UNIVERSITY OF SOUTHAMPTON

THE IMPACT OF PUBLIC INTERNATIONAL LAW ON PRIVATE SHIPPING LAW

The Effect of the Modern International Legislative and Enforcement Practices on Certain Principles of Maritime Law

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ABSTRACT

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The present thesis argues that the combination of the Port State Control system that is today in operation and the tactics employed by the International Maritime Organisation for the introduction of rules and regulations for safety and pollution prevention at sea, led to the establishment of a system which has the potential to bring about significant changes that extend beyond the area of safety and pollution prevention, reaching areas lying entirely beyond the scope of IMO, and actually affecting directly Private Maritime Law.

The first three chapters are dedicated to outlining the relevant provisions of Public International Law of the Sea and analysing their evolution, in order to define the legal framework within which any regulation process for matters of safety and pollution prevention, may manoeuvre. Special reference is made to the development of the concept of Port State Control and its emergence as a new, alternative method of enforcement, under the guidance of IMO.

Following this, the study focuses on the modus operandi of IMO and evaluates the tactics employed by this organisation in pursuing its ends. Emphasis is given to the abuse by IMO of the tacit amendment procedure and the effect of the introduction of the 'no more favourable treatment' clauses as a Damoclean sword over the shipping nations of the world.

Chapter five examines the practices employed by influential Port States like the EU and the US, in enforcing international regulations as well as their contribution to the establishment of the new reality in shipping, and assesses the reactions of smaller states with large registries, -like Cyprus and the Bahamas-, to these developments. The attitude of the different sectors of the industry are investigated in order to assess their reaction.

Lastly, chapter six is dedicated to proving that the consequences of these developments find their way, within a very short period of time, to the national laws of the contracting - to the different conventions- states, with the potential of revolutionising principles of Private Maritime Law; something which renders IMO a sui generis alternative legislator for this sensitive area of law. The impact that the ISM Code and the STCW '95 might have on issues of Private Maritime Law is investigated through the use of English Maritime case-law.

Στους αγαπημένους μου γονείς
με όλο το σεβασμό και την αγάπη μου

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PREFACE

From the earliest days of trading, the character of shipping as a means of transporting goods and passengers, along rivers and across lakes and seas, established this sector as a necessary component in the development of international commerce. Transportation of goods has mostly been carried out by sea making the conservation of the shipping industry a *sine qua non* factor for the world's economy.

The technological leaps that occurred in the second half of the 19th century, following the invention of steam-powered machinery, sparked a process of advancement that has continued to this day. These developments naturally affected the shipping industry. Indeed, the shipping industry showed from the very beginning of this era, its determination to take full advantage of all the possibilities offered through technology.

At the same time, and indeed through the whole of the 20th century, national economies around the world, assisted by technological developments, expanded to such a degree that one can speak today of the "globalisation" of the economy. Since the beginning of the 20th century there has been a gradual increase in international trade which automatically caused a rise in the demand for tonnage for the transportation of goods. This demand led to the construction of a large number of new vessels and turned shipping into a high profile industry. The search for greater efficiency has led to larger vessels, improved cargo handling techniques and smaller crews and has brought into being giant oil tankers and the containerisation of goods.

During this process, and despite the benefits offered by technological developments in the area of safety, the international community has from time to time been shocked by maritime tragedies. These have inevitably resulted in pressures on the different governments for the adoption of drastic measures intended to prevent further incidents. Disasters like the "Titanic (1912), the "Torrey Canyon" (1967), the "Herald of Free Enterprise" (1987), the "Exxon Valdez" (1989), and the "Estonia" (1994), played a significant role in the creation of a universal demand for the enforcement of strict standards in the shipping industry.

Largely because of these disasters, the shipping industry acquired a high profile status, leading to universal demand for the adoption of strict standards for safety of life at sea and for the prevention of marine pollution. The international community recognised the need for a reform of the legal framework that governed the international shipping industry and the need for establishing methods for co-operation between States. On the one hand there was a need for the adaptation of Public International Law and on the other hand there was a need for the continuous practical co-operation between all the interested parties as well as between the different States. The former led to the International Conventions of Geneva in 1958 as well as by the 1982 Convention on the Law of the Sea (UNCLOS '82). These constitute a unique effort of the international community and are among the most successful developments in Public International Law. The latter was led to the founding of the International Maritime Organisation which undertook to realise the universal wish for "Safer Seas and Cleaner Oceans". Public International Law established a framework of rights and obligations of States over safety of life at sea and pollution prevention. The international community entrusted IMO with the task of finding ways to achieve these objectives, and IMO in its turn, having formulated the necessary policies, seeks appropriate ways to deliver these policies to their intended recipients. However, in doing so, IMO must operate within the legal framework set by the International Law of the Sea.

Nowadays, IMO's effort for the setting of the principal rules for safety of life at sea and pollution prevention is coming to completion: IMO has introduced a large number of international conventions covering all major aspects of safety, and the prevention of pollution. Furthermore, UNCLOS '82 gained greater international recognition than any other international convention of similar scope in the past. A comprehensive system for the introduction of international standards for shipping is now in place and indeed, a multi-level universal system also exists for the implementation of these standards by States around the world thanks to the work of IMO and the support that this organisation has received from Public International Law. However, it needs to be determined, whether IMO's policies and practices lie within the letter as well as the spirit of the International Law, and an evaluation is needed of the consequences of

IMO's work on other areas of law. Indeed, private shipping law, as was formed in England and as spread to the rest of the world, may no longer be the result of market practices incorporated in Acts of the Parliament or recognised by court judgements. It seems that a new, *sui generis*, legislator has been created with the potential to change maritime law as it is presently known.

ACKNOWLEDGEMENTS

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G.P.Pamborides
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ABBREVIATIONS

AC	Appeal Cases Law Reports
AJIL	American Journal of International Law
ALL ER	All England Law Reports
BIMCO	Baltic International Maritime Conference
CMI	Comité Maritime Internationale
COLREG	Convention on the International Regulations for Preventing Collisions at Sea, 1972
COW	Crude Oil Washing
DG VII	Directorate General VII (Transport Directorate of the EU)
dwt	Dead Weight Tonnage
EC	European Community
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EU	European Union
FAL	Convention on Facilitation of International Maritime Traffic, 1965
FOC	Flags of Convenience
grt	Gross Registered Tonnage
gt	Gross Tonnage
HSC	High Seas Convention
IACS	International Association of Classification Societies
IALA	International Association of Lighthouse Authorities
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice, Reports
ICLQ	International and Comparative Law Quarterly
ICS	International Chamber of Shipping
IJSL	Lloyd's International Journal of Shipping Law
ILC	International Law Commission

ILM	International Legal Material
ILO	International Labour Organisation
ILR	International Law Reports
IMCO	Intergovernmental Maritime Consultative Organisation
IMDG	International Maritime Dangerous Goods Code
ISF	International Shipping Federation
ISM Code	International Safety Management Code
ITF	International Transport Workers' Federation
JMLC	Journal of Maritime Law and Commerce
KB	King's Bench Law Reports
LL	The Load Lines Convention, 1966
Ll.L.R	Lloyd's List Law Reports
Ll.M.C.L.Q	Lloyd's Maritime and Commercial Law Quarterly
Lloyd's Rep.	Lloyd's Law Reports
LOSB	UN Law of the Sea Bulletin
LOT	Load on Top
MEPC	Marine Environmental Protection Committee
MIA	Marine Insurance Act,1906
MOU	Memorandum of Understanding
MSA	Merchant Shipping Act
MSC	Maritime Safety Committee
ND	New Directions in the Law of the Sea
ODILJ	Ocean Development and International Law Journal
OECD	Organisation for Economic Co-operation and Development
OILPOL	International Convention for the Prevention of Pollution of the Sea by Oil. 1954
OJEC	Official Journal of the European Communities
OR	Open Registry
P&I Clubs	Protection and Indemnity Clubs
PCIJ	Permanent Court of International Justice
PSC	Port State Control
QB	Queen's Bench Law Reports

RGDIP	Revue Général de Droit International Public
RIAA	Reports of International Arbitrary Awards
ROCRAM	Operative Network of Regional Maritime Co-operation among Maritime Authorities of South America, Mexico and Panama.
SBT	Segregated Ballast Tanks
SEA	Single European Act
SOLAS 74/78	Safety of Life at Sea Convention 1974, as amended by the 1978 Protocol
STCW	International Convention on Standards of Training Certification and Watchkeeping for Seafarers, 1978, as amended
TEU	Treaty on European Union
TIAS	Treaties and Other International Act Series (United States)
TSC	Territorial Sea Convention
TSPP	Tanker Safety and Pollution Prevention Conference
TSS	Traffic Separation Schemes
UKTS	United Kingdom Treaty Series
ULCC	Ultra Large Crude-Oil Carriers
UN	United Nations
UN Doc.	United Nations Documents
UNCCROS	United Nations Convention on Conditions for Registration of Ships
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Environment Programme
UNTS	United Nations Treaty Series
US	United States
USCG	United States Coast Guard
VLCC	Very Large Crude-Oil Carriers

TABLE OF CONVENTIONS

1910 The International Convention for the Unification of Certain Rules Relaiting to Assistance and Salvage at Sea, British and Foreign State Papers, vol 103, p. 434. Entry into Force 1 March 1913.

1923 Convention on the International Regimes of Maritime Ports, 58 LNTS 287. Entry into Force 26 July 1926.

1924 The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25 August 1924. International Maritime Convention of M.N. Singh, vol. 4, p. 3037

1948 Convention on the Intergovernmental Maritime Consultative Organisation, 289 UNTS 3. Entry into Force 17 March 1958.

1954 International Convention for the Prevention of Pollution of the Sea by Oil, 327 UNTS 3. Entry into Force 26 July 1958.

- 1962 Amendment, 600 UNTS 322, 1967 UKTS 59 (Cmnd 3354), ND II p. 567. Entry into Force 28 June 1967.
- 1969 Amendment, 600 UNTS 336, 9 ILM 1970, 1978 UKTS 21, ND II p. 580. Entry into Force 20 Jan 1978
- 1971 Amendment, 11 ILM 1972 267, ND II p. 567. Not in Force.

This Convention was superseded by the 1978 Protocol to MARPOL '73, as between the States parties thereto, with effect from 2 Oct 1983.

1957 Treaty Establishing the European Economic Community, 1973 UKTS 1. Entry into Force 30 April 1957.

International Convention Relaiting to the Limitation of Liability of Owners of Sea-Going Ships, 1968 UKTS 52. Entry into Force 31 May 1968.

1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, 516 UNTS

205, ND I p. 1, 240 UKTS 94. Entry into Force 10 Sep 1964.

Geneva Convention on the High Seas, 450 UNTS 82, ND I p. 257. Entry into Force 30 Sep 1962.

Geneva Convention on the Continental Shelf, 499 UNTS 311, ND I p. 101. Entry into Force 10 June 1964.

1960 International Convention for the Safety of Life at Sea. Entry into Force 26 May 1965.

1965 Convention on Facilitation of International Maritime Traffic (FAL), 591 UNTS 265. Entry into Force 5 March 1967.

- 1969 Amendment. Entry into Force 12 Aug 1971
- 1973 Amendment. Entry into Force 2 June 1984
- 1977 Amendment. Entry into Force 31 July 1978
- 1986 Amendment. Entry into Force 1 Oct 1986
- 1987 Amendment. Entry into Force 1 Jan 1989
- 1990 Amendment. Entry into Force 1 Sep 1991
- 1992 Amendment. Entry into Force 1 Sep 1992
- 1993 Amendment. Entry into Force 1 Sep 1994.

1966 International Convention on Load Lines (LL), 640 UNTS 133, TIAS No. 6331. Entry into Force 21 July 1968.

- 1971 Amendment. Not in Force (50 ratifications)
- 1975 Amendment. Not in Force (45 ratifications)
- 1979 Amendment. Not in Force (43 ratifications)
- 1978 Protocol. Not in Force (19 ratifications)
- 1983 Amendment. Not in Force (26 ratifications)

1968 Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 23 February 1968, International Maritime Convention of M. N. Singh, vol 4, p 3045.

1969 Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil (Bonn), 704 UNTS 3, ND II p. 632. Entry into Force 9 Aug 1969

International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties, 9 ILM 1970 25, 1975 UKTS 77, ND II p. 592. Entry into Force 6 May 1975

International Convention on Tonnage Measurement of Ships (TONNAGE), 1982 UKTS 50 (Cmnd. 6183), 11 ILM 1971 284. Entry into Force 16 Oct 1978.

1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREG), 1977 UKTS 77, 12 ILM 1973 734, ND IV p. 245. Entry into Force 15 July 1977.

- 1981 Amendment. Entry into Force 1 June 1983
- 1987 Amendment. Entry into Force 19 Nov 1989
- 1989 Amendment. Entry into Force 19 April 1991
- 1993 Amendment. Entry into Force 4 Nov 1995.

1973 International Convention for the Prevention of Pollution from Ships (See reference under the 1978 Protocol to this Convention).

1974 International Convention for the Safety of Life at Sea (SOLAS'74), 1980 UKTS 46, 14 ILM 1975 959. Entry into Force 25 May 1980.

- 1978 Protocol. Entry into Force 1 May 1981
- 1981 Amendment. Entry into Force 1 Sep 1984
- 1983 Amendment. Entry into Force 1 July 1986
- 1987 Amendment. Entry into Force 30 Oct 1988
- 1988 April Amendment. Entry into Force 22 Oct 1989
  Oct Amendment. Entry into Force 29 Apr 1990
  GMDSS Amendment. Entry into Force 1 Feb 1992
- 1988 Protocol. Not in Force (28 Ratifications)
- 1989 Amendment. Entry into Force 1 Feb 1992
  IBC Code Amendment. Entry into Force 13 Oct 1990
- 1990 Amendment. Entry into Force 1 Feb 1992
  IBC/IGC Codes Amendment. Not in Force
- 1991 Amendment. Entry into Force 1 Jan 1994
- 1992 May Amendment. Entry into Force 1 Oct 1994
  Dec Amendment. Entry into Force 1 Oct 1994
  IBC/IGC Codes Amendment. Entry into Force 1 July 1994
- 1994 Amendment. Entry into Force 1 July 1998 (Introducing ch. IX and X)
  Amendment introducing ch. XI. Entry into Force 1 Jan 1996
  Amendment (other Chapters). Entry into Force 1 Jan 1996 and 1 Jan 1998
  IGC Code Amendment. Entry into Force 1 July 1998
  December Amendment. Entry into Force 1July 1996.

1976 ILO Convention No. 147 Concerning Minimum Standards in Merchant Ships, 15 ILM 1976 1288, ND VI p. 449, 1984 UKTS 22 (Cmnd. 9186). Entry into Force 28 Nov 1981.

Convention on Limitation of Liability for Maritime Claims, Cmnd. 7035, 16 ILM 1977 606. Entry into Force 1 Dec 1986.

1978 International Convention on Standards of Training Certification and Watchkeeping for Seafarers (STCW), 1984 UKTS 50 (Cmnd. 9266). Entry into Force 28 April 1984.

- 1991 Amendment. Entry into Force 1 Dec 1992
- 1994 Amendment. Entry into Force 1 Jan 1996
- 1995 Amendment. Entry into Force 1 Feb 1997.

Protocol Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), 17 ILM 1978 546, ND IV p. 345 and X p. 32. Entry into Force 2 Oct 1983.

Annex I: Entry into Force 2 Oct 1983
Annex II: Entry into Force 6 Apr 1987
Annex III: Entry into Force 1 July 1992
Annex IV: Not in Force
Annex V: Entry into Force 31 Dec 1988

- 1984 Amendment. Entry into Force 7 Jan 1986
- 1985 Amendment to Annex II. Entry into Force 6 Apr 1987
  Amendment (Protocol I). Entry into Force 6 Apr 1987
- 1987 Amendment. Entry into Force 1 Apr 1989
- 1989 Amendment to IBC/BCH Codes. Entry into Force 13 Oct 1990
  Amendment to Annex II. Entry into Force 13 Oct 1990
  Amendment to Annex V. Entry into Force 18 Feb 1991
- 1990 HSSC Amendment. Not in Force
  Amendment to IBC/BCH Codes. Not in Force
  Amendment to Annexes I and V. Entry into Force 17 March 1992
- 1991 Amendment. Entry into Force 4 April 1993
- 1992 Amendment to Annex I. Entry into Force 6 July 1993
  Amendment to IBC/BCH Codes. Entry into Force 1 July 1994
  Amendment to Annex II. Entry into Force 1 July 1994
  Amendment to Annex III. Entry into Force 28 Feb 1994
- 1994 Amendment. Entry into Force 3 March 1996
- 1995 Amendment. Entry into Force 1 July 1997

- 1996 Amendment. Entry into Force 1 Jan 1998
- 1997 Amendment. Entry into Force 1 February 1999
  Protocol introducing Annex VI. Not in Force.

1982 United Nations Convention on the Law of the Sea (UNCLOS 82), 21 ILM 1982 1261, UN Doc. Amendment/CONF. 62/122. Entry into Force 1Oct 1995.

1986 Single European Act (SEA), 1987 OJ EC L 169/1. Entry into Force 1 July 1987.

United Nations Convention on the Conditions for Registration of Ships (UNCCROS), 7 LOSB 87 (1986), UN Doc. TD/RS/CONF/232, 26 ILM 1987 1229. Not in Force.

1989 International Convention on Salvage, IMO Pblns. Entry into Force 14 July 1996.

1992 Treaty on European Union (TEU/Maastricht), 1992 OJ EC C 191/1. Entry into Force 1 Nov 1993.

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CH. 1: POWERS AND RESPONSIBILITIES OF THE FLAG STATE

1.1 SHIP'S NATIONALITY:

Historically, national states have been ascribing nationality to ships in the same way that they would ascribe nationality to citizens. This practice was the result of a number of reasons. Firstly, shipowners felt the need for protection of their ships, whilst these were sailing on the high seas, exposed to a number of dangers including piracy. The granting of nationality to the ship - and the consequent right to fly the flag of that country - allowed the ship to seek the protection of that country against any individual or any third state which threatened the interests of that ship. Secondly, the granting of nationality signified the jursidiction of that state over the ship and therefore the relations amongst the members of the ship's community were governed by a specific set of rules.

National laws, around the globe, recognised the unique character of a ship and accepted its legal personality. It was, therefore, a natural consequence that this legal person should be under the jurisdiction of a state. Traditionally, the nationality was granted to a ship as soon as this would be registered in the register of a state. The registration of the ship indicated that that ship was under the jurisdiction of the registering state's laws, and allowed that ship to fly the flag of the registering state.

The above practice was identical to the practice followed by international law on the issue of the nationality of individuals. It was well accepted in international law that every state had the right to prescribe the conditions for the grant of its nationality to an individual. Consequently, the application of this principle in the area of the law of the sea was not a surprise. Indeed, state practice was adapted to this principle and this was soon to become a rule of international law, that is, until the *Nottebohm* case[1].

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[1] *Liechtenstein v. Guatemala, ICJ Reports [1955] 4.*

1.1.1 The *NOTTEBOHM* Case:

In 1955, the International Court of Justice was called upon to adjudicate on a case between Liechtenstein and Guatemala, better known as the *Nottebohm* case[2].
Mr Nottebohm was a German national at the time of his birth, but had been residing in Guatemala for 34 years, from 1905 to 1939. In 1939, he applied for naturalisation in Liechtenstein during a visit of his to one of his brothers who resided at the time in Liechtenstein. In the meantime, he continued residing and having the centre of all his business in Guatemala until 1943 at which time the Government of this country refused to readmit Mr Nottebohm and seized all his property as a result of [war] measures adopted by this country in 1943. Liechtenstein instituted proceedings against the Government of Guatemala, claiming restitutional compensation for the action taken by this country against *". . . a citizen of Liechtenstein, in a manner contrary to international law."*[3] The Court was asked to address the question of whether Liechtenstein had a right to raise a claim on behalf of Mr Nottebohm against the Government of Guatemala, based on the fact that Mr Nottebohm was a citizen of Liechtenstein. In doing so, the International Court examined the facts of the case in order to establish any bond or attachment between Mr Nottebohm and Liechtenstein on the one hand, and Mr Nottebohm and Guatemala on the other. In other words, the Court was not satisfied by the fact that Mr Nottebohm was naturalised in Liechtenstein according to the laws of this state, but sought to investigate whether the granting of such a nationality was something that the Government of Guatemala was obliged to recognise, under the rules of international law. In investigating the facts, the Court found that the link between Mr Nottebohm and Guatemala was a strong and long-standing one, whereas the link between Mr Nottebohm and Liechtenstein was a very weak one. Based on the above, the International Court of Justice decided that Liechtenstein was not entitled to extend its protection to Mr Nottebohm against

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[2]Ibid.

[3]Ibid. at pp.6 - 7.

Guatemala and went on to rule[4], by 11 votes to three, that the claim of Liechtenstein must be held to be inadmissible.

The International Court of Justice, for the first time ruled that a country cannot extend its protection to any of its nationals without question. In its *ratio*, the Court referred to a "genuine connection" that should exist between Mr Nottebohm and Liechtenstein. It seems that it went on to compare the "link" of Mr Nottebohm to each of the two countries involved, in order to reach the conclusion that the "link" between Mr Nottebohm and Guatemala was a genuine one whereas his link with Liechtenstein was less genuine.

The decision of the Court raised more questions than answers: Would Liechtenstein be in a position to extend its protection towards Mr Nottebohm against any other third country with which Mr Nottebohm had no link whatsoever? Is the matter of the existence of a "genuine connection" to be determined on a case-by-case basis? Was this judgement stating a principle of international law or was it merely attesting a special case of dual nationality? Whatever the answer to these questions may be, this judgment opened Pandora's box with implications extending beyond the scope of "immigration law".

1.2 THE "GENUINE LINK":

At approximately the same time that the International Court of Justice gave its judgement on the *Nottebohm* case, the International Law Commission (hereinafter "the ILC") started working on the preparation of the 1958 Geneva Conference on the Law of the Sea. The concept of a "genuine link", as it emerged from the *Nottebohm* case, was quickly adopted by the ILC. The ILC, in its 1955 draft, went so far as to set out criteria for determining the existence of a genuine link between a ship and its country of registry. However, these criteria were not included in the final draft prepared by the commission since this method was considered not to be practicable.

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[4]Ibid.

The 1958 Convention on the High Seas (hereinafter "the HSC") was faced with two different principles regarding the matter of nationality of ships. On the one hand, there was a general principle in international law allowing each state to set out the rules according to which a ship could fly under its flag. This principle was summarised in the judgement of the permanent Court of Arbitration in *The "Muscat Dhows"* case[5], where it was said that: *"Generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules covering such grants."*[6]

On the other hand, the conference had to decide on whether it would adopt the newly-emerged concept of "genuine link" established by the Nottebohm Decision, which the ILC included in its drafts.
The conference opted to adopt a provision which would incorporate both of these elements. Paragraph 1 of Article 5 of the HSC stipulates the following:

> *"Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."*

Article 5 attempts to combine the well-established and universally recognised right of each state to set out the conditions for the grant of its nationality to ships, with the newly-emerged concept of "genuine link". However, the incorporation of the "genuine link" requirement in Article 5 of the 1958 HSC does not seem to have affected the

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[5]See the 1905 XI R.I.A.A. (Reports of International Arbitral Awards) 83.

[6]2 AJIL 921 [1908] 924.

practice of the maritime states insofar as registration is concerned.[7] The attempts for the inclusion in Article 5 of the HSC, of a detailed definition of a "genuine link", were not successful in the end. However, even the mere inclusion of a "genuine link" as a prerequisite for the registration of a vessel under a certain flag was more than enough to start a global debate as to the exact meaning of this phrase and its application by states around the world.

The introduction of this new element of "genuine link" had taken place at a period when open registries were beginning to become a very popular option for shipowners and ship managers around the world. These open registries (or flags of convenience)[8] started making their existence felt on a global scale right after the Second World War had ended. Inevitably, the introduction and popularity that open registries had gained alerted all those parties who felt that open registries posed a threat to their interests.[9] These parties saw, in the introduction of the "genuine link" through Article 5 of the HSC, a "golden gift" which would enable them to "fight" open registries more easily. Article 5 of the HSC provides an indication of what a genuine link should include, by requiring the effective jurisdiction and control of the flag state over administrative, technical and social matters of the vessels under its flag. This gave rise to the argument that, since most open registries were not in a position to exercise such jurisdiction and control over vessels under their flag, no genuine link could be established between them and the registered vessels and, therefore, the practice could be described as antithetical to international law. However, despite the external soundness that this argument appears to have, the exact meaning of "effective exercise of jurisdictional

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[7]See Churchill and Lowe, "The Law of the Sea", second ed., Manchester University Press, 1991 at p.206 where it is suggested that the "genuine link" requirement does not represent customary international law, contrary to the statement included in the preamble of HSC, which describes the provisions of the Convention as being *"generally declaratory"* of established principles of international law.

[8]See infra under 1.3.

[9]For a full account of the worries faced by the advocates for the abolition of open registries, See infra under 1.3.

control" was far from clear. In any event, the state practice, as well as the practice of the industry, indicates that this argument failed to convince.

In 1960, the International Court of Justice had the chance to address the matter of ship registration in the *"IMCO"*[10] case.[11] The International Court of Justice was asked to give an advisory opinion on the meaning of Article 28(a) of the IMCO Convention. According to this Article, the Maritime Safety Committee to be elected by the General Assembly, would consist of 14 members, representative of nations having an important interest in maritime safety, of which no less than eight must be *"the largest shipowning nations"*. Traditional maritime nations, like The Netherlands and the United Kingdom, sought to exclude Panama and Liberia from claiming two of the eight posts.[12] They argued that the owners of the vessels under the registry of Panama and Liberia were not nationals of those states and therefore they should be excluded from the list of the eight "largest shipowning nations". They went on to ask the Court to apply the genuine link doctrine from the *Nottebohm* case. However, the Court held that the concept of the genuine link was irrelevant and refused to examine it. The ICJ ruled that Article 28(a) referred to the states with the largest registered tonnage and did not accept the argument that this Article referred to the beneficially-owned tonnage. It must be noted, however, that the Court addressed the issue as merely an issue of treaty interpretation and did not enter into the question of nationality of ships or open registries. Nevertheless, this advisory opinion of the ICJ stroke a considerable blow on the genuine link requirement. In effect, it clarified that, after registration, the nationality of the vessel is the one of the flag under which it flies, and the third parties should recognise this without entering into the issue whether a genuine link exists or not between the vessel and the flag state.

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[10]This is the Inter-governmental Maritime Consultative Organisation which later became the International Maritime Organisation (IMO). See infra, Chapter 4.

[11]*ICJ Rep [1960] 150.*

[12]At the time, Panama held the eighth position on the basis of registered tonnage, and Liberia the third.

1.2.1 The United Nations Convention on the Law of the Sea (UNCLOS) 1982:

Despite the fact that an initial introduction of the genuine link requirement through Article 5 of HSC gave rise to a global debate both as to what it means and as to how it should be implemented, and despite the fact that it created vagueness and uncertainty instead of clarifying the issue of ship registration, UNCLOS 1982 did almost nothing to change it. Article 91(1) reads as follows:

> *"Every state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship."*

Up to this point, this Article is an exact reproduction of Article 5(1) of HSC. It recognises on the one hand the right of every state to set down the requirements for the registration of a ship under its flag and, on the other hand, it provides for the existence of a genuine link between the flag state and the vessel that is to be registered. The last part of Article 5(1) of HSC, which provides for the effective exercise of jurisdiction and control over administrative, technical and social issues, of the flag state over vessels under its flag, is not included in Article 91. Instead, the draftsman of UNCLOS 1982 decided to introduce a separate article which would address this point. Article 94 of UNCLOS 1982, entitled 'Duties of the flag state', repeats, in its first paragraph, the part of Article 5(1) of HSC which was omitted in Article 91 and stipulates that:

> *"1. Every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."*

Paragraph 2 of Article 94 goes on to set out in more detail the content of this duty. Paragraphs 3 and 4 of this Article introduce for the first time the obligation of the flag

state to ensure safety at sea by taking measures regarding construction, equipment and seaworthiness of the vessels under its flag as well as manning, labour conditions, crews' training and prevention of collisions. The measures to be taken by the flag state are set out in detail.[13]

It becomes clear from the above that all the elements that Article 5(1) of HSC contained are, in effect, included in UNCLOS 1982. However, the provision of paragraph 1 of Article 94 of UNCLOS 1982 appeared in the HSC in a different context. The use of the phrase *"in particular . . ."*[14] in the text of the HSC proves the intention of the draftsman of the Convention to indicate, in a general manner, what the "genuine link" should include as a minimum. In UNCLOS 1982, however, the provision requiring the existence of a "genuine link" between the vessel and its flag state is separate altogether from the provision requiring the effective exercise of jurisdiction and control by the flag state over administrative, technical and social matters on its vessels. The inclusion of the latter in a completely different article entirely alters the character that this provision used to have under Article 5(1) of HSC. It no longer constitutes an indication of what a genuine link should comprise, something which was implied by the use of the phrase *"in particular . . ."* in that Article. The requirement for the existence of a genuine link as it appears in Article 91 of UNCLOS 1982 is not linked in any way with the requirement contained in Article 94. Therefore, strictly speaking, the phrase "genuine link" is subject to even more liberal interpretations than those witnessed under the HSC.

In other words, the lack of clarity and the vagueness initially introduced by Article 5(1) of HSC was preserved (if not reinforced) by UNCLOS 1982 which missed the opportunity either to abolish the requirement for the existence of a genuine link altogether or to define and clarify the content of this requirement. The confusion as to the exact meaning of the genuine link was after the UNCLOS 1982, as strong as

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[13]See also infra, Chapter 3 under 3.2.

[14]See Article 5(1) of HSC.

ever.[15] The debate about the meaning of "genuine link" was to continue with further implications in the debate for the abolishment of the international system of Open Registries. This situation led the United Nations Conference for Trade and Development (hereinafter UNCTAD) to convene a conference which would address the matter and attempt to give a permanent solution to the problem. On 16th July 1984, the United Nations Conference on Conditions for the Registration of Ships[16] opened, under the auspices of UNCTAD.

1.3 OPEN REGISTRIES:

Registration is the administrative formality which signifies the granting of the nationality of the registering state to the registered vessel.[17] Indeed, in practice, shipowners demonstrated their will to sail their vessels under the flag of their country, thus claiming the protection of their country whilst these vessels were sailing on the high seas.[18]

The rule of international law governing the granting of nationality to ships which formed the basis of state practice was summarised in Article 5 of the HSC which recognised that every state can fix on its own the conditions and requirements for the

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[15]For further reading, See McDonnell M.L. *'Darkening confusion mounted upon darkening confusion: The search for the elusive genuine link'*, Journal of Maritime Law and Commerce [1985], pp.365-396.

[16]See supra under 1.3

[17]International law does not in any way require that every ship must have the nationality of a state. See HSC Art 6 and UNCLOS 82 Art 92. Furthermore, international law recognises the possibility that certain vessels might sail under the flag of an international organisation (HSC Art 7) and, more specifically, of the UN and its agencies (UNCLOS 82 Art 93). For further reading on the issues, See Churchill and Lowe op. cit., at n. 7, page 172 and pages 208 - 209.

[18]For the benefits enjoyed by the shipowners, See infra under 1.1.

granting of its nationality to ships.[19] Accordingly, every state around the world maintained its own laws and regulations regarding registration of vessels and the granting of nationality to them. Traditionally, ships were registered at the place where the shipowner kept his centre of business. This, automatically signified that the law of that state applied fully over the ship as it applied over land. Therefore, all the legal rights and obligations of the ship and the shipowner were covered by the national legislation of the registering state. These usually included laws concerning fiscal matters, the manning of the vessel and labour matters in general, social security requirements, matters of construction and safety, etc.

In the meantime, the expansion of international shipping - greatly assisted by the technological developments that affected the field since the beginning of the Century- was transforming the industry in one of the most competitive industries in the world. Modern ships could offer their services to literally every market around the world, regardless of the place where the ship was registered and where the shipowners had the basis of their business. Competition in the world of shipping became quite fierce. Inevitably, the policies adopted by the flag states on any issue which could affect the running cost of a ship (e.g. fiscal matters, crewing matters, etc.) also affected the competitiveness of the ships sailing under the flag of that state. Ships flying under the flag of a state who had a favourable tax regime, or lax requirements on crews' salaries and social security, had a definite advantage over the vessels of the states that did not.

It was at that time that Open Registries[20] started to attract considerable tonnage towards them.[21] These were countries which attracted tonnage from other registries

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[19]The second element of Article 5, which refers to the existence of a genuine link between the state and the ship, did not form part of customary international law. See supra under 1.1 fn 7.

[20]This term is often used as an alternative to "flags of convenience" ("FOC").

[21]For an account on the development of the merchant fleets of Panama and Liberia, See R. Carlisle, *'Sovereignty for Sale, The Origin and Evolution of the Panamanian and Liberian Flags of Convenience'*, Naval Institute Press, Annapolis, Merryland, 1981.

(or new tonnage) because of the policies they adopted on the issues which were related to the running costs of their vessels. Such registries were "open" to the tonnage of any other state, in the sense that, in most of the cases, a shipowner's nationality (or beneficial ownership) was of no importance. In other words, open registries were attracting those shipowners who were seeking alternative registries that could offer them more benefits than the registries of their own countries.

Over the years, a number of definitions were put forward in order to describe the phenomenon of Flags of Convenience. The most comprehensive definition appears in a report published by the Rochdale Committee[22] in 1970, which outlines the main features of a flag of convenience. The report in an attempt to identify the elements of a Flag of Convenience stipulates that:

> *"(i) The country of registry allows ownership and/or control of its merchant vessels by non-citizens.*
>
> *(ii) Access to the registry is easy; a ship may usually be registered by the consulate abroad. Equally important, transfer from the registry at the owner's option is not restricted.*
>
> *(iii) Taxes on the income from the ships are not levied locally, or are very low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given.*
>
> *(iv) The country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipts from very small charges on a*

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[22]Committee of Enquiry into Shipping: Report, London, HMSO 1970, Command Cmnd 4337, p151.

large tonnage may produce a substantial effect on its national income and balance of payments.

(v) *Manning of ships by non-nationals is freely permitted.*

(vi) *The country of registry has neither the power nor the administrative machinery effectively to impose any government or international regulation; nor has the country even the wish to consult the companies themselves."*

The Rochdale report suggested that all of these features should be present before a country is characterised as a flag of convenience.[23] However, this definition was criticised as being extremely narrow.[24] In any event, what is of importance is that, usually for the reason under (iv), certain countries managed to attract ships from other registries through the advantages offered by (iii) and (v), facilitating such action through (i) and (ii). Unfortunately, this action may result in a decrease in safety, pollution prevention, as well as manning standards because of (vi).

Kasoulides[25] identifies three systems of attribution of nationality to ships:

(a) Closed or regulated registries where the ships are wholly owned by its nationals and manned primarily with national crew;

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[23]Ibid. page 183.

[24]See Sturmey S.G. *'The Open Registry Controversy and the Developing Issue'*, The Institute of Shipping Economics, Bremen, Book Series 8, 1983, p8. For a further analysis of the issue, See also Bergstrand S and Doganis R, *'The Impact of Flags of Convenience (Open Registries)'*, in W.E. Butler editor, The Law of the Sea and International Shipping, 1985, pp.414 - 415.

[25]See Kasoulides G.C., *'The 1986 United Nations Convention on the Conditions of Registration of Vessels and the Question of Open Registry'*, Ocean Development and International Law, Volume 20 (1989-6), pp.543 - 576, at p546.

(b) A hybrid form, where ownership and manning requirements are limited only by requirements that they include a majority of citizens of the registering body; and

(c) Open registry.[26]

Since the 1940's, the "flags of convenience" phenomenon is becoming gradually more and more popular, occupying an ever-growing percentage of world tonnage. Open registries constitute a reality which was gradually imposed on the shipping industry.

The fact that open registries apply a lax policy so far as the nationality of the shipowner (and/or ship manager) of vessels under its flags[27] is concerned, created a better environment for those shipowners who, for various reasons, did not wish to appear as the real shipowners; beneficial ownership that would allow the real shipowner the luxury of remaining unidentified, was more easily achieved in countries with open registries.

UNCTAD expressed noticeable interest in the collection of the data regarding beneficial owners as well as true managers of the world's tonnage. According to an UNCTAD's report[28], the beneficial owner is the person, company or organisation which gains the pecuniary benefits from the shipping operation. It is a common secret that the merchant fleets of countries with open registries are beneficially-owned by interests based in other countries. These interests are predominantly based in developed western countries such as the USA, Hong Kong, Greece and Japan. This

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[26]For further reading, See Tache S.W., *'The Nationality of Ships: The Definitional Controversy and the Enforcement of Genuine Link'*, 16 International Lawyer (1982), pp.301 - 312.

[27]Most national legislations of countries with open registries require a mere incorporation of the shipowning company in the jurisdiction of the registering state without imposing any requirements as to the nationality of the shareholders of that company. For further reading and examples of national legislation, See ibid. at p303.

[28]Merchant Fleet Development, Beneficial Ownership of Open Registry Fleets, UNCTAD V, TD/222/Suppl. 1, para. 8.

phenomenon and the ever-growing number of tonnage under flags of convenience fuelled the debate for the meaning of "genuine link" even further. The advocates of the abolition of flags of convenience suggested that open registries generated problems insofar as the identification of the true owners and true managers was concerned and made accountability much more difficult.

1.3.1 ITF's Initiatives Against Flags of Convenience:

The International Transport Workers' Federation (hereinafter "the ITF") is an international trade union which affiliates with national unions in the different branches of transportation.[29] The ITF is a foundation with a very influential network in all major maritime nations around the world. Its actions led to the signing of numerous collective agreements between shipowners and transport workers in all the major maritime nations. With this established system, the ITF was in a position to pursue its goal for the well-being of its members: Pressure would be exercised on shipowners, individual companies, or even governments for the adoption of more favourable legislation insofar as wages and social security were concerned, as well as for the adoption of stricter laws and regulations concerning safety and living conditions on board vessels. However, this influential position of the ITF came under threat with the introduction of the flags of convenience system. Shipowners could now escape all these strict laws and collective agreements by merely re-registering their vessels under a flag of an open registry which had little or no legislation at all over issues of manning or crew wages and social security. The ITF openly declared war on the system of open registries and vouched to fight it by every means available to it.

The ITF has established the "blue certificate", a certificate issued by the ITF to ships that are in compliance with ITF standards. During the call of a ship to a port, ITF inspectors may board the vessel and request to see the wage and manning schedule and

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[29]For further reading, See Northrup H.R. and Rowan R.L. *'The International Transport Workers' Federation and Flag of Convenience Shipping'*, Industrial Research Unit, Wharton School, University of Pennsylvania, Philadelphia, 1983.

the ITF's "blue certificate". If the master of the ship fails to produce a "blue certificate" or the wage schedule is not satisfactory according to the inspector, the shipowner is invited to sign an agreement with the ITF, and if he fails to do that, the ITF may exercise its influence on the affiliated national union at that port in order to convince other dock workers or tugboat operators to boycott any work that needs to be done on that ship or prevent it from leaving the port. This agreement, the terms of which are dictated by the ITF, includes a duty on behalf of the shipowner to pay his crew wages, which the ITF claims to be the equal of the European average standard, as well as conditions requiring the shipowner to pay "arrears": wages that the shipowner should have paid the crew for passed time. Furthermore, the ITF charges dues for its welfare fund.[30] The shipowner usually has no alternative but to enter the relevant agreement and pay the "outstanding" amounts. If he fails to do so, he risks in the least, a delay in the departure of his vessel from that port.[31]

In order to justify its actions, the ITF embarked on a campaign to portray all vessels under FOC's as sub-standard. In fact, this was merely a method which would exercise pressure on shipowners to reconsider their flagging-out and encourage them to come back to their own national registry. Northrup and Scrase[32] argue that the ITF campaign was not a genuine campaign about the well-being of seamen around the world, but a campaign on behalf of the trade unions of western Europe (and other traditional maritime countries) to "regain" lost jobs. Indeed, this practice of the ITF led to a lot of internal disputes and almost caused a rupture with unions in Asia.[33]

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[30]In 1996, dues to the ITF welfare fund were calculated at US$230 per crew member per year.

