

# Port State Control as a Deterrent to Substandard Shipping: Promise versus Performance

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## Introduction

According to International law, ships engaged in commercial trading must be registered in a State whose flag they are allowed to fly. As a process which ties a seagoing vessel to a sovereign State, registration involves both rights and duties. By extending its nationality to a ship, the Flag State protects it against possible intrusion by foreign powers<sup>1</sup> within the bounds of international law. However, the sovereign right to grant a flag<sup>2</sup> also called registration comes with its fair share of burden; the Flag State is indeed required by

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\* JSPS Postdoctoral Fellow, University of Tsukuba, Institute of Social Sciences. This study has been carried out during a research tenure generously funded by the Japan Society for the Promotion of Science. The author is highly indebted to Professor Osamu Yoshida, Professor of International Law at the University of Tsukuba, Institute of Social Sciences for kindly reviewing this paper.

<sup>1</sup> Ships without a flag (or nationality) enjoy no protection under international law. Such ships are liable to be boarded even in the high seas by any State and for any reason as long as it matters to that State. Under US law for instance, "a vessel subject to the jurisdiction of the United States includes a vessel without nationality" 46 USC APP. 1903 (c)(1)(A). The US Court of Appeal for the Eleventh Circuit affirmed this principle in *United States v. Marino-Garcia* a case involving two stateless vessels seized by the Coast Guard while carrying marijuana in the high seas near Cuba. The Court stated that "vessels without nationality are international pariahs. They have no internationally recognized right to navigate freely on the high seas." *Marino-Garcia*, 679 F.2d at 1382. The seminal case in English law is *Naim-Molvan v the Attorney-General for Palestine* in which the Privy Council ruled that the seizure of a vessel carrying Jewish settlers in the high seas while flying no flag was legal and the forfeiture proper. [1948] AC 351.

<sup>2</sup> This right was first recognized by the Permanent Court of Arbitration in 1905 in the *Muscat Dhows Case* (France v. Great Britain). In this case, the Court held that "...generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants". 11 RIAA (1905) pp.83. This principle was reaffirmed by the US Supreme Court in *Lauritzen v. Larsen*, 345 US 571; 1953 AMC 1210 (1953)

international law to exercise jurisdiction and control in administrative, technical as well as social matters over ships flying its flag<sup>3</sup>. In other words, the ascription of a flag carries with it a corresponding obligation to police its use. This obligation applies to various aspects of safety at sea, construction, maintenance, manning, labor conditions on board and most importantly; the Flag State must ensure that ships under its registry are appropriately surveyed before being issued the necessary certificates of seaworthiness which allow them to trade internationally. These are basic requirements of international law as specified by an array of multinational conventions from SOLAS to MARPOL and are widely believed to be part and parcel of customary international law.<sup>4</sup> Furthermore the 1982 UNCLOS requires States to establish rules and standards to prevent reduce and control pollution of the marine environment from vessels at the global level and implement or enforce them at the national level<sup>5</sup>. UNCLOS also lays down a qualitative requirement under which Flag States' national laws and regulations must at least have the same effect as that of generally accepted rules and standards<sup>6</sup>.

Traditionally, the major maritime powers possess the necessary infrastructure to meet these various obligations and a competent administration<sup>7</sup> responsible for ensuring and monitoring compliance by their merchant fleet with international safety regulations. However, a troubling reality of today's shipping world is the presence along side nations with strong maritime credentials of Flag States lacking both the will and means to carry out the basic responsibilities associated with operating a ship registry. Technical tasks associated with ship safety are often outsourced by these States to pri-

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<sup>3</sup> UNCLOS, article 94. Text reprinted in *21 I.L.M.* (1982), at p. 1261

<sup>4</sup> Birnie and Boyle, *International Law & the Environment*, Oxford (2002), 2nd Ed. at pp.361 and 370

<sup>5</sup> UNCLOS, articles 211 and 217

<sup>6</sup> UNCLOS, article 211 (2)

<sup>7</sup> UNCCORS, article 4 (2). Text reprinted in *6 ILM* 1967 at p. 1229

vate companies known as Classification Societies who perform the necessary surveys and issue certificates on behalf of the Flag State. These are known as Open Registries a concept that applies to States which authorize beneficial ownership of ships under their flag by foreign nationals. The most notorious among them are Flags of Convenience (FOCs); so named because the sovereign power granting the flag has no genuine link<sup>8</sup> with the ownership or management of the vessel and does so for the sole purpose of extracting tax revenues while the shipowner's choice of registry is essentially driven by expectations of a loose legal environment that would guarantee him operational flexibility, low cost labor and substantial profits.

In the universe of maritime transport where fierce competition has always been a constant, the practice of "flagging out" to a convenient registry has become widespread and for some unscrupulous shipowners; the ideal safety device in their relentless quest for remaining afloat. The ineluctable consequence of this cost cutting hysteria is that today, more than half of the world's fleet is under flag of convenience<sup>9</sup> and environmentally sensitive substances such as

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<sup>8</sup> The requirement for a genuine link between the vessel and the flag has been set forth in Article 5 of the 1958 High Seas Convention; text available in 450 UNTS, No. 6465, at pp. 82 - 103. In practice, it did not prevent the flourishing of FOCs and the development of second registries known as "bis registries", a policy inaugurated by Norway in 1987, soon followed by France, Britain and the Netherlands. The "bis registries" were meant to counter the phenomenon of FOCs by creating more competitive local fleets with the possibility of hiring foreign crew subject to more flexible labor laws. Ships listed under this second registry incur a lower operational cost and therefore are more competitive than those on the primary registry. Basically this device was invented by western powers in order to maintain a substantial maritime standing by undercutting the pressure within their domestic shipping communities to flag out to open registries.

