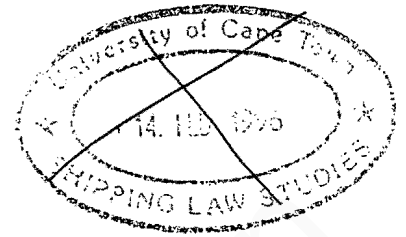


**THE SUB-STANDARD SHIP AND PORT STATE CONTROL IN SOUTH
AFRICA**



by

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Research dissertation presented for the approval of the Senate in fulfillment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

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PREFACE

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The United Nations Conference on the law of the sea 1982

"HAIL, HAIL LION OF JUDAH"

CHAPTER 1

AN INTRODUCTION TO PORT STATE CONTROL

In our modern era we often find we are spectators to the development occurring around us. This is particularly true of trade and industry. As the net of trade and industry has slowly been cast across the globe , so it has made demands on all who subscribe to its lordship. More effective means of productivity, , lower costs , higher turnover and more efficient transport. Demands which we race to meet , all of which are important but none more important than the need for transport. Without a satisfactory transport system industry would die. There would be no accessible markets except those where the product was made and those markets would soon be saturated. The importance of an effective and efficient transport system has not gone unnoticed and the result is that this system , which was initially birthed to facilitate and serve trade and industry , has itself graduated to that status. Inevitably with this graduation it has adopted the principles and vision of its mentor. Money is sovereign in the world of industry and trade , indeed a cruel and ruthless sovereign.

Shipping , probably more than any other mode of transport , has suffered at the hands of this master. Unscrupulous ship owners with fleets of vessels that scour the oceans and her ports looking for and doing as much business as possible. These vessels are at sea for long periods of time with crews that can ill afford to argue about the poor state of their pay. Out of the spotlight , out of sight - out of mind. Maintenance , safety standards , hygiene , qualified crew are all luxuries in the quest for good business and that ever elusive satisfying dollar. The vessels in the unscrupulous ship owners' fleet are merely numbers which generate income and the crew on board these numbers are less than numbers. .

Slowly , however , the attention of the world is being focused on the shipping industry. As the world grows progressively greener and environmentally friendly and people start to stand

up for the rights of whales , penguins and the like , so the spotlight begins to shift in the direction of the sub-standard ship and her owner. Sub-standard vessels that pose a threat to the environment are viewed with distress and alarm. Pressure is slowly being brought to bear on such vessels and their owners but is it enough? If the public were informed that sub-standard aircraft were taking to the air daily there would be a public outcry of huge proportions. The urgency with which the matter would be dealt with would be almost un-paralleled for efficiency and results. Yet it is an anomaly that every day sub-standard vessels take to sea and not a word is said. Perhaps the emphasis should be shifted to the most endangered species of all with respect to these vessels , the seaman. After all , he is the one who has to live aboard these vessels and has to endure all that comes with such a life. The Australian Parliament's inquiry into ship safety entitled "Ships of Shame"¹ reveals just some of the atrocious conditions that some seamen are forced work and live under. The report makes for sobering reading. Not only is it the seaman's lot to survive on these vessels while they are afloat but there is also the very real possibility that the vessel may sink. While it is not clear what the exact loss of life at sea is each year , it is suggested that it might be as high as 4000 seafarers².

PORT STATE CONTROL

Port State Control can most simply be described as the system of administration and control of the standard of foreign vessels in a particular port. This same control exercised over local

¹ Report from the House of Representatives Standing Committee on Transport , communications and Infrastructure. (December 1992)

² Richard Flint , ITF Communications , September 1995

vessels falls under Flag State Control. In Port State Control the port assumes the power to utilise this system from various sources which will be canvassed later. The important part is the intention behind the adoption of Port State Control measures which is the protection of life , the protection of the environment and the protection of property (hopefully in that order). Some might suggest that Port State Control is an offensive reaction to a defensive failure , and that the very existence or need for Port State Control is a monument to the failure of other original measures of control , particularly the owner and Flag State.

The Port State has been defined³ as the State in the territorial waters of which a vessel is at any particular time , provided the vessel is destined to or has just left a port in that State. Sir Anthony Clarke offers a definition of Port State Control as "the control and supervision of ships by that State.". He continues to add ,

"[I]ts purpose is to ensure that sub-standard ships do not enter or leave its ports with consequent risk to safety of life , the preservation of property and the protection of the environment."⁴

Clearly the emphasis of Port State Control is on the sub-standard vessel. The system seeks to identify such vessels and either cause the defects which result in its unseaworthiness to be remedied immediately or to ensure that these defects are remedied as soon as possible. The Port State has historically always had jurisdiction over delicts and crimes committed within its waters ; moreover , says Clarke , there is no principle of private or international law that says that the Port State should not regulate the conduct and the safety of vessels which visit its ports in any way in which it see's fit.⁵ There was , however , an initial reluctance to act in this manner partially

³ Sir Anthony Clarke - LMCLQ , part 2 May 1994 , pg202

⁴ op cit pg202

⁵ op cit pg204

because states took the view that shipping is an international activity and as such should , as far as possible , be regulated by international agreement.⁶ Allied to this is the all pervasive fear on the part of States that any actions taken by them in their ports against foreign vessels will result in retaliatory measures by the flag states of the vessels involved.

The control that the Port State exercises over the vessels in its jurisdiction is given to it by various international conventions and resolutions. These conventions and resolutions not only empower the Port State to take action but also stipulate what action may be taken by the Port State. In certain cases these powers and actions are refined by legislation and agreements. A particularly good example of an agreement is the Paris Memorandum of Understanding (Paris MOU) of 1982. This is a regional agreement on Port State Control which brings together some 15 independent countries in an attempt to "co-ordinate and harmonise the efforts of parties in relation to Port State Control."⁷

An example of legislation enacted to aid Port State Control is found on the other side of the Atlantic in The United States of America. This legislation is found in the United States Code⁸ which has provisions that cover a number of related topics. These provisions cover the type of vessels that are subject to inspection , the scope and standards of inspections , reciprocity between States and penalties which may be imposed. The Code also gives the United States Coast Guard power to board and inspect all vessels which enter United States' ports to ensure that the requisite safety and pollution standards are met. These measures exist to enhance and facilitate the effectiveness of the Port State Control system. They have been adopted by the respective States , not to replace the

⁶ op cit pg204

⁷ Safer Ships Cleaner Seas - paragraph 11.15 pg138

⁸ U.S. Code 46.33

international conventions and resolutions , which are responsible for the initial empowerment but to clarify and , in some places , extend the initiative of the conventions. It is essential , if Port State Control is to be an effective watchdog against the sub-standard ship , that it has the teeth to back up its bark. Where the international conventions and resolutions fall short States should not be limited but should be able to extend the conventions and resolutions by adopting legislation or agreements which are in line with internationally acceptable standards and are true to the vision of the Port State Control system.

It is important to note at this stage that Port State Control was not envisaged as a substitute for the primary responsibilities of the shipowner and Flag State to keep their ships in an acceptable condition⁹. The rise of Port State Control resulted , as noted earlier , from the deficiencies in the primary responsibilities and , while it is clear that Port State Control is necessary and has an invaluable role to play in the war on the sub-standard ship , it is not to be seen as a substitute for Flag State Control. Port state Control is a remedy which it is hoped will compliment Flag State Control and not replace it.¹⁰

THE POWER BEHIND PORT STATE CONTROL

Port State Control Jurisdiction finds its legal basis and support in a number of International Conventions and resolutions. The starting point for this jurisdiction is the United Nations Convention on the Law of the Sea (UNCLOS) of 1982.

Article 25

⁹ Clarke: op cit pg207

¹⁰ Clarke: op cit pg207

- 25(1) = *The Coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.*
- 25(2) = *In the case of ships proceeding to internal waters or a call at a port facility outside internal waters , the Coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.*
- 25(3) = *The Coastal State may , without discrimination in form or in fact among foreign ships , suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security , including weapons exercises. Such supervision shall take effect only after having been duly published.*

It is important for our purposes to understand what innocent passage is. The definition has undergone numerous changes during the course of its existence but the current definition is found in article 19 of UNCLOS of 1982. The portion of innocent passage that is most relevant to us is the "innocence". Article 19 says that passage will be innocent as long as it is not "prejudicial to the peace , good order or security of the coastal state.". Article 19 continues to add that the passage of a foreign ship will be considered to be prejudicial to the peace , good order or security of the coastal State if it engages in any of a list of forbidden activities which include wilful and serious pollution. All the coastal State has to do is show that the vessel in question falls foul of the provisions in article 19 and that it justifies its actions on the basis that the vessel's passage is not innocent. The passage requirements are far more simple and they require that the vessel's passage be continuous

and expeditious but does allow acts incidental to navigation or necessary as a result of *force majeure* or distress.

Port State jurisdiction is also envisaged in UNCLOS 1982 article 218. This particular article deals extensively with pollution and may be linked to Port State Control when one considers the threat of pollution posed by sub-standard ships , particularly tankers. There is also the threat of oil pollution from bunkers as the Cape Town coast found out to its cost last winter¹¹. So while this particular article , at first glance , may not be considered as authority for Port State Control it does have some force.

Article 218

-218(1) = *When a vessel is voluntarily within a port or at an off-shore terminal of a State , that State may undertake investigations and , where the evidence so warrants , institute proceedings in respect of any discharge from that vessel outside the internal waters , territorial sea or exclusive economic zone of that state in violation of applicable international rules and standards established through the competent international organisation or general diplomatic conference.*

-218(3) = *When a vessel is voluntarily within a port or at an off-shore terminal of a State , that State shall , as far as practicable , comply with requests from any State for investigation of a discharge violation referred to in paragraph 1 , believed to have occurred in , caused , or threatened damage to the internal waters , territorial sea or exclusive economic zone of the requesting State. It shall*

¹¹ The Apollo Sea , a Panamanian registered bulk carrier carrying iron ore from Saldanha Bay , sank with the loss of all hands (36 crew and officers). A resulting oil spill from her bunkers fouled the Cape's beaches.

likewise , as far as possible , comply with requests from the flag State for investigation of such a violation, irrespective of where the violation occurred.

-218(4) = The records of the investigation carried out by a Port State pursuant to this article shall be transmitted upon request to the flag State or to the Coastal State. Any proceedings instituted by the Port State on the basis of such an investigation may , subject to section 7 , be suspended at the request of the coastal State when the violation has occurred within its internal waters , territorial sea or exclusive economic zone. The evidence and records of the case , together with any bond or other financial security posted with the authorities of the Port State , shall in that event be transmitted to the coastal State. Such transmittal shall preclude the continuation of proceedings in the Port State.

As it can be seen , UNCLOS gives extensive powers to the Port State. The rights given in UNCLOS of 1982 only bind States that are parties to the convention. As this represents the majority of States UNCLOS has a wide area of influence. It should also be noted that States may also be bound to the terms of UNCLOS by nature of it having graduated to international common law. This may , however , be disputed. The only limits placed upon the exercise of such power are that it must not be exercised unreasonably , it must not discriminate against foreign vessels and its exercise must not be inconsistent with international obligations accepted by the State exercising powers.

