PORT STATE CONTROL: STRONG MEDICINE TO CURE A SICK INDUSTRY

John Hare*

PREFACE

In a previous article dealing with flag, coastal and port state control,¹ I suggested that the shipping industry was closing the net on unseaworthy ships and their unscrupulous owners. At that time, in early 1994, I shared the shipping industry’s hesitancy to acclaim the success of port state control measures which were burgeoning around the maritime states of the world. There are now positive indications that port state control is proving more effective than even its most ardent early proponents would have hoped.

"Port State Control," as a concept, involves the powers and concomitant obligations vested in, exercised by, and imposed upon a national maritime authority (or its delegate) by international convention or domestic statute or both. Port state control confers the power to board, inspect and where appropriate detain a merchant ship flying a flag foreign to that state. The aim of port state control is to ensure compliance of ships with all applicable international safety at sea instruments and with any domestic legislative maritime safety requirements.

This article will seek to explore the legal basis of international port state control and the manner in which it has matured over the past fifteen years into what has become the most effective cure of the malaise of the maritime industry.²

However, in focusing on the legality and operation of port state control, one should remain conscious of the fact that it is but one of a compendium of three prime jurisdictions which have a collective responsibility to ensure

---

* Associate Professor of Law and Head of Shipping Law at the Institute of Marine Law at the University of Cape Town.


the maintenance of standards at sea. The first such jurisdiction is flag state control which means the international and domestic powers and obligations of a state which allows vessels to register under its flag. The birth of port state control may probably be traced to the failure of the majority of flag states (certainly by volume of tonnage registered) to properly carry out their responsibilities in administering their ships' registers.\(^3\)

The second of the control measures is the jurisdiction of a coastal state to police the use of its waters by foreign tonnage. This jurisdiction, and its limitations and inadequacies, was also examined in my earlier article.\(^4\)

Port state control, as the third jurisdictional regime, should not be viewed in isolation from its two counterparts. But the time has clearly come when the maritime industry can embrace and applaud port state control as an instrumental force in bringing the industry back from the brink of disgrace where it was teetering at the beginning of this decade.

I. THE NATURE AND ORIGINS OF PORT STATE CONTROL

The concept of a state exercising its jurisdiction over ships that ply its waters—particularly those that call at its ports—is well established in both history and legal practice:

It is universally acknowledged that once a ship voluntarily enters port it becomes fully subject to the laws and regulations prescribed by the officials of that territory for events relating to such use and that all types of vessels, military and other, are in common expectation obliged to comply with the coastal regulations about proper procedures to be employed and permissible activities within internal waters.\(^5\)

But the practice of the majority of ports, at least until the last decade, was to give scant inspection to calling vessels. A pilot may well have checked...
whether the vessel was loaded below her marks, but even this was circumvented by the common and immensely dangerous practice of "hogging" a ship to bend her load line above the water line. Maritime authorities were concerned almost exclusively with the affairs of their own ships (and then too often in a lackadaisical manner). With the growth of flags of convenience (many of whose maritime authorities turned a blind eye to the condition of the vessels whose fees they so readily received), with the lack of interest by port authorities, and with the inadequacies of general coastal state policing of passing ships, the unseaworthy ship (euphemistically referred to 'sub-standard') abounded. That this slide was hastened by the general decline in world trade in the late 1970s, particularly for non-containerized break bulk cargo vessels, bulk carriers and tankers, cannot be denied. Surplus and superannuated tonnage long overdue for the scrap-yard can only be used to make meager profits in the hands of marginal and economically stressed ship-owners.

It was in relation to oil tankers (many of which were knocked together with undue haste in the oil boom of the early 1970s) that the international community first sat up and took notice that there was perhaps something untoward going on in the shipping industry. The sad reality of newsmaking is that it is often easier to galvanize public opinion with a single photograph of three forlorn oil-soiled penguins than with a headline recording the sinking of yet another bulk carrier with all hands lost.

The control and prevention of oil pollution has long occupied the minds of international maritime legislators. The chapter of major oil tanker casualties, starting with the grounding of the Torrey Canyon in 1967, gave a very conspicuous public face to the vagaries of shipping and the tragedy of what can happen when things go wrong. Less conspicuous was the continuing appalling loss of non-tanker merchant ships, particularly bulk carriers, which remains one of the prime causes of concern of the shipping industry to this day.

---

6 As early as 1916 South Africa followed the lead of Australia in passing an act which prohibited the discharge of oil into navigable waters. This lead was followed by the United Kingdom in its 1922 Oil in Navigable Waters Act. Apart from a draft convention prepared in 1926 in Washington, there was no international oil pollution control until the 1954 International Convention for the Prevention of Pollution of the Sea by Oil. This Convention took up the proposals of the 1952 Faulkner Committee and was in turn used to found the oil pollution prevention provisions of the 1958 Law of the Sea Convention.

7 A recent illustration of this was the loss of the bulker Leros Strength, which went down with all hands in February 1997, in circumstances which suggest that the vessel was well past her safe working life. See also the Institute of London Underwriters' Casualty Returns infra.
While oil pollution casualties may well have highlighted sub-standard shipping as a green issue, the continuing loss of seamen’s lives is the crux of the issue and the catalyst that has given strength to the arms of the ILO, the IMO, and the ITF in coordinating international reaction.