[31]See Figure 1 for summary of the ITF FOC campaign.

[32]*'The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983 - 1995'*, Transportation Law Journal, Volume 23, No. 3, University of Denver, College of Law, Spring 1996, pp.369 - 423, at p374.

[33]Ibid.

The ITF campaign against flags of convenience has been going on for the last decade with little success. The ITF can effectively exercise its boycotts on "bad" vessels only in a few countries around the world.[34] It considers all shipowners registering their vessels under a flag of convenience to be "bad" with the exception of those who sign ITF agreements for whom they argue:

> *"In our experience, their ships are relatively safe, and on-board conditions are generally good . . ."*.[35]

Thus, it appears, through the practice of the ITF, that even they themselves recognise, that the open registries system is a reality which has to be accepted. ITF's policy on the matter could only result in pressurising a shipowner to accept the ITF's minimum wage and other financial benefits for his crew, as well as improvements regarding the safety of life on his ship. However, even the ITF was forced to recognise the concept of "total crew cost" ("TCC"), which was forced upon them by the affiliated seamen's' union from third-world countries and which is considerably less than the ITF rate.[36] There is no way that the social-economic differences between developed countries like Sweden could be equated to those existing in third-world countries so that a common international wage could be calculated. ITF's campaign needs primarily to convince its third-world members before it could stand any chance of fighting the international open registries system.

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[34]These include Sweden, Australia, Canada (British Colombia) and Finland.

[35]See the ITF's official booklet, *'Flags of Convenience - The ITF's Campaign'*, at p39.

[36]For further reading, See Northrup and Scrase, op. cit. at pp.378 - 381.

1.4 THE UNITED NATIONS CONVENTION FOR THE CONDITIONS OF THE REGISTRATION OF SHIPS (UNCCROS) 1986:

The United Nations Conference of Trade and Development (UNCTAD)[37] showed interest in the developments concerning the issue of FOC's from an early stage. UNCTAD concluded that the international system of ship registration needed to be regulated and, in a resolution adopted at its committee on shipping in 1981, the basic principles upon which ship registration should be based were set out:

(a) The management of shipowning companies and ships;

(b) The identification and accountability of shipowners and operators of ships;

(c) The equal participation of the state of registration in the capital of shipowning companies; and

(d) The manning of ships and other measures essential to ensure proper exercise of jurisdiction and control of the state on a ship flying its flag.

This resolution recommended that an international conference should be called, which, on the basis of these principles, would convene an international agreement on the issue.[38] This led to the United Nations Conference on Conditions for Registration of Ships, which began its work on 16th July 1984.

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[37]UNCTAD is an organ of the General Assembly whose function is primarily *"to promote international trade . . . particularly trade between countries at different stages of development . . ."*. See Resolution 3281(xxix).14.I.L.M.259 (1975) of the General Assembly.

[38]This was reflected in the UN General Assembly Resolution 37/209 of 20th December 1982.

The international community appeared to be divided on the issue of open registries. Since, as it was mentioned above,[39] neither the 1958 HSC nor UNCLOS 1982 addressed the matter, the practice of a number of states to operate open registries, as well as the practice of the shipowning community to demonstrate its preference towards flags of convenience, were allowed to continue undisturbed. The existing diversity in the circles of the international community became quite apparent during the meetings of the Committee on Shipping of UNCTAD. The developing states - "the Group of 77", as they came to be known - supported by the Soviet Union and the other Eastern European states - "the Group D", as it was known - as well as by China, suggested that the open registries should be phased out, claiming that the operation of such registries has a direct negative impact on their national registries. The countries which maintain open registries rejected this idea altogether, claiming that it is an inalienable right of each state, deriving from its sovereignty, to set out the conditions for the registration of vessels under its flag. Group B[40] countries also ruled out the idea of phasing out open registries and attempted to encourage the other states to seek a formula which would "force" the flag states to fully exercise their control and jurisdiction over their vessels, thus eliminating abuses of the existing system of ship registration. It appeared that, in order to achieve this, there was a need to clarify the "genuine link" between a vessel and the state of its registry. The different studies undertaken by UNCTAD about open registries during the 1970's and 1980's[41] concluded that open registry fleets had adversely affected international shipping, especially the development and competitiveness of fleets of developing countries. UNCTAD considered that defining the "genuine link" was of utmost importance and encouraged its members to address the issue:

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[39]See supra under 1.2.

[40]Countries of the Organisation for Economic Co-operation and Development (OECD).

[41]See, for example, the Repercussions of Phasing Out Open Registries, UN Doc. no. TD/B/C.4/AC.1/5; See also "action on the question of open registries", UN doc. no. TD/B/C.4/220, TD/B/C.4/223.

"There are two basic reasons why standards are more likely to be breached under open registry flags than under other flags, all stemming from lack of control over owners, managers and key shipboard personnel - i.e. the lack of economic linkage between a vessel and its flag state . . . The open registry issue calls for international agreement on the need for economic links between a vessel and flag state so that the flag state can control owners and/or managers and key shipboard personnel. Such linkage is essential . . ."[42]

It becomes apparent from the above that UNCTAD considered the genuine link to be an "economic link". UNCTAD concluded that the best way of tackling the problem of open registries was by an international agreement on the conditions under which countries should accept vessels on their registers.[43] UNCCROS was envisaged by UNCTAD to become a convention which would, once and for all, set down those conditions which would apply internationally for the registration of a ship in a national register, thus defining the exact meaning of "genuine link", which would gradually lead to the phasing out of the system of open registries. At least this appeared to be the climate in which UNCCROS opened on 16th July 1984.

Article 1 of UNCCROS 1986 sets out the objectives of this Convention and stipulates as follows:

"For the purpose of ensuring or, as the case may be, strengthening the genuine link between a state and ships flying its flag, and in order to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social

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[42]UNCTAD, "action on the question of open registries", UN doc. no. TD/B/C.4/220 p(iii) (1981).

[43]See UNCTAD, Legal mechanisms for regulating the operation of open registry fleets during the phasing out period, UN doc. no. TD/B/C.4/AC.1/6 (1979).

matters, a flag state shall apply the provisions contained in this Convention."

The first point to be noted in Article 1 is the adoption by the conference of the term "shall", which indicates that UNCCROS 1986 is a Convention with mandatory terms for the signatories.[44] It is also worth mentioning that Article 1 of UNCCROS 1986 goes one step further than Article 5 of the 1958 Convention and Article 94 of the 1982 Convention: these last two Conventions would refer only to *"administrative, technical and social matters"*, whereas UNCCROS 1986 included the word *"economic"*.[45]

Article 2 contains the definitions of different terms used in this Convention. Here, "ship" is defined as *". . . any self-propelled sea-going vessel . . . with the exception of vessels of less than 500 gross registered tonnes"*. This caused the reaction of the ITF, which complained about the narrow scope of this definition, since vessels of less than 500grt as well as mobile off-shore units were not covered by this Convention.

Article 4 includes general provisions and restricts itself in reiterating the legal framework which was in operation prior to this Convention.

Article 5 forms one of the most important provisions of this Convention. According to this Article, the flag state must establish a National Maritime Administration ("NMA"), which *". . . shall be subject to its jurisdiction and control"*.[46] Article 5 then goes on to state in general that the flag state has an obligation to implement applicable

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[44]Group B countries withdrew their reservations about the use of the term "shall" during the last session of UNCCROS 1986.

[45]The inclusion of the word *"economic"* was agreed after intensive disagreements on the issue. See report of the United Nations Conference on the Conditions of Registration of Ships in its third part, Annex 1, composite text. UN doc. no. TD/RS/CONF/19/AD.1.

[46]This provision was included in order to cover those cases where the NMA of a certain state is located outside the territory of that particular state. See UN doc. no.TD/RS/CONF./19/AD.1.P5 note "D".

international standards on issues of safety and pollution prevention. Paragraph 3 of this Article sets out in detail, but not exhaustively, the tasks that the NMA would have to perform. NMA will make sure that ships registered under its flag will apply international rules and standards regarding safety at sea and prevention of marine pollution as well as with the national legislation on registration. Moreover, the NMA will periodically survey the ships flying its flag and ensure that appropriate documents proving the right to fly the flag will be on board. Furthermore, it shall ensure that the owners of ships flying its flag fully comply with the principles of registration as set out by national legislation and UNCCROS, as well as that the state will require all the appropriate information necessary for full identification and accountability. In general, Article 5 imposes a direct obligation on the state to proceed to the implementation of UNCCROS, indicating the way to achieve that. It is an attempt of the draftsman of the Convention to prevent the creation of different mechanisms in each state and succeed in forming the organisations which will bear the obligations imposed by UNCCROS 1986.

According to Article 6, the state of registration will take measures to ensure that the owner or persons accountable for the management and operation of ships would be identifiable. Such information would be kept in the register as well as on board and must be made available to the port state authorities. Logbooks must be kept on board and must be made available to persons with legitimate interest in the information carried therein. Documents carried on board must include information identifying the owner or the operator or the person who is accountable for the operation of the ship. Paragraph 6 of Article 6 allows the flag state to exercise its discretion in ensuring that the owners or operators of vessels under its registry *". . . are adequately identifiable for the purpose of ensuring their full accountability"*.

The UNCTAD press release[47], published on the day of the conclusion of the Convention, described Articles 8, 9 and 10 as *"the heart of the Convention"* and claimed that these Articles provide *". . . key economic links between a ship and the flag*

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[47]UNCTAD Information Unit, UN doc. no. TAD/INF/1770., 7th February 1996.

state . . .". It had been the position of the Group of 77 throughout the conference that "genuine link" had to constitute an "economic link" related to manning, management and equity. Article 8 provides for the participation of the flag state or its nationals in the ownership of ships under its flag. However, the level of participation is left entirely to the discretion of the flag state. UNCCROS 1986 merely provides that the said level *". . . should be sufficient to permit the flag state to exercise effectively its jurisdiction and control over ships flying its flag".*[48]

Article 9, entitled "Manning of Ships", is a result of long and intense negotiations. It imposes on the flag state a duty to observe the principle according to which a "satisfactory" part of the officers and crew will be nationals of the flag state or persons permanently resident there. In implementing this, the flag state will consider the availability of qualified seafarers, multi-lateral or bilateral agreements or other arrangements and the economically viable operation of its ships. The basis for the implementation of this provision can be either the ship or the company or the fleet. Furthermore, the flag state must ensure that manning is of a level and competence that will enable the ship to comply with international rules and standards. The applicable international rules and standards must form the basis for the drafting of the terms of the conditions of employment on board the ships of the flag state. Lastly, legal disputes between seafarers and their employers must be settled through adequate legal procedures, which the flag state will ensure both for its nationals and for foreign seafarers.

Both of these Articles led to intensive criticism raised by Group B countries, who argued:

> *"[M]anning, management and equity were not central to the genuine link and effective control . . . [A]s a matter of principle, equity*

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[48]See paragraph 2 of Article 8 of UNCCROS 1986.

participation was not an element for consideration in an international agreement but for individual states to dictate."[49]

At the end, the Group of 77 compromised and accepted that the flag states should have a choice between the issue of manning and the issue of ownership, as to which one to comply with. This led to the adoption of Article 7 of UNCCROS 1986, which states, *inter alia*:

". . . [A] state of registration has to comply either with the provisions of paragraphs 1 and 2 of Article 8 (ownership) or with the provisions of paragraphs 1 to 3 of Article 9 (manning), but may comply with both."

However, the Group of 77 stood firm on its belief that issues of management should be addressed separately and be applicable on every participating state.

Article 10 paragraph 1 requires that each state, before registering a vessel under its registry, must ensure that:

". . . The shipowning company or a subsidiary shipowning company is established and/or has its principal place of business within its territory in accordance with its laws and regulations".

However, paragraph 2 defeats the purpose of paragraph 1, since it recognises the possibility for the registration of a vessel in cases where the shipowning company is not established in the flag state, and provides that, in such cases, there must be a representative or management person who shall be a national of the flag state or domiciled in the flag state, *". . . duly empowered to act on the shipowner's behalf and*

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[49]Draft report of the first committee, UN doc. no. TD/RS/CONF/C/1/L.2, 1st August 1984, at 5,6.

account."[50] The representative must also be available for any legal procedures and must meet the shipowner's responsibilities.

Article 11 requires that participating states keep a register of ships in order to ensure the compliance with the provisions of UNCCROS 1986 and outlines the information that such a register should include. In particular, the register will keep records with information on the name of the ship, previous name and registration, place and port of registration or home port, name, address and nationality of the owner or of each of the owners or the bareboat charterer as well as information about any mortgage against the vessel. This Article attempts to tackle the problem of maritime fraud and seeks to minimise the exposition of third parties to the danger of dealing with shipowners who are acting in *male fide* by giving the right of access to the above information to people with legitimate interest.

Article 12 deals with the issue of bareboat chartering. It provides that a state may grant registration for the charter period and, in effect, treats bareboat charterers as "owners" for the purposes of this Convention.

Likewise, Article 13 calls upon the participating states to promote *"in conformity with their national policies"*[51] joint ventures in order to promote the shipping industry of developing countries.

Articles 14 and 15 incorporate into the Convention's text Resolutions 1 and 2, annexed to the Convention, which are in the form of recommendation. Resolution 1 deals with the interest of labour-supplying countries and calls upon such states to supervise the arrangements involving employment of their nationals on foreign vessels. Resolution 2 seeks to provide financial and technical assistance to countries that will suffer losses because of the implementation of UNCCROS.

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[50] See paragraph 2 of Article 10 of UNCCROS 1986.

[51] See paragraph 1 of Article 13 of UNCCROS 1986.

Article 19 provides that the Convention will enter into force *". . . 12 months after the date on which not less than 40 states, the combined tonnage of which amounts to at least 25% of world tonnage, have become contracting parties to it . . ."*. By 1st October 1997, only twenty-one countries had ratified this Convention.

Since the early stages of the conference, it became apparent that the matter of registration of ships was dividing the interested parties in two major sides: On the one hand, the Group of 77, supported by Group D and China, and on the other hand, the countries of Group B, supported by countries with open registries. The former considered the existing system of open registries to be the main problem of the development of the national fleets of developing states and aimed to achieve the phasing out of this system altogether. The latter, recognising the problem of the lack of enforcement of international standards on behalf of some flags of convenience, appeared to be willing to address the matter of registration in order to ensure that the states with competent national administrations could claim a genuine link with the vessels registered under their flags. However, Group B countries were not willing to accept that the open registries system was the only problem and, furthermore, that the phasing out of the open registries would solve all the problems.

The conference was trapped in endless discussions about the definition of "genuine link", which led to the rejection of every proposal coming from one side by the other side. The final draft constitutes a compromise between the two sides and, in some ways, fails to achieve what it set out to achieve when it started.

The best demonstration of this continuous disagreement and following compromise is Article 7, which gives the participating states the choice of adopting either the provisions of the Convention dealing with ownership or the provisions of the Convention dealing with manning. The conference started with its main aim to phase out open registries. Yet, the only thing achieved was to legitimise the existing system of open registries.

Nevertheless, it would be unfair to claim that UNCCROS 1986 failed to change anything. The introduction of a national maritime administration, issues of enforcement of international standards both by flag states and port states, and issues of identification and accountability of owners and operators, as well as the involvement of the flag state in the management of ships flying its flag, constitute some of the new elements which could benefit international shipping. Most importantly, UNCCROS 1986 has defined the route upon which national administrations should operate their registries. Open Registry states got the message and they should act on it.

1.5 CONCLUSIONS:

The 20th Century, and especially its second half, signified the globalisation of the industry, which became possible thanks to technological developments. The shipping industry was now operating in a common market: the global market. This revealed the necessity for international agreements which would set down mutually-accepted rules and regulations upon which international shipping could operate constructively.

Within this framework, it was recognised that every country had the right to prescribe the requirements for the granting of its nationality to ships. Undoubtedly, this was part of customary international law and was indeed practised by all maritime nations around the world. In the meantime, the realities of the industry led to the introduction of a system of open registries, which came to change the face of shipping as it was known. This phenomenon was regarded as a threat by some well-established interests in the industry, like ITF. The panic and confusion of the time is reflected in Article 5 of HSC, which introduced the "genuine link" requirement, giving rise to a debate which was to last for almost 40 years. Open registries (or flags of convenience) were targeted by a number of parties and were portrayed as tantamount to substandard tonnage. This argument was based primarily on the fact that a number of flags of convenience states delegated their authority for inspection, certification and surveys of their fleets to private organisations like classification societies[52] because they had no means of

[52]See infra underchapter 5.2.4.

enforcing international standards by themselves. This campaign against Flags of Convenience coincided with the international campaign for safer ships and cleaner oceans. UNCCROS 1986, however, proved that the international community accepted the Open Registry states as part of today's shipping and declared its determination to seek alternative ways of enforcing international standards. Indeed, the problem of substandard vessels is an international one and does not always reflect the lack of will or inability of the flag state to implement international standards. It is commonly recognised nowadays that this problem can only be solved through a collective effort under the guidance of an international organisation: IMO.

CH. 2: JURISDICTIONAL COMPETENCE OF THE COASTAL STATE

2.1 INTRODUCTION:

As it was explained in the previous chapter, every ship has the nationality of the country whose flag it flies.. However, through the years, international law placed certain restrictions on this absolute power of the flag State. Nowadays, jurisdictional issues are determined, not only according to the national legislation of the flag state, but also according to the status of the area where the vessel lies at each given point of time. Nevertheless, jurisdiction over any vessel may be acquired by a State other than the flag State only as an exception to the above principle. This chapter will attempt to trace the origins of the concept of Coastal State jurisdiction and evaluate its contribution in the enforcement of international standards in the shipping industry.

The introduction of the concept of "Territorial Sea" excluded the presumption of the exclusiveness of flag state jurisdiction and set a trend which is still developing today. The maritime zone of "territorial sea" was soon followed by the "contiguous zone " and later by the "exclusive economic zone".

Thus, the presumption of the exclusiveness of the jurisdiction of the flag state is restricted by the rights of the coastal state to exercise its jurisdiction over its own maritime zones. Furthermore, even on the High Seas, where the principle of the exclusiveness of the flag state jurisdiction is still dominant, there are certain cases where this prerogative of the flag state may be restricted[1].

[1] This may include piracy, unauthorised broadcasting ,slave and drug trafficking , pollution et. al. For further reading See Churchill and Lowe, "The Law of the Sea", 2nd ed., p.168-176. See also *infra* under 2.6.

However, it must be stressed that the flag state remains the authority which has both the right and the duty to exercise legislative as well as enforcement jurisdiction over vessels flying its flag. The role of any third state was supposed to be, -but in practice today is not- auxiliary to the task of the flag state.

2.2 THE "INTERNAL WATERS":

Internal waters are the waters which "...lie on the landward side of the baseline from which the territorial sea and other maritime zones are measured"[2]. The definition would mostly comprise bays, ports, rivers, canals etc.. In effect, the internal waters are regarded as an integral part of the coastal state and therefore, the coastal state enjoys full territorial sovereignty over them.

This means that a foreign vessel entering the coastal state's port, -or other internal waters-, places itself, as well as those on board under the jurisdiction of that state. In practice, though coastal states would only interfere to enforce their national legislation where their own interests are affected. The authorities of the coastal state would not interfere to apply their national law on matters relating solely to the internal affairs of the foreign ship in the port[3]. If, however, the offence affects the peace or good order of the port or its consequences extend or might extend beyond the limits of the "internal economy" of the vessel, the coastal state's jurisdiction would commonly be exercised.

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[2] See art. 5(1) of the Territorial Sea Convention (TSC) of 1958 and art. 8 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS '82).

[3] For the difference between the theoretical bases between the Anglo-American position and the French position See Churchill and Lowe op. cit., p. 55.

2.2.1 The Right of Access of Vessels to Foreign Ports:

Since, as it was mentioned above, internal waters are regarded as a mere extension of the coastal state's territory, a question which naturally comes up is whether international law provides for any right of access of vessels to foreign ports. In other words, can any vessel claim a right to enter the port of a third state and therefore does the port state have a duty under international law to allow access of foreign vessels in its ports?

The existing literature on the issue appears to be contradicting. A significant number of authors supports the view that there is a general right of access of vessels to foreign ports. Colombos suggests that customary international law imposes a general duty for the promotion of international intercourse, navigation and trade , and concludes that "prohibition of the use of ports to foreign nationals would imply a neglect of the duties..."[4]. This view, which is supported by a number of other scholars[5] was partly accepted by O'Connell. He supports the view that International law merely places the duty on a port state to exercise its discretion on granting access to its ports on a non-discriminatory basis[6].

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[4] Colombos, C.J., "The International Law of the Sea", 6th ed., Longman's, London 1967, (reprinted 1968), passim.

[5] See for example, Kundig R.P., "International Straits: the Regime of Access ", 5 Georgia Journal of International and Comparative Law 107 (1975), p. 115, as well as Jessup P. C., "The United Nations Conference on the Law of the Sea", 55 Columbia Law Review 234 (1959), p. 247.

[6] O'Connell D.P., "The International Law of the Sea", Shearer I.A. (ed.), vol. 2, Clarendon press, London, 1984, p. 848. This remark, however, referred primarily to the 1923 Convention on the International Regime of Maritime Ports, addressed further down.

However, it appears that the majority of scholars adopt the view that there is no legal obligation on the port state to allow access to foreign vessels in its ports and therefore there can be no unequivocal right of access of vessels in foreign ports[7].

The 1923 Convention on the International Regime of Maritime Ports, -which came into force in 1926 and has been ratified by a considerably small number of States-, as well as a number of bilateral Agreements providing for reciprocal access to maritime ports, is often presented by advocates of the existence of a right of access (or the existence of a right of access on a non-discriminatory basis)[8] as a standard source of practice. This argument, however, even if one accepts that the 1923 Ports Convention represents the standard source of practice, is based on the assumption that this practice is accompanied by the element of *opinio juris* which is essential for the establishment of a rule of customary International Law[9]. The question whether the provisions of the 1923 Ports Convention were incorporated in customary International Law had been addressed by the United Nations Conference on Trade and Development (UNCTAD) which concluded that this Convention does not state unequivocally that a right of access exists[10]. As it was stressed in the UNCTAD Report the Convention had not been ratified by many developing countries as well as many important maritime countries.

This point was addressed in the case of the *Saudi Arabia Vs Arabian American Oil Company* (ARAMCO)[11]. The Kingdom of Saudi Arabia supported, among other things,

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[7] See Lowe, A.V., "The Right of Entry to Maritime Ports in International Ports", 14 San Diego Law Review (1976-77), pp. 527-622. See also Hakapaa K., "Marine Pollution in International Law (Material Obligations and Jurisdiction),Suomalainen PieteAkademia, Helsinki, 1981.

[8] See O'Connell op. cit., at p. 848.

[9] The issue whether a provision which, even if it was contractual in its origin, managed to pass in the general corpus of International Law so as to become part of customary International Law, is addressed in the *North Sea Continental Shelf* cases, ICJ Rep., (1969).

[10] See "Economic Co-operation in merchant Shipping - Treatment of Foreign Merchant Vessels in Ports", UNCTAD/TD/B/C.4/136, 9 Sep 1975.

[11] 27 International Law Rep. (1963), p117.

the view that it had the right to regulate, at its own discretion, the conditions of access and departure of foreign vessels for its ports. Even though this point was not contested by ARAMCO, the court supported the view that

> *"it is indispensable that every sovereign state has the right to control its ports, and to regulate as it deems best, transportation from its territory... . However, the territorial sovereignty of the state over its means of maritime communication is not unrestricted. It can only be exercised within the limits of customary International Law, of the treaties the state has concluded and of the particular undertakings it has assumed. This is clearly provided in Art. 16 of the Statute of the International Regime of Maritime Ports of 9 December 1923"*[12].

Lowe however, characterised the remarks of the tribunal as not conclusive and the issue to be far from settled[13].

The 1958 Geneva Convention, did not address the issue directly. The only reference to the issue is to be found in art. 3 of the High Seas Convention (hereinafter HSC) which deals only with the right of access to foreign ports of Land-locked States. The 1982 Convention continued on the same spirit as that adopted in the 1958 Convention regarding the rights of the Land-locked States, but also indirectly implied that the coastal authority had the right to deny access for reasons of pollution control[14]. Similar provisions have been included in a number of International treaties relevant to marine pollution prevention[15]. Lastly, it must also be noted that O'Connell argued that the extension of Art. 18 of UNCLOS '82 to include in the definition of "passage" any "*...passage to or from roadsteads or port facilities which lie outside internal waters*",

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[12] Ibid., p. 212.
[13] Lowe op.cit. fn 7, p. 606.
[14] Art. 211(3) of UNCLOS '82.
[15] See art. VI bis (4) of the 1954 Convention on Oil Pollution as well as art. 5(3) of MARPOL 73/78.

supports the view that there must be rules of International Law providing for a right of access to foreign ports[16]. However Churchill and Lowe suggest that this was done "*...for the convenience of bringing such ships within the legal regime of ships in innocent passage...*"[17].

The above demonstrate that there is complete disagreement among scholars of the Law of the Sea whether such a right exists or not, and if it does exist whether such right is absolute or not. The right of a coastal state to exclude vessels from other parts of its internal waters is not in any way questioned by any of the scholars. What is questioned is the right of the coastal state to determine at will which vessel should be allowed to access its ports and which should not. Nevertheless, even those scholars who advocate the existence of a right of access to foreign ports, recognise the right of the coastal state to impose restrictions of entry to the vessels seeking to exercise such a right. In other words, it is agreed in literature that the coastal state has an absolute right to regulate its ports. This means that the coastal state's authorities are competent to deny access to its ports at least to any vessel (non-discriminatory) which does not comply with the regulations set out for the operation of a particular port.

So far as the "dispute" amongst the different scholars is concerned, it appears that the best founded view is the one put forward by Lowe: "the ports of a state which are designated for international trade are, in the absence of express provisions to the contrary, made by a port state, presumed, to be open to merchant ships of all states and (that) such ports should not be closed to foreign merchant ships except when the peace, good order or security of the coastal state necessitates closure"[18]. Lowe supports the view that to "forbid foreign merchant vessels to enter maritime ports would be a breach of international comity"[19].

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[16] O'Connell op.cit. fn 6, p. 269.
[17] Churchill and Lowe op. cit., p.64.
[18] Lowe op. cit. fn 7, at p. 622.
[19] Ibid., p.621.

What is of importance for the purposes of this study, is that the right of the coastal state to deny access to foreign merchant vessels which would or could constitute a threat to that state is today fully recognised and indeed practised by all the major maritime nations of the world.

2.3 THE TERRITORIAL SEA:

Article 2 (1) of the United Nations Convention on the Law of the Sea '82 (UNCLOS '82) states the following:

> "*The sovereignty of a coastal state extends, beyond its land territory and internal waters... to an adjacent belt of sea, described as the territorial sea*".

The idea that the coastal states should have some kind of authority over seas adjacent to their land, is quite old[20]. Nevertheless, the concept of the territorial sea emerged as an accepted principle of international Law only during the 1958 Geneva Convention on the Territorial Sea (hereinafter referred to as TSC). Furthermore, art. 2 of UNCLOS '82 declares that:

> "*...the sovereignty over the territorial sea is exercised subject to this convention and to other rules of International Law*"[21].

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[20] For further reading See O'Connell D.P.. "The juridical Nature of the Territorial Sea", BYBIL, vol. XLV 1971, pp. 303-83.

[21] This in effect is a reproduction of art. 1(2) of the 1958 Convention on the Territorial Sea and the Contiguous Zone (TSC).

In other words, the sovereignty of the coastal state over its territorial sea is by no means absolute, but is restricted by the provisions of UNCLOS '82 as well as by the other rules of International Law, customary or conventional. This formula appears to be reasonable if the theoretical debate which preceded is taken into consideration. The main debate was between the French school of thought on the one hand and the "territorialists" (the Anglo-American school of thought) on the other.

The "territorialists" supported the view that the coastal state enjoyed sovereignty over its territorial sea. The French school of thought, rejected this suggestion and claimed merely jurisdictional competence of the coastal states over adjacent waters, for specific purposes like fishing or national defence. LaPradelle, who was considered to be the classic representative of the French school of thought, published an article in 1898 in which he supported the view that states enjoyed merely a "bundle of servitudes" over coastal waters enabling them to take action solely for the protection of their national interests[22]. This disagreement among the theorists is also reflected in the state practice. Even though the Anglo- American school of thought was steadily becoming more popular, important maritime nations like France and Spain would still reject the concept of sovereignty of the coastal state over the territorial sea, and adopted the view that the coastal state had merely restricted jurisdiction over waters adjacent to its coast. The difference between the theoretical background of the two schools of thought, also affected the issue of the breadth of the territorial sea. According to the Anglo-American school, the breadth should be fixed so that a maritime zone would be formed, over which the coastal state would have sovereignty. The French school on the other hand, rejected this concept and sought to assess restricted jurisdiction over varying distances

[22] LaPradelle de A.G., "Le Droit de l'Etat sur la Mer Territorial", 5 RGDIP 264-84, 309-47 (1899).

from the coast according to the character of the interest they wanted to protect. However, this is of no interest for the purposes of this study[23].

The disagreement between the two views was more than academic. The national legislation of the different states was, in effect, a reflection of the theory that each state adopted. Those states accepting the views put forward by the French school, would enact legislation which would give them jurisdiction only over specific matters like fishing, security, customs, as well as sanitation and navigation. On the other hand, states adopting the concept of sovereignty over the territorial sea, considered their national legislation to extend over these waters and apply, as it does over land.

Jurisdiction is a coin with two different sides. One side of the coin is the legislative jurisdiction and the other side the enforcement jurisdiction. In other words, enacting legislation covering matters over territorial sea is something which does not automatically imply that this legislation is or may be enforced. Even countries like the United Kingdom, who constantly and vigorously claimed full jurisdiction (both legislative and enforcement) over its territorial sea, refrain themselves from exercising enforcement jurisdiction on the basis of comity[24].

Despite the disagreement among the theorists and the different practical approaches of the states on the issue, all sides seemed to have a common aim: to preserve the well established right of "innocent passage" and at the same time allow the coastal states to protect their legitimate interests.

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[23] For further reading See Fenn P.T., "Origins of the Theory of Territorial Waters", 20 AJIL 465-82 (1926) and Kent H.S.K., "Historical Origins of the Three Mile Limit", 48 AJIL 537-53 (1954).

[24] See Churchill and Lowe, op. cit. fn 1, pp. 77-80.

2.3.1 The Right of Innocent Passage:

The right of innocent passage is considered today to be the cornerstone of the freedom of navigation of vessels through the territorial seas. However, this has not always been the case. The whole matter was covered with vagueness and different states were employing different practices. Therefore it was necessary for the international community to define with clarity the scope of innocent passage, since the existing uncertainty was posing a major problem to international navigation. In fact, the concept of innocent passage, developed in parallel with the concept of sovereignty over the territorial sea and this was only natural since any positive definition of any one of the two concepts would indirectly define the other. The various attempts of the international community to codify the existing customary International Law through an international convention, contributed to the formation of these two concepts as these are known in modern times.

The right of innocent passage, allows the ships of any state to "pass innocently" through the territorial sea of another state. In other words, the content of the word passage and the word innocent , outline the scope of the right of innocent passage. The 1930 Hague Codification Conference[25] defined "passage" as follows:

> "*Passage means navigation through the territorial sea for the purpose either of travelling that sea without entering inland waters, or of proceeding to inland waters, or of making for the High Sea from inland waters. [I]t includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress*".

[25] This was an attempt of the League of Nations for the codification of International Law. For further reading See "The League of Nations Conference for the Codification of International Law" (1930), 4 vols., Dobbs Ferry, N.Y., 1975, Rosenne S. (ed.).

The 1958 TSC adopts the same approach[26] as does UNCLOS '82[27]. That is to say, passage would include -apart from the actual passage which would have to be "continuous and expeditious"[28]-, stopping and anchoring, if this is incidental to ordinary navigation or rendered necessary by *force majeure* or distress, as well as in cases where one ship seeks to assist another, or a person, or an aircraft which is in danger or distress.

The definition of "innocence" is more complexed than that of "passage". The 1930 Hague Codification Conference suggested the following:

> "*Passage is not innocent when a vessel makes use of the territorial sea of a coastal state for the purpose of doing any act prejudicial to the security, to the public policy, or to the fiscal interests of that state*[29]".

The importance of this definition was that it helped to clarify that there was no connection between the character of "innocence" and the national legislation of the coastal state. That is to say, any violation of the national legislation of the coastal state by a foreign vessel in passage would not necessarily cause the loss of the character of "innocence" to the ship in question. This view was adopted by art. 14 of the TSC. Art 14(4) stipulated the following:

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[26] See art. 14 of the TSC.
[27] See arts 18 and 20 of UNCLOS '82.
[28] Art 18(2) of the '82 Convention.
[29] See Rosenne S., op. cit. fn 25.

> "Passage is innocent so long it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with these articles and with other rules of International Law"

It must be noted here though that article 14(5) introduces an important exception to the rule:

> "*Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal state may make and publish in order to prevent these vessels from fishing in the territorial sea*".

UNCLOS '82 however, even though it adopts the text of art. 14(4) of the 1958 TSC, goes on to give a non-exhaustive list of incidents which "...shall be considered to be prejudicial to the peace, good order or security of the coastal state"[30]. The list refers primarily to all those incidents which were implied by art 14(4) of the 1958 TSC. Furthermore, art 19(2) goes on to include passage in a manner that would indicate "any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal state or in any other manner in violation of the principles of International Law embodied in the charter of the United Nations" as well as "any other activity not having a direct bearing on passage".

It appears that "innocent passage" is a well defined concept which allows little room for manoeuvring to states seeking to interfere with international navigation in their territorial seas. Nevertheless, the coastal state has the right to prevent the passage of any ship through its territorial sea if this passage is not (or seizes to be) innocent[31]. Furthermore, the loss of the character of innocence would automatically expose the

[30] Art 19 of UNCLOS '82.
[31] Art 25(1) of the '82 Convention.

vessel to the full jurisdiction of the coastal state, both legislative and enforcement. The coastal state can temporarily suspend the right of innocent passage of foreign ships through specific areas of its territorial sea in order to protect its security[32] . So far as warships are concerned, it appears that the International community is not too eager to set down clear rules about the passage of such vessels through territorial seas. Neither the 1958 TSC nor UNCLOS '82 deal with the matter. The only reference made in these two conventions regards the passing of submarines through territorial sea and stipulates that such vessels have an obligation to navigate on the surface whilst in such areas[33].

2.3.2 Rights and Obligations of the Coastal States Towards Foreign Vessels Exercising the Right of Innocent Passage in their Territorial Sea :

UNCLOS '82 contains an innovation which is crucial for the assessment of the powers of the coastal state over its territorial sea. Art 21 of the Convention provides the following:

> *1. The coastal state may adopt laws and regulations, in conformity with the provisions of this convention and other rules of international law, relating to innocent passage through the territorial sea in respect of [...]*
> *(f) the preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof.*
> *2. Such laws and regulations shall not apply to design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards*
> *[.....]*
> *4. Foreign ships exercising the right of innocent passage through the territorial*

[32] See art 25(3) of UNCLOS '82 and art 16(3) of the TSC.
[33] See art 14(6) of the TSC and art 20 of UNCLOS '82.

sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of Collision at sea.

Art. 211(4) of the same Convention goes on to stipulate that:

"*Coastal states may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention , reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage.*"

From the above it becomes clear that it is the intention of the draftsman of the 1982 Convention to introduce a general right for the coastal state (or the port state) to legislate for the prevention of marine pollution. However, such legislation must not in any way extend beyond the framework set by international law and specifically when it comes to issues of design, construction and the manning or equipment of foreign vessels, it must not extend beyond the generally accepted international standards. In other words, the coastal state has a right to legislate and seek to enforce such legislation over such issues having as limit the standards which are generally accepted to be international (i.e. the standards set by competent international organisations like IMO)[34].

The main obligation of the coastal state is not to hamper innocent passage through its territorial sea[35]. Art. 24(1) of the 1982 Convention stipulates the following:

[34] Other rights like the right to suspend innocent passage or the right of hot pursuit which are not considered to be of any crucial significance for this study are not dealt with at this point. For further reading on the issue See Churchill and Lowe op. cit. pp 77-84.

[35] See Article 15 (1) of TSC.

"The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention the Coastal State shall not:
a. impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
b. discriminate in form or in fact against the ships of any State or against ships carrying cargo to, from or on behalf of any State."

In other words, the Coastal State must ensure that the right of other states to navigate through its territorial sea is recognised and respected . Furthermore, both the 1958 Geneva Convention and the 1982 Convention provide that:

"The coastal state shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea"[36].

Accordingly, foreign vessels are entitled to claim a right of innocent passage through the territorial sea of any coastal state and have a general obligation to comply with all the laws and regulations of the coastal state relating to the exercise of this right[37].

[36] See article 15(2) of the 1958 TSC and Article 24(2) of the 1982 Convention.
[37] Art 21 of UNCLOS '82 enumerates exhaustively the laws and regulations a coastal state may enact relating to innocent passage.

2.4 THE PECULIARITIES OF STRAITS AND ARCHIPELAGOS:

The 1982 Convention recognised the difficulties arising out of areas with geographical peculiarities, like straits and archipelagos. As a result of this, the draftsman of UNCLOS '82 introduced the concept of "transit passage" to apply for international straits and the concept of "archipelagic sealanes passage" to apply in archipelagos.

The concept of transit passage is the result of a compromise between the advocates of absolute freedom of navigation through international straits -who were seeking the recognition of a right similar to the one enjoyed by vessels on the High Seas- and on the other hand, the advocates of the recognition of a right of innocent passage through straits. Thus art 39 of UNCLOS '82 provides as follows:

> *"1. Ships and aircrafts, while exercising the right of transit passage, shall:*
> *a. Proceed without delay through or over the strait;*
> *b. Refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering the straits, or in any other manner in violation of the principles of international law embodied in the charter of the United Nations;*
> *c. Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;*
> *d. Comply with other relevant provisions of this part.*
>
> *2. Ships in transit passage shall:*
> *a. Comply with generally accepted international regulations, procedures and practices for safety at sea, including the international regulations preventing*

collisions at sea;

b. Comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships."

The above, undoubtedly bear resemblance with the provisions concerning the right of innocent passage. Nevertheless, art 44 of the 1982 Convention , clarifies that "there shall be no suspension of transit passage". In other words, the right recognised to coastal states by art 23(3) of UNCLOS '82 for the suspension of the right of innocent passage in their territorial sea is not recognised for strait states. Such states can in no way suspend transit passage[38].

The archipelagic sealanes passage is in effect the same concept as the one of transit passage, with the only difference being the fact that it applies on archipelagic states. Art 54 of the 1982 Convention provides that arts 39, 40, 42 and 44 apply *mutatis mutandis* to archipelagic sealanes passage.

2.5 THE EXCLUSIVE ECONOMIC ZONE:

The concept of the "exclusive economic zone" (EEZ) was introduced for the first time in the '70s and immediately became very popular between many developing states as well as states with considerable interests in fishing, like Canada and Norway. The concept, in its current form, represents a compromise between excessive claims for an extended territorial sea, brought forward by a number of Latin American states, and advocates of the freedom of the High Seas. As it stands, this new concept allows all involved interests to remain satisfied: developing states achieved the recognition of their own exclusive economic rights over an extended area adjacent to their territorial sea, while traditional maritime states seeking to safeguard the freedom of the high seas,

managed to exclude any claims of sovereignty raised by coastal states for such extended areas.

The *travaux preparatoires* of UNCLOS '82, indicate that there was a lot of discussions about the legal character that the EEZ should have. The two sides were arguing whether the EEZ should have the character of the High Seas with the exception of those economic rights recognised to the coastal states, or whether it should have the character of the territorial seas with the exception of those particular rights recognised to third states seeking to make use of this maritime zone. That is to say, the main debate was whether this zone would have a residual character of territorial waters or of High Seas. UNCLOS '82 decided to reject both of these suggestions and recognised a *sui generis* status for the exclusive economic zone[39].