<sup>9</sup> In 1950 FOCs represented only 9% of the world fleet; in 2000 this share hit a record 50%. Only six countries (Panama, Liberia, Greece, Bahamas, Cyprus, and Malta) control nominally 53% of the world tonnage. However, their real share is insignificant since all six countries together represent less than 0.2% of the world fleet. Hence, the overwhelming majority of ships registered in these States are owned and controlled by foreign nationals, mostly from OECD countries. For instance the entire fleet of Hong Kong as well as 1/5 of Japan's fleet is under Panamean flag. Similarly, almost the entire Liberian fleet is US owned. See I.D. «Pavillons de complaisance en chiffres.» in *L'Humanité*, Issue of December 30th, 1999.

oil are essentially transported by ships flying such flags<sup>10</sup>. Most of these States do not have the resources to properly regulate their huge fleets. Furthermore, because of their dependence upon registry income, they do not have the inclination to rigorously prevent and punish pollution from their multinational clients. The result is that an important fleet of vessels is operating in the world's oceans without complying with formally agreed international norms; a phenomenon that came to be known as substandard shipping. With environmental issues coming to mounting prominence in the 1970 ties, the international community has come under tremendous pressure to act. Solutions to this problem have been sought mainly in two directions. First, by calling on Flag States to show more resilience in enforcing international safety related laws and regulations<sup>11</sup>. Second by gradually developing a parallel system of enforcement of international rules and standards under which Port States are granted greater powers<sup>12</sup>. The rationale behind this reallocation of jurisdiction is the fact that exclusive reliance on flag enforcement has failed to prevent and effectively tackle the problem of substandard

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<sup>10</sup> The market is organized in such a way that the most polluting substances also called "black products" are transported by the oldest vessels that are approaching the end of their service or even surpassed it.

<sup>11</sup> The importance of Flag State implementation and enforcement has been highlighted in IMO Guidelines of 1997 which set out means for Flag States to maintain measures for the effective application and enforcement of relevant conventions. See IMO Assembly Resolution A.740 (18) (1993) and A.847 (20) (1997). The Assembly also established in 1992 a Flag State Implementation Committee responsible for the identification of measures necessary to ensure effective and consistent global implementation of IMO instruments by Flag States and adopted a Code for the Investigation of Marine Casualties and Incidents, which requests Flag States to conduct an investigation of all serious casualties; Resolution A. 849 (20) (1997). These measures came after the international community's efforts to impose a "genuine link" requirement between flag and ships have failed mainly because of the opposition of a coalition of FOCs and powerful transnational lobbies who benefited from the status quo.

<sup>12</sup> Under MARPOL, these powers include the right of the Port State to inspect a foreign vessel and to detain it when the condition of the vessel so warrants, until it can proceed to sea without posing an unreasonable threat of harm to the marine environment. Not only has UNCLOS consolidated the detention powers of the Port State, it also entitles it to undertake legal proceedings against a vessel in one of its ports for alleged discharges of polluting substances outside that State's territorial sea or EEZ in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference. (Article 218). Detention and arrest are however subject to conditions specified in Articles 223 and 232 of UNCLOS.

shipping. Despite the powers at their disposal, Flag States are often lax on enforcement. While Coastal States who are at the receiving end of maritime tragedies and for this reason may be more inclined to act, they lack the appropriate legal entitlement to do so. In other words, those with the power to act fail to act because they have no incentive to act and those with the incentives have no power to act. Port State Control is expected to correct this imbalance by ensuring that the power to enforce laws is extended to those who are most likely to take action<sup>13</sup>. Early advocates of Port State Control believe that this reallocation of enforcement powers would help the international community tackle decisively the problem of substandard shipping.<sup>14</sup> The purpose of this paper is to revisit this assumption in the light of the *Erika* oil spill in December 1999 in France. The *Erika* was Italian owned, Maltese flagged 24 years old tanker which had been previously inspected by Port States, Flag States and industry inspectors on several occasions. The *Erika* also possessed valid certificates issued by the Registro Italiano Navale (RINA) a full member of the International Association of Classification Societies (IACS). And yet this tanker which presented all the formal warranties of seaworthiness broke in two as a consequence of a structural failure. It is suggested that this incident highlights the fact that Port State control is not immune to the kind of shortfalls that have undermined faith in Flag State enforcement of international law on ship safety and pollution prevention. The paper investigates the problems that beset the adequate implementation of PSC and explains why it may not be the ultimate fix to the problem of substandard shipping.