The international maritime community had previously sought to establish regimes for self regulation; as early as 1876, the agitation of British MP Samuel Plimsoll led to the U.K.’s Merchant Shipping Act of 1876 which enshrined the requirement of a load-line for all merchant ships. The successor to Plimsoll’s Act, the present load-line convention, is one of the package of conventions relied on for port state control.

And the maritime community did not address issues of safety at sea solely in relation to oil pollution and load-lines. As early as 1914, following a conference in London, the first SOLAS was concluded. The four subsequent SOLAS conventions have covered most areas of maritime safety and are continually updated under the auspices of the IMO.

Disaster begets action and remedy. It took the loss of the Amoco Cadiz off the coast of Britanny in 1978, with a cargo of 227,000 tons on board, to focus the world’s attention on the sea. The Amoco Cadiz spurred the IMO into re-examining the laws of salvage—an initiative which was then taken over by the CMI in preparation for the draft Montreal Salvage Convention which in turn led to the London Salvage Convention of 1989 (not yet in force). It is beyond the scope of this paper to examine all of the international conventions which impact upon the safety of ships at sea; suffice it to state that collectively, as will be pointed out below, they provide the framework for port state control inspections, and without them, and the considerable labors that preceded their conclusion, port state control would have as little direction as it would have teeth.

---

8 Clarke, supra note 2, at 209.
9 The International Labour Organisation, the International Maritime Organisation and the International Transport Workers’ Federation respectively.
10 See infra note 23.
11 It is interesting to note that this conference followed the loss of the Titanic on her maiden voyage across the Atlantic in April 1912—a disaster which prompted the U.K. government to call a conference to discuss safety issues.
14 Then known as the International Maritime Consultative Organization.
15 Comite Maritime International, the international association of maritime law associations.
II. THE ROLE OF INTERNATIONAL ORGANIZATIONS

As has been alluded to above, the ILO and the ITF have played significant roles in applying pressure upon maritime states to apply relevant safety conventions and regimes. The CMI has also played its part in addressing salvage and safety issues. But it is upon the IMO that responsibility for drawing up and implementing safety standards became focused. The IMO, then known as IMCO, was established by United Nations (U.N.) resolution in 1948. The 1948 SOLAS convention which followed took heart from the fact that for the first time there was to be a permanent international authority which could lobby for and enact international conventions to regulate shipping. The IMO, especially during the 1950s, played a leading role in the preparation of UNCLOS. It has since sponsored and spearheaded the various subsequent SOLAS conventions establishing and improving load lines, navigation, watchkeeping, building and registration requirements of all ships.

In addition to the promotion of international conventions, the IMO passes its own assembly resolutions which in turn bind the member states of the IMO. Therefore, it is these resolutions coupled with the international conventions, which impose obligations on port states to exercise the controls envisaged by the resolutions.

The IMO has recently consolidated its port state control measures. The consolidated resolution and its annexures set out the procedures for port state control in chapter and verse. Inspections are categorized as initial port state inspections and as more detailed inspections. Guidelines are provided for detention and reporting procedures.

---

16 The United Nations Convention on the Law of the Sea, 1958. UNCLOS article 25 may be seen as the first international legal basis for port state control. The article empowered states to take necessary steps to prevent any breach of conditions to which the call of any vessels at its ports may be subject. Articles 216 and 218 enable a port state to enforce international anti-dumping and anti-pollution measures, with article 219 giving states power to take administrative measures to prevent errant vessels from leaving port. To the extent that an unseaworthy ship may, at least through her bunkers, present an oil pollution threat, authority may be found in these articles for the intervention of a port state authority in most instances. The only limitation was that steps taken be reasonable, public, and not discriminatory.

Not only do the IMO provisions require surveys and inspections to ensure that vessels comply with the appropriate international conventions, they now make it possible for port state control officers inspecting foreign ships to check operational requirements "when there are clear grounds for believing that the master or crew are not familiar with essential ship board procedures relating to the safety of ships." The Resolution makes particular reference to passenger ships and ships which may present a special hazard. 'Clear grounds' are defined in the Annex to the Resolution and include operational shortcomings, cargo operations not being conducted properly, the involvement of the ship in incidents caused by operational mistakes, absence of an up-to-date muster list, and indications that crew members may not be able to communicate with each other in a common language. This is a departure from the previous constraints of port state control inspection. Port state control officers were previously limited to checking certificates and documents. The Resolution confirms that if conditions are not valid, or if there are clear grounds for believing that the condition of the ship or of its equipment or its crew are not up to scratch, a more detailed inspection may be carried out. Moreover, there is considerable focus on the crew's ability to carry out safety functions on board ship.

It should also be noted that the IMO plays an active role as observer in the activities of the regional port state control co-operation groupings referred to below.

