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THE USE OF PORT STATE CONTROL IN MARITIME INDUSTRY AND APPLICATION OF THE PARIS MOU

*Dr. Z. Oya Özçayır**

I. INTRODUCTION

Port state control is the control of foreign flagged ships in national ports by Port State Control Officers (PSCO). It is frequently asserted that port state control would be unnecessary in an ideal world. This assertion, however, does not reflect reality, and in many cases people are forced by the authorities to act within the law. A similar principle applies to the shipping world as well. In many cases, shipowners and ship managers are forced to act within the law. Because control systems used by other players in the shipping world have been unable to eradicate all substandard vessels from the seas, port state control systems have become more effective and have provided a safety net of last resort.

Port state control is not, and can never be, a substitute for the proper exercise of flag state responsibility. Flag states have the primary responsibility of safeguarding against substandard ships. When flag states fail to meet their commitments, port states must act as the last safety net in the control system.

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II. THE SAFETY NET

The port state safety net consists of many elements:

- International Conventions of the International Maritime Organization (IMO);
- The Conventions of the International Labour Organization;
- Flag State Control;
- Classification Societies;
- The Marine Insurance Industry; and
- Port State Control.

The International Maritime Organization (IMO), a specialized agency of the United Nations, began to advance international treaties and other legislation concerning marine safety and pollution prevention in the 1950s in order to develop international standards that would replace the multiplicity of national legislation that then existed. The IMO has produced a mass of legislation, and the majority of the world tonnage is a member of these conventions. Under the IMO Conventions, flag states have the primary responsibility for providing structurally safe and environmentally compliant ships. IMO statistics indicate that the shipping industry is ratifying new conventions and that the international community is adopting necessary legislation.¹

SUMMARY OF STATUS OF CONVENTIONS²
AS OF DECEMBER 31, 2008

Instrument	Entry into force date	No. of Contracting States	% world tonnage*
IMO Convention	17-Mar-58	168	97.22
SOLAS 1974	25-May-80	158	99.04
SOLAS Protocol 1978	01-May-81	114	96.16
SOLAS Protocol 1988	03-Feb-00	91	93.63
Stockholm Agreement 1996	01-Apr-97	11	8.59
LL 1966	21-Jul-68	158	99.01
LL Protocol 1988	03-Feb-00	87	93.85
TONNAGE 1969	18-Jul-82	148	98.85

1. See International Maritime Organization, http://www.imo.org/conventions/mainframe.asp?Topic_id=247 (last visited Feb. 28, 2009) (showing the number of international conventions adopted by the IMO).

2. *Id.*

COLREG 1972	15-Jul-77	152	98.35
CSC 1972	06-Sep-77	78	60.95
1993 amendments	-	9	6.18
SFV Protocol 1993	-	16	19.73
STCW 1978	28-Apr-84	151	99.00
STCW-F 1995	-	11	4.87
SAR 1979	22-Jun-85	93	49.86
STP 1971	02-Jan-74	17	23.98
SPACE STP 1973	02-Jun-77	16	23.33
INMARSAT C 1976	16-Jul-79	93	93.25
INMARSAT OA 1976	16-Jul-79	89	91.63
1994 amendments	-	40	26.91
2006 amendments	-	1	0.03
FAL 1965	05-Mar-67	114	90.31
MARPOL 73/78 (Annex I/II)	02-Oct-83	148	99.00
MARPOL 73/78 (Annex III)	01-Jul-92	130	95.07
MARPOL 73/78 (Annex IV)	27-Sep-03	121	80.75
MARPOL 73/78 (Annex V)	31-Dec-88	137	96.98
MARPOL Protocol 1997 (Annex VI)	19-May-05	54	82.65
LC 1972	30-Aug-75	85	67.09
1978 amendments	-	20	17.49
LC Protocol 1996	24-Mar-06	36	30.53
INTERVENTION 1969	06-May-75	86	74.40
INTERVENTION Protocol 1973	30-Mar-83	53	48.67
CLC 1969	19-Jun-75	38	2.89
CLC Protocol 1976	08-Apr-81	53	56.41
CLC Protocol 1992	30-May-96	121	96.39
FUND Protocol 1976	22-Nov-94	31	47.33
FUND Protocol 1992	30-May-96	103	94.12
FUND Protocol 2000	27-Jun-01	-	-
FUND Protocol 2003	03-Mar-05	23	19.84
NUCLEAR 1971	15-Jul-75	17	20.38
PAL 1974	28-Apr-87	32	40.80
PAL Protocol 1976	30-Apr-89	25	40.46
PAL Protocol 1990	-	6	0.85
PAL Protocol 2002	-	4	0.17
LLMC 1976	01-Dec-86	51	48.97
LLMC Protocol 1996	13-May-04	33	35.37
SUA 1988	01-Mar-92	151	92.75
SUA Protocol 1988	01-Mar-92	139	87.77
SUA 2005	-	8	5.53
SUA Protocol 2005	-	6	5.42
SALVAGE 1989	14-Jul-96	57	47.16

OPRC 1990	13-May-95	97	67.03
HNS Convention 1996	-	13	13.64
OPRC/HNS 2000	14-Jun-07	23	30.88
BUNKERS			
Convention 2001	21-Nov-08	33	51.26
AFS Convention 2001	17-Sep-08	35	62.69
BWM Convention 2004	-	17	15.35
NAIROBI WR Convention 2007	-	-	
*Source: <i>Lloyd's Register/Fairplay World Fleet Statistics 31 December 2007</i>			

Despite the existence of many new conventions, the application and enforcement of international legislation remains a continuing problem on the maritime agenda. As a general rule, each state that ratifies an international convention is responsible for the convention's implementation. Moreover, governments ratifying international instruments are obligated to incorporate the provisions into their national legislation. In practice, however, the enforcement of international conventions raises many problems. For instance, the conventions may take a long time to be incorporated into the national legal system of each state; there may be inconsistencies between the convention and the implementing legislation; or implementation of a convention may not be a priority of the member state. Therefore, the origination of a convention does not always translate into its implementation and effective enforcement.

III. FLAG STATE RESPONSIBILITY³

The national flag constitutes the primary source of state responsibility for a ship.⁴ Flag states are required to ensure that their ships comply with the standards accepted by flag states under international law and conventions.⁵ Under international law, flag states are primarily responsible for ensuring compliance with international minimum standards. This means that a flag state's ships are to be operated and maintained in a manner that minimizes the risk to seafarers, the marine environment, and the cargo.⁶ Article 94 of the 1982 United Nations Convention on the Law

3. See generally Z. OYA ÖZÇAYIR, LIABILITY FOR OIL POLLUTION AND COLLISIONS 10-21 (1998).

4. *Id.* at 11.

5. United Nations Convention on the Law of the Sea, art. 94, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS 1982].

6. See *id.*

of the Sea (UNCLOS 1982), establishes flag states' fundamental duties,⁷ and Article 94(5) requires flag states to take any steps necessary to secure observance with generally accepted international regulations, procedures, and practices.⁸

7. *Id.*

8. *Id.* In describing the duties of flag states, Article 94 states:

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. In particular every State shall:
 - (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
 - (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
 - (a) the construction, equipment and seaworthiness of ships;
 - (b) the manning of ships, labor conditions and the training of crews, taking into account the applicable international instruments;
 - (c) the use of signals, the maintenance of communications and the prevention of collisions.
4. Such measures shall include those necessary to ensure:
 - (a) that each ship, before registration and thereafter at appropriate intervals is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
 - (b) that each ship is in charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;
 - (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.
5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.
6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag state. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any necessary action necessary to remedy the situation.
7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or to the marine environment. The flag State and the

These international regulations include those related to the safety of life at sea, the prevention of collisions, the prevention, reduction, and control of marine pollution, and the maintenance of communications by radio.⁹ These rules are applicable to all ships on the national register.

In practice, flag states issue vessels safety certificates, which indicate compliance with international conventions.¹⁰ Flag states are able to ensure that vessels meet international requirements by conducting periodic surveys and through the process of renewing ships' various certificates.¹¹ These certificates constitute the core elements for the port state control system.

Similarly, Article 217(1) of UNCLOS 1982 articulates flag state responsibility for effective enforcement of international rules, standards, and regulations, irrespective of where a violation occurs.¹² A flag state, however, cannot exercise jurisdiction over a foreign vessel, which has caused pollution, beyond the limits of any state's territorial jurisdiction.¹³ Article 218 of UNCLOS 1982 extends port state jurisdiction to close this gap.¹⁴ Articles 218, 219, and 220 of UNCLOS 1982 deal with the enforcement of applicable international rules and standards for the protection of the marine environment by port states and coastal states "[w]hen a vessel is voluntarily within a port or at an off-shore terminal"¹⁵ of that state.¹⁶

For a considerable period of time, the shipping community relied on flag states to control their ships. This approach became impracticable with the advent of flags of convenience. Flag states increasingly relied on

other State shall co-operate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

Id.

9. *Id.* art. 94(5).

10. *Id.* arts. 94(4), 217(1), (3).

11. *Id.* art. 217(1), (3).

12. Article 217(1) discusses flag state enforcement of vessel compliance:

States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag states shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.

Id.

13. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 2, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205.

14. UNCLOS 1982, *supra* note 5, art. 218.

15. *Id.* art. 218(1).

16. *Id.* arts. 218, 219, 220.

classification societies to regulate and control the standards laid down by the IMO. The control mechanisms applied by flag states and classification societies have been unable to remove all substandard vessels from the industry.