The coastal state has a sovereign right over the natural resources of its EEZ. This sovereign right includes "exploring and exploiting, conserving and managing"[40] non-living natural resources (e.g. oil, gas, manganese nodules etc.), all living natural resources (referring mainly to fishing)[41], as well as any other economic resources "...such as the production of energy from the water, currents and winds"[42]. Furthermore, the coastal state has:

> "*the exclusive right to construct and to authorise and regulate the construction, operation and use of:*
> *a. artificial islands;*
> *b. installations and structures for the purposes provided for in art. 56 and other economic purposes;*

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[38] This view was firstly introduced at the *Corfu Channel* Case [1949] ICJ Rep 1.
[39] See arts. 55 and 86 of the '82 convention.
[40] See art 56 of UNCLOS '82.
[41] Arts 61-73 of UNCLOS '82.
[42] Art 56 of the '82 Convention.

c. installations and structures which may interfere with the exercise of the rights of the coastal state in the zone"[43].

The coastal state, -which also has a right to establish safety zones, (not exceeding 500 metres), around such constructions-, has a duty to give due notice for such structures as well as to remove them as soon as they are no more in use and must not construct such structures in "...recognised sealanes essential to international navigation"[44]. Moreover, the coastal state has "a right to regulate, authorise and conduct scientific research in its EEZ"[45], which in effect prevents any third state from conducting any marine scientific research in that area without the consent of the coastal state.

However, UNCLOS '82 went on to confirm jurisdiction to the coastal state over "...the protection and preservation of the marine environment"[46]. Specifically, the convention gives both legislative and enforcement jurisdiction over issues of vessel-source pollution[47] as well as over issues of dumping of waste[48] and pollution from sea-bed activities[49]. For the first time the coastal state may enact legislation on issues relating to marine pollution in its exclusive economic zone and indeed take action to enforce such legislation on vessels which do not comply whilst sailing in the EEZ. This provision of the convention is of particular importance: the maximum allowable breadth of an EEZ is 200 nautical miles and, state practice has proved that there is a tendency to take full advantage of the relevant provisions of UNCLOS '82.

Article 58 of the 1982 convention deals with the right and duties of third states in the EEZ of another state. The freedom of overflight, the freedom of laying submarine

[43] Art 60 of UNCLOS '82.
[44] Ibid.
[45] See art 246 of the '82 convention.
[46] Ibid art 56 of UNCLOS '82. See also Part XII of the Convention.
[47] Ibid arts 211(5 and 6), 220 and 234.
[48] Ibid arts 210(5) and 216.

cables and pipelines and of course the freedom of navigation, are guaranteed by the convention. So far as the freedom of navigation is concerned, article 58 refers directly to article 87 of the convention which deals with freedom of navigation on the High Seas. It therefore appears that, so far as navigation is concerned, the introduction of the concept of EEZ does not in any way change the character of freedom which is guaranteed by UNCLOS '82 for the High Seas area. This *sui generis* legal character of the EEZ allows room for disputes to arise between the coastal state and third states making use of the EEZ. Article 59, in an attempt to solve this problem provides as follows:

> "*In cases where this convention does not attribute rights or jurisdiction to the coastal state or to other states within the exclusive economic zone, and a conflict arises between the interests of a coastal state and any other state or states, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole*".

This provision, in conjunction with the thorough system for the settlement of disputes set out in Part XV of the convention, provides a formula to be used in cases where such a conflict of interests arises.

2.6 THE HIGH SEAS:

Article 86 of the '82 Law of the Sea Convention, defines the High seas as:

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[49] Ibidarts 208 and 214.

"*All parts of the sea that are not included in the exclusive economic zone , in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state*".

Ever since the theoretical foundations of the freedom of the High Seas were put into context through Grotius's "Mare Liberum", the view that the high Seas should be open to all states became gradually more and more established. This is considered to be a well established principle of customary International Law, since as early as the beginning of the 19th century, that the area of the High Seas is not a *res nullius*, susceptible to appropriation by anyone who is in a position to exercise occupation over it, but is a *res communis* and is there for everyone to use. The conventions on the Law of the Sea recognise fully this right and provide non-exhaustive lists of some of such "freedoms" which every state has a right to exercise on the High Seas. The only obligation of a State exercising any freedom of the High Seas is to show "reasonable regard"[50] to the interest of other states. However, in practice, this term of reasonable regard (or "due regard") , favours the strongest states since these are in a position to impose on the others the "priority" of their interests. Nevertheless, International Law recognises and guarantees the freedom of the High Seas. This includes any use so far as it is not excluded specifically by a rule of law[51].

The fact that the High Seas area is not under the jurisdiction of any particular state, implies that the flag state is the only state with any type of jurisdiction over vessels sailing on High Seas under its flag. In fact the right of the flag state to exercise legislative as well as enforcement jurisdiction over its ships on the High Seas is recognised both by the 1958 Convention (art 6 of the HSC) and UNCLOS '82 (art 92). In cases where more than one ships are involved, (like for example collision cases), the Law of the Sea Conventions reserve penal and disciplinary proceedings to the

[50] This term which is included in art 2 of the 1958 High Seas Convention (HSC) was replaced with the term "due regard" in the '82 Convention.
[51] This view is put forward by Churchill and Lowe, op. cit.fn 1, p. 168.

authorities of the state in whose ship the defendant served, or the state of which he is a national[52].

This exclusive jurisdiction of the flag state has certain exceptions. The most important exception which enjoys broad recognition is the right of any state to act against piracy on the High Seas. Article 101 of UNCLOS '82 stipulates the following:

> *"Piracy includes any illegal act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship (or aircraft) against another ship (or aircraft), or persons, or property on board it, on (or over) the High Seas"[53]. Any state can exercise legislative as well as enforcement jurisdiction over pirates[54]"*.

This same right is recognised to any state over those responsible for the unauthorised broadcasting on the High Seas. Article 109 provides both for legislative and enforcement jurisdiction of the affected state as well as of the flag state and the states of which the broadcasters are nationals.

The Torrey Canyon disaster of 1967 highlighted a case in which a pollution incident on the High Seas could have detrimental effects on adjacent coastal states and led to the 1969 Intervention Convention. Article 221 of the 1982 Convention recognises the necessity of the establishment of a right of intervention and allows states whose coastline is threatened with serious pollution from a foreign shipping casualty on the High Seas, to take the necessary action in order to avoid damage. In this case the

[52] See art 11 of the HSC and art 97 of UNCLOS '82.
[53] The same definition was included in art 15 of the HSC.
[54] See art 19 of the HSC and art 105 of UNCLOS '82.

coastal state has enforcement jurisdiction but does not seem to have legislative jurisdiction. Its right to act derives directly from International Law.

Article 99 of UNCLOS '82 (and art 13 of the HSC) provides that in cases where a ship is suspected of being engaged in slave trade, it may be visited and boarded by the authorities of any state, who can only report the findings to the flag state which has an obligation to act upon that report.

Lastly, it must be mentioned that both customary and international treaty law recognise the right of a state to pursue a foreign ship which has violated its laws within its territorial sea (or internal waters) and to arrest it on the High Seas. This right of "hot pursuit" can be exercised if the pursuit began while the ship (or one of its boats) was still within the territorial sea of the coastal state. The pursuit must be continuous and shall cease automatically as soon as the pursued ship enters the territorial sea of another state[55].

2.7 CONCLUSIONS:

It appears that the issue of the jurisdiction of Coastal states over foreign vessels sailing in the different maritime zones of that state, varies in International Law, according to the matter which it attempts to address. International Law seems to recognise enhanced jurisdiction to the coastal state over issues of marine pollution whereas this does not seem to be the case with the rest of the matters that this study addresses i.e. matters of safety of navigation.

[55] For further reading See Poulantzas N.M., "The Right of Hot Pursuit in International Law", Leyden, 1969.

So far as marine pollution is concerned the coastal state has full legislative jurisdiction over foreign vessels sailing within its territorial sea, while these are exercising their right of innocent passage. However, any such laws of the coastal state must not "apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards"[56]. Furthermore, according to article 220(2) of the 1982 convention the coastal State may exercise enforcement jurisdiction over a foreign vessel sailing through its territorial sea if that vessel is suspected of violating the coastal state's anti-pollution legislation or applicable international rules relating to vessel-source pollution. In such cases, the coastal state's authorities may inspect the vessel and institute legal proceedings should they conclude that the conduct of the vessel was not in compliance with the relevant rules and regulations. If marine pollution from the foreign vessel is "wilful and serious" then the character of the passage ceases to be innocent and that vessel is automatically subject to the full jurisdiction of the coastal state.

This legislative and enforcement jurisdiction of the coastal state does not apply over straits while the foreign vessel is exercising its right of transit passage. In these cases the coastal state can only adopt legislation which will give "effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances, in the strait"[57]. Accordingly, the coastal state may exercise enforcement jurisdiction over foreign vessels only if the violation of the rules and regulations causes or threatens "major damage to the marine environment of the strait"[58].

The provisions of the 1982 Convention regarding the EEZ resulted in an increase of the geographical scope of the coastal state's jurisdiction over foreign vessels. This is of particular importance since this new concept which acquired immediate support around the globe, in effect extends over the waters which enclose the vast majority of the

[56] See art 21(2) of UNCLOS '82.
[57] Ibid art 42(1).
[58] Ibid art 233.

existing international sealanes. Churchill and Lowe note that the universal establishment of a 200 mile EEZ would embrace about thirty six per cent of the total area of the sea and would contain virtually all the major shipping routes of the world[59]. Article 211(5) of UNCLOS '82 provides that a coastal state may legislate for its EEZ, provided that that legislation gives effect to "generally accepted international rules and standards, established through the competent international organisation or general diplomatic conference". However, the coastal state may arrest a vessel in its EEZ, thus exercising enforcement jurisdiction, only where the violation of its legislation has resulted "in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal state or to any resources of its territorial sea or exclusive economic zone"[60]. Otherwise, the coastal state may only require the vessel involved to identify itself giving its port of registration and the last and next port of call as well as any other information which would enable the coastal state to establish whether a violation has occurred. If such information is denied the coastal state may undertake physical inspection of the vessel in the EEZ. The above rule has an exception for ice-covered areas which form part of the EEZ of the coastal state. In such cases, the coastal state may legislate even over issues covering "design, construction etc..." and has full enforcement jurisdiction over them.

Article 94 of UNCLOS '82 places a direct obligation on the flag state to take measures which would promote safety at sea. These measures must again be in conformity with "generally accepted international standards"[61]. Broadly speaking, this includes issues of construction, equipment and the seaworthiness of ships, issues relating to ship routing and issues of crewing standards.

So far as issues of construction, equipment and seaworthiness are concerned, it appears that international law does not provide for any legislative or enforcement jurisdiction

[59] op. cit. fn 1, p. 134.
[60] See art 220(3-8) of UNCLOS '82.
[61] See also art 10 of the HSC.

of the coastal state. The flag state has the right and the obligation to prescribe and enforce such standards assisted in certain cases by the port state[62]. Nevertheless, the coastal state has legislative and enforcement jurisdiction over such issues if its legislation is merely giving effect to the international standards as these are generally accepted.

Moreover, the coastal state has a primal role to play in the avoidance of collisions in its maritime zones. Article 21(4) and 39(2) of the '82 convention stipulate that vessels exercising their right of innocent passage through the territorial sea (or their right of transit passage through straits) must observe the Regulations for Preventing Collisions at Sea regardless of whether the flag state or the coastal state is a party to the 1972 Convention[63]. Nevertheless both the 1958 TSC and UNCLOS '82 recognise that all coastal states have the right to enact regulations relating to navigation of foreign vessels in their territorial sea. Article 21 of COLREG '72 places a duty on the coastal state to take into account IMO recommendations on the issue. The coastal states have also enforcement jurisdiction over foreign vessels violating regulations of ships routing in their territorial sea. The matter is a bit more complicated for international straits. Article 41 of UNCLOS '82 prescribes that a coastal state may enact a traffic separation scheme which however must " conform with generally accepted international regulations" and also must be referred to IMO "with a view to their adoption" before being prescribed by the coastal state. Similarly, coastal states may enforce only international standards on vessels exercising the right of transit passage.

The issue of crewing standards is left entirely to the hands of the flag state. Article 94(4) of the '82 convention provides that flag states must ensure that each of their ships "is in the charge of a master and officers who possess appropriate qualifications ... and

[62] See infra at chapter 3 for the competence of the port state to take action against sub-standard vessels.
[63] This is a reference to the 1972 Convention on the International Regulations Preventing Collisions at Sea of IMO (COLREG).

the crew is appropriate in qualifications and numbers for the type, size, machinery and equipment of the ship".

However, the Coastal State could use the legislative and enforcement Jurisdiction it is given by article 21[64] and article 220 of UNCLOS '82 as the back door for the effective exercise of control over all foreign vessels in the territorial sea. The coastal state may use its jurisdiction over issues of marine pollution to exercise full control over issues like crewing (and seek to enforce the STCW Convention which can be taken as the relevant international standard), design and construction (thus seeking to enforce Conventions like the Load Lines Convention and the SOLAS Convention[65]) and matters of safety of navigation in general which were considered to be issues under the jurisdiction of the flag state (and in certain cases which are dealt with in the next chapter, the port state), but definitely not the coastal state.

[64] See *supra* under 2.3.2 .
[65] See *infra* chapter 6 of Part III for the consequences of the ISM Code on the jurisdictional competence of the coastal state.

CH. 3: PORT STATE CONTROL AND JURISDICTION

3.1 INTRODUCTION:

Even though the phrase "Port State" is usually followed by "control and jurisdiction", "port state control" and "port state jurisdiction" are two different concepts. Port state jurisdiction signifies the competence of the port state to legislate and/or seek to enforce this jurisdiction over vessels visiting its port. It comprises all those dimensions that constitute the prerogative of the port state to assert jurisdiction over affairs in its own ports by either legislating and/or enforcing such legislation, or merely by enforcing international standards[1]. Port state control is one of those dimensions: it forms a part of the broader concept of port state jurisdiction. Port state control allows the port state to exercise full control over issues of maritime safety, marine pollution and issues of crew competence and working conditions. It constitutes that part of port state jurisdiction which is most widely utilised by maritime nations around the world. It represents the will of these states to address issues which till recently used to fall under the rule of comity which prevented them from interfering with matters the effects of which did not affect the interests of the port state.

3.2 PORT STATE JURISDICTION:

The entry of any vessel into a foreign port signifies the submission of this vessel to the legal order of the port state. Nevertheless the issue remains much more complexed since the flag state continues to have both legislative and enforcement jurisdiction over

[1] This distinction belongs to Kasoulides, see "Port State Control and Jurisdiction", Martinus Nijhoff, Netherlands, 1993.

these vessels even while they are lying in a port of another state. However, the Anglo-Americans and the French did not appear to agree on the legal basis of the powers of the port state to exercise any kind of jurisdiction over foreign vessels in its ports.

The Anglo-American school of thought suggested that the port state had complete jurisdiction over foreign vessels in its ports but, the port state could choose to forgo this jurisdiction as a matter of policy. On the other hand, the French school of thought supported the view that the port state had no jurisdiction whatsoever over issues which could be characterised as purely internal to the foreign vessel. Nevertheless, in practice these two theories led to similar results. Traditionally, port states would avoid interfering with issues related with the "internal economy" of the ship the consequences of which do not, in any way, extend beyond the vessel. The Anglo-Americans would choose to do this as a matter of policy whereas the French would follow the same practice because of lack of jurisdiction. In any case, the port state would not interfere unless the consequences of an incident which occurred on board affected the peace or good order of the port state. It appears, however that a port state will assert jurisdiction if the captain of the ship or the consul of the flag state request the intervention of the port state[2]. In practice the Anglo-American theory is nowadays commonly accepted.

Port states have full jurisdiction to regulate issues of navigation, pilotage and pollution and such laws are commonly enforced on all vessels in ports. However, port state jurisdiction has been more clearly defined so far as issues of pollution prevention are concerned. Before UNCLOS '82, international law recognised that the port state had enforcement jurisdiction for any violation of its national legislation concerning marine pollution, which has taken place in its ports. This jurisdiction did not extend over violations committed before the entry of the vessel in the port states territorial sea, i.e. on the high seas. UNCLOS '82 made no changes in so far as the legislative powers of

[2] For an account on the exceptions on the principle of non-intervention over issues of "internal economy" see Churchill and Lowe op. cit. at fn 1 of ch.2, p. 54-57, where references to case law are included.

the port state are concerned with the exception of the provisions of art. 211(3) which provides that states may set requirements as a condition for the entry of foreign vessels in their ports[3].

Nevertheless, the 1982 Convention brought forward radical changes in the matter of enforcement jurisdiction of the port state. Customary international law is codified in art. 220(1) which provides that the port state has the power to arrest and prosecute a vessel which violates its anti-pollution laws or applicable international rules, in its territorial sea or EEZ. Art 218 however, is revolutionary. It provides as follows:

> *"Enforcement by port states*
> *1. When a vessel is voluntarily within a port or at an offshore 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 law and standards established through the competent international organisation or general diplomatic conference.*
> *2. No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another state unless requested by that state, the flag state or a state damaged or threatened by the discharge violation or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the state instituting the proceedings.*
> *3. When a vessel is voluntarily within a port or at an offshore 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,*

[3] The article also provides for the communication of these requirements to the "competent organisation" and for "due publicity".

territorial sea or exclusive economic zone of the requesting state. It shall likewise, as far as practicable, comply with requests from the flag state for investigation of such a violation, irrespective of where the violation occurred. 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 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."

Art. 219 goes on to deal with the measures relating to seaworthiness of vessels to avoid pollution and provides as follows:

"Subject to section 7, states which upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their offshore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such states may permit the vessel to proceed only to the nearest appropriate repair yard and upon removal of the causes of the violation, shall permit the vessel to continue immediately."[4]

[4] Section 7 mentioned in the above two articles, provides certain safeguards for the foreign vessel which include, *inter alia*, the facilitation of hearing of witnesses and the admission of evidence (art. 223), the enforcement of any measures solely by officials or government vessels (art. 224),as well as the obligation of the port state to exercise "due care" not to endanger the safety of navigation, create a hazard to the vessel, "or bring it to an unsafe port or anchorage or expose the marine environment to an unreasonable risk" (art 225).

Art. 227 reiterates the duty of the port state not to discriminate against foreign vessels. Furthermore, art. 221 places an obligation on the port state to suspend any legal action taken against a foreign vessel, "upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag state within six months of the date on which proceedings were first instituted". This article however, goes on to provide two significant exceptions to the rule: firstly it stipulates that the coastal state has precedence in the case of major pollution of its coast over the flag state, and secondly that the port state may refuse to transfer the proceedings if " the flag state in question has repeatedly disregarded its obligations to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels". This latter remark, is an expression of the will of many maritime nations to provide for alternative methods of enforcement if the flag state fails to observe its international obligations thus allowing vessels registered under its flag to lack behind in matters of safety and pollution prevention. This is particularly the case with "open registries", (or flags of convenience as they are otherwise known), where small countries with limited resources seek to attract as much tonnage as possible under their flag[5]. Nevertheless this provision is characteristically vague and therefore open to possible exploitation. There appear to be no objective criteria upon which the flag state may be judged, but also the "judge" of the performance of the flag state is awkwardly enough the port state itself.

The draftsman of UNCLOS '82 considered the laying down of detailed procedures for the investigation of foreign vessels to be absolutely necessary. Accordingly, art. 226 of UNCLOS '82 provides as follows:

> *1(a) States shall not delay the foreign vessel longer than is essential for purposes of the investigation provided for in art. 216, 218 and 220. Any physical inspection of a foreign vessel shall be limited to an examination of*

[5] See infra under chapter 5.2.3.

such certificates, records or other documents as the vessel is required to carry by generally accepted international rules and standards or of any similar documents which it is carrying; further physical inspection of the vessel may be undertaken only after such an examination, and only when:

(i) there are clear grounds for believing that the conditions of the vessel or its equipment does not correspond substantially with the particulars of those documents;

(ii) the contents of such documents are not sufficient to confirm or verify a suspected violation;

(iii) the vessel is not carrying valid certificates and records.

(b) If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security.

(c) Without prejudice to applicable international rules and standards relating to the seaworthiness of vessels, the release of a vessel may, whenever it would present an unreasonable threat of damage to the marine environment, be refused or made conditional upon proceeding to the nearest appropriate repair yard. Where release has been refused or made conditional the flag state of the vessel must be promptly notified, and may seek release of the vessel in accordance with Part XV[6] .

2. States shall co-operate to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea.

Lastly, it must be noted that the convention provides only for monetary penalties[7] as well as that port states are liable for damage or loss if their enforcement measures are unlawful or unreasonable[8].

[6] Part XV deals with the settlement of disputes.
[7] See art 230 of UNCLOS '82.
[8] Ibid. art 231.

The Law of the Sea Convention however, did not demonstrate the equivalent zeal for issues of construction and equipment of vessels, crewing or working conditions on board vessels. It remains silent over the matter of port state jurisdiction over these issues, reflecting in this way, the climate of the time: marine pollution constituted a top priority whereas the other issues were not considered urgent enough to be dealt with by this conference. It appears that the participating states regarded these issues as issues falling within the category of "internal economy" of the vessels and therefore were covered by the rule of comity which reserved the right of the port state to interfere only in order to protect its own interests. Indeed, it seems that the intention of the draftsman of the convention was to leave the matter in the hands of the flag state[9].

Inevitably, the above analysis gives rise to a question: since it is well recognised by now that the port state has complete legislative and enforcement jurisdiction over its ports, why was it considered necessary by the draftsman of UNCLOS '82 to provide all those detailed articles concerning marine pollution but still avoid the recognition of a similar right of the port state over issues of shipping safety and crewing or working conditions on board the vessels visiting its ports? A possible explanation could be that the international community wanted to make clear that issues of marine pollution lie beyond the rules of comity which "prevented" the exercise of full enforcement jurisdiction of the port state over foreign vessels unless the interests of that state are threatened. In any event the situation was not entirely clear and it was obvious that more specific conventions were necessary in order to clarify the areas over which port state enforcement jurisdiction would extend in practice. This need for clarity was one of the reasons which led the international community to the introduction of the concept of Port State Control through the appropriate *forum*: IMO.

[9] Ibid art. 94 entitled "Duties of the Flag State". See also art 10 of the High Seas Convention which provides that every state shall take such measures for its vessels as are necessary to ensure safety at sea with regard to communications, the prevention of collisions, crew conditions and the construction, equipment and seaworthiness of ships, in conformity with "generally accepted international standards".

3.3 PORT STATE CONTROL:

It is not unusual for a vessel not to call to a port of its flag state for quite a long period of time. This is one of the consequences of the international character of the shipping industry where the rules of supply and demand may require a vessel to trade in an area far away from its flag state. Consequently, the enforcement of the national legislation of the flag state over its vessels becomes practically, if not impossible, at least problematic. This would be the case particularly with small states which maintain fleets disproportionately larger that the size of the flag state's administration, thus making enforcement of international standards very difficult[10]. At the same time, the international community was engaging in a global effort to introduce international standards, to be recognised and respected around the world, under the *aegis* of the International Maritime Organisation as well as other international organisations like International Labour Organisation. The international community, recognising the difficulties faced by flag states due to the character of the industry, sought ways of assisting these flag states. At the beginning, the port state was thought to be an ideal solution to the problem. This was to act as an "agent" of the flag state in its effort to exercise the necessary control over the vessels flying its flag, which were at the moment in one of its ports. The findings could then be communicated to the flag state which would evaluate them and take appropriate action, if necessary.

In the meantime, it was becoming more and more obvious that not all flag states were demonstrating the same "eagerness" in controlling the vessels under their flag. A number of "young" states were establishing open registries without really having neither the necessary infra-structure nor the necessary expertise which would allow them to fulfil their international obligations for the enforcement of the international standards over the tonnage under their flag. The consequences of this lack of control

[10]This constitutes one of the reasons which led countries with small administrations and limited resources to delegate their power for the carrying out of regular surveys as well

however, would most likely not affect the flag state since the place of trading is most of the times far away from the place of registration. Certain flag states would not only fail to exercise any type of control over their tonnage, but would take no action in response of the reports send to them by port states around the world.

By then, the practice of the port states to inspect foreign vessels in their ports "on behalf" of the flag states, had broken the psychological barrier that existed dictating that port authorities had no involvement over matters the effects of which were not extending beyond the limits of the vessel. Moreover, it had been established by then that port states had jurisdiction, both to legislate and to enforce such legislation on foreign vessels visiting their ports. In view of the lack of interest demonstrated by a number of flag states for the exercise of any effective control over their tonnage, it became clear that port state control could be used as an alternative mode of enforcement of international standards. The introduction of an alternative enforcement regime would promote the compliance of the international fleet with the established standards, but also it would "encourage" flag states to employ more drastic practices in enforcing these standards themselves. The idea of port state control -both in its original form i.e. as an auxiliary scheme to the flag state, and as an alternative mode of enforcement- was conceived, born and bred within IMO. It has been a long and delicate process since in an international organisation like IMO, a simple determination whether this new regime was legal or not, was not enough. Politics and economics were also on the agenda. The fact that the jurisdiction of the port state over its ports was already recognised as a prerogative deriving from the sovereignty of that state, does not automatically mean that the industry could sustain a sudden change in the practices applied at that moment, and accept the different port authorities to begin enforcing their national legislations overnight. Traditionally as it was explained above, port states had abstained from exercising their enforcement jurisdiction. Even though any non-compliance with the international standards regarding pollution prevention would be more easy to put forward, in an attempt to prove the existence of a threat to the interests

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as for the issuing of the relevant certificates, to classification societies. See *infra* chapter 5.2.3.

of the port state, other issues like construction and equipment of vessels, crewing or working conditions would not be that easy to prove. IMO, which would be more than happy if an alternative enforcement regime was to be introduced, had to pursue the whole matter with particular care since the new regime could not succeed in its targets unless all parties involved could be convinced to accept it. Any hasty or far fetched move of IMO could alienate those nations which were reluctant to accept it.

Gradually, over the years, provisions allowing for port state control were introduced in a number of conventions -primarily IMO conventions. These include:

-the 1966 Load Lines Convention and its 1988 Protocol;
-SOLAS '74 and its 1978 and 1988 Protocols;
-MARPOL 73/78;
-STCW '78-'95; and
-COLREG '72.

The example set by IMO was soon followed by ILO which with its Convention No. 147 of 1976 concerning Minimum Standards in Merchant Ships, adopts a similar approach thus providing for port state control on issues falling under the scope of this organisation.

3.3.1 The Load Lines Convention 1966:

The 1966 Load Lines Convention (hereinafter the LL Convention), which is one of the most successful conventions of IMO[11], contains provisions which allow for the exercise of port state control over issues dealt with in this convention. Of course the flag state

[11] By October '97. 140 states had ratified the convention representing 98.19% of the world's tonnage.

has the obligation to implement the convention and issue the relevant certificates as well as to survey periodically its vessels in order to confirm compliance with the provisions of the LL Convention. The convention provides for mutual recognition of certificates issued by contracting governments and places an obligation on all the participating states to accept such certificates[12].

However, art. 21 which deals with port state control stipulates as follows:

> *1. Ships holding a certificate ... are subject, when in the ports of other contracting governments, to control by officers duly authorised by such governments. Contracting governments shall ensure that such control is exercised as far as is reasonable and practicable with a view to verifying that there is on board a valid certificate under the present convention. If there is a valid International Load Line Certificate (1966) such control shall be limited to the purposes of determining that:*
> *(a) the ship is not loaded beyond the limits allowed by the certificate;*
> *(b) the position of the load line of the ship corresponds with the certificate; and*
> *(c) the ship has not been so materially altered ... that [it] is manifestly unfit to proceed to sea without danger to human life.*
> *If there is a valid International Load Line Exemption Certificate on board, such control shall be limited to the purpose of determining that any conditions stipulated in the certificate are complied with.*
> *2. If such control is exercised under subparagraph (c) of paragraph 1 of this article, it shall only be exercised in so far as may be necessary to ensure that the ship shall not sail until it can proceed to sea without danger to the passengers or the crew.*
> *3. In the event of the control provided for in this article giving rise to intervention of any kind, the officer carrying out the control shall immediately inform in writing the consul or the diplomatic representative of the state whose*

[12] See art. 20 of the LL Convention.

flag the ship is flying of this decision and of all the circumstances in which intervention was deemed to be necessary."

The above article leaves no room for any doubts that port state authorities are entitled to exercise port state control over foreign vessels in their ports. This provision is quite strong considering that this was the first attempt of IMO to introduce port state control in an international convention. Nevertheless, the character of this convention is somehow peculiar: it is practically impossible for any flag state -even those which wish to enforce standards vigorously- to exercise control over issues covered by the LL Convention since the critical point of compliance comes up every time the ship accepts a new load. In other words, non-compliance in this case could not solely be caused by the lack of interest on behalf of the flag state to implement the provisions of this convention. Effective control over issues of stability may only be carried out at the port of loading and therefore the flag state may only exercise such control with the assistance of the port state. Furthermore, it must be noted that the port state authorities have the power to intervene in order to enforce the content of the relevant certificate and not the convention as such. This is a clear indication that the will of the draftsman of the LL convention was that the port state would act as an "agent" of the flag state thus ensuring compliance with the flag state's certificate which had been issued according to the provisions of the convention. Lastly, it must be noted that the port state may only detain the foreign vessel if there have been material alterations which rendered the ship as manifestly unfit to proceed to sea without danger to human life. This provision refers directly to art. 19 of the convention which provides that in such cases the International Load Line Certificate (1966) issued by the flag state shall be cancelled. That is to say, the port state may detain a vessel if the circumstances which would justify the cancellation of the existing certificate, are present at the time of inspection.

3.3.2 MARPOL 73/78:

MARPOL 73/78 provides for a dual system of enforcement: flag state and port state enforcement. The whole matter was left vague pending the outcome of UNCLOS '82[13]. Art. 4(2) of MARPOL 73/78 provides that:

> *Any violation of the requirements of the present convention within the jurisdiction of any party to the convention shall be prohibited and sanctions shall be established therefor under the law of that party. Whenever such a violation occurs, that party shall either;*
> *(a) cause proceedings to be taken in accordance with its law; or*
> *(b) furnish to the administration of the ship such information and evidence as may in its possession that the violation has occurred.*

It must be noted here that the above article refers to "...any violation... within the jurisdiction of any party". This means that the article applies also on areas beyond the internal waters of the port state thus allowing the coastal state to cause proceedings to be taken in accordance to its national legislation. That is to say, art. 4 refers also to coastal state jurisdiction.

The primary obligation for the implementation of the convention and for the issuance of the relevant certificates lies with the flag state. All participating governments undertake to mutually recognise these certificates[14]. Para. 2 of art 5 provides for port state control and stipulates the following:

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[13] See Birnie P.W., Memorandum of ,"The Legal Regime of Prevention of Collisions and Stranding of Vessels Carrying Noxious or Hazardous Cargoes", Parliamentary Papers 1978-79, vol. 15, para. 38.
[14] See art. 5(1) of MARPOL 73/78.

A ship required to hold a certificate in accordance with the provisions of the regulations is subject, while in the ports or offshore terminals under the jurisdiction of a party, to inspection by officers duly authorised by that party. Any such inspection shall be limited to verifying that there is on board a valid certificate, unless there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate. In that case, or if the ship does not carry a valid certificate, the party carrying out the inspection shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment. That party may, however, grant such a ship permission to leave the port or offshore terminal for the purpose of proceeding to the nearest repair yard available.

The above provision, in effect, holds the certificate as an absolute prove of compliance and restricts the power of the port authorities to carry out full inspections on the ship's equipment only when there are "clear grounds" to believe that such equipment is inadequate.

Art. 6 provides that the participating states may co-operate to detect violations and to enforce the convention. Inspections may be carried out on board foreign vessels in order to investigate any violation of the convention, even if such a violation occurred beyond the jurisdiction of the port/coastal state. However, no action may be taken on the basis of the collected evidence. The evidence must be communicated to the flag state which may institute proceedings against the involved parties. Lastly, it must be mentioned that the convention provides for compensation for any loss or damage suffered by the ship which has been unduly detained or delayed[15].

[15] Ibid. art. 7(2) .

It is worth mentioning that the 1954 Oil Pollution Convention (hereinafter OILPOL), also contains provisions allowing for port state enforcement. Port state authorities have the power to inspect the oil record book of foreign vessels in their port and if such an inspection or other factors justify an assumption on behalf of the port state authority that there had been a violation of the convention, all the relevant evidence should be forwarded to the flag state which can take legal action against such vessel[16]. The role of the port state was in this convention secondary and of an auxiliary character to the flag state.

3.3.3 SOLAS '74 and its 1978 Protocol:

SOLAS '74 contains provisions similar to those of MARPOL. As in all the other conventions under study, the flag state is the state with the responsibility of the implementation of the convention and the issuing of the relevant certificates.

Regulation 19(b) of Chapter 1 provides as follows:

> *Such certificates, if valid, shall be accepted unless there are clear grounds for believing that the condition of the ship or of its equipment does not correspond substantially with the particulars of any of the certificates, or that the ship and its equipment are not in compliance with the provisions of Reg. 11(a) and (b) of this chapter*[17].

[16] See arts. IX(5) and X of OILPOL '54.

[17] Reg 11 requires the condition of a ship and its equipment to be maintained after a survey as well as that no change shall be made to the structural arrangements, machinery, equipment and other items covered by the survey.

In such a case, or where the certificate has expired, the port state must take measures which will prevent the ship from sailing until it becomes fit to do so or in order to allow the ship to proceed to the nearest repair yard[18].

Strictly speaking, port state authorities can only inspect the different SOLAS certificates and can proceed to carry out a full inspection only if it is apparent that the ship's condition is below the prescribed standards. However, Reg. 19 also allows port state officers to check whether the existing certificates match the existing equipment. This in effect implies that port state authorities have the power to carry out a full inspection of the vessel based entirely on their impressions. The same conclusion may also be reached from the part of Reg 19(b) which refers to Reg. 11(a) and (b): there is no real way of checking whether the condition of the ship and its equipment conforms with the provisions of SOLAS, or whether no structural alterations have been carried out without a physical inspection of the vessel's hardware. It therefore appears that SOLAS allows for more powers of inspection than the other conventions.

3.3.4 The 1978 STCW Convention:

The STCW Convention is of particular interest since it constitutes the last indication of IMO's attitude and policies towards port state control[19].

Art. X of the Convention deals with issues of control. Firstly, it stipulates that the relevant certificates issued by the flag states shall be mutually accepted by the contracting states. It goes on though to provide that such certificates may not be

[18] See Reg. 19(C) of Chapter 1 of SOLAS.
[19] The convention was in effect re-drafted in 1995. See infra chapter 6.4.

accepted if "...there are clear grounds for believing that a certificate has been fraudulently obtained or that the holder of the certificate is not the person to whom that certificate was originally issued"[20]. If the port officials carrying out an inspection come across any violation of the Convention , they must inform the master of the vessel as well as the appropriate diplomatic representative of the flag state in the area so that appropriate action may be taken. According to the 1978 STCW port authorities had the power to detain a foreign vessel under art. X(3) and regulation I/4 based on two grounds: failure to correct deficiencies in proper certification or in proper watch arrangements. However, such failures should pose "... a danger to persons, property or the environment"[21]. Regulation 1/4 which is annexed to the convention has been considerably amended during the '95 reform. This regulation which is entitled "control procedures" provides as follows:

> *1. Control exercised by a duly authorised control officer under art. X shall be limited to the following:*
> *1.1 Verification in accordance with art. X(1) that all seafarers serving on board who are required to be certificated in accordance with the convention, hold an appropriate certificate or a valid dispensation...*
> *1.2 Verification that the numbers and certificates of the seafarers serving on board are in conformity with the applicable safe manning requirements of the administration and*
> *1.3 Assessment , in accordance with section A-i/4 of the STCW Code, of the ability of the seafarers on the ship to maintain watchkeeping standards as required by the convention if there are clear grounds for believing that such standards are not being maintained because any of the following have occurred:*
> *1.3.1 The ship has been involved in a collision, grounding or stranding, or*
> *1.3.2 There has been a discharge of substances from the ship when under way, at anchor or at berth which is illegal under any international convention or*

[20] See art X(1) of the STCW Convention.
[21] Ibid. art. X(3)

1.3.3 The ship has been manoeuvred in an erratic or unsafe manner whereby routeing measures adopted by the organisation or safe navigation practices and procedures have not been followed, or

1.3.4 The ship is otherwise being operated in such a manner as to pose a danger to persons, property or the environment.

2 Deficiencies which may be deemed to pose a danger to persons, property or the environment include the following:

2.1 Failure of seafarers to hold a certificate, to have an appropriate certificate, to have a valid dispensation...;

2.2 Failure to comply with the applicable safe manning requirements of the administration;

2.3 Failure of navigational or engineering watch arrangements to conform to the requirements specified for the ship by the administration;

2.4 Absence in a watch of a person qualified to operate equipment essential to safe navigation, safety radio communications or the prevention of marine pollution; and

2.5 Inability to provide for the first watch at the commencement of a voyage and for subsequent relieving watches persons who are sufficiently rested and otherwise fit for duty.

3 Failure to correct any of the deficiencies refereed to in paragraph 2, in so far as it has been determined by the party carrying out the control that they pose a danger to persons, property or the environment, shall be the only grounds under article X on which a party may detain a ship.

Para. 1.3.4 of Reg I/4 expands in effect the "clear grounds" since it allows the port authorities to determine whether a foreign vessel is being operated in a manner which poses a danger to persons, property or the environment. Para, 2 merely gives a non-exhaustive list of what could be deemed to pose such a danger, and gives the port authorities a lot of space to manoeuvre. Indeed, it could be suggested that the hands of the port state are completely freed since a port official carrying out the assessment of

the ability of the seafarers to perform their duties according to this convention[22], "...can require the seafarer to demonstrate the related competency at the place of duty. Such demonstration may include verification that operational requirements in respect of watchkeeping standards have been met and that there is a proper response to emergency situations within the seafarers level of competence"[23].

3.3.5 Convention No. 147 of ILO 1976:-

The International Labour Organisation, realised that a system which provided for an alternative method of enforcement , thus breaking the monopoly of power of the flag state, could be of great assistance in the efforts of this organisation. ILO Convention No. 147 of 1976 allows for port state control by including comprehensive provisions on the matter. ILO No. 147 provides that if the port officials believe that a foreign vessel visiting their port does not conform with the specified standards, it may either inform the flag state or "it may take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health", provided that it does not "unnecessarily detain or delay the ship"[24]. In other words, port state officials, may, at their discretion determine whether the conditions on board are adequate or not.

Even though the powers of a state to legislate as well as to enforce its jurisdiction over foreign vessels, is recognised universally, the long and uniform state practice to abstain from enforcing their national laws unless their own interests were affected, made any change difficult. Any step towards the introduction of the new regime had to be the result of a collective effort. In other words, there was a need for the involved parties to come together and decide on how this new system is to operate. This was achieved with the gradual inclusion of port state control clauses in a number of conventions. This

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[22] See para. 1.3 of Reg I/4 of STCW.

[23] See sec. A-i/4, para. 4 of the STCW Code. Part A of the code where sec A-i/4 is found, provides the mandatory standards regarding provisions of the annex to the STCW Convention.

process, which started in the 1960s, is a dynamic one and continues to develop ever since.

The concept of port state control was originally intended to assist the flag state in carrying out its international obligations. However, it soon became clear that this concept had the potential to revolutionise the enforcement system in the industry thus making the existing maritime conventions much more effective. Apparently, the effectiveness of port state control is nowadays as important (if not more) than flag state control.

Nevertheless, this ever growing importance of port state control, even though it has undoubtedly assisted greatly international organisations like IMO and ILO to promote their targets, it appears to have also encouraged a number of strong maritime states to engage in an effort to take full advantage of this new power that came to their hands. Certain states, based on the fact that it is their own prerogative deriving from their sovereignty to legislate and enforce such legislation in their internal waters, appear overzealous and ready to adopt measures which would be much stricter than the international standards. This, which is by all means legal, might nevertheless prove destructive for the industry and can threaten the system of international standards as this was formed under IMO (and other organisations)[25].