The Safety of Life at Sea convention (SOLAS) also has regulations which affect Port State Control. In regulation 19 of chapter 1 we find the right of Port States to satisfy themselves

that foreign ships visiting their ports carry valid Flag State certificates of compliance which comply with internationally agreed standards. Regulation 19 goes so far as to say , in paragraph (c) , that if any certificate has expired or is found to be invalid , or if there are clear grounds for believing that the condition of the ship does not accord with its certificates , the officer of the Port State carrying out the control procedures "shall" , not may , take steps to ensure that the ship shall not sail until she can proceed to sea or leave the port for the purposes of proceeding to the appropriate repair yard without danger to the ship or the persons aboard. Paragraph (d) provides that,

"in the event of this control giving rise to intervention of any kind , the Flag State and nominated surveyors or recognised organisations responsible for the issue of the certificates shall , not may , be notified."

Paragraph (e) goes still further and extends this duty requiring that the authorities at the next port of call be contacted and notified as to the status of the vessel in question.

Similar control regulations are found in the International Convention on Load Lines of 1966 (article 21) , the International Convention for the Prevention of Pollution from Ships (MARPOL) articles 5 and 7 , the Convention Concerning Minimum Standards in Merchant Ships of 1976 (article 4) and the International Convention on Standards of Training , Certification and Watchkeeping for Seafarers (STCW) of 1978 (article X).

As mentioned before , Port State Control derives its power not only from the international conventions but also from a number of International Maritime Organisation (IMO) resolutions. These resolutions include:

- (a) Resolution A.466(XII) of 1981 as amended by resolution A.597(15) of 1987 which provides guidance on control procedures under SOLAS and the Load Lines Convention as well as including advice on ways of checking compliance with the collision regulations. More importantly though, it allows an inspector to look beyond the certificates if he or she is acting on reliable information from a crew member, a professional body or anyone else concerned with the safety of a particular ship, that the ship is or appears to be sub-standard.
- (b) Resolution A.742(18) of 1993, which has the effect of replacing Resolution A.681(17) of 1991, provides guidelines covering operational requirements including those covered by STCW, SOLAS and MARPOL. The resolution allows a Port State Control inspector, who has clear grounds for believing that the operational condition of the ship is inconsistent with the requirements of the conventions; to check on-board procedures such as whether key crew members can communicate adequately with each other or if officers in charge of the navigational watch are familiar with bridge control and navigational equipment. The inspector's checks should not include any operational tests or impose physical demands which could, in the opinion of the master, jeopardise the safety of the ship, her crew, passengers or cargo. This particular resolution provides a number of examples of clear grounds for further inspection including the absence of an up to date muster list.
- (c) Resolution A.542(13) and MEPC 26(23), which provide detailed guidelines on the procedures for the control of ships and discharges under Annex II of MARPOL.

The Donaldson Report into sub-standard shipping¹² identifies two weaknesses with the above measures of control. Firstly, it highlights the fact that the measures set out in UNCLOS and the IMO resolutions do not fully protect good shipowners from inspections at every port of call, with the consequent inevitable, although often minor, disruption to the ships routine when Port State Control officials board the vessel and require the production of the relevant certificates. Secondly, the measures shown above do not adequately deal with sub-standard ships. The report suggests that this is because the measures for control provided for in SOLAS and other conventions are based upon the assumption that notification of deficiencies to the flag state and, if they have not been fully remedied, to the authorities at the next port of call, will ensure that in the future the ship will meet international standards.¹³

"This is an entirely false assumption given the lamentable state of much Flag State Control and the fact that the next port of call may be in a State which has an equivocal attitude to Port State Control or has inadequate resources to follow up the notification. Once a ship has been found to be sub-standard she needs careful watching for the future. All ports at which she may thereafter call and not just the next port, need to be alerted to this fact."¹⁴

As it can be seen, there is clear support for Port State Control in the international community but it is also apparent that the measures prescribed by convention and resolution are not all encompassing. It is up to the State involved to make the system work. It will be as effective as it is allowed to be. In this light, it is useful to consider the steps taken by the

¹² Safer Ships Cleaner Seas: Report of Lord Donaldson's Inquiry into the prevention of pollution from Merchant Shipping (HMSO) May 1994

¹³ paragraph 11.14 pg137

¹⁴ ibid 11

United States in the adoption of legislation to compliment the international measures and , likewise , the steps taken by the States involved in the Paris MOU. These States have adopted an aggressive position on Port State Control and it has payed off by causing owners of sub-standard ships to think twice before sending their vessels to such ports. But why has Port State Control become so important? The answer to this lies , as suggested earlier , in the failure of other original sources of control.

FLAG STATE CONTROL

Aside from the international conventions and resolutions which permit Port State Control , there are other contexts in which sub-standard shipping can be controlled. In accordance with international law , each State has the right to exercise control over the ships that fly its flag. In international customary maritime law it is obligatory for any State which allows the registration of ships under its flag to effectively exercise its jurisdiction and control in administrative , technical and social matters over ships flying its flag.¹⁵ We are talking here about Flag State Control. The Flag State of a vessel is required to take such measures for ships flying its flag as are necessary to ensure safety at sea with regard to (inter alia) construction , maintenance and seaworthiness , manning , labour conditions , crew training and the prevention of collisions.¹⁶ Article 94(5) of UNCLOS III also imposes a duty on Flag States to take any steps that may be necessary to secure observance with generally accepted international regulations , procedures and practices. This is achieved by the Flag State issuing to its vessels safety certificates which confirm compliance with the main international conventions , without which it is practically impossible to trade the ship world-wide. It has even been suggested that these certificates are the key to the Port State

¹⁵ UNCLOS III , Article 94

¹⁶ Tulane lecture pg 5

Control system.¹⁷ In principle the idea of Flag State control is ideal , each State taking responsibility for its vessels and ensuring the maintenance and safety of its fleet. In practice , however , the picture is somewhat different. The raising of the flag of convenience and , more detestable , use of such flags by unscrupulous shipowners to discharge their responsibilities , has caused the effectiveness of the Flag State as a measure against sub-standard shipping to weaken. This was noted in the Donaldson Report in the quotation that ended the previous section , but this fact has given rise to far more vocal and passionate feelings.

"Flag States are just a laugh. You tighten up one Flag State and another one starts. It is just ludicrous. You never get a lasso on all those different Flag States. Most of the Flag States are not serious players , they are just in it for the money. But Port States have a serious interest in the quality of the ships coming in because of their local environment and because they do not want ships screwing up Port facilities. I believe Port State Control is the best Answer because Ports have no axes to grind , no contractual liabilities or contractual obligations to the owner. If the Port authority does not like his ship , they should have no problem about making it pretty damned public."¹⁸

Some of the complaints which concern the effectiveness of Flag States have recently focused on the part played by classification societies. Many Flag States rely heavily upon classification societies to ensure that their vessels comply with standards laid down by the I.M.O . Just as all Flag States are not of equal standard , neither are classification societies and not all the societies apply the rules with the same enthusiasm and care. This results in some shipowners leaving the

¹⁷ Tulane lecture pg6

¹⁸ Clarke: op cit pg204 ; quoting Roger Nixon

tougher classification societies for the more liberal ones , with a resulting lowering of standards. Apparently the classification society community has been listening to these complaints and some members have taken action. In March this year (1995) the world's three leading classification societies , Lloyds Register , the American Bureau of Shipping and Det Norske Veritas , joined forces to launch a new series of initiatives to combat the problem of sub-standard shipping. The societies , in an article in Lloyds List¹⁹ , said their aim was to establish a momentum for change that would be unstoppable. The initiatives include automatically suspending class for vessels whose special renewal and annual surveys become overdue , withholding class from vessels shifting register until all requirements of the previous society have been met and releasing vessel information hitherto regarded as confidential to Flag States , Port States and Insurers. The societies also decided to tighten procedures for the employment and control of non-exclusive surveyors and to introduce a minimum standard for monitoring surveys , as well as new criteria for the qualification and training of their own surveyors. They also decided to establish new procedures for responding to Port State Control before and after inspections. The societies are under no illusion as to the fact that these steps will cost them financially and they expect to lose business in the short term , but according to the societies the cost is not important. It is hoped that this move will have the desired effect of causing the other classification societies to come around to the same position. This is a positive move towards addressing the problem of the sub-standard ship which will , we hope , alleviate some of the pressures placed upon Flag States and will definitely make the Port State's job far easier.

¹⁹ March 29 1995 , pg1

SYNOPSIS

Port State Control has become increasingly more important until it has now reached the stage where it can be convincingly argued that it is indispensable. The Port State is , as was mentioned above , the State that has most to lose by allowing sub-standard ships in its waters. It has a vested interest in controlling the ships that visit its waters and ports. It is this State that will suffer when oil washes up on its beaches or wrecks litter its coast and port entrances. It is this State that will have to foot the bill when the owner disappears without a trace. It is this State that will have to repatriate the crew should they be lucky enough to survive ; if not , this is the State that will have the grim task of recovering the bodies wherever they turn up. It is unreasonable to expect the Port State to wait and watch as all these things happen. Port State Control is an essential and probably the most effective , measure in the war on sub-standard shipping. We should have learned from trade and industry by now that , if you want something done well , there must be an incentive. The Port State , of all the participants in the war on sub-standard shipping , finds the best incentive in self preservation.

With this in mind we shall consider the most effective way of improving the Port State Control system in South Africa. To do this effectively , we shall look at comparative jurisdictions that have a reputation and a record to match , of having good Port State Control measures.

CHAPTER 2

PORT STATE CONTROL IN THE UNITED KINGDOM

PORT STATE CONTROL IN THE UNITED KINGDOM

In the United Kingdom (U.K) the Marine Safety Agency (MSA) is responsible for carrying out both Flag State and Port State Control inspections. The MSA came into being on the 1 April 1994 and is an executive agency of the Department of Transport. Prior to the MSA , the Surveyor General's Organisation (SGO) was part of the marine directorate of the DOT. The function of the MSA is similar to that of the SGO , although it has taken on additional responsibility in the form of the Register of Shipping and Seamen. The MSA operates within a strategy for marine safety and the prevention of pollution from shipping , laid down by the Secretary of State for Transport , on advice from the departments Shipping Policy Directorate , after consultation with the MSA. The aim of the MSA is "to develop , promote and enforce high standards of marine safety and to minimise the risk of pollution of the marine environment from ships , within the policy framework set by the Secretary of State."¹

The MSA has three main areas of activity , viz. Marine Standards , Survey and Certification and Inspection and Enforcement. There is no real difference between Flag State and Port State responsibility with respect to the approach each has to their task. The MSA is well staffed in comparison to other similar bodies and , at 1 April 1994 , it had a staff compliment of 376. Of these posts , 198 are for professionals who concentrate on the technical aspects , including the survey and inspection of ships. The MSA employs three basic classes of surveyors²:

- (a) Nautical Surveyors - These are all ex-seafarers with the requisite high qualifications. They have all served as a

¹ Donaldson Report , par. 6.16 , pg60

² Donaldson Report , Appendix C , para. C.14 , pg 417

Master or Chief officer on foreign going ships and have good and safe service records.

(b) Engineer and Ship Surveyors - These are usually ex-seafarers , some with a Royal Navy background and are generally chartered engineers. They are also required to have qualifications of a high standard and must have at least three years experience as a watchkeeping engineer.

(c) Ship Surveyors - These must have a degree or equivalent in naval architecture. They must have at least seven years experience , following a suitable period of training , in an establishment concerned with ship building , design , operation or relevant research , including at least three years in a position of responsibility.