A clear example of the system's failure, particularly the deficiencies in the international safety net, is illustrated by the *San Marco* case.¹⁷ The *San Marco*, originally known as the MV Soral, was a 1968 Panamax dry bulk carrier.¹⁸ It was owned by a succession of one ship brass plate companies.¹⁹ In March 1991, it was sold for \$3.2 million to a company named Sea Management.²⁰ The vessel was then traded as the *San Marco* under the ownership of another brass plate company, Shipping of Nicosia, Cyprus.²¹ In May 1993, it was detained by the Canadian Coast Guard (CCG) for serious defects related to the structural integrity of the ship, in addition to its fire suppression and life preservation mechanisms.²² Following this incident, the vessel's protection and indemnity Club withdrew their insurance coverage.²³ Because the owner would not do the immediate repairs, its classification society, Bureau Veritas (BV), withdrew its class after an inspection.²⁴

In May of 1993, the vessel was inspected by the Hellenic Register for a class transfer from BV.²⁵ The vessel was found to be in "good condition and well-maintained" and was issued clean class certificates, which were valid until 1995.²⁶ A month after the inspection, the CCG allowed the *San Marco* to depart from Vancouver, under tow, at the request of the shipowner.²⁷ Although the Hellenic Register issued a clean class certificate and the vessel had BV certificates valid until 1995, the CCG only allowed the vessel to be towed unmanned.²⁸ The CCG had no legal power to compel the owner to perform repairs locally.²⁹ Soon after leaving Canadian waters, the tow to *San Marco* was cut and a crew was put on board by a helicopter. From then on, the unrepaired vessel, with clean HRS

17. See Ian Middleton, *Holes in the System*, SEATRADE REV. MONTHLY, Jan. 1994, at 6.

18. *Id.* at 6-7.

19. *Id.* at 7.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

certificates, continued to trade.³⁰ Obviously, if the Canadian port state had the legal power to demand repairs before departure, the vessel would have been prevented from trading in a dangerously unseaworthy condition. As this was not the case, the *San Marco* managed to slip through the safety net.

In November of 1993, while the *San Marco* was 150-200 miles off the South African coast on a voyage from Morocco to Indonesia, she lost 14x7 meters of shell plating from both sides of her No.1 hold and all the cargo in that hold.³¹ The ship was put into Cape Town as a port of refuge and was detained by the South African Department of Transport.³² As it was not possible for the vessel to continue its trade functions without spending substantial amounts of money on repairs, the vessel was subsequently sold for scrap at a public auction.

As illustrated by the *San Marco* case, shipowners, classification societies, insurers, and flag state administrators failed to properly perform their jobs. Port state control would be unnecessary if all interested parties acted responsibly and prudently. The control mechanisms applied by the flag states and classification societies have proven insufficient in eliminating all substandard vessels from the industry.

IV. MEMORANDUMS OF UNDERSTANDING

A. *The History of Regional Memorandums of Understanding (MOUs)*

The origins of port state control lie in the memorandum of understanding that was signed in Hague in 1978, between eight North Sea states. The memorandum was preceded by a 1976 maritime session of the International Labour Conference, which adopted the Merchant Shipping (Minimum Standards) Convention, more commonly known as ILO Convention No. 147.³³ This Convention aimed at inspecting vessels that entered the ports of member states.³⁴ On March 2, 1978, the Hague Memorandum was signed by the maritime authorities of eight countries that decided that the ILO Convention deserved a proper follow up.³⁵ The aim

30. *Id.* at 9.

31. *Id.* at 6.

32. *Id.*

33. DR. Z. OYA ÖZÇAYIR, PORT STATE CONTROL 121 (LLP 2nd ed. 2004) [hereinafter ÖZÇAYIR].

34. Convention Concerning Minimum Standards in Merchant Ships, Oct. 29, 1976, 68 U.N.T.S. 17 [hereinafter ILO Convention No. 147].

35. George Kasoulides, *Paris Memorandum of Understanding: A Regional Regime of Enforcement*, in THE NORTH SEA: PERSPECTIVES ON REGIONAL ENVIRONMENTAL CO-OPERATION 180, 180 (David Freestone & Ton Ijlstra eds., 1990).

of the memorandum was the surveillance of seagoing ships in order to ensure that requirements stated under ILO Convention No. 147, as well as other Conventions, were met.³⁶ In March of 1978, just as the Hague Memorandum was about to take effect, the *Amoco Cadiz* incident happened.³⁷ Consequently, this incident resulted in “strong political and public outcry in Europe for far more stringent regulations with regard to the safety of shipping.”³⁸ Following these developments, the ministers responsible for the maritime safety of fourteen European countries together with the representatives of the Commission of the European Communities, the IMO, and the International Labour Organization (ILO), met in Paris in December, 1980.³⁹ They agreed that the elimination of substandard shipping would be best achieved by coordination of port states and implementation of the provisions of a number of widely accepted international maritime conventions, the so-called “relevant instruments.”⁴⁰ In January of 1982, at a second ministerial conference, again in Paris, the present Paris MOU on Port State Control was adopted and signed by the maritime authorities of the fourteen states.⁴¹

Although the Paris MOU on Port State Control—the earliest regional agreement of its kind—was signed in 1982, maritime authorities of most states already had specific powers to exercise port state control under the conventions to which they were parties. For instance, the control of foreign merchant vessels by port states has been a feature of international maritime conventions since the International Convention for the Safety of Life at Sea (SOLAS) Convention (1929).⁴² The drafters of SOLAS, recognizing the inability of states to constantly monitor ships in their fleet, allocated power to port states to inspect vessels’ documentation.⁴³ Hence, the powers used

36. *Id.*

37. The Paris MOU on Port State Control, A Short History, <http://www.parismou.org/ParisMOU/Organisation/About+Us/History/xp/menu.3950/default.aspx> (last visited Mar. 1, 2009) [hereinafter A Short History].

38. *Id.*

39. ÖZÇAYIR, *supra* note 33, at 121.

40. *Id.* at 122.

41. *Id.*

42. *See generally* International Convention for the Safety of Life at Sea, May 31, 1929, 136 L.N.T.S. 81 [hereinafter SOLAS]. The control of foreign merchant vessels by port states has also been a focal issue in several other conventions. *See* International Convention on Load Lines, art. 21, Apr. 5, 1966, 640 U.N.T.S. 133 (hereinafter LL 66); *see also* International Convention for the Prevention of Pollution From Ships, as modified by the Protocol of 1978 relating thereto, reg. 6, Feb. 16, 1978, 17 I.L.M. 546 [hereinafter MARPOL 73/78]; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, art. X, July 7, 1978, 1361 U.N.T.S. 2 [hereinafter STCW 1978].

43. SOLAS, *supra* note 42, art. 54.

by PSCOs are not new; it is the willingness to use these powers and the coordinated application of port state control that is a relatively recent development.

A memorandum of understanding is not an international convention; rather, it is an administrative agreement that has been subscribed to and executed in a framework of cooperation among the maritime authorities of the party states. During the preparation of the Paris MOU, all countries involved showed a political will to quickly see the practical results of their study. They recognized that conventions usually require lengthy ratification procedures and that similar problems arise when amendments were necessary.⁴⁴ Therefore, memorandums of understanding are established instead of conventions.

For the first time, with the Paris MOU, a regular and systematic control of ships was exercised by a regional group of port states. The Paris MOU is the model upon which other regions of the world have based their agreements on port state control.⁴⁵ Since its entry into force, the number of states in the Paris MOU has grown.⁴⁶ This has mainly been due to the increase in the number of member states of the European Union (EU). On July 1, 1996, the EU's European Community (EC) Directive 95/21/EC on port state control came into force and made port state control mandatory in states that were members of the EU.⁴⁷

B. The IMO Rules on Port State Control

The first resolution on procedures for the control of ships, IMO Resolution A.466 (XII), was adopted by the IMO Assembly in 1981.⁴⁸

44. ÖZÇAYIR, *supra* note 33, at 122.

45. *See, e.g.*, The Paris Memorandum of Understanding on Port State Control, Jan. 16, 1982, 21 I.L.M. 1 [hereinafter Paris MOU]; The Acuerdo De Vina del Mar Agreement on Port State Control of Vessels (Nov. 5, 1992) [hereinafter Latin American MOU]; The Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Dec. 2, 1993) [hereinafter Tokyo MOU]; The Memorandum of Understanding on Port State Control in the Mediterranean Region (July 11, 1997) [hereinafter Mediterranean MOU]; The Memorandum of Understanding on Port State Control for the Indian Ocean Region (June 5, 1998) [hereinafter Indian Ocean MOU]; The Memorandum of Understanding on Port State Control for the West and Central Africa Region (Oct. 22, 1999) [hereinafter Abuja MOU]; The Memorandum of Understanding on Port State Control in the Black Sea Region (Apr. 1, 2000) [hereinafter Black Sea MOU].

46. A Short History, *supra* note 37.

47. Council Directive 95/21, Concerning Port State Control, 1995 O.J. (L 157) (EC) [hereinafter 95/21/EC].

48. *See generally* International Maritime Organization [IMO], Procedures For The Control of Ships, A. Res. XII/466 (Nov. 19, 1981) *available at* <http://www.imo.org/> (follow

Since 1981, the resolution has been amended in response to new developments in the shipping world, and there is no doubt that there will be future amendments. In 1995, the Assembly of the IMO made the first amendments to A.466 (XII) by adopting Resolution A.787(19), entitled “Procedures for Port State Control.”⁴⁹ Resolution A.787(19) was amended in 1999, by Resolution A.882(21), which is the current version of the IMO Procedures for Port State Control.⁵⁰ The new resolution provides basic guidance on how to conduct port state control inspections; encourages consistency in the conduct of these inspections and control procedures; and clarifies the procedure for assessing the deficiencies of a ship, its equipment, or its crew.⁵¹ These procedures are not mandatory and only offer guidance to port states.⁵² Although the participating port state control regions are supposed to follow the IMO procedures when exercising port state control, in practice, it has been clear that port state control regions have interpreted and implemented these procedures in a number of different ways.

