre Administratif des Affaires Maritimes
SUMMARY OF PORT STATE CONTROL RESULTS.

MAJOR CATEGORIES OF DEFICIENCIES (1988):

- in % of individual ships:
  - 43.90%
  - 21.57%
  - 14.15%
  - 14.15%
  - 31.23%

- in % of inspections:
  - 34.11%
  - 34.65%
  - 18.57%
  - 14.11%
  - 14.11%

- in % of deficiencies:
  - 25.37%
  - 25.37%
  - 25.37%
  - 25.37%
  - 25.37%

DELAIS/DETENTIONS PER SHIP'S TYPE (1988):

- in % of total number of delays/detentions:
  - other types 10.22%
  - dry bulk carriers 16.27%
  - chemical carriers 5.98%
  - unified vessels 27.1%
  - cargo vessels 20.3%
  - container ships/ferries 18.12%
  - general dry cargo vessels 60.34%

* As more than 1 deficiency may be observed in one ship/one inspection, the sum of the percentages may exceed 100, therefore the sum of the angles of the circle segments may exceed 360°.
BREAKDOWN OF MOST COMMON DEFICIENCIES, OBSERVED IN MOST SIGNIFICANT MAJOR CATEGORIES OF DEFICIENCIES.

1988

SHIPS' CERTIFICATES

- Safety equipment certificate
- International oil pollution prevention certificate
- Load line certificate

LIFE SAVING APPLIANCES

- Life boat inventory
- Life rafts
- Life boats

FIRE FIGHTING APPLIANCES

- Fixed fire extinguishing installation
- Fire fighting equipment

SAFETY IN GENERAL

- Cargo/crew accommodation ladders
- Fire pumps

NAVIGATION

- Nautical charts
- Lightship/Permanent signals
- Radar

MARINE POLLUTION - ANNEX I

- Oil record book
- Dispenser or oil on board
- Standard discharge connection
- 95 ppm alarm
### Appendix V (iii)

#### Major Categories of Deficiencies

<table>
<thead>
<tr>
<th>Major Categories of Deficiencies</th>
<th>Number of Deficiencies</th>
<th>Percentage of Total Deficiencies</th>
<th>Number of Inspections</th>
<th>Percentage of Individual Ships</th>
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<td>13709</td>
<td>14364</td>
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<td>15709</td>
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<td>(Deficiencies/Inspections/Individual Ships)</td>
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</tbody>
</table>

### Major Categories of Deficiencies Continued

- **Ships' Certificates**
- **Crew**
- **Accommodation**
- **Food and Catering**
- **Working Spaces**
- **Life Saving Appliances**
- **Fire Fighting Appliances**
- **Accident Prevention**
- **Safety in General**
- **Alarm Signals**
- **Cargo**
- **Load Lines**
- **Hoisting Arrangements**
- **Propulsion + Auxiliary Machinery**
- **Navigation**
- **Radio**
- **Marine Pollution - Annex I**
- **Deficiencies SPECIF. FOR TANKERS**
- **Marine Pollution - Annex II**
- **All Other Deficiencies**
- **Deficiencies NOT CLEARLY HAZARDOUS**

85
**DEPARTMENT OF TRANSPORTATION**
**U.S. COAST GUARD**

**UNITED STATES COAST GUARD**

**VESSEL BOARDING REPORT**

**DATE:**

**VESSEL NAME:**

**VESSEL TYPE:**

**CALL SIGN:**

**GT:**

**YEAR BUILT:**

**FLAG:**

**BOARDING PORT:**

**PS CASE NUMBER:**

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<tr>
<th>AREAS EXAMINED</th>
<th>CARGO OPERATIONS</th>
<th>U.S. NAVIGATION SAFETY REGS</th>
<th>U.S. POLLUTION PREVENTION REGS</th>
<th>CERTIFICATES</th>
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<table>
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<tr>
<th>Deficiency Description</th>
<th>Deficiency Citation</th>
<th>Action Taken or Required</th>
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<td>2)</td>
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<td>5)</td>
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**Copy delivered to:**

(Master/Mate Printed Name)  
(Position)

**Boarding Officer:**

(Printed Name)  
(Signature)