Clearly , these posts are not taken lightly , as can be seen by the strict qualification requirements. Marine surveyors are expected to cover a wide range of duties , including the survey of hulls , main and auxiliary machinery , boilers and navigation equipment and inspection of manning and cargo aspects such as overloading and passenger and crew accommodation. The surveyors are not split into Flag State/Port State groupings; the surveyors can be called upon to do either.

Port State Control inspections in the U.K are based upon the procedure laid down by the Paris MOU. The actual inspections are carried out in a prescribed manner and include preliminary inspections and inspections of specific areas (which may result in a more detailed inspection by a single inspector or a team of inspectors). Once the inspection is completed , a preliminary report of the inspection is filled out. A more detailed report may be completed later and the main details are entered on the SIRENAC database. In the U.K , Flag State and other work is statutory and therefor takes precedence over Port State Control.

Port State Control inspections involve approximately 7% of the MSA's staff resources at an annual cost of 1 million Pounds. The Donaldson Report makes an interesting comment here by comparing the amount spent on preventative measures viz. the 1 million Pounds and the amount spent on measures to respond to disasters viz. 3.5 million Pounds. Surely prevention is better than cure?³

A major investigation was launched in January 1993 in the U.K under the guidance of Lord Donaldson ,

"to advise on whether any further measures were appropriate or feasible to protect the U.K coastline from pollution from merchant shipping."⁴

The thrust of the enquiry was directed at the prevention of pollution but the report dealt quite extensively with the issue of Port State Control and made a number recommendations of value. The Report was presented to Her Majesty in April 1994.

SAFER SHIPS CLEANER SEAS

This report , referred to as the Donaldson Report , considered the need for Port State Control and , while it recognised the long term aim as being the improvement of Flag State Control , it recognised that until that occurs , Port State Control will be the U.K's first line of defence against the pollution of its coastline.⁵ The report also suggested that Port State Control could not be fully effective without the collaboration of States in a particular region.

THE PARIS MEMORANDUM OF UNDERSTANDING AND THE U.K

The Paris Memorandum of Understanding (MOU) of 1982 has sought to address a number of problems and uncertainties that arise from the international conventions and IMO resolutions. The two

³ Safer Ships Cleaner Seas pg143

⁴ Opening page of report

⁵ pg135

important problems it tries to rectify , as stated earlier , are firstly , the protection of good shipowners from inspections at every port of call and , secondly , the fact that sub-standard ships are not adequately dealt with. The MOU seeks to address these problems by:

"co-ordinating and harmonising the efforts of parties in relation to Port State Control with the objective of achieving greater success in securing the compliance of ships with international standards regarding the safety of life at sea , pollution prevention and on-board working and living conditions."⁶

In April 1994 the parties to the Paris MOU were The U.K , Belgium , Finland , Denmark , France , Germany , Greece , Ireland , Italy , The Netherlands , Poland , Portugal , Spain and Sweden. The operation of the MOU is coordinated by the Port State Control Committee , which has representatives from each of the member States and the European Community. The IMO and International Labour Organisation act as observers. The Secretariat serves the commission and is responsible for the daily running of the MOU. The Secretariat is based in the Netherlands. The MOU utilises a database called SIRENAC (Systeme d'Information Relatif aux Navires Controles) which is maintained by the Centre Administratif des Affaires Maritimes (CAAM) at St Malo , France. Ship inspectors in the U.K also have access to a database called the Ship Inspections And Survey (SIAS) database. This database contains details of both surveys and inspections of U.K flagged ships and of Port State Control inspections carried out in U.K ports. SIAS is capable of holding more detailed Port State Control information than SIRENAC. The MOU members have agreed to inspect not less than 25% of the foreign ships entering their ports in a year. They have further

agreed to avoid inspecting ships outside targeted categories if they have been inspected within the previous six months , unless there are clear grounds for doing so. It is estimated that 80% of ships entering the Paris MOU ports are inspected at least once a year. The U.K has set itself a higher target than the 25% adopted by the Paris MOU , viz.30%. The U.K has succeeded so far in achieving this rate of inspection. The Donaldson Report feels that the increased rate of inspections is reasonable as long as the proportion of sub-standard ships is as high as it is.⁷ The report even suggests that an increase in this rate of inspection , subject to a system whereby good shipowners are sheltered , would not be unfounded.⁸ The contrary argument that the Report is trying to quell here is the argument that increased inspection unduly disrupts the life of vessels. There has been an attempt to target certain ships where the consequences of deficiencies would be particularly serious or which are more likely than others to be sub-standard. This has been achieved by an agreement between the Paris MOU States which currently requires them to pay special attention to:

- (a) Passenger and roll-on roll-off ships.
- (b) Ships with a special hazard such as oil , chemical or gas carriers.
- (c) Ships which are known , from Paris MOU data , to have had several recent reported deficiencies.
- (d) Ships of specified Flag States that have a poor safety record as measured by their detention rate within the Paris MOU.
- (e) Bulk carriers.

The move towards targeting specific States represents a major development which was long resisted by some Paris MOU member States. "It recognises that failings may lie not only with the operators of the sub-standard ship but also with

⁷ para. 11.18 , pg139

⁸ *ibid.*

the supervision and control exercised , or not exercised , by her Flag State."⁹

Of the 14 783 inspections carried out in 1992 , the Paris MOU report for that year showed that over 45% revealed deficiencies. Of these , 5.6% were so serious that they resulted in the detention of the vessel in the interests of the safety of crews and of the environment. The Donaldson Report suggested a strategy for the future as it considered that the figures revealed indicated that

"some shipowners have reached the conclusion that the balance of commercial advantage lies in ignoring the effects of the Paris MOU Port State Control."¹⁰

The Report believes that such a conclusion is reached only after the parties have considered and weighed up

- (a) the chances of being inspected;
- (b) the chances of the sub-standard condition and operation of their ships escaping detection upon an inspection ;
and
- (c) the degree of the adverse consequences of an inspection which reveals that a ship is sub-standard.¹¹

The Report concludes that the objective must be to alter the above equation by

"improving both the apparent and the actual chances of the ship being inspected , improving the detection rate amongst ships inspected and increasing the financial and other disincentives to be found to be operating a sub-standard vessel."¹²

⁹ Para. 11.20 , pg139

¹⁰ Para. 11.37 , pg143

¹¹ *ibid.*

¹² *ibid.*

The principle recommendation designed to achieve the above is found in paragraph 11.40 of the report and is a system of self-targeting to be introduced throughout the Paris MOU region. The Foundation of the scheme would be a shipborne record of the result of Paris Mou inspections - the Paris MOU logbook coupled with a new notice requirement. The self-targeting system should not be confused with self-regulation and it would oblige ships to report themselves to the regulators. The self-targeting system would apply to ships belonging to the register of a Paris MOU State even when visiting ports in their own country of registration.

The Report recommends that the U.K Government , together with its Paris MOU partners , should introduce a Port State control log book for ships calling at Paris MOU ports¹³. The idea being similar to that of the MARPOL requirement that certain oil tankers carry a survey history file from mid-1995 onwards. The form of the log book would be decided by agreement and would be issued to vessels upon their first inspection by a Paris MOU Port State Control authority. The report is quick to stress that the introduction of the Paris MOU log book would in no way displace the need for the SIRENAC database. The fact that the logbook had been issued would be included in the computer record. The database would also be required to check that no unauthorised additions or omissions had occurred in the new logbooks and also to provide statistical and other information such as the proportion of ships in particular categories which were subject to notice requirements. The Report also notes that the capacity of the SIRENAC database is limited , in that it records whether deficiencies were found or not and , if so , the broad category of the deficiency¹⁴. It does not reveal the extent

¹³ Para. 11.42 , pg144

¹⁴ Para. 11.44 , pg144

and nature of the inspection (e.g. bridge , communications , safety devices etc.) or a detailed description of the deficiencies. This information , according to the Donaldson Report , could and should be stored in the Paris MOU log book¹⁵.

THE SELF-TARGETING SYSTEM

Once the system started , every vessel bound for a Paris MOU port which had not been the subject of a Paris MOU inspection within the previous 12 months (perhaps six months for some types of vessels) would be required to give the Port State Control authority of the State concerned 48 hours notice of her intended time and place of arrival. As far as resources permitted and it would be essential that they did so permit , that ship , on her arrival , would be subject to as thorough an investigation as international law allows. Ships would be required to continue giving notice at each Paris MOU port until inspected for the first time under the new system. At the first inspection the ship would be issued with her Paris MOU log book. This requirement would also apply , once the system was established , to any ship visiting a port in the Paris MOU region for the first time. Failure to give the required advance notice of 48hrs could lead to a discharging or loading ban for 48hrs from arrival; a case of the punishment exactly suiting the crime¹⁶.

The contrary argument is that the Port State Control authorities could find out whether a ship had been the subject of a Paris MOU inspection by consulting the Paris MOU database. This is correct , although access to the database can be subject to delays. Furthermore the report responds by saying that harbour authority information as to whether and when the ship will arrive is not as easily attained as from the ship herself or her

¹⁵ *ibid.*

¹⁶ Para. 11.74 , pg152

owners¹⁷. The Report does continue to stress that this is not the point and that the primary object of the exercise is to draw the attention of the shipowner to the fact that his ship is highly likely to be inspected¹⁸.

The subsequent self-targeting regime would depend upon the result of the first inspection. The Donaldson Report envisages several possible scenarios¹⁹:

- (a) no deficiencies are found. If this occurs it would be recorded in the Paris MOU log book which the Master would be able to produce whenever he entered a Paris MOU port. Prima facie it would be a passport to freedom from inspection for the next 12 months (six months for some vessels) in the absence of clear grounds for suspecting that deficiencies have been overlooked or that deficiencies have arisen subsequent to the inspection. This, according to the Report, should be appreciated by shipowner's and managers who take the trouble to ensure that their ships are maintained to or above the appropriate international standards. At the end of the 12 months, or the appropriate period, the ship would be required to report again on her next visit to a Paris MOU port. It would be for the authorities concerned to decide whether or not to inspect her. Ships which were consistently found to be free of deficiencies should expect to be inspected progressively less frequently.
- (b) deficiencies are found which do not justify detention and are remedied or are said to have been remedied before the ship sailed. This ship would be required to give advance notice of her arrival at subsequent Paris MOU ports of

¹⁷ Para. 11.47, pg145

¹⁸ Para. 11.47, pg145

¹⁹ Para. 11.48, pg 145

call until an inspection resulted in a report that no deficiencies were detected.

- (c) deficiencies are found which would justify detention , but for the fact that the owners undertake to effect the repairs at a subsequent port of call. There would be two consequences in this situation. Firstly , the specified port would be informed regardless of whether it was a Paris MOU port or not. Secondly , the notification requirement would be longer lasting than if the deficiencies had been remedied before the ship sailed. At the ship's next Paris MOU port of call she would be inspected to confirm that the deficiencies had been remedied and the notification requirement would be removed only if on a subsequent inspection she emerged with a clean bill of health. If the inspection at the next visit to a Paris MOU port revealed that the deficiencies still had not been put right the ship would be subject to detention. Continuing the notice requirement would help to meet the problem of following up on ships which were given leave to remedy deficiencies at a subsequent port of call.
- (d) deficiencies are found which lead to the detention of the vessel. A notice requirement would be imposed or , if already in existence , maintained for a further period of 12 months after which the normal initial notice requirement would again apply to the ship. Such a ship would be liable to inspection at every visit to a Paris MOU port within the 12 month period even if inspections during that period find her free of deficiencies. Whether she was or was not inspected on each occasion would be a matter for Port State authorities in the light of the results of subsequent inspections , but the shipowner would know that his ship was at a high risk of being inspected.

