

## **PORT STATE CONTROL**

### **Introduction to Port State Control**

Port State Control is the control of foreign flagged ships in national ports. As stated in nearly all the literature about port state control, in an ideal world port state control would not be necessary. Since the control systems used by the other partners in the shipping world have proven ineffective in eradicating all substandard vessels from the seas, port state control stays in practice. However, port state control is not, and can never be a substitute for the proper exercise of flag state responsibility. The primary responsibility to safeguard against substandard ships lies with the flag states. It is when flag states fail to meet their commitments that the port state comes into play.

When one reads the literature about the port state control, one comes across statements to the effect that port state control is the last safety net and in an ideal world the port state control would not be necessary.

So how would the system work in an ideal world?

International conventions have been created and developed on the basis of the safety of the ships being regulated by the flag states. The International Maritime Organization (IMO), a specialized agency of the United Nations, started to develop international treaties and other legislation concerning safety and marine pollution prevention in the 1950s in order to develop international standards which would replace the multiplicity of national legislation which then existed. IMO has produced a mass of legislation over the years and majority of countries are members of these conventions. If majority of the countries are members of these conventions, why is it still possible to find shipowners or manning agents who force seafarers to risk their health and lives at sea, or find ships which are unsafe and do not comply with the required technical conditions under the international conventions? Or why are there so many crew members who do not know what to do in case of an emergency?

Shipping is not failing in ratifying new conventions and international community is not failing in adopting necessary legislation; but shipping is failing in the application and enforcement of international legislation, especially the ones on safety, pollution and crew welfare. As a general rule the implementation of international conventions is the responsibility of the states that ratified them. Governments ratifying the international instruments are obliged to incorporate the provisions into their national legislation. However, in practice enforcement of international conventions raises many problems. They may take a long time to be incorporated into the national legal system of each state. The coming into force of a convention does not necessarily mean its effective enforcement.

For a considerable period of time, the shipping community relied on the flag states to provide overall control. This has been very difficult to achieve especially with the advent of flags of convenience. Flag states also have gradually relied upon more and more on classification societies to regulate and control the standards laid down by the IMO. However, the control mechanisms applied by the flag state and classification

societies have proven be not good enough to remove the all-substandard vessels form the industry.

The clear example of failure of this system can be seen in the *San Marco* case. This case is the illustration of the deficiencies in the international safety net. The *San Marco* then known as the MV Soral was a 1968 built panamax dry bulk carrier. It was owned by a succession of one ship brass plate companies. In March 1991 it was sold to a company named Sea Management for \$3.2 million. The vessel traded as San Marco under the ownership of another brass plate company, Shipping of Nicosia, Cyprus. In May 1993, it was detained by the Canadian Coast Guard (CCG) for serious structural, fire fighting and live saving defects. Following this incident the vessel's P&I club withdrew the cover. As the owner would not do the immediate repairs its classification society, Bureau Veritas (BV), withdrew class after an inspection.

In May 1993 the vessel had been inspected by an Hellenic Register of Shipping (HRS) surveyor for a class transfer from BV and found to be in "good condition and well-maintained". The vessel was issued with clean class certificates, without any repair recommendations. She had the BV certificates valid until 1995 and no recommendations. Towards the end of June, the same year, the CCG allowed the *San Marco* to depart from Vancouver under tow at the request of the shipowner. However, although the HRS issued a clean class certificate and the vessel had BV certificates valid to 1995 the CCG did only allow the vessel to be towed unmanned. The CCG had no legal power to compel the owner to do repairs locally. Soon after leaving Canadian waters the tow to *San Marco* was cut and a crew put on board by a helicopter. From then on, the vessel continued to trade, unrepaired with clean HRS certificates. Obviously, if the Canadian port state control 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 1993, while she was 150-200 miles off the South African coast on a voyage from Morocco to Indonesia, she lost some 14x7 metres of shell plating from both sides of her No.1 hold and all 5000 tons of cargo in that hold. The ship was put into Cape Town as a port of refuge and quickly detained by the Department of Transport. As it was not possible to continue trading her without spending substantial amount of money on repairs, the vessel was subsequently sold for scrap at a public auction.

As illustrated in the *San Marco* case, shipowners, classification societies, insurers, flag state administrators have failed to do their job properly. If all parties concerned acted responsibly and prudently, port state control would not be necessary. The control mechanisms applied by the flag states and classification societies have proven not to be sufficient in eliminating all substandard vessels from the industry.

Six years after the *San Marco* case, the *Erika* incident yet again forced a radical re-assessment of the industry's safety net.

## **The *Erika***

The *Erika* incident which took place in December 1999 prompted a huge legislation overhaul. During the early morning of 12 December 1999 the Maltese registered tanker *Erika* broke in two in gale force winds in the Bay of Biscay approximately 60 miles of Brittany Coast. The tanker was carrying 31,000 tonnes of heavy fuel oil.

In analysing the reasons for the *Erika*'s disastrous loss, many factors such as flag, class, age, charterer came into play. The *Erika* reflected the polyglot nature of the tanker industry. The charterer was French, the owner Italian, the crew Indian, and the flag Maltese. However, the *Erika* was not the only incident where so many nationalities were involved in the management of a vessel. There have been many oil pollution incidents where the vessels were registered under a flags of convenience country, polluted various sea resources but none of them had the same attraction. But 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. 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. She was classed with RINA (Registro Italiano Navale), a full member of International Association of Classification Societies (IACS). The ship was under the management of an Italian company, which was also ISM certified by RINA. Between 1991 and 1999 she was inspected 16 times by the port state control inspectors and twice by the flag states control inspectors. This figure does not include the vetting inspections undertaken by the oil majors, or the surveys carried out by the classification societies. Several oil companies chartered the *Erika* throughout the 1990s. The inspectors of Texaco, Exxon's subsidiary Standard Marine, Repsol and Shell approved her as a fit vessel to carry their cargoes. The vessel was also approved by TotalFina whose cargo she was carrying when she sank. In December 1999, the *Erika* had the approval of most of the major oil companies, which carry out vetting inspections prior to accepting a tanker.