3.4 PRACTICAL APPLICATION OF PORT STATE CONTROL:

The introduction of the new concept through the inclusion of relevant clauses in international conventions, does not automatically imply the mode of application of this system. The relevant conventions contain general provisions which would allow port

[24] See art 4 of ILO No. 147.
[25] See infra chapter 5.2.1 and 5.2.2.

states to exercise port state control[26]. Nevertheless, any attempt to exercise port state control unilaterally was bound to create more problems than those it intended to solve. The prescription of national rules on the mode of application of port state control, could lead to a mosaic of national legislations thus threatening to disturb the normal activities of the industry. It soon became necessary for this new system of enforcement to be co-ordinated if it was to bring any results.

On the other hand, IMO realised that an attempt on its behalf to introduce a global system of application of port state control, would be extremely difficult. Different parts of the world are characterised by their own peculiarities and therefore a global system would be condemned to failure from the beginning. Instead, IMO encouraged its members to proceed to regional co-operation in the application of port state control.

Regional co-operation appeared to be the most effective way to exercise port state control. First of all, there would be certainty of the applicable instruments so that shipowners would not have to comply with different laws according to the port their vessel was visiting. Commonly, vessels call to the ports of different states in the same geographical area. The existence of different port state control systems in the same area would make the life of the shipowner more difficult and would create an environment of uncertainty and increase pressure on the crew. Secondly, any difference in the level of strictness that the authorities of the neighbouring states were demonstrating, would inevitably affect the competition between the ports of these states. That is to say, a state which would choose to introduce and apply a more stringent port state control regime would run the risk of facing a severe decrease in its business if ports of neighbouring countries were to be more moderate in the exercise of port state control. Thirdly, regional co-operation would enable neighbouring states to exercise a more effective control on vessels visiting the region. Exchange of information gathered during inspections carried out by one state would allow the other states to concentrate on inspecting other vessels thus avoiding unnecessary duplication

[26] See *supra* under 3.3 and in chapter 4.

of work as well as unnecessary inconvenience of the vessels. Lastly, regional co-operation could be more fruitful than a global system since countries of the same geographical area usually share a common mentality, culture, system of administration and in most cases, language.

The Amoco Cadiz disaster of 1978 highlighted the necessity for positive action against substandard vessels, especially in the area of the North Sea. This area comprise some of the most busy ports in the world, something which exposes it to increased dangers. It was therefore decided in 1978 by the North Sea states that it was necessary for them to co-operate in the enforcement of international standards in their capacity as port states. This led to the Hague Memorandum of Understanding (hereinafter Hague MOU) of 1978[27]. The Hague MOU expressed the will of the participating governments to co-operate in an attempt to monitor compliance of foreign vessels visiting their ports, with various international agreements which set the international standards[28]. Unfortunately the Hague MOU proved to be nothing more than a common declaration of the will of the involved departments. It was more of a threat for more serious action rather than a real action. The Hague initiative lasted for four years but failed to bring about any substantial change.

In the meantime the European Community (hereinafter EC) was in the process of acquiring more and more power and of formulating common policies over issues of mutual interest. It therefore, appeared to be a good idea that the EC would address this problem as a single entity. This was particularly important for the Community itself since the practice adopted by the different member states could disturb the free competition in the EC. The Community proceeded with a proposal for a Council

[27] The parties to the Hague MOU were Belgium, Denmark, France, F.R. Germany, Netherlands, Sweden and the UK.
[28] The Preamble of the MOU referred to ILO No 147, Reg. 19 of Ch. 1 of SOLAS '74, Ch. 1 of SOLAS '60, art. 21 of the LL Convention and circular 219 of MSC/IMO (Dec. '86 on the Procedures and guidelines for the control of ships).

Directive concerning the Enforcement, in respect of Shipping using Community Ports, of International Standards for Shipping Safety and Pollution Prevention[29].

The Directives of EC once issued, create an obligation to all member states to introduce legislation giving effect to their content. Therefore the proposal, if accepted would create legal obligations on port authorities of EC states to enforce its provisions. The target of the proposed Directive were all the vessels which were considered substandard: these would include all vessels "not meeting the standards set by international conventions in force at any given time"[30]. These standards would apply indiscriminately on any vessel calling at a Community port, even if the flag state of that vessel was not a party to the convention which was sought to be enforced[31]. The proposed Directive was introducing a system according to which port authorities would have to pay particular attention to certain categories of ships and older vessels[32]. It called for particular attention on passenger ships, oil, gas and chemical tankers, in particular of ten years old and above. Furthermore, it placed a direct obligation on port authorities to inspect a vessel when its certificates are not in order. It also attempted to remedy the problems generated by the vagueness covering the term "clear grounds" which is put forward by all the relevant conventions, as a reason for the carrying out of a full inspection. The draft Directive provided for an exhaustive list of clear grounds which was to be amended from time to time[33]. Furthermore, it provided for the right of the port state to detain a substandard foreign vessel in its port until the rectification of the existing deficiencies. Art. 7(1) included a non-exhaustive list of examples of deficiencies which would justify the detention of a vessel. However the matter of the penalties for deficiencies was left to the discretion of the port states[34]. Lastly, the Directive provided in art. 8(1) for the establishment of a system for the exchange of information.

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[29] COM(80) 360, Explanatory Memorandum.
[30] See art. 2(2) of the draft Directive.
[31] Ibid. art. 3.
[32] Ibid. Art. 4.4.
[33] Ibid. Art. 8.
[34] Ibid. Art. 9.

Unfortunately, this proposed Directive never materialised. Instead the French government convened in Paris in 1980 a conference on a ministerial level which established a working group to draw up a new document based on the proposed Directive and the Hague MOU. This effort resulted in the Paris Conference of January 1982 where the ministers of fourteen European States founded the so called Paris Memorandum of Understanding [35].

3.4.1 The Paris Memorandum of Understanding (Appendix 1):

The Memorandum of Understanding on Port State Control (hereinafter Paris MOU) 1982, constitutes the first serious attempt for the establishment of a comprehensive system of regional co-operation for the exercise of port state control. The establishment of the MOU demonstrates the will of the participating authorities to co-ordinate their efforts for the enforcement of international standards within their ports, by adopting similar procedures for the carrying out of inspections, the exchange of the gathered information and the implementation of the new regime in general. The executive body of the MOU is the Port State Control Committee[36] whereas the administration is undertaken by the Netherlands[37]. The "nerve" centre of the MOU is situated in St. Malo (France) where, all the necessary records and data are kept in a computer which is linked with all the participating authorities[38].

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[35] The fourteen states were: Belgium, Denmark, France, Germany, Netherlands, Norway, Sweden, the United Kingdom, Finland, Greece, Ireland, Italy, Portugal and Spain. In 1992 Poland became a party to the MOU and Canada followed in 1993.
[36] See sec. 6.1 and sec 6.3 of the Paris MOU. Apart from the fourteen participating authorities, a representative of the EC participates in the Committee.
[37] Ibid. Sec. 6.4.
[38] The mode of operation of the Centre Administratif des Affaires Maritimes (as it is officially known) is provided in Annex 4 of the MOU entitled "Information System on Inspections".

The Paris MOU recognises in its preamble that the principle responsibility for the implementation of standards, burdens the flag state. Section 2.1 lays down the "relevant instruments" which set these standards. These are:

-1966 Load Lines Convention;
-SOLAS '74 and the Protocols to it of '78 and '88;
-MARPOL 73/78;
-STCW '78;
-COLREG '72; and
-ILO No. 147 1976.

Of course, it is absolutely necessary that all participating authorities must have ratified all the relevant instruments if the MOU is to be effective. Any lack of uniformity in the applicable instruments inevitably leads to difficulties in the efficiency of the MOU.

In general, it appears that the Paris MOU is based primarily on the main IMO Conventions. Moreover, annex 1 , which provides for the inspections procedures to be followed by the participating authorities, makes extensive references to a number of IMO resolutions[39]. However, the Paris MOU adopted more general provisions than those adopted by the proposed Directive. It avoids giving an exhaustive list of clear grounds. Sec. 3.2.1 of the MOU provides as follows:

"The authorities will regard as "clear grounds", inter alia, the following:
-a report of notification by another authority;
-a report or complaint by the master, a crew member, or a person or organisation with a legitimate interest in the safe operation of the ship, shipboard living and working conditions or the prevention of pollution, unless

the authority concerned deems the report or complaint to be manifestly unfounded;
-other indications of serious deficiencies, having regard in particular to annex 1."

Nevertheless, the authorities are expected to "include control on compliance with on board operational requirements in their control procedures"[40]. Clear grounds for the control of operational requirements are listed in an exhaustive list[41].

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Sec. 2.4 provides that there must be "no more favourable treatment" of ships registered in a state which is not a party to the applicable instrument. The letter of this section had the potential of leading to an attempt on behalf of the participating authorities to enforce the provisions of the relevant instruments even in cases where the conventions themselves do not specifically provide for such a possibility. This led the Secretariat to declare that this section applies only in cases where the relevant convention contains a "no more favourable treatment" clause[42]. In practice if a ship is inspected and found not to be in compliance with any of the relevant instruments, the master will be given notice to carry out the necessary repairs and rectifications before leaving the port. However, sec. 3.7 provides as follows:

"In the case of deficiencies which are clearly hazardous to safety, health or the environment, the authority will, ...ensure that the hazard is removed before the ship is allowed to proceed to sea and for this purpose will take appropriate action, which may include detention."

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[39] See 1.1 of annex 1 of Paris MOU.
[40] Sec 3.1 of the MOU introduced in May 1993.
[41] Ibid. sec 3.2.2
[42] See Memorandum of Understanding on Port State Control, 1986, p. 7 (an information booklet published by the Secretariat).

No exercise of such control may "unduly detain or delay a ship"[43]. Sec. 1.3 stipulates that each authority undertakes a commitment to achieve "... an annual total of inspections corresponding to 25% of the estimated number of individual foreign merchant ships... which entered the ports of its state during a recent representative period of 12 months".

Section 5 extends the authority of the port state so that to apply, as Lowe put it, "not to the condition of the ship, but to its activities"[44]. It provides that the participating authorities must do their best to gather evidence of suspected violations to the requirements of Rule 10 of MARPOL 73/78, when a request is made by another participating authority. This, even though is pursuant to the provisions of UNCLOS '82, restricts the role of the port state allowing it merely to offer its assistance in the process of collecting evidence. The port state is not in a position to take any measures of enforcement against the vessel; the collected evidence may result in the bringing of action against the vessel only in the flag state or in the state requesting the inspection (provided that the vessel calls in one of the ports of that state in the future).

Over the years the Paris MOU had the chance to learn by its mistakes and rectify its own weaknesses. In 1993 in an attempt to give one further motive to the flag states to carry out their obligations for the implementation of the international standards, decided to note the flag states which had an over-average port state control detention record for the past three consecutive years and to consider vessels flying the flags of these states as priority cases for inspection. This policy besides exercising a direct pressure on the flag state, it also indirectly promotes a more effective implementation since the targeting of a specific flag could result in a decrease in the tonnage of that flag. Shipowners, whose vessels are in general complying with the international

[43] See sec 3.11 of the MOU.
[44] Lowe A.V., "A Move Against Substandard Shipping", 6 Marine Policy (1982-3), pp. 326-330.

standards, would not tolerate their ships being subject to more inspections simply because they fly that particular flag. This would cause an increased inconvenience to such shipowners and could result in possible delays and therefore financial losses.

Furthermore the Paris MOU publishes now a list of vessels detained. This materialised after a change in the long standing practice of the Port State Control Committee to treat such information with complete confidentiality, making it available only to the flag state. Certain sectors of the industry, like the charterers and the insurers had been pressing for the publication of this data arguing that such an exposure of the "bad" shipowners would increase the effectiveness of the work of the MOU.

The introduction of this new concept of regional co-operation, in the form of the Paris MOU, raised at the beginning a few concerns on behalf of shipowners. There were fears that vessels trading within the area of the Paris MOU would be exposed to multiple inspections and prolonged delays. These fears were fuelled by the mistrust of the shipowners that there could be a good co-ordination of actions and exchange of information between the participating authorities. Furthermore a number of developing states, raised their concern that such regional organisations could result in a decrease of the influence that IMO exercised in international shipping. They argued that the introduction of such regional "schemes" could result in the adoption of more stringent regulations (than those adopted by IMO) which could be used to exclude these developing states from the international competition. This caused the close monitoring of the Paris MOU's activities by UNCTAD until 1990 when it was decided that the exercise of port state control had no real economic effects on the operation of merchant ships[45].

In practice, the Paris MOU proved to be precisely what it intended to be: a port state control regional co-operation scheme which seeks to enforce the existing international

standards as these are set by the relevant international organisations (i.e. IMO and ILO). IMO and ILO were granted from the very beginning the status of the "observer" at the MOU and it seems that there has been close co-operation between the three *fora*. During the 50th session of the IMO Council the concern that the MOU was becoming an independent organisation, was raised again. States participating in the MOU reaffirmed that the purpose of the MOU "was intended to enforce and reinforce IMO's agreed standards and not to develop new standards"[46].

The Paris MOU, being the pioneer of the regional implementation of the port state control system, conceived at IMO, had a very difficult task to pursue. It had to implement a revolution in the area of enforcement but in a very smooth manner so that there would be no disturbance of the balance between the involved sides. Despite of all these, the Paris MOU seems to have managed to set a model upon which other regional co-operation schemes were to be built.

3.4.2 The Vina del Mar Agreement 1992:

The Latin-American Agreement on Port State Control (hereinafter the Vina del Mar Agreement[47]) 1992, is an attempt of the states of that region to co-operate in enforcing international standards in their ports. Latin-American states had been brought together on an earlier stage to form the "Operative Network of Regional Maritime Co-operation among Maritime Authorities of South America, Mexico and Panama" (hereinafter ROCRAM). After the adoption of Resolution A.682(17) of IMO in November 1991, which invited governments to establish regional agreements for port state control, ROCRAM decided to proceed to the establishment of a port state scheme in its geographical area.

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[45] UNCTAD, A view of Maritime Transport, 1990, p. 75.
[46] IMO, C.50/II, 25 Feb. 1983, para. 13.
[47] Vina del Mar is the place in Chile where the above agreement was concluded.

The legal characteristics of this Agreement are similar to those of the Paris MOU. The Vina del Mar Agreement constitutes a common declaration of the involved maritime authorities (not of the involved governments) regarding their will to exercise port state control and enforce the international standards on foreign vessels calling at their ports. The participating maritime authorities are those of Argentina, Brazil, Chile, Colombia, Equador, Mexico, Panama, Peru, Uruguay and Venezuela. These authorities declare their commitment to exercise port state control without discrimination based on certain standards set by IMO, stating that they will be making efforts to carry out inspections on at least 15% on individual foreign ships calling at their ports during a period of twelve months. This is probably the biggest difference between the Vina del Mar Agreement and the Paris MOU, which set its minimum on 25%.

Another major difference, is that of the "relevant instruments" which the Agreement sets as applicable. It provides that "relevant instruments" are the following (with their respective amendments already in force)[48]:

-Load Lines 1966;
-SOLAS '74 and its 1978 Protocol;
-MARPOL 73/78;
-STCW '78;
-COLREG '72.[49]

The Vina del Mar Agreement is in every other respect a verbatim reproduction of the Paris MOU. Sec. 3 deals with Inspection procedures and adopts the system which applies in the Paris MOU. The same applies for sec. 4, entitled Provision of

[48] See sec. 2.1 of the Agreement.
[49] The Vina del Mar Agreement does not require compliance with ILO No. 147.

Information and sec 5, entitled Operational Violations, which are identical to the respective sections of the Paris MOU. Sec. 6, which deals with issues of organisation, adopts the same structure as the one introduced by the Paris MOU. The Secretariat as well as the Information centre are the responsibility of the Argentine Maritime Authority which is based in Buenos Aires. Lastly, sec. 7, dealing with the amendments procedure, and sec. 8, dealing with the adoption and signature of the Agreement are also identical to the relevant provisions of the Paris MOU.

3.4.3 The Tokyo Memorandum of Understanding 1993:

On 1st December 1993 the Memorandum of Understanding on Port State Control in the Asia-Pacific Region (hereinafter the Tokyo MOU) 1993, was concluded in Tokyo. The participating states were: Australia, Canada, China, Fiji, Honk Kong, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Papua New Guinea, Philippines, Russian Federation, Singapore, Solomon Islands, Thailand, Vanuatu and the Socialist Republic of Vietnam. In its preamble the Memorandum refers to Resolution A.682(17) of IMO[50] and proceeds to unequivocally note "...that the Memorandum is not a legally binding document and is not intended to impose any legal obligation on any of the Authorities"[51].

The Tokyo MOU. Like the Vina del Mar Agreement, is modelled on the Paris MOU. This Memorandum is a verbatim reproduction of the Paris MOU with a few differences which are merely of a corrective character aiming in improving the effectiveness of the Tokyo MOU. Sec. 2 sets out the "relevant instruments" upon which the Tokyo MOU is based. These are:

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[50] This Resolution invites governments to establish regional agreements for the application of supervision measures by port states.
[51] See the preamble of the MOU.

-Load Lines 1966;

-SOLAS '74 and its 1978 Protocol;

-MARPOL 73/78;

-STCW '78;

-COLREG '72; and

-ILO No. 147.

The provisions concerning inspections are exactly the same with those of the Paris MOU. Sec. 3.3.3 calls upon the participating authorities to pay special attention to "...groups of ships appearing in the three-year rolling average table of above average delays and detentions in the annual report of the Memorandum". Furthermore, sec 3.3.5 includes in these "special attention" groups, ships which have not been inspected by the authorities in the last six months. Another innovative element of the Tokyo MOU is that it provides for the exchange of inspection information with other regional organisations for port state control[52]. The Tokyo MOU is in every other respect identical to the Paris MOU. The Secretariat of the Tokyo MOU is based in Tokyo and is totally independent from any maritime authority, accountable only to the Committee of the MOU[53].

The regional target for inspections of the Tokyo MOU is set on 50% of all visiting ships by the year 2000, with each authority determining an appropriate annual percentage of foreign ships inspection[54]. Of the participating authorities, Fiji, Indonesia, Philippines, Solomon Islands, Thailand and Vietnam have not yet brought into effect the provisions of the Tokyo MOU.

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[52] See sec. 4.2 of the Tokyo MOU.

[53] Ibid. Sec. 6.4 .

[54] This percentage is based on the number of ships which enter regional ports during a recent base period to be decided by the committee, See sec. 1.4 of the Tokyo MOU.

The Tokyo MOU adopted fully the framework introduced by the Paris MOU and seeks to apply a common system of enforcement in the ports of this region of great geographical scope. The area covered by the MOU is not only bigger than the area of the Paris MOU but is also an area of increasing importance for international trade and therefore for international shipping as well.

3.4.4 The Caribbean Memorandum of Understanding 1996:-

Among the latest fruits of the efforts of IMO for the establishment of regional agreements for port state control is the Caribbean Memorandum of Understanding on Port State Control (hereinafter Caribbean MOU) concluded on 9 February 1996 in Barbados. The Caribbean MOU is practically identical to the Paris MOU and seeks to enhance maritime safety, the marine environment as well as the living and working conditions on board foreign ships calling at Caribbean port, thus enforcing the standards set by IMO and ILO. The MOU which became possible after the financial support of the government of Norway and the exchange of know-how from the existing MOUs, in effect extends the regime of port state control as it applies in Europe to the sensitive area of the Caribbean. It also contains special provisions which extend port state control inspections on ships below convention size.

The Secretariat of the Caribbean MOU will be provided by Barbados and a regional information centre will be set up in the Curacao, with the assistance of the Netherlands and France. The Caribbean MOU which was the result of the efforts of twenty Caribbean states and territories, was initially signed by Antigua & Barbuda, Barbados, Dominica, Grenada, Guyana, Jamaica, Netherlands Antilles, Surinam and Trinidad & Tobago. The United Kingdom, is expected to sign the MOU on behalf the UK dependant territories in the Caribbean: Anguilla, Bermuda, British Virgin Islands,

Cayman Islands, Montserrat and Turks & Caicos Islands. The remaining countries are expected to follow soon. The MOU will take effect for each maritime authority that, following its signature, has submitted a notification of acceptance of the Caribbean MOU

From the above, it can be seen that the Paris MOU "experiment" succeeded in setting the standards upon which the other MOUs were built. Apart from the Vina del Mar Agreement, the Tokyo MOU and the Caribbean MOU, a number of other MOUs, are currently under discussion with the encouragement of IMO. It is expected that within the following years, MOUs will become fully operational in the following regions: Southern and Eastern Mediterranean; Middle East (the Persian Gulf); West and Central Africa; Eastern Africa and the Indian Ocean. This demonstrates that the European initiative for the establishment of the Paris MOU and the following encouragement of IMO for the establishment of regional agreements for the enforcement of port state control, has gained momentum and is today considered to be the most effective way for the implementation of port state control

3.5 CONCLUSIONS:

As it was explained above, both customary and conventional international law recognise fully the prerogative of the coastal/port state to have both legislative and enforcement jurisdiction within its internal waters and therefore, within its ports as well. On the other hand, it was also considered to be well established that the rules of comity restricted the enforcement jurisdiction of the port state (i.e. within port areas) only over issues the effects of which extended beyond the "internal economy" of the foreign vessel. The international shipping industry was operating on a finely balanced climate according to which port states could, but would not, interfere with issues not

affecting the their "peace and good order". This *modus operandi* of the industry gave, in effect, flag states absolute jurisdiction over vessels flying their flags.

The introduction of the concept of port state control changed completely the face of the whole industry. Fortunately, this was done gradually over a period of twenty five years and therefore the industry had plenty of time to adapt. Furthermore, the concept of regional implementation of port state control allowed the industry to experience the results of the Paris MOU experiment first, and appreciate the advantages.

Regional co-operation is the only effective system for port state control enforcement. Exchange of information between co-operating maritime authorities minimises the workload of the port authorities of a single state and allows a more effective control over foreign ships in the specific area. A harmonised system of inspections prevents any unreasonable hardship to be caused to shipowners and crew and is also easier to attain. Unfair competition between ports of neighbouring states is avoided whereas special characteristics of the region can be taken into account (e.g. vessels of traditional construction or vessels engaged in a trade unique only in that area).

The Paris MOU led the way and encouraged other initiatives to follow. Nevertheless, it must be highlighted that the existing MOUs are not legally binding documents[55]. They are merely political declarations of the intentions of the involved maritime authorities (not even of their governments), on how to exercise their right to exercise port state control. In other words, it is entirely up to the participating authorities whether they will pursue the enforcement of the MOU vigorously or not. If these authorities choose not to abide by the agreed practices this non-compliance is not in any way a violation of an international convention and therefore this cannot be construed as a violation of international law.

[55] Aust A., "The Theory and Practice of Informal International Instruments", 35 International and Comparative Law Quarterly 787 (1986), p 787.

The degree of success of the different regional agreements, depends absolutely on the degree of commitment that the participating authorities demonstrate. This is probably the biggest weakness of the existing system since a weak "link" could be enough to jeopardise the effectiveness of the whole effort. Indeed, in areas where intensive competition between neighbouring ports is taking place, the stringency of the exercise of port state control can easily determine the "preferences" of the shipowners. This can also lead to internal conflicts in the port state if the local users of the port (exporters-importers) suffer as a result of the port state control policy of their state[56].

On the other hand, the introduction of the regional agreements constitutes an indirect encouragement to the participating authorities to ratify the "relevant instruments" which are applicable internationally. Overall the introduction of the port state control idea and the creation of the MOUs has changed dramatically the face of shipping around the world and has provided the international shipping community with an alternative mode of enforcement which broke the omnipotence of the flag state and put pressure on substandard vessels to either comply or abandon the game. Furthermore the recently adopted practice of the Paris MOU to publish the names of the substandard vessels added a new dimension to port state control: substandard vessels are exposed to the other "players" in the industry probably with serious financial consequences for the involved shipowners.

[56] See Hallman R.M., "Toward an Environmentally Sound Law of the Sea", A Report by the International Institute for Environment and Development, 1974, pp. 57-58, where the author speaks of the possibility of the creation of "ports of convenience".

CH. 4: THE ROLE OF THE IMO IN PROMOTING SAFETY AT SEA AND PROTECTING THE ENVIRONMENT

4.1 INTRODUCTION:

The issue of Safety at sea even though it has always been a source of concern for the shipping industry, it became a matter of international interest at the beginning of the century. In 1914, right after the disaster of the Titanic[1], there was an attempt for the introduction of an international convention for the Safety of Life at Sea (SOLAS). However, SOLAS 1914 was never realised due to the outbreak of World War I. It was 14 years later, in 1928, that the international community managed to introduce a revised form of SOLAS which came into force in 1933. SOLAS was again revised in 1948 and the new convention entered into force in 1952.

After the end of World War I, concern was also raised for matters of marine pollution. In 1921 the British Government held a conference in London with the participation of shipowners, oil companies and harbour officials to consider problems arising from oil pollution. This resulted in the introduction of the "Oil In Navigable Waters Act, 1922".[2] The above Act and the initiatives taken by the British led to an international conference which was held in Washington in 1926 to consider this issue. Even though there was no Convention out of this conference this meeting led to the voluntary adoption by British shipowners of a 50 mile prohibited zone. This example was followed later by shipowners in other European countries (e.g. Holland, Belgium, Sweden) as well as the shipowners of the United States.[3]

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[1] The Titanic sank in April 1912 taking with it more than 1500 lives.
[2]The Oil In Navigable Waters Act of 1922 prohibited any discharge of oil or oily water in the territorial waters of Great Britain and Northern Ireland imposing a fine of £100 for any offence under it.
[3]The American shipowners voluntarily adopted a prohibited zone of 100 miles.

After the end of World War II the international community started realising that these two issues, as well as shipping matters in general, required close monitoring and the idea for the establishment of a specialised international agency which would undertake this task, was gaining momentum.

4.2 THE INTERNATIONAL MARITIME ORGANISATION (IMO):

On 6th March 1948 the United Nations Maritime Conference which was held in Geneva adopted a convention which established the Inter-Governmental Maritime Consultating Organisation (IMCO).[4]

Article 1 of the Convention on the International Maritime Organisation outlines the purposes of the Organisation. According to this article the purposes of the Organisation are:-

(a) to provide machinery for co-operation among Governments in the field of Governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters relating to the purposes set out in this article;

(b) to encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without

discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;

(c) to provide for the consideration by the Organisation of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II;

(d) to provide for the consideration by the Organisation of any matters concerning shipping and the effect of shipping on the marine environment that may be referred to it by any organ or specialised agency of the United Nations;

(e) to provide for the exchange of information among Governments on matters under consideration by the Organisation.

Article 2 of the Convention sets out the functions of the Organisation. In effect, the Organisation provides a forum where all member states exchange views on issues which fall under the scope of the Organisation, in order to achieve the above purposes.

The main organs of the Organisation are the following: the Assembly; the Council; the Maritime Safety Committee (MSC); the Marine Environment Protection Committee (MEPC); the Legal Committee; the Technical Co-operation Committee, and the Facilitation Committee.[5]

Part V of the IMO Convention deals with the Assembly. The Assembly which is the main organ of the Organisation, consists of all the members. It meets every two years

[4]This Convention came into force in 1958. In 1975 the IMO Convention was amended and the name of the Inter-Governmental Maritime Consultative Organisation was changed to International Maritime Organisation.
[5] See art 11 of the IMO Convention

and among other things it elects the members of the Council, it approves the budget, it approves the work programme of the organisation, it issues recommendations to members for action and decides on convening international conferences.

The Council is the governing body of the organisation and consists of 32 members elected by the Assembly (Article 16).[6]

The Council usually meets twice a year. It considers the draft work programme and budgets prepared by the Secretary General and submits them to the Assembly. It is also acting as a liaison between the different committees and the Assembly. In essence it exercises all the functions of the Assembly except that of recommending to member states regulations and guidelines. Furthermore, the Council appoints the Secretary General of the Organisation, with the approval of the Assembly. It is also responsible for relations with other organisations as well as for entering into agreements or arrangements with such organisations.

The Maritime Safety Committee (MSC) is the committee with the biggest workload at the Organisation. The Committee, considers matters concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log books and navigational records,

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[6]Article 17 of the IMO Convention stipulates that in electing the members of the Council the assembly shall observe the following criteria:

(a) Eight shall be states with the largest interest in providing international shipping services;
(b) Eight shall be other states with the largest interest in international seabound trade;
(c) Sixteen shall be states not elected under (a) or (b) above which have special interests in maritime transport or navigation, and whose election to the council will ensure the representation of all major geographic areas of the world.

marine casualty investigation, salvage and rescue, and any other matters directly affecting maritime safety[7]

The Legal Committee considers all legal matters within the scope of the Organisation. One of its most usual tasks involves the preparation of the different conventions and protocols produced by the Organisation.

The Marine Environment Protection Committee (MEPC) considers matters concerned with the prevention and control of marine pollution from ships. MEPC's work has been increasing in the last few years.

The Technical Co-operation Committee (TCC) considers matters concerned with the implementation of technical co-operation projects for which IMO acts as the executing or co-operating agency.

Lastly, the Facilitation Committee aims in eliminating unnecessary formalities in international shipping.

Part XI of the IMO Convention provides for the Secretariat of the Organisation and stipulates that the secretary-general shall be the chief administrative officer of the Organisation. It could be suggested that the Secretariat is the eyes and ears of the organisation since among other things it is in charge of informing the members about the developments at the IMO and monitor the ratifications and the implementation of such rules by the member states.

[7] Ibid. art. 28.

Even though the IMO Convention was produced by the conference of 1948 it has taken the Convention a decade before it came into force. A large number of signatories hesitated to ratify the Convention because of the uncertainty covering the areas that the Organisation would be dealing with. These hesitations derived primarily from paragraphs (b) and (c) of Article 1 of the Convention. Expressions like "a world without discrimination" and the promise to take action against "unfair restrictive practices" appeared to certain Governments as a threat to the practice of free enterprise. There was a fear that IMO would attempt to regulate international shipping which traditionally had been operated in a *laisez fair* manner. Many governments sought (and finally got) the reassurance that IMO would not interfere with the commercial aspects of shipping and would limit itself to technical aspects[8].

Indeed the series of Conventions adopted by IMO during the first two decades of its life indicate that the Organisation focused its work on setting international standards for the shipping industry. By 1979, the majority of IMO conventions were adopted, covering most of the key subjects by mandatory legislation. This was the first step of a lengthy process which would allow the provisions of these conventions to reach the industry and achieve their goals. IMO aspired to set international standards for safety and pollution prevention, recognised by all states as such, and applied universally. Because of this, the Organisation deliberately set high requirements for the entry into force of important treaties such as the SOLAS or the 1969 Tonnage Convention. It was recognised from the beginning that in order for these Conventions to be regarded as international standards they should be ratified by a sufficient number of maritime countries. Consequently, the ratifications of these Conventions were considerably delayed. Nevertheless, when finally they came into force it could be claimed that they genuinely reflected international standards.[9]

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[8] See Mankabady S., "The International Maritime Organisation - International Shipping Law", vol. 1, 2nd ed., London, 1986.

[9] On 1st October 1997, the SOLAS Convention was ratified by 135 states representing 98.26% of the world's tonnage and the Tonnage Convention by 117 states representing 97.50% of the world's tonnage.

4.3 THE WORK PRODUCED BY THE IMO:

The main purpose for the creation of the IMO was to offer a forum where all the countries of the world could meet to discuss ways to tackle the problems of the shipping industry. Member states were to set out first the international standards for the industry and then co-operate to implement them. Indeed, right from the very beginning, the organisation embarked on a very ambitious and long-term effort to convene international conferences covering all major areas of safety and pollution prevention, which were to result in international conventions.

In pursuing its policies, IMO makes use of three different instruments: Resolutions, Codes and Conventions. From these instruments the most crucial, which is always binding on the parties, is the Conventions. Resolutions, on the other hand have merely an advisory character, and are considered to be only recommendations to member states. Nevertheless, in theory, resolutions express the collective will of the Assembly of IMO and a number of member states have taken advantage of certain resolutions to introduce relevant legislation on a national level[10]. Lastly, Codes stand between the two. It is not unusual for a proposed policy to "become" first a Resolution then a Code and finally a Convention. Nevertheless the most effective method at the disposal of IMO for the implementation of its policies, is through the Conventions.

The core of IMO's work, -i.e. the instruments which reflect the safety and pollution prevention standards which are regarded as international-, are the following conventions:

- The Safety of Life at Sea (SOLAS) Convention of 1974 and its 1978 Protocol;
- The 1966 Load Lines Convention;
- The International Convention for the Prevention of Pollution from Ships (MARPOL) of 1973 and its 1978 Protocol;

[10] See for example infra in chapter 5.1.1.2 under "D" and "F" for the practice of the European Union on this matter.

- The 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREG); and
- The 1978 Convention on Standards of Training, Certification and Watchkeeping (STCW).

The main features of these convention are highlighted below :

4.3.1 The Safety of Life at Sea (SOLAS) Convention:

The SOLAS Convention has been described (and probably is) as the most important of all international Conventions of IMO. SOLAS 1974 is the last of a series of SOLAS Conventions which began in 1914, as it was explained above[11]. By the time the IMO came into existence in 1958, SOLAS was considered as a well-established Convention which had managed to establish the foundations upon which IMO would operate, insofar as safety of life was concerned.

The first major task for IMO after its creation was to update the SOLAS Convention. In 1960 a new SOLAS Convention was adopted at IMO which entered into force in May 1965. Soon after the Convention came into force, IMO took action to amend SOLAS 1960 in order to bring it up-to-date with the technical developments of the time. Amendments were passed in 1966, 1967, 1968, 1969, 1971 and 1973. However these amendments never came into force since they never managed to achieve ratification by the 2/3 of the contracting parties. This inaction on behalf of the participating states led the Organisation to the drafting of the SOLAS 1974 Convention which included not only the amendments agreed up until that date but also the "tacit acceptance"[12] procedure which was to enhance the effectiveness of its Conventions.

The SOLAS Convention of 1974 seeks to specify minimum standards for the construction, equipment and operation of ships. The Convention deals with issues of sub-division and stability, machinery, electrical installations, issues of fire protection, life saving appliances and arrangements, safety of navigation, radio communications,

[11] See supra under 4.1.
[12] See infra under 4.4.1.

etc. It is up to the flag states to ensure that the vessels flying their flag comply with the requirements of SOLAS and to issue the necessary certificates, prescribed by the Convention, as a proof of this compliance.

The Convention is divided into eleven chapters each of which consists of a number of regulations. Chapter I is entitled "General provisions". These provisions first specify the type of ships to which SOLAS apply.[13] It then goes on to specify the intervals for the surveys of life saving appliances and other equipment of cargo ships, the radio installations and motor life boats or portable radio apparatus for survival crafts and finally for hull, machinery, equipment, steering gear and electrical installations.[14] Chapter I regulates the issuing of documents which certify that the requirements of the Convention are met by the ship. Lastly Chapter I includes provision for "port state control".[15]

Chapter II - 1 deals with sub-division and stability issues. Here the Convention seeks to secure that in passenger ships the sub-division of water-tight compartments must be such that even after a ship's hull has been damaged the vessel will remain afloat and stable. In general the degree of sub-division varies with the ship's length and type as well as the trade in which it is engaged. Furthermore Chapter II - 1 outlines the requirements for machinery and electrical installations which will ensure that these will continue to operate under various emergency conditions. Chapter II - 2 deals with fire protection, fire detection and fire extinction issues. This section includes detailed fire safety provisions for tankers and combination carriers.

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[13]Regulation 1 states that SOLAS applies only to ships engaged on international voyages, and Regulation 2 clarifies that war ships, ships of less than 500 tons, ships not propelled by mechanical means, wooden ships of primitive build, pleasure yachts not engaged in trade and fishing vessels, are not made subject to the Regulations. Regulation 3 outlines the exceptional circumstances under which the administration may exempt a ship engaged in international voyages from the Regulations.
[14]Regulation 8 states that surveys for life saving appliances and other equipment of cargo ships must take place at intervals not exceeding 24 months. Regulation 9 stipulates that radio installations and motor life boats or portable radio apparatus for survival crafts are subject to surveys at intervals not exceeding 12 months, and Regulation 10 requires that the hull, machinery, equipment, steering gear and electrical installations are to be surveyed at intervals not exceeding 5 years.
[15]See supra Chapter 3.

Life saving appliances and arrangements are dealt with in Chapter III which is divided into three parts. Part A applies to all ships and contains general provisions on the appliances required as well as the procedures both for emergency and routine practice. Parts B and C contain detailed requirements both for passenger and cargo vessels.

Chapter IV describes the type of radio equipment to be carried on board each vessel, the operational requirements for watchkeeping and listening, and clarifies technical issues related to radiotelegraphy and radiotelephony. Chapter IV provides for a mandatory log-book to be kept by the Radio Officer and describes the entries that should be listed in this log-book.

Safety of navigation is the subject matter of Chapter V of the Convention. This Chapter identifies the navigation safety services that each contracting party has to provide, and includes provisions of an operational nature applicable to all ships. These include the maintenance of meteorological services for ships, routing of ships, as well as the maintenance of search and rescue services. The obligation of the Master of a vessel to proceed to the assistance of other vessels in distress and the obligation of contracting parties to ensure that all vessels are sufficiently and efficiently manned from a safety point of view, are set forth. This chapter of SOLAS is of particular importance since it applies to all ships on all voyages in contrast with the rest of the Convention which applies to certain classes of ships engaged in international voyages.

Chapter VI deals with the carriage of grain and tries to minimise the effect of shifting of grain on a ship's stability. It contains provisions concerning stowing, trimming and securing grain cargoes. It sets forth a calculation method which takes into account the adverse heeling effects caused by the movement of grain in the void spaces above the grain surface in the vessel. It also provides for documents of authorisation, grain loading stability data and associated plans of loading, all of which must be available on board. This chapter was extensively revised in 1991.[16]

[16]This chapter of SOLAS was completely rewritten in 1991 with the aim of extending its scope to other cargoes.

The carriage of dangerous goods is the subject matter of Chapter VII. This contains provisions for the classification, packing, marking and labelling, documentation and stowage of dangerous goods in packaged form, in solid form in bulk, and liquid chemicals and liquefied gases in bulk. It does not however apply to substances carried in bulk in purpose built ships. In order to assist the national administrations of the contracting parties in issuing instructions to the vessels under their flag concerning the carriage of dangerous goods, IMO developed the International Maritime Dangerous Goods (IMDG) Code.[17]

Nuclear ships are covered in Chapter VIII which outlines the basic requirements for safety on such vessels dealing particularly with radiation hazards. The IMO Assembly adopted a companion document in 1981 which is more detailed and comprehensive, entitled "Code of Safety for Nuclear Merchant Ships".

In November 1993 the IMO Assembly adopted the International Safety Management (ISM) Code which was prepared by a joint committee of MSC and MEPC. By May 1994 the ISM code was added to SOLAS as Chapter IX of this Convention. The ISM Code establishes an internationally recognised standard for the organisation of a company's management system in relation to safety and pollution prevention.[18]

The 1994 SOLAS Conference adopted in May 1994 Chapter X to the Convention which concerns safety measures for high speed crafts (HSC). Chapter X came into force on January 1996 and provides mandatory international regulations dealing with the special needs of this type of vessel.

Lastly Chapter XI contains special measures to enhance maritime safety: it stipulates that organisations acting on behalf of Administrations must follow IMO's guidelines when carrying out inspections or surveys, that certain vessels[19] must be provided with an identification number conforming with the scheme of IMO and allows Port State

[17]This code is today one of the most important aids to the industry.
[18]See infra Chapter 6.

Control Inspectors to check operational requirements "when there are clear grounds for believing that the Master or crew are not familiar with essential shipboard procedures relating to the safety of ships".