The IMO recognizes that it is not the deliberate intent of states to allow substandard ships to operate under their flags. Some states, particularly developing nations with new registers, lack adequate resources for policing their own fleet, let alone the fleets of other vessels calling at their ports. The IMO has assisted greatly in training governments to improve their own maritime inspectorates, and plays a leading role in maritime education generally through the World Maritime University. Of the IMO's role in relation to port state control, its current Director, Mr. William O'Neil, had the following to say on World Maritime Day in 1996:

Shipping is an international industry which is proud of its tradition of freedom of the seas, but that does not mean that ships can sail wherever they like regardless of their condition. The maritime world has the right to expect that ships of all nations meet the levels of safety and environmental

\[Id.,\] adopted Nov. 23, 1995.
protection which have been internationally agreed upon. It is up to shipowners to make sure that their ships are safe, properly manned and do not pollute the seas and it is the duty of governments to make sure that ships which fly their flag comply with the standards laid down in the IMO treaties which they have ratified. If they fail to do so, then IMO—which has the stewardship of these standards—has not only the right but the obligation to take further action.\textsuperscript{19}

It is thus the IMO which is prescribing the medicine. The IMO's medicine chest will be much strengthened by the advent of the SOLAS requirement for ISM certification. This certification, coupled with a Safety Management System (SMS), is due to take effect on July 1, 1998, and will impose upon ship-owners definitive standards of operation and management. These standards will become the benchmarks against which port state control inspectors may in the future assess compliance.

III. REGIONAL INITIATIVES—THE MEMORANDA OF UNDERSTANDING

Crucial to the success of port state control operations is the sharing of information gained about particular ships or their owners and operators, between jurisdictions in and out of which those ships trade. The reason for this is twofold. First, ships are unduly inconvenienced if they are inspected at every port. Second, sharing information forewarns maritime states of the delinquents in their midst. The establishment of regional initiatives in which states are tied together in their port state control activities by memoranda of understanding ("MOU's"), are becoming increasingly significant and will one day encompass most of the world's oceans and ports. With the ease of dissemination of information through the internet, the various regional initiatives, set up for geographic convenience, will increasingly share each other's databases, thereby closing the net even more effectively on the unseaworthy ship and its unscrupulous owner seeking to ply a trade into unsuspecting ports.

\textsuperscript{19} The text of O'Niell's address is at the IMO's website, <http://www.imo.org/imo/wmd/96messag.htm> (visited Feb. 5, 1998).
The first and perhaps most prominent of the regional groupings is the Paris Memorandum of Understanding, which was signed in 1982.\(^{20}\)

The Paris MOU was born of the December 1980 Regional European Conference on Maritime Safety. This Conference focused upon the need to increase maritime safety, the protection of the marine environment, and the importance of improving living and working conditions aboard ships. The green issues and the human rights issues, at that stage still appallingly neglected, were the impetus for the Conference. It is thus interesting to examine the preamble paragraphs of the MOU:

> Mindful that the principal responsibility for the effective application of standards laid down in international instruments rests upon the authorities of the state whose flag a ship is entitled to fly;
> Recognizing nevertheless that effective action by port states is required to prevent the operation of sub-standard ships;
> Recognizing also the need to avoid distorting competition between ports;
> Convinced of the necessity for these purposes of an improved and harmonized system of port state control and of strengthening co-operation and the exchange of information.\(^{21}\)

The groundwork was laid for effective international co-operation in this MOU.\(^{22}\) The key to the Paris MOU (and indeed to others and to port state control itself) is a requirement that each contracting state will ensure, through an effective system of port state control, that foreign merchant ships

---


\(^{21}\) Paris MOU, supra note 20.

\(^{22}\) The effectiveness of the Paris MOU resulted in the IMO passing Resolution A.682(17) on "Regional Co-operation in the Control of Ships and Discharges," and inviting governments to form regional initiatives for port state control in co-operation with IMO.
calling in its ports comply with the international instruments listed in the MOU.23

The MOU has required each contracting authority to inspect an annual total of 25 percent of foreign merchant ships calling at its ports since 1985. Each authority should “consult, co-operate and exchange information” with other authorities. Moreover, authorities should “seek to avoid inspecting ships which have been inspected by any of the other authorities within the previous six months unless they have clear grounds for inspection.”24

The 1982 Paris MOU required that port state control be conducted “without discrimination as to flag.” It also required each state to insure that no more favorable treatment be given to ships flying the flag of a state not party to the memorandum. As will be seen below, however, port state control has matured to the stage where it now recognizes the need to accept the stark reality that some ships pose more of a problem than others. Most MOUs now allow (indeed require) discrimination upon the basis of flag, age, type of vessel, loan owner, operator, or even known classification society.25

The Paris memorandum sets out detailed guidelines as to inspection procedures and detention. The prime purpose of detention is to insure rectification of defects in the vessel. Thus, the Paris MOU provides

In the case of deficiencies which are clearly hazardous to

---

23 The relevant instruments are listed as follows:


24 Paris MOU para 3.4. “Clear grounds” includes notification by another authority or complaint of the ship’s master, crew or any person “with a legitimate interest in the safe operation of the ship.”