C. Basic Principles of MOUs

The MOUs invoke international instruments that are legally binding for states.⁵³ Their aim is to eliminate the operation of substandard ships through a harmonized system of port state control. They do not set any new standards or enforce any requirements on foreign merchant vessels above the international convention requirements.⁵⁴ They aim to ensure that all

“Information Resources” hyperlink; then follow “Index of IMO Resolutions” hyperlink; then follow “Assembly (A)” hyperlink; then follow “A.466 (XII)” hyperlink) (last visited Mar. 6, 2009).

49. International Maritime Organization, Procedures for the Control of Ships, A. Res. 19/787, at 2 (Nov. 23, 1995) available at <http://www.imo.org/> (follow “Information Resources” hyperlink; then follow “Index of IMO Resolutions” hyperlink; then follow “Assembly (A)” hyperlink; then follow “A.787(19)” hyperlink) (last visited Mar. 6, 2009).

50. See International Maritime Organization, Amendments to Procedures for Port State Control, A. Res. 21/882, at 1 (Nov. 25, 1999) available at <http://www.imo.org/> (follow “Information Resources” hyperlink; then follow “Index of IMO Resolutions” hyperlink; then follow “Assembly (A)” hyperlink; then follow “A.882(21)” hyperlink) (last visited Mar. 6, 2009).

51. See generally INTERNATIONAL MARITIME ORGANIZATION, PROCEDURES FOR PORT STATE CONTROL (2001) [hereinafter PROCEDURES FOR PORT STATE CONTROL].

52. *Id.* ¶ 1.1.

53. Paris MOU on Port State Control, Relevant Instruments, <http://www.parismou.org/ParisMOU/Organisation/About+Us/Instruments/default.aspx> (last visited Mar. 14, 2009) [hereinafter Instruments].

54. ÖZÇAYIR, *supra* note 33, at 123.

ships operating in their region meet international standards. Thus “[o]nly internationally accepted conventions shall be enforced during port State control inspections.”⁵⁵ A port state can only apply those conventions that have entered into force and which it has implemented for its own ships.⁵⁶ Because of the principle of “no more favourable treatment” ships that fly the flag of a state which are not a party to that convention or which are below convention size are not exempt from inspection.⁵⁷

The basic principles of regional MOUs may be generally stated as follows:

1. Shipowners and operators are ultimately responsible for compliance with the requirements expressed in international maritime conventions. The responsibility for ensuring such compliance remains with the flag state.
2. Each maritime authority gives effect to the provisions of the relevant MOUs.
3. Each authority must ensure that foreign merchant ships visiting its ports comply with the standards articulated in the relevant conventions and all amendments thereto in force. In this context, a participating maritime authority regards a ship flying the flag of another member state as a foreign ship too.
4. The MOUs provide for a total number of inspections, expressed in terms of a percentage, that each of the states party to the relevant MOU shall conduct. IMO and ILO conventions provide the basis for inspections under the MOUs.
5. All possible efforts are made to avoid unduly detaining or delaying a ship.
6. In principle, there will be no discrimination as to flag.
7. Inspections are generally unannounced.
8. In general, ships will not be inspected within six months of a previous inspection in an MOU port, unless there are “clear grounds” for inspection.⁵⁸

Under many IMO Conventions, ships are required to carry certificates onboard to provide proof of inspection and to demonstrate compliance with international standards.⁵⁹ These certificates are accepted as documents of

55. Instruments, *supra* note 53.

56. PROCEDURES FOR PORT STATE CONTROL, *supra* note 51, ¶ 1.2.3.

57. *Id.* ¶ 1.2.2.

58. Res. 21/882, *supra* note 50. This list provides the general rules applicable to all regional MOUs and they are all based on the main frame of the Paris MOU.

59. See PROCEDURES FOR PORT STATE CONTROL, *supra* note 51, ¶ 2.2.3, App. 4.

proof by different port authorities that a ship is in compliance with the required standards.⁶⁰ Inspections should be limited to a check of a ship's certificates and to reported or observed deficiencies, if any,⁶¹ unless there are clear grounds that the condition of the ship, its equipment, or its crew do not substantially correspond with the particulars of these certificates,⁶² "or that the master or crew members are not familiar with essential shipboard procedures relating to the safety of ships or the prevention of pollution."⁶³ In the event that an inspection reveals problems, a port state can take further action to either delay the departure of the ship or detain it.⁶⁴ In the past, this has been interpreted to mean that the inspection should stop once the PSCO has been shown a set of valid certificates.⁶⁵ Experience has shown, however, that valid certificates are no guarantee of a ship's compliance with the conventions. The control procedures may allow for the enforcement of compliance with onboard operational requirements, particularly if the PSCO has a reason to believe that the crew demonstrates insufficient proficiency in that area.

A PSCO may conduct an inspection based on a report or notification by another authority or a report or complaint by the master, a crew member, or organization with a legitimate interest in the safe operation of the ship. Multiple factors can dictate whether there are "clear grounds" to conduct a more detailed inspection:

1. the absence of principal equipment or arrangements required by the conventions;
2. evidence from a review of the ship's certificates that a certificate or certificates is clearly invalid;
3. evidence that documentation required by the conventions and listed in appendix 4 are not onboard, incomplete, are not maintained or are falsely maintained;
4. evidence from the PSCO's general impression and general observations that serious hull or structural deteriorations or deficiencies exist that may place the structural, watertight, or weather-tight integrity of the ship at risk;
5. evidence from the PSCO's general impressions and observations that serious hull or structural deterioration or deficiencies

60. *See id.* ¶ 2.2.3.

61. *Id.* ¶ 2.2.4.

62. *Id.* ¶ 2.2.5.

63. *Id.* ¶ 1.6.1.

64. *Id.* ¶ 4.7.2.

65. ÖZÇAYIR, *supra* note 33, at 134.

- exist that may place at risk the structural, watertight or weather tight integrity of the ship;
6. evidence from the PSCO's general impression or observations that serious deficiencies exist in the safety, pollution prevention or navigational equipment;
 7. indications that key crew members may not be able to communicate with each other or with other persons on board;
 8. the emissions of false distress alerts not followed by proper cancellation procedures;
 9. receipt of a report or complaint containing information that a ship appears to be substandard.⁶⁶

D. Port State Control Officers

A PSCO's powers derive solely from the sovereign state which employs him or her, and the PSCO is subject to the national laws of the jurisdiction under which he or she is operating.⁶⁷ The PSCO should be an experienced person "qualified as a flag State surveyor" and "should be able to communicate in English with key crew members."⁶⁸ The PSCO should be qualified as a master or chief engineer and have seagoing experience.⁶⁹ In principle, the PSCO should not have any commercial interest in the port, the ship, or be employed by, or on behalf of, a classification society.⁷⁰

All PSCOs carry an identity card issued by their maritime authorities as evidence of their authority to carry out inspections.⁷¹ Inspections may be carried out by a single PSCO or a team of PSCOs, depending to some extent on the size and type of ship and the resources available on any particular day. The role of a PSCO is extremely important, because his or her powers are extensive and include: (1) straightforward inspections of a ship; (2) stoppage of cargo or other specific operations; and (3) detention of the vessels exhibiting deficiencies that are clearly hazardous to safety, health, or the environment; such detention may be enforced without a court order.⁷²

66. PROCEDURES FOR PORT STATE CONTROL, *supra* note 51, ¶ 2.3.

67. *Id.* ¶ 1.6.6.

68. *Id.* ¶¶ 2.5.1-.2.

69. *Id.* ¶ 2.5.5.

70. *Id.* ¶ 2.4.3.

71. *Id.* ¶ 2.4.4.

72. *Id.* ¶ 2.6.

1. The Inspection Process

Port State Control (PSC) inspections may be on a random, escalated, or targeted/periodical basis. The following types of PSC inspections are used in: (1) initial inspections (random); (2) detailed inspections (escalated); and (3) expanded inspections (targeted/periodical).⁷³

2. Detention

When a PSCO finds deficiencies, he or she may require that certain actions be taken, which include: (1) reification of deficiencies prior to departure; (2) reification of deficiencies in the next port, under specific conditions; and (3) reification of (minor) deficiencies (only) within fourteen days; and (4) the detention of the ship.⁷⁴ Following an inspection, the PSCO must decide the necessary course of action to correct the deficiencies found and the time within which the corrections are to be made.⁷⁵ If the deficiencies found are serious, the PSCO has to decide whether he or she should prevent the ship from sailing until the deficiencies are rectified.⁷⁶

A PSCO's decision as to whether a ship ought to be detained is a delicate one. The decision to detain a vessel is based on the professional judgment of the PSCO. If deficiencies are revealed during a PSCO inspection, which are "clearly hazardous to safety or the environment," the PSCO must ensure that those deficiencies are corrected before the vessel is allowed to sail.⁷⁷ The authority may detain the vessel in order to ensure that deficiencies are rectified, and in practice this is often done.⁷⁸ Despite the guidelines provided to assist PSCOs in making such judgments, the PSCO's determination that the deficiencies are so clearly hazardous to warrant a detention involves subjectivity. A PSCO may detain a vessel if there is one deficiency of such serious nature that it warrants the vessel's detention, or if there is a combination of deficiencies that may not

73. *See id.* ¶¶ 1.6.4, 1.6.5, 2.1, 2.3. The IMO guidelines outline exactly what should be examined during a detailed inspection. *See id.* ¶¶ 3.1-3.3.23. While the IMO guidelines may serve as a consistent reference point, professional judgment is ultimately used to determine the appropriate level of inspection in any given circumstance.

74. *Id.* ¶ 4.7.

75. *Id.*

76. *Id.* ¶ 2.6.5.

77. *Id.* ¶ 4.7.2.

78. *Id.* ¶ 2.6.5.

individually warrant detention, but when viewed together with other deficiencies, are seriously sufficient to warrant a vessel's detention.