A few years after the adoption of SOLAS 74 and before the Convention came into force a number of oil tanker accidents revealed that the provisions of the Convention needed to be amended so that further requirements would be included. However it is not possible to amend a Convention which has not come into force yet and the Organisation was seeking alternative ways for the introduction of these changes. The solution came with the decision of the Conference on Tanker Safety and Pollution Prevention (TSPP) to include these amendments into a Protocol which was adopted in 1978 and is known as the 1978 Protocol to the SOLAS Convention. This protocol of 1978 introduced the concept of unscheduled inspections and the concept of mandatory annual surveys in Chapter I of SOLAS 74 and strengthened the Port State control requirements of the Convention. Improvements were also made to Chapter II - I and Chapter II-2 as well as Chapter V. In general the protocol made the fitting of an inert gas system (IGS), mandatory for new crude oil carriers and product carriers of 20,000 dwt as well as for existing crude oil carriers of 70,000 dwt (by 1st May 1983), and for ships of 20,000 to 70,000 dwt (by 1st May 1985). Furthermore all ships of 1,600 grt and above must be fitted with radar and ships of 10,000 grt and above must be fitted with two radars capable of being operated independently. The protocol requires that tankers of 10,000 grt and above must have two remote steering gear control systems each capable of being operated separately from the navigating bridge.

The SOLAS 1974 Convention came into force on the 25th May 1980. It is generally regarded as the most important of all international treaties concerning the safety of merchant ships. The protocol of 1978 which was adopted in February 1978 finally came into force on 1st May 1981. Since then the Convention is being amended

[19]passenger ships over 100 gt and cargo ships of 300 gt and above.

constantly to keep up with the technical developments and to enable it to target existing deficiencies in the field of safety.[20]

4.3.2 The Load Lines Convention 1966:

It has long been recognised that the draft to which a ship may be loaded is an important factor for the safety of the vessel. In 1930 - long before IMO came into existence - the first International Convention on Load Lines was adopted. However as a result of many technical developments this Convention was replaced by the 1966 Load Lines Convention which came into force on 21st July 1968. This Convention seeks to improve the safety of vessels by establishing minimum freeboards and by setting up "uniform principles and rules with respect to the limits to which ships on international voyages may be loaded".[21] Besides the freeboards, external weathertight and watertight integrity constitute the main objective of the Convention: to ensure the watertight integrity of the vessel's hull below the freeboard deck.

The provisions of the Load Lines Convention are based on a system which takes into account the potential hazards presented by different geographical zones in different seasons. The appropriate load lines must be marked on each side of the ship together with the deck line. These lines vary according to the type of cargo each vessel carries. The provisions of the Load Lines Convention apply "to all ships engaged on international voyages"[22]. War ships, fishing vessels, pleasure yachts not engaged in trade, as well as ships solely navigating in certain geographical areas (e.g. the Great Lakes of North America and the river St. Lawrence, the Anticosti Island, the Caspian Sea) are excepted from these provisions. Furthermore National Administrations may exempt ships of a novel kind.[23]

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[20]The Convention was amended in 1981, 1983, four times in 1988 after the "Herald of Free Enterprise" disaster, in 1989, 1990, 1991, 1992 and 1994. This continuous amending process fuelled the criticisms for abuse of the "tacit acceptance" procedure.
[21]See the pre-amble of the Convention.
[22] Ibid. Article 4(2).
[23]See for example Section 19 of the Merchant Shipping (Load Lines) Act 1967 of the United Kingdom.

The flag state administration has an obligation to survey vessels under its flag and provide them either with a load line certificate or an exemption certificate. This certificate is valid for a maximum period of 5 years. Periodical inspections must be carried out on each anniversary (plus or minus 3 months) of the date of completion of the survey. The Convention contains also provisions for ships intended for the carriage of timber deck cargo in order to tackle problems arising out of the peculiarities of this type of cargo.

In 1971, 1975, 1979 and 1983 IMO adopted amendments to the Load Lines Convention. These amendments concern primarily alterations and improvements to zone boundaries, and the 1975 amendments concern the introduction of the principle of "tacit acceptance" into the Convention. However none of these amendments has yet entered into force. On 11 November 1988 IMO adopted the 1988 Protocol, in order to harmonise the Convention's survey and certification requirement with those contained in SOLAS and MARPOL 73/78. The 1988 protocol has not yet managed to acquire the necessary ratifications to come into force.[24]

4.3.3 The International Convention for the Prevention of Pollution from Ships (MARPOL) 1973:

In the 60's there was an increase in the amount of chemicals carried by sea and consequently the threat for the marine environment became much bigger. Actually it became that big that in 1969 IMO decided to convene an international conference to prepare a suitable international agreement for placing restrains on the contamination of the sea and air by ships. That Convention was finally adopted in November 1973.

[24]The 1988 protocol will come into force 12 months after being accepted by not less than 15 states whose combined merchant fleets constitute not less than 50% of world tonnage.

MARPOL 1973 covers all the technical aspects of pollution from ships[25] and applies to ships of all types with the exception of war ships, naval auxiliaries, or other vessels owned or operated by a State and used for non-commercial services. All vessels must hold a certificate which is to be issued by the flag state. MARPOL contains provisions allowing for port state control inspections[26]. Furthermore MARPOL may be amended by the "tacit acceptance" procedure under which amendments automatically enter into force on a specific date unless rejected by one third of the contracting parties or by contracting parties whose combined fleets of merchant shipping represents not less than 50% of world's gross tonnage[27].

MARPOL contains five Annexes dealing respectively with oil, noxious liquid substances carried in bulk, harmful substances carried in packaged forms, sewage, and garbage:

Annex I of MARPOL is based on the philosophy that, in principle, the discharge of oil is prohibited unless specifically allowed. The system distinguishes between persistent (black) and non-persistent (white) oils[28]. Annex I applies to all ships unless a vessel is exempted by the administration of its flag state on the grounds that application of Annex I would be unreasonable or impracticable[29]. The tanker must carry an International Oil Pollution Prevention (IOPP) certificate. This certificate is issued by the administration of the flag state after an initial survey of the ship is carried out. Following the initial survey the vessel must be periodically surveyed at intervals not exceeding 5 years and must also undergo at least one intermediate survey during the period of validity of the certificate.

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[25]MARPOL does not contain any provisions about the disposal of waste into the sea by dumping because this topic is covered by the London Dumping Convention. It does not apply to pollution arising out of the exploration and exploitation of sea bed mineral resources either.

[26] See supra under Chapter 3.3.2.

[27] See infra under 4.4.1.

[28]For further information on black and white oils see Abecassis and Jarashow's "Oil Pollution from Ships" 2nd ed., London, 1985, at pp. 196-197 and note 7 at p.197.

[29] See Reg. 2 of MARPOL 73/78.

MARPOL 73 introduces a new concept in order to protect areas which are highly vulnerable to oil pollution. According to Regulation 10 of Annex I, discharge of oil or oily mixtures from any oil tanker or any other vessel of 400 gross tonnage and above is completely prohibited when such vessel sails in a "special area". Regulation 10 specifies as special areas the Mediterranean Sea, the Baltic Sea, the Black Sea, the Red Sea and the Gulf area. Annex I provides that all oil carrying ships must be in a position of retaining oily wastes on board through the "load on top" system or for discharge to shore reception facilities. This provision involves the fitting of appropriate equipment including a filtering system, slop tanks, piping and pumping arrangements etc. New oil tankers of 70,000 dwt and above must be fitted with "segregated ballast tanks" (SBT) and are required to meet certain sub-division and damage stability requirements so that they can survive after damage by collision or stranding. Regulation 20 requires an oil record book to be carried and maintained on board. Non tankers have to carry an oil record book Part 1 (Machinery space operations) and tankers must additionally carry Part 2 (Cargo and ballast operations).

Annex II contains provisions for the control of pollution by liquid noxious substances carried in bulk. The substances are divided into four categories according to the hazard they present to marine resources, human health or amenities. The discharge of the residues of such substances is allowed only to reception facilities unless certain conditions are complied with. In any case no discharge of residues containing noxious substances is permitted within 12 miles of the nearest land in water of less than 25 metres in depth. Special stringent restrictions apply to the Baltic and Black Sea areas. All operations which involve substances listed in Annex II of MARPOL 73 must be recorded in a cargo record book which must be carried on board.

Annex III applies to all ships carrying harmful substances in packaged form or in freight containers, portable tanks or road and rail tank wagons. Harmful are those substances which are identified as "marine pollutants" in the International Maritime Dangerous Goods (IMDG) code. This Annex is the first of the Convention's optional Annexes: States ratifying the Convention must accept Annexes I and II but can choose

not to accept the other three. Annex III contains requirements concerning the issuing of detailed standards on packing, marking, labelling, documentation, stowage, quantity limitations, exceptions and notifications for preventing pollution by harmful substances.

Under Annex IV ships are not permitted to discharge sewage within four miles of the nearest land unless they have in operation an approved treatment plant. Between four and twelve miles from land sewage must be comminuted and disinfected before discharge. The Annex requires for the provision of reception facilities by the participating states.

Annex V aims in preventing pollution by dumping of garbage into the sea. Garbage means all kinds of victual, domestic and operational waste (e.g. plastics, food wastes, paper products, rugs, wood, glass, metal, bottles etc.). The Annex sets forth specific minimum distances from the coast within which no disposal of garbage may take place. The most important feature of this annex is the complete prohibition placed on the disposal of plastics into the sea. Food wastes and other garbage cannot not be dumped within 12 miles of land unless it has first been passed through a comminuter or grinder. Even then the minimum distance from land when dumping is permitted is set at 3 miles. The Annex provides for special areas such as the Mediterranean, Baltic and Black seas.

Last September, the IMO adopted the Protocol of 1997 which introduces Annex VI. This Annex deals in detail with the prevention of Air Pollution from Ships. The Annex sets limits on sulphur oxide and nitrogen oxide emissions and prohibits the deliberate emission of ozone depleting substances.
A series of maritime accidents involving oil tankers between the years 1976 and 1977 led IMO to calling a conference to consider further measures including changes to MARPOL and SOLAS 74. In 1978 the International Conference on Tanker Safety and Pollution Prevention (TSPP) was held. TSPP realised that the biggest problems preventing the rectification of MARPOL 73 were associated with Annex II of that

Convention. It was therefore decided to adopt the agreed changes for Annex I and at the same time allow contracting states to defer implementation of Annex II for three years after the date of entry into force of the Protocol (i.e. until 2nd October 1986). In effect the MARPOL Protocol 1978 absorbed the parent Convention of MARPOL 73.

The Protocol provided for "segregated ballast tanks" (SBT) on all new tankers of 20,000 dwt and above (instead of 70,000 dwt and above required by MARPOL 73) to be protectively located, that is, they must be positioned in such a way that they would help protect the cargo tanks in the event of a collision or grounding. Furthermore the Protocol recognised the importance of "crude oil washing" (COW)[30] which had recently been developed. The Protocol adopts COW as an alternative to SBTs for the existing tankers and as an additional requirement for new tankers. A further alternative was allowed for a period of 2 to 4 years after the entry into force of MARPOL 73/78: According to the Protocol clean ballast tanks (CBT)[31] could be used instead of SBTs. Tankers operating solely in specific trades between ports which are provided with adequate reception facilities are exempted from the SBT, COW and CBT requirements. Furthermore the 1978 Protocol to MARPOL introduced stricter regulations for the survey and certification of ships. Apart from the initial survey, the periodical surveys at the 5 year intervals and the minimum of one intermediate survey during the period of validity of the IOPP certificate, unscheduled inspections or mandatory annual surveys have been introduced and the action that might be taken when vessels are found to be defective or sub-standard has been more clearly defined.

Since then a number of amendments have been introduced to MARPOL 73/78. In 1984 and 1985 amendments were introduced to update and expand Annex II respectively taking into account technological developments since MARPOL 73/78 was drafted. In 1985 Protocol I was amended making it an explicit requirement to report incidents

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[30]Under the method of crude oil washing tanks are washed not with water but with crude oil that is the cargo itself. For further reading on this method See "Oil Pollution from Ships" op.cit fn ...at p.32.

[31]According to the "dedicated clean ballast tank" system certain tanks are dedicated solely to the carriage of ballast water in other words this system utilises existing pumping and piping and allowed the shipowners to postpone any expenses for the introduction of the other systems. Ibid. p.34 et seq.

involving discharge into the sea of harmful substances in packaged form. In 1987 amendments were introduced again which extended Annex I special area status to the Gulf of Aden. In March 1989 three different groups of amendments were introduced affecting the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC code), the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH), and appendices 2 and 3 of Annex II of MARPOL, respectively. In October of the same year North Sea was pronounced a special area under Annex V of the Convention. In 1990 amendments were introduced in order to harmonise the system of survey and certification (HSSC) in MARPOL 73/78. At the same time the same amendments were introduced into the IBC code and the BCH code. In November of the same year the Antarctic was characterised as a special area under Annex I and V. In 1991 the wider Caribbean was made a special area under Annex V.

In 1992 extensive amendments were introduced which affect both new and existing vessels. All new tankers of 5,000 dwt and above must be fitted with double hulls separated by a space of up to 2 metres. As an alternative tankers may incorporate the mid-deck concept under which the pressure within the cargo tank does not exceed the external hydrostatic water pressure. Such tankers have double sides but not double bottoms. Furthermore new requirements concerning sub-divisions stability for oil tankers of 20,000 dwt and above are introduced. The amendments also reduce considerably the amount of oil which can be discharged into the sea from ships. Regulation 13G which will apply to existing crude oil tankers of 20,000 dwt and product carriers of 30,000 dwt and above and took effect from 6th July 1995 requires that all tankers that are 25 years old on this date and were not constructed according to the requirements of the 1978 Protocol will have to be fitted with double sides and double bottoms. Tankers built according to the standards of the protocol are exempt until they reach the age of 30. Furthermore tankers that are 5 years old or more must carry on board a completed file of survey reports together with a condition valuation report endorsed by the flag administration. This tactic employed by IMO aims in encouraging shipowners of ageing vessels to scrap them by making their conversion up to standards the only alternative. The high costs involved in such a conversion, leave

such shipowners without a choice. In September 1997, a new Regulation 25A was introduced to Annex I, specifying intact stability criteria for double hull tankers. These 1997 amendments will come into force on 1 February 1999.

4.3.4 The Convention on the International Regulations for Preventing Collisions at Sea (COLREG) 1972:

Safe navigation at sea plays a crucial part in the prevention of loss of life at sea as well as the prevention of pollution. SOLAS 1960 contained provisions for the prevention of collisions at sea. In 1972 (20th October) IMO adopted the Convention on the International Regulations for Preventing Collisions at Sea which came into force on 15 July 1977.

The Convention is divided into five parts and also contains four Annexes. Part A deals with the application of the rules and sets forth the necessary definitions for this Convention. Part B outlines the steering and sailing rules. Part C deals with technical details on lights and shapes while Part D is devoted to sound and light signals. Exemptions are dealt with in Part E. The four Annexes outline technical details of the above matters with Annex 4 devoted entirely to "distress signals".

COLREG '72 recognised fully "traffic separation schemes".[32] The Convention also contains provisions dealing with safe speed, the operation of vessels in narrow channels, the conduct of vessels in restricted visibility, the conduct of vessels operating in or near traffic separation schemes and the operation of vessels restricted in their ability to manoeuvre or constrained by their draft. Special provisions are adopted regarding lights for air cushion vessels or vessels engaged in towing, dredging or underwater operations, as well as sound signals to be given in restricted visibility.

[32]See Rule 10 of the Convention.

The Convention, which contains provisions for the introduction of amendments under the "tacit acceptance"[33] procedure, was amended in 1981, 1987, 1989 and 1993; all of these amendments are already in force.

4.3.5 The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW):

Soon after the establishment of IMO the organisation recognised the importance of training of the crew of a vessel in matters of safety and prevention of maritime pollution. In 1964 a committee on training was established by IMO and the International Labour Organisation (ILO). This Committee engaged on an effort to give guidance in the form of a code which would contain information on education and training of Masters, Officers, and Seamen in general. Nevertheless the code itself was not as effective as a Convention would be. IMO realised that there could be no real attempt to change things in international shipping without introducing legislation regarding the training of seafarers. Furthermore the technological developments could never be applied in the industry if the work force of the industry lacked the necessary skills. The IMO Assembly decided in 1971 to convene a conference to adopt a Convention on this subject. This led to the 1978 Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, (STCW) which finally came into force on 28th April 1984.

According to the provisions of the Convention every officer of a seagoing ship shall hold an appropriate certificate of competency which "shall be issued to those candidates who, to the satisfaction of the administration, meet the requirements for service, age, medical fitness, training, qualifications and examinations in accordance with the appropriate provisions of the Annex"[34]. This certificate shall be in the official language of the issuing country as well as (if the language used is not English), in English. Article VIII of the Convention provides for those cases when the administration may

[33] See infra under 4.4.1.

issue a dispensation in which case the seafarer may serve for a certain period in a capacity for which he does not hold the appropriate certificate.

The Convention contains provisions regarding Port State Control[35]and the "tacit amendment procedure"[36]. Furthermore, it provides that no more favourable treatment will be given to ships flying a flag of a state which is not party to the Convention than that given to ships under the flag of a state which is a party to the Convention[37].

The technical provisions of the Convention are contained in an Annex which is divided into six chapters. Chapter I contains general provisions and includes a list of definitions of the terms used in the Annex, the content of the certificate and the endorsement form, as well as the control procedures. This Chapter specifies that certificates issued by another contracting state must be recognised unless they are fraudulently obtained. However the requirements of the Annex may be waived for seafarers on ships engaged on "near - coastal voyages" which are defined in Regulation I/1 as "voyages in the vicinity of a party as defined by that party".

Chapter II deals with the Deck Department and outlines basic principals to be observed in keeping a navigational watch. This chapter contains the mandatory minimum requirements for the certification of Masters, Chief Mates and Officers in charge of navigational watches. Furthermore Regulation II/5 defines the mandatory minimum requirements to ensure the continued proficiency and updating of knowledge for Masters and Deck Officers. Chapter II also contains provisions regarding watches in port and mandatory minimum requirements for a watch in port on ships carrying hazardous cargo.

Chapter III deals with the Engine Department and outlines basic principles to be observed in keeping an engineering watch. It also includes the minimum requirements for certification of Chief and Second Engineer Officers of ships with main propulsion

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[34] See Article. V of '78 STCW
[35] See supra under Chapter 3.3.3.
[36] See infra under 4.4.1.
[37] See infra under 4..4.2.

machinery of 3,000 kw or more and for ships of between 750 kw and 3,000 kw. Chapter III also establishes mandatory minimum requirements for ratings forming part of an engine room watch.

Chapter IV deals with the Radio Department and establishes minimum requirements for certification of Radio Officers and Radio Operators as well as requirements to ensure their continued proficiency and updating of knowledge. Furthermore the chapter deals with radio watchkeeping and maintenance.

Chapter V sets forth the special requirements for tankers. Additional mandatory minimum requirements for the training and qualification of Masters, Officers and ratings of oil tankers, chemical tankers and liquefied gas tankers are specified in detail.

Proficiency in survival crafts is the subject of Chapter VI. This chapter is concerned with mandatory minimum requirements for the issuing of certificates of proficiency in survival crafts.

In 1991 amendments were introduced to deal with the implementation of the Global Maritime Distress and Safety System (GMDSS) which will be implemented gradually in the period from 1992 to 1st February 1999. These amendments entered into force on 1st December 1992.

In 1995 the Convention underwent an extensive revision which resulted in a complete change of the philosophy behind this instrument[38].

[38]See infra under chapter 6.4.

4.4 THE CREATION OF A "NEW" SYSTEM FOR THE REGULATION OF MATTERS OF SAFETY AND POLLUTION PREVENTION:

In its struggle for cleaner seas and safer oceans, IMO, had a Trident to hit substandard vessels. The middle point of this Trident was port state control. The introduction of this alternative mode of enforcement gave IMO's effort a tremendous boost to enable it to achieve its objectives[39]. The developments on the enforcement "front" are addressed in chapter 3 and therefore no further reference will be made in this chapter.

The other two points of IMO's trident are completed by two elements conceived and introduced[40] by the organisation: the "tacit amendment procedure" and the "no more favourable treatment" clause. These are two novel legal points which found their way to most of the major conventions by attracting minimum attention, in the sense that their full potential was not appreciated at the time of their introduction. Perhaps the most important period in IMO's life was the period beginning from the early 1970's and extending to the early 1980's. It was during that period that the most important conventions, which would constitute the spinal cord through which the organisation would be able to support its "body" and thus achieve its targets, were adopted. These conventions included these two elements which, at the moment, did not appear to be of any great importance. The conventions were still undergoing the process of achieving the necessary number of acceptances, so that they could enter into force. It was, therefore, impossible or very difficult to assess any impact that such new elements could have after they would enter into force. The "tacit amendment procedure" and the "no more favourable treatment" clause were laying in their embryonic form, in the safety of the womb of the conventions, waiting to enter the maritime world. It would be some time before they would develop fully and demonstrate their potential.

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[39] By definition, enforcement lies beyond the scope of IMO's jurisdiction and even though the port state control concept is implemented by member states usually on regional bases, IMO's contribution to its coming into being, but also to the form that it has acquired was very important.

[40] Whether by mistake or not, is of no significance to this study.

4.4.1 The Tacit Amendment Procedure:

IMO is a technical international organisation which seeks to promote co-operation among governments in the field of international shipping[41]. The conventions that are convened under its auspices are likely to be highly technical conventions seeking to address issues arising out of the operation of ships. The shipping industry itself is a highly technical industry, as is also the carrying of goods by sea.

On the other hand, the established mode for the introduction of international law or regulations had always been a time-consuming process. It was, therefore, acknowledged that the existing system posed a threat of rendering the work of the Organisation obsolete, since developments in the technical field would outpace the process of entering into force of any adopted amendments to any convention.

There was a general consent that a formula had to be introduced which would allow clearly technical provisions to be regularly revised without these revisions being subjected to the established amendment procedure, which required the notification of the acceptances of a considerable number of participating states before any amendment entered into force. The problem found the perfect solution with the introduction of the "Tacit Amendment Procedure". According to this procedure, amendments would enter into force on a specific date, unless objected to by a specific number of states. In other words, the silence on behalf of a member state would be assumed as an approval and there would be no need for a positive acceptance.

This amendment procedure found its way in the text of all major IMO Conventions introduced in the 1970s.

COLREG 1972, a highly technical Convention, is divided into articles which deal with the standard subjects of every convention[42] and regulations which constitute the essence of this Convention and are entirely technical. Art. 5 of COLREG '72 provides that the

[41]See Article 1(a) of the 1948 IMO Convention.

[42]These include provisions on signature, ratification and acceptance of the Convention, its territorial application, its entry into force as well as provisions concerning the revision of the Convention and the introduction of amendments.

Convention or the regulations may be revised by a conference convened by the Organisation. Furthermore, art. 6, which is entitled 'Amendments to the Regulations' provides that regulations may be amended through the tacit procedure. Article 6(iv) writes as follows:

> *"Such an amendment shall enter into force on a day to be determined by the Assembly at the time of its adoption unless, by a prior date determined by the Assembly at the same time, more than one third of the contracting parties notify the Organisation of their objection to the amendment. Determination by the Assembly of the dates referred to in this paragraph shall be by a two thirds majority of those present and voting."*

The above allows the Assembly of the Organisation to introduce any amendments to the regulations of the Convention, on a date that it will fix, by a two thirds majority. Consequently, any such amendment would automatically enter into force if, by the said date, objections equivalent to one third of the contracting states are not notified to the Organisation.

In 1973, a conference convened by IMO adopted the international convention for the prevention of pollution of ships, better known as MARPOL. MARPOL contains a more complex version of the tacit amendment procedure. Article 16, entitled 'Amendments', provides for two different modes for the amendment of the Convention. The Convention may be amended after consideration by the Organisation or by a conference. Article 16(2)(f) provides as follows:

> *"an amendment shall be deemed to have been accepted in the following circumstances:*
>
> *(i) an amendment to an article of the Convention shall be deemed to have been accepted on the date on which it is accepted by two thirds of the Parties, the combined merchant fleets of which*

constitute not less than 50 per cent of the gross tonnage of the world's merchant fleet;

(ii) an amendment to an Annex to the Convention shall be deemed to have been accepted in accordance with the procedure specified in subparagraph (f)(iii) unless the appropriate body, at the time of its adoption, determines that the amendment shall be deemed to have been accepted on the date on which it is accepted by two thirds of the Parties, the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world's merchant fleet. Nevertheless, at any time before the entry into force of an amendment to an Annex to the Convention, a Party may notify the Secretary-General of the Organisation that its express approval will be necessary before the amendment enters into force for it. The latter shall bring such notification and the date of its receipt to the notice of Parties;

(iii) an amendment to an appendix to an Annex to the Convention shall be deemed to have been accepted at the end of a period to be determined by the appropriate body at the time of its adoption, which period shall be not less than ten months, unless within that period an objection is communicated to the Organisation by not less than one third of the Parties or by the Parties the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world's merchant fleet whichever condition is fulfilled"[43].

It becomes clear from the above that articles of the Convention are not subject to the tacit amendment procedure. Only Annexes to the Convention as well as appendices to such Annexes may be amended through this procedure. It is exactly these Annexes and

[43]This procedure applies for amendments after consideration by the Organisation, as well as for amendments by a conference. See also Article 16(3)(c).

appendices to such Annexes that constitute the technical part of MARPOL. The will of the draftsman of the Convention to allow the application of the tacit amendment procedure solely for the cases of technical amendments is clear.

Special note must be taken of Article 16(5), which stipulates as follows:

> *"The adoption and entry into force of a new annex shall be subject to the same procedures as for the adoption and entry into force of an amendment to an article of the Convention."*

In other words, the draftsman of MARPOL seeks to prevent any attempt to allow the introduction of new provisions, even if those were to be technical ones, through the back door. The introduction of any new Annexes will be considered as an amendment of the Convention itself and, therefore, will be subjected to the established amendment procedure, which would require the explicit acceptance of any such amendment by two thirds of the contracting parties, the combined merchant fleets of which constitute not less than 50% of the gross tonnage of the world's merchant fleet[44].

A very similar article, both in structure and in its spirit, is included in SOLAS 1974. Article VIII(b)(vi) stipulates as follows:

> *"(1) An amendment to an article of the Convention or to chapter I of the annex shall be deemed to have been accepted on the date on which it is accepted by two thirds of the Contracting Governments.*
>
> *(2) An amendment to the annex other than chapter I shall be deemed to have been accepted:*

[44] According to Article V of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships of 1973, all the procedures set out in Article 16 of the mother Convention apply respectively for any future amendments of the Protocol.

(aa) at the end of two years from the date on which it is communicated to Contracting Governments for acceptance; or

(bb) at the end of a different period, which shall not be less than one year, if so determined at the time of its adoption by a two-thirds majority of the Contracting Governments present and voting in the expanded Maritime Safety Committee[45].

However, if within the specified period either more than one third of Contracting Governments, or Contracting Governments the combined merchant fleets of which constitute not less than fifty per cent of the gross tonnage of the world's merchant fleet, notify the Secretary-General of the Organisation that they object to the amendment, it shall be deemed not to have been accepted."

SOLAS 1974 provides that, any amendment to the Convention or its annex may be effected either after consideration within the Organisation or by the conference[46].

The main part of the Convention contains general provisions regarding the application of this Convention, its status towards prior treaties and conventions, provisions regarding its amendments, its certification, its entering into force, and in general, provisions which one would expect to find in every international convention. Chapter I of SOLAS 1974 contains more focused "general provisions". After specifying the type of ships to which SOLAS applies, the Convention goes on to specify the intervals between the necessary surveys of the various equipment and regulates the issuing of certificates by the relevant authorities. Lastly, Chapter I includes those Articles which regulate the issue of port state control.

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[45]The expanded Maritime Safety Committee includes all the Contracting Governments of states, even if these Governments are not members to the Organisation itself. See Article VIII(b)(iii).

[46]The Protocol of 1978 relating to the International Convention for the Safety of Life at Sea 1974 stipulates in Article II that *"The provisions of Article . . . and VIII (of the Convention) are incorporated in the present Protocol . . ."*.

It becomes clear by Article VIII(b)(v)(1) and (2) that the draftsman of SOLAS 1974 wished for the tacit amendment procedure to apply only on the *stricto sensu* technical chapters of the annex. These chapters, at least at the time of the adoption of the Convention, were highly technical, dealing with issues such as sub-division and stability of a vessel, fire protection and detection, radiotelegraphy and radiotelephony, etc.[47]. Surprisingly though, SOLAS 1974 does not contain any provisions similar to that of Article 16(5) of MARPOL 73/78. It does not provide for the possibility of the introduction of a new chapter or even a new annex to the Convention. Therefore, since there is no specific provision preventing any such new introduction, the issue was left open to the will of the contracting parties. Furthermore, since Article VIII sought only to protect the main corpus of the Convention and Chapter I of the annex, allowing the tacit amendment procedure to apply for all other cases, it would appear that any new introduction of a new chapter, as well as any future amendment of such a new chapter, would be subject to the tacit amendment procedure.

By 1978, when the STCW Convention was adopted, it appears that the Organisation had adopted a common provision dealing with amendments, similar in structure and in spirit with those included in MARPOL and SOLAS respectively. Article XII(8)(vi) and (vii) stipulate as follows:

> *"(vi) an amendment to an Article shall be deemed to have been accepted on the date on which it is accepted by two thirds of the Parties:*
>
> *(vii) an amendment to the Annex shall be deemed to have been accepted:*
>
> *1. at the end of two years from the date on which it is communicated to Parties for acceptance; or*
>
> *2. at the end of a different period, which shall be not less than one year, if so determined at the time of its adoption*

[47]For further details, see supra 4.3.1..

by a two-thirds majority of the Parties present and voting in the expanded Maritime Safety Committee;

however, the amendments shall be deemed not to have been accepted if within the specified period either more than one third of Parties, or Parties the combined merchant fleets of which constitute not less than fifty per cent of the gross tonnage of the world's merchant shipping of ships of 100 gross register tons or more, notify the Secretary-General that they object to the amendment".

The separation between technical and non-technical provisions is clear in the case of the '78 STCW, too. So is the will of the draftsman to allow the application of the tacit amendment procedure solely for purposes of amending the annex to the Convention, which is divided into Chapters and deals solely with technical matters. The main corpus of this Convention may not be amended by the tacit amendment procedure. Nevertheless, STCW 1978 (like SOLAS '74) does not contain a clause similar to Article 16(5) of MARPOL and, therefore, the concept of amending the annex to the Convention also includes the possibility for the introduction of new chapters or even the total replacement of the annex itself. The Convention provides both for amendments after consideration within the Organisation and for amendments by a conference.

Lastly, it must be mentioned that the 1966 Load Lines Convention, which is the other major Convention of IMO, originally did not contain any tacit amendment procedure clause. The 1975 amendment to this Convention, which sought to introduce this clause to the Convention, has not yet achieved the two-thirds majority that is necessary to bring it into force.

4.4.2 The "No More Favourable Treatment" Clause:

As already mentioned above, IMO purposely set the entering into force requirements for all its major conventions quite high[48]. This would, of course, delay the coming into force of each convention, but would nevertheless also mean that once the necessary ratifications had been achieved, the conventions would be truly reflecting the international standards. The introduction of any new international convention which would merely bind a small number of states which chose to participate in such a convention would serve no purpose, since it could hardly be claimed that such a convention reflected any international standards. IMO's strategy proved to be successful since, nowadays, international standards are defined by the contents of these very conventions.

However, it soon became apparent that, despite the large number of ratifications that each of these conventions would achieve, a number of states which wished to avoid applying the provisions of such conventions on their fleets could opt not to sign or ratify a convention, thus allowing any vessel sailing under their flag to avoid complying with the "international standards". This would not only defeat the purpose of the introduction of the conventions, but would create the impression that signing or ratifying any of these conventions would render the vessels sailing under the flags of any participating states worse off and less competitive than vessels sailing under the flags of non-participating states. There was, therefore, a need for a new formula to be found to tackle this problem.

Based on the fact that IMO's major conventions reflected - if not defined - very accurately the prevailing international standards, IMO introduced the so-called "no more favourable treatment" clause to its main conventions. Article 5(4) of MARPOL 73 states as follows:

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[48]SOLAS 1974/1978 requires 25 states whose combined merchant fleets constitute not less than 50% of the world's gross tonnage, and the same applies for the 1978 STCW. MARPOL 73/78 requires 15 states with not less than 50% of the world's gross tonnage, whereas COLREG 1972 requires ratification by 15 states with not less than 65% of the world's fleet by number of ships or gross tonnage of vessels of 100 gross tons.

"With respect to the ship of non-Parties to the Convention, Parties shall apply the requirements of the present Convention as may be necessary to ensure that no more favourable treatment is given to such ships."

Even though a similar provision was not included in the original 1974 SOLAS Convention, this was added by the 1978 Protocol to this Convention. Article II of the 1978 Protocol to SOLAS stipulates:

"3. With respect to the ships of non-Parties to the Convention and the present Protocol, the Parties to the present Protocol shall apply the requirements of the Convention and the present Protocol as may be necessary to ensure that no more favourable treatment is given to such ships."

In the text of the 1978 STCW, Article X, entitled 'Control', deals in detail with the powers of the authorities of the contracting states to control foreign ships whilst in their ports in order to verify that such ships comply with the provisions of the Convention. Paragraph (5) of Article X provides that:

"This Article shall be applied as may be necessary to ensure that no more favourable treatment is given to ships entitled to fly the flag of a non-Party than is given to ships entitled to fly the flag of a Party."

Even though, in the case of the 1978 STCW, the "no more favourable treatment" clause concerns merely the application of this Article, it nevertheless fulfils its purpose, since this very Article is the Article which addresses the issue of "control", which, in effect, means the enforcement of the whole Convention.

The introduction of the "no more favourable treatment" clause signified the end of the choice previously given to every administration - to simply not participate in order to avoid the compliance with a certain convention. From then on, non-participation by no

means meant also non-compliance. Indeed, the coming into force of one of these conventions would actually act as a motive for non-participating states to become contracting parties, since, at the same point of time that a certain convention entered into force, its provisions signified the establishment of the relevant international standards.

The introduction of the "tacit amendment procedure" clause and the "no more favourable treatment" clause into the major IMO Conventions appeared to be, during the time of their adoption, two reasonable steps which assisted the Organisation to achieve its objectives. This process of introduction began at the beginning of the '70's and almost immediately turned into a habit for IMO; the two clauses found their way into all the major conventions before they had a chance to be tested in practice[49]. Nevertheless, it was commonly accepted that these two methods would not only speed up the work of the Organisation, but would assist in making it more effective. Indeed, these two clauses combined together rendered the Organisation both flexible and effective.

However, the tacit amendment procedure proved that its effect extended much deeper than initially thought. At the time of the adoption of the relevant clauses, there was no doubt left that such an amendment procedure would only apply for technical issues. It appears that the participating states had every reason to believe that they could opt out of this procedure if they disagreed with the adoption of any future amendment. Indeed, the wording of the relevant clauses was such as to reflect this. Article 16(2)(g)(ii) of MARPOL stipulates that:

> *"in the case of an amendment . . . under the procedure specified in subparagraph (f)(iii), the amendment deemed to have been accepted in accordance with the foregoing conditions shall enter into force six*

[49]By 1978, when the Protocol to SOLAS 1974, the Protocol of MARPOL and the 78 STCW Convention were being adopted, the tacit amendment procedure had never been activated. COLREG 1972, which contained a relevant clause, had only entered into force on 17th July of the previous year.

months after its acceptance for all the Parties with the exception of those which, before that date, have made a declaration that they do not accept it or a declaration . . . that their express approval is necessary."

Similarly, Article VIII(b)(vii)(2) of SOLAS 1974 reads as follows:

"An amendment to the annex other than chapter I shall enter into force with respect to all contracting Governments, except those which have objected to the amendment under subparagraph (vi)(2) of this paragraph and which have not withdrawn such objections, six months after the date on which it is deemed to have been accepted . However, before the date set for entry into force, any Contracting Government may give notice to the Secretary-General of the Organisation that it exempts itself from giving effect to that amendment for a period not longer than one year from the date of its entry into force, or for such longer period as may be determined by a two-thirds majority of the Contracting Governments present and voting in the expanded Maritime Safety Committee at the time of the adoption of the amendment."

Lastly, Article XII(1)(a)(ix) of STCW 1978 provides that:

"an amendment to the Annex shall enter into force with respect to all Parties, except those which have objected to the amendment under sub-paragraph (a)(vii) and which have not withdrawn such objections, six months after the date on which it is deemed to have been accepted. Before the date determined for entry into force, any Party may give notice to the Secretary-General that it exempts itself from giving effect to that amendment for a period not longer than one year from the date of its entry into force, or for such longer period as may be determined by a two thirds majority of the Parties present and voting in the expanded Maritime Safety Committee at the time of the adoption of the amendment".

Thus, in theory, participating states may reject a new amendment by objecting to it or postpone its implementation by their authorities for a period of one year if they so wish, or more with the approval of the other contracting states. In practice though, the above provisions, which, *prima facie*, reflect a well-established rule of international law based on the principle of sovereignty of each country, are rendered completely obsolete by the "no more favourable treatment" clauses contained in those conventions. At the time that a new amendment entered into force, it constitutes the official version of the specific convention. Therefore, since these conventions reflect and define the existing international standards, all ships, whether they fly a flag of a participating state or not, must fully comply with these provisions and, if they fail to do so, they are subject to the enforcement jurisdiction of the port state.

Apart from the above, however, the omission of a clause similar to Article 16(5) of MARPOL, -which, in effect, prohibits the use of the tacit amendment procedure for the introduction of new annexes to this Convention-, from SOLAS 1974 and STCW 1978 opened the way for the abuse of this amendment procedure. In theory, the tacit amendment procedure was introduced in order to allow the conventions to abreast the technological developments as they occurred, thus being always up to date and most effective. The wording of the relevant amendment articles of all the conventions reveals that the draftsman fully recognises the established amendment procedure and accepts the introduction of the "unorthodox" tacit amendment procedure as an alternative which would only be used for strictly technical issues. Nevertheless, it appears that, since the mid-1980's, the Organisation has been making constant use of the tacit amendment procedure, rendering this procedure as the norm. Indeed, the "orthodox" amendment procedure is used only where the use of the tacit procedure would be impossible.

It appears that any new amendment could be introduced through the tacit amendment procedure provided that the issue it is dealing with has been previously christened to be a "technical issue". Of course, this can easily be done in an organisation as technical as IMO. Indeed, the temptation for the bureaucrats of the Organisation to opt for the tacit

amendment procedure which would allow them to introduce any amendments in a very short period of time, instead of the traditional amendment procedure which would take much longer, faces them with a pseudo-dilemma. Nevertheless, the actions of such bureaucrats would be of no significance if the member states were not willing to back this choice of theirs[50].

The motives of IMO should not in any way be disputed. The Organisation has only one interest, and that is the promotion of its target for "safer seas and cleaner oceans". Quite often though, this eagerness of IMO for the introduction of new, more stringent, regulations in the area of shipping is exploited by different sides which have other - usually economic- interests. The Organisation, encouraged or bullied by a number of its member states, has recently proceeded to the adoption of two major pieces of legislation through the tacit amendment procedure, which have the potential to change the face of shipping as it is known today. One of its most important conventions, the 1978 STCW, was almost wholly revised in 1995 to a degree that, in its present form, it has little in common with the parent Convention. This revision was effected through the tacit amendment procedure, which allowed the new 1995 STCW to enter into force on 1st February 1997. The same amendment procedure was again used to add to SOLAS 1974 a new chapter: Chapter IX of SOLAS 1974 introduced the international safety management code as a mandatory regulation in May 1994. This new Chapter will be implemented for a large number of vessels, on 1st July 1998[51].

One of the biggest disadvantages of the tacit amendment procedure, when this is used to introduce amendments which are only by name technical, is the fact that the industry, in its broad sense (insurance, classification societies, banks, etc.), as well as most of the participating states are not given enough time to study these new amendments and to assess their implications. The shipping industry offers a service which is indispensable for the whole world, and exactly because of its international character, it requires a stable and certain environment within which it will be allowed to operate. Up until the

[50]See Chapter 5 for an evaluation of the attitude of the member states.

[51]See supra Chapter 6 for a detailed analysis of the ISM Code and the STCW 95.

introduction of the ISM Code and the STCW 95, it appeared that the pace as well as the gravity of the amendments were sustainable by the industry. However, all this may change once the consequences of these two pieces of legislation start to be felt, and such consequences can only be evaluated some time after they are fully implemented.