The paper contains three sections, section one discusses the rationale for PSC and comments its legal basis in international law. Sec-

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<sup>13</sup> See Apollis, *L'emprise maritime de l'Etat côtier*, Pedone (1981) at p. 228

<sup>14</sup> See Hare "Port State Control: Strong Medicine to Cure a Sick Industry", 26 *Georgia Journal of International and Comparative Law* No. 3, (1997) at p.68; in the same vein see remarks by the French and Finish Delegates at the 62<sup>nd</sup> International Labor Conference (ILC) of 1976, *Record of Proceedings*, p 186 and 188.

tion two looks at institutional instruments adopted by States for the implementation of PSC, focusing particularly on the Paris Memorandum of Understanding on Port State Control (hereinafter Paris MOU). The third section brings the *Erika* incident in perspective and presents it as an illustration of gaps and shortfalls. The paper concludes by stressing the need for the international community to shift from current paradigms exclusively inspired by the command and control type of legislation to more pragmatic solutions rooted in an understanding of the economic rationale that drive substandard shipping.

## 1. Political Rationale and Legal Underpinnings of Port State Control

The right of a State to exercise jurisdiction on foreign vessels in its internal waters, more so in its ports is long established in customary law<sup>15</sup>. However, the articulation of the notion as well as its extensive construction in contemporary international law is closely bound up with the need to protect the marine environment against pollution from ships. Port State Control is an immediate by-product of the dysfunctional implementation by some flag States of their obligations regarding the marine environment. With the succession maritime disasters often involving oil tankers, Coastal States came under intense pressure mostly from an internal coalition of environ-

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<sup>15</sup> See Churchill & Lowe, *The Law of the Sea*, Manchester University Press, at pp. 54-57; also Somers "The Role of the Courts in Enforcement of Environmental Rules" in Freestone & IJlstra Eds. *The North Sea: Perspectives on Regional Environmental Cooperation*, Special Issue of the *International Journal of Estuarine and Coastal Law (IJECL)* Graham & Trotman, (1990) at p. 193. Historically the notion that a State has jurisdiction over commercial vessels within its ports has never been challenged in international law. However, States have generally refrained from exercising jurisdiction over foreign ship on matters relating to the internal economy of the ship. Most opinions concur to the fact that such attitudes are based on comity rather than mandated by international law.

mental groups and coastal economic interests to extend of their pollution control jurisdiction beyond the three-mile territorial sea<sup>16</sup>. Although these claims cannot be dissociated with general trend by coastal powers to increase and expand their grip over maritime spaces adjacent to their territory<sup>17</sup>, they have been essentially articulated on two grounds;

- The right to self-protection for its own citizens and the environment against the dangers presented by substandard ships; and
- International enforcement of conventions dealing with safety at sea, by preventing unseaworthy ships from proceeding to sea.

However, maritime States opposed what they considered to be an unprecedented assertion of jurisdiction with a potential to interfere with their traditional freedom of navigation<sup>18</sup>. They feared that unscrupulous States might use environmental enforcement as a device to hassle and prosecute their ships for political reasons<sup>19</sup>. The United States was one of those concerned in particular, the Department of Defense.<sup>20</sup> However, while they defended their rights as maritime nations, these States were also Coastal States and for this reason were quite receptive to calls for a much vigorous exercise of jurisdiction by States over foreign vessels entering their ports. Under such conditions, the concept of Port State Control easily gained acceptance from both sides and became the compromise which

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<sup>16</sup> See Doc. A/CONF.62/C.3/L.6. Draft articles on a zonal approach to the prevention of pollution of the marine environment submitted by Canada, Fiji, Ghana, Guyana, Iceland, Iran, New Zealand, Philippines, Spain. III UNCLOS Official Records, Vol. III at 249.

<sup>17</sup> Apollis, note 13 at p. 222.

<sup>18</sup> See for instance the position expressed by Germany on the draft articles on enforcement of regulations concerning the protection of the marine environment against vessel-source pollution. A/CONF.62/C.3/L.7. III UNCLOS Off. Rec., Vol. III at 250; see also the statement of the delegate of Liberia, III UNCLOS OF. REC., Vol. II at 315

<sup>19</sup> McGonigle & Zacher, *Pollution, Politics and International Law: Tankers at Sea*, University of California Press (1979) at pp. 208-209.

<sup>20</sup> Id at 209-210

closed the gap between the two extremes.<sup>21</sup> Simply defined, PSC means that:

“a State may exercise jurisdiction over foreign ships in its ports in respect of offenses against international rules and standards even if committed in sea areas beyond its coastal jurisdiction...even if the violations were committed on the high seas (or foreign waters) and they did not in any way affect the Port State, the later would be entitled to take enforcement action against the vessel concerned”<sup>22</sup>

Under the MARPOL Convention<sup>23</sup>, the Port State has the power not only arrest (arrest jurisdiction) but also to try (judicial jurisdiction) a foreign vessel found in breach of its anti pollution legislation either in one of its ports or territorial sea. This jurisdiction does not apply to acts committed outside the territorial sea. However, MARPOL authorizes Port States to inspect foreign vessels and detain them when their condition so warrants until they can proceed to sea without presenting an unreasonable threat of harm to the marine environment.

It is however with the Third United Nations Convention on the Law of the Sea (UNCLOS)<sup>24</sup> that the rise of the Port State has received its most obvious consecration.

Not only does UNCLOS confirm the powers of the Port State already embodied in previous instruments such as MARPOL i.e., the power to arrest in one of its ports and prosecute a foreign vessel for violation of its pollution laws or applicable international rules in its territorial sea and Exclusive Economic Zone (EEZ)<sup>25</sup> it goes a step further by acknowledging the right of a Port State to prosecute a

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<sup>21</sup> In addition to being acceptable to both Coastal and Flag States, PSC also has the merit that it can be applied to the vessels of non parties to MARPOL or SOLAS as a condition of port entry.