25 See the U.S. Coast Guard prioritization of vessels, infra.
safety, health or the environment, the Authority will . . .
ensure that the hazard is removed before the ship is allowed
to proceed to sea.26

Appropriate action may be taken which may include detention or stopping
the ship from continuing an operation by reason of established deficiencies
which, individually or together, would render the continued operation
hazardous. Exceptions are allowed where a ship needs to proceed to a repair
port. To prevent errant ship owners from running a detention, the MOU
stipulates that such ships will be refused access to any port within other party
states until the owner or operator has provided evidence of rectification of
the defects.27

One of the most important and effective provisions of the Paris MOU is
the obligation imposed upon each authority to publish quarterly information
about detentions under PSC procedures. This information is required not
only to contain the name of the ship, but also the name of her owner and
operator, her flag state, and her classification society. The reasons for the
detention are then given.

Initially, port states were reluctant to publish detention information,
particularly where owners were identified. They feared a rash of damages
suits by irate shipowners. Indeed, there have been a number of protests of
the content of detention publications. Publication, however, has in the past
three years become the norm: Publication allows the brokers of the world
to know what ships have been detained and why. Publication lets the
world’s insurers know who the miscreants are. It lets the consumer,
passenger, or cargo shipper know who the delinquents are and lets them
avoid using substandard ships as an effective means of ridding the oceans of
their scourge. The port state authorities have become so comfortable with
the publication of detention lists that one may now find them regularly in

26 Paris MOU, para. 3.7.
27 Running a detention order, or failing to comply with it, remains a real possibility. The
Cypriot panamax bulk carrier San Marco (35538 grt, built in 1968) was detained by
Vancouver port authorities in 1993 after which BV withdrew her class. She was allowed to
proceed under tow, unmanned, for repairs in Mexico. But no repairs were undertaken. The
vessel slipped her tow, took her crew back on board, and proceeded to load a full cargo of
fertilizer. During this voyage, she hit heavy weather off Cape Town and lost shell plating
14x7m in the way of number 1 cargo hold. That the vessel reached the safety of Cape Town
and did not sink with all hands was nothing short of a miracle. The San Marco was as
substandard a ship as one could find, yet the Hellenic Register issued a full suite of
classification certificates after BV had withdrawn theirs.
"Lloyds List" (U.K., Australia, Canada and the U.S., on a monthly basis) and even on the internet. Indeed, the internet is likely to be a very valuable coordinating tool in the administration of port state control procedures in the future. It is the easiest way to access detention data bases and will certainly become the prime means of publication of detained ships in the future.

Following the lead (and largely the letter) of the Paris MOU, the Tokyo MOU for the Asian-Pacific region is up-and-running, although many of the participating states have yet to establish effective port state control facilities and procedures.

The Vina del Mar MOU, 1992, covers the Latin American maritime authorities. This MOU recognizes the objectives of a further regional maritime cooperation scheme and then again repeats, largely to the letter, the provisions of the Paris MOU. Interesting additions to the Vina del Mar MOU, however, are Annex IV and Appendix I, which seek to establish a "Trade data interchange director" and a computer system to input the database records of the participating states.

The most recent port state control system is that set up in the Caribbean on February 9, 1996, in terms practically identical to the Paris MOU. The United Kingdom is expected to sign the MOU on behalf of its dependent territories in the Caribbean, and the MOU takes effect upon
signature of each participating country. Other regional initiatives are on the way. The Iranian Maritime Administration is piloting discussions among West and Central African and Persian Gulf States for an Indian Ocean rim initiative. Clearly, the success of these regional MOU's is dependent upon the efforts of each other.

IV. DOMESTIC ENABLING MEASURES

Armed with this formidable array of international instruments and bolstered by the resolutions of both the ILO and IMO, it is up to port states to exercise port state control in a manner consistent with their own domestic legislation. Many scholars suggest that port state control is not an option. Rather it is an obligation in international law for parties to SOLAS, UNCLOS, and regional initiatives. Port state control even becomes an obligation by virtue of their membership in the IMO alone.

Many states have promulgated domestic legislation to give effect to the notions of port state control. We shall examine briefly the jurisdictions of the United States, the United Kingdom, Australia, South Africa, and New Zealand.

A. The United States

The United States has, since May 1, 1994, promoted a rigorous and public policy of foreign vessel inspection.\textsuperscript{33} Port state control in the United States is conducted by the United States Coast Guard ("USCG"). Prior to 1994, the USCG concerned itself mainly with limited aspects of navigation safety and pollution prevention, particularly in relation to tanker and passenger vessels. It was unusual for the Coast Guard to intervene to enforce the compendium of international instruments embraced by port state control.

In three years, the USCG has established a probing port state control system over the approximately 8000 foreign flag ships that use U.S. ports each year. The aim of the program is clearly to eradicate the presence of

\textsuperscript{33} The public face of U.S. port state control may be viewed at the United States Coast Guard website, <http://www.uscg.mil/hq/g-m/psc/psc.htm> (visited Feb. 5, 1998). Much of the material used in this précis has been taken from that site.
substandard ships in U.S. waters.\textsuperscript{34} To this extent, its aim parallels that of the American OPA.\textsuperscript{35}

Legislative authority is given to the United States Coast Guard under the United States Code.\textsuperscript{36} Chapter 33 gives reciprocity to other parties to the SOLAS convention, which is a welcome step in the direction of an international initiative. The USCG requires all vessels of 1600 GRT or more to give advanced notice of their arrival.\textsuperscript{37} The USCG then checks the vessel's details against its own records and that of its register and assigns points to each ship for compliance with international conventions, previous track records and those of sister ships in the same ownership or management, ratings of the flag and classification society involved. This is a clear departure from the initial 'no discrimination' provisions of early port state control measures. Indeed, the purpose of USCG port state control is to recognize high risk vessels, their owners, and their classification societies and to take appropriate action.