4.5 CONCLUSIONS:

During the two decades between 1965 and 1985, the shipping industry witnessed a complete transformation insofar as, the setting as well as the implementation of international standards, are concerned. During this period the "new" system for the regulation of shipping regarding safety and pollution prevention, was being formed, and by the mid 80's the system was in place and operable. This "new" system contained all the necessary ingredients which would allow IMO to achieve its objectives within such a time frame that would not render that objective out of date, and to lead the way to safer ships and cleaner oceans. The concept of Port State Control, as an alternative mode of enforcement, in conjunction with the major IMO conventions, -which may be amended in the minimum of time, through the tacit amendment procedure, and leave no room for substandard ships to avoid compliance, through the "no more favourable treatment" clauses-, renders the effort against substandard ships competent enough to carry out its tasks. Through the establishment of this "new" system, the IMO, managed to ensure an effective and fast legislative mechanism backed by a rigorous enforcement mechanism which applies this "legislation" indiscriminately.

CH. 5: ATTITUDES OF STATES AND THE INDUSTRY TOWARDS THE "NEW" REGULATING SYSTEM

5.1 INTRODUCTION:

The "new" system introduced through IMO would be without any importance if the international shipping community - as this is expressed by the different states, as well as the shipping industry itself - were not willing to accept and enforce it in their practice. Respectively, the wishes of the industry as well as of the member states for the introduction of new practices would stand no chance of being realised without the involvement of IMO Indeed, the will of IMO is nothing more than the collective will of its member States. Any action to be taken by the Organisation must first be introduced by the member states, -or a non-governmental organisation representing a sector of the industry and participating at IMO's meetings as an observer-, and then enter a stage of discussions and negotiations aiming at the achievement of a common ground, acceptable to most of the involved sides. The very success of any instrument which might result from this process, depends on whether it will be enforced by the member states in a manner which will be sustainable by the industry. The industry operates in a delicate environment and extra caution needs to be exercised in order to not disturb the fine balance existing between the involved interests. An understanding between the member states and the industry needs to be reached before the introduction of any new pieces of legislation which might affect the practices of the industry. This understanding and constructive exchange of views can only be achieved through IMO and therefore its existence is of utmost importance for shipping.

This Chapter seeks to evaluate the role of maritime States in the introduction of new rules and regulations and assess the stand of states with large registries. Furthermore, it will attempt to assess the attitude of the industry towards the

"new" system as well as the reaction of the industry towards the attitudes of the significant maritime States.

5.2 ATTITUDES OF THE STATES:

In this International arena, some sides play a rather more important role than others and their contribution in providing IMO with new proposals for action, in forming the substance of any action to be taken and especially in enforcing the outcome of any such action, is crucial. The European Union, as a group of nations with common policies and interests but also as a geographical area comprising some of the most significant port destinations in the world, is one of the most important players. The United States, being an economic and political superpower and thus in a position to influence the position of other states, is another. However, the biggest part of the world's tonnage is under the flags of other states with much less power in international politics. Countries like Liberia and Panama or Cyprus and the Bahamas which, on the "chess board" of international politics are insignificant, in terms of shipping they are quite the opposite and therefore, their practices need to be examined.

5.2.1 The Attitude of the European Union (EU):

The fact that the European Union comprises some very big maritime States like Greece and Britain but also some of the biggest ports in the world like Rotterdam, Antwerp and Hamburg, in conjunction with the fact that the European Union has a separate legal personality, render the Union as one of the most crucial factors in international shipping and any study on the matters of safety and pollution prevention, would be incomplete without an account on EU's shipping policy.

The coming together of a number of states for the creation of, initially, an economic community and, later, of a political and social union could not in any

way be achieved without the introduction of a common legal order. This new legal order, which was provided for in the founding Treaties, was to give rise to what is today known as "community law", a fully- fledged legal system which operates separately but also in association with the legal orders of each individual member state. This new legal order has a very distinct and unique characteristic: it lies on the thin line separating international law from national law. As two learned writers on community law have put it, *"the European Community is a developed form of international organisation which displays characteristics of an embryonic federation"*[1]. The success of this new legal order is based on the power of the Community to make law with direct applicability (or direct effect) and on the fact that community law is supreme and over-rides any national laws of member states which may be in conflict with it[2].

In the 1960's, the European Community took no action whatsoever towards addressing the issues of safety and the protection of the marine environment[3]. In the 1970's, a number of events, like the 1973 oil crisis, and major tanker disasters, like *The "Amoco Cadiz"*, prompted the Community to deal with the problems of the shipping industry in a more systematic manner. There was a gradual increase in the number of incidences where the different organs of the Community dealt with shipping, mainly for issues of competition but also for matters concerning safety[4]. This trend continued throughout the 1980's, which saw the different institutions of the Community engaging on issues of safety and pollution

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[1]See Wyatt and Dashwood's *'European Community Law'*, 3rd Edition, 1993, Sweet & Maxwell, pp.53 - 56.

[2]For further reading, see Wyatt, *'New Legal Order or Old?'*, 1982, 7 E.L. Rev. 147. See also the Judgement of the ECJ in the case *6/64 Costa v. ENEL [1964] ECR 585.*

[3]There will be no references to any action taken by the European Community regarding the enforcement of competition law in the area of shipping, since this falls entirely out of the scope of the present study.

[4]See, for example, the Resolution of the European Parliament on shipping accidents. OJ C67, 12th March 1979; Bull. EC 2-1979 at 2.3.10.

prevention more frequently than ever before. Two recommendations were issued from the Council of Ministers calling all member states to ratify the Torremolinos Convention for the safety of fishing vessels[5], and the Search and Rescue (SAR)[6] Convention. Furthermore, in 1982, the Memorandum of Understanding on Port State Control was signed at the Ministerial Conference on Maritime Safety in Paris[7]. However, the biggest step towards the European Community Shipping Policy came in March 1985 when the Commission published the *'Progress Towards a Maritime Policy'*[8]. For the first time, the Community had analysed the status of the shipping industry in Europe and formulated its own policy in order to promote European interests in this field. Shipping was now amongst the areas of attention of the European Commission. Nevertheless, the primary point of focus of the Commission was competition and little attention was paid to issues of safety or protection of the marine environment. The real breakthrough over these issues was to be achieved in the 1990's. After the introduction of the Single European Act and the Maastricht Treaty[9], the European Community acquired the legal basis which would allow it to deal with issues other than economic, like the environment, public health and safety. In particular, Article 75(1.c) of the EC Treaty allowed the Commission to introduce non-commercial measures concerning safety. Furthermore, Title XVI of the Treaty provided the foundation for the introduction of measures to tackle marine pollution. The Maastricht Treaty, which came into force on 1st November 1993, untied the hands of the Commission and allowed it to embark on an effort to formulate and implement an

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[5]The recommendation was made on 23rd September 1980, calling for the ratification of the Convention by 31st July 1982.

[6]This recommendation was made on 25th July 1983. See Bull. EC 7/8-1983, at 2.1.1980.

[7]See supra, Chapter 3.

[8]COM (85) 90 Final, 14th March 1985.

[9]This is the Treaty on European Union (TEU) signed in Maastricht in 1992.

independent EU policy on issues of marine pollution and safety in the European waters.

5.2.1.1 A Common Policy on Safe Seas:

The Commission, without losing any time, published, in February 1993, a communication to the Council and the Parliament entitled 'A Common Policy on Safe Seas'[10]. Three years later, in March 1996, the Commission published another communication entitled 'Towards a New Maritime Strategy'[11]. The 1993 communication from the Commission (as this was updated by the 1996 document) constitutes the common policy of the European Union member states on safe seas. According to these "communications", Europe's common policy on safe seas is based on four pillars[12]:

The first pillar upon where the EU policy is based, is its determination to implement a policy which will result in the convergence of the national policies for the implementation of international rules by the EU member states. Even though all EU member states have ratified all major international conventions of IMO, the Commission recognises that there exists a divergence on the way that safety and pollution prevention standards are implemented in the geographical region covered by the EU. The Commission considers this divergence to be the result of a combination of factors, namely the fact that the Conventions leave to the discretion of the national administrations the setting out of several requirements as well as the inadequacy of certain administrations to carry out surveys and certification for the vessels under their flag, which forces them to rely completely on classification societies, sometimes of a doubtful competence.

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[10]COM(93)66 Final of 24th February 1993.

[11]COM(96)81 Final of 18th March 1996.

[12]See Jacques de Dieu, *'EU Policies Concerning Ship Safety & Pollution Prevention versus International Rule-Making'*, in Ringbom Henrik ed., Competing norms in the Law of Marine Evironmental Protection, Kluwer Law International, 1979, pp.141-163.

Furthermore, the Commission considers the fact that SOLAS's scope of application does not include vessels operating solely in domestic trade or cargo vessels below 500 gross tons is another factor. Lastly, the Commission feels that the most important reason for the existence of such a divergence between the practices of its member states in the implementation of major IMO conventions is the fact that the member states do not adopt a common policy on implementing the IMO Assembly Resolutions, even though most of these Resolutions pass with an overwhelming majority. The EU appears to be determined to achieve a common safety and pollution prevention standard for the whole of Europe and declares that, in doing so, it will seek to pass the content of the most important IMO Resolutions as mandatory European law[13].

The second pillar of this common policy on safe seas aims to achieve a uniform mode of enforcement of the international standards on all ships visiting European ports, irrespective of the flag they fly. The Commission declares that it considers port state control to be the most efficient tool against substandard shipping, since many flag states are not capable of securing and maintaining the international standards. It is worth mentioning that, in its Communication, the Commission makes specific references to Articles 192, 194, 197, 211 and 218 - 221 of UNCLOS 82[14].

The third pillar of the Union's policy calls for the development of an adequate maritime infrastructure to extend to the full length of the area of the European Union. The Commission clarifies that it will push forward for the establishment of a common mechanism which will monitor the traffic of ships within European waters and will ensure that this new maritime infrastructure will be used by all ships sailing in the Community waters[15].

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[13]See COM (96) 81 of 18th March 1996, under 2.2.1 at page 6.

[14]Ibid. para. 45, at page 18. See also supra under shapters 2 and 3 for an analysis of these Articles.

[15]Ibid. paras. 51 - 58, at pages 19 - 21.

Lastly, the Commission, after spelling out in great detail all the drawbacks of the international rule-making process within IMO[16], declares that it will continue to work closely with the Organisation, which it considers to remain the body primarily responsible for setting standards on maritime safety. Furthermore, it vows:

> *". . . to ensure that the IMO's work develops in a way which will produce adequate solutions for ships sailing in its waters"*[17].

From the above, it becomes clear that the attitude of the European Union towards the work of IMO is, on the one hand, supportive and positive, but also, on the other hand, negative: the EU, counting on its position as an economic super power but also as a geographical area which comprises some of the most important ports of the globe, offers its allegiance to IMO as the "carrot" in order to promote its own interests within the Organisation. On the other hand, it does not hesitate to express its discomfort and discontent whenever the international consensus achieved within IMO falls short of the objectives that the EU countries sought to achieve, thus using the "stick" by indirectly threatening to take unilateral action in order to address certain problems in a more determined way than the one offered by IMO. These four pillars upon which the European Union's common policy on safe seas is based constitute the declared will of the Commission. Nevertheless, the very structure of the European Union requires the reaching of some consensus between the 15 member states prior to the introduction of any practical measures. It would, therefore, be more wise to judge the attitude of the European Union towards IMO from its actual actions taken through the introduction of European legislation.

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[16]Ibid. para. 59, at page 21.

[17]Ibid. para. 61, at page 21.

5.2.1.2 The EU's Shipping Legislation:

During the period between the years 1991 and 1997, the Commission embarked upon a very ambitious effort to introduce a number of legislative instruments that would enable it to realise its policies regarding safety and pollution prevention. The only restriction that the Commission faced in its attempt was that actions should not in any way interfere with the existing competition rules of the Union. The result of this effort was quite impressive:

A. In 1991, the EC adopted the so-called "transfer regulation"[18]. This regulation fully recognises that the safety level achieved by the IMO conventions regarding cargo vessels built on or after 25th May 1980 is the most appropriate. According to the provisions of the Regulation, a member state can no longer refuse to issue to any of these ships any certificate provided for in SOLAS, MARPOL and the Load Lines Conventions during the process of transfer of any of these ships from one member state's registry to another. In effect, the Regulation aims at putting aside all the differences between the interpretation of the provisions of these Conventions by the administrations of the member states. The Regulation provides for a mechanism which will resolve any disagreement regarding the interpretation of these IMO Conventions[19].

B. In 1992, the Council issued a Decision on radio-navigation systems for Europe[20]. This Decision takes on board a policy recommended by the

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[18]Official Journal of the European Communities, L68 of 13.3.91, Council Regulation (EEC) No. 613/91 of 4th March 1991 on the transfer of ships from one register to another in the Community.

[19]Ibid. Article 7.

[20]OJEC, L59 of 4.3.92, Council Decision of 25th February 1992

International Association of Lighthouse Authorities (IALA) and aims to develop a European terrestrial radio-navigation system.

C. In 1993, the Community adopted a Directive which intended to promote the idea of accident prevention as well as to limit the consequences of maritime accidents on the marine environment by imposing a general obligation on the master or the operator of every ship carrying dangerous or polluting goods to communicate to the relevant authority details of their cargoes when leaving a Community port or when they are bound to a Community port[21]. This Directive also implemented Resolution A.648(16) of IMO.

D. The Assembly of the International Maritime Organisation, during its meeting in November 1993, adopted Resolution 747(18) regarding the application of tonnage measurement of segregated ballast tanks in oil tankers. This IMO Resolution sought to provide a uniform mode for the measurement of tonnage of segregated ballast tankers. However, despite the overwhelming majority that the proposal achieved during the Assembly, port authorities around the world appeared reluctant to implement its provisions, fearing that such an action would place them in a less competitive position towards neighbouring ports. The European Union decided in 1994 to adopt a Regulation which would introduce the provisions of IMO Resolution A.747(18), in a mandatory form, for all member states[22]. Thus, the objective of the IMO Resolution, which intended to reward these "environmentally friendly" vessels, was now achieved without allowing the environmentally conscious states who chose to implement it to suffer any financial loss as a result of their policy to pursue the international standards.

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[21]OJEC, L247 of 5.10.93, Council Directive 93/75/EC of 13th September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods.

[22]OJEC, L319 of 12.12.94, Council Regulation (EEC) No. 2978/94 of 21st November 1994 on the implementation of IMO Resolution A.747(18) on the application of tonnage measurement of ballast spaces in segregated ballast oil tankers.

E. There has been a growing trend amongst flag states to delegate their authority for the issuing of international certificates for safety and pollution provided for in conventions like SOLAS 74, Load Lines 1966 and MARPOL 73/78, to technical organisations: the classification societies. This practice resulted in a large increase in the number of classification societies, a lot of which fail to implement adequately the international standards. IMO attempted to tackle the problem in its Resolution A.739(18), which seeks to set out the minimum requirements for recognised organisations. The European Community issued, in 1994, a Directive which sets out the rules and standards that need to be achieved by such organisations in order for them to be recognised by the Community[23]. This Directive sets out in great detail the procedures for the recognition of classification societies already recognised by a member state, by another member state, and provides a detailed list of criteria which must be fulfilled by such classification societies in order to achieve the status of a "recognised organisation". It is worth noting that the provisions of this Directive extend also over areas which are not covered by the IMO conventions. Article 14 of the Directive provides as follows:

> *"1. Each member state shall ensure that ships flying its flag shall be constructed and maintained in accordance with the hull, machinery and electrical and control installation requirements of a recognised organisation."*

Furthermore, the Directive provides for the "no more favourable treatment" of vessels flying the flag of a non-member state. Indeed, from 1st January 1996, ships certified by organisations not recognised by the EU are being targeted for priority inspections by the authorities of the port[24]. Lastly, Article 12 of the

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[23]OJEC, L319 of 12.12.94, Council Directive 94/57/EC of 22nd November 1994 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations.

[24]See COM(96) 84, Final, Annex B, pp 3-4.

Directive establishes a system of reporting all the cases where, despite the fact that valid certificates issued by organisations acting on behalf of the flag state existed on board, the vessels were found to be substandard. The collected data must be communicated both to the Commission, which might make use of it in considering whether a certain organisation is to continue to be recognised by the Community, as well as to the Secretariat of the Paris MOU, which might decide to make use of it whilst carrying out its inspections.

F. In November 1994, the Council issued a Directive which sought to implement the standards contained in the 1978 STCW Convention of IMO, in the area of the European Union[25]. The provisions of this Directive constitute a strict interpretation of the 1978 STCW Convention and, in certain cases, go even further to enhance the provisions of this Convention by implementing through this Directive other policies of IMO, relevant to the standards of training of personnel serving on board vessels[26]. The issue of effective oral communication among the crew and between the crew and passengers on board passenger vessels is addressed in detail[27]. The Directive also contains a "no more favourable treatment" clause addressed to non-EU vessels. Indeed, Article 10 of the Directive places an obligation on port state authorities of the member states to carry out inspections on board vessels flying the flag of a state which is not a party to the STCW Convention, or a vessel whose officers and ratings are not recognised under the provisions of this Directive, as a matter of priority. The port state must *". . . check whether the level of vocational training and competence of their crews meet the standards laid down in the STCW Convention . . ."* as well as

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[25]OJEC, L319 of 12.12.94, Council Directive 94/58/EC of 22nd November 1994 on the minimum level of training of seafarers.

[26]In the preamble of the Directive, direct mention is made to IMO Resolution A770(18) concerning the minimum training requirements for personnel nominated to assist passengers in emergency situations on passenger ships. Furthermore, this obligation for a proper level of communication link amongst the crew is extended to cover tankers carrying noxious or polluting cargo. See Article 8(3).

[27]See Article 8(1) and (2).

in the Directive itself. That is to say, the port state authorities of the EU states are given a free hand to carry out inspections on board foreign vessels in order to verify not just compliance in form, but also compliance in essence, with the provisions of the 1978 STCW Convention. All this was taking place a few of months prior to the 1995 conference for the revision of the STCW Convention, exhibiting the eagerness of the Union to demonstrate its determination to carry out its strict policy for the enforcement of the international standards contained in the IMO Conventions.

G. One of the most important steps taken by the European Union in its attempt for the enforcement of international standards is the so-called Port State Control Directive of 1995[28]. This, in effect, is a scheme very similar to the one introduced with the Paris MOU, which aims at enforcing the major international conventions which set out the international standards[29]. The scope of application of this Directive extends to cover all the vessels calling at an EU port (or off-shore installation), irrespective of their flag and irrespective of whether the flag states are contracting parties to the convention that is being applied. Furthermore, port state authorities are authorised to take necessary action in order to ensure that vessels below 500gt are, to the extent that a convention does not apply, safe[30]. The Directive sets a minimum target for inspections at 25% of the total ships calling at ports of each state. The inspection procedure is quite similar to the one adopted by the Paris MOU inspectors. As a minimum, the inspector must check

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[28]OJEC, L157 of 7.7.95, Council Directive 95/21/EC of 19th June 1995 concerning the enforcement in respect of shipping using community ports and sailing in the waters under the jurisdiction of the member states, of international standards for ship safety, pollution prevention and ship board living and working conditions (Port State Control). See, Appendix 2.

[29]Article 2(1) of this Directive sets out the conventions which are to be enforced for the purposes of this instrument: the 1996 Load Lines Convention, SOLAS 74/78, MARPOL 73/78, the 1978 STCW, COLREG 72, the TONNAGE 1969 and ILO No. 147. These Conventions are the same as those enforced by the Paris MOU with the addition of the TONNAGE 1969 which constitutes an innovation of this Directive.

[30]See Article 3 of the Directive.

the certificates and documents of the vessel and satisfy himself of the overall condition of it. If there are "clear grounds" for believing that the conditions of a particular ship are below the standards set by the conventions, the inspector may proceed to check on-board operational requirements. "Clear grounds", according to Article 6(3), *". . . exist when the inspector finds evidence which in his professional judgement warrants a more detailed inspection of the ship, its equipment and its crew."* A non-exhaustive list of examples of clear grounds is set out in Annex III of the Directive, and Annex V identifies certain categories of vessels which are to be subject to an expanded inspection if, the first stage of inspection, provides the authority with clear grounds for a more detailed inspection[31]. The Directive goes on to provide for the right of the owner or operator to compensation for any loss or damage suffered by an unjust detention or delay and to institute a right of appeal against a detention decision, which, however, will not cause the suspension of the detention. Article 12 of the Directive describes what the professional profile of the inspector should be and is anxious to clarify to all interested parties that classification societies are to be excluded from the process of port state control or even from giving assistance to port state authorities[32]. All the information concerning vessels which have been detained more than once in a period of 24 months is to be published every three months. This information will include, apart from the particulars of the vessel, a specific reference to the classification society or other organisation which has issued statutory certificates to the detained vessel on behalf of the flag state. Moreover, the shipowner or operator will be obliged to cover the costs of the inspections if the inspections result in a detention of the ship[33]. It is very interesting to note that Article 19 of the Directive provides for an amendment procedure which is clearly influenced by the tacit amendment procedure contained in the IMO Conventions. This Article provides that certain technical aspects of

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[31]Ibid. Article 7.

[32]See para. 3 of Article 12.

[33]See Article, 16(1) of the directive.

the Directive (like the figure of 25% which constitutes the minimum target for inspections) may be amended by the Regulatory Committee, whenever this is deemed necessary.

Prima facie, this Directive might appear unnecessary since it merely repeats the tasks that the Paris MOU inspectors are asked to carry out. Nevertheless, the Directive is of great significance since it constitutes a legal instrument with full mandatory force, which means that the involved authorities will now be burdened with a legal obligation to carry out these inspections and, if they fail to do so, will be in violation of European law and, therefore, subject to legal action. Furthermore, it will achieve a harmonised *modus operandi* which will be closely monitored by the relevant authorities of the European Commission, thus avoiding the problems which the Paris MOU faces or might face in the future because of the growing number of its participating members and the administrative and other differences in the way that port state authorities in such states operate. Nevertheless, the European Union reiterates its determination to continue to co-operate with the Paris MOU. However, it could be suggested that the Paris MOU, insofar as its operation amongst EU member states is concerned, has ceased to exist since now there is a much stronger legal bond between the EU member states for the application of international safety standards.

H. At the end of 1995, the European Union proceeded to issue a Council Regulation which managed to draw the attention of the shipping industry around the globe (see Appendix 3). This Regulation sought to implement the provisions of the International Safety Management Code (ISM Code) which had already been adopted as Chapter IX of SOLAS by the International Maritime Organisation (see Appendix 6). According to the adopted provisions at IMO, the Code will apply after 1st July 1998 for passenger ships, tankers and dry bunkers, and on later dates for other categories of vessels[34]. IMO, with Resolution A741(18) - see Appendix 4-, adopted on 4th November 1993 (six months prior to the conference which

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[34] See infra under 6.2. See also Chapter IX of SOLAS in Appendix 6.

made the Code mandatory as Chapter IX of SOLAS), urged its member states ". . . *to implement the ISM Code on a national basis, giving priority to passenger ships, tankers, gas carriers, bulk carriers and mobile off-shore units which are flying their flags, as soon as possible but not later than 1st June 1998, pending development of the mandatory applications of the Code*". The European Union, based on this recommendation of IMO, proceeded to introduce Council Regulation (EC) No. 3051/95 of 8th December 1995 on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries)[35]. This Regulation implements the provisions of the ISM Code on all companies operating a regular service with a ro-ro ferry to and from any European port, irrespective of the flag they fly, from 1st July 1996. In other words, any ro-ro passenger ferry operating or wishing to operate on a route which includes any port of the European Union must fully comply with the ISM Code two years earlier than the date set by IMO. The Union, for the first time, takes a unilateral action to implement a measure which will be deemed to reflect the international standards only after 1st July 1998. Despite the fact that the recommendation of Resolution A741(18) of November 1993 calls upon its member states to act in their capacity as flag states in order to implement the ISM Code on an earlier date, this Council Regulation seeks to enforce the provisions of the Code on all ro-ro passenger ferries calling at any European port, irrespective of the flag they fly. Of course, the international law of the sea allows the port states to exercise their legislative and enforcement jurisdiction regarding issues of marine pollution as well as safety over foreign vessels whilst these are in their ports. Nevertheless, strictly speaking, the provisions of the ISM Code do not in any way reflect any international standard for the protection of the marine environment and the promotion of safety at sea until 1st July 1998, and any attempt for the enforcement of these provisions by a port state against foreign vessels visiting its ports, even though it may not be characterised as illegal, it definitely constitutes a unilateral act which lies entirely beyond the spirit of co-operation and understanding of IMO.

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[35]See OJ EC, L 320 of 30.12.95, see Appendix 3.

I. EU has issued a Council Directive which adopts the testing standards for marine equipment that were developed by IMO. From 1st January 1999, all equipment listed in the Directive have to comply with these uniform standards and will bear the EU mark.

The action programme of the European Union is now well under way and four proposals of the Commission have already achieved political agreement and are very close to coming into force. This includes a directive which will introduce harmonised safety rules for all passenger ships flying the flag of a member state, which, in effect, will extend the SOLAS regime over ships operating in domestic trade[36], thus extending the EU rules for classification societies and marine equipment over these ships too. Furthermore, the provisions of SOLAS regarding the registration of passengers sailing on board passenger vessels will soon be implemented in Europe through a directive which is expected before the end of 1997. At the same time, another directive which will be giving effect to the new STCW 1995 Convention is expected. Lastly, in an effort of the European Union to give effect to the Torremolinos Protocol, another directive is under way which will apply a set of harmonised safety rules for fishing vessels in Community waters.

The area covered by the European Union includes some of the most popular port destinations in the world. This fact, in conjunction with the jurisdiction recognised nowadays to port states, renders Europe one of the most significant (if not the most significant) factors in the formulation and enforcement of international shipping standards. After the Maastricht Treaty, the EU demonstrated its determination to follow a more aggressive safety policy. The result of this policy is two-folded: It is pre-emptive in the sense that it leads the way to stricter and more effective regulations within the framework of IMO, exercising pressure on the organisation as well as on other member states who know that, unless they co-operate and negotiate ways for the implementation of

[36]The SOLAS Convention applies to ships involved in international journeys only.

this policy, they will have no opportunity to influence its final form, thus abandoning their fleets to the mercy of the port state inspectors of the EU if the latter decides to proceed unilaterally to adopt the relevant legislation. Secondly, the very structure of the European Union allows its member states to operate in a uniform mode with common practices in enforcing these international standards. It is becoming increasingly difficult for substandard vessels to continue operating within European waters. The comprehensive port state control system, which is already in place, backed with a mentality which prevails in all member state authorities for a high level of safety, environmental protection and social conditions issues -which nevertheless fully comply and respect the international standards set under the auspices of the IMO- render Europe one of the most important factors in the struggle for safer seas and cleaner oceans. The area covered by the European Union constitutes a "high risk" area for the owners of substandard vessels of the whole world.

5.2.2 "Unilateralism" As Expressed By The Policy Of The USA:

In all the years that the IMO has been in existence, the USA being a super power, dominated the scene of international affairs, be they political, economic or social. The USA has strong economic interests in international trade and, therefore, in shipping as well. At the same time, the USA demonstrated an increasing concern over environmental issues, and this is, to a large degree, due to the pressures exercised by the press on the government following a number of high profile maritime disasters. The climax of this pressure was reached during *The "Exxon Valdez"* disaster which resulted in the pollution of an environmentally sensitive area on Prince William Sound in Alaska. In the aftermath of this disaster, the USA proceeded to the introduction of the Oil Pollution Act 1990, which constitutes the beginning of a new policy of this country towards vessels calling at US ports the condition of which is found to be below the international standards that are accepted by this country.

The United States' position in international politics allows this country to have a very vivid presence at the International Maritime Organisation, where it maintains a large delegation enlarged even further from time to time with legal and technical experts. This delegation plays a very important role during the discussions of any issue which lies before IMO and flexes its muscles both on and behind the scenes in order to achieve standards which ensure a high level of safety and environmental protection according of course to the interests of the US. However, this eagerness exhibited by the US during the preparatory stages of any IMO developments is not backed by the same eagerness for the implementation of these standards within the US waters and ports. The US generally applies stricter standards than those achieved through IMO. The US makes full use of the prerogative recognised for every state by the international law of the sea and fully exercises its powers in its capacity as a port state and as a coastal state. This practice of the US, even though, *stricto sensu*, lies in conformity with international law and UNCLOS 1982, undermines the work of IMO by exhibiting disregard for what is considered acceptable by the rest of the world. The very purpose of the existence of IMO is to provide this forum for discussions amongst the member states in order to achieve, through understanding and mutual consent, a commonly agreed standard of safety and pollution prevention. The United States, based on the fact that it has all the power it needs to enforce its own standards, proceeded on the road of unilateral action, feeling that this was the best way to protect its interests.

Enforcement jurisdiction is exercised in the US by the Coastguard. The Coastguard had authority to enforce a rigorous port state control system long before the introduction of OPA 90 but had chosen to play a moderate role in the enforcement of international standards on foreign vessels calling at US ports. The then Coastguard Commandant, Admiral Kime, was of the view that it was the responsibility of the owners, flag states and classification societies to ensure compliance with these standards and that port states should only intervene when

these responsibilities were abrogated[37]. Not even the introduction of OPA 90 managed to change this attitude of the Coastguard towards the port state enforcement of international standards. However, the events that followed *The "Exxon Valdez"* incident, including the introduction of OPA 90, formed an atmosphere of pressure towards the Coastguard for a more decisive port state policy. On 27th September 1993, the US Senate, replying to this pressure, directed the Coastguard to develop and initiate stricter port state control. This resulted in the introduction of the new Coastguard strategy to identify "substandard ships", which came into effect on 1st May 1994, and constitutes a complete change in the spirit of implementation of a port state regime. The Coastguard would now identify and eliminate substandard foreign vessels from foreign waters.

5.2.2.1 The New US Coastguard Programme On Port State Control:

According to the new system, every vessel, before entering the US jurisdiction, must submit to the Coastguard an "advance notice of arrival", containing all the information necessary for the assessment of each particular vessel. This information concerns five major categories:

1. The owner of the vessel;
2. The flag state of the vessel;
3. The classification society;
4. The type of vessel; and
5. Its history of previous USCG violations.

Points are allotted depending on the information contained under each of these categories and the total points allotted to each vessel determines this vessel's boarding priorities. In other words, the more points a vessel "scores", the higher priority it will constitute for inspection.

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[37]FAIRPLAY, 26 May 1994, page 21.

The targeted "owner" is defined as the owner, operator or managing operator of any vessel that has been the subject of port state intervention by the Coastguard during the last 12 months. All vessels associated in any way with the targeted owner will be "awarded" five points. Furthermore, the owner's name will remain on the list of targeted owners until none of his vessels is intervened within a period of 12 months.

Vessels belonging to a flag state whose intervention ratio exceeds the average intervention ratio of all flag states calling on US ports will also be targeted. A vessel from a targeted flag state will receive seven points, and if the flag state does not possess a performance record, then these seven points will automatically be given to the vessel. A similar system will be applied for those classification societies which are not recognised by the US Coastguard. For the assessment of the classification societies, the Coastguard adopts the *'Guidelines for the Authorisation of Organisations acting on behalf of the Administration'* of the International Maritime Organisation[38].

The vessel's type will also be a factor in determining priorities for examination or inspection. High risk vessels, such as tankers and passenger vessels as well as all vessels of 10 years of age and over, will cost them at least one point. Lastly, the "history" record of that particular vessel for the last 12 months, held by the US Coastguard, will affect the number of points allotted to that vessel. The total points "scored" by each vessel will determine the level of priority for boarding by the US Coastguard.

Vessels that have received a total score of at least 17 points will be classified as "Priority I" vessels, which means that they will be targeted for inspection prior to

[38]See IMO's Assembly Resolution, 739(18).

their entry into a US port, since such vessels may pose an imminent threat to life, the environment or the port itself[39].

With a similar system, "Priority II" will be given to vessels targeted for examination after they have entered a US port but prior to any cargo operations or passenger embarkation. If the vessel receives a total of 4 - 6 points, then it will be given a "Priority III", which means that it will be targeted for examination after it has entered a US port with no restriction whatsoever of cargo or passenger operations. Lastly, "Priority IV" means that the vessel is not targeted at all.

This system might appear complex, but is actually a very comprehensive one which proved to be very effective: in the first six months of its first year of application (1994), the US Coastguard managed to exceed the number of interventions carried out in the whole of the previous year (1993)[40].

In practice, a typical US Coastguard inspection primarily involves a thorough check of the vessel's statutory certificates provided for under SOLAS 74/78, MARPOL 73/78, Load Lines 66 and the STCW. Furthermore, it includes a general examination of the vessel's structure and equipment, including the on-board safety systems as well as the accommodation and sanitary conditions prescribed by ILO No. 147. If, during the process of the above inspection, the inspector forms the view that the ship's condition differs substantially from the one described on the relevant certificates, then "clear grounds" are present to justify an expanded inspection, which may include issues of operational control. If the inspection notes a number of deficiencies, the vessel is subject to detention.

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[39]"Priority I" is also given to stateless vessels, vessels suspected of involvement in a marine casualty affecting the vessel's seaworthiness, or suspected of posing a hazard to the port or the environment due to the release of hazardous materials or an on-going discharge of oil.

[40]See James Croall, *'US Coastguard Programme - Port State Control'*, P&I International, January 1995, page 10 - 12, at page 12.

The data collected by the Coastguard during the course of its port state operations is automatically made public and is fully accessible by any interested party[41]. Furthermore, the list of the substandard flag states as well as that of the classification societies are made available to the public. Originally, lists of substandard owners were available as well, but this caused an outcry from the shipowners, and this information is now available only after an official request has been filed under the provisions of the US Freedom of Information Act.

This new strategy of the US Coastguard renders this agency the most aggressive port state control authority in the world, since, in effect, it expands the well-established and well-accepted international system of port state inspections over the territorial waters of this state. The obligation imposed on every vessel wishing to enter the United States waters to notify the Coastguard of its intention, has certainly changed the face of the exercise of the right of innocent passage, as this was known until then. OPA '90 requires any vessel calling at a port in the United States, which carries oil in bulk, to be equipped with a double hull[42]. Furthermore, Section 4114(b) of OPA '90 produces maximum working hours for crew members of a tanker[43]. Section 4106 of OPA '90 provides that the secretary in charge of the Coastguard will evaluate the manning, training, qualification and watch-keeping standards of any foreign country that issues relevant documentation and will determine whether this country has standards for licensing and certification of seamen at least equivalent to those stipulated by US law or international standards accepted by the US, as well as whether these standards are being enforced. If the answer to any of these two questions is negative, the secretary will prohibit vessels issued with documentation by that country, from

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[41]This database of information on all vessels calling at US ports trades under the name "Port State Information Exchange" and is provided free by the Coastguard.

[42]See also Section 4115 of Public Law 101-380-August 18, 1990 (OPA 90) and Chapter 37 of Title 46, United States Code, Section 3703a.

[43]See Section 8104 of Title 46, United States Code.

entering the US until he has been satisfied that the proper standards have been established and are being enforced[44].

This action adopted by the US, as well as the aggressive enforcement of the port state regime by the Coastguard lies entirely within the limits of international law. However, it constitutes a unilateral initiative which, at the time of its introduction, was alien to the developments that were taking place under the International Maritime Organisation. Nevertheless, it must be stressed that most of the innovations introduced by the US on a national law level "somehow" find their way to international conventions. For example, the issue of maximum working hours for crew members on tankers, which was introduced by OPA 90, was fully endorsed by the 1995 STCW Convention[45]. Furthermore, the tough stand taken by the Americans on the issue of the recognition of the certificates issued by a country which applies standards lower than those of the US, or does not properly enforce the international standards when issuing certificates for issues of manning, training and watch-keeping, influenced IMO, ILO as well as the European Union, where the matter is currently under consideration and results are imminent[46]. Undoubtedly, the US prefers the role of leading the international community and IMO by its unilateral shipping policy instead of pushing IMO forward from within, even though it demonstrates that it considers the work achieved under IMO of some importance by maintaining an active role within IMO.

5.2.3 The Struggle Of The Smaller Countries For Compliance:

Apart from the US, the EU and the other powerful maritime nations like Norway and Japan, there is a large number of relatively small states at IMO which nevertheless represents a big percentage of the world's tonnage. Countries like

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[44]See Section 9101(a) of Title 46, United States Code.

[45]See Section B-VIII/1 of this Convention.

[46]See Com (96) 84 Final *'Towards a New Maritime Strategy'* at page 14 under a.

Panama, Liberia, Cyprus, the Bahamas, Malta, and even St Vincent and the Grenadines, and Vanuatu constitute some of the most powerful flags in the world so far as shipping is concerned. These countries stood accused in the past (and stand accused in the present) of being responsible for the deterioration of the standards in the shipping industry in that they fail to enforce the international standards either because they lack the necessary mechanisms which would allow them to carry out their international obligations or because they compete with each other in attracting more tonnage, since all of these countries maintain "open registries"[47].

All of the above states have ratified SOLAS 74/78, MARPOL 73/78, the 66 Load Lines Convention and the STCW and are, therefore, parties to all the major IMO conventions which set the minimum acceptable international standards for safety and pollution prevention. However, vessels belonging to many of these states are frequently found to be substandard and, as a result of this, are detained by port state control authorities around the world. The problem, therefore, clearly derives from the inadequacy or the lack of an effective enforcement system on behalf of the flag states. What needs to be investigated, therefore, is how such countries go about fulfilling their international obligations, deriving from the conventions to which they participate.

5.2.3.1 The Enforcement Policy Of The Republic Of Cyprus:

The national law of the Republic allows the registration of a vessel under the Cyprus flag, if more than 50% of the shares of that vessel are owned by either a Cypriot or a a corporation established in Cyprus and having its registered office there[48]. In practice, this means that any non-national may establish a company in Cyprus and declare the office of their lawyer or their accountant to be their

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[47]On the issue of open registries, see supra under chapter 1.

[48]Section 5(1) of the Merchant Shipping (Registration of Ships, Sales and Mortgages) Law, consolidated, 1996.

registered office. This would allow this company to register under the Cyprus flag any vessel of any type and tonnage before this vessel reaches the age of 17 years. Nevertheless, vessels over this age may be allowed to register, subject to certain conditions[49]. The laws of the Republic exempt every Cypriot shipping company from any kind of tax. Consequently, a large number of foreign-owned vessels have been (and are still being) attracted to the Cyprus flag[50].

The authority in charge of shipping in Cyprus is the Department of Merchant Shipping, which constitutes a section of the Ministry of Communications and Works. This Department is in charge of implementing the policy of the Government in the area of shipping, a task which involves the exercise of flag state control over the Cyprus fleet and, of course, the enforcement of the provisions of the international conventions to which Cyprus is a party[51]. The Department of Merchant Shipping of Cyprus employs 30 civil servants of whom 25 are technical personnel able to carry out surveys and inspections of ships[52]. It is, therefore, clear that it is practically impossible for the existing personnel of the Department of Merchant Shipping to carry out the obligations levied on it by the IMO conventions. The only alternative left to countries whose administrative infrastructure is disproportionately smaller towards the number of vessels under their flag is to delegate their authority to carry out the necessary surveys and

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[49]For example, if the vessel is between 17 and 20 years' old, it may register after the shipowner has signed the Cyprus Collective Agreement for Seamen, and the vessel either undergoes a special inspection or is managed from the island.

[50]There are 1652vessels under the Cyprus flag, the combined gross tonnage of which totals 23,479,431.

[51]Cyprus has ratified SOLAS 74/78, COLREG 72, MARPOL 73/78, Load Lines 1966, Tonnage 1969, the 1978 STCW and the 1976 ILO No. 147, as well as a number of other conventions of IMO and ILO.

[52]The Government of Cyprus announced two years ago that it will work for the establishment of a network of independent surveyors who will operate in all major ports in the world, but no significant steps have been taken for the realisation of this policy to date.

inspections as well as to issue the relevant certificates and documents, to private organisations which possess both the expertise and the necessary infrastructure to carry out this task. Cyprus has authorised a number of classification societies for this purpose[53].