<sup>22</sup> Hakapää, *Marine Pollution in International Law*, Helsinki (1981) at p. 172.

<sup>23</sup> Text reprinted in 17 *ILM* (1978) at 546.

<sup>24</sup> Text reprinted in 21 *ILM* (1982), at p. 1261.

<sup>25</sup> Article 221 of UNCLOS



foreign vessel that is alleged to have caused pollution outside its territorial sea or EEZ in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference<sup>26</sup>. UNCLOS also reiterates the powers of the Port State to take administrative measures to prevent a vessel in its port from sailing should it be in breach of applicable international rules and standards relating to seaworthiness and thereby threatens damage to the marine environment until the causes of the violation is removed unless the vessel is going to the nearest repair yard. Besides MARPOL, these rules and standards are embodied in several other international conventions adopted under the aegis of IMO and ILO such as:

- The 1966 Load Lines Convention<sup>27</sup>
- The 1974/78 SOLAS<sup>28</sup>
- STCW<sup>29</sup>
- ILO Convention No. 147 on Minimum Standards<sup>30</sup> (safety and working conditions)

Control under these conventions essentially consists in the verification of the existence of certificates and their validity. Physical inspection is undertaken only when the Port State Control Officer (PSCO) considers that there are “clear grounds” to believe that the ship’s equipments are inadequate<sup>31</sup> or do not substantially correspond with the particulars of the certificates (SOLAS) or that the working conditions on board are below appropriate standards<sup>32</sup>. Re-

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<sup>26</sup> Article 218 of UNCLOS

<sup>27</sup> Article 21, text of the 1966 Load Lines Convention reprinted in 640 *UNTS* (1967) at p. 133.

<sup>28</sup> Regulation 19 of Chapter 1; Regulation 2 of Chapter 8; text reprinted in 17 *ILM* (1978) at p. 579.

<sup>29</sup> Article 10 (1), text reprinted in *UKTS* (1984) at p. 50.

<sup>30</sup> Article 4, ILO Convention No. 147 on Minimum Standards, text reprinted in 15 *ILM* (1976) at p. 1288

<sup>31</sup> Article 6 of MARPOL. Since 1996, a new MARPOL regulation also allowed Port State inspection where there are clear grounds for believing that the master or crew are not familiar with essential shipboard procedures relating to the prevention of pollution by oil. Regulation 8A, Annexes I, II, III and V. See Valenzuela, in Vidas and Østreng eds. *Order for the Oceans at the Turn of the Century* at p.500

<sup>32</sup> ILO Convention No. 147 on Minimum Standards, note 30.

gional PSC arrangements such as the Paris MOU try to dilute the discretionary power of PSCOs by laying down certain criteria the presence of which would indicate a compelling case for physical inspection.<sup>33</sup> When irregularities are found, the PSCO is entitled to take steps to ensure that the vessel does not sail until it can do so without causing risks to the marine environment. If action of this type is taken, the Flag State must be informed through its nearest maritime consular or diplomatic representative of the action taken and the circumstances and if possible have such a representative present. Such facts also must be reported to IMO. In order not to encourage abuses in the exercise of such power, most conventions contain a caveat to ensure that inspections should not unduly delay the ship<sup>34</sup>. Furthermore, vessels chosen for inspection should not be selected in a discriminatory manner and standards should be evenly applied. To summarize the point, it may be said that in substance, PSC is conducted to ensure that foreign ships are seaworthy; that they do not pose a pollution risk; provide a healthy and safe working environment; and comply with the relevant International Conventions. We shall now turn in to examining how it works in practice.

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<sup>33</sup> Article 3 of the Paris MOU states that “a report of notification by another Authority; a report or complaint by the master, a crew member, or a person or organization with a legitimate interest in the safe operation of the ship, shipboard living conditions or the prevention of pollution, unless the Authority concerned deems the report or complaint to be manifestly unfounded; other indications of serious deficiencies, having regard in particular to Annex 1.” The Directive 2001/106/EC modifying the Directive 95/21/EC goes even further by imposing mandatory inspections on certain ships. See text at OJ L 19/17, 22. 1. 2002.

<sup>34</sup> See Article 219 of UNCLOS ? “Measures relating to seaworthiness of vessels to avoid pollution”; for an insightful discussion of the potential conflict involved between safety and the fluidity of commercial transactions, see Boisson, *Safety at Sea-Policies, Regulations and International Law*, Editions Bureau Veritas, (1999) at p. 452.

## 2. The Institutional Framework for the implementation of PSC: the Paris MOU and its Regional Replicas

Ideally, the implementation by Port State of international rules pertaining to ship safety and pollution prevention would be carried out under the supervision of an independent international body and the IMO would appear to offer the best warranty of impartiality for such a role. At present however, IMO does not perform a supervisory function on a worldwide basis neither does it have the constitutional powers to enforce or oversee the enforcement of international commitments negotiated under its leadership. This limitation has meant that from a theoretical point of view, every States will determine on its own what enforcement measures will be necessary in order to come in line with its international commitments. In practice however, policy coordination rather than unilateral action has prevailed in the enforcement of Port State Control. Such coordinated efforts have been channeled through regional agreements known as Memoranda of Understanding (MOU) on PSC. The first initiative in this area is the 1982 Paris MOU<sup>35</sup>, an administrative agreement bringing together mostly Western European countries. The successes encountered by the Paris MOU has been acknowledged by the IMO in its Resolution 689 of 1991 in which it calls for the development of similar frameworks in other regions of the world. Since then, 8 more MOU on PSC closely modeled on the Paris regime have been adopted:

- The Tokyo MOU
- The Acuerdo de Viña del Mar for Latin America
- The Caribbean MOU
- The Abuja MOU for West and Central Africa
- The Mediterranean MOU
- The Indian Ocean MOU

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<sup>35</sup> See text of the Paris Memorandum of Understanding at 21 *ILM* at p. 1982.