The Donaldson Report considers it a mistake to concentrate attention simply upon individual ships. The Report considers it trite that there are no sub-standard ships without sub-standard owners or managers and , in so doing , concludes that if one ship in a fleet in the same ownership or management failed to meet international standards , there is a high probability that others also will. The Report therefore recommended that if more than one of several ships in the same ownership or management is found to be sub-standard on inspection in Paris MOU ports , a notice requirement should be imposed on all the ships in the same ownership or management²⁰.

"To enable the targeting of certain shipowner's and managers we recommend that:

(a) ships with a notification requirement should be required to disclose the names of their owners and managers when giving notice to Paris MOU authorities ; and

(b) the names of owners and managers should be recorded both in the Paris MOU logbook and on the SIRENAC database. SIRENAC already records the names of owners but will need to be amended to include managers as well."²¹

The suggested scheme is also aimed at causing as little inconvenience or extra work to the Master of the ship as possible e.g the advance notice of arrival under the scheme should be capable of being combined with any other reports required by MAREP (Marine Reporting , a body formed by the IMO) , the European Community directive on vessels carrying dangerous goods or any other scheme. The report also envisages that the exceptions to the self-reporting system be as few as possible

²⁰ Para. 11.49 , pg146

²¹ Para. 11.50 , pg146

but , for reasons of practicality , the notification requirement should not be applied to cross channel and other short sea ferries which call at Paris MOU ports several times a day. Special attention is envisaged for such vessels because of the risk to passengers (e.g. The Herald of Free Enterprise) but this is better achieved by a regime of inspection tailored to their special voyage patterns²².

The Report envisages little difficulty in the monitoring of the self-targeting since if any ship arrived in a Paris MOU port without having a Paris MOU log book on board and without having given advance notice of her arrival , she would clearly be in breach of her obligations under the scheme. Equally the log book , if produced , would show whether the ship was subject to a requirement to give advance notice of arrival²³.

The Report also considers the need for a degree of discretion to be involved in the inspection of ships. The Report goes as far as attaching "great importance" to the maintenance of the discretion of Port State Control inspectors. Shipowners and managers with a good record are deserving of consideration and in these cases an inspection may reasonably be of limited scope. The Report does , however , stress the importance of proper Port State Control in upholding international standards²⁴.

The effect of the proposals on self-targeting are considered by the Donaldson Report to place greater emphasis on the Paris MOU criteria relating to ships with known recent defects. Other criteria would still remain in place. These criteria would be taken into account in two situations; firstly , as a guide to

²² Para. 11.54 , pg147

²³ Para 11.55 , pg147

²⁴ Para. 11.56 , pg147

the use of resources not committed to other inspections as a result of self-targeting and , secondly , in order to provide a check on the extent to which self-targeting was proving effective in high risk categories. There would continue to be a need for some random inspections independent of self-reporting in order to ensure that ships were complying with the notification requirements²⁵.

The Paris MOU system utilises the quota System viz. Paris MOU States are obliged to inspect 25% of the foreign shipping entering its ports per year. Under the system proposed by the report it would be self-targeting which would dictate the proportion of the work undertaken by each State and the existing quotas would become redundant. "The work would be demand led not quota led"²⁶. The Report envisages the burden of the work in the North East Atlantic falling upon The U.K , France , The Netherlands and possibly Germany because these countries provide a first and , often only , port of call in the area.

SOURCES OF INFORMATION

The Report considers the use of information from third parties in Port State Control inspections and attaches importance to the Port State Control inspectors having access to the widest possible sources of information. Some of the sources discussed and considered are:

- (a) harbour authorities. Port State Control in the U.K relies heavily on information from harbour authorities on impending arrivals at U.K ports. The Report suggests that should it become clear that harbour authorities are not providing this information as required , we recommend that

²⁵ Para. 11.47 , pg148

²⁶ Para. 11.59 , pg148

the U.K government should consider imposing a statutory obligation to ensure they do so²⁷.

(b) pilots , harbourmasters and others are also a source of potentially useful information.

(c) major oil companies which carry out tanker inspections.

The Report makes reference to evidence received from one major oil company that , of the 3500 tanker inspections it carried out in 1991 , about one in five were sub-standard to the extent that they could not be recommended for charter²⁸.

(d) the Salvage Association (founded in 1856 by underwriters in London to carry out and co-ordinate surveys on behalf of the underwriters. The association now acts as the technical arm of the London Insurance market.) which conducts surveys on behalf of the Joint Hull Committee of the Institute of London Underwriters and Lloyds Underwriters Association. It is reported²⁹ that by June 1993 , full Structural Condition Surveys had been carried out on 147 ships of which only 30 passed first time without the need for recommendations. Almost 800 less intense Condition Surveys had also been carried out , a number of which matured into full Structural Condition Surveys. The Salvage Association also has information on worldwide marine casualties and incidents which , until 5 April 1994 , it made publicly available on a daily basis. The Report recommends that the U.K government ask the Salvage Association to reconsider the halting of this publication³⁰.

²⁷ Para. 11.61 , pg149

²⁸ Para. 11.62 , pg149

²⁹ *ibid.*

³⁰ *ibid.*

- (e) the Protection and Indemnity clubs. The U.K club has a programme of ships visits which concentrates on various aspects of a ships performance including standards of operation and management. It was reported³¹ that between June 1990 and July 1992 , 832 ships were visited and of these 349 were in an acceptable condition , 403 had minor deficiencies which required attention and 80 received such adverse reports that they were required to undergo a condition survey under club rules.
- (f) the classification societies who carry out surveys on behalf of Flag States and shipowners.

These are additional sources of information which are available and would be beneficial to Port State Control. The Report considered the value of these sources and also considered a statutory obligation to make these reports and observations available to the MSA³². The Report , however , came to the conclusion that this would be undesirable as it might create conflicts of interest and confidentiality and could also result in reports being characterised by tact rather than by realism. In this light the Report recommended that the DOT should foster the "closest possible relations³³" with these sources of information and , to the extent that they too have a need to know , should make their own information available to them³⁴. The Report further recommended that the U.K government should encourage other Paris MOU countries to adopt a similar approach. The Report makes particular reference the Oil Companies International Marine Forum's (OCIMF) Ship Inspection Report Exchange (SIRE) which was launched in October 1993. The Report expresses its support for SIRE which involves the voluntary

³¹ *ibid.*

³² Para. 11.63 , pg150

³³ *ibid.*

³⁴ *ibid.*

submission of tanker inspection reports by the 34 members of OCIMF to a central database. Information is available to all OCIMF members and also to non-member organisations³⁵.

SATURATION INSPECTIONS

The Report also considers the notion of saturation inspections³⁶, which would involve the U.K government occasionally inspecting all ships entering a particular port in a particular period. The Report considers that the perceived risk of inspection is at least as important as the actual risk itself. This system of saturation inspections is already undertaken by U.K Port State Control on an occasional basis. While the Report recognises that at any particular time a saturation inspection in one port may reduce the actual risk of being inspected in other ports, the shipowners will be required to weigh the risk that their ships may be destined for a port where there is a 100% inspection rate. The Report continues to recommend the adoption of such a programme throughout the whole Paris MOU region and suggests that the programme and its results should receive maximum publicity (while no advance notice should be given as to where such inspections are due to take place).³⁷

The Report recommends that the U.K government should highlight exceptional cases of sub-standard ships more frequently and persuade its Paris MOU partners to do so as well. This recommendation was made in the light of one such case. This involved a general dry cargo carrier, the MV Stella, which was inspected in Southampton in November 1993. She was built in 1965 and registered in St Vincent and Grenadines. In the previous two years she had been detained at various MOU ports no

³⁵ Para. 11.64, pg150

³⁶ Para. 11.65, pg150

³⁷ Para. 11.66, pg150

less than three times. She was found to have a number of serious deficiencies which eventually resulted in the vessel leaving Southhampton under tow. This particular incident was highlighted in the press and was featured prominently on local television.

ENFORCEMENT

The Report also looks towards increasing the seriousness of the consequences of deficiencies being found. The Report advocates the position that the consequences of any inspection which reveals deficiencies must hurt the shipowner³⁸. The Report refers to the Australian report , Ships of Shame³⁹ , which recommended that a penalty surcharge be imposed on sub-standard vessels⁴⁰. This idea was rejected by the Australian government on the grounds that detention , and the cost incurred thereby , is a sufficient sanction. The Report , while acknowledging this fact , points out that this very fact , together with a threat of a claim for compensation under SOLAS Chapter I Regulation 19(f) or under equivalent provisions in other conventions and the strength of the representations which are usually received from those with an interest in the vessel , renders detention a sanction which is used with extreme reluctance⁴¹. The Report favours a scale of increasing sanctions to be applied not only in cases of detention but in other cases where detention is deemed inappropriate. The Report considers a number of such sanctions with particular emphasis on the denial of the right to enter U.K ports and the denial of the right to discharge and load. It rejects the sanction of denying access to U.K ports but

³⁸ Para. 11.70 , pg151

³⁹ Report from the House of Representatives Standing Committee on Transport , Communications And Infrastructure. December 1992

⁴⁰ Ships of Shame , pg 81 , 4. c)

⁴¹ Para. 11.70 , pg151

clearly recommends that the U.K. should itself act and encourage other Paris MOU countries to take powers to impose the sanctions suggested⁴². The Report supports sanctions that affect the discharging and loading of vessels in Paris MOU ports⁴³. These sanctions range from a few hours to an absolute ban on a particular ship or fleet of ships for a longer period, perhaps several months. A change of flag or the name of a ship is not a bar to such action as all ships have permanent and immutable IMO numbers which would be used for identification purposes⁴⁴.

ECONOMIC IMPLICATIONS OF PORT STATE CONTROL

One of the most important functions of the Donaldson Report was to consider the economic implications of the measures it recommended. Clearly, new measures and ideas can not be rationalised or considered until a monetary amount can be placed alongside to ascertain whether the new measures are indeed viable or merely wishful thinking. The Report follows the principle that it is the polluter or potential polluter who should pay⁴⁵. It has been argued that "policing" inspections should not be paid for by those being policed. However, the Report gives a couple of examples where this takes place and is considered entirely acceptable. The most important example is the Civil Aviation Authority which recovers its costs in enforcing safety standards from aircraft operators through the fee's it charges them. The Report is of the opinion that the numbers of such charges are likely to increase rather than decrease and can see no reasons why Port State Control should be any different from the Civil Aviation Authority⁴⁶. The Report

⁴² Par. 11.72, pg152

⁴³ Para. 11.73, pg152

⁴⁴ Para. 11.81, pg153

⁴⁵ Para. 22.17, pg350

⁴⁶ Para. 22.19, pg350

favours a system that recovers costs in an equitable manner and imposes penalties where they are deserved⁴⁷. An important part in this consideration is that all ships receive equal treatment within the Paris MOU club and for ships of all nations.