When a Cyprus-registered company wishes to register a vessel under the Cyprus flag, upon filing this application which would be accompanied by the necessary corporate documents, it must also submit to the registrar a confirmation of the classification society that this society is ready to proceed with the survey and certification of the vessel in question on behalf of the Government of the Republic of Cyprus, in accordance with the applicable requirements of SOLAS 74/78, the 1966 Load Lines Convention, MARPOL 73/78, as well as with any other IMO codes and resolutions on safety or marine pollution prevention which may be applicable to the specific vessel. Furthermore, prior to the permanent registration of this vessel, the applicant must submit to the registrar copies of the ship's statutory certificates[54], as well as a Certificate of Survey, a Cyprus Tonnage Certificate, the International Tonnage Certificate (1969) and a duly verified Ship's Carving and Marking Note. The completion of this process will allow the permanent registration of the vessel under the Cyprus flag. It is, therefore, possible that a vessel flying the Cyprus flag may never be boarded by one of the surveyors of the Department of Merchant Shipping of Cyprus, thus leaving the responsibilities undertaken by this Government, through its signing of the IMO conventions, entirely in the hands of private organisations over which Cyprus does not maintain any kind of auditing procedure. The administration of Cyprus has limited means not only of enforcing international standards, but also of ensuring that its agents (i.e. the classification societies) are carrying out their

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[53]The list includes most of the major classification societies of the globe, like ABS, Lloyd's Register, NKK, Bureau Veritas, as well as a number of other classification societies like the Hellenic Register of Shipping, and the Cyprus Bureau of Shipping.

[54]These include the following Certificates, according to the ship's size and type: Cargo Ship Safety Construction, Cargo Ship Safety Equipment, Cargo Ship Safety Radio, International Load Line Certificate (1966), International Oil Pollution Prevention, International Noxious Substances Pollution Prevention, Passenger Ship Safety and Certificate of Fitness.

business in an appropriate manner. Despite of how reputable they are, classification societies are commercial organisations with financial interests in many cases conflicting with their role as the custodians of international standards.

5.2.3.2 The Enforcement System Of The Commonwealth Of The Bahamas:

The Bahamas maintains a system according to which a vessel may be registered under the Bahamian flag irrespective of the nationality or place of incorporation of the owning entity. Any ocean-going vessel of at least 1,600 net registered tons, engaged in a "foreign going trade", and of an age less than 12 years, may be registered under the Bahamian flag. These restrictions regarding the tonnage and age of the vessel may be waived with the permission of the minister in charge, if certain criteria are met. Like in the case of Cyprus, the tax regime concerning activities in the area of shipping is a most favourable one and there are no restrictions whatsoever concerning the nationality of the crews serving on board Bahamian vessels. The Bahamas constitutes today the fourth biggest registry in the world and has under its flag 1163 vessels, the gross tonnage of which totals23,798,904[55].

The authority in charge of shipping in the Bahamas is the Bahamas Maritime Authority. This was created in 1995 to cope with the growing number of tonnage under the Bahamian flag and its headquarters are based in London. This Authority is responsible to carry out the shipping policy of the government and perform the obligations of the state under the IMO conventions[56]. It employs a staff of 25 people of whom only 9 are of a technical background.

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[55] See Lloyd,s Register of Shipping, Statistical Tables, 1996.

[56] The Commonwealth of the Bahamas is party to the 1966 Load Lines Convention, SOLAS '74/'78, MARPOL '73/'78 and the STCW as well as to a number of other IMO conventions.

According to the Bahamian legislation, all ships under the flag of this country must undergo, apart from the initial inspection -which takes place prior to registration or before the ship is put into service- an annual inspection. Surveys however, may be carried out by the Classification Societies recognised by the government of the Bahamas to carry out this task and issue the relevant certificates for and on behalf of the State[57]. In practice, these classification societies carry out the surveys and issue these certificates. All the inspections (initial, annual and inspections after accidents or extensive renewals or repairs) should be carried out by the officers of the authority in London. Of these, annual inspections may be carried out by any of the Nautical Inspectors appointed by the government. This network of 350 independent inspectors helps to relieve the officers of the authority from their task to inspect every ship under the Bahamian flag annually and provides the shipowners with an effective alternative system, since these inspections may be carried out at any of the 200 ports around the world where these inspectors are based.
In the case of the Bahamas (as in the case of Cyprus) the government mechanism is unable to carry out its international obligations, relying solely on its own resources. Therefore, the expertise and infrastructure of the classification societies (and the independent nautical inspectors) is absolutely essential. This practice by itself is not necessarily to be criticised; what is to be criticised is the fact that the government of states like the Bahamas do not provide for a comprehensive auditing system to ensure that their delegates are carrying out their responsibilities properly and in a manner that the State itself would employ.

Of course, not all states belonging to this group are performing their obligations with the same results. Liberia, for example, despite being the second largest registry in the world, has always been performing better than the other states, according to the statistics of the Paris MOU[58]. Indeed, most of the countries

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57 The government of the Bahamas recognises 7 societies, all members of IACS: ABS, Bureau Veritas, Det Norske Veritas, Germanischer Lloyd, Lloyd's Register of Shipping, NKK and Registro Italiano Navale.

mentioned in this category, have the will to promote safety and marine protection standards on vessels under their flag. Such an improvement would only benefit these countries and justify their efforts to prove to the world that the phrase "open registry" is not tantamount to substandard vessels. During all those years that the ITF tried to prove that the abolition of the open registry concept around the world would constitute a panacea for international shipping, traditional open registries like Liberia and Cyprus have been arguing that fiscal and registration policies have nothing to do with the rules of safety, pollution prevention and the protection of social conditions of seamen. It appears that now that they have managed to convince the world to give them a chance to prove their case, they must demonstrate their capability of exercising effective control over their vessels, thus separating themselves from countries like the Honduras, Romania and Nigeria, which have demonstrated a complete disregard for international standards[59]. Nevertheless, it seems that strong port states around the world are ready to put these declarations to the test and the next decade will probably see a system of evaluation of flag states, which may result to the non-recognition of certain flags or even the prohibition of entry to the ports of a State, of vessels flying under the flag of a "non-qualified" state.

5.3 THE ATTITUDE OF THE SHIPPING INDUSTRY:

The developments taking place at IMO would only occasionally have some impact on commercial aspects of shipping, and even in those cases, the impact would be indirect and would reach the industry after it would complete the ratification process, giving the affected parties ample time to adjust their practices to change or even lobby their governments against any ratification. IMO had always been, in the eyes of shipowners, ship managers, insurers and cargo owners,

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[58]See Annex 2 of the Paris MOU, Annual Report, 1995. In that table, Malta has a three-year rolling average detention of 24.07%, whereas Liberia has only 5.59%.

[59]See ibid. Paris MOU, Annual Report, 1995, pages 47 - 50, and Annual Report, 1994, pages 66 - 68.

an organisation which dealt solely with matters of public policy and law concerning non-commercial matters of shipping and, therefore, its actions were considered to be commercially insignificant. However, the new tactics of IMO, explained in the previous chapter, took the industry by surprise and forced it to realise that the decision-making centres were no longer located at the flag state administrations; IMO had both the power and the means to initiate processes which could result in the introduction of binding legislation almost immediately after its adoption. By the beginning of the 90's, the different sides of the shipping world were beginning to realise that a new international system for the regulation of issues of safety, pollution prevention, and social and working conditions on board vessels, was in place, and started investigating the ways that each of them could influence this process, either by encouraging it or by delaying it.

5.3.1 Shipowners and Shipmanagers:

Traditionally, shipowners were cautious towards any attempts by the public sector, be it national or international, to regulate shipping. Consequently, they were not too keen to accept the efforts of this new regulating mechanism that was emerging out of IMO. Nevertheless, it soon became apparent that "good" shipowners, who were long-term players of the "game", wishing to establish a good and reputable name, had nothing to fear from this new mechanism, so long as its powers were used prudently and after due consideration. Indeed, this effort for the rigorous enforcement of high standards for safety would have economic benefits for such shipowners, since it would force "bad" shipowners, who had the competitive advantage of operating substandard vessels, at a much lower cost than prudent shipowners, out of the game.

The direct link between the level of the standards of safety, pollution prevention and social and working conditions on board a vessel and the operational cost of this vessel was clearly established by a study carried out by OECD[60] regarding

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[60]Organisation for Economic Co-operation and Development.

this issue, the findings of which were published in 1996[61]. This paper clearly demonstrates, with references to specific figures, the breadth of the competitive advantage that a "bad" shipowner may enjoy against a "good" shipowner. The following diagram (see Table 1) illustrates this advantage, based on a theoretical example giving out the range of expenditure starting with the maximum, which corresponds to the highest level of commitment in the observance of safety standards, going on to a second category which represents the "good practice" in the industry, going on to the third category which represents the "common practice" and the fourth category which represents the "standard" practice. The fifth category represents the "floor", which stands for the minimum level of expenditure after which the ship would cease to be operational.

As it can be seen from this table, in the case of the 20-year-old bulk carrier, it costs US$3,250 per day to run in order for it to be in compliance with the basic standards of safety prescribed by IMO. However, the operational cost of this vessel could be as high as US$7,500 per day if the shipowner is committed to the maximum possible standards of safety and pollution prevention. What is of great importance is that the same vessel may continue to be operational, but at the same time below the standards prescribed by the international community, on a cost of US$2,750 per day, saving the shipowner US$500 per day, which is the equivalent of US$182,500 per year. In the case of the product tanker, the differences are even bigger. To operate such a vessel, observing the international standards would cost US$3,750 per day, whereas to operate the same vessel to the maximum possible standard of safety would cost US$9,500 per day. Yet this type of vessel could still be operational, but not in compliance with the international standards, with a cost of US$3,100 per day. The shipowner of the substandard

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[61] OECD Working Papers, *'Competitive advantages obtained by some shipowners as a result of non-observance of applicable international rules and standards'*, Volume IV, No. 2, Paris 1996.

VESSEL OPERATING COST "LEVELS" AND FINANCIAL ADVANTAGES

(period of reference : end 1994)

(20 year old bulk carrier; 30 000 dwt) US$/Day		(1990 built product tanker; 40 000 dwt) US$/Day
	Ceiling (1)	
7 500		9 500
	Good Practice (2)	
4 500		4 850
	Common Practice (3)	
3 750		4 250
	Standard (4)	
3 250		3 750
	(6) Floor (5)	
2 750		3 100

Table 1

vessel is saving himself US$650 per day, which is the equivalent of US$237,250 per year[62].

The shipping industry is highly competitive, and the art of minimising the operational cost of a vessel can determine the success or failure of a shipowner. The cutting of costs through a decrease in the expenditure regarding the safety standards of the vessel is being systematically applied by shipowners who pursue a profit on a short-term basis, demonstrating an opportunistic *modus operandi*. Unfortunately, this category of shipowners, even though considerably small, is still big enough to strike a blow to the image of the industry in general. These shipowners can afford to continue their practices in the degree that they can continue to avoid the claws of the international enforcement system, may that be the flag states (or classification societies acting on their behalf) or the port states. Therefore, the introduction of more stringent enforcement regulations results in a continuous narrowing of the margin within which such substandard vessels may operate. Nevertheless, this margin is still big enough to constitute a threat to the marine environment, ship safety, social and working conditions on board vessels, as well as to the healthy and stable climate that is necessary for the commercial activities of the shipping industry. What is clear, however, is that the complete elimination of substandard vessels will be to the benefit of the shipping industry in general, since it will provide a common basis for fair competition in a free market.

5.3.2 The Insurers:

One side of the industry which welcomed the introduction of this new *status quo* is that of the insurers. The enforcement of higher standards of safety could only benefit the interests of this sector, since logically, it would decrease the number of claims. The new "Institute Time Clauses" (Hulls) indicate the determination of

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[62]For a more detailed analysis of the findings of this study with specific examples demonstrating the advantages obtained by a shipowner by operating his vessel at a substandard level, see the OECD Working Paper, ibid. at pages 11 - 15.

the insurance sector to take advantage of the developments at IMO. The Inchmaree clause[63] is now subject to the exercise of due diligence not only by the assured, owners and managers, but also by the *". . . superintendents or any of their on-shore management"*. This constitutes an attempt of the insurance industry to endorse the provisions of the ISM Code, which, even though it will come into force in July 1998, has apparently already achieved the approval of the industry. Furthermore, the new ITC (Hulls), recognising the ever-growing importance in the role that is played by classification societies under this new *status quo*, contains a so-called "classification" clause[64]. Clause 4.1.2 stipulates that:

> *"Any recommendations, requirements or restrictions imposed by the vessel's classification society which relate to the vessel's seaworthiness or to her maintenance in a seaworthy condition are complied with by the dates required by that society".*

Clause 4.3 places an obligation on the assured to report to the classification society any incident, condition or damage for which the society might make recommendations as to repairs or other action to be taken. Lastly, Clause 4.4 reserves to the underwriters the right to approach directly the classification society for any information or documents concerning the subject of the insurance. Moreover, in the area of mutual insurance, the leading P&I clubs instruct their inspectors visiting member vessels to notify the club directors of any serious deficiencies witnessed during that visit which could place their membership status into question[65].

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[63]See ITC (Hulls) 1995, Section 6.2.

[64]See ITC (Hulls) 1995, Clause 4.

[65]It appears, however, that P&I clubs are not likely to take drastic measures in enforcing new developments at IMO. See *'Lloyd's List'*, Friday, 18th July 1997: "ISM Code will not be a UK club cover condition".

5.3.3 The Salvage Sector:

Another sector of the industry which appeared eager to take advantage of relevant developments at IMO was that of salvage. The law of salvage was based on the 1910 Brussels Convention on Salvage, which constituted a codification of the principles of salvage law as these were developed in the English courts. In the aftermath of *The "Amoco Cadiz"* disaster in March 1978 off the north-west coast of France, IMO decided to co-operate with the Comité Maritime International (CMI) in drafting a new convention which would cover the needs of modern times. This effort resulted in the London Salvage Convention of 1989, which came into force on 14th July 1996 after being ratified by 15 nations.

The Salvage Convention endorsed the innovation contained in Lloyd's Open Form '80 (LOF'80) which, for the first time, sought to avoid the application of the "no cure - no pay" principle. SALVAGE '89 extended this idea to apply not only to tankers (as LOF'80 had provided for), but also to any vessel or cargo which threatened damage to the environment. In other words, the long-standing principle of "no cure - no pay" was being put aside in order to safeguard the survival of the salvage industry and to encourage professional salvors to maintain their costly hardware to the benefit of the whole industry. Right after the signing of the 1989 Convention, the sectors of the industry involved in salvage operations demonstrated their absolute acceptance of the provisions of this Convention through the incorporation of the most crucial articles of this Convention in Lloyd's Open Form '90 (LOF'90)[66]. The Salvage Convention constitutes a typical example of the new role that IMO envisages for itself. This particular sector of the industry, even though it appeared determined to proceed with the introduction of an innovative element which would adapt this sector to modern realities, realised that it had to seek first the approval of the international community through the IMO process. After the international organisation adopts this innovative element, even though the instrument which adopts it is not yet in

[66]Articles 1, 8, 13 and 14 of the Convention constitute part of the Salvage Agreement between the involved parties.

force, the industry is justified (and encouraged) to proceed with the practical application of this new element. By merely going through the mechanism of IMO and gaining its approval, any proposal may proceed to become established in the everyday practices of the industry. It would be very difficult, if not impossible, for any sector of the industry to try to reform itself "unilaterally", outside this mechanism, away from the "umbrella" of the Organisation.

5.3.4 The Classification Societies:

The sector of the industry which was affected most by the introduction of this new order is that of the classification societies. Originally, classification societies were employed directly by underwriters before insuring ships. Today, however, class provides a series of services which covers almost every single technical aspect of shipping. Classification societies are nowadays huge technical organisations with vast expertise on a range of issues, including matters of construction of vessels, specification on strength requirements of materials used in this construction, and even quality control audits. Of course, they continue to play their traditional role in providing the insurance industry with the necessary technical data for each vessel seeking cover. Furthermore, it is by now common practice of flag states to authorise classification societies to issue on their behalf the necessary statutory certificates stipulated by the international conventions.

Indeed, the International Maritime Organisation recognised this unique character of classification societies and realised that they can play a unique role in the struggle for the implementation of the high level of safety standards. IMO has repeatedly demonstrated its will to promote this role of classification societies in endorsing its activities in a number of its instruments[67]. However, this increase

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[67]See, for example, Regulation 3-1 of Part A-1 of SOLAS, Chapter II-1, introduced by the May 1996 amendments, which provides that *"In addition to the requirements contained elsewhere in the [SOLAS] Regulations"* ships *"shall be designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a recognised classification society"*. See also Resolution A.789(19) of IMO regarding the "specifications on the survey and certification functions of

in the workload of the classification societies around the world resulted in an increase in the number of classification societies themselves as well, which unfortunately decreased the standard of services offered by these organisations. The International Association of Classification Societies (IACS), which has, as its members, the biggest and most reputable classification societies, imposes a self-regulatory scheme on its members. Furthermore, IMO, in co-operation with IACS, proceeded to set out guidelines for the recognition of classification societies[68].

It is, therefore, apparent that classification societies play not only a crucial role in the shipping industry, but also a multi-dimensional role in the sense that they carry out a number of different functions in a number of different capacities. Classification societies perform tasks delegated to them by flag states, but also offer a great service to marine underwriters as well as to the shipping industry. Above all, their sole customer who, at the end of the day, also pays their bills, is the shipowner. It is exactly this fact that led a number of critics to accuse the classification societies of having conflicting interests in performing their functions and ask for the exposure of these societies to claims deriving from losses resulting from the hesitation of classification societies to carry out their statutory duties according to a level so strict that it could "displease" their customer, i.e. the shipowner. Up to now, classification societies have been protected by courts, both in England as well as in America, from claims raised by cargo interests against them. The courts accepted the arguments of classification societies that, in general, they do not owe a duty of care to anybody else apart from their customer, i.e. the shipowner[69]. However, it appears that it is only a matter of time before

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recognised organisations acting on behalf of the Administration", which will enter into force on 1st July 1998 as part of SOLAS, Chapter XI.

[68]See Resolution A.739(18) of IMO entitled "Guidelines for the authorisation of organisations acting on behalf of the Administration".

[69]See, for example, *The "Nicholas H" [1995] 2 Lloyd's Rep. 299*. See also *The "Sun Dancer" [1994] 1 Lloyd's Rep. 183* (American case).

the courts will give in to the demands of other sectors of the industry, like the one of the cargo interests, and accept an increased liability for the classification societies[70].

5.3.5 Charterers and Cargo Interests:

This side of the industry has been traditionally kept out of matters of safety and pollution prevention. Their interests are adequately protected against the negligent shipowners even though that usually entails long and painful litigations. Nevertheless, this sector of the industry has now realised that the new system for the regulation of shipping safety could secure their interests even more and could assist their lawyers in their "battles" against the shipowners' side.
At the same time though, this increased regulation of the safety and pollution prevention matters, inevitably leads to a respectively increased exposure of the liable side; this overzealous search for scapegoats has given rise to an idea that charters should be held liable for their choice to employ the services of a substandard vessel. Even though this idea has not gained yet any legal foundation at an international level, it seems that it is only a matter of time before this happens.

5.4 CONCLUSIONS:

It appears that the critical developments accomplished by IMO on the legislative and enforcement fronts, as explained in the previous chapters, have created a new reality, a new mechanism, for the regulating of the industry and its practices insofar as matters of safety, pollution prevention, and social and working conditions on board vessels are concerned. Now that the focus of this new system is no longer the flag state, influential port states like the EU and the US are in a

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[70]For a comprehensive analysis of the stand adopted by the courts, both in England and in the US, see "Classification Societies: Their Liability - An American Lawyer's Point of View in Light of Recent Judgements" by William N France, *'Lloyd's International Journal of Shipping Law'*, Part II, March 1996.

position to dictate the levels of safety for ships wishing to visit ports under their control, and flag states have no defence against the policies of these port states. However, even these powerful port states would not be able to enforce their port state control schemes without the prior consent (or lack of disagreement) of the industry: shipping is too valuable to the world's economy to jeopardise. This is, therefore, a process which involves, on a first stage, the industry and the member states which put forward suggestions for the introduction of new legislation. It is then up to IMO to try and "sell" these new ideas to all member states, allowing powerful sides like the EU and the US to exercise their "influence" over weak sides like Panama, Cyprus and the Bahamas. Once this stage is completed and the new concept achieves the approval of the Organisation, the time is right for its practical implementation either through the initiative of the industry which recognises the advantages of such an implementation, or through the initiative of port states which no longer have an obligation to justify their actions to the flag states. The importance of the flag states is continuously diminished, since flag states may only influence affairs if they choose to exercise their rights to enforce these standards themselves: a costly and difficult task. It appears that most flag states prefer to stay aloof and leave all the initiatives to the "mercy" of port states.

CH. 6: IMPLICATIONS OF RECENT DEVELOPMENTS AT IMO ON ISSUES OF PRIVATE SHIPPING LAW

6.1 INTRODUCTION:

Despite the intense legislative program of IMO during the 70's and the implementation of this program at the beginning of the 80's, maritime casualties demonstrated no decline. On the contrary, the casualty record of the 80's suggested that the comprehensive system of the IMO conventions had little or no impact on safety or pollution prevention. Several marine tragedies in the 80's revealed that the most important element in shipping casualties is human error, which is often to blame for injuries and loss of life at sea as well as for environmental disasters and property damage. The report of Lord Donaldson's Inquiry into the "Prevention of Pollution for Merchant Shipping", which took place in the aftermath of *The "Braer"* disaster, concluded, *inter alia*, that *"It is generally accepted that human error is the cause of about four fifths of marine accidents"*[1].

This fact was becoming more and more evident, and IMO came to realise that its whole effort concerning the safety of life at sea and the prevention of marine pollution could bear no fruit unless drastic measures were taken which would allow the industry to address the problem of the "human element". IMO embarked on an effort to introduce legislation which would be capable of addressing this problem decisively. It was soon realised that this effort would entail an attempt to establish a new culture regarding safety and pollution prevention to all the sides of shipping operations which involved humans. In other words, every single person engaged one way or another with shipping had to adopt a completely fresh view towards safety. IMO looked again at the practices of the industry for the solution, and reached the conclusion that a quality assurance system, similar to that of ISO 9002[2], could contribute to the solution of the problem.

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[1]CM 2560 (May 1994) para. 2.1.

[2]This quality assurance system, developed by the International Organisation for Standardisation, was already in use by most "blue chip" shipping companies around the world.

Good management was to become the target of IMO, and the Maritime Safety Committee set out to find the best way to achieve this[3]. This effort was concluded in the first half of the 1990's, with the introduction of the International Management Code for the Safe Operation of Ships and for Pollution Prevention, better known as the International Safety Management (ISM) Code.

At the same time, a similar effort was under way for a comprehensive revision of the provisions of the 1978 STCW Convention, through a specially accelerated programme. This Convention, by definition, deals with matters which are directly linked with the "human factor" and, therefore, no real effort could be taken against this problem without the adaptation of this Convention to the new policies of IMO.

Both of these initiatives were undertaken by IMO as a top priority and the Organisation did not hesitate to make use of the tacit amendment procedure which would enable it to realise its targets in a considerably shorter time, thus taking advantage of the momentum that the struggle against the "human factor" was gaining. However, the structure and nature of IMO do not allow this Organisation to investigate parameters of its actions which are beyond matters of public policy. Indeed, commercial considerations of the industry may come up during discussions of certain issues at IMO meetings, through the delegations of non-governmental organisations representing the industry. Nevertheless, not even the industry itself is always in a position to assess the indirect impact of certain new proposals. The introduction of these two instruments constitutes a typical example of how certain developments at IMO which are introduced through speedy procedures, thus not allowing the industry to assess their impact, may influence (or even revolutionise) certain principles of private shipping law. This chapter will attempt to investigate the potential legal implications of the ISM Code and STCW 95, two of the most important IMO legislations against the "human factor" introduced through the tacit amendment procedure.

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[3]Discussions on this issue started from as early as April 1988, one year after *The "Herald of Free Enterprise"* disaster. The MSC, during its fifty-fifth session, called for the development of guidelines on safe ship management.

6.2 THE INTERNATIONAL SAFETY MANAGEMENT (ISM) CODE:

Based on the fact that most casualties in shipping and marine pollution incidents are the result of crew negligence, ineffective management and lack of communication between the vessel and the shore-based managers, the ISM Code sought to introduce a new culture to the management of shipping companies (commercial practices, of course, are excluded) and establish a universally mandatory code of practice to ensure that safety and pollution prevention issues are addressed along defined lines on board and ashore. The stated purpose of the Code is to establish an internationally recognised standard for the organisation of a shipping company in relation to the safe management and operation of ships and pollution prevention[4]. In effect, the Code aims to apply, in the area of shipping, a system of quality assurance and safety management in order to minimise the possibilities of human error both ashore and on board.

The ISM Code is primarily targeting the "company", which is defined as the owner of the ship, or any other entity, such as the manager or bareboat charterer *". . . who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the Code"*[5]. This company must develop, implement and maintain a safety management system (SMS) which must be in compliance with mandatory rules and regulations and must take into account any recommendations of IMO, the flag state administration as well as other organisations from the industry[6] based on its needs. The Code does not attempt to dictate to the companies how to run their operations; it is entirely up to the company to carry out this task, so long as the SMS will contain all the necessary information. The SMS must include the company's policies, instructions and procedures for the safe operation of the vessel, procedures for reporting accidents and non-conformities with the Code, procedures to prepare for emergency situations as well as for internal audits and management reviews. It must also clearly define levels of

[4]See para. 1 of the preamble of the ISM Code.

[5]Ibid Article 1.1.2.

[6]Ibid. Article 1.2.3.

authority and lines of communication between and amongst shore and shipboard personnel[7]. The company's policy, contained in the SMS, must describe the ways for ensuring safety of life, prevention of pollution as well as to provide for a safe working environment, with safeguards against all identified risks and a system which would allow for the continuous improvement of safety management skills of the personnel of the company both on board the ships and ashore[8].

In defining the levels of authority, this company must document the powers, duties and status as to each other of all personnel involved in managing or performing any work related to safety and pollution prevention, or personnel involved in verifying this work. In other words, each employee of a shipping company whose actions or omissions could have an impact on issues of safety and pollution prevention must have his position clearly described so that there will be no misunderstanding as to the authority and the responsibility of each one. Furthermore, the issue of clearly defined lines of communication is specifically addressed: every company has to designate a person or persons, based ashore, whose responsibility will be to ensure the safe operation of its ship and to act as the link between the company and the on-board personnel. Here, the Code goes a bit further to stipulate that, amongst the responsibilities and authorities vested on this person, there must be the monitoring of safety and pollution prevention aspects. Furthermore, the designated person must ensure that adequate resources and shore-based support are applied as these are required[9]. However, the most important aspect of Article 4 of the Code, which is entitled "Designated Person(s)", is the fact that it stipulates that such person must have *". . . direct access to the highest level of management"*. The inclusion of this provision, generated a lot of speculation regarding its meaning and its possible effect on the practices of the industry.

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[7]Ibid. Article 1.4.

[8]Ibid. Arts. 1.2 and 2.

[9]It is the company's responsibility to ensure that such resources and support are provided to enable the designated person to carry out the job (Art. 3.3).

Article 5 sets out in detail the principles upon which the company must work in order to define and document the responsibilities and authorities of the master of the ship. The minimum of master's responsibility is set out and must include the implementation of the safety policy of the company, motivating the crew on the application of this policy, verifying that the requirements of the SMS are observed, as well as reviewing the SMS itself and reporting its deficiencies to the management. The Code obliges every shipping company to declare in its SMS that *". . . the master has the overriding authority and the responsibility to make decisions with respect to safety and pollution prevention and to request the company's assistance as may be necessary"*[10].

Article 6 deals with the issue of the qualifications and training of the master and the crew. It stipulates that the company must ensure that the master is properly qualified and conversant with the SMS, as well as that the seafarers serving on board their ships are qualified, certificated and medically fit, according to the applicable national and international regulations. Procedures for familiarisation of new personnel with the provisions of the SMS must be established, and instructions which are essential prior to sailing must be clearly identified by the company. These would include full understanding of all relevant rules, regulations, codes and guidelines. Furthermore, the company must establish clear procedures for the training of the crew in support of SMS and ensure that all necessary information about this system is conveyed to the personnel in a working language understood by them. The company is obliged to ensure that the personnel is in a position to communicate effectively between them in executing their SMS duties. Furthermore, plans and instructions for essential shipboard operations regarding safety and pollution prevention, like navigational safety or the reliability of equipment, must be provided by the company[11]. One other important task that the company is required to carry out by the Code is to establish the necessary procedures which will enable it to identify potential emergency situations on board the vessels and respond properly to them. Indeed, the SMS must provide all the measures

[10]See Art. 5.2 of the Code.

[11]Ibid. Art. 7.

which will ensure that the organisation of the shipping company can respond at any time to such emergencies, through establishing, for example, the necessary contingency plans. This preparedness of the company to deal with emergencies must be tested regularly with drills and exercises organised by it[12].

The introduction of a quality assurance system would be useless unless any "failures" of the system to operate are reported to the management in due time, thus allowing it to investigate such failures and try to correct them. Article 9 provides that the SMS should contain procedures for the reporting of any *"non-conformities, accidents and hazardous situations"* to the company, as well as establish procedures for the implementation of corrective action. Furthermore, the company must keep records of all the inspections held on board which led to the discovery of these non-conformities, as well as of the corrective action taken in order to rectify such non-conformities[13]. All the procedures established in accordance with the Code by the company must ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations. These procedures must identify any equipment, the sudden failure of which might result in hazardous situations, as well as measures promoting the reliability of such equipment, which must include the regular testing of systems that are not in continuous use. Article 10.4 stipulates that these procedures must be integrated into the ship's operational maintenance routine.

Article 11 is of great importance, since it creates an obligation for the company to establish and maintain procedures to control all the documents and data that are relevant to the safety management system. All these documents that are produced in the process of implementing the SMS must be kept and will form part of the Safety Management Manual which will be carried on board. It is entirely up to the company to monitor the implementation of the SMS and carry out internal audits to verify the compliance of the personnel with its provisions. These audits and any corrective action must be carried out in accordance with documents and procedures, and the results must

[12]Ibid. Article 8.

[13]Ibid. Article 10.2.

be brought to the attention of the involved personnel. Corrective action must be taken to rectify deficiencies found during these internal audits[14].

Every company found to comply with the requirements of the Code will be issued a document of compliance (DOC). This document is to be issued to the company either by the administration of the flag state (or the classification society acting on its behalf) or by the government of the country in which the company has chosen to conduct its business. This government though will be acting on behalf of the flag state administration. However, the safety management certificate issued to a ship, certifying that the shipowning company and its ship board management operate in accordance with the approved SMS, may only be issued by the flag state administration (or the classification society acting on its behalf). The implementation of the ISM Code is the responsibility of the flag state or any organisation recognised by it which acts on its behalf.

The 62nd Maritime Safety Committee of IMO approved the draft of the Code for submission to the Assembly in May 1993. Indeed, during November of the same year, IMO, at its eighteenth assembly, through Resolution A741(18) (see Appendix 4), adopted the International Safety Management Code and urged governments to implement it on vessels flying their flags as soon as possible. In May 1994, a conference of contracting governments to SOLAS introduced the ISM Code as Chapter IX of this Convention (see Appendix 6). Chapter IX of SOLAS provides that the provisions of the Code will be implemented as follows:

(a) Passenger ships, including passenger high speed craft, not later than 1st July 1998;

(b) Oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high speed crafts of 500 gross tonnage and upwards, not later than 1st July 1998; and

[14]Ibid. Article 12.

(c) Other cargo ships and mobile off-shore drilling units (MODU's) of 500 gross tonnage and upwards, not later than 1st July 2002[15].

6.3 LEGAL IMPLICATIONS OF THE ISM CODE:

As explained above, the ISM Code focuses on the "human factor" and seeks to minimise the number of human errors occurring not only on board the vessels, but also within the organisation which manages such vessels, and which have the potential of causing shipping casualties, endangering human life, the marine environment or even property. In doing so, the Code cannot but affect, in one degree or another, all those issues addressed by private shipping law which might be influenced by "human behaviour", whether that refers to the actions or omissions of the master and the crew or to the actions and omissions of the employees and officers of the managing company. The introduction of the ISM Code has the potential to affect the position of the shipowner (as well as that of other parties) with regard to his civil liability, insurance cover, criminal liability, as well as a number of other aspects regarding identification and the traditional structure of the shipping company.

6.3.1 Civil Liabilities:

6.3.1.1. Seaworthiness And Due Diligence:

Most cargo claims faced nowadays concern cargo carried under the Hague or Hague/Visby Rules[16]. In general under the Hague/Visby Rules, the shipowner has a duty to provide a seaworthy ship which *"must have the degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the*

[15]See Regulation 2 entitled "Application" of SOLAS 1974, Chapter IX.

[16]For the purposes of this study, the effect of the Hague and Hague/Visby Rules is the same, so reference will only be made to the Hague/Visby Rules unless specific reference to the Hague Rules is made.

commencement of her voyage having regard to all the probable circumstances of it"[17]. This provision includes, apart from the "hardware" of the ship, issues concerning human aspects like the manning of the ship as well as its management[18]. Article 4, r.2 of the Hague/Visby Rules allows the carrier to avoid liability if he proves that the damage resulted from an act of negligence in the navigation or management of the ship:

> *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:*
>
> *(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship".*

However, it must be stressed that even though negligence is an "accepted peril" according to the Hague/Visby Rules, incompetence[19] is not. In other words, a shipowner would be able to avoid liability if the loss or damage was caused through an act of negligence of the master in the navigation, but not if the master was incompetent. In that case, the incompetence of the master constitutes the vessel unseaworthy, and the only defence left to the shipowner is to demonstrate that he has exercised due diligence in providing a competent master. In the case of *The "Makedonia"*[20], Hewson J regarded failure to exercise due diligence to man the vessel properly, as a form of unseaworthiness:

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[17]See *McFadden v. Blue Star Line [1905] 1 KB 697* (as per Channel J); See also *Redhead v. Midland Railway [1967] LR 2 QB, 412; Bradley v. Federal S N Co [1926] 20 4 Lloyd's Rep. 446* (as per Scrutton LJ).

[18]See *The "Roberta" [1938] 60 Lloyd's Rep. 84.* In that case, the vessel was held to be unseaworthy because its owners employed an engineer who proved to be incompetent.

[19] the word inefficiency is often used by the courts to convey the same meaning as it can be seen from the quotation of Hewson J 's dictum in The "Makedonia". See also Tetley's Marine Cargo Claims, 3rd edn, Canada, 1988.

[20]*[1962] 1 Lloyd's Rep. 316.*

"It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. . ."[21].

Incompetence may be the result of a number of factors. Lack of training on the proper use of fire-fighting equipment, for example, or the lack of knowledge of the particular characteristics of a certain vessel may well be taken as incompetence rather than as negligence. Furthermore, incompetence covers not only the cases of individual seamen, but also the crew as a single unit. This means that the vessel must be manned with a sufficient number of crew, ratings and officers, but also that the crew must be in a position to effectively carry out its duties which can only be done if, for example, there is a common language between themselves.

The ISM Code poses an obligation on the shipowning company to ensure that all seamen serving on board company vessels must be competent to carry out their duties as well as that the crew as a unit must be in a position to perform as a team. Competence would now include the training of each crew member in the provisions of the safety management system of the company as well as his familiarisation with the instructions which must be provided prior to sailing by the company to each crew member. This information must be provided to the crew member in a language which can be understood by him, and the company must make sure that each individual is in a position to comprehend and carry out their duties[22].

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[21]This dictum was originally delivered by Lord Atkinson in the case of *The "Clan Gordon" [1924] AC 100*. In that case the owners failed to inform the master of the fact that the ship's construction rendered her unstable in certain conditions of trim with homogenous cargoes, and the master gave orders for the emptying of two ballast tanks, causing her to capsize. Lord Atkinson said, at p. 120: *"It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. Does not that principle apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in certain circumstances likely to be met with on an ordinary ocean voyage?"*

[22]See Article 6 of the Code.

The obligation of the shipowner to maintain a competent crew, even after its initial recruitment, is a continuous one, since, under the Hague/Visby Rules, he must exercise due diligence to provide a seaworthy vessel with a competent crew at the commencement of each voyage. This obligation is still the same even if the loss or damage was caused as a result of the shore staff of the company. One of the innovations of the Code is the involvement of the management of the ship in a pro-active role which provides the crew members with all the necessary information and instructions about how to handle hazardous situations and the steps and measures that must be taken in order to prevent problems arising. In the case of an emergency situation, for example, the crew must follow the procedures described in the SMS for dealing with similar situations. If they do but their efforts fail, it may well be that the company failed to establish the right procedures for the particular emergency and, therefore, failed to exercise due diligence to provide a seaworthy ship. If, on the other hand, the crew does not follow the established procedures of the company and there is a casualty out of this, then there might be liability of the company, either because it failed to train its crew according to the SMS or because it failed to motivate it in following its safety policies. In other words, this failure of the crew to carry out the orders of the company may well indicate that the crew was incompetent and, therefore, the vessel was unseaworthy. It would then be up to the company to prove that it had exercised due diligence in employing the right crew, training it and keeping it motivated in following its safety policies. The same will apply for non-emergency situations where the company must provide *"plans and instructions for key shipboard operations"*[23].

In the case of the Hamburg Rules, a much simpler system of liability is provided[24]. Here, the burden of proof is reversed; it is up to the owner to prove that he did all that he could to avoid the casualty which caused the loss or the damage. The provisions of the ISM Code, therefore, could provide the owner with the necessary evidence to prove his case in court.

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[23]Ibid Article 7.

[24]See Article IV of the Hamburg Rules.

The above-mentioned arguments regarding seaworthiness apply *mutatis mutandis* for claims arising out of time as well as voyage charterparties.

6.3.1.2 Classification Societies:

It becomes apparent by the letter of the Code that the draftsman accepted fully the role of the Classification Societies in the shipping industry. Indeed, it appears that IMO wished to see these organisations to become directly involved in the implementation of the Code. This fact contributes to the extension of the exposure, of this field of the industry, to more claims originating from cargo interests. The introduction of the Code and the new role that Classification Societies assume in the implementation of the Code, can constitute the "fatal blow" to the liability of these organisations: the courts might accept that this new role of Classification Societies extends their duty of care to also cover all those *bona fide* third parties who carried out transactions with their "customers" (i.e. shipowners and shipmanagers), based on the certificates issued by them. If this happens the outcome of cases with similar facts to The "Nicholas H" will be exactly the opposite[25].

6.3.1.3 Limitation Of Liability:

Under the provisions of the 1957 Limitation Convention, -which, even though it is no longer in force in this jurisdiction, still applies in a considerable part of the world-, an owner can only limit his liability if the relevant accident had taken place without his *"actual fault or privity"*[26]. Insofar as "actual fault" is concerned, the Code is likely to have an impact in the extent that the transparency system introduced through this Code will assist the lawyers of the claimants in their efforts to break the limitation of the shipowners' liability[27]. Furthermore, the provisions of the Code set the minimum

[25] For an account on the liability of Classification Societies see supra under 5.2.4. See also the article of W.N. France op. cit. at fn 70 of chapter 5.

[26] See Article 1 of the 1957 Convention.

[27] See infra under 6.3.4.

management standard to be observed by shipping companies, thus providing the courts with a benchmark against which a particular shipowner may be judged[28]. It is the second part of the phrase - "privity" - which attracts more attention. Privity is actual knowledge, or "turning a blind eye" as Lord Denning put it in *The "Eurysthenes"*[29]. When discussing privity of the owner, one must first be in a position to define what the word "owner" includes. The courts had to investigate in great detail the available evidence in search of the "directing mind and will" of the company in order to determine whether the latter was privy to the failure or negligence attributed to the ship[30]. Article 4 of the ISM Code strikes a blow to this existing gap. The appointment of a designated person who provides a communication link between the ship and the company and the fact that this person has *"direct access to the highest level of management"* may very well cause a change in the practice of the courts and facilitate their work[31]. Furthermore, the established system of reporting and analysing non-conformities as this is laid down in Article 9 of the ISM Code in conjunction with the documentation system laid down in Article 11 of the Code will most definitely affect the mass of data regarding shipboard operations for the promotion of safety and the protection of the marine environment that is being made available to the company, thus constituting the "owner" privy to almost anything which occurs on board his vessels.