**Note:** This report is for information only. Notice will be given if penalty action in initiated.

**VESSEL COPY**
<table>
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<tr>
<th><strong>FOREIGN FREIGHT VESSEL EXAMINATION</strong></th>
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<td><strong>FLAG:</strong> ______________________________</td>
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<tr>
<td><strong>PORT:</strong> ______________________________</td>
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<td><strong>CREWS LIST:</strong> __________</td>
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<td><strong>38 CFR 160.111:</strong> __________</td>
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### A. CERTIFICATES

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<td>SOLAS Safety Radiotelegraphy Cert. (SOLAS Reg. 12 Ch. I)</td>
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<td>IOPP Cert. or Equivalent with Form A_____ or Form B_____ (check one). (33 CFR 151.19 or 151.21)</td>
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<td>Latest Endorsement:</td>
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<td>Loadline Certificate (46 CFR 42.03-10)</td>
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<tr>
<td>Latest endorsement:</td>
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</table>
B. GENERAL

1. Loadline is not submerged (46 CFR 42.07-10)
2. No pollution evident alongside
3. No significant hull damage evident
4. 
5. 

C. NAVIGATION SAFETY

1. Current charts for the port (33 CFR 164.33(a)(1)). List local charts carried or their foreign equivalent:

<table>
<thead>
<tr>
<th>Chart #</th>
<th>Edition #/Date</th>
<th>Issuing Agency</th>
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2. Publications are current and corrected up-to-date (33 CFR 164.33):
   a. U.S. Coast Pilot
   b. Coast Guard Light List
   c. Tide Tables
   d. Tidal Current Tables

3. Pre-arrival tests required by 33 CFR 164.25 were conducted and logged (33 CFR 164.11(q))

4. NAV RULES 33 CFR 88.05
4. Following equipment is on board and operable (have energized if possible):

NOTE

ENERGIZING TRANSMITTING EQUIPMENT DURING CERTAIN CARGO OPERATIONS COULD POSE A HAZARD

   a. Marine Radar (33 CFR 164.35(a))
   b. Illuminated Magnetic Steering Compass (33 CFR 164.35(b))
   c. Current Deviation Table or compass comparison record for magnetic compass, in wheelhouse (33 CFR 164.35(c))
   d. Gyrocompass (33 CFR 164.35(d))
   e. Illuminated Gyrocompass repeater at main steering stand (33 CFR 164.35(e))
   f. Illuminated Rudder Angle Indicator (33 CFR 164.35(f))
   g. Maneuvering fact sheet displayed prominently in wheelhouse (33 CFR 164.35(g)) containing:
      (1) Port & Starboard turning circle diagrams for 90 degree turns
      (2) Time & distance to stop from full & half speeds
      (3) Table of shaft revolutions for representative speeds
          OR
          Table of control settings for representative speeds
      (4) Table of speeds at which bow thruster is effective
      (5) Maneuvering information for normal load and normal ballast condition for:
          (a) calm weather
          (b) no current
          (c) deep water conditions
          (d) clean hull
      (6) Warning statement at bottom of maneuvering fact sheet
   h. Echo Depth Sounding device (33 CFR 164.35(h))
I. Continuous recorder for Echo Depth Sounder (33 CFR 164.35(i))

j. Relative Motion Plotting Equipment (33 CFR 164.35(j))

k. Block diagram operating instructions for steering gear change-over (33 CFR 164.35(k))

l. Centerline RPM indicator for each propeller (33 CFR 164.35(l))

m. Centerline indicator showing pitch and operational mode of each controllable pitch propeller (33 CFR 164.35(m))

n. Centerline indicator showing direction and amount of thrust of each lateral thrust propeller (33 CFR 164.35(n))

5. Two independent radars on vessels over 10,000 GT (33 CFR 164.37)

6. Labeled ARPA (33 CFR 164.38(b))

7. Electronic Position Fixing Device (33 CFR 164.41)

8. All equipment failures have been reported to COTP (33 CFR 164.53(b))

9. Radiotelephone with 156.65 MHz (Ch. 13) VHF-FM capability (33 CFR 26.03)

10. 

11. 