The Report believes that the best solution is to charge the shipowners for inspections on the basis of rates which would produce a full cost recovery⁴⁸. The reasoning here being that the need for Port State Control stems from the conduct of the industry as a whole in putting sub-standard ships to sea. The Report believes that a modest extra charge for Port State Control is a small price to pay for the potential benefits. The Report then addresses the question of whether there should be a scale of charges or whether there should be a single flat rate? The Australian Maritime Safety Authority uses the flat rate system which has its benefit in its simplicity. The Donaldson Report, however, favours a scale of charges and believes that this system has "considerable advantage" in that the heaviest charges will fall on the worst ships⁴⁹. It does recognise that such a system will result in the average charge being heavier but believes that the incentive is created to have no deficiencies and in so doing avoid inspections. The Report further recommends that a new fund be set up to pay for all Port State Control inspections and that this should be funded by the shipping industry through a charge⁵⁰. The U.K government is encouraged to consult widely, not only with its partners in the Paris MOU, on the system of charging for Port State Control. The aim should be full cost recovery and the system should ensure, as far as practicable, that ships found to be

⁴⁷ Para. 22.20, pg350

⁴⁸ Para. 22.22, pg351

⁴⁹ Para. 22.25, pg351

⁵⁰ Para. 22.25, pg351

seriously deficient incur higher charges than those found to be free of or with only minor deficiencies. The Report suggests that the long term aim should be for a similar system of charging to be applied by all Paris MOU States . The principles to be followed should be that the charges should be sufficient ,
"but not more than is required , to meet the costs taking one year with another ; that clear , separate accounts should be published ; and that economy , effectiveness and efficiency should be demonstrated."⁵¹

SYNOPSIS

It is clear that the U.K enjoys an advanced system of Port State Control and that the whole subject receives a great deal of attention. The U.K has been rather fortunate to date that no serious casualties have occurred off her coast and that those casualties which did pose a threat did not turn out as disastrously as anticipated e.g The Braer and the Tory Canyon. What is clear is that the U.K has identified the threat and has also identified the measure that will most help to combat that threat. The U.K's commitment to Port State Control is clearly visible through her present system of Port State Control , her involvement in the Paris MOU , and her investigation into ways in which to make the system more effective (The Donaldson Report). The U.K presents a good example for other States to follow if they are serious about Port State Control.

⁵¹ Para. 22.26 , pg351

CHAPTER 3

PORT STATE CONTROL IN AUSTRALIA

PORT STATE CONTROL IN AUSTRALIA¹

The second comparative jurisdiction we shall look at is Australia. Australia is not far behind the United Kingdom in its initiatives regarding Port State Control. While Australia may be regarded as a successful Port State Control State, it has only recently moved in the same direction as the U.K by looking at a regional system of Port State to compliment its national measures. Up until this stage, Australia has relied on its own measures to protect its coastline and those who frequent its ports, a position that South Africa is currently in. For this reason Australia is probably a more useful jurisdiction to look at when considering the South African position.

THE AUSTRALIAN SYSTEM

The Australian Maritime Safety Authority (AMSA) conducts an extensive Port State Control programme. This programme is carried out in accordance with the authority and responsibilities under the Safety of Life at Sea Convention (SOLAS), the Marine Pollution Convention (MARPOL), the International Load Line convention, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) and other relevant conventions and resolutions (these being the same as those in the United Kingdom as set out in the previous chapter). Australia, like any other signatory to a convention, has an obligation to implement and administer the various conventions to which it is a signatory. The current programme that AMSA follows with regard to the inspection of foreign flagged ships visiting Australian ports was commenced by the Australian Department of Transport and Communications in 1986. In February 1987 this programme was

¹ All information and statistics on Australian Port State Control come from the Australian Port State Control Report of 1994 by the Australian Maritime Safety Authority.

extended to cover health and safety standards based on the International Labour Organisations Merchant Shipping Convention of 1976. With the establishment of AMSA in 1991 the control of these activities was passed on to AMSA. AMSA is , therefore , responsible for a host of functions and can administer Australian law so as to give effect to international maritime safety and pollution prevention conventions. AMSA has its head office in Canberra and , apart from the staff located here , it has some 45 surveyors under its employment situated at its 16 offices throughout the country. These are the staff that are responsible for conducting the Port State Control inspections.

Under its current Port State Control system the target for inspections of foreign ships visiting Australian ports is 25%. This percentage is based on the number of ships eligible for inspection that visit Australia during a given year. An eligible ship is a ship which has not been inspected by AMSA within the six months (three months for passenger ships) immediately preceding the date of arrival at a port. The number of inspections carried out in Australian Ports has steadily increased since AMSA took over in 1991. The 1991 total of foreign ships inspected of 783 has grown substantially viz. 1720 ships inspected in 1992 , 2003 ships in 1993 , and 2406 in 1994. The highest number of inspections occurred in the ports of Dampier , which had 260 inspections in 1994 , New Castle , 264 inspections in 1994 , and Sydney with 184 inspections in the same year. These figures represent actual inspections undertaken by AMSA surveyors. In addition to these inspections , customs officials check statutory certificates of all foreign vessels on arrival and departure from Australia. The inspection percentage of these is almost a perfect 100%. The 2406 ships inspected in 1994 represent 72 countries , the total number of ship visits made in Australian ports during 1994 is estimated at 11 800. Many of these visits were made by regular traders and ships

calling at more than one port. Of these 11 800 ships , it is estimated that 4198 were "eligible" ships. This means that the inspection rate of target ships for the year of 1994 ran at some 57%. This is an exceptional rate of inspection and is more than double the target set by AMSA. Well over half of the vessels inspected , some 60.59% , were bulk carriers , the next highest was container ships , coming in at 8.18%. The Flag State that had the most of its ships inspected was Panama with 407 inspections , followed by Liberia with 209 inspections and the Philippines with 190 inspections. The above two statistics , type of ship inspected most and states undergoing the most inspections , show that Australia clearly targets specific classes of ships within its target inspection rate. Dry cargo carriers are known to be particularly dangerous ships as they have to withstand great loads and pressures which take their toll on the vessel and make the safe usage life of the vessel shorter than most other ships. It is interesting to note that in the United Kingdom dry cargo carriers are also targeted for this very reason. It should also be mentioned that these vessels would not have to be targeted were it not for the actions of the shipping industry in putting sub-standard vessels of this nature to sea , demanding that they carry loads that they can no longer safely accommodate. The other figure of interest , concerning the Flags of the vessels inspected , shows us that Australia has no qualms with targeting States that are known to be flags of convenience. All three of the States listed as having been inspected most are flags of convenience.

The total number of deficiencies detected in the inspection of ships for 1994 came to 9372 and the resulting number of hour' of delay or detention came to 5767. Considering that relatively minor deficiencies may not result in a delay , as they can be rectified during normal port time , the 5767 hours of delay or detention suffered by ships indicates the severity of the deficiencies presenting themselves at Australian ports. It is

important to note that 2415 of these 9372 deficiencies were noted in respect of life-saving appliances and 2027 were noted in respect of fire fighting equipment. These deficiencies account for nearly half (47.40%) of the total number of deficiencies observed in 1994. This is in itself an alarming statistic, as these are the basic safety devices required on board ships. Their neglect shows a genuine lack of concern for the safety of the crew of the ship on the part of the owners. It is believed, according to AMSA, that many of the deficiencies might have been prevented with proper maintenance and that the lack thereof is due to: inadequate management of ships by owners or operators; inadequate inspection or concern on the part of the ship's officers or crew; inadequate provision of resources for adequate rectification; inadequate inspections by the Flag State or, inadequate surveys being undertaken by classification societies authorised by the Flag State to perform inspections. The import of reduced crew numbers on board vessels also contributes to a lack of time and/or resources available for equipment maintenance. The blame for smaller crews must be placed squarely at the feet of those who manage the ship as they are the ones responsible for crewing the vessel.

As it was noted above, these deficiencies result in thousands of hours of delay as a result of detentions. In Australia a ship is detained under the Navigation Act when the deficiencies observed during an inspection are considered by the inspecting officer to be so serious as to make the ship unseaworthy or sub-standard. AMSA follows the international conventions' requirements of informing the Consul or nearest diplomatic representative of the ship's Flag State of the detention. In 1994 153 ships registered in 29 countries were observed to have deficiencies sufficiently serious to impair their seaworthiness and warrant detention. The detention rate expressed as a percentage of the total number of ships inspected is 6.36%, nearly double the 1993 rate of 3.59%. Of these detentions bulk

carriers , predictably , accounted for 71.24% of the ships detained in 1994.

It is essential to AMSA and Port State Control that the inspectors carry out inspections in a uniform manner. To this end AMSA has created its "Instructions to Surveyors". This particular publication concerns Port State Control and serves to provide guidance on the selection of ships for inspections and the uniformity of these inspections. The selection system used is aimed at providing the most efficient use of surveyor resources by targeting those classes of ships which have proved to be worthy of special attention. As mentioned before , the target inspection level for the year is 25% of the eligible ships entering Australian ports. The uniformity requirements for inspections are met by the inclusion in the "Instructions to Surveyors" of a guide for primary inspections and more detailed instructions related to individual aspects of a vessel such as life saving and fire fighting equipment , as well as the strength and watertight integrity of the hull.

The information on Port State Control inspections carried out by AMSA is stored and collated in a computer system called SHIPSYS. This system is operated on a mini computer in Canberra. The on-line and multi-user data entry is provided via AMSA's local area network , leased lines or through public lines via modems. The results of inspections are recorded by the inspecting surveyor immediately once the inspection is completed. This information is then readily available to all AMSA surveyors throughout Australia. This reduces the likelihood of a well found vessel being unnecessarily inspected at subsequent ports. This computer system is continuously being reviewed to ensure the integrity of the data and to simplify procedures for users. A major overhaul of the system was intended to be undertaken this year (1995) to improve its user friendliness and to make it

more compatible with similar international systems and to enhance its use as a management tool.

AMSA has an interest in assessing the effectiveness of its programme and , therefore , as both a program performance indicator and as a means of answering industry's questions AMSA has commissioned a study to assess the program. This study is being done by shipping analysts Simpson , Spence and Young in London. The study looks into the external impact of AMSA's inspection program. It will initially be a pilot study focusing on the iron ore trade out of North West Australia. It will concentrate on vessel availability for iron ore cargoes and will look at trends in the freight rates with comparable markets. AMSA concedes that a one-off report will probably show little , however , AMSA also believes that a trend analysis may be helpful in indicating some external impact of the program².