The regional MOUs and Council Directive 95/21/EC provide a list of deficiencies which are considered to be of such a serious nature that they may warrant the detention of the ship involved.⁷⁹ In order to assist the PSCO, deficiencies are grouped either under relevant conventions or codes. These lists are only guides and should not be seen as an exhaustive list of detainable items. The decision to detain requires the PSCO's professional judgment, which is precisely why the knowledge, experience, integrity, and independence of the PSCO are particularly important.

When a PSCO decides to detain a ship, he or she will immediately inform the master of the ship and advise him to seek assistance and to arrange remedial action in order to avoid delaying the ship.⁸⁰ Following a detention, the PSCO is immediately required to inform both the flag state and the classification society (if it has issued statutory certificates) of the detention.⁸¹ This notification includes the PSCO's report of inspection.

A detained ship will only be released once the PSCO is satisfied that the asserted deficiencies have been properly corrected.⁸² In cases where some repairs cannot be carried out in the port of detention, the PSCO may allow the ship to proceed to a repair yard as long as adequate temporary repairs are made, and it is safe for the ship to make the voyage.⁸³

V. PORT STATE CONTROL SYSTEMS

The port state control system is operating under two major systems around the world. One is the group of regional-based memorandums of understanding,⁸⁴ and the other is the independent United States port state control system.

79. See The Paris MOU, *supra* note 45; The Latin American MOU, *supra* note 45; The Tokyo MOU, *supra* note 45; The Mediterranean MOU, *supra* note 45; The Indian Ocean MOU, *supra* note 45; The Abuja MOU, *supra* note 45; The Black Sea MOU, *supra* note 45; 95/21/EC, *supra* note 47.

80. PROCEDURES FOR PORT STATE CONTROL, *supra* note 51, ¶¶ 2.6.5, 5.1.1.

81. *Id.* ¶ 5.1.3.

82. See *id.* ¶ 4.7.1.

83. *Id.* ¶ 4.7.3.

84. At present, there are eight regional agreements on port state control. See generally The Paris MOU, *supra* note 45; The Latin American Agreement, *supra* note 45; The Tokyo MOU, *supra* note 45; The Caribbean MOU, *supra* note 45; The Mediterranean MOU, *supra* note 45; The Indian Ocean MOU, *supra* note 45; The Abuja MOU, *supra* note 45; The Black Sea MOU, *supra* note 45.

The Paris MOU has been a model for all other regional agreements. Through the Paris MOU, a regional group of port states, who were parties to the relevant maritime conventions, exercised regular and systematic control of ships entering their ports for the first time. The Paris MOU was initially signed by fourteen European countries.⁸⁵

As compared to other regional agreements, the Paris MOU has always been the most strict port state control system. The Paris MOU constantly undergoes changes in order to update the memorandum so that it is consistent with the changes of the EU Directive on Port State Control. It has been updated thirty times since its entry into force in 1982, and the thirtieth amendment was adopted on May 19, 2008 to become effective on September 17, 2008.⁸⁶

The United States does not take part in any of the regional agreements on port state control. The United States undertakes control measures on a unilateral basis. On May 1, 1994, the U.S. Coast Guard introduced its revised Port State Control Initiative.⁸⁷ The primary objective of this initiative was to identify high risk foreign merchant ships based on the performance records of their owners, operators, classification societies, and flag states, to systematically target these ships for boarding.⁸⁸

In the United States there is no agreement or memorandum of understanding that is specifically dedicated to port state control. Therefore, it is impossible to compile a conclusive list of conventions enforced by the U.S. Coast Guard under its Port State Control Program. The United States exercises its port state control authority through the U.S. Coast Guard's long-standing foreign vessel boarding program, now referred to as the Port State Control Program.⁸⁹

85. Paris MOU, *supra* note 45, at 1. The original countries that signed the MOU, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom, were joined later by Bulgaria, Canada, Croatia, Cyprus, Estonia, Iceland, Latvia, Lithuania, Malta, Poland, Romania, the Russian Federation, and Slovenia. *Id.*

86. See The Paris MOU on Port State Control, The Memorandum of Understanding (MOU), <http://www.parismou.org/ParisMOU/Organisation/Memorandum+of+Under+standing/xp/menu.3945/default.aspx> (last visited Mar. 9, 2009).

87. ÖZÇAYIR, *supra* note 33, at 351.

88. *Id.*

89. *Id.* at 352.

A. *The Effects of the Erika and Prestige Incidents and 9/11 Terrorist Attacks on Port State Control Regimes*

During the early morning of December 12, 1999, the Maltese registered tanker, the *Erika*, broke in two due to gale force winds while in the Bay of Biscay approximately forty-five miles off the French Coast.⁹⁰ The tanker was carrying 30,844 tons of heavy fuel oil.⁹¹ About 400 kilometers of beaches, including many popular holiday resorts were polluted by oil, and thousands of seabirds were covered with it.⁹² The pollution from the *Erika* and its loss produced a substantially greater effect than any other pollution incident in Europe, such as the *Braer*, the *Sea Empress*, and the *Aegean Sea*.⁹³ Although these incidents had resulted in legal liability, they did not affect the European political agenda as much as the *Erika*. The *Erika* reflected the polyglot nature of the tanker industry. The chartered ship was French, the management company Italian, the crew Indian, and the flag Maltese.⁹⁴ The *Erika* was not the only incident to involve so many

90. MALTA MARITIME AUTHORITY, REPORT OF THE INVESTIGATION INTO THE LOSS OF THE MOTOR TANKER ERIKA ON SUNDAY 12 DECEMBER 1999, at Executive Summary (2000) [hereinafter MALTA MARITIME AUTHORITY].

91. *Id.* § 1.1.2.

92. *See id.*

93. The *Aegean Sea* grounded at La Coruña, Spain, in heavy weather in 1992. *Tanker Spills Oil in Spanish Harbor*, N.Y. TIMES, Dec. 4, 1992, at A9. The ship broke in two and caught fire. *Id.* Seventy-two thousand tons of oil were spilled and wide environmental damage resulted. *Id.* Following this incident and other pollution incidents that took place between 1990 and 1995, extensive amendments were made to MARPOL 73/78 including requirements under Annex I for double hulls on new tankers and enhanced surveys for existing tankers. Z. Oya Özçayır, *The IMO and Recent Oil Pollution Incidents*, 9 J. INT'L MAR. L. 185, 193 (2003). Extensive amendments were made to SOLAS 1974, including the mandatory introduction of the International Safety Management (ISM) Code effective from 1988 have been adopted. *Id.*

In 1993, *Braer*, laden with 84,000 tons of North Sea crude, experienced engine failure south of Shetland Islands, United Kingdom. *Id.* The ship was driven ashore in severe weather and broke up on coastal rocks. *Id.* All cargo and bunker oil escaped. *Id.* As a result of the *Braer* incident, the Donaldson Inquiry was created by the United Kingdom. *Id.* In 1994 a conference was held to agree on major amendments to the International Convention on Standards of Training Certification and Watchkeeping. *Id.*

The *Sea Empress* stranded off the entrance to Milford Haven, United Kingdom, when entering port in 1996. *Id.* Bad weather made refloating difficult and 65,000 tons of oil leaked into the sea and caused grave damage to highly sensitive coastal areas and fishing. *Id.* The ship was eventually floated and taken into harbor, where remaining oil was transferred to other ships. *Id.* Following this incident, in 1996, the International Conference on Carriage of Hazardous and Noxious Substances by Sea was held. *Id.*

94. MALTA MARITIME AUTHORITY, *supra* note 90, § 14.16.

nationalities in the management of a vessel, but no other had the same attraction.

The *Erika* was different from many previous incidents, as it carried the required certificates, was under class, and had been inspected by port states, flag states, and industry inspectors on several occasions.⁹⁵ Nevertheless, the vessel slipped through the whole series of safety nets.

At the time of her sinking, all of the *Erika*'s class and statutory certificates were valid.⁹⁶ She was classed with Registro Italiano Navale (RINA), a full member of International Association of Classification Societies (IACS).⁹⁷ The ship was under the management of an Italian company, which was International Safety Management certified by RINA.⁹⁸ Between 1991 and 1999, the *Erika* was inspected sixteen times by PSCOs and twice by her flag state's control inspectors.⁹⁹ She also went through vetting inspections undertaken by the major oil companies and surveys carried out by the classification societies.¹⁰⁰ Several oil companies chartered the *Erika* throughout the 1990s.¹⁰¹ The inspectors of Texaco, Exxon's subsidiary Standard Marine, Repsol, and Shell approved her as a fit vessel to carry their cargoes.¹⁰² The vessel was also approved by TotalFina, whose cargo she was carrying when she sank.¹⁰³ The *Erika* raised the pollution issue to the top of the European political agenda and prompted a huge legislative overhaul.

In November of 2002, not long after the *Erika* incident, the oil tanker *Prestige* broke in two and sank off the Northwest coast of Spain while carrying 77,000 tons of heavy fuel oil.¹⁰⁴ With the *Prestige* incident, the maritime industry faced questions similar to those encountered with the *Erika* incident. Like the *Erika*, the *Prestige* had been through port state control inspections six times since 1998, with no record of detentions and had only four minor deficiencies.¹⁰⁵ It was built according to American Bureau of Shipping classification requirements, and at the time of the incident the vessel was in full compliance with all ABS classification

95. See ÖZÇAYIR, *supra* note 36, at 292-94.

96. *Id.* at 291.

97. MALTA MARITIME AUTHORITY, *supra* note 90, § 14.16.

98. *Id.*

99. *Id.* § 8.1.

100. *Id.*

101. ÖZÇAYIR, *supra* note 33, at 291.