Upon the points rating, the ship is then categorized as Priority I, II or III. Priority I high risk vessels require inspection before they are even allowed into port limits, often at the buoys. Defects must be rectified before the vessel enters port if at all possible.

USCG Regulations set out detailed guidelines for port state control examinations. The proviso is given that:

\begin{quote}
Paragraph C13 of the USCG's Instruction Procedures defines the 'Sub-standard Ship' as follows:

"In general a vessel is regarded as sub-standard if the hull, machinery, or equipment, such as life-saving, fire fighting and pollution prevention, are substantially below the standards required by U.S. laws or international conventions owing to: (a) the absence of required principle equipment or arrangement; (b) gross non-compliance of equipment or arrangement with required specification; (c) substantial deterioration of the vessel structure or its essential equipment; (d) non-compliance with applicable operation and/or manning standards; or (e) clear lack of appropriate certification or demonstrated lack of competence on the part of the crew. If these evident factors as a whole, or individually endanger the vessel, persons on board, or present an unreasonable risk to the marine environment, the vessel should be regarded as a sub-standard ship <http://www.uscg.mil/hq/gm/nmc/pubs/msm/v2/c19.htm> (visited Feb. 5, 1998).
\end{quote}

\textsuperscript{36} Ports and Waterways Safety Act, 33 U.S.C.A. §§ 1221-1232 (1986). There is a proposal under discussion at present to reduce the tonnage to 300 GRT.
PSC examinations are not intended nor desired to be analogous to an inspection for certification of a U.S. flag vessel. Rather they are intended to be of sufficient breadth and depth to satisfy a boarding team that a vessel's major systems are in compliance with applicable international standards and domestic requirements, and that the crew possess sufficient proficiency to safely operate the vessel. The examinations are designed to determine that required certificates are aboard and valid, and that a vessel conforms to the conditions required for the issuance of required certificates. This is accomplished by a walk-through examination and visual assessment of a vessel's relevant components, certificates and documents, and may be accompanied by limited testing of systems and the crew. When the examination reveals questionable equipment, systems or crew incompetence, the boarding team may expand the examination to conduct such operational tests or examinations as deemed appropriate.38

The most significant aspect of the U.S. Coast Guard's port state control policy is the publication of lists of owners & operators, flag states, and classification societies which have run afoul of USCG port state control procedures during the past twelve months. The USCG diligently publishes monthly detention records, giving full details of the vessel and the defects both on its website and in Lloyds List.39

Flags, owners and operators, and classification societies are assessed to help assign the priority rating to a vessel under inspection upon the declared policy that "if any of these entities fails to fully undertake its responsibilities for a ship's safe operation, then the ship is likely to be considered a sub-standard vessel by the USCG."40 A percentage rating is then given to both flags and classification societies.41 The list and the detention ratio is

39 The Lloyds List publications unfortunately do not give owners' particulars. Lloyds List April 29, 1997 page 13. It would appear that Lloyd's List is reluctant to put owners' and classification societies' names to print.
40 See the lists' publication at the USCG website, supra note 28.
constantly updated. Additionally, the flags and classification societies themselves are categorized for priority status.

B. The United Kingdom

The United Kingdom (U.K.) has suffered the exposure of two major maritime casualties having a bearing on the issue of sub-standard ships in recent times. The first was the tragic capsizing of the ferry Herald of Free Enterprise and the second the grounding of the tanker Braer off the Shetland Islands in 1993. Both gave rise to extensive and critical self-examination of the U.K.'s maritime safety measures, and the Braer disaster led to the most comprehensive inquiry into maritime pollution and safety yet undertaken in the form of the "Safer Ships, Cleaner Seas Report."44

The port state control function is deputized to the Marine Safety Agency (MSA).45 The MSA undertakes survey, inspection, and certification to ensure compliance with domestic and international marine standards by both U.K. registered and foreign vessels. The MSA has also recently taken on a public face with an internet site giving details of its operation and publishing monthly detention lists.46 In addition to publishing its website, the MSA publishes monthly detention lists in Lloyds List. As in the U.S., owners and classification society details are not published in Lloyds List. Such details do, however, appear on the website.

The U.K. is a party to the Paris MOU, and its detention procedures are thus regulated by the MOU and its guidelines. U.K. law recognizes its own inherent jurisdiction to exercise full domestic control over foreign flag

42 Honduras' detention ratio was 56% of all flag vessels inspected. Facts taken from the U.S. Coastguard's Port State Control website at id.

43 The May 1997 figures based upon 1996 inspections give the Romanian Registrar of Shipping first place (39%), followed closely by the Hellenic Register (27%). Facts taken from the U.S. Coastguard's Port State Control website at id.