- The Black Sea MOU
- The Riyadh MOU

The regional approach offers many advantages. Among them the gathering and sharing of information about substandard ships among participating maritime authorities, the development of uniform standards and procedures for control and inspections and most important of all it reduces costs by avoiding useless duplication of efforts and unjustifiable delays to shipping. So far, all the existing MOUs contain a clause that exempts from inspection ships that have recently undergone inspection by the maritime authorities of a State party to the same MOU<sup>36</sup>. Moreover, when coupled with effective monitoring, uniformity of standards can prevent distortions which could result in the establishment of “ports of convenience”.

It is important to stress that these MOUs as such are not a primary source of international obligations. Their main purpose is to lay down the groundwork for effective cooperation of participating maritime authorities in the area of PSC. They are essentially cooperative arrangements for the enforcement of existing international standards; they do not create new rights and obligations for their members but represent a unification of national means of implementing existing international commitments and responsibilities<sup>37</sup>. Moreover, except the Paris MOU which has been made binding by a Council Directive of 1995<sup>38</sup>, the MOU are in principle voluntary, therefore, failure by a State to comply with their term does not lead to legally enforceable claims. Having briefly exposed the basic elements common to all MOUs, we shall now move on to a more de-

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<sup>36</sup> This requirement is made necessary by the need to secure the support of the industry, which had already voiced concerns over the prospect of facing controls or inspections anytime they visit a different port.

<sup>37</sup> Kasoulides “Paris Memorandum of Understanding: A Regional Regime of Enforcement” in Freestone and IJlstra eds. *The North Sea: Perspectives on Regional Environmental Cooperation*, Special Issue of *IJECL*, Graham & Trotman, (1990) at p. 186.

<sup>38</sup> See *O.J.* L157, 7.7. 1995 at p. 1. Council Directive 95/21/EC of 19 June 1995 Concerning the Enforcement, in respect of Ships using Community Ports and Sailing in the Waters Under the Jurisdiction of the Member States, of International Standards for Ship Safety, Pollution Prevention and Shipboard Living and Working Conditions.

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tailed analysis of the Paris MOU which has become the blueprint  
for the introduction of Port State Control regimes in other regions  
of the world.

### 3. The Paris MOU

The Paris MOU which came into effect in July 1982 represents Europe's response to the 1978 Amoco Cadiz oil spill in France. By then, Europe has realized that the adoption of sophisticated treaty systems such as MARPOL would make little difference in practice if adequate action is not taken to ensure compliance. The MOU was therefore aimed at closing the enforcement gap by developing uniform rules and procedures, uniform targets and putting in place permanent institutions<sup>39</sup> and a computerized network for sharing information among members. In 1995, the MOU has been made mandatory by the Council Directive 95/21/EC.<sup>40</sup> This change of legal status from a soft instrument to hard law meant that non compliance could lead to legal action before European judicial organs.

Initially the Paris MOU had 17 participating maritime authorities, all of them western Europeans. It has later expanded geographically to include Canada and most recently the Russian Federation. The Paris MOU also maintains a network of cooperative relationships with other regional Port State Control regimes<sup>41</sup>. The goal of

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<sup>39</sup> The structure of the Paris MOU consists of the Port State Control Committee which is the executive body composed of one representative from each participating maritime authority and a representative of the EC, the Administration which houses secretariat facilities and is based in the Netherlands, and the Computer Center based in Saint Malo, France where all inspection related data are stored and accessible online by the Parties to the MOU.

<sup>40</sup> Directive 95/21/EC Concerning the enforcement in respect of shipping using Community ports and sailing waters under the jurisdiction of Member States, of international standards for ship safety, pollution prevent and shipboard living and working conditions (known as the Port State Control Directive ). *O.J. L* 157, 7.7. 1995, at p.1

<sup>41</sup> Two Regional MOU have obtained official observer status to the Paris MOU; the Tokyo MOU and the Caribbean MOU. The US Coast Guard is also observer at meetings of the Paris MOU. Two others, the Mediterranean and Black Sea MOU have pending applications.

such cooperative arrangements is to ensure as much as possible uniformity in control and inspection procedures as well as exchange of information and expertise among the various MOU.

As far as inspection procedures are concerned, Section 3 of the MOU provides that;

In selecting ships for inspection, the Authorities will pay special attention to:

- (a) ships which may present a special hazard, for instance oil-tankers and gas and chemical carriers.
- (b) Ships which have several recent deficiencies.