AUSTRALIA AND THE REGIONAL PERSPECTIVE

Within Australia there has been a move towards starting a regional Port State Control programme. Prior to 1994 the Australian Port State Control programme was carried out with little contact with other countries. It is , however , clearly visible from the Paris Memorandum of Understanding (MOU) on Port State Control that greater effectiveness can be achieved through regional co-operation. This resulted in the Asia-Pacific regional Port State Control programme which came into being on the 1 April 1994. This programme or MOU requires each administration involved to establish and maintain an effective system of Port State Control with a view to ensuring that , without discrimination , foreign merchant ships visiting its

² Patrick Quirk (General Manager of ship and personnel safety services of AMSA) in his address at the "Shipping Challenges and Opportunities in the New South Africa" conference in Durban , September 1995 , pg7.

ports comply with appropriate international standards. An inspection target rate has been set at 50% of ships operating in the region by the year 2000. The agreement requires each administration to consult, co-operate and exchange information with the other authorities in order to further the aims of the MOU. The countries whose administrations are parties to the MOU are Australia, Canada, China, Hong Kong, Japan, Korea, Malaysia, New Zealand, Papua New Guinea, The Russian Federation, Singapore and Vanuatu. To Administer the MOU, a committee and secretariat were formed. The committee has a representative of each of the authorities that have adopted the MOU. In addition to the members of the MOU a number of organisations and other countries have attended as observers at committee meetings. These include the International Maritime Organisation, the International Labour Organisation, the United Nations Economic and Social Commission for Asia and the Pacific, the Secretariat of the Paris MOU, the United States of America, Fiji, Indonesia, Philippines, Solomon Islands, Thailand and Vietnam. The committee's first meeting was held in Beijing in April 1994 and since then the secretariat has been established to service the committee. The secretariat of the Asia-Pacific MOU has its headquarters in Tokyo. A computer database has also been developed in Canada to aid the distribution of information on ship inspections between members. Australia sends the details of its inspections bi-weekly to the database.

It is important to note that the agreement follows the example of its European counterpart and takes the form of a MOU. AMSA stresses that it is not a diplomatic agreement which requires a higher degree of bureaucratic involvement by various government departments which often sees the aims of the agreement disappear within the context of the politics of the situation³. AMSA states

³ op cit pg10

that a diplomatic agreement is also an inflexible instrument that does not readily adapt to changing situations⁴. AMSA is very much in favour of the MOU form and advocates it for all future agreements on Port State Control⁵.

SHIPS OF SHAME

The Report of the House of Representatives Standing Committee on Transport , Communications and Infrastructure (the committee) , Ships of Shame , was published in December 1992. The catalyst for the inquiry which lead to the Report was the loss in close succession of six bulk carriers off the Western Australian coast between January 1990 and August 1991. The most well known case involved the Greek registered oil tanker Kirki. The Kirki was loaded with approximately 82 660 tonnes of light crude oil and was positioned 55 miles off the Western Australian coastal centre of Cervantes when her bow section fell off. This ship was in class with a reputable classification society and had been regularly inspected and should therefore have been structurally sound , yet it was clearly not. The structural integrity of the vessel escaped the notice of the classification society , the ship's managers , charterer and crew and , consequently , the lives of the crew were put at risk and the coast of Western Australia and the marine environment faced a major pollution threat.

The Report makes for harrowing reading at times and the reports of the conditions under which some crews are forced to live and work can be described as nothing short of atrocious. While it is not relevant to the present enquiry to engage in a discussion of the morality of these conditions , this writer would be remiss if he did not state that he strongly condemns the occurrences reported and hopes that the Port State Control system in South

⁴ *ibid.*

⁵ *ibid.*

Africa will develop sufficiently to deal swiftly and strongly with such cases.

The Report made a number of references to Port State Control inspections and favoured the approach that Port State Control was and should be the key element in ensuring acceptable levels of maritime safety. The Australian government's response was favourable and it accepted the general thrust of the recommendations. AMSA responded by taking certain measures including adding to the staff and increasing its offices , training schemes for surveyors and the publicising of details of inspections. The details which are now published not only include the ships' statistics but also expose the ships' owners , managers , as well as a list of the deficiencies. These details are passed on to the media and various industry sources. A progress report was tabled by the committee in November 1994 with its focus on the implementation of the december 1992 recommendations and the ongoing campaign against unsafe shipping.

SYNOPSIS

Australia has developed a very thorough and impressive Port State Control system. The voracity with which Australia has attacked the task at hand is commendable and can serve as an example to States with emerging Port State Control systems. The figures shown above speak for themselves , however , they do more than just speak. These figures challenge other States. If it is possible for Australia to achieve such an excellent inspection rate then it is possible for other States to do the same. Australia is a model for States that are not in areas of the world where it is possible to implement a Port State Control system by merely joining an MOU. This is particularly true of African States and South American States. States that are serious about Port State Control and all States should be , would be well advised to follow Australia's lead in creating a

good local system and then canvassing and initiating a regional scheme.

CHAPTER 4

PORT STATE CONTROL IN SOUTH AFRICA

PORT STATE CONTROL IN SOUTH AFRICA¹

In this chapter we shall look at Port State Control in the country that concerns us most, South Africa. South Africa lies on a major shipping route and as such we see a large volume of shipping traffic each year. Our ports service and supply vessels journeying from the east coast of the Americas to India and the Middle East. We also serve as a stop for vessels on their way from the western parts of Africa and vessels that are too big to traverse the Suez canal or are not prepared to pay the canal fee. Durban is the port that handles the greatest number of ships annually in Africa and Richards Bay handles the most tonnage of any African port. For this reason it is essential that South Africa has an effective system of Port State Control. A country which has as much coastline as South Africa has (in proportion to her its size) must protect its waters, coastline and ports jealously from the scourge of the sub-standard ship. We must never forget that we are firmly entrenched in the third world and the ramifications of disasters on our coast or in our waters will be far more serious than those in the first world.

SA =
big part

used for
PSC

X113: 3rd
world
...
1989 S.

THE SOUTH AFRICAN SYSTEM

In South Africa our approach to the international conventions that the United Kingdom and Australia subscribe to has had to be a little different. While the end result is the same, the way South Africa has gone about subscribing to the conventions is different. South Africa is a signatory to the International Law of the Sea Convention (LOSC), which arose out of the third United Nations Convention on the Law of the Sea (UNCLOS), thus, while we have not yet ratified the convention, we are bound by

SA = sign
LOSC

¹ All information on Port State Control in South Africa comes from a meeting held with Captain Dernier of the Chief Directorate of Shipping of the South African Department of Transport. The meeting took place on the 4 October 1995.

SOLAS
(MSA)

it. The Safety of Life at Sea Convention (SOLAS) finds expression as a schedule to the Merchant Shipping Act² (MSA). Similarly, the International Convention on Load Lines of 1966³ and the International Convention on the Standards of Training, Certification and Watchkeeping for Seafarers (STCW) of 1978⁴, also find expression as schedules to the South African MSA. The International Convention for the Prevention of Pollution from ships of 1976 appears in the form of an Act with the same name⁵. It is apparent that while South Africa may not have been party to these international conventions, it has ensured the adoption of the standards of the conventions by incorporating them into local legislation. Another Act of relevance to the operation of Port State Control in South Africa is the Marine Traffic Act⁶.

STCW

7 parties
reg,
but
nevertheless
adopted
own

Port State Control in South Africa falls under the Chief Directorate of Shipping in the Department of Transport (DOT). This Chief Directorate fulfils the same function as the British Marine Safety Agency (MSA) and the Australian Maritime Safety Authority (AMSA). There is, however, a substantial difference as the Chief Directorate of Shipping is a State controlled body which is not privatised in any way, unlike the British MSA and AMSA. The DOT is fully subsidised by the State and as a result the amounts it charges for surveys and inspections is minimal. Privatisation of the Directorate, particularly with reference to surveying and inspection duties is a difficult situation. Privatisation means the Directorate would lose a portion, if not all, of its subsidy. This would mean that the Directorate

privatisation
= difficult

² Merchant Shipping Act 57 of 1951, Schedule 2
³ Schedule 4 of the MSA.
⁴ Schedule 5 of the MSA.
⁵ International Convention for the Prevention of Pollution from Ships Act 2 of 1986.
⁶ Marine Traffic Act 2 of 1981

would have to make up the loss by increasing the charges for surveys. While this is in itself justifiable , in terms of the argument of the Donaldson Report⁷ that it is the shipping industry that puts ~~sub-standard~~ ships to sea and so it is the shipping industry that should bear the costs of policing these ships , it is still likely to result in an outcry from the South African industry. It would also be a bold move for the DOT which at present struggles under the burden of a low budget. The Directorate has, however , been considering the idea of making the survey officers an agency of the DOT. The Directorate is adamant that it wants to keep the survey officers and their work within the control of the DOT and resists strongly the idea of passing the work on to private surveyors. The reasoning behind this is that the private surveyor has a financial interest in the surveys it carries out and if it acts too harshly or is perceived by the shipowner to have acted as such , the shipowner will find another private surveyor to do the work. In short the scenario is not that different from the one seen in the case of classification societies where the unscrupulous ship owner will move his ship to the society that best suites his approach to business. This would lead to a dropping of standards and a lowering of standards within the ranks of those trying to maintain standards would be disastrous and is not at all an acceptable situation. This is why the Directorate favours the idea of keeping the surveyors , albeit within an agency , within its ranks. These surveyors have nothing to lose by doing their job properly.

Shipping industry should bear the costs

private would be good

present i (But DOT disagrees)

Review shipping

Cost

The Chief Directorate of Shipping employs 18 surveyors at present (October 1995). These surveyors are scattered amongst the ports on the South African coast. The surveyors are accounted for in the following ports: Richards Bay 1 , Durban 5 , East London 1 , Port Elizabeth 1 , Mossel Bay 1 , Cape Town 6 and

⁷ Donaldson Report , Para. 22.22 , pg351

Saldanha Bay 3. This is not a great number of surveyors if one compares it to the numbers in The United Kingdom and Australia. A very troubling trend seems to be the loss of these surveyors. Richards Bay has lost one surveyor already this year and Cape Town and Durban are due to lose a surveyor each this month (October 1995). The Directorate requires seven more surveyors (this number includes the three surveyors lost so far this year) to satisfy their minimum requirements and four more on top of this number to be in a comfortable position. These surveyors do not only perform Port State Control inspections. In fact, Port State Control inspections make up a very small part of their workload as they do have other duties. The bulk of the surveyors time is taken up with the survey of ships, examinations (for safety certificate purposes) and casualty investigations. Because of the workload placed upon the surveyors and their limited numbers, the surveyors will get around to do Port State Control inspections when and if they have the time. The national target for Port State Control inspections of 25% was seriously challenged only by Saldanha Bay with an inspection rate of 24.9%. All the other ports mentioned came in at between 1% and 4%. The reason for the disparity in inspection rates is that Saldanha Bay was specifically targeted for Port State Control inspections due to the fact that in the previous couple of years a number of vessels have left Saldanha Bay only to become casualties. The result of the increase in Port State Control activity at Saldanha Bay has become evident in the decrease of sub-standard ships visiting Saldanha. This can only be taken to mean that the message has gotten across that the sub-standard ship is no longer welcome in Saldanha Bay. The lesson to be learned here appears simple enough: there are no sub-standard ships in Saldanha Bay because of the active Port State Control programme. If we do the same in all our other ports it is reasonable to expect the same result.

Enough.