## **The Memorandum of Understandings (MOUs)**

### **Historical Outlook**

The origins of port state control lie in the memorandum of understanding between eight North Sea States signed in Hague in 1978. The background of this memorandum is that in 1976 a maritime session of the International Labour Conference adopted the Merchant Shipping (Minimum Standards) Convention, more commonly known as ILO Convention No. 147. This Convention aimed to inspect vessels that entered the ports of member states. On March 2 1978 the Hague Memorandum was signed by the maritime authorities of eight countries<sup>1</sup> which decided that this Convention deserved a proper follow up. The aim of the memorandum was to surveillance the seagoing ships generally in order to ensure that requirements stated under the ILO Convention No.

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<sup>1</sup> These countries were Belgium, Denmark, France, Germany FR, the Netherlands, Norway, Sweden and the United Kingdom.

147, as well as in other Conventions, were met. Just as the Hague Memorandum was about to come into effect, in March 1978 *Amoco Cadiz* incident happened. This incident caused a strong political and public demand in Europe for much more stringent regulations with regard to the safety of shipping. Following these developments, the ministers responsible for maritime safety of 13 European countries, together with the representatives of the Commission of the European Communities, IMO and the International Labour Organization (ILO) met in Paris in December 1980. They agreed that the elimination of substandard shipping would be best achieved by co-ordination of port states and based on the provisions of a number of widely accepted international maritime conventions, the so called relevant instruments. At a second ministerial conference, again in Paris, in January 1982, the present Paris MOU on Port State Control was adopted and signed by the maritime authorities of 14 states.

Although Paris Memorandum of Understanding on Port State Control (Paris MOU) - the earliest regional agreement of this 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 became parties. These include the International Convention for the Safety of Life at Sea (SOLAS);<sup>2</sup> the International Convention on Load Lines 1966 (LL 66); the International Convention for the Prevention of Pollution From Ships, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78) and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW 1978). Therefore, the powers used by Port State Control Officers (PSCOs) are not new; it is the willingness to use these powers and the coordinated application of port state control which are new. However, it has to be kept in mind that a port state can only apply those conventions which have entered into force, and which it has implemented for its own ships. Ships that fly the flag of a state which is not a party to that convention or below convention size would not be exempt from inspection because the principle of *no more favourable treatment* would be applied.

The Paris MOU has been in operation since July 1982. With this memorandum, for the first time, a regular and systematic control of ships was exercised by a regional group of port states which are parties to the relevant Conventions. The Paris MOU is the model upon which other regions of the world base their agreements on port state control. Since its entry into force the number of states in the Paris MOU has grown. This has mainly been due to the increase in the number of member states of the EU. Now EC Directive 95/21/EC on port state control places a legal requirement on all EU member states to carry out port state control inspections.

As its name already suggests, a memorandum of understanding is not an international convention. It is an administrative agreement that has been subscribed and executed in the framework of the co-operation among the maritime authorities of the states party

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<sup>2</sup> It was recognised by the drafters of the 1929 SOLAS Convention that a flag state could not constantly monitor every ship in its fleet wherever it sails in the world. Therefore, the states were given power to inspect a vessel's documentation. If there were clear grounds for suspecting that the condition of the ship did not meet the Convention standards, then an inspection of the ship could be carried out.

to them. Why was there a preference for a memorandum of understanding rather than a convention, which from an international juridical point of view is a more powerful instrument? During the preparation of the memorandum all countries involved showed a political will to see the practical results of their study. It was realised that conventions usually require lengthy ratification procedures and similar problems will be faced when conventions need to be amended.<sup>3</sup>Therefore, a memorandum of understanding has been established instead of a convention.

At present there are eight regional agreements on port state control and these have a total of 123 member states.

These regional agreements are namely;

- 1) The Paris Memorandum of Understanding on Port State Control 1982 (Paris MOU)
- 2) The Acuerdo De Viña del Mar Agreement on Port State Control 1992 (Latin American Agreement)
- 3) The Memorandum of Understanding on Port State Control in the Asia-Pacific Region 1993 (Tokyo MOU)
- 4) The Memorandum of Understanding on Port State Control in the Caribbean Region 1996 (Caribbean MOU)
- 5) The Memorandum of Understanding on Port State Control in the Mediterranean Region 1997 (Mediterranean MOU)
- 6) The Memorandum of Understanding on Port State Control For the Indian Ocean Region 1998 (Indian Ocean MOU)
- 7) The Memorandum of Understanding on Port State Control for the West and Central Africa Region 1999 (Abuja MOU)
- 8) The Memorandum of Understanding on Port State Control in the Black Sea Region 2000 (Black Sea MOU)

There is also a regional agreement under development. In July 1999 a first draft of a regional PSC agreement for the ROMPE ((Regional Organisation for the Protection of the Marine Environment) sea area and the complementary training programmes for its implementation was discussed in Manama, Bahrain. The meeting was organized by the Maritime Agency Mutual Aid Centre (MEMAC) Bahrain, in co-operation with the GCC (Gulf Co-operation Council) and IMO.

The meeting was attended by the delegates from Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates, with UNEP/ROWA (Regional Office for West Africa) as observers.

### **The Rules That Govern Port State Control Activities**

In November 1995, IMO adopted resolution A.787(19)-Procedures for Port State Control. The resolution was amended in 1999 by resolution A.882(21) and will no doubt be further amended in the future. The resolution is intended to provide basic guidance on the conduct of port state control procedures and afford consistency in the conduct of such inspections, the recognition of deficiencies of a ship, its equipment,

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<sup>3</sup> Since 1982, the Paris MOU has been subject to 20 amendments.

its crew and the application of control procedures. It is published by IMO as a booklet with the title of “Procedures for Port State Control”<sup>4</sup>.