46 Id.
vessels by voluntarily using its ports.\textsuperscript{47} The U.K. has reportedly set a 30\% inspection target for itself (see the 25 percent target set by the Paris MOU) and the MSA has succeeded in achieving a target in excess of that figure. In accordance with an agreement between the Paris MOU states, discrimination is now allowed to pay particular attention to vessels considered to present special risks.\textsuperscript{48}

It is clear from the review of its 1996 detentions that the U.K. is ‘doing its bit’ to make port state control public and to make it work.\textsuperscript{49} There were 184 foreign flag detentions during 1996 which reflected an overall detention rate of 8.4 percent of all inspections carried out for 1996. This compares to the detention rate of 11.6 percent for 1995.

It is also significant to note that five flag states accounted for over half of the ships detained. It is clear that certain registers are substandard.\textsuperscript{50} Perhaps Panama’s situation should be viewed in the light of its register—containing the bulk of the world’s merchant fleet—and with recognition of its efforts to improve the safety record of its vessels.

C. Australia\textsuperscript{51}

One should look to Australia for an indication of the most conspicuously effective port state control program. Australia needed a catastrophic catalyst for its maritime authorities to take notice of the malaise which was permeating the shipping industry by the end of the 1980s. Following the relatively unexplained loss of six bulk carriers off the Australian coast between January 1990 and August 1991, an inquiry was convened “to enquire into and report on the issue of ships’ safety at the national and international level” with particular concentration on bulk carrier vessels and foreign flag vessels plying Australian ports. The report of chairman Peter

\textsuperscript{47} See the Donaldson Commission ¶ 5.79.

\textsuperscript{48} These are passenger and ro-ro ships, specialized carriers such as chemical or gas carriers, ships known from Paris MOU data bases to have had recent reported deficiencies, ships of specified flag states that have a poor safety record as assessed by their detention ratio within other Paris MOU members, and bulk carriers.


\textsuperscript{50} The delinquent registers (with detentions) are Cyprus (32); Russia (19); Malta (18); Panama (13); and Turkey (12), id.

\textsuperscript{51} I am grateful to Capt. Peter Murphy for information given to me confirming the legislative provisions of Australian port state control.
Morris titled "Ships of Shame" did more perhaps to highlight the plight of the industry than any other initiative before or since. It records a roll of neglect, inefficiency, corruption and tragedy. Although the roll was substantially under check—largely through the effectiveness of international port state control measures—the roll, sadly, has yet to have its last entry posted. Bulk carriers continue to sink in unexplained circumstances with appalling loss of life. But the port state control initiative which flowed from the Morris Report in Australia has sent a strong message to substandard operators to keep their ships away from Australian waters.

The Australian Safety Maritime Authority (AMSA) conducts port state control in Australia; it also has adopted a public face and complies with its publications to make its detentions known by publishing monthly statistics in the local and international shipping media and on its website. As a member of the Asia-Pacific MOU, Australia does more than comply with its 25% inspection target. In 1996, Australia, inspected 2901 vessels, of which 248 were detained. Like the U.K., Australia has no qualms about publishing delinquent flags and substandard classification societies, and these may be found on the AMSA website on a monthly basis. The site also gives details of detentions indexed by ship type, an interesting addition.

The domestic legislative basis of the AMSA's inspections may be found in the Commonwealth Navigation Act 1912 of (as amended) sec 210. According to the terms of that section, if it appears to the AMSA that a ship is unseaworthy or substandard, the AMSA may order the ship to be provisionally detained, and shall immediately give the master of the ship notice of the provisional detention with a statement of the grounds for the detention. The AMSA must then commission a report as to whether the ship is unseaworthy or substandard—a distinction which I have previously argued should be one of semantics only. The Master of the ship must be given a copy of the report upon the strength of which a decision is taken whether to order the ship to be finally detained or to release her unconditionally (or on such conditions that the AMSA considers appropriate). If an order for the final detention of the ship is made, the ship shall not be released until the

---

55 See Hare, supra note 1.
AMSA is satisfied that her further detention is no longer necessary and orders her released.

D. South Africa

South Africa, like Australia, has too long been a favored destination for unscrupulous ship-owners. It suffers the additional risk of being on the most economical geographical route between the West and the East, and has a foul coastline with seasonal rough seas to boot. It is scarcely surprising therefore that South Africa has suffered more than its fair share of casualties, many involving sub-standard ships. The South African coastline has hosted three of the world’s ten largest VOC losses. One of these was the second largest oil tanker ever lost. South Africa has sufficient domestic legislative muscle to give full effect to port state control procedures. South Africa, which became a full member of the IMO in 1996, has recently brought its accession to international instruments up to date. The new South African government, shortly after attaining power in April 1994, commissioned a full inquiry into maritime transport policy, including matters of maritime safety which resulted in the publication of a white paper in September 1996 recognizing the importance of bolstering the South African port state control procedures.

In addition to its international obligations and their concomitant powers, South Africa’s main authority for inspection may be found in the Marine Traffic Act (1981) and the regulations published in the terms of that Act. At this stage, South Africa is not a party to any regional initiative, but is looking both west and east to align itself with initiatives in Latin America.