102. *Id.*

103. *Id.*

104. John Tagliabue, *Gas Tanker Strikes Shipwreck in English Channel*, N.Y. TIMES, Jan. 2, 2003, at A7.

105. See ÖZÇAYIR, *supra* note 33, at 298.

requirements.¹⁰⁶ The vessel was subject to a comprehensive regime of safety and environmental regulations including those of the main IMO conventions, such as the Safety of Life at Sea and the International Convention on the Prevention of Pollution from Ships (MARPOL). The vessel's phase out date under MARPOL would have been 2005.¹⁰⁷

On March 21, 2000, the European Commission adopted its first package of post-*Erika* measures in the form of the "Communication on the Safety of Seaborne Oil Trade" (*Erika I* package).¹⁰⁸ Following that, on December 6, 2000, the European Commission adopted a second set of community measures on maritime safety in the form of the "Communication from the Commission to the European Parliament and the Council" (*Erika II* package).¹⁰⁹

Both the *Erika I* and *Erika II* packages aimed to achieve the same objectives, such as tightening existing legislation on both port state control and classification societies.¹¹⁰ The packages also sought to propose new measures to speed up the phasing out of single hull tankers to improve controls on shipping in European waters, to establish a European Maritime Safety Agency (EMSA), and to create a supplementary fund to provide compensation to the victims of the pollution.¹¹¹

Following the *Prestige* incident, a new study developed the Community Computer Network, a network for monitoring shipping aimed at facilitating the identification of ships at risk once they enter into European waters.¹¹² Studies also started to accommodate ships in stress in places of refuge.¹¹³

106. Press Release, American Bureau of Shipping, ABS Releases Report on "Technical Analyses Related to the Prestige Casualty" Calls for International Guidelines on Places of Refuge (Mar. 4, 2003), available at <http://www.eagle.org/news/press/mar04-03.html>.

107. ÖZÇAYIR, *supra* note 33, at 296.

108. *See generally* The Commission of European Communities, *Communication from the Commission to the European Parliament and the Council on the Safety of the Seaborne Oil Trade*, COM (2000) 142 final (Mar. 31, 2000) [hereinafter *Safety of Seaborne Oil Trade*].

109. *See generally* Commission of the European Communities, *Communication from the Commission to the European Parliament and the Council on a Second Set of Community Measures on Maritime Safety Following the Sinking of the Oil Tanker the Erika*, COM (2000) 802 final (Dec. 6, 2000) [hereinafter *Measures on Maritime Safety*].

110. *Safety of the Seaborne Oil Trade*, *supra* note 108, at 5; *Measures on Maritime Safety*, *supra* note 109, at 2.

111. *Safety of the Seaborne Oil Trade*, *supra* note 108, at 5-6; *Measures on Maritime Safety*, *supra* note 109, at 2-5.

112. Council Directive 2002/59, Establishing a Community Vessel Traffic Monitoring and Information System, art. 1, 2002 O.J. (L 208) 10 (EC).

113. International Maritime Organization, Sub-committee on Safety of Navigation-47th session, 2-6 July 2001, available at http://www.imo.org/About/mainframe.asp?topic_id=112&doc_id=1138 (last visited Mar. 9, 2009).

The EMSA's powers have been expanded to cover maritime security and seafarer's qualifications.¹¹⁴

After the terrorist attacks on September 11, 2001, a new stage in port state control began. In November of 2002, the United States passed a domestic law called the Maritime Security Transportation Act of 2002 (MTSA 2002).¹¹⁵ The following month, the International Ship and Port Facility Security (ISPS) Code¹¹⁶ was adopted by the IMO.¹¹⁷ The MTSA 2002 and the ISPS Code represent a significant expansion of port state control activities.

Both the *Erika* and *Prestige* incidents, as well as the 9/11 attacks, initiated a process of change towards a maritime policy at the European level and the incorporation of maritime security as part of maritime transport policy. New amendments were made to the Paris MOU to bring the memorandum in line with the latest changes of the EU Directive on Port State Control.¹¹⁸ The U.S. Port State Control Program underwent changes to implement the maritime security policy issued under the MTSA 2002 and the ISPS Code.

The effects of the *Erika* and *Prestige* incidents were also seen in the work of the IMO. Following these incidents, the IMO acted to raise the limits for oil pollution compensation and to implement mandatory ship reporting, traffic separation, and routing systems. Moreover, the IMO created agreements on the phase out of single hull tankers, set guidelines on places of refuge for ships in need of assistance, and adopted the new ISPS Code.¹¹⁹

VI. BASIC PRINCIPLES OF THE PARIS 1982 MOU

By becoming parties to the Paris MOU, each member state authority commits itself to a specified enforcement regime regarding port state control and undertakes to comply with the following:

114. ÖZÇAYIR, *supra* note 33, at 349.

115. Maritime Security Transportation Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (Nov. 25, 2002).

116. International Maritime Organization [IMO], *International Ship and Port Facility (ISPS) Code*, IMO Doc. SOLAS/CONF/5/34 (Dec. 17, 2002).

117. International Maritime Organization [IMO], *Implementation of SOLAS Chapter XI-2 and the ISPS Code*, IMO Doc. MSC/Cir.1104 (Jan. 15, 2004) [hereinafter *Implementation of SOLAS*].

118. ÖZÇAYIR, *supra* note 33, at 124.

119. *Implementation of SOLAS*, *supra* note 117.

1. The primary responsibility for compliance with the provisions of the relevant instruments lies with the shipowner/operator. The responsibility for ensuring such compliance remains with the flag state.¹²⁰
2. Each maritime authority is to give effect to the provisions of the Paris Memorandum.¹²¹
3. Each authority has to ensure that foreign merchant ships visiting its ports comply with the standards outlined in the relevant conventions and all amendments thereto in force,¹²² and “[e]ach Authority may also carry out controls on ships at off-shore installations.”¹²³ In this context, a participating maritime authority regards a ship flying the flag of another member state as a foreign ship.¹²⁴
4. The member states agree to inspect twenty-five percent of the estimated number of individual foreign merchant ships that enter their ports during a twelve-month period.¹²⁵
5. The Paris MOU provides that the IMO and ILO conventions provide the basis for inspections.¹²⁶
6. Efforts shall be made to avoid unduly detaining or delaying a ship.¹²⁷
7. In principle, there will be no discrimination as to flag.¹²⁸
8. Inspections are generally unannounced.¹²⁹
9. In practice, “[e]ach Authority will consult, cooperate, and exchange information with the other Authorities in order to further the aims of the Memorandum.”¹³⁰

Under the Paris MOU, various internationally accepted conventions, which are referred to as “relevant instruments,” shall be enforced.¹³¹ Each

120. The Paris Memorandum of Understanding on Port State Control, The Basic Principles, <http://www.parismou.org/ParisMOU/Organisation/About+Us/Principles/default.aspx> (last visited Mar. 17, 2009) [hereinafter Basic Principles].

121. Paris MOU, *supra* note 45, § 1.1.

122. *Id.* § 1.2.

123. *Id.*

124. ÖZÇAYIR, *supra* note 33, at 123.

125. Paris MOU, *supra* note 45, § 1.3.

126. Basic Principles, *supra* note 120.

127. *Id.*

128. Paris MOU, *supra* note 45, § 1.2.

129. ÖZÇAYIR, *supra* note 33, at 124.

130. Paris MOU, *supra* note 45, § 1.4.

131. *Id.* § 2.1. The “relevant instruments” are as follows:

state that is a party to the Paris MOU will apply the applicable conventions that are currently in force. Amendments to these conventions will be accepted as relevant instruments, and will be enforced through a member state's exercise of port state control, as long as the amendments are both in force and have been accepted by the member state.

B. Targeting Factors

Under the Paris MOU, certain selection criteria, such as the ship's flag, age, and type, are evidence of both how well a ship is likely to be operated and in what condition that ship is likely to be found. Targeting factors are used to focus inspection efforts on those ships that are most likely to be found substandard. The Paris MOU has developed a computerized targeting formula as part of its database system in order to help PSCOs rank priority ships.¹³² As a result of this formula, there is a target factor for each individual ship.¹³³ By allocating points to each criterion, a scoring system

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1. The International Convention on Load Lines, 1966 (LOAD LINES 66);
 2. The Protocol of 1988 relating to the International Convention on Load Lines, 1966 (LL PROT 88);
 3. The International Convention for the Safety of Life at Sea, 1974 (SOLAS 74);
 4. The Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS PROT 78);
 5. The Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS PROT 88);
 6. The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocols of 1978 and 1997 relating thereto (MARPOL 73/78);
 7. The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW 78);
 8. The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG 72);
 9. The International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE 69);
 10. The Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention No. 147) (ILO 147);
 11. The Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention No. 147) (ILO147 PROT 96);
 12. The International Convention on Civil Liability for Oil Pollution Damage, 1992; and
 13. The International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 (AFS2001).

Id. § 2.1.1-13.

132. ÖZÇAYIR, *supra* note 33, at 131.