= strategy
of
surveyors

large
workload

target
21%
70% of

Saldanha
has been
highly
successful

The 1993/1994 annual report of the South African DOT⁸ (the 1994/1995 report was not available at the time of the writing of this dissertation) does not , unfortunately , tell us much about Port State Control. In fact it tells us nothing specific but it does contain information that helps to highlight the DOT's involvement in similar areas. From the report⁹ we see that the DOT issued safety certificates to 31 foreign ships. This means that at least 31 foreign ships were surveyed , compared to the 1992/1993 number of 33. These safety certificates are not part of the Port State Control inspection system and are done on the request of the Flag State of the ships in question. Most of these requests for safety surveys come from The United Kingdom , India , Hong Kong , Italy and The Netherlands. The requests for safety certificates from South Africa are starting to increase. Unfortunately , the figures in the annual report of the DOT do not state how many Port State Control inspections took place in the 1993/1994 year. The report¹⁰ does , however , show that 24 710 surveys took place during the course of the year. Of these surveys 18 134 were examinations of new life jackets. 5413 were surveys of life saving equipment on fishing boats (South African fishing boats require a safety survey annually to get a safety certificate). 704 surveys were of life boats , 121 were surveys of dangerous goods and explosives. The balance of the surveys were made in respect of tonnage , load lines , passenger ships and grain ships. All of these surveys represent an increase from the previous year (except for the survey of dangerous goods and explosives which went from 125 in the 1992/1993 year to 121 in the 1993/1994 year). As it was mentioned above , while none of

31 (1994)
↓
33 (1993)

{ships surveyed} → give anal.

request for safety certificates.

mini surveys → Dec. 1993

⁸ Report of the Department of Transport , The South African Roads Board , The National Transport Commission The International Air Services Council and the Air Service Licensing Council for the period 1 April 1993 to 31 March 1994. (Published by Authority)

⁹ Pg71

¹⁰ Pg72

these figures tell us anything specific about Port State Control inspections , what we do know is that somewhere in this pile of figures the Port State Control figures find a place. *+ speaking PSC*

The only figures we can quote with confidence about Port State Control in South Africa , which do not appear in the DOT's annual report , is the national target for Port State Control inspections of 25% and the Saldanha Bay inspection figure of 24.9%. The rest of the ports we know lie between 1% and 4% and that is about as far as statistics take us.

The Chief Directorate of shipping does engage in the targeting of vessels for Port State Control inspections. The Directorate makes a point of targeting specific vessels and does not hide the fact that it does. It targets ships in the following categories:

- (a) Vessels it receives reports about concerning their condition from industry , pilots or other credible sources.
- (b) Vessels that are old.
- (c) Vessels that appear to be in a bad condition (if the condition of a vessel suggests it may be sub-standard it will be inspected).
- (d) Bulk Carriers (a common thread with The U.K and Australia).
- (e) Dangerous cargoes (all ships that load explosives are surveyed and ships carrying certain other categories of dangerous cargoes are given a visual inspection).

The Directorate does not target according to the flag of a vessel as it finds that this is not an accurate measure for predicting sub-standard ships. Another notable absence is the that of the Ro-Ro (Roll on - Roll off) ferry. South africa does not have such vessels visiting its ports for obvious reasons. The only Ro-Ro's that do visit South Africa are not of the ferry

kind and have stern doors which are generally a lot safer than the Ro-Ro ferries which have bow and stern doors.

The Directorate also regards as part of its duties the duty to respond to reports concerning the safety of crews on vessels entering its ports. The DOT receives many such reports annually and has the difficult task of having to decide which reports are genuine and which are purely vexatious in nature. As a rule, the Directorate will not investigate telephonic or anonymous reports. The reasoning being that the Directorate will ensure confidentiality and makes this clear, so there is no need for anonymous reports. Any such reports are viewed with suspicion and are, in all probability, vexatious. If, however, the crew of a vessel come ashore and are prepared place their grievance in writing, the Directorate has an obligation to investigate the grievance. By no means are all such investigations done only if the complaint is placed in writing. The Directorate also responds to reports from reliable sources such as pilots and other credible members of the industry. The Directorate must, however, be careful here and cover itself from a legal point of view by having sufficient reason to investigate these complaints. A most successful form of co-operation has emerged between the Directorate and the Transport and General Workers Union (TGU) which falls under the control of the International Labour organisation (ILO). The Directorate will pass any complaints it receives on to the TGU. The TGU then does a preliminary investigation and, if it feels that the complaint is valid and deserving of serious investigation, it will refer the matter back to the DOT which will then investigate the matter. This is especially beneficial with respect to foreign crews as the ILO has an interest here and a request to inspect from the TGU (clearly linked to the ILO) paves the way for the DOT to initiate a valid investigation. The ILO connection in this co-operation provides an international flavour to the jurisdiction the DOT has over crew matters. The

duty to respond to reports on vessels entering its ports of land safety

step labour TGU

DOT is nonetheless cautious of getting involved in matters involving foreign crews , especially matters involving pay disputes and prefers to pass such matters on to the ILO. However , where there is a genuine complaint the DOT will fulfil its obligation to investigate.

Unfortunately it was not possible to get the budget of the DOT and , therefore , work out what percentage of the Chief Directorate of Shipping's budget is spent on Port State Control. What is apparent , though , is that the budget of the Chief Directorate of Shipping is below what it should be and is , in fact , too low to allow the Directorate to function at the level it would like to. This is illustrated by the fact that the Directorate is eleven surveyors short of being in a good position as far as surveyors are concerned. The shortage of funds is also reflected in the loss of surveyors. It is not just a case of there not being enough surveyors , it is more a case of the Directorate not being able to afford the surveyors. A surveyor will be paid almost double what he is paid by the DOT if he goes back to sea. In terms of market related wages , the approximately R30 000 per annum that the DOT pays its surveyors is well below what persons of similar qualifications are paid on shore. The requisite qualifications for the position of surveyor in the DOT is Deck Officer Class I , which is a high qualification and should be recognised and rewarded as such. There is a proposed plan for a minimum manning scale to be achieved by the end of the financial year which is looking into increasing the number of surveyors to a minimum acceptable standard. As stated above , there is a need for seven more surveyors to reach this minimum level of efficiency. A direct result of the low budget and pay is the fact that when the DOT advertised its vacancies for the positions of surveyor in the Chief Directorate of Shipping , it has , to date , received a single applicant. One might well be pressed to enquire what possible incentive there could be to become a DOT shipping

budget
- low

can't afford
surveyors.

qual. A

incentive

surveyor? The answer is that it stations the otherwise ship bound officer on shore , closer to home and family. It is also , in the words of Captain Dernier¹¹ "a diversified and interesting job , with never a dull moment.". Apparently this is not enough to entice potential candidates off the sea and on to the shore (more specifically into the DOT). It appears ironic that it is the very industry we seek to control that , once again , teaches us the lesson we need to learn here: money talks.

The DOT , like AMSA and The U.K MSA , does utilise a database. This is situated in Pretoria at the head offices of the DOT. This database has no specific name but is used to keep records of all Port State Control inspections and detentions. It also reports , as a matter of procedure , to the International Maritime Organisation (IMO) every six months and it reports all detained ships to the IMO immediately they are detained. It also reports these detentions to the Flag States of the vessels involved. The database and management systems of the DOT are being updated all the time and the DOT has developed a management tool to upgrade the whole department. The question must be asked whether this database is suitable? There is no doubt that it meets the current Port State Control needs but will it still be suitable should the momentum of Port State Control increase in South Africa? What should also be considered is , whether the "management tool" that is used to upgrade the department should itself be upgraded or replaced? The bottom line is that ~~Port State Control in South Africa is not just the~~ surveyors in the ports carrying out inspections. It involves and requires the backup of a suitable database , staff and a management system that are continually being developed and updated.

Database
recording
in Pretoria

reports to
IMO
+
FS

used
develop
+
backup

¹¹ Captain Dernier meeting 4 October 1995

SOUTH AFRICA AND THE REGIONAL PERSPECTIVE

South Africa is currently considering joining a regional Port State Control system. The benefits of such a regional system or Memorandum of Understanding (MOU) on Port State Control are clearly visible in the Paris MOU , of which the U.K is a member and the Asia-Pacific MOU of which Australia is a member and , in fact , the initiator. The benefits of a good Port State Control system in a State can easily be negated by the effects of being surrounded by States that do not concern themselves with Port State Control. Thus , it is essential that , if Port State Control is to be a success , it be embraced with the same enthusiasm by all the States in a particular region.

MOU

need
enforcement

The move that South Africa is behind is being spear headed by Australia , which has already been successful in setting up the Asia-Pacific MOU. South Africa is very interested in joining the proposed MOU which will cover most of the Indian ocean from South Africa through to Australia. There was a meeting scheduled for last year (1994) , however , the meeting never took place and there are murmurings that not all the proposed parties (members) to the MOU are as enthusiastic about the MOU as Australia is. It is difficult to conceive how the MOU would be able to operate successfully if not all the required States were party to it. As stated above , the MOU finds its success in the co-operation of its member States. This is a problem that will have to be considered and dealt with , quite harshly if necessary.

need
co-op

South Africa is also a part of The Southern Africa Development Economic Community (SADEC) which is a regional co-operation agreement that involves Angola , Namibia , South Africa , Mozambique and Tanzania. A regional MOU spanning the same States would be of great value to South Africa and the door is already open to initiating such steps through SADEC.

SADEC
can help
prepare an
MOU

SYNOPSIS

South Africa is clearly the least attractive Port State Control jurisdiction that we have looked at thus far. Its Port State Control system suffers due to lack of funds, lack of man power and possibly even a lack of urgency. It is important to remember that we are a third world country and we do not have unlimited funds at our disposal. Our economy is still on shaky legs as the "new South Africa" emerges to take her place in the world. There are things that are more important than Port State Control and deservedly require the lion's share of available funding. At the same time, however, the powers that be need to take a serious look at the value of the Port State Control system again. One cannot escape the fact that South Africa has an extensive coastline which fringes a major shipping route.

The area of Port State Control in South Africa needs to be addressed, problems need to be identified and remedies need to be found. The problems and possible contingencies to these problems will be dealt with in the next chapter.

(order of analysis)
manpower;
urgency

more of
things than
PSC

SA = major
shipping
route

Sub 2

may well be Road

CHAPTER 5

**WHICH DIRECTION NOW FOR SOUTH AFRICAN PORT STATE
CONTROL?**

REFLECTIONS ON SOUTH AFRICAN PORT STATE CONTROL

It is apparent from the comparative study undertaken in the previous chapters that the operation of the Port State Control system in The United Kingdom and Australia is far superior to that in South Africa. In this chapter we shall try to address some of the shortcomings in the South African approach to Port State Control. We shall also propose some suggestions that might not only serve to improve the South African system but will also , hopefully , be practicable.

It would appear , from the study of the South African system of Port State Control , that the major problem is the lack of funds. Without sufficient funding the Department of Transport can not run effectively. As the Chief Directorate of Shipping is but one of seven Chief Directorates in the Department , the insufficient budget of the Department must be divided amongst these seven Directorates. Judging by the coverage given to each Chief Directorate in the annual report of 1993/1994¹ , in which the Chief Directorate of Shipping was afforded six pages , these six pages comprising all the information on the Chief Directorate in both English and Afrikaans , the Chief Directorate of shipping is not considered the most important of the Chief Directorates. It is conceivable therefore , in the light of the lack of budgetary information , that the Chief Directorate of Shipping does not receive an equal portion of the "pie" passed down to the Chief Directorates. I am not in any way suggesting that the amount spent on shipping should , in all respects , be equal to the amount spent on , say , roads and urban transport. I am merely highlighting the fact that an already emaciated budget is being apportioned none to equally

¹ Report of the Department of Transport , the South African Roads Board , the National Transport Commission , the International Air Services Council and the Air Service Licensing Council for the period 1 April 1993 to 31 March 1994.

among seven hungry Chief Directorates. Clearly the problem will grow worse as one goes down the hierarchy in the Department of Transport.