D. PACKAGED HAZARDOUS MATERIALS

1. Obtain a copy of the Dangerous Cargo Manifest (DCM) from the vessel's master or mate for dangerous cargo on board or about to be loaded. DCM has been prepared in accordance with:

   49 CFR
   or
   IMDG Code

2. Check the DCM for compliance with the requirements in 49 CFR 176.30:

   a. No un-regulated materials listed (49 CFR 176.30(a))

   b. Contains vessel name and official number (or call sign) (49 CFR 176.30(a)(1))

   c. Contains nationality of vessel (49 CFR 176.30(a)(2))
d. Contains stowage location of each material listed (49 CFR 176.30(a)(7))

e. Contains signature of preparer and date (49 CFR 176.30(b))

f. Contains signature of master or licensed deck officer (49 CFR 176.30(c))

g. Copy of all authorized exemptions are with DCM (49 CFR 176.31)

3. Check several items on the DCM for compliance with 49 CFR 172.101 or the IMDG Code, as applicable:

   a. Proper shipping name and identification number (49 CFR 176.30(a)(3))

   b. Number and description of packages and gross weight for each type of packaging (49 CFR 176.30(a)(4))

   c. Hazard class (49 CFR 176.30(a)(5))

4. Check the cargo segregation, as listed on the DCM or stow plan, for compliance with the requirements in 49 CFR 176.80 - 176.83

5. Check several items on the DCM for compliance with the detailed requirements in 49 CFR 176

6. Check several items on the DCM for compliance with the packaging requirements in 49 CFR 173

7. If Class A commercial or military explosives are present, check for required permit for designated dangerous cargo or freight container approval, if applicable (49 CFR 176.76(a) and 176.100)

8. With a ship’s officer, check the cargo in the holds and/or on deck for compliance with the stowage plan. Do not limit yourself to cargoes listed in the DCM. Be alert for:

   a. improperly marked or labeled packages (49 CFR 172.300-.450)

   b. improperly placarded freight containers or portable tanks (49 CFR 172.500-.558)

   c. labeled or placarded cargoes not listed on the DCM (49 CFR 176.30(a)(3))

   d. leaking containers or packages (49 CFR 176.50)

   e. no licensed officer supervising cargo operations (49 CFR 176.57)

   f. break bulk hazardous materials not stowed IAW 40 CFR 176.74
g. "No Smoking" signs properly posted (49 CFR 176.60)

9. __________________________________________________________________________

10. __________________________________________________________________________

NOTE

IF BUNKERING OR OTHER OIL TRANSFER OPERATIONS ARE TAKING PLACE, 
CONDUCT A MONITOR OF THE TRANSFER

E. POLLUTION PREVENTION

1. Fuel oil/Bulk lube oil discharge containment of sufficient capacity (33 CFR 155.320)

2. Ballast water not carried in fuel tanks (new oceangoing ships 4000 GT and above) 
   (33 CFR 155.440)

3. Pollution placard properly posted (33 CFR 155.450)

4. No oil forward of collision bulkhead (33 CFR 155.470)

5. Oil Transfer Procedures are legible, in a language understood by the crew, and posted or 
   available (33 CFR 155.740)

6. Oil Transfer Procedures contain the information required by 33 CFR 155.750, including:
   
   a. List of each product transferred by the vessel, including the generic or chemical name
      (33 CFR 155.750(a)(1)(i))

   b. Description of each oil transfer system on the vessel, including:
      
      (1) line diagram of transfer piping including each valve, pump, control device, vent and 
      overflow (33 CFR 155.750(a)(2)(i))

      (2) location of shutoff valves that separate bilge or ballast systems from oil transfer 
      system (33 CFR 155.750(a)(2)(ii))

      (3) description of and procedures for emptying manifold containment 
      (33 CFR 155.750(a)(2)(iii))

   c. Number of persons required to be on duty during oil transfer operations (33 CFR 155.750 (a)(3))
d. Duties by title of each officer, person in charge, tankerman, deckhand, and any other person required for oil transfer operations (33 CFR 155.750(a)(4))

e. Procedures and duty assignments for tending moorings during oil transfers (33 CFR 155.750(a)(5))

f. Procedures for operating the means of communications (33 CFR 155.750(a)(6))

g. Procedures for topping off tanks (33 CFR 155.750(a)(7))

h. Procedures for ensuring all valves used during oil transfer are closed upon completion of the transfer (33 CFR 155.750(a)(8))

i. Procedures for reporting oil discharges into the water (33 CFR 155.750(a)(9))

j. Exemptions or alternatives which have been granted are included (33 CFR 155.750(b))
k. Amendments to oil transfer procedures incorporated (33 CFR 155.750(c))