133. *Id.*

is employed and a ship is assigned a targeting factor.¹³⁴ The target factor value of each ship is calculated in the central Paris MOU PSC database (SIRENAC) on the basis of a ship's profile and inspection history.¹³⁵ The Paris MOU has developed a wide range of relevant elements for target factors:¹³⁶

1. Ships visiting a port of a State, the Authority of which is a signatory to the Memorandum, for the first time or after an absence of 12 months or more. In the absence of appropriate data for this purpose, the Authorities will rely upon the available SIRENaC data and inspect those ships which have not been registered in the SIRENaC following the entry into force of that database on 1 January 1993;
2. Ships not inspected by any Authority within the previous 6 months;
3. Ships whose statutory certificates on the ship's construction and equipment, issued in accordance with the Conventions, and the classification certificates, have been issued by an organization which is not recognized by the Authority;
4. Ships flying the flag of a State appearing in the black-list as published in the annual report of the MOU;
5. Ships which have been permitted by the Authority to leave a port of its State on certain conditions:
 - a) deficiency to be rectified before departure
 - b) deficiency to be rectified at the next port
 - c) deficiencies to be rectified within 14 days
 - d) deficiencies for which other conditions have been specified
 - e) if ship related action has been taken and all deficiencies have been rectified;
6. Ships for which deficiencies have been recorded during a previous inspection, according to the number of deficiencies;
7. Ships which have been detained in a previous port;
8. Ships flying the flag of a non-Party to a relevant instrument;
9. Ships with recognized organization deficiency ratio above average;
10. Ships in a category referred to in section 8 of Annex I which are:

134. *Id.*

135. *Id.*

136. Paris MOU, *supra* note 45, Annex I, § 1.2.

- a) Oil tankers with a gross tonnage of more than 3000 and older than 15 years of age, as determined on the basis of the date of construction indicated in the ship's safety certificates.
 - b) Bulk carriers, older than 12 years of age, as determined on the basis of the date of construction indicated in the ship's safety certificates;
 - c) Passenger ships older than 15 years of age other than ro-ro ferries and high-speed passenger craft operating in regular service under the provision of Council Directive 1999/35/EC;
 - d) Gas and chemical tankers older than 10 years of age, as determined on the basis of the date of construction indicated in the ship's safety certificates.
11. Other ships above 13 years old.¹³⁷

C. Inspections

1. Initial Inspection

During an initial inspection, the PSCO will, at a minimum and to the extent applicable, inspect a number of certificates and documents that a ship is required to carry.¹³⁸ In addition to document control, a PSCO is also required to inspect several areas of the vessel, including the engine room, and must be satisfied that both the accommodations for passengers and crew, and the hygienic condition of the ship complies with the requirements under the ship's certificates.¹³⁹ The certificates and documents that a PSCO should check during the initial inspection are numerous.¹⁴⁰

137. *Id.* Annex I, § 1.2.1-11.

138. *Id.* § 3.1.

139. *Id.*

140. *Id.* Annex I, § 2. During the initial inspection, the PSCO should inspect the following certificates and documents:

1. International Tonnage Certificate (1969);
2. Passenger Ship Safety Certificate;
3. Cargo Ship Safety Construction Certificate;
4. Cargo Ship Safety Equipment Certificate;
5. Cargo Ship Safety Radio Certificate;
6. Exemption Certificate;
7. Cargo Ship Safety Certificate;
8. Document of Compliance (SOLAS 74, Regulation II-2/54)
9. Dangerous goods special list or manifest, or detailed stowage plan;

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10. International Certificate of Fitness for the Carriage of Liquefied Gases in Bulk, or the Certificate of Fitness for the Carriage of Liquefied Gases in Bulk, whichever is appropriate;
 11. International Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk, or the Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk, whichever is appropriate;
 12. International Oil Pollution Prevention Certificate;
 13. International Pollution Prevention Certificate for the Carriage of Noxious Liquid Substances in Bulk;
 14. International Load Line Certificate (1966);
 15. International Load Line Exemption Certificate;
 16. Oil Record Book, parts I and II;
 17. Shipboard Oil Pollution Emergency Plan;
 18. Cargo Record Book;
 19. Minimum Safe Manning Document;
 20. Certificates issued in accordance with STCW Convention;
 21. Medical certificates (see ILO Convention No. 73);
 22. Table of shipboard working arrangements (see ILO Convention No. 180 and STCW 95);
 23. Records of hours of work or rest of seafarers (see ILO Convention No. 180);
 24. Stability information;
 25. Copy of Document of Compliance and Safety Management Certificate issued in accordance with the International Management Code for the Safe Operation of Ships and for Pollution Prevention (IMO Resolutions A.741(18) and A.788(19));
 26. Certificates as to the ship's hull strength and machinery installations issued by the classification society in question (only to be required if the ship maintains its class with a classification society);
 27. Survey Report Files (in case of bulk carriers or oil tankers);
 28. For ro-ro passenger ships, information on the A/A-max ratio;
 29. Document of authorization for the carriage of grain;
 30. Special Purpose Ship Safety Certificate;
 31. High Speed Craft Safety Certificate and Permit to Operate High Speed Craft;
 32. Mobile Offshore Drilling Unit Safety Certificate;
 33. For oil tankers, the record of oil discharge monitoring and control system for the last ballast voyage;
 34. The muster list, fire control plan, and for passenger ships, a damage control plan, a decision – support system for the master (printed emergency plan);
 35. Ship's log book with respect to the records drills, including security drills, and the log for records of inspection and maintenance of lifesaving appliances and arrangements and fire fighting appliances and arrangements;
 36. Reports of previous port State control inspections;
 37. Cargo securing manual;
 38. For passenger ships, list of operational limitations;
 39. For passenger ships, a plan for co-operation with SAR-services;
 40. Bulk carrier booklet;
 41. Loading/Unloading Plan for bulk carriers;
 42. Garbage Management Plan;

2. More Detailed Inspection

If the vessel does not carry the relevant certificates, or if the PSCO has “clear grounds” from his or her general impressions that the condition of the ship or its equipment does not correspond substantially with the particulars of the certificates or that the master or crew is not familiar with essential shipboard procedures, a more detailed inspection should be carried out.¹⁴¹

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43. Garbage Record Book;
 44. Certificate of financial insurance or any other financial security in respect of civil liability for oil pollution damage;
 45. International Ship Security Certificate (ISSC);
 46. Continuous Synopsis Record;
 47. Record of AFS (*AFS/R1.1.b*);
 48. International Anti-Fouling System Certificate (IAFS Certificate) (*AFS/R2.4*);
[sic]
 49. Declaration on AFS (*AFS/R5*).

Id.

141. *Id.* § 3.1. The Paris MOU provides many examples that constitute “clear grounds” for conducting a more detailed inspection:

1. the ship has been identified as a priority case for inspection, under section 1.1 and sections 1.2.3, 1.2.4, 1.2.5b, 1.2.5.c, and 1.2.8 of this Annex;
2. during examination of the certificates and documents referred to in section 2 of this Annex, inaccuracies have been revealed or the documents have not been properly kept or updated;
3. indications that the relevant crew members are unable to communicate appropriately with each other, or with other persons on board, or that the ship is unable to communicate with the shore-based authorities either in a common language or in the language of those authorities;
4. evidence of cargo and other operations not being conducted safely or in accordance with IMO guidelines;
5. failure of the master of an oil tanker to produce the record of the oil discharge monitoring and control system for the last ballast voyage;
6. absence of an up-to-date muster list, or crew members not aware of their duties in the event of fire or an order to abandon the ship;
7. the emission of false distress alerts not followed by proper cancellation procedures;
8. the absence of principal equipment or arrangements required by the conventions;
9. evidence from the port State control officer’s general impressions and observations that serious hull or structural deterioration or deficiencies exist that may place at risk the structural, watertight or weather tight integrity of the ship;
10. excessively unsanitary conditions on board the ship;
11. information or evidence that the master or crew is not familiar with essential shipboard operations relating to the safety of ships or the prevention of pollution, or that such operations have not been carried out;

3. Mandatory Inspection

Following the *Erika* and *Prestige* incidents, the EU introduced the concept of mandatory inspections on high risk ships through Directive 2001/106/EC.¹⁴² This has been incorporated into the Paris MOU and has been made applicable to all member states of the Paris MOU since July 22, 2003.¹⁴³ Under this new scheme, ships of a certain age and type are specifically selected for the purpose of conducting expanded inspections.¹⁴⁴ A ship with a target factor greater than fifty will be inspected if it has been at least one month since it was last inspected by a member state.¹⁴⁵ These types of ships are required to notify the port state of its arrival if it has been more than twelve months since the ship has been inspected by a PSCO of a member state.¹⁴⁶

4. Mandatory Expanded Inspections

Under the amended Paris MOU, certain vessels are identified as high risk and port state control inspections are mandatory for them after twelve months from their last “expanded inspection.”¹⁴⁷ This inspection must be carried out at the first port the vessel visits after a period of twelve months since its last expanded inspection.¹⁴⁸ Vessels defined as high risk include: (1) oil tankers over fifteen years old and with more than 3000 gross tonnage; (2) gas and chemical tankers over ten years old; (3) bulk carriers over twelve years old; and (4) passenger ships over fifteen years old.¹⁴⁹ If a vessel becomes eligible for an expanded inspection, it should give either three days notice of arrival to the member port state that it is calling at, or

12. the absence of a table of shipboard working arrangements or records of hours of work or rest of seafarers (see ILO180).

Id. Annex I, § 4.

142. The Paris Memorandum of Understanding on Port State Control, Ship Notification Information for Masters, Ship Owners & Ship Agents of Foreign Flag Ships, <http://www.parismou.org/ParisMOU/home/MEI/xp/menu.3985/default.aspx> (last visited Mar. 17, 2009) [hereinafter Ship Notification Information]. See also Council Directive 2001/106, 2001 O.J. (L. 19) 17 (EC).

143. Ship Notification Information, *supra* note 142.

144. *Id.*

145. Paris MOU, *supra* note 45, § 3.2.

146. *Id.* § 3.3.

147. *Id.*

148. *Id.*

149. *Id.* Annex I, § 8.2.1-4.

give notice to the next port of destination before leaving the current port if the voyage is expected to last less than three days.¹⁵⁰

5. Priority Inspections

Each state or port may have its own priority list of ships to be inspected depending on the types of vessels visiting their ports. Reports of complaints from ships' crews, pilots, or port authorities, and incidents such as collisions or groundings, are priority criteria that override a ship's targeting factor.¹⁵¹ Under the Paris MOU, certain ships shall be considered as an overriding priority for inspection, regardless of the value of the target factor.¹⁵²

150. Ship Notification Information, *supra* note 142.

151. Paris MOU, *supra* note 45, Annex I, §§ 1.1.1, 1.1.4, 1.1.5.

152. *Id.* Annex I, § 1.1. Overriding factors that necessitate inspections include:

1. Ships which have been reported by pilots or port authorities in accordance with section 1.5 of the Memorandum; [sic]
2. Ships carrying dangerous or polluting goods, which have failed to report all relevant information concerning the ship's particulars, the ship's movements and concerning the dangerous or polluting goods being carried to the competent authority of the port and coastal State;
3. Ships which have been the subject of a report or notification by another Authority;
4. Ships which have been the subject of 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; the identity of the person lodging the report or complaint must not be revealed to the master or the shipowner of the ship concerned;
5. Ships which have been:
 - involved in a collision, grounding or stranding on their way to the port,
 - accused of an alleged violation of the provisions on discharge of harmful substances or effluents,
 - maneuvered in an erratic or unsafe manner whereby routing measures, adopted by the IMO, or safe navigation practices and procedures have not been followed, or
 - otherwise operated in such a manner as to pose a danger to persons, property or the environment;
6. Ships which have been suspended or withdrawn from their class for safety reasons in the course of the preceding [six] months.
7. Ships which cannot be identified in the SIRENaC information system.