---

56 In 1983 the Spanish tanker *Castillo de Bellver*, carrying 276,000 tons of light Arabian crude oil, suffered a crack amidships, caught fire, broke in half, and sank 12 miles off the western seaboard of South Africa. The bulk of the oil was contained in the aft section, which was towed out 300 miles and sank in 3,000 meters with no significant coastal pollution.


and in the Indian Ocean Rim. The officials in the Department of Transport are actively engaged in an ongoing review of their port state control capability, and international cooperation. There is little doubt that regional initiatives covering the oceans to the west and east of South Africa will be formed. It would also make sense for South Africa to join the Asia-Pacific MOU as much of its passing traffic is destined for the Far East or Australia. South Africa should apply for the status of "co-operating authority" from all the other MOU's—not just those covering ports from which South African trade originates. South Africa's geographical location makes her particularly susceptible to passing tramp shipping from any part of the world.

South Africa has, however, a long road to travel to reach internationally accepted levels of inspection. Owing to under-manning, the current overall inspection rate is below 5%, although a higher percentage is achieved for bulk carriers and other high risk vessels. Hopefully, the initiative to form a South African Maritime Safety Authority, to which most of the maritime powers of the Ministry of Transport are to be delegated, will vastly improve South Africa's port state control focus and capability. It is an initiative which deserves the highest priority in the wake of the continued presence of substandard vessels in South African ports. It is envisaged that SAMSA could be in operation by the beginning of October 1997.


60 On 18, April 1997, the MV Neamt, 5931 grt, was detained by the South Africa Department of Transport under port state control measures. She had taken 48 days to sail from West Africa with a cargo of cashew nuts. Lloyds List Africa Weekly, May 9, reports: "With no radar, no navigation lights and a useless compass, the crew found their way to Cape Town by asking passing vessels on their VHF radios where they were. On the way, the vessel's engines caught fire seven times, as the pistons have no rings and blowbacks caused small fires throughout the voyage. Of her three generators, only one worked sporadically. The Chief Engineer reported that all the carbon dioxide fire-fighting cylinders were empty and the engine's cooling systems were completely broken down, as water supply pipes had rusted through from the inside. Inside the vessel is constantly dark because all the light bulbs have blown, and there are no spares. The vessel's crew have not been paid for four months, and there is no food on board. The refrigerators are not working . . ."
E. New Zealand

South Africa has taken much encouragement for the proposed establishment of its semi-privatized, fee-levying safety authority from the successful metamorphosis of New Zealand's state maritime transport authority. In 1994 New Zealand vested most state maritime authority in its newly-established Maritime Safety Authority.62

New Zealand's Maritime Transport Act (1994), empowers the Authority to detain any ship and impose conditions for its release where the "operation or use of (the ship) endangers or is likely to endanger any person or property, or is hazardous to the health of safety of any person"; or where "the appropriate prescribed maritime document is not for the time being in force in respect of the ship, or the master of any member of the crew of that ship."

There is a more general ground for the exercise of powers where "the Director is satisfied, on clear grounds, that the master is not, or crew are not, familiar with essential shipboard procedures for the safe operation of the ship."63

New Zealand, like Australia, has taken steps to absolve port state control officials from liability for actions taken in good faith.64 As has been seen above, New Zealand is a party to the Asia-Pacific MOU, 1993.

V. APPEAL PROCEDURES, COSTS AND WRONGFUL DETENTION

The achilles heel of current international port state control practice is that authorities may be concerned by their possible exposure to actions for wrongful detention where a ship is detained for what subsequently turns out to be insufficient cause. If a chartered vessel is facing cancellation dates and is unable to complete loading or discharge by reason of a port state control detention, her owners would clearly suffer considerable financial losses. These losses may be mirrored down the charter party chain, and could be compounded by publicized allegations that the owner's hitherto good trading name has been tarnished.

---

61 I am grateful to Mr. Tony Martin of the New Zealand Maritime Safety Authority for his useful input.
63 See id. § 55(d).
64 See infra note 69.
In most jurisdictions, the actions of port state authorities, which are required by the MOU's to have either direct or delegated state powers, would be treated as the actions of the state and would be subject to ordinary administrative review procedures. The regional MOU's provide appeal procedures. Additionally, some countries provide specific appeal procedures in their domestic enabling legislation.

But what of the actions of the officials concerned, and of the liability of the authorities as their employers? Port state inspectors are required by the MOU's and by the IMO to be vested with delegated state powers. Being state employees, inspectors and their authority employers could find their actions under the same scrutiny as applied to an arrest of persons without good cause.

Both the Australian and the New Zealand domestic legislation have taken a proactive stance in relation to liability of their port state control officers. The Australian Commonwealth Navigation Act, 1912, contains recent amendments which absolve officials from liability for "anything done under the provisions of (the Navigation Act) unless direct proof of corruption or malice be given."

The New Zealand statute absolves members and employees of the authority from personal liability for acts done "in good faith in pursuance or intended pursuance of the functions or powers of the authority or of the Director."