7. Sufficient deck lighting, shielded as necessary (33 CFR 155.790)

8. Records available for inspection (33 CFR 155.820):
   a. Name of each person in charge (33 CFR 155.820(a))
   b. Signed copies of Declarations of Inspection for past month (33 CFR 155.820(b))

9. Oil Record Book (ORB) (33 CFR 151.25):
   a. ORB on board and available for inspection (33 CFR 151.25(i))
   b. Part I (Machinery Space Operations) aboard (33 CFR 151.25(a))
   c. Each operation signed by person in charge (33 CFR 151.25(h))
   d. Each completed page signed by master (33 CFR 151.25(h))
   e. ORB maintained on board for 3 years (33 CFR 151.25(k))
   f. Last disposal of oily wastes (33 CFR 151.25(d)):
      (1) At-sea: Date __________________________ Location __________________________ Amount __________________________
(2) To reception facility: Date__________________________________________

Location: ____________________________________________________________

Amount _____________________________________________________________

g. Recorded discharges are IAW 33 CFR 151.09

10. Compare ORB to most recent bilge monitor continuous discharge record for unauthorized discharges (33 CFR 151.09)

11. Vessel has an operable and labelled MSD on board (33 CFR 159.7)

12. Bilge monitor continuous discharge record retained on board for 3 years (33 CFR 155.370(d))

13. _______________________________________________________________________

14. _______________________________________________________________________

F. BULK SOLID HAZARDOUS MATERIALS

1. Shipping papers complete:
   a. Shipping name & Hazard class (46 CFR 148.02-1(a)(1))
   b. Quantity to be transported (46 CFR 148.02-1(a)(2))
   c. Name & address of U.S. shipper (46 CFR 148.02-1(a)(3))
   d. Certification Statement (46 CFR 148.02-1(a)(4))
   e. Special Permit on board (if hazardous material not listed in 46 CFR 148.01-7 is being carried)

2. Dangerous Cargo Manifest on board and complete (46 CFR 148.02-3(a)):
   a. Name and official number of the vessel (46 CFR 148.02-3(a)(1))
   b. Nationality of the vessel (46 CFR 148.02-3(a)(2))
   c. Proper name of the hazardous material (46 CFR 148.02-3(a)(3))
   d. Hold(s) in which the material is transported (46 CFR 148.02-3(a)(4))
   e. Quantity of material in each hold (46 CFR 148.02-3(a)(5))
   f. Signature of Master or authorized representative (46 CFR 148.02-3(a)(5))
3. Cargo inspections carried out and logged (46 CFR 148.03-7)
4. Stowage conditions observed (46 CFR 148.03-11)
5. Special Additional Requirements complied with (46 CFR 148.04)
6. Additional requirements of special permit complied with (46 CFR 148.01-11)
7. ________________________________
8. ________________________________

G. FOLLOW-UP ACTION BY BOARDING OFFICER

2. Discrepancies corrected during boarding. Note page numbers of exceptions opposite
3. Significant vessel damage brought to the attention of a marine inspector or investigating officer
4. Vessel operations suspended
5. Vessel detained
6. COTP order No. _______________ issued. (Describe opposite)
7. Appropriate MSIS product(s) updated
8. Work hours expended for this exam:
   Travel time: _______________    Training hours: _______________
   Time On: _______________       Time Off: _______________
   TOTALS: USCG _______________ USCGR _______________
9. ________________________________
10. ________________________________

97
notice of detention

the undersigned, p.c. kamstra

the duly authorized officer of the netherlands shipping inspectorate

in the district i/ii at rotterdam, herewith notifies you that the:

ms: 
callsign: 
gross tonnage: 123249
port of registry: monrovia
flagstate: liberia
deadweight: 267803
type of ship: oil tanker
date on which keel was laid: 1975
owner: 
master: 
agency: pakhoed
berthed: maasvlakte - rotterdam
classification society: l.r.

has been detained in accordance with the provisions of section 21 of the prevention of pollution from ships act (official collection 1963, no. 637)
on account of:

- danger to the marine environment

in accordance with the provisions of section 23 of the prevention of pollution from ships act
it is not permitted for the ship to proceed to sea.