Id. Annex I, § 1.1.1-7.

6. Concentrated Inspection Campaigns

Since 1995, the Paris MOU has introduced so-called “Concentrated Inspection Campaigns” (CIC).¹⁵³ The campaigns normally last a period of three months and focus on a specific area of the ship, check on special matters or areas of concern, or enforce new requirements that enter into force.¹⁵⁴ Among other issues, CICs address issues concerning pilot ladders, oil record books, working and living conditions, ISM Implementation, structural safety of bulk carriers, structural safety of oil tankers, and cargo securing procedures.¹⁵⁵ In 2005, the concentrated inspections were aimed at the communication equipment onboard, with particular regard for the global maritime distress and safety system (GMDSS). From February 1 to April 30, 2006, a CIC was carried out in the context of MARPOL 73/78, Annex I, Regulations 16 and 17. In September of 2007, the concentrated campaign focused on the compliance with the International Safety Management Code (ISM).¹⁵⁶ Shipowners and charterers have to be prepared for CICs and ensure that their vessels meet all required standards.

D. Detention

Annex I of the Paris MOU provides a list of defects that, under the conventions, are regarded as grounds for detention. This list is only a guide and it should not be seen as the definitive list of detainable items.¹⁵⁷ Deficiencies that warrant detention in the area of STCW 78 are the sole grounds for detention under this Convention.¹⁵⁸ The decision to detain requires the PSCO’s professional judgment.¹⁵⁹ If the proper operation or maintenance of inert gas systems or cargo related gear or machinery fails, then detention may not be warranted, but the cargo operations of the vessel have to be suspended.¹⁶⁰ The various defects can be grouped under the various conventions.¹⁶¹

153. ÖZÇAYIR, *supra* note 33, at 161.

154. *Id.*

155. *Id.* at 161-62.

156. *Id.*

157. Paris MOU, *supra* note 45, at Annex I, § 9.3.4.

158. *Id.* § 9.3.4.9.

159. *Id.* § 9.1.

160. *Id.* § 9.3.4.11.

161. Defects can be grouped according to their conventions:
Areas under SOLAS 74 (References are given in brackets)

1. failure of proper operation of propulsion and other essential machinery, as well as electrical installations;

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2. insufficient cleanliness of engine room, excess amount of oily-water mixtures in bilges, insulation of piping including exhaust pipes in engine room contaminated by oil, improper operation of bilge pumping arrangements;
 3. failure of the proper operation of emergency generator, lighting, batteries and switches;
 4. failure of the proper operation of the main and auxiliary steering gear;
 5. absence, insufficient capacity or serious deterioration of personal lifesaving appliances, survival craft and launching arrangements;
 6. absence, non-compliance or substantial deterioration to the extent that it can not comply with its intended use of fire detection system, fire alarms, fire fighting equipment, fixed fire extinguishing installation, ventilation valves, fire dampers, quick closing devices;
 7. absence, substantial deterioration or failure of proper operation of the cargo deck area fire protection on tankers;
 8. absence, non-compliance or serious deterioration of lights, shapes or sound signals;
 9. absence or failure of the proper operation of the radio equipment for distress and safety communication;
 10. absence or failure of the proper operation of navigation equipment, taking the provisions of Regulation V/12(o) of SOLAS 74 into account;
 11. absence of corrected navigational charts, and/or all other relevant nautical publications necessary for the intended voyage, taking into account that type approved electronic chart display and information system (ECDIS) operating on official data may be used as a substitute for the charts;
 12. absence of non-sparking exhaust ventilation for cargo pump rooms (Regulation II-2/59.3.1 of SOLAS 74);
 13. serious deficiency in the operational requirements listed in 5.5 of Annex I [of the Paris MOU];
 14. number, composition or certification of crew not corresponding with safe manning document;
 15. failure to carry out the enhanced survey programme in accordance with SOLAS 74, Chapter XI, Regulation 2;
 16. absence or failure of a VDR, when its use is compulsory.

Paris MOU, *supra* note 45, at Annex I, § 9.3.4.2.

Areas Under the IBC Code (References are given in brackets)

1. transport of a substance not mentioned in the Certificate of Fitness or missing cargo information (16.2);
2. missing or damaged high-pressure safety devices (8.2.3);
3. electrical installations not intrinsically safe or corresponding to code requirements (10.2.3);
4. sources of ignition in hazardous locations referred to in 10.2 (11.3.15);
5. contraventions of special requirements (15);
6. exceeding of maximum allowable cargo quantity per tank (16.1);
7. insufficient heat protection for sensitive products (16.6).

Id. § 9.3.4.3.

Areas Under the ICG Code (References are given in brackets)

1. transport of a substance not mentioned in the Certificate of Fitness or missing cargo information (18.1);

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2. missing closing devices for accommodations or service spaces (3.2.6);
 3. bulkhead not gastight (3.3.2);
 4. defective air locks (3.6);
 5. missing or defective quick closing valves (5.6);
 6. missing or defective safety valves (8.2);
 7. electrical installations not intrinsically safe or not corresponding to code requirements (10.2.4);
 8. ventilators in cargo area not operable (12.1);
 9. pressure alarms for cargo tanks not operable (13.4.1);
 10. gas detection plant and/or toxic gas detection plant defective (13.6);
 11. transport of substances to be inhibited without valid inhibitor certificate (17/19).
- Id.* § 9.3.4.4.

Areas Under LOADLINES 66

1. significant areas of damage or corrosion, or pitting of plating and associated stiffening in decks and hull effecting seaworthiness or strength to take local loads, unless proper temporary repairs for a voyage to a port for permanent repairs have been carried out;
 2. a recognized case of insufficient stability;
 3. absence of sufficient and reliable information, in an approved form, which by rapid and simple means, enables the master to arrange for the loading and ballasting of his ship in such a way that a safe margin of stability is maintained at all stages and at varying conditions of the voyage, and that the creation of any unacceptable stresses in the ship's structure are avoided;
 4. absence, substantial deterioration or defective closing devices, hatch closing arrangements and water tight doors;
 5. overloading;
 6. absence of or impossibility to read draught mark.
- Id.* § 9.3.4.5.

Areas under Annex I to MARPOL 73/78 (References are given in brackets)

1. absence, serious deterioration or failure of proper operation of the oily-water filtering equipment, the oil discharge monitoring and control system or the 15 ppm alarm arrangements;
 2. remaining capacity of slop and/or sludge tank insufficient for the intended voyage;
 3. oil record book not available (20(5));
 4. unauthorized discharge bypass fitted;
 5. survey report file missing or not in conformity with Regulation 13G(3)(b) of the Convention.
- Id.* § 9.3.4.6.

Areas under Annex II to MARPOL 73/78 (References are given in brackets)

1. absence of the P&A Manual;
 2. cargo is not categorized (3(4));
 3. no cargo record book available (9(6));
 4. transport of oil-like substances without satisfying the requirements (14);
 5. unauthorized discharge by-pass fitted.
- Id.* § 9.3.4.7.

Areas under Annex V to MARPOL 73/78

1. absence of the garbage management plan;

When a PSCO decides to detain a ship, the master of the ship will be immediately informed and advised to seek assistance and to arrange remedial action in order to not delay the ship.¹⁶² Following a detention, the PSCO officer is required to notify the flag state and the classification society (if the statutory certificates are issued by the classification society), without delay.¹⁶³ This notification includes the PSCO's report of inspection.¹⁶⁴

A detained ship will only be released once the PSCO is satisfied that the deficiencies found have been properly rectified.¹⁶⁵ In cases where some repairs cannot be carried out in the port of detention, the PSCO may allow

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2. no garbage record book available;
 3. ship's personnel not familiar with disposal/discharge requirements of garbage management plan.

Id. § 9.3.4.8.

Areas under STCW 78

1. failure of seafarers to hold a certificate, to have an appropriate certificate, to have a valid dispensation or to provide documentary proof that an application for an endorsement has been submitted to the flag State Administration;
2. failure to comply with the applicable safe manning requirements of the flag State Administration;
3. failure of navigational or engineering watch arrangements to conform to the requirements specified for the ship by the flag State Administration;
4. absence in a watch of a person qualified to operate equipment essential to safe navigation, safety radio communications or the prevention of marine pollution;
5. failure to provide proof of professional proficiency for the duties assigned to seafarers for the safety of the ship and the prevention of pollution;
6. inability to provide for the first watch at the commencement of a voyage and for subsequent relieving watches persons who are sufficiently rested and otherwise fit for duty.

Id. § 9.3.4.9.

Areas under ILO Conventions

1. insufficient food for voyage to next port;
2. insufficient potable water for voyage to next port;
3. excessively unsanitary conditions on board;
4. no heating in accommodation of a ship operating in areas where temperatures may be excessively low;
5. excessive garbage, blockage by equipment or cargo or otherwise unsafe conditions in passageways/accommodations;
6. clear evidence that watch keeping and other duty personnel for the first watch or subsequent relieving watches are impaired by fatigue.

Id. § 9.3.4.10.

162. Paris MOU, *supra* note 45, § 3.14.

163. *Id.* § 3.10.2.