The procedures are not mandatory and only offer guidance to port states.

### **Basic Principles**

The intention of port state control is not to enforce on foreign merchant shipping any requirement which goes beyond convention requirements. In other words, the MOUs do not extend the scope of port state control beyond the international convention requirements.

- The prime responsibility for compliance with the requirements laid down in the international maritime conventions lies with the shipowner/operator. The responsibility for ensuring such compliance remains with the flag state.
- Each maritime authority gives effect to the provisions of the relevant MOUs.
- Each authority has to ensure that foreign merchant ships visiting its ports comply with the standards laid down 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.
- 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. Under the Paris MOU the member states have agreed to inspect 25% of the estimated number of individual foreign merchant ships which enter their ports during a 12 month period. This percentage is different in other MOUs. The Tokyo MOU refers to a 75% value and the Indian Ocean MOU refers to 10% value while Viña del Mar, Caribbean, Mediterranean, West and Central African and the Black Sea MOUs mention a minimum of %15 annual inspections.
- IMO and ILO conventions provide the basis for inspections under the MOUs.
- All possible efforts are made to avoid unduly detaining or delaying a ship.
- In principle, there will be no discrimination as to flag.
- Inspections are generally unannounced.
- In general ships will not be inspected within six months of a previous inspection in a MOU port, unless there are “clear grounds” for inspection.

Under the MOUs, the “clear grounds” justifying the undertaking of further inspections are defined as;

- a) a report or notification by another authority;
- b) 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, the shipboard living and working conditions, or the prevention of pollution, unless the authority deems the report or complaint to be manifestly unfounded; and
- c) other indications which may warrant a more detailed or an expanded inspection.

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<sup>4</sup> IMO, *Procedures for Port State Control* (IMO, 1997). New edition published in 2001.

In addition to this list, there is a second series of specific “clear grounds” concerning the compliance of vessels with on-board operational requirements. These are;

- a) evidence of operational shortcomings revealed during port state control procedures in accordance with the 1974 SOLAS Convention, MARPOL 73/78, and the 1978 STCW Convention;
- b) evidence of cargo and other operations not being conducted safely or in accordance with IMO guidelines;
- c) involvement of the ship in incidents due to failure to comply with operational requirements;
- d) evidence, from the witnessing of a fire or abandoned ship drill, that the crew are not familiar with essential procedures;
- e) absence of up-to-date muster list; and
- f) 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;

### **International Instruments**

The MOUs invoke international instruments that are legally binding for states parties. They do not set any new standards. They basically aim to make sure that all ships operating in the region meet the internationally agreed standards. Only internationally accepted conventions shall be enforced during the port state control inspections. For instance under the Paris MOU states parties to the Paris MOU commit themselves to enforce the conventions listed in Section 2 of the Paris MOU which are referred to as the relevant instruments:

- International Convention on Load Lines 1966, as amended, and its 1988 Protocol (LOADLINES 66/88);
- International Convention for the Safety of Life at Sea 1974 (SOLAS), its Protocol of 1978, as amended, and the Protocol of 1988, (SOLAS 74/78/88);
- International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978, as amended (MARPOL 73/78);
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978, as amended (STCW 78);
- Convention on the International Regulations for the Preventing Collisions at Sea 1972, as amended (COLREG 72);
- International Convention on Tonnage Measurement of Ships 1969 (TONNAGE 1969);
- Merchant Shipping (Minimum Standards) Convention 1976 (ILO Convention No.147)

Inspections on board ships under the Merchant Shipping (Minimum Standards) Convention 1976 (ILO Convention No.147) relate to:

- Minimum Age Convention 1973 (No. 138);
- Minimum Age (Sea) Convention (Revised) 1936 (No.58);

- Minimum Age (Sea) Convention 1920 (No.7);
- Medical Examination (Seafarers) Convention 1946 (No.73);
- Prevention of Accidents (Seafarers) Convention 1970 (No.134) (Arts. 4 and 7);
- Accommodation of Crews Convention (Revised) 1949 (No. 92);
- Food and Catering (Ship's Crew) Convention 1946 (No.68) (Art.5);
- Officer's Competency Certificates Convention 1936 (No.53) (Arts. 3 and 4).

### **Who boards a ship to carry out port state control?**

Port state control is carried out by a Port State Control Officer (PSCO). The PSCO's powers derive solely from the sovereign state which employs him and is subject to the national laws of the jurisdiction in which he is operating. The PSCO should be an experienced person qualified as a flag state surveyor and able to communicate with the master and key crew members in English. However, the PSCO need not have sailed as master or chief engineer or have had any seagoing experience. *In principle*, he should not have any commercial interest in the port, the ship or be employed by or on behalf of a classification society.

All PSCOs carry an identity card issued by their maritime authorities as evidence of the authority to carry out inspections. 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 inspection process**

The port states authorities set overall percentage *inspection rates* to ensure that a minimum number of ships are inspected. They use *targeting factors* to focus inspection effort on those ships most likely to be substandard. Ships of a certain age and type are specifically selected for the purpose of conducting *expanded inspections*. *Concentrated inspection campaigns* are conducted to check on special matters or areas of concern.

Certain selection criteria such as the ship's flag, age and type, are believed to directly influence how well a ship is likely to be operated and in what condition a ship is likely to be found. To help PSCOs rank priority ships, the Paris MOU has developed a computerised targeting formula as part of its database system. This formula resulted in a target factor (TF) for each individual ship. By allocating points to each criteria a scoring system is employed and a ship is assigned a targeting factor. The target factor value of each ship is calculated in the central Paris MOU PSC database (SIRENAC) on the basis of ship's profile and inspection history.

The targeting system consists of two modules:

- i) the generic factor and
- ii) the history factor.