Unfortunately , there is no ready solution to the problem of lack of funds. As it has been stated before , South Africa is a part of the third world and as a result we must not raise our expectations to the hope of achieving first world results. There may , however , be a few measures which the Chief Directorate of Shipping can follow which might serve to aid budget constraints.

A possible solution lies in the Donaldson Report² which , amongst numerous other things , contains recommendations for the United Kingdoms Port State Control system. The Donaldson Report suggests that the shipowners be charged for inspections on the basis of rates which would produce a full cost of recovery³. This same idea has been considered by the Department of Transport but has never been adopted. One of the main concerns being the outcry that will come from the shipping industry. The Donaldson Report also considers this point but reasons that the need for Port State Control stems from the conduct of the industry as a whole putting sub-standard ships to sea⁴. The Donaldson report considers a modest extra charge for Port State Control inspections as a small price to pay for the potential benefits. The Donaldson Report also addresses the question of whether there should be a scale of charges or a single flat rate? This is a question that the South African Department of Transport will also have to consider should it decide to follow the recommendations of the Donaldson report. It is interesting to note that Australia and The United Kingdom have adopted

² Safer Ships Cleaner Seas

³ Para. 22.22 , pg351

⁴ Ibid.

differing views on this matter. It is respectfully submitted , in this regard , that the approach adopted by the Donaldson Report is the more suitable one for South Africa , although the Australian position does find a great deal of merit in its simplicity. The Donaldson Report favours a scale of charges with the heaviest charges falling on the worst ships⁵. This system will create the incentive to either avoid South African ports or to have no deficiencies and in so doing avoid inspections. It is conceivable that this charging for Port State Control inspections will help to defray the financial restrictions of the Chief Directorate of Shipping. It is important that The United Kingdom and her Paris MOU partners accept these recommendations of the Donaldson Report. Without the approval and precedent of these States the Department of Transport can not consider such a move. .

It is submitted that should such a system emerge it might serve to increase the perceived importance of Port State Control in South Africa. Clearly , Port State Control is not considered vitally important in South Africa at present. This is clearly seen in the Port State Control inspection figures. Admittedly this must be seen in the light of a shortage of staff but still, the major part of the surveyors' work involves work from which the Department derives some income. It is conceivable , therefore , that the emphasis on Port State Control inspections will be increased when there is income to be derived from its operation.

It is also suggested that , should this system of charging for Port State Control inspections become a reality , the Chief Directorate of Shipping should consider forming a semi-privatised body that would control the operations of the surveyors. Thus , one could envisage a SAMSA (South African

⁵ Para. 22.25 , pg351

Maritime Safety Authority). This body would be responsible for , amongst other things , Port State Control inspections. The benefits to surveyors of such a move are outlined in the previous chapter. The main reason behind this suggestion is that it is essential that the income derived from the charges levied for Port State Control inspections be kept and used to facilitate the functioning of Port State Control. The entire exercise would be entirely meaningless if the income derived from such activities was lost in the coffers of the Department of Transport. The purpose here is to increase the funds available so that the Chief Directorate can offer its surveyors competitive salaries so that the Chief Directorate can employ enough surveyors to do the job properly.

As it was mentioned above , a very real problem in South Africa appears to be the perceived lack of importance of the Port State Control system. This is an erroneous and potentially dangerous perception to be under. If one considers the potential threat to the South African coast that sub-standard vessels , particularly tankers , pose it is foolish to disregard the importance of Port State Control. In June 1994 the Panamanian registered bulk carrier the *Apollo Sea* sank off our coast. There is no proof that she was sub-standard , that is not the issue. The issue is that she had 2470 tonnes of heavy fuel and 650 tonnes of light gas oil in her tanks , most of which spilled onto Cape Town's main tourist beaches. Fortunately , the spill was cleared up before the holiday season and the cost was covered by the P&I club of the *Apollo Sea*. Imagine the catastrophic results of a tanker going down off our coast in the nature of the *Exxon Valdez*. The clean up costs of that particular spill have reached the astronomical amount of 3 billion U.S Dollars. The amount of oil spilled was 11 million U.S gallons. Should such an event take place and should the owners be untraceable or "non existent" as most unscrupulous sub-standard shipowners seem to be , the consequences for South Africa would be disastrous. It

might well cause the entire tourist industry for the stretch of the coast affected to collapse and would seriously affect the tourist industry of the country as a whole. Not to mention where on earth a third world country would get \$3 billion U.S Dollars to clean up a spill.

We cannot afford to take this threat lightly. As it was pointed out in the previous chapter , South Africa lies on a very busy sea route and sees a great deal of shipping traffic annually. What is more , a great deal of this traffic either originates from or services the third world and is unlikely to be of a very high standard. Let us not be a country that adopts the motto "once bitten twice shy" in regard to such matters. South Africa has seen two of the ten worst oil spills of all time⁶ of her coast and yet we continue to question the importance Port State Control. How much longer can we afford to ride our luck?

As it was mentioned above , the bottom line for improved Port State Control in South Africa appears to be funding. If Port State Control is not considered important enough to warrant an increase in funding direct from the government then only two options remain.

Firstly , to embark on a program of education about the threats of not having a good Port State Control system aimed , not only at the powers that be but at the public as well. It would appear that the public becomes highly emotive when a couple of penguins get covered with oil (strangely enough , the seamen who lose their lives in these catastrophes do not get the same consideration) , enough education as to the threat posed to their sea life by sub-standard shipping will , no doubt , give

⁶ The *Castillo de Bellver* , Saldanha - August 1983 - 77 million US gallons spilled.

The *World Glory* , South Africa - June 1988 - 14 million US gallons spilled.

rise to public awareness and outcry. The people who we are really seeking to influence here are those who control the budget of the Department of Transport. These are the people who need to see and understand the benefits of a good Port State Control system. Unfortunately, often the only way to do this effectively is to present the worst case scenario but if this is what is required, then so be it. Perhaps a dose of reality will have the desired effect.

The obvious response to such a suggestion is that such an educational campaign itself requires financial backing. This is the place to involve the industry. There will always be members of the industry who are looking to present themselves in a favourable light and this education project would be just the place for such members to get involved. This project could be done in conjunction with other recognised and already established environmental groups. The only effort required here on the part of the Department of Transport is to bring the parties into contact with each other and to educate the parties involved so that there is a clear purpose and objective to the campaign.

The other option is, as was mentioned above, to take Port State Control out of the Department of Transport and place it in the hands of a government agency (SAMSA). The ideal situation would be for this body to retain its funding from the government but also be allowed to raise funds by means of the procedures mentioned above. The problem here lies in the initial funding required to get the agency off the ground. The agency would require a minimum of one inspector in each port. This means the employment of 7 new surveyors and it must be remembered that the Department of Transport has not been inundated with applications. There would also need to be a central office to control the whole system. This is unlikely to be a major problem as it could be situated in Pretoria and it could make use of the

already existing database. As stated above , the government's continued contribution would be the ideal scenario. It is, after all , the government who will benefit from an improved Port State Control system.

The proposed education scheme could also be used to help achieve the establishment of this agency. The sooner Port State Control in South Africa is brought out of the shadows and into the light the sooner it will get the recognition it deserves and the funding it needs. People need to see and understand the importance of this little known system before it will be considered valuable.

Another area that needs to be discussed is the area of regional co-operation and the Memorandum of Understanding on Port State Control. As mentioned above , Australia has looked into the possibility of initiating an MOU spanning the Indian Ocean. This in itself is a good idea and such an initiative would be welcomed but it is submitted that the coming into existence of such a MOU should not be looked upon as the answer to our problems. Firstly , under such an MOU we would have an obligation to have a much more effective Port State Control system than at present. It is unlikely that our contribution in most ports of an inspection rate of between 1% and 4% would be considered satisfactory. Secondly , as it has been mentioned time and time again in this dissertation , South Africa is a part of the third world and the proposed MOU spans most of the third world maritime nations of the world. We could not therefore sit back and allow other nations to take up the slack in our inspections , rather to the contrary we may be one of the nations expected to take up the slack. An MOU is dependant upon the co-operation of the parties involved and in this case the co-operation of third world parties. This in itself poses a problem as communication in the third world is notoriously ineffective. To see an Indian Ocean MOU as the answer to our

problems is both unrealistic and short sighted. Irrespective of the existence of such a MOU or not , South Africa needs to address the issue of Port State Control. The powers that be must take a serious look at Port State Control and then make a decision to either get behind it and improve it or be prepared to take their chances and accept the hand that fate deals them.

CHAPTER 6

CONCLUSION

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As it can clearly be seen Port State Control enjoys recognition as a legitimate area within the greater sphere of law. It is recognised internationally , as was shown , as a legitimate action on the part of the States that choose to avail themselves of its benefits. It has developed a great deal since its genesis and continues to do so , mainly at the hands of those States that have adopted and now vociferously support the system. This development is a healthy sign and a legitimate response to our changing times and mores. It is important to identify Port State Control as a legitimate area of activity within marine law and law in general. It is , foremost , an activity of a legal nature that exists to serve and indeed does serve , the commercial and public interests. The concepts of conservation , pollution protection and (lest we forget) human rights are served by this area of the law. Port State Control is not a philosophical or humanist response to the problems at hand. Port State Control has its roots firmly entrenched in law , particularly public international law.

It is essential that Port State Control be recognised for what it is , not only in its legal standing but also in its relationship with other methods of control. Port State Control is a response to a threat posed by the shortcomings of other original measures and standards of inspection in addressing the problem of sub-standard shipping. It is not a substitute for an effective survey and inspection regime undertaken by the owners , classification societies or the Flag State. It is an offensive reaction to a defensive failure. It is also important to recognise that even the most rigorous Port State Control program will never guarantee the safety of the vessels inspected¹ or the

¹ Patrick Quirk , pg8

crews on board those vessels. It is a single strategy within a wider program aimed at raising the level of maritime safety².

As it can clearly be seen , Port State Control is growing world wide in stature as a viable and appropriate response to sub-standard shipping. Those countries that have adopted and used the system to its fullest have not only seen its benefits but also recommend and encourage its adoption in other States. There is a monetary cost involved in the establishment of such a system but this can be defrayed with a little bit of thought and work. All the system really requires to succeed is someone in a position of authority who sees and understands its benefits and believes in it. The benefits are there for all to see , they just need to be brought out of the dark and placed in the light.

It would be remiss of me not to make the following observation. The initial incentive behind the subject choice of this dissertation was to bring to light the plight of the seaman. While he has indeed been mentioned it is a sad comment of the world we live in when the plight of fellow humans cannot play a decisive role in addressing a problem of this nature. The rules dictated for the playing of this particular game are set out by trade and industry and human life and welfare are not relevant considerations. The bottom line is money. The elusive dollar takes precedence over all other considerations. So much so that if we wish to address the problems posed we are required to play by these rules. Probably the saddest statement of all , though , comes in the form of having to rely on mankind's response to penguins and the like to protect the life of the forgotten seaman. An effective Port State Control system must take into consideration the human factor.

² op cit pg12

Port State Control is an imperfect system operating in an imperfect world³. But it does offer a hope of safety and the best incentive of all is self preservation and in this Port State Control finds its roots.

³ *ibid.*