164. *Id.*

165. *Id.* § 9.3.2.

the ship to proceed to a repair yard as long as adequate temporary repairs are made, and it is safe for the ship to make the voyage.¹⁶⁶

2. Detention Information

Like other aspects of the Paris MOU, the content of detention information went through some changes. In the 1980s, flag states were only provided with information on their ships when so requested.¹⁶⁷ In 1993, a list was published for the first time of the flag states exceeding the average detention percentage to be inspected on a priority basis.¹⁶⁸ In 1994, ships with poor safety records started to be named.¹⁶⁹ The aim was to make the maritime industry aware of the identity of those ships that were continuously found in substandard condition. In its 1999 report, the Paris MOU published three lists of flag states: (1) the “white list” indicating high quality flags; (2) the “grey list” indicating flags with an average PSC record; and (3) the “black list” indicating flags with a consistently poor safety record.¹⁷⁰ In 1999, the Paris MOU also started to publish a so-called “Rustbucket of the Month” on its website.¹⁷¹ This publication provided detention information describing particular detentions in detail with photographic information of the detained vessel.¹⁷² Publication of information concerning ships inspected includes the following:

1. Name of the ship;
2. IMO number;
3. Type of ship;
4. Tonnage;
5. Year of construction;
6. Name and address of the company of the ship;
7. In the case of ships carrying liquid or solid cargoes in bulk, the name and address of the charterer responsible for the selection of the vessel and the type of charter;
8. Flag State;
9. The classification society or classification societies, where relevant, which has/have issued to this ship the class certificates, if any;

166. *Id.* § 3.11.

167. ÖZÇAYIR, *supra* note 33, at 165.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

10. The recognized organization or organizations and/or any other party which has/have issued to this ship certificates in accordance with the applicable conventions on behalf of the flag state, stating the certificates delivered;
11. Country, port and date of inspection;
12. Number and nature of deficiencies.¹⁷³

Publication information concerning detained ships includes nearly all the information listed above and the following additional information:

1. Port and date of the last special survey and the name of the organization which carried out the survey;
2. Number of detentions during the 24 previous months;
3. Country and port of detention;
4. Date when the detention was lifted;
5. Duration of detention, in days;
6. Number of deficiencies found and the reasons for detention, in clear and explicit terms;
7. Description of the measures taken by the competent authority and, where relevant, by the recognized organization as a follow-up to detention;
8. If the ship has been refused access to any port within the region of the Memorandum, the reasons for such measure in clear and explicit terms;
9. Indication, where relevant, of whether the recognized organization or any other private body that carried out the survey has a responsibility in relation to the deficiencies which, alone or in combination, led to detention;
10. Description of the measures taken in the case of a ship which has been allowed to proceed to the nearest appropriate repair yard, or which has been refused access to any port within the region of the Memorandum.¹⁷⁴

E. Refusal of Access

Under the Paris MOU, a ship without ISM certificates on board must be detained.¹⁷⁵ If there are no other deficiencies warranting detention that have been found, the detention may be lifted to avoid port congestion.¹⁷⁶

173. *Id.*

174. Paris MOU, *supra* note 45, Annex 5.

175. Paris MOU, *supra* note 45, § 3.10.4.

176. *Id.*

Such ships, however, will be banned from Paris MOU ports until valid ISM certificates have been issued.¹⁷⁷

After January 22, 2002, detentions count towards a ban, and a ship registered with a flag on the blacklist will be refused access to ports in the Paris MOU region.¹⁷⁸ A vessel will be refused access after a second detention within a three year period if it is in the “very high risk” or “high risk” category on the blacklist.¹⁷⁹ After a third detention in two years, a vessel in a lower risk category on the blacklist may be refused access.¹⁸⁰

Ships subject to refusal of access consist of gas and chemical tankers, bulk carriers, oil tankers, and passenger ships.¹⁸¹ There is no tonnage or age limitation for refusing such vessels.¹⁸² In order to lift the ban, the flag state or the class (where it is appropriate), must certify that the ship complies with required standards, and the ship must complete an expanded inspection at the owner’s expense.¹⁸³ In accordance with section 3.12.1 of the Paris MOU, ships may be banned from a port if they jump detention or fail to call at an indicated repair yard.¹⁸⁴

VII. REVIEW OF PORT STATE CONTROL

Port state control has been on the maritime agenda for a long time and has started to become an effective component of the shipping world with the increased enforcement of regional maritime agreements. With the continuous development of regional agreements, it is impossible for a shipowner to trade without considering port state control.

There are many control systems in shipping, but none has been as distressing as port state control for the shipowners. Shipping is international by definition, and it has sizeable economic turnover. Therefore, economic advantage is the most common motivation for noncompliance with international minimum standards. It is again the risk of loss of profit which encourages or forces the shipowner to comply with required international standards. Political and commercial aspects have always come after financial considerations.

177. *Id.*

178. ÖZÇAYIR, *supra* note 33, at 156-57.

179. Paris MOU, *supra* note 45, § 3.10.5.

180. *Id.*

181. *Id.* Annex 3 § A.

182. ÖZÇAYIR, *supra* note 33, at 157.

183. Paris MOU, *supra* note 45, Annex 3 § B.

184. *Id.* § 3.12.1.

Shipowners always need to keep port state control in mind for their trade because failure to comply with port state control requirements may result in huge costs and may prevent a vessel from trading with certain ports for a considerable period of time. The main principle of MOUs is “name and shame.” Once a vessel is detained it will be on the list of detained ships available on the website of the relevant MOU. In the past, some vessels have tried to avoid inspections and resulting sanctions by changing the vessel’s name; however, as every vessel is registered with a unique IMO identification number, such means of escape have not been successful. With the continuous development of regional MOUs, especially the Paris MOU, the amount of information available on the internet about a detained vessel is becoming more and more extensive. It is not only the name of the shipowner that is available on the website, but also the name of the relevant classification society, as well as the name and address of the initial charterer of a ship carrying liquid or solid bulk cargoes. The aim of port state control system is to provide as detailed information as possible about the detained vessels in order to name all the parties that took place in such unsafe vessel trading. Therefore, it is not only the shipowners who need to take into account port state control, the other characters of shipping practice such as flag states, charterers, and classification societies need to consider the effects of port state control as well.

In order not to be affected by a vessel’s bad history of inspections, a charterer could check a prospective vessel’s port state control detention history. This study should cover the port state control detention history for all vessels under the same management and/or ownership, and would provide detailed information on maintenance standards and work practices of a vessel and her owner. Such data should be examined with caution by keeping in mind the differences in port state control practices in order to make sure that a prudent shipowner is not unreasonably penalized for minor defects to a vessel.

Shipowners will also face the financial consequences if their ships are found to be in substandard condition and detained. The Paris MOU provides for all costs related to the inspection to be charged to the owner or operator of the ship.¹⁸⁵ The detention will not be lifted until full payment has been made or a sufficient guarantee for reimbursement has been given.¹⁸⁶

185. Paris MOU, *supra* note 45, § 3.15.

186. *Id.* § 3.16.

Is port state control a perfect system to eliminate substandard ships? Like any other system in which human beings are involved, port state control systems are open to abuse. Despite its ever increasing role in policing the world's fleets, port state control does not have a uniform application in all different regions and sometimes not even within the same region of the MOU. With the increase in the number of MOUs and the member states of these MOU's, the number of countries entitled to PSC inspection increases. This enlargement increases the risk of varied standards of inspectors and inspections. Therefore, even the establishment of an internationally uniform standard of competence of inspectors will not necessarily provide a solution; as such a standard could again be subject to different interpretations.

There are basically two systems of port state control: (1) through regional agreements; (2) through the U.S. port state control. Within the regional agreements, the Paris MOU has become the most strict port state control system. There are two reasons for such a practice. First, the Paris MOU has the financial means, and second, the Paris MOU member states are the European Union countries. The European Union is very keen on improving maritime safety standards, especially following the *Erika* and *Prestige* incidents.

The U.S. Port State Control system has been a notable exception with tighter standards than the regional agreements. Following the 9/11 attacks, maritime security also became part of the maritime policy development, which in turn reflected tighter European and U.S. port state control regimes. This general practice encouraged unsafe vessels to trade in other parts of the world, where port state control could be avoided.

Despite the effective operation of the Paris MOU and the U.S. Port State Control system, port state control cannot be applied in all parts of the world because of financial and technical issues. For instance, South Africa is situated on a particularly busy corner of the world's major sea routes. The weather conditions are frequently dreadful and many casualties occur, but South African port state control is never as effective as a European port due to insufficient funds and lack of trained personnel.

Another issue with port state control is that it can easily be used as a political tool in order to demonstrate that certain flag states are not performing their tasks as well as they should. Any deficiencies found or detentions that occur for a vessel trading in her home port are not accounted for in port state control figures, as these controls are flag state control rather than port state control. Port state control is largely subjective. It is possible for a port state control inspector to treat a deficiency as requiring detention or correction before departure, depending on their professional

judgment and possibly the general policy of the country or ports towards port state control or the flag of the ship concerned.

Lastly, it is possible to ask for compensation for an unduly detained ship, but the process is long, costly, and does not lift the detention order. Therefore, instead of going through the legal process, the shipowners prefer to sort out the problem in more practical ways.

This practice shows that port state control systems are going to remain as the most effective control systems for shipping in a progressing world. More than any other oil pollution incident, the *Erika* incident and 9/11 have instigated a process of change in transport policies; however, the effective use of the port state control legislative process should be universal. A substandard vessel is a mobile property and could be anywhere on the world seas. Therefore, effective port state control rules should be applied globally; otherwise, we would only create ports of convenience for substandard vessels. The goal should be creating safer ports throughout the world and increasing effective implementation of international conventions. The responsibility is not just on one party; rather flag states, port states, shipowners, classification societies, international organizations, and whoever is taking part in the shipping industry need to act together. These different interested parties need to comply with the international rules and regulations in order to achieve global cooperation and implementation.