The generic factor for an individual ship is calculated by adding together several elements forming a generic profile of the ship. These include: flag states on black list,

targeted ship type, non EU recognised classification society, age of the ship, above average class deficiency ratio and flag. The generic factor is updated when the particulars of the ship change or the status of its existing flag or class change. The historic element includes; ships which are entering the region for the first time in the last 12 months; or which have not been inspected in the last six months; ships with a previous detention in the last 12 months, and those with a number of deficiencies during last 12 months. The overall TF is calculated by adding the generic and historic factor. The targeting factor is only a guideline for selecting ships. Each state or port may have its own priority list of ships to be inspected depending on the type of vessels visiting their ports.

Irrespective of the targeting factors and concentrated inspection campaigns there are a number of circumstances or overriding factors that would take a ship to the top of inspection list. These include:

- Ships that have been reported;
- Ships reported as having outstanding deficiencies;
- Where operational concerns about a ship exist;
- Ships suspended from class.

If a ship has been inspected during the previous six months, and on that occasion, was found to comply with the port state control requirements, it will, in principle, be exempted from further inspection, unless there are clear grounds to warrant further investigation. However, in practice evidence shows that ships are often re-inspected at intervals of less than six months especially when a ship moves between port state regions.

In general the inspection should be limited to check of ship's certificates unless there are clear grounds for believing that the condition of the ship does not substantially reflect those certificates. 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. Experience continues to show that valid certificates are no guarantee of compliance with the conventions. Control on compliance with on board operational requirements may be included in the control procedures, particularly if the PSCO has reason to believe that the crew demonstrates insufficient proficiency in that area.

Guidelines on what to inspect are available in IMO Guidelines on port state control procedures (Res. A.882(21)), in the Paris MOU's Manual for Surveyors and in the Annexes to the EC Directive on port state control. Although these documents serve as a consistent reference point ultimately professional judgment is used in selecting areas for attention.

The regional PSC MOU members from time to time agree to carry out special inspection campaigns for a period of generally 3 months. Within such campaigns special attention is laid on certain details during the regular inspections held on board.

## **Detention**

A PSCO may impose the following courses of action on a ship:

- a) Rectification of deficiencies prior to departure;
- b) Rectification of deficiencies in the next port, under specific conditions;
- c) Rectification of (minor) deficiencies (only) within 14 days;
- d) Detention of the ship.

Following an inspection the PSCO has to decide which action has to be taken to correct the deficiencies found and the time within which the corrections are to be made. If the deficiencies found are serious the PSCO has to decide whether he should prevent the ship from sailing until they are rectified.

The role of a PSCO, in deciding on the detention of a ship, is very delicate. The decision to detain a vessel is based on the professional judgment of the PSCO. If deficiencies are revealed on a PSCO inspection, which are “clearly hazardous to safety, health or to the environment” the PSCO must ensure that those deficiencies are removed before the vessel is allowed to sail. The authority may, in practice will, detain the vessel in order to ensure that deficiencies are rectified. Despite the guidelines provided to assist PSCO to make that judgement there is a subjective element in a PSCO’s judgement that deficiencies are so clearly hazardous to warrant a detention.

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 which may not warrant detention if viewed individually but when viewed together with other deficiencies, they are seriously sufficient to warrant a vessel’s detention.

The Paris MOU gives a list of defects which may constitute grounds for detention. But this is only a guide and it should not be seen as the definitive list of detainable items. The decision to detain requires the PSCO’s professional judgment that is why the knowledge, experience, integrity and independence of PSCO is particularly important.

The non-exhaustive list of examples of deficiencies provided by the Paris MOU is as follows:

- Lack of valid certificates;
- SOLAS Convention deficiencies;
- International Bulk Cargo Code deficiencies;
- International Gas Carrier Code deficiencies;
- Load Line Convention Deficiencies;
- MARPOL Convention, Annex I deficiencies;
- MARPOL Convention, Annex II deficiencies;
- Standards of Training, Certification and Watchkeeping Convention-STCW-deficiencies
- ILO Convention deficiencies.

Under each category, there is a list of specific deficiencies. When a PSCO decides on the detention of a ship, he will immediately inform the master accordingly and advise him to seek assistance and to arrange remedial action in order not to delay his ship. Following a detention the PSCO officer is required to inform the flag state and the

classification society (if it has issued statutory certificates) without delay. This notification includes the PSCO's report of inspection.

A detained ship will only be released once the PSCO is satisfied that the deficiencies found have been properly rectified. 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.

If the vessel does not comply with the conditions of the release, it will be liable and refused to access to all Paris MOU ports. In order to lift the ban, the vessel needs to be re-inspected to confirm that the ship complies with the conventions. The banning provision has also been extended to cover ships which are required to comply with the ISM Code. The absence of valid ISM certification might also lead to a ship being detained.

In exceptional circumstances, where the overall condition of a ship, its equipment or the working conditions of the crew are found to be obviously substandard, the PSCO may suspend an inspection. In such a case the port state should notify the flag state of the suspension without delay. The suspension would continue until the deficiencies identified by the PSCO have been rectified, as instructed.

### **Inspection Charges**

The port state should not charge the ship for any general inspection. However, charges can be expected if the ship invites a port state to undertake inspection, or if the ship is detained and the PSCO has to return to the vessel for a re-inspection. That's why it is important that the ship should ensure that all deficiencies are properly rectified before asking for a re-inspection. It is also possible that there may be charges if there are overriding factors.

### **Appeal Against Detention**

In case of a ship arrest the claimant needs to satisfy various legal tests before a hearing in the local courts. In case of an appeal the courts usually hear any appeal made by a shipowner who is suffering substantial losses from the arrest. Unlike the arrest of a ship, a PSC detention order can be issued at the sole discretion of a PSCO, without prior consideration of the merits by a judge. An unduly detained ship will be entitled to compensation and can appeal against the detention if the detained ship can prove the wrongful detention.