rotterdam, the 9th of february 1990

the above mentioned officer,

w.s. p.c. kamstra
notice of release

the undersigned, p.c. kamstra

duly authorized officer of the netherlands shipping inspectorate

in the district i/ii at rotterdam, herewith notifies you that the
detention of the:

ms master 

of which you were informed by 'notice of detention' dated the

9th of february 1990 has been raised.

rotterdam, the 11th of february 1990

the above mentioned officer,

w.s. p.c. kamstra

23230 limar nl
25377 dgsmr nl
<table>
<thead>
<tr>
<th>Ln#</th>
<th>Line Title</th>
<th>General Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>700</td>
<td>Class Notation</td>
<td>+100A1+LMC UMS(OIL TANKER).</td>
</tr>
<tr>
<td>701</td>
<td>Former Names</td>
<td>X CATTLEYA(67).</td>
</tr>
<tr>
<td>702</td>
<td>Building Yard Data</td>
<td>HYUNDAI HI ULSAN #7412.</td>
</tr>
<tr>
<td>703</td>
<td>Minimum Safe Manning</td>
<td>0751 SCH. 1</td>
</tr>
<tr>
<td>704</td>
<td>Deadweight Tonnage</td>
<td>267607 DWT</td>
</tr>
</tbody>
</table>

Roll Keys = Display Lines  ENTER = Reselect  .CMD 1 = Next Vessel
CMD 2 = Certificate Data  CMD 5 = Inspections  CMD 9 = Addresses  CMD 7 = EOJ
VESSEL DATA INQUIRY

Vessel Number: ___
Name: ............
Type: ............ CRUDE OIL TANKER
Operation Code: Active and Trading
Gross Tons: 125,249
Net Tons: 103,664
Mo/Yr Built: 03 / 77
Certificate Type: PM Cert. Issue.
Special Tax Status: 103,664
From Flag: ???
Cert. Issue: 3/04/88
STK Date: 00/00/00
Engine Power kW: 26,480

Ln#  Line Title            Remarks                  Type Surv/Exp  Validity  SCY
720  Load Line             P01289                    FT  12/23/90  09/23/92  LRS
725  Radiotelegraph        P0989                     FT  08/17/90  08/17/90  LRS
735  Construction          P01289                    FT  12/23/90  09/23/92  LRS
745  C L C Oil Pollution   #15363                    IS  02/20/91
750  Safety Equipment      P0989                     FT  11/17/90  08/17/91  LRS

Roll Keys = Display Lines  ENTER = Reselect  CMD 1 = Next Vessel
CMD 3 = General Info.     CMD 5 = Inspections  CMD 7 = End of Job

End of Line #'s

101
VESSEL DATA INQUIRY

Vessel Number........ 06644
Name.................. SS CRYSTAL OIL TANKER
Type.................. CRUDE OIL TANKER
Operation Code.... Active and Trading
Gross Tons........... 125,249
Net Tons............. 103,664
Mo/Yr Built......... 03/77
Registered.......... 2/30/77
Certificate Type... PM
Cert. Issue........ 2/04/88
Engine Power kw..... 26,480
Status.............. A
Class.............. LRS
Special Tax Status: From Flag.. ????
Call Sign...........
STK Date........... 00/00/00
Radio Exp.. 06/30/92

Ln# Line Title---------- Place------- Date---- Remarks----------------------------- SCY
787 Inspection/Survey Re REACTIVATE 06/04/87 09/20/87 IN
787 Inspection/Survey Re SINGAPORE 09/20/87 09/23/87 SV 000005
787 Inspection/Survey Re JOHORE 09/14/88 12/06/88 IN
788 Inspection/Survey Re SINGAPORE 08/18/89 12/06/88 SV 172035
789 Inspection/Survey Re SINGAPORE 12/19/89 IN
790 Inspection/Survey Re ROTTERDAM 02/09/90 P.S. DETENTION - POLLUTION TX

End of Line #’s

Roll Keys = Display Lines .ENTER = Reselect .CMD 1 = Next Vessel...
CMD 2 = Certificate Data CMD 3 = General Info. CMD 7 = End of Job
References


United States Coast Guard, *Coast Guard Legal Authorities*. Commandant Publication (COMDTFUB) P5850.2 1986.