With the adoption of a new Directive<sup>42</sup> following the *Erika* spill, the so-called *Erika* 1 Package, additional items have been added in order to make controls more systematic and dilute the discretion of PSCO. However the ground breaking element in the new Directive is that for the first time, it denied port access to certain ships which on account of their flag, cargo, condition and history pose a serious safety hazard. Under Article 7b, gas and chemical tankers, bulk carriers, oil tankers, passenger ships shall be refused access if the ship either:

- flies the flag of a State appearing in the black list as published in the annual report of the MOU and
- has been detained more than twice in the course of the preceding 24 months in a port of a State signatory of the MOU,

or

- flies the flag of a State described as “very high risk” or “high risk” in the black list as published in the annual report of the MOU and
- has been detained more than twice in the course of the preceding 36 months in a port of a State signatory of the MOU

In addition to this, any ship not subject to an expanded inspection

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<sup>42</sup> Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001; *O.J. L* 19/17, 22.1.2002

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with a target factor greater than 50 in the SIRENAC information system must be inspected “provided that a period of at least one month has elapsed since the last inspection carried out in a port in the MOU region”<sup>43</sup>

However, as the MOU also seeks to reconcile maritime safety with the fluidity of navigation a notable feature of the Paris MOU, which it shares with other MOU, is that the Authorities will seek to avoid inspecting ships which have been inspected by any of the other Authorities within the previous six months unless they have clear grounds for inspections.<sup>44</sup> The surveyors are provided with a manual containing *inter alia*, references to applicable international conventions and articles of the MOU and codes for the information system. Upon completing the inspection, the inspector issues to the vessel a document containing the results and details of any action taken. These findings are uploaded in the computer system so that other surveyors are able to consult it before going on board a ship.

An important requirement of the Paris MOU is the obligation imposed on each maritime authority to publish quarterly information about detentions under PSC procedures.<sup>45</sup> This information must contain the name of the ship as well as details of the owner, operator, the flag and the classification society. This measure inspired by the “name and shame” approach seeks to bring about a change of attitude within the shipping industry where a long tradition of secrecy has too often resulted in problems being hidden or ignored rather than revealed and solved. Initially however, some Port States were reluctant to publish detention information for fear of exposing themselves to damage suits by ship-owners<sup>46</sup>. At present,

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<sup>43</sup> Article 4. 2(a)

<sup>44</sup> Article 4. 3 of the new Directive add the following: the ship is not listed in Annex 1, no deficiency have been reported, following a previous inspection, the ship is not covered by paragraph 2 (a)

<sup>45</sup> Section 3.14 of the Paris MOU

<sup>46</sup> *Kasoulides Port State Control and Jurisdiction-Evolution of the Port State Control Regime*, Martinus Jijhoff (1993), at p. 160. at p. 160

the situation has changed; publication seems to have gained world-wide acceptance and is a practice commonly shared by all other MOU on PSC.

The Paris MOU also imposes quantitative control and inspection targets to its members. According to Section 1 (3), “each Authority will achieve an annual total of inspections corresponding to 25% of the estimated number of foreign merchant ships” which entered its ports<sup>47</sup>. The level of compliance with this target has not always been the same for all countries; while States like Greece achieve more than 40% i.e., more than what is required; others like France have persistently failed to make it. In 2001, France’s performance has deteriorated to a mere 9%. This situation prompted a legal action by the European Commission asking the European Court of Justice<sup>48</sup> to declare that in not observing its annual threshold of 25% of ships inspected by the Port State as provided for in the 95/21 EC Directive, France has infringed European maritime safety rules.<sup>49</sup> Nonetheless, the Paris MOU is seen as a reference and is arguably the most advanced regional Port State regime in the world. It is this system that has seen its foundations seriously shaken by the *Erika* incident.

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<sup>47</sup> This figure is 75% for the Tokyo MOU, 10% for the Indian Ocean MOU while the Viña Del Mar, Caribbean, Mediterranean, Black Sea and Abuja MOU mention a minimum of 15% annual inspections. It is however only under the Paris MOU that failure to reach these inspection targets is actionable before court. In June 2002, the European Commission decided to sue France and Ireland before the European Court of Justice for their failure to meet the 25% target.

<sup>48</sup> See CJCE, 22 juin 2004, *Commission des Communautés européennes c/ République française*, aff. C-439/02, *Revue européenne de droit de l’environnement*, (2004), No 3 at page 49.

<sup>49</sup> The insufficient number of PSCO in France, which is the consequence of the drastic contraction of the French merchant fleet under national flag is given as a major explanatory factor of the country’s failure to meet its mandatory targets. See Sénat, Session Ordinaire de 1999-2000, Rapport d’information par Henri de Richemont, Annexe au Procès-verbal de la séance du 27 juin 2000 at. p. 163.



#### 4. The Erika Spill, an illustration of shortfalls and gaps.

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 off the Brittany Coast. At the time of the incident, the tanker was carrying 31, 000 tonnes of highly toxic heavy fuel oil. On 25 December, the first oil slick began to hit the French Atlantic coast and washed up at dozens of points simultaneously. About 400 km of beaches including many popular holiday resorts have been polluted by the oil, and thousands of seabirds were caught in it.

The *Erika* was one of a batch of eight sister ships built in Japan during the period 1974-1976. The tanker was a 19,666 gross tonnage conventional steel single hull oil tanker with segregated ballast tanks. Following the casualty, the information released by the registers and classification societies showed that four out of the eight ships built in the same series had suffered serious structural damage involving cracking or buckling of the deck.