Under different jurisdictions, there are limited rights of appeal against a port state detention order. However, appeal against a detention order takes quite a long time and does not stop the process of detention. That is why it is not possible to obtain the release of a detained vessel by simply getting a letter of guarantee from a P&I club.

It is not very easy to find successful cases where an owner has successfully recovered compensation following a wrongful detention by a PSCO. In 1993, the Panamanian OBO carrier *Mosteles* was detained by a PSCO for breach of MARPOL while it

berthed in Rotterdam. The owners made an application to the Ministry of Transport against the wrongful arrest. In 1994, an application was made in Holland in the *Pauline Oliveiri* case. In this case the owners finally met the Dutch authorities' conditions for sail but the authorities kept the detention order in force until the owner agreed to put up security for Dfl 15,000,000.00. In both of these cases the courts concluded that the detentions were justified and ruled in favour of the port state authority.

### **The USA Port State Control**

The United States does not take part in any of the regional agreements on port state control. It undertakes control measures on a unilateral basis. On May 1, 1994 the US Coast Guard introduced its revised port state control initiative. The primary objective of this program is to identify high risk foreign merchant ships based on the performance records of their owners, operators, classification societies and flag states; and to systematically target ships for boarding.

In the USA there is no agreement or memorandum of understanding which is specifically dedicated to port state control. Therefore it is not possible to have a conclusive list of conventions enforced by the US Coast Guard under the port state control program. The US exercises its port state control authority through the US Coast Guard's long standing foreign vessel boarding program, nor referred to as Port State Control Program.

In US Port State Control system the following have been considered as the primary factors in making the decision to conduct an onboard inspection:

- Owners and operators' list;
- Classification societies;
- Flag states;
- The boarding history of the vessel;
- Vessel type.

According to US Coast Guard the first three entities directly influence a vessel's operational condition and compliance with international safety and environmental protection standards. Therefore, if any of these entities fails to undertake its responsibilities fully for a ship's safe operation, then the ship is likely to be considered a substandard vessel by the US Coast Guard.

### **Boarding Priority Matrix**

The possibility of a foreign vessel being boarded is based on the number of points the vessel acquires under the boarding priority matrix. However, the points assigned to a vessel under this targeting regime do not classify the vessel as substandard; only a boarding and examination can reveal such conditions.

The boarding matrix is used to decide which ships port state control officers should board on any given day, in any given port.

<b>Owner</b>	<b>Flag</b>	<b>Class</b>	<b>History</b>	<b>Ship Type</b>
<b>5 points</b> Listed owner or operator	<b>7 points</b> Listed Flag State	<b>Priority I</b> Ten arrivals with detention ratio more than 4 times the average OR Ten arrivals and involved with at least one detention in the previous 3 years.	<b>5 points each</b> Detention within the previous 12 months.	<b>1 point</b> Oil or chemical tanker.
		<b>5 points</b> Ten arrivals with a detention ratio between 3&4 times the average.	<b>1 point each</b> Other operational control within the previous 12 months.	<b>1 point</b> <b>Gas Carrier</b>
		<b>3 points</b> Ten arrivals with a detention ratio between 2&3 times the average.	<b>1 point each</b> Casualty within the previous 12 months.	<b>2 points</b> Bulk Freighter over 10 years old.
		<b>1 point</b> Ten arrivals with a detention ratio between the average and twice the average.	<b>1 point each</b> Violation within the previous 12 months.	<b>1 point</b> <b>Passenger Ship</b>
		<b>0 points</b> Ten arrivals with a detention ratio below the average OR Ten arrivals with no detentions in the previous three years.	<b>1 point each</b> Not boarded within the previous 6 months.	<b>2 points</b> Carrying low value commodities in bulk.

## **Boarding Priorities<sup>5</sup>**

### **Priority I Vessels:**

Priority I vessels include:

- 17 or more points on the Matrix, or
- Ships involved in a marine casualty that may have affected seaworthiness, or
- USCG Captain of the Port determines a vessel to be a potential hazard to the port or the environment, or
- Ships whose classification society has ten or more arrivals the previous year and a detention ratio more than four times the average, or
- Ships whose classification society has less than ten arrivals the previous year and have been associated with at least one detention.

Priority I vessels are targeted for examination prior to entry into US ports. Port entry of these vessels may be restricted until they are examined by the Coast Guard. Where feasible these vessels are boarded prior to port entry to ensure deficiencies are corrected. Otherwise, they are boarded upon entry and prior to commencement of cargo transfer operations or passenger embarkation.

### **Priority II Vessels**

Priority II vessels include:

- 7 to 16 points on the Matrix, or
- Outstanding requirements from a previous boarding in this or another US port, or the vessel is overdue for an annual tank or passenger exam.

Priority II vessels are targeted for boarding prior to commencement of cargo transfer operations or passenger embarkation. Cargo operations of these vessels may be restricted until the vessels are examined by the Coast Guard. An exemption to the requirement for boarding prior to commencement of cargo transfer operations or passenger embarkation may be granted if there are clear indications that the ship is in substantial compliance with applicable standards.

### **Priority III Vessels**

Priority III vessels include:

- 4 to 6 points on the Matrix, or
- Alleged deficiencies reported, or
- The vessel is overdue for an annual examination, or quarterly passenger re-exam.

Priority III vessels may be targeted for boarding after entry into port, but there are no restrictions on commencement of cargo transfer operations or passenger embarkation.

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<sup>5</sup> Ibid.

## **Priority IV Vessels**

Priority IV vessels include:

- 3 or fewer points on the Matrix.

Priority IV vessels are not targeted for boarding, but may be boarded and examined by the US Coast Guard at the discretion of the local Captain of the Port or Officer in Charge, Marine Inspection.

## **Port State Control Examinations**

### **Types of Examinations**

The US Coast Guard port state control examinations consist of annual examinations, re-examinations or deficiency follow-up examinations. Any of these examinations may be broadened in scope of depth into an expanded examination if clear grounds exist that lead a boarding team to believe that the condition of the ship or its equipment does not correspond with a certificates of the ships does not comply with applicable laws or conventions.