To give full effect to port state control, all states should follow the Australian and New Zealand leads and enact an indemnification of officials for actions taken in good faith. The Australian requirement that "corruption

---

65 The authority must authorize "properly qualified persons" for inspections, but may be assisted by "any person with the required expertise" provided they have no commercial interest in the ship or in the port. See para. 3.5 of the Paris MOU. Memorandum of Understanding on Port State Control in Implementing Agreement on Maritime Environment, January 26, 1982, para. 3.2, 21 I.L.M. 1.
66 See, e.g., Paris Memorandum of Understanding supra note 65, para. 3.13, 21 I.L.M. 1.
67 See, e.g., Maritime Transport Act, 1994 (N.Z.) § 55(7), (allowing port state control decisions to be taken on appeal to a District Court).
68 See, e.g., § 5(4) of Admiralty Jurisdiction Regulation Act of 1983, 1995 JSRSA I (S.A.) "Any person who . . . without reasonable and probable cause obtains the arrest of property . . . shall be liable to any person suffering loss or damage as a result thereof for that loss or damage."
69 Navigation Act, 1912, § 384(1).
70 Maritime Transport Act, § 34.
or malice” must be proved in order to found the claim makes sense. Allowing damages to be claimed against the port state control authority because good cause is not subsequently shown with the wisdom of hindsight would unduly inhibit port state control. If a few ships are detained for insufficient reason and commercial losses are suffered thereby, it would be a small price to pay to ensure the efficacy of port state control and its resultant protection of life and property.

The costs of port state control inspections are borne by the port state authority, although it has become relatively common practice for states to levy a maritime safety charge upon vessels calling at their ports. Thus, for example, the various maritime safety authorities are able to fund their operations to an extent on a “user pays” principle. Once a vessel is detained for non-compliance, however, provision is usually made for all costs to be borne by the ship-owner.71

VI. THE MEASURE OF SUCCESS

How does one measure the success of an international initiative such as port state control? Ideally, the first prize would be a significant drop in the number of seamen’s lives lost due to the foundering of their ships. Sadly, we are not yet seeing such tangible results. The losses continue, apparently unabated. In particular, obos and other bulk carriers, having endured a long and hard-working life loading and carrying unforgiving cargoes such as iron ore, are then extended into overtime by marginal operators who can only afford minimum maintenance and below-basic crew wages.

The Institute of London Underwriters’ monthly casualty returns72 record almost monthly that another bulker has been lost at sea with all hands.73 On the positive side, a trend is emerging which shows at least a levelling of losses. The Institute’s confirmed total losses for each year were 1993 (140

71 See, e.g., Memorandum of Understanding, supra note 65, which upon revelation of deficiencies allows all inspection costs (by implication the revealing inspection and all subsequent measures) to be recovered from the deficient vessel’s owners. The ship need not be released from detention until such costs are paid. A similar provision is found in Section 56 of the New Zealand Maritime Transport Act of 1994.

72 Published monthly by Lloyd’s List—see the 1996 cumulative returns in Lloyd’s List April 19 at p. 9

73 See Lloyd’s List April 19 at p 8: “The Leros Strength sank in heavy seas about 30 miles west of Stavanger on February 8. Master had reported leakage to the bow causing navigational problems. 20 crew missing. Oil spillage occurred.”
ships); 1995 (112 ships); 1996 (111 ships). 1997 saw 20 ships lost in January and February alone.

But there is little doubt that those jurisdictions taking their Port State Control obligations seriously (and who are fortunate enough to have the means to do so) are narrowing the trading options of the substandard ship. The new STCW provisions,\textsuperscript{74} the ISM standards\textsuperscript{75} and novel and necessary measures such as ship identification devices similar to those employed on aircraft (which coastal and port states are now authorized by IMO resolution to make mandatory), all indicate that the maritime industry is taking the problem seriously.

Of Australia, once a favored destination for sub-standard ships, and of the U.S. (both of whose programs are relatively new) a Lloyds List editor recently wrote:

\begin{quote}
You would have to be mad or terminally ignorant to fix a marginal ship out of an Australian port, and if you have an oil cargo to ship to the U.S. you would need quality tonnage operated by demonstrably high quality managers.\textsuperscript{76}
\end{quote}

The New Zealand Maritime Safety Authority seems to be getting a similar message across. And the ITF earlier this year embarked on a program of targeting certain European ports to ensure that calling vessels demonstrated required safety standards. The ITF's campaign against flags of convenience, waged for over 40 years, has surely reinforced the message. The ITF's battle is not just against unfair wage and labor conditions, it also aims to root out flags of convenience and the substandard ships they so often allow.\textsuperscript{77}

**CONCLUSION**

International port state control has come of age. With its roots founded in necessity bred of successive maritime casualties, port state control has

\textsuperscript{74} Imposing improved standards of training and watchkeeping; in effect from 1 February 1997.

\textsuperscript{75} See supra, section II.

\textsuperscript{76} Lloyds List March 27 1977.

come into its own as the most effective means of ridding the world’s ports and oceans of sub-standard, unseaworthy and dangerous ships. This is not to say that international pressure on flag states, owners and classification societies to do their jobs properly and responsibly should be in any way relaxed. The reality, however, remains that there are good and bad ship-owners. There are good and bad classification societies. And there are good and bad ship registers. Let the international message of port state control be loud and clear: bad ships, bad owners, bad flag states and bad classification societies are pariahs for which there should be no place in the shipping industry of the future.