At the time of her sinking all of the *Erika*'s class and statutory certificates were valid. She was classed with RINA, a full member of IACS. The ship was under the management of an Italian company, which was also ISM certified by RINA. The 24 old tanker sailed under Maltese flag, was owned by the Savarese family of Sorrento in Italy through the Tevere Shipping Company of Valletta and was operated by Panship Management & Services of Italy.

Between 1991 and 1999, she was inspected 16 times by port state control inspectors and 2 times 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 society. Several oil companies chartered the *Erika* throughout the 1990s. The inspectors of Texaco, Exxon's subsidiary Standard Marine, Repsol and Shell approved her as fit to carry their cargoes. The vessel was also approved by TotalFina whose cargo it was car-

rying when it sank. In December 1999, the *Erika* had the approval of most of major oil companies, which carry out vetting inspections prior to hiring a tanker.

Hence, by all existing standards the *Erika* was fit for the business and possessed a clean bill of health delivered by a world class classification society (RINA). However, the structural failures which brought it down show that it was not and that there was a substantial gap between theory (certificates and other requirements) and the real condition of this ship. Among other issues, this contrast particularly raises questions not only on the effectiveness (or lack of it) of PSC measures, but most importantly on the strength and inherent limits of Port State Control as a device for eradicating substandard shipping.

Clearly, if Port State control rules were sufficient and fully enforced this incident could have been prevented since the *Erika* has been subject to PSC in Novorossiysk shortly before it broke in two. This demonstrates that inspections measures in the way they are carried out do not always allow inspectors to detect certain flaws.<sup>50</sup> Studies have also shown a lack of consistency in inspections even in States parties to the same MOU let alone between States belonging to different MOU<sup>51</sup>. This situation has much to do with the fact that despite the existence of MOU, the substance of controls varies from one State to another depending of their maritime culture or sometimes their sense of business. This lack of consistency may result in a diversion of traffic toward ports that have the reputation of being softer on visiting ships and leave considerable scope for irresponsible shipowners to avoid compliance. It is not enough to adopt and

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<sup>50</sup> PSC under the Paris and Tokyo MOU or even the US OPA, in the way they were carried before 1999 would not have detected the structural faults which caused the *Erika* to break up. Only the type inspection done by Classification Societies in dry dock could reveal problems of this kind. See Gray "Port State Control, Where to Now" Presentation to Port State Control 2000, Lloyd's List Daily Commercial News Melbourne Australia May 31, 200 at p.3.

<sup>51</sup> See Datta and Bloor, "Port-state Control and ILO Conventions" in *Seaways*, January 2004 at p.2.

commit oneself to following common standards, it is essential that there is also uniformity in interpretation and implementation. A possible solution to narrowing the implementation gap could be the creation of regional agencies within the framework of existing MOU under which PSCO would directly operate. In other words, implementation should be brought under the regional realm and PSCO placed under the control of a unique regional body rather than having to depend on a string of disparate maritime authorities. While this may sound far fetched in other MOU, it may not be so in a European context where fishing for instance is already a community matter.

Another problem that besets international efforts for a reliable and sound Port State Control is the problem of resources, in particular financial and human resources. Port State Control is not a big revenue earner and so resources are always likely to be limited; on the contrary it requires the deployment of important financial assets and a sizeable number of highly qualified personnel who must be competent enough to get the job done properly. The implication is that it may not be affordable for poorer nations to develop sophisticated and reliable Port State Control<sup>52</sup> without substantial external assistance. Moreover, because of their dependence of foreign trade, developing countries may not be willing to impose tough PSC measures, should they have the means to implement them, for fear of not having to pay more on transport or undermining the competitive position of their own ports. Substandard ships continue to exist because they are the cheapest to charter.

The problem of scarcity resources is not necessarily an issue for developing countries. Developed nations also face this type of problem, although in a different way. A patently obvious example is the case of France which fails to meet its 25% mandatory target under the Paris MOU due to a shortage of PSCO. According to one industry

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<sup>52</sup> Ibid. at p.3

commentator<sup>53</sup>, the shortage of qualified personnel in France is the direct result of the policy of French shipowners to flag out to convenient registries and the ensuing practice of hiring low paid foreign crew. Since the best qualified PSCO are those who have a maritime experience<sup>54</sup>, the shrinking of the French fleet leads to a shortage of potential candidates to fill up the vacancies and results into an imbalance between demand and supply of PSCO. A French Senate information report<sup>55</sup> (hereinafter the Richemont report), published after the Erika incident also shows that imposing inspection targets when there is a shortage of inspectors could lead to a perverted sense of priorities. The report states that in France, inspectors would rather visit five well-maintained vessels a day than one vessel that presents clear signs of substandardness because this could take them a day or more and require more resources.

However, besides the problem of resources (human and economic) and the lack of uniformity in implementation which explains the contre-performances of PSC, a long term solution to substandard shipping lies in a better understanding of the economic parameters which fuels the phenomenon instead of exclusively relying on command and control legislation. Substandard shipping; it is suggested is an unwanted externality of the way the international shipping market operates today. Therefore any solution to it must look at the economic factors that brought the problem to existence in the first place and explain its persistence.