### **I. Annual Examinations**

This examination consists of the specific procedures outlined in the freight, tank, or passenger vessel examination books, and other sections of the Marine Safety Manual. It includes an examination of the vessel's certificates, licenses and documents followed by a general examination, i.e. "walk through" of the vessel. It shall also include examination and testing specific equipment, and conducting operational testing and emergency drills to ensure the crew's proficiency at carrying out critical tasks. This type of examination is conducted on all tank and passenger vessels, and cargo vessels.

### **II. Re-examinations**

The purpose of re-examination is to ensure that a vessel has remained in compliance with appropriate laws or international conventions between annual examinations periods. In general these examinations consist of an examination of the vessel's certificates, licenses and documents carried out by walking through the vessel. The testing of specific equipment and the witnessing of operational procedures and emergency drills by the vessel's crew are not a standard part of the re-examination. However, in case of foreign passenger vessel re-examinations, it will include the witnessing of fire and abandon ship drills to ensure that the vessel's crew can adequately ensure the safety of passengers in an emergency.

### **III. Expanded Examinations**

If any examination reveals "clear grounds" for believing that the condition of a vessel or its equipment does not correspond substantially with the particulars of its certificates, the boarding team should expand the examination to further explore the

scope and depth of these indications. Expanded examinations should focus on those areas where “clear grounds” have been established and should not include any other areas or systems unless the general impressions or observations of the boarding team support such examination.

In order to assist the boarding team, a list of deficiencies that establish “clear grounds” to expand an examination has been developed. The deficiencies are grouped under the relevant conventions and/or codes. They are considered serious enough to warrant the detention of the vessel involved. The list is not exhaustive, it aims to provide an explanation of the relevant items.

### **Boarding Teams**

They usually consist of a marine inspector and one or more boarding officers. Boarding teams conducting Priority I boardings, annual freight, tanker and passenger vessel examinations, biennial Certificate of Compliance examinations and quarterly passenger vessel reexaminations shall include a marine inspector. Boarding teams conducting other types of boardings should, at a minimum, consist of at least two Coast Guard members, at least one of whom must be qualified Port Safety Boarding Officer, or a qualified Assistant Marine Inspector.

In cases where at-sea boardings are conducted in cooperation with area or group commands outside of the Marine Safety Program, boarding teams will be provided by the Marine Safety Office, or jointly by the Captain of the Port and Marine Inspection Office. However, operational commanders will maintain the discretion to configure the boarding teams to meet operational situations, including the use of law enforcement qualified personnel, as necessary, to ensure the safety of the boarding team.

### **Penalty Enacted for Vessels Detained Under US Port State Control Programme**

In general, when a vessel is found to be substandard upon boarding by the Coast Guard it will be detained until the deficiencies are remedied. It is possible to find the name of this vessel, its operators and the deficiencies of the vessel on the US web site. With publicizing the details of the detained vessel the Coast Guard aims to achieve compliance with the international safety conventions by negative publicity. However, the new legislation enacted by the US Congress has more direct economic effects than the negative publicity.

The starting point of this legislation is the information obtained from the US Coast Guard. In 1996, 69 of the 476 detained vessels carried U.S government cargoes between 1992 and 1997. The question asked by the Congress on the basis of this information was “Why should one Federal agency be detaining a vessel for violation of an international safety convention, while another agency hires that vessel to transport its goods?”<sup>6</sup> Following this discussion the Congress enacted a new

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<sup>6</sup> House Rep. No. 236, 105<sup>th</sup> Cong., 2d Sess. 29 (1998) Cited in Papavizas Constantine G. “Penalty Enacted For Vessels Detained Under U.S Port State Control Program” (1999) Part 1, *The International Journal of Shipping Law*, p. 64, n. 4.

legislation under which substandard vessels and vessels operated by operators of substandard vessels are prohibited from the carriage of government-impelled cargo for up to one year after such determination has been published electronically. The law is applicable to all such vessels, owners and operators from 1 January 1999.

The law does not apply to vessels registered under the US flag. The prohibition against a specific vessel or an operator expires the earlier either one year after electronic publication of the publication of the prohibition or any date which the owner or operator prevails in an appeal of the violation of the international safety convention upon which the detention was based.

In the US Maritime Administration Notice, 20 May 1999, the shippers of government impelled cargoes are warned to check the US Coast Guard web sites before fixing or loading cargo aboard a vessel in order to find out whether the vessel is disqualified specifically or as a result of being operated by a disqualified owner or operator. Shippers are also advised to ask the carriers to state in their tender offers, charterparties, contracts of affreightment, or other documents that the vessel(s) or owner(s) or operators are not disqualified.

### **Qualship 21**

On January 1 2001, the US Coast Guard initiated the Qualship 21 (Quality Shipping for the 21<sup>st</sup> century) programme. Qualship 21 is an initiative to identify high-quality non-US flagged vessels, and then reward them with incentives. The aim of the program is to give positive recognition to best performing ships and provide incentives to encourage quality operations. Incentives for Qualship 21 vessels include Qualship 21 certificates, vessel names posted on the Coast Guard web site, Qualship designation on EQUASIS files, and less frequent PSC exams.

Qualship 21 will initially apply to foreign flagged vessels and on the basis of this initiative a scheme will be developed for the US flagged fleet.

### **The Effects of *Erika* Incident**

According to the European Union the *Erika* incident has shown that the European regulations were not strict enough, and that notwithstanding these rules, substandard vessels, managed by unqualified crews continue to approach the European coasts while carrying dangerous cargoes.

Following the *Erika* incident, on 21 March 2000, the European Commission adopted its first package of post *Erika* measures. Under this package a substantial modification was made to the existing European Directive concerning port state control of vessels. The main points of these measures are as follows:

- The implementation of a compulsory and stricter survey of certain categories of ships. A specific and strict procedure for control is organised by the European Directive. A determination is made as to which ships are considered potentially dangerous and stated as follows:

- Gas and chemical tankers older than 10 years;
- Bulk carriers older than 12 years;
- Oil tankers with a gross tonnage of more than 3000 gross tonnes and older than 15 years;
- Passenger ships older than 15 years.

Then these vessels are submitted to a strict and reinforced survey in the first European port visited after a period of 12 months following the last reinforced survey carried out in another European state port.

The potentially dangerous ships can be banned from European ports if these vessels;

- Have been detained more than once in the course of the preceding 36 months in a port of a state signatory of the Paris MOU, and
- Fly the flag of a state appearing in the very high risk section of the black list as published in the annual report of the Paris MOU; or
- Have been detained more than twice in the course of the preceding 24 months in a port of a state signatory of the Paris MOU, and
- Fly the flag of a state listed in the black list published in the annual report of the Paris MOU.

In order to undertake these harmonised controls at the European Union level, a global information system was set up. Each European coastal state is called upon to publish, on a quarterly basis, information on vessels which were arrested by it during the past three months. The data is made available on the EQUASIS database.

(<http://www.equasis.org>)

The proposed changes are not limited with port state control. The control on the classification societies and their responsibilities have been increased. A timetable has been proposed in order to phase out single hull tankers.

On 6 December 2000 the European Commission adopted a second set of community measures on maritime safety. The Commission wishes to create a net over European territorial waters, by increasing the system of control and supervision of ships transiting off the European coasts. It is believed by the Commission that system and the amount of indemnification for environmental pollution resulting from the IMO Conventions is insufficient. Therefore the Commission aims to raise the limits of indemnification fixed in the Fund Convention up to 1 billion Euro, by spreading the amounts among all of the parties involved in oil transportation. The last reform concerns the possible creation of a European Maritime Security Agency, whose role would be to harmonise the control and supervision mechanism set up by the regulations, as well as to help the Commission to ensure its application.

### **Measures taken by IMO following the *Erika* Incident**

- During its 82<sup>nd</sup> session on 16-20 October 2000 the Legal Committee of the IMO adopted instruments to raise by 50% the limits of the compensation payable to victims of oil pollution by oil from tankers. The amendments to the 1992 Protocol of the International Convention on Civil Liability for Oil

Pollution Damage (CLC Convention) and to the 1992 Protocol of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPCF) are expected to enter into force on November 1 2003, unless objections from one quarter of contracting states are received before then.

- A new mandatory ship reporting system, to be called MANCHEREP, would apply to all ships of over 300 gross tonnes and would cover the current traffic separation system off Les Casquets and the areas bordering it.
- A timetable has been agreed in order to eliminate the single hull tankers by 2015 or earlier. All new tankers built since then are required to have double hulls.

### **Review of Port State Control**

Port state control has been an active component of the shipping world for a considerable time. The regional agreements on port state control have been strengthened in existing areas and continues to expand into new areas. It is becoming nearly impossible for a shipowner to identify one or two ports where the ships could trade without concern about a port state inspection or a fear of detention.

Why should the shipowners worry about port state control so much?

Shipping has two distinctive features;

- It is international; and
- It involves serious amount of money.

Therefore whenever we need to resolve a shipping problem we have to keep in mind these two features. Let's take flags of convenience as an example. The practice of shifting maritime activity from one flag to another and registering vessels in states with more convenient laws and or policies is not new. The reasons for registering a ship under a flags of convenience country vary from one owner to another. But the most common motivation has always been of economic advantage. The choice of flag relates to investment and to cost/revenue considerations. Therefore, it is not possible for a shipowner to choose a flag without considering fiscal advantages. There is a positive economic incentive in not complying with international minimum standards and the competitive advantages which the substandard operator gains are sizeable. The maritime companies also consider the political and commercial aspects of the problem whether there are any trading restrictions due to the vessel's flag or whether there are any political risks associated with the flag state.

Shipowners always need to keep port state control in mind for their trade as failing to comply with port state control requirements may be hugely costly and may stop the vessel to be able to trade with certain ports for a considerable period of time;

- The main principle of MOUs are name and shame. Once a vessel is detained it will be on the list of detained ships available on the web site of the relevant MOU. In the past some vessels have tried to avoid inspections and consequent sanctions by change of name. However, as every single vessel is registered

with a unique IMO identification number, such means of escape have not been successful.

- Concentrated inspection campaigns need to be considered as well. These campaigns normally last a period of 3 months and focus on a specific area of the ship.
- Under the Paris MOU ships may be refused to access to any port in the region of the memorandum if they jump a detention or fail to indicate at an indicated repair yard. Following the Erika incident it will be more difficult for a vessel to sail around the European ports without complying with the port state control requirements.
- With the entry into force of the International Safety Management Code (ISM) there will be no exemption from enforcement of the provisions of the ISM Code against vessels entering the ports of the parties to the relevant MOUs. In fact, European port states are now required, as a matter of European law to check for compliance of both the ISM and STCW conventions and if appropriate, detain a vessel for breach of either of those two conventions even if non-certification is the only deficiency. The state may allow the vessel to sail in order to avoid the port congestion, but is required to notify the other flag and member states accordingly. In such cases other member states will refuse right of entry to its ports until compliance is complete to the satisfaction of the original detainage state.

It is not only the shipowners who need to worry about the port state control. The charterers have to keep in mind port state control as well.

In one case<sup>7</sup> a bulk carrier was chartered to load a grain cargo. The receivers had tight time requirements. If the loading and discharge didn't run smoothly, they had to shut down their processing plant and incur substantial losses. The chartered vessel arrived at the loading port on time and loaded the cargo without delay however, during the loading the ship was subjected to a port state control inspection. The inspectors found several defects with the ships lifesaving equipment and the vessel was detained until these defects had been corrected this resulted in a 3 day delay. As a consequence the receivers of cargo suffered a financial loss of some \$ 200,000 with little chance of making recovery.