When one looks at the actual conditions of maritime trade, two elements become rather conspicuous. First the imbalance in the global tanker market between the supply of ships and the demand from cargo owners resulting from the global economic slowdown, in other

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<sup>53</sup> Berlet «Un Pavillon Français pour défendre nos côtes» in *Les Echos* of May 17th, 2000.

<sup>54</sup> Gray "Port State Control, Where to Now?" Presentation to Port State Control 2000, Lloyd's List Daily Commercial News Melbourne Australia May 31, 200 at p.5

<sup>55</sup> Sénat, Session Ordinaire de 1999-2000, Rapport d'information par Henri de Richemont, Annexe au Procès-verbal de la séance du 27 juin 2000. at. p. 163.

words, a discrepancy between supply and demand which drives down fare rates to dangerously low levels<sup>56</sup>. Today this gap is such that some shipowners have difficulties paying the salaries of their employees. Under such circumstances, security becomes a luxury and cost cutting the first priority. The persistence of this situation increases the pressure on shipowners and operators to achieve savings no matter the consequences, either by flagging out to convenience registries<sup>57</sup>, or by pushing for the establishment of so called "second registries"<sup>58</sup>. The result is that in 2000, 11 FOCS totalize  $\frac{3}{4}$  of all losses at sea in terms of world tonnage.<sup>59</sup>

Moreover, when profitability margins are low as it is the case today, it becomes highly unlikely that shipowners would invest in new ships.<sup>60</sup> An unintended consequence of this rational attitude is that older ships will remain in business.<sup>61</sup> Since such ships may not be allowed to freely operate in rich countries where flag requirements are tougher and Port State Control increasingly more severely implemented, these ships will migrate to convenient registries where the fear of legal retribution is almost inexistent, and trade between ports where the risk of being caught is the lowest<sup>62</sup> either because

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<sup>56</sup> See the BRS Report 2000 at p. 35.

<sup>57</sup> Bouvais, "Les pavillons de complaisance en ligne de mire" in Novethic, Issue of November 27, 2001.

<sup>58</sup> Also called "Bis registries", they represent a reaction of traditional maritime nations to the fast reduction of their local merchant fleet due to the competition of flags of convenience. The first example of this brand of hybrid registries was established by Norway in 1987, the Norwegian International Ship Register and was soon followed by other European countries. France (Kerguelen), Italy, Portugal (Madeira), Belgium, Great Britain (Man Islands). The "Bis registries" offer more flexibility since they allow for the recruitment of multinational crew and negotiate salaries without reference to European standards. However, even this would not be enough to counter the irresistible rise of flags of convenience.

<sup>59</sup> Bouvais, note 56

<sup>60</sup> A new VLCC (Very Large Crude Carrier) costs today 80 millions USD. To make such an investment profitable in a reasonable period of time, an owner must make 30.000 a day in returns. Between 1998 and 1999, the maximum return per day has dropped from 30.675 USD to 19.000 USD, a 38% decrease in just one year! It follows that the only profitable ships are the ones that have already been redeemed, that is to say the oldest ships. See Valois *Le transport de pétrole par mer*, Celse (1999) at p. 109.

<sup>61</sup> More than 57% of the world's tanker fleet is more that 25 years old, see Richemont Report at p. 141.

<sup>62</sup> Scorpecci, "Economic advantages of non - compliance with Pollution Regulations" Nat-ship 2004 Conference, Melbourne 19 - 20 February, 2004 at pp.7 - 8.

such States value the business more than the environment or simply because they cannot afford the technology or do not have the necessary human expertise to enforce international safety standards. It is therefore the conditions in the market that explain a great deal why substandard shipping has proven difficult to eradicate despite the wealth of laws existing at the international, regional and national level aimed at addressing it. The problem of substandard shipping has deeply rooted economic causes; however the solutions that have been sought to address it have been mostly political, often aimed at placating public outraged by a recurrence of catastrophic tanker accident. A more realistic approach would be to address the causes of the problem rather than seeking to tackle its unwanted manifestations.

### **Conclusion and suggestions**

The present study has shown that while there is worldwide consensus that PSC plays an important role in cracking down substandard shipping, it may not offer the best warranty for eradicating the problem. Port State Control certainly has a role to play and there is evidence to suggest that it is making some impact.<sup>63</sup> However it can only serve its purpose when the international community understands its limits and therefore the extent to which it needs to be supplemented by other approaches. Exclusive reliance on PSC would not stamp out substandard shipping. Due to the unequal distribution of resources and the nature of incentives; it will only lead to a migration of substandard ships towards ports where controls are less stringent either by design or simply by the lack of means. The international community must consider economic measures which seek to address the root causes of substandard shipping

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<sup>63</sup> See Datta and Bloor, article quoted at note 51.

rather than just trying to address its unwanted effects. It is suggested that such measures could take the form of an international buy out of older tankers in order to reduce the number of ships available. This would make the transport business become profitable and send a positive signal to potential investors. The key obstacle to the renewal of the world's tanker fleet has been the profitability issue. Measures aimed at accelerating the retirement of older tankers would help alleviate this problem. Alternatively, States could adopt various internal measures such as tax reliefs, subsidies or other positive incentives in order to encourage the purchase of new vessels. This would reduce the risks for potential investors by improving the prospect for competing with FOCs as well as discourage the practice itself. When substandard shipping is no longer profitable, owners of such ships will voluntarily take to the demolition yard as this would be the only reasonable option left for them.