One of the easiest checks a charterer can make on a prospective vessel is checking the individual ships' port state control detention history. Such a study should be done with the port state control detention history for all vessels under the same management and/or ownership. Such data provides extremely valuable information on maintenance standards and work practices of a vessel and her owner. However, one has to keep in mind the differences in port state control practices and evaluate this data with an experienced person in order to make sure that a good ship and her owner are not unreasonably penalised for minor defects to a vessel. A detention or improvement order could be evidence of an unseaworthy ship. Despite the fact that the seaworthiness of a vessel is a matter of fact and the presence of a certificate or

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<sup>7</sup> Case example given by Capt. Jonathan Stoneley "A Charterer's Perception of Port State Control" Port State Control: Managing Safety and Quality in Shipping, 2&3 December 1998, London.

otherwise is only evidential, not conclusive, Article 2(9) of the EC Directive refers to a ship under detention as “unseaworthy”. It is possible that the cargo claimants will look at the ship’s history of port state control inspections more closely in order to prove the unseaworthiness of a vessel.

Is the port state control a perfect system to eliminate substandard ships? Like any other system where human beings are involved port state control system can be abused.

Some of the problems experienced with port state control practice are:

- Port state control is taking an even increasing role in policing the world’s fleets, and owners are facing increasing threat of port state control inspections. But unfortunately, port state control does not have a uniform application in all these areas, sometimes not even within the same region of the MOU. As the number of MOUs increases, so the number of countries entitled to PSC inspection increases. This creates more 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. One is the regional agreements, the other is the US port state control. Within the regional agreements, the Paris MOU is becoming the most strict port state control system. There are two reasons for such a practice: Firstly, Paris MOU has the financial means. Secondly, Paris MOU member states are European Union countries. European Union is very keen on improving maritime safety standards especially following the *Erika* incident. The US Port State Control system has been a notable exception with tighter standards than the regional agreements. This general practice encourages the unsafe vessels to trade other parts of the world where port state control can be avoided.
- Port state control can not be applied in all parts of the world as it needs to be. 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 port state control is never as effective as an European port due to insufficient funds and lack of trained personnel.
- Port state control 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. If a ship is trades into its home ports and any deficiencies are found or detentions occurred during these home port inspections these do not take place in port state control figures as these controls are flag state control rather than port state control.
- Port state control has a large subjective element in it. It is possible for a port state control inspector to treat a deficiency as requiring detention or to be corrected before departure depending on his professional judgement and possibly the general policy of the country or ports towards port state control or the flag of the ship concerned.
- 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 a more practical way.

### **Can port state control be applied in the straits?**

As it has been pointed out following the *Erika* incident it appears unlikely that any prudent charterer would have sent *Erika* and her particularly polluting cargo to USA under current OPA (US Oil Pollution Act) punitive legislation and port state control regime. Thus one can suspect that the average age of tankers used to carry American imports of crude oil & products is lower & their seaworthiness is higher than that of their counterparts calling at the ports of EU. Could a 25 year old river-type vessel go any of the European ports? The answer would be definitely no but such a vessel manages to come to a Turkish port. The Russian tanker *Volgoneft 248* which broke in two off the port of Ambarli in the Marmara Sea near Istanbul at the end of 1999.

The *Volgoneft 248* was classed by the Russian river register and statutory survey was carried by the Russian Maritime Register of Shipping. She was officially limited to sailing between March and November, in wave heights below 2.5 m. As she was outside the scope of restrictions, her documents were no longer valid. The vessel loaded Heavy Fuel Oil in Bourgas, Bulgaria.

Flag state; Russia

Port States; Bulgaria, Turkey

Port State Control Agreements in Force in the Region at the Time of the Incident:

Turkey-Mediterranean MOU signed on 11 July 1997

Turkey and Bulgaria are members of Black Sea MOU but this MOU is signed after the incident.

In the *Volgoneft 248* case the flag state failed to do the flag state control. At the time of the incident the Black Sea MOU was not effective in Bulgaria, the first port state. This leaves the second port state Turkey to do port state control.

As the definition of port state control clearly indicates, it is not possible to use port state control unless the vessel is voluntarily in a foreign country's port. Therefore, it is not possible for Turkey to use port state control on the vessels passing through the straits. However, it is possible to coordinate the port state control in the region more effectively. For instance, under the Caribbean port state control there is a code of safety for Caribbean ships. During the development of the Caribbean MOU it was recognized that the majority of substandard ships operating in the region were less than 500 gross tons and there was no detailed international standard for this class of ships as they were mainly outside the ambit of the international conventions. Consequently, the guidelines provided for inspections to be carried out on the Caribbean cargo ships below 500 gross tons. Ships of traditional built were supplemented by a Code of Safety for Caribbean Cargo Ships (CCSS Code). This decision has been taken on the basis of the vessels sailing in the region. The practice

of port state control shows that the member states in a regional MOU can bring into force tighter controls for the vessels in that region. In order to increase the effectiveness of port state control in the region, the EU and the Paris MOU are constantly monitoring the port state control regime and propose corrective actions. The same principle can be applied for port state control practice in Turkey.

If port state control is here to stay and Turkish vessels are subject to port state control wherever they go in the world, why don't we make the best use of the system?

Despite the fact that Turkey won't have a right to have port state control on the vessels passing through straits it can make the best use of this tool by making sure that vessels visiting a port in the Black Sea or Mediterranean MOU region go through port state control. Therefore, full exchange of information between regional areas should exist so that the port, where the ship will be visiting, has the maximum amount of information before the ship calls. This will also eliminate repeated inspection.

In Europe the *Erika* incident was used to improve the safety standards in the ports of the region. Why doesn't Turkey use the *Volgoneft 248* and the other incidents before that to improve port state control in the region or in fact to start to use the port state control.