The 1976 Limitation Convention, which is in force in this jurisdiction, provides for a stricter system for the breaking of the limitation. The owner may lose his right to limit his liability only when it is proved that the loss resulted from a *"personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result"*. This provision is technically a much

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[28]"Actual fault" is usually argued in order to prove a managerial error. See, for example, *The "Lady Gwendolen" [1965] 1 Lloyd's Rep. 335*; *The "Garden City" [1982] 2 Lloyd's Rep. 382*; and *The "Marion" [1984] 2 Lloyd's Rep. 1.*

[29]*[1976] 2 Lloyd's Rep. 171.*

[30]See *The "Lady Gwendolen"*, *The "Garden City"* and *The "Marion"*, cited above under footnote 28. See also *The "Ert Stefanie" [1989] 1 Lloyd's Rep. 359.* All of these cases deal with this issue and investigate thoroughly the structure of the company.

[31]See infra under 6.3.5 for the designated person.

more difficult provision to crack for the lawyers of a claimant than "actual fault or privity". Indeed, it is unlikely that the ISM Code will introduce any element which could dramatically change, in a direct way, the outcome of limitation of liability cases under the 1976 Convention. However, the greater system of transparency and documentation introduced by the Code could be used in the future to prove, for example, an omission committed by a shipowner recklessly and with the knowledge that loss would probably result if, for example, there was a case where a shipowner received reports of a non-conformity on one of his vessels which led to a "hazardous occurrence" and that same shipowner failed to take any action to prevent any similar occurrence on a sister ship under the same management. In any event, the impact of the Code on the 1976 Convention will be of much less significance than that on the 1957 Convention.

6.3.2 Insurance Cover:

Section 39(5) of the 1906 Marine Insurance Act stipulates that:

> *"In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but, where with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."*

Furthermore, in voyage policies, there is an implied warranty of seaworthiness at the commencement of a particular voyage[32]. Section 39(4) of the MIA provides that the vessel must be *"reasonably fit in all respects to encounter the ordinary perils of the adventure insured"*. It is, therefore, apparent that the issue of "seaworthiness" is of central significance for all types of policies, including P&I club cover, which is regarded as a time policy.

[32]See Section 39(1) of the 1906 MIA.

As explained above, a large part of "seaworthiness" is related to human aspects[33]. The introduction of the Code, -the very purpose of which is to address the problem of "human error" in marine casualties-, is therefore, likely to influence this side of the industry as well. In voyage policies, the underwriters will be able to make use of the possibility they have to avoid covering the loss just by proving that the vessel was sent to sea in an unseaworthy state. This task will now be much easier for underwriters, since they would be in a position to scrutinise the Safety Management Manual in search of any information which might indicate that the vessel was unseaworthy. The new transparency system introduced by the Code means that the shipowner will cease being the sole party with access to such information.

Insofar as Time policies are concerned, the underwriter's burden of proof is considerably increased. He must be in a position to prove that the ship was sent to see in an unseaworthy state *"with the privity of the assured"* and, therefore, that he is *"not liable for any loss attributable to unseaworthiness"*[34]. The meaning of "privity" is the same as in the limitation cases mentioned above[35]. Consequently, the ISM Code will affect relations between underwriters and shipowners to the degree that it affects the power of the shipowner to limit his liability under the 1957 Limitation Convention. Firstly, the introduction of the concept of the "designated person" will reduce the possibilities of the shipowners to simply reply "I didn't know", considerably. The designated person who will have *"direct access to the highest level of management"* will leave no space to the shipowning company to not know or "turn a blind eye" to any non-conformities or problems which might render the vessel unseaworthy. Secondly, the system of reporting and analysing non-conformities, accidents and hazardous occurrences as set out in Article 9 of the Code, and the system introduced by Article 11 of the Code, -regarding the system of the control of all documents and data relevant to the implementation of the safety management system-, by definition, will increase the

[33]See supra under6.3.1.1.

[34]See Section 39(5) of the 1906 MIA.

[35]See supra fn. 28.

mass of information communicated to the "company", thus increasing the facts to which the owner is privy.

Lastly, another area which might be affected by the introduction of the Code is the duty of the assured to disclose all material facts to the underwriters deriving from the character of the contract as one of *uberrimae fidei.* According to Section 18(1) of the MIA, the assured must *"disclose to the insurer . . . every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business ought to be known by him".* The latter part of this provision will undoubtedly be influenced by the introduction of the Code. The shipowner will now be deemed to know every circumstance which *"ought to be known by him".* It is, therefore, likely that since the new Code envisages a system according to which the company will be able to effectively manage its fleet through the introduction of a detailed system of recording and reporting of non-conformities, the mass of the material facts which ought to be known by the shipowner will increase. Respectively, the task of the underwriters to locate any material non-disclosure in their attempts to avoid covering a loss will be hugely facilitated through the system of transparency introduced by the Code[36].

6.3.3 Criminal Liability:

Another area to which the introduction of the Code might have some effect is that of the criminal liability of the owner, charterer or manager of the vessel, as well as of any other personnel who is either shore-based or based on board to whom, according to the provisions of the SMS, responsibilities regarding safety issues have been delegated. The Merchant Shipping Act 1995 contains provisions according to which a dangerously

[36]Despite the fact that P&I clubs invariably require their members to fully comply with applicable international and national laws regarding their vessels, there are indications that compliance with the ISM Code will not be a condition of cover. See *'Lloyd's List'*, Friday, 18th July 1997, where it is reported that the UK P&I Club will not make its cover conditional on ISM. It looks, however, that this is a stance reflecting the difficulty of all shipowners around the world to achieve ISM accreditation by July 1998, when the Code will start applying as mandatory law.

unsafe ship or the unsafe operation of a ship, whether it flies a British flag or not, is a statutory criminal offence for which owners, charterers or manages can be convicted[37]. Section 51 of the 1988 MSA provides as follows:

> *"It shall be the duty of the owner of a ship to which this Section applies to take all reasonable steps to secure that the ship is operated in a safe manner."*

Section (4) extends the meaning of "owner" to cover the demise charterer of a vessel as well as the manager of a vessel, and clarifies that the expression "all reasonable steps" should be *". . . construed as a reference to the taking of all such steps as it is reasonable for him to take in the circumstances of the case"*. The provisions of the ISM Code stipulate that the SMS must provide in detail what these "reasonable steps" must be. Furthermore, the Safety Management Manual would now provide the prosecutor with the relevant information which would allow him to determine whether the existing SMS is up to a standard which may be characterised as safe, but also to investigate in detail all the steps which were taken to secure the safe operation of the ship. Also, the work of prosecution should be made easier after the introduction of the Code, since the prosecutor will not have to identify first the person who was the controlling mind and will of the company in order to prove afterwards that that person had the guilty intent necessary for the criminal offence. Article 4 of the Code provides the prosecutor with the solution to such problems[38]. Moreover, in 1995, the English Law Commission recommended the introduction of the new offence of "corporate keeling" for which a company could be liable if there was a management failure through a conduct falling below what would reasonably be expected under the circumstances, resulting in a death. If this recommendation goes ahead, it is likely that

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[37]See Sections 98 and 100 of the 1995 MSA.

[38]See, for example, *The "Safe Carrier" [1994] 2 All ER 99.* In that case, there was a casualty caused by a mistake of the chief engineer who was given two and a half hours to familiarise himself with the engine-room rather than three days, which would have been the safe standard. Had this case been adjudicated upon after the introduction of the Code, the prosecution would have a much easier task in identifying the person, the actions of whom could lead to the conviction of the managing company.

the ISM Code would constitute the benchmark against which the corporation's conduct will be judged. The SMS would again constitute the backbone of the case for the prosecution. This offence should apply to foreign companies operating in the UK as well as to UK companies.

6.3.4 The Transparency System:

One of the most important aspects of the new Code is the fact that it attempts to establish a transparency system which will cover all the aspects of a safety management plan both on board vessels and ashore. The first parameter of this system is the fact that the full details of the person or organisation responsible for the application of the provisions of the ISM Code must be reported to the administration of the flag state. This parameter is likely to affect indirectly the practice of shipping companies around the world, since it will make the identification of the interests lying behind every vessel much easier. This easier identification, will expose the entity mentioned on the document of compliance (DOC) as the vessel's manager, to tax authorities around the world as well as to the International[Transport]Workers' Federation (ITF) which will seek to take advantage of this data to determine which entities have the operational control of different vessels. Furthermore, it is very likely that the entity identified on the DOC would be considered as the "operator" under the provisions of OPA 90.

The second parameter of the transparency system is the fact that the SMS must contain detailed information clearly setting out what needs to be done and naming the person who needs to carry out the task. The companies need to set out clearly their objectives and identify the means of achieving them, as well as determine the responsibility and authority of each person involved in a job which is somehow related to safety and pollution prevention, both on board the vessel and ashore. The "company" is asked to lay down in detail what it considers to be the right way for ensuring that the vessel, as well as its crew, operate in a safe manner. Furthermore, the company needs to instruct in detail its crew members and shore-based personnel on how to carry out their duties and how to deal with everyday and emergency situations. It also has to ensure that its employees follow the instructions and perform these duties adequately as well as to

provide for ways which would allow it to take corrective action to remedy situations which do not comply with the Safety Management System. This, in effect, constitutes a "previous statement" from the management on how the company and its vessels must be run; the company will no longer be able to decide upon the position which it will adopt in a court of law, after the event and after having considered the circumstances of each case. After the introduction of the Code, the SMS will constitute a previous statement by this company. Each shipowner, (and each ship manager), would have specified exactly how he thinks that this vessel should be run and afterwards a counsel would be in a position to go through the Safety Management System and compare the actions actually taken with the action that ideally should have been taken according to the SMS.

The third parameter of this transparency system is introduced by Articles 9 and 11 of the ISM Code. These Articles generate an obligation on behalf of the company to take the necessary measures which will ensure a meticulous recording and reporting of the application of the SMS. Any non-conformities must be recorded and reported to the company which will investigate the issue and proceed to the corrective action that is appropriate. All the operations must be documented and records must be kept. This innovation signifies the end of the monopoly of the shipowner and the ship manager to any information which reveals what exactly happens on a vessel. Lawyers of cargo or insurance interests will now be in a position to see firsthand all the communications between the master and the designated person, the reporting of any non-conformities and the action (if any) taken by the company for the correction of any problem. These lawyers will no longer have to rely on the information that the other side decides to communicate to them.

This new transparency system should not, necessarily, create any problems for those shipowners who have nothing to hide. Indeed, the meticulous recording and reporting system as well as the existence of their SMS should make it easier for them to prove their proper conduct. However, the transparency system is bound to have devastating effects on "bad" shipowners and ship managers who, until now, have managed to survive by taking advantage of the existing system.

6.3.6 The Designated Person:

One of the most significant aspects of the new Code is introduced by Article 4, which deals with the concept of the designated person(s). The Article stipulates that every company falling within the scope of the Code has to designate a person or persons ashore, with direct access to the highest level of management, who will ensure the safe operation of the ship and who will act as a link between the company and the ship. The phrase which appears to be of particular interest is *". . . having direct access to the highest level of management"*. Concern has been raised that this provision may affect the liability of the shipowner if any acts, knowledge or state of mind of the designated person are considered by the courts to be acts, etc. of the shipowner himself. Indeed, issues like "privity", which may arise both in marine insurance cases and limitation cases, "due diligence", which may arise out of cargo claims governed by the Hague/Visby Rules, or finally the issue of identification in cases of criminal liability could well be affected by the relevant provisions of the ISM Code.

Such concern may well be further fuelled by the decision of the Privy Council in a non-maritime case: *Meridian Global v. Securities Commission*[39]. Just over two years ago, their lordships had the opportunity to address the issues of whose knowledge is to be considered as knowledge of the company and who is to be considered as the *"directing mind and will of a company"* - a phrase introduced by the dictum of Viscount Haldane LC in *Lennard's Carrying Co Limited v. Adriatic Petroleum Co Limited*[40]. In the *Meridian* case, the Privy Council had the opportunity to explain this dictum and clarify the law covering this area. Relevant to that appeal was the fact that the New Zealand Securities Amendment Act 1988 provided that every person who became a substantial security holder (over 5%) of a public company was required to give notice of his interest to the company and stock exchange as soon as he knew, or ought to have known, this fact. Meridian, a Hong Kong investment management company, was involved in the purchase of 49% of Euro National Corporation Limited ("ENC"), a

[39] *[1995] 3 All ER 918.*

[40] *[1914 - 15] All ER 280.*

publicly listed New Zealand company. The transaction was carried out by the chief investment officer and the senior portfolio manager of Meridian, who were held to have improperly used their authority to buy and sell shares. At the earlier stages of adjudication, the parties accepted that the effect of the transaction was to give Meridian a relevant interest in the 49% holding in the "ENC" for the critical period. Meridian gave no notice under the Securities Amendment Act 1988. However, the whole scheme was not known to the directors of the company. Only the two officers mentioned above were involved in this.

Their lordships, taking as a starting point the phrase "directing mind and will" used by Viscount Haldane in the *Lennard's* case, explained that there must be rules by which acts may be attributed to a company: *"the rules of attribution"*, generally to be found in the Articles of Association of a company, or implied by company law. These primary rules of attribution are completed by general rules of attribution: the rules of agency. Lord Hoffman, in delivering the judgement of the Privy Council, said:

> *"The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability"*[41].

Lord Hoffman held that if the court considered that the rule of law was intended to apply to companies and that any insistence on the primary rules of attribution would, in practice, defeat this intention, then *"the court must fashion a special rule of attribution for the particular substantive rule"* and if the court, in interpreting this rule of law, established that it was intended to apply, then it must seek to answer these questions:

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[41]The *Meridian* case, Ibid. at p.923.

> *"How was it intended to apply? Whose act (or knowledge or state of mind) was for this purpose intended to count as the act, etc. of the company?"*[42].

His Lordship sought to justify his conclusions by referring to various authorities. On the facts in *The "Lady Gwendolen"*[43], Lord Hoffman said:

> *"So far as anyone in the hierarchy had functions corresponding to those to be expected of an individual owner, his failure to discharge them were attributable to the company. So far as there was no such person, the superior management was at fault in failing to ensure that there was. In either case the fault was attributable to the company"*[44].

In order not to allow the primary rules of attribution to defeat the intention of the law to apply to companies, the courts must set aside the primary rules of attribution and see that the policy lying behind the rule of law is protected. The question that has to be answered is: *"Was the law intended to apply to a company?"* If the answer is "Yes", then the second question is: *"Whose knowledge or state of mind is intended to count as the act, etc. of the company?"*. Their Lordships concluded by saying that, in such cases, the usual channels of interpretation should be applied, taking into account the language, content and especially the policy of the legislation.

Insofar as the ISM Code is concerned, it is made clear that the Code intends to apply primarily to companies. The very intention of the Code is to target the management company in order to improve standards of safety and pollution prevention. Therefore, if the applicable law in a case which was being determined by English courts was the ISM Code (as SOLAS 74), the court would have to give a positive answer to the first

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[42]Op. cit. fn 39, at p. 924.

[43]*[1965] 2 All ER 283.*

[44]Ibid. at p. 927.

part of Lord Hoffman's test. The second part of this test asks *"Whose act . . . was . . . intended to count as the act, etc. of a company?"* Again, the text of the Code provides the answer here. It is apparent that the intention of the legislator was that this person should be the designated person. It appears highly likely that an English court, in applying the principles set out in the *Meridian* case would, at the end, hold the designated person to represent, with his acts or omissions, the company for which he is working. Indeed, if the English courts follow the course indicated by the *Meridian* case, issues like "privity" and "due diligence" would be put in a completely different perspective, with the potential to revolutionise the *status quo*.

6.4 THE NEW STCW CONVENTION OF 1995:

At the beginning of the 90's, and under the influence of the developing trend in IMO for an "attack" against the "human factor", the International Shipowners' Federation (ISF) suggested a thorough revision of the existing 1978 STCW, the principal IMO Convention dealing with issues directly linked with the "human factor". That Convention was a result of a compromise between those nations pressing ahead for higher standards and those concerned about their ability to implement such measures. The text of this Convention merely stipulates minimum knowledge requirements for the issue of certificates without setting forth precise standards of competence relating to the abilities needed to perform shipboard functions safely and effectively. Candidates for certification are only required to be competent *"to the satisfaction of the Administration"*[45]. This exposed STCW 78 to different interpretations, resulting in a failure to establish a uniform minimum level of competence internationally, thus harming confidence in the reliability of STCW certificates issued by certain governments. Furthermore, STCW '78 was drafted in terms of conventional shipboard work organisation, based on traditional divisions between the deck and engine departments, failing to accommodate modern developments in training and shipboard organisation. All the above, in conjunction with a series of high-profile maritime casualties which drew additional attention to concerns about general levels of crew competence, led the IMO Secretary General to initiate a revision of the Convention in

[45]See Article IV of the 1978 STCW Convention.

co-operation with ILO[46], which resulted in a diplomatic conference held in July 1995. This conference adopted a package of radical amendments to the STCW Convention.

These amendments established precise standards of competence relating to the actual ability of seafarers to perform their tasks safely and effectively. The 1978 STCW stipulated knowledge requirements only, leaving standards of competence largely to be determined by the governments. The new amendments stipulate the standards of knowledge, understanding and proficiency that need to be achieved in each different element of competence by candidates for certification, as well as the criteria for the valuation of this candidate. The scope of these new standards of competence is extended to cover more categories of shipboard personnel, not addressed by the '78 STCW.

The new amendments introduce new responsibilities for shipping companies. The latter will now have to ensure that the seafarers they employ meet minimum international standards of competence, that ships are manned in accordance with flag state requirements and that detailed records are maintained of all seafarers. This goes even further than the ISM Code, since it stipulates that companies must be able to demonstrate that the relevant STCW provisions have been implemented to ensure that the Convention's intentions have been brought into effect, i.e. that seafarers employed on board are competent, qualified and can indeed perform their duties safely and effectively. Companies will also have to ensure that seafarers, on being assigned to their ships, undergo familiarisation on board and that measures are adopted to ensure effective co-ordination between them.

Another point of the new amendments concerns the mandatory minimum rest periods that must be taken by officers and ratings forming part of the watch in order to prevent fatigue. The STCW Code stipulates that all persons who are assigned duty as an officer in charge of a watch or as a rating forming part of a watch *". . . shall be provided a*

[46]A number of ILO conventions also deal with the issue of certification of seafarers: Officers' Competence Certificates, 1956 (No. 53); Certification of Ships' Cooks, 1946 (No. 69); and Certification of Able Seamen, 1946 (No. 74).

minimum of 10 hours of rest in any 24-hour period". These hours of rest may be divided in no more than two periods, one of which shall be at least six hours in length but these requirements will not be applicable in cases of emergency or drill or in an overriding operational condition[47].

Special care was devoted in ensuring implementation of the revised Convention. The Convention requires governments to apply penalties to shipping companies and seafarers found to be in breach of the Convention's requirements. Furthermore, port state control is expanded, allowing the inspectors to verify the qualifications and competence of seafarers. The meaning of "clear grounds" is expanded so that inspectors will now be permitted to undertake an assessment of seafarers' abilities to maintain watch-keeping standards whenever a ship is deemed as *". . . being operated in such a manner as to pose a threat to persons, property or the environment"*[48]. Furthermore, governments issuing STCW certificates will be required to submit to IMO documentary evidence of compliance with the standards of the Convention. They must also demonstrate that their training and certification regimes incorporate quality standards subject to independent valuation. Flag states which allow foreign seafarers to serve on their vessels by accepting certificates issued by another state are obliged to take responsibility for checking the competence of such seafarers. Lastly, the Convention provides for methods of alternative certification to cover the cases of those vessels, the operation of which is not based solely on conventional divisions between deck and engine departments.

The Convention also incorporates an STCW Code which is divided into two parts. Part A contains mandatory requirements which all governments will have to implement, whereas Part B contains the commendatory guidance which many governments may nevertheless decide to apply on a mandatory basis.

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[47]In Section B-VIII/1, "overriding operational conditions" are defined as the essential shipboard work which cannot be delayed for environmental or safety reasons or which could not reasonably have been anticipated at the commencement of the voyage.

[48]See also Section A-I/4 of STCW 95.

The 1995 amendments to the STCW Convention entered into force on 1st February 1997 through the "tacit acceptance procedure". Until 1st February 2002, however, the parties may continue to issue, recognise and endorse certificates which applied before that date in respect of seafarers who began training or sea-going service before 1st August 1988.

In the case of STCW 95, just like in the case of the ISM Code, the "company" constitutes a focal point[49]. The philosophy lying behind the new STCW is completely different than that of its predecessor's.

6.5 POTENTIAL LEGAL IMPLICATIONS OF THE STCW 95:

The major reforms introduced by the 95 STCW Convention are the following:

1. New Responsibilities for shipping companies;
2. New Uniform standards of competence of the crew; and
3. New and strict obligations on member states to implement these new standards.

The first two categories can potentially directly affect matters of private shipping law, whereas the third can only influence this area indirectly.

6.5.1 Civil Liability:

Regulation I/14 sets out in detail the responsibilities of shipping companies in implementing the provisions of the Convention: Each seafarer must hold an appropriate certificate, and the vessel must be manned in compliance with the requirements of the national administration[50]. Furthermore, the company must ensure that detailed records regarding the documentation and data relevant to all the seafarers employed on their

[49]It is worth noting that the definition of "company" contained in Regulation I/1 of STCW 95 is exactly the same as that contained in Article 1.1.2 of the ISM Code.

[50]i.e. the manning level stipulated in the SOLAS Convention.

ships are maintained and are readily accessible, and that all crew members are familiarised with their duties as well as the characteristics of the ship on which they serve[51]. Lastly, the company is required to ensure that the crew as a unit can effectively co-ordinate its activities when performing functions related to safety or pollution prevention or when dealing with emergency situations.
Furthermore, Part A of the STCW Code establishes a minimum resting period for persons involved in watch-keeping[52]. The STCW also adopts measures which will assist in the realisation of the intention of this Convention for effective communication amongst the crew and between the vessel and third parties by introducing a requirement for sufficient knowledge of written and spoken English to enable key personnel to carry out their duties related to safety and pollution prevention in an adequate manner.

Another area of great importance is that the new Convention, for the first time, establishes precise standards of competence related to the actual ability of seafarers to perform their tasks safely and effectively. The standards of competence are set out in the "Competency Tables" of Part A of the STCW Code. These detailed tables set out the criteria for defining competence, methods for demonstrating it, and lastly, a system to evaluate this competence[53].

The part of "seaworthiness" regarding matters which involve the "human element" is directly linked with the provisions of the STCW. As explained above[54], the incompetence of the crew can render a vessel unseaworthy. The inability of a seafarer

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[51]The issue of familiarisation is dealt with extensively in Part A of the STCW Code, which is also mandatory. Section A-I/14 provides that the company must issue written instructions describing its policies and procedures on the issue of familiarisation and prescribes the minimum content of these instructions. Furthermore, Section A-VI/1 extends the concept of familiarisation in safety matters to cover all personnel serving on board the vessel, regardless of the fact that their routine or emergency duties do not include matters of safety.

[52]See Section A-VIII/1 of the STCW Code.

[53]See, for example, Table A-II/1 [extract] dealing with the matter of navigation at the operational level.

[54]See supra. under 6.3.1.1.

to perform his job according to the standards stipulated by the new Convention will render that individual incompetent. Likewise, the inability of a seafarer to carry out his job due to lack of knowledge in relation to the particular vessel-, i.e, due to the fact that the company has not taken all the necessary measures to ensure that that particular individual was properly trained and familiar with the ship's equipment and his duties-, may also result in rendering the vessel unseaworthy[55]. Moreover, fatigue, which is specifically addressed by the Convention which sets out the minimum resting periods for personnel involved in watch-keeping, may also constitute a factor rendering an individual temporarily incompetent to perform his duties, thus rendering the vessel unseaworthy. Lastly, the incompetence of the crew as a unit, rather than as individuals, is a matter that is more likely to come up in the future, since the STCW 95 addresses this point both with regard to the manning of the particular vessel and with regard to the capacity of the crew to co-ordinate their actions and to communicate between themselves.

However, even if it is established that the vessel was unseaworthy, the shipowner may still escape liability under the Hague/Visby Rules[56] if he manages to prove that he exercised due diligence in providing a competent crew[57]. Nevertheless, shipowners will remain liable for the actions of their crew agents, since the obligation to exercise due diligence in making the vessel seaworthy cannot be delegated to others[58]. The 95 STCW introduces a system according to which every administration must keep detailed records in a register of all certificates and endorsements for masters and officers which are issued or revalidated, as well as those which have been suspended, cancelled, reported lost or destroyed, to which shipping companies around the world will have direct access in order to confirm the authenticity of a certificate carried by seafarers serving on their ships. The establishment of such registers in conjunction with the obligation of shipping companies to maintain a record of all documentation and data

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[55]*The "Clan Gordon" [1923] Lloyd's Rep. 120.*

[56]Ibid. under 3.4.1.1.

[57]*The "Makedonia" [1962] 1 Lloyd's Rep. 316.*

[58]See *The "Muncaster Castle" [1961] 1 Lloyd's Rep. 57.*

relevant to seafarers employed on their ships will provide shipowners with an alternative route through which they can assess the competence of seafarers seeking employment on board their vessels. In *The "Makedonia"*[59], the port captain, who was responsible for engaging the chief engineer whose fault resulted in the casualty, took only five minutes to engage him. Hewson J concluded, *inter alia*:

> *". . . The certificate of competency is taken by all who have taken evidence on this point before me as being proof of technical ability, but all this experts laid stress in varying degrees upon the desirability of a proper interview, an interview which to assess the applicant himself. . . written references are not so important as a report from previous employers"*[60].

Likewise, in *The "Garden City"*[61], again it was emphasised that owners should not seek to rely on certificates at face value. Staughton J stated:

> *"If Polsteam* [the shipowner] *had engaged its officers, as many shipowners do, ad hoc on the international labour market, they would have been foolish to entrust the safety of one of their ships to an officer who produced only certificates of competence and opinions such as are in evidence in this case. A responsible shipowner should and would make further enquiries"*[62].

The outcome of these two cases would, of course, be the same even after the introduction of the STCW 95. The new Convention introduces an international system to which shipowners may refer in their attempt to assess the level of competence of seafarers seeking employment on board their vessels. Likewise, if they fail to take

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[59]supra fn 57.

[60]Ibid. at p.337.

[61]*[1982] 2 Lloyd's Rep. 382.*

[62]Ibid. 395 - 396.

advantage of this system, thus failing to exercise "due diligence" in employing a competent crew, the claimants will have a much easier task in proving its case and information will be readily available to them which will allow them to assess the competence of the seafarer under question, or the whole crew for that matter. In other words, the establishment of this international system for keeping a record of the qualifications, competence, experience, training and even medical fitness of seafarers can constitute another valuable "information bank" for lawyers seeking to prove the lack of due diligence against shipowners.

In the area of limitation of liability, the introduction of the STCW 95 is likely to have much less effect that the introduction of the ISM Code. Insofar as the 1957 Limitation Convention is concerned, the breaking of limitation will become easier where shipowners try to disprove "actual fault" when the claimant alleges such a fault over issues concerning the manning of the vessel or the competence of his crew. In order for the limitation of his liability to be broken, two facts must be established: First, the standard of management required from a prudent shipowner was not achieved, and secondly, the failure to reach the necessary standard can be attributed to the shipowner in question. In the "limitation cases"[63], the courts devoted considerable time in determining whether the shipowners involved had acted as reasonable and prudent shipowners in the sense that their management and supervisory systems were adequate. As to this, the introduction of the STCW 95, which sets out the explicit responsibilities of a shipping company in regard to crucial matters like familiarisation, crew co-ordination and communication, as well as the crew's resting period, is going to make an important difference: The company needs to demonstrate that it has exercised prudence during the initial selection of the officers and the crew, as well as that it has taken the necessary measures to supervise them to ensure the compliance with the provisions of the STCW 95.

On the issue of "privity", it must be stressed that the new STCW will be applied in conjunction with the ISM Code and, therefore, the provisions of the Code regarding the

[63]See supra fn. 28.

designated person will also cover the obligations created through the new STCW for the shipping company. This will result in more effective results, since the ISM Code merely requires companies to ensure that better procedures relating to personnel are established whereas the STCW stipulates that companies must be able to demonstrate that the STCW provisions have been implemented to ensure that crew members are competent, qualified and can, in reality, perform their duties safely and effectively[64].

6.5.2 Marine Insurance:

In the area of marine insurance, STCW 95 is again likely to affect matters of "seaworthiness". In voyage policies, according to Section 39(1) of MIA, the vessel must be seaworthy at the commencement of the voyage. If the shipowner fails to provide a vessel seaworthy at the commencement of the voyage, the underwriters are discharged from any liability, regardless of whether the loss resulted as a consequence of the unseaworthiness or not[65]. In theory, an underwriter in a Voyage Policy, could resist covering a loss incurred on a ship which, at the beginning of its voyage, was unseaworthy, due to the fact that its crew was not competent, according to the standards introduced by STCW 95. If, for example, the chief mate was not given enough time to familiarise himself with his duties and the characteristics of the ship before the commencement of the voyage, the vessel could be considered to be unseaworthy, thus, allowing the underwriters of a voyage policy to avoid payment based on Section 39(1) of the 1906 MIA.

In a Time Policy however, establishing unseaworthiness at the commencement of a voyage is not enough to allow the insurer to avoid payment. According to Section 39(5), the ship must be sent to sea in an unseaworthy state with the "privity" of the assured. The fact that the STCW 95 generates a series of primary obligations for the shipping company, like, for example, the obligation to ensure that resting periods

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[64]See *'The Revised STCW Convention'* by the International Shipping Federation, London, 1st Edition, 1995, at p.13.

[65]In practice, however, this principle is not followed. Instead, voyage policies adopt the principle of Section 39(5).

for personnel engaged in watch-keeping as well as the obligation of a company to ensure that all new crew members undergo a familiarisation period before they are engaged in their duties regarding safety and pollution prevention, broadens the scope of the shipowners' "privity". In other words, the company can no longer "turn a blind eye" over these issues, pretending that such issues are of lesser importance. Furthermore, the fact that STCW will operate in conjunction with the ISM Code and, therefore, Article 4 regarding the designated person will be in operation, will allow underwriters to be discharged from liability. P&I club membership, even though treated as a time policy, could be affected in the sense that any non-compliance with the provisions of the STCW Convention will constitute a violation of the membership rules which invariably require full compliance of all shipowners with the applicable international legislation regarding the operations of their vessels.

6.5.3 The Transparency System:

STCW 95 introduces a transparency system which, even though has a much narrower scope of application than that of the ISM Code, it shares the same philosophy with the transparency system introduced by this Code. This transparency system also, has three parameters: STCW 95 adopts the same definition for "company" as the ISM Code[66]. This makes the identification of the real interests behind every ship much easier, thus allowing tax authorities around the world, but also other organisations like the ITF, to identify the entity behind every vessel. Furthermore, the second parameter of the transparency system requires the company to issue written instructions to the master of each ship operated by this company, clearly stipulating the policies of this company regarding the familiarisation of personnel with shipboard equipment and setting out the procedures to ensure this familiarisation period before such personnel is assigned to any duties[67]. In effect, the company is asked to state its mind as to what it thinks should be done in order for its crew to familiarise itself with its ships and explain in detail the procedure to achieve this. Again, in the case of STCW 95, as in the case of the ISM

[66]See Regulation I/1 of STCW 95.

[67]Section A-I/14 of STCW 95.

Code, lawyers acting on behalf of interests raising claims against shipowners would have at their disposal a "previous statement" of the company which may be used as a benchmark against which the subsequent conduct of that company may be assessed. Lastly, the third parameter of the transparency system provides for the detailed keeping of records by every company, but also for the detailed keeping of records by flag state administrations, for seafarers serving under their authority. This system of recording of relevant information regarding qualifications, competence, experience, training and medical fitness of seafarers sheds light for the first time over an area which was kept in the dark until today and establishes a comprehensive system which had the potential to heal, in the long run, the ulcer of the shipping industry resulting from the fraudulent issuing of seafarers' certificates of competence.

6.5.4 IMO's Role As A "Policeman":

STCW 95 introduced a unique system of ensuring implementation of the Convention by the participating states, which has the potential to affect indirectly the *modus operandi* of the industry in certain areas. The Convention introduces a system according to which all governments issuing STCW certificates are required to submit to IMO documentary evidence of compliance with the standards of the Convention. Furthermore, governments issuing certificates are obliged to demonstrate that their training and certification regimes are continuously monitored through a quality standard system[68]. Up to this point, the Convention does not appear to be any different from other major conventions. Nevertheless, STCW 95 provides that all the information will be used by the Maritime Safety Committee of IMO to identify parties that are able to demonstrate that they can give full and complete effect to the Convention. In other words, IMO will be issuing a "white list" of the governments which comply with the Convention. IMO, for the first time, will be indirectly involved in the enforcement of one of its conventions. The publication of such a "white list" is likely to have an impact on the industry in the sense that port state control authorities around the world will make use of this list in determining their targets for inspection

[68]See Regulation I/8 of STCW 95.

purposes. Moreover, other flag state members of the Organisation are likely to make use of this list in determining whether they should recognise certificates issued by the other governments for service by foreign seafarers on board their ships, or not. It is also probable that other organisations involved in the private side of shipping, like insurers and P&I clubs, might make use of this white list of IMO on determining levels of insurance premiums or when setting out membership requirements to P&I clubs. In the long term, it is possible that the contents of the white list will influence charterers and other cargo interests when these are deciding on which ship to engage to transport their goods.

6.6 CONCLUSIONS:

The ISM Code and the STCW 95 constitute a co-ordinated attack of IMO against substandard vessels and, in particular, against the element of "human error" in marine casualties. The philosophy behind these two instruments is very similar, and even though it had not been the intention of the Organisation to influence through the introduction of these two instruments well-established principles of private shipping law, it appears that the industry is ready to come to terms with the changes. It is still early to assess the real impact of these two instruments on the issue of private shipping law addressed above, since, in effect, none of these instruments is still in force[69]. One can, therefore, merely speculate on the reaction of the English courts to the provision of these two instruments. Nevertheless, these two instruments would, at the very least, provide the courts with a benchmark against which practices employed by the industry could be judged. The ISM Code and the STCW 95 provide the minimum standards for safety management and crew matters respectively. Furthermore, the new transparency system, introduced primarily by the ISM Code but also backed by the STCW Convention, will almost certainly affect the *modus operandi* of lawyers around the world, since the process for the collection of evidence as well as the process of cross-examination of witnesses for shipowners and ship managers is likely to change beyond

[69]Even though STCW 95 entered into force in February 1997, its provisions are not likely to be felt by the industry until the transitional period provided for in the Convention lapses.

recognition. If, however, the English courts decide to take on board all the possibilities offered to them by these two instruments, then their introduction could revolutionise private shipping law by changing the face of matters like "privity", "seaworthiness" and "due diligence". Indeed, if the English courts follow the route indicated through the *Meridian* case, the "designated person" will constitute the epicentre of the strongest "earthquake" ever to hit the seas.

FINAL CONCLUSIONS

In the 20th century, shipping experienced an unprecedented boom which resulted from technological developments initiated in the latter part of the 19th century. The application of the new technology to shipping meant that modern ships could travel longer distances in less time, carrying more cargo or passengers than ever before This increased activity of international trade resulted in a rise of demand for more tonnage to accommodate the new needs of the industry, thus revitalising international trade, with beneficial consequences on the world's economy.

From as early as 1915, the international community exhibited an eagerness to minimise loss of life at sea, in the aftermath of the disaster of the "Titanic". At the same time, concerns about the future of the marine environment were being raised both in Europe and in the United States. Unfortunately, World Wars I and II distracted the international community from dealing with matters of safety of life at sea and the protection of the marine environment. Those two wars imposed a different agenda with completely different priorities. However, right after the end of the second world war, the need of addressing the problems of safety and pollution prevention at sea, was once again at the forefront of the agenda.

The shipping industry constitutes a unique case, since its international character calls for universal action for regulating matters of safety and pollution prevention: any unilateral action would be doomed to fail. This was recognised from an early stage by the international community, which expressed its determination to address these issues collectively. When the conditions for a universal reaction to the problem of safety and pollution prevention standards on ships matured, the legal framework set by the Law of the Sea was based on a system according to which the flag state was the focal point for matters of legislative as well as enforcement jurisdiction. International law, accepted that ships constituted an extension of the flag state's jurisdiction; it also recognised the jurisdiction of port states over foreign vessels. Nevertheless, up to that point international state practice dictated that the port state could only interfere in cases

where the consequences of events occurring on foreign vessels visiting their ports, extended beyond the "internal economy" of these vessels.

The international community came to realise that there was a need for setting down clear and unambiguous standards for safety of life at sea and pollution prevention. It became apparent that a specialised agency which would deal exhaustively with all these issues, needed to be established. This agency was indeed established, soon, after the end of world war II. IMO was to constitute the forum where all the nations of the world could meet to set the international standards for safety and pollution prevention, and then monitor their application.

The effectiveness of the standards set by IMO was wholly dependent on the effectiveness of the methods of enforcement of these standards. The role of the flag state in this effort was of primal importance. However, diverse interpretations of these standards by the different states, as well as the diversity in the degree of eagerness exhibited by the flag states in the enforcement of these standards, highlighted the need for the introduction of a common mode of enforcement. This could only occur after the intervention of public international law, and entailed an effort which extended beyond the mandate of IMO. The international community exhibited its determination to provide IMO with all the necessary assistance to allow it to achieve its objectives. The Law of the Sea was gradually reformed to allow for methods of enforcement, different from that of the flag state. This effort resulted in an expansion of the port state's jurisdiction and led to the introduction of coastal state jurisdiction. Furthermore, the inclusion in the letter of the Law of the Sea Conventions of expressions like "generally accepted international standards" and "the competent international organisation", enhanced the role of IMO and contributed towards making this organisation the highest authority for the formulation and implementation of international standards. Public international law did everything to empower IMO with all the necessary "weapons" to reform the shipping industry according to the vision of its member states.

From the very beginning, IMO realised that it was burdened with the responsibility of setting specific standards of safety of life at sea and pollution prevention. This was a

difficult task which had to be carried out after due consideration of the will of all the states involved in the process, and of the possibilities offered through technological developments. For this to happen, there was a need for solid foundations to be laid through a comprehensive system of international conventions covering all the major areas of shipping. These foundations were to set the undisputed minimum standards to which the whole of the world's shipping industry should conform. IMO has achieved this objective even though it took the organisation a considerable number of years. Nevertheless, when these conventions finally came into force IMO could justly claim that they reflected the applicable international standards for safety and pollution prevention since they were accepted and recognised by the states under the flags of which the majority of the world's tonnage was sailing. This completed the first phase of the struggle against substandard vessels.

However, it soon became clear that IMO's conventions would only be successful if they were properly enforced. IMO, being an international organisation, had no power to enforce the standards that it had previously set. Despite this, IMO, taking advantage of its unique position, which allowed it to lead the international community on matters of shipping safety and pollution prevention, embarked on a campaign to solve the problem of the enforcement. Based on the fact that public international law allowed for the exercise of an alternative method of enforcement through port states and coastal states, IMO managed to define port state control through its conventions in such a manner that nowadays one can speak of the omnipotence of the port state, as opposed to that of the flag state which prevailed in the past. As a matter of fact, the role of the flag state gradually diminished and port states are now at the forefront of the effort to enforce IMO's standards on safety and pollution prevention, around the world.

That is how matters appear from the outside. However, the realities within the organisation are rather different from the appearances. Each country's tonnage, expressed as a percentage of the world's tonnage, does not necessarily reflect its power to influence matters dealt with by IMO. In reality, IMO is dominated by the European Union and the United States. The geographical areas of these states comprise the most popular port destinations of the world, thus allowing the authorities of these countries

to dictate their policies with regard to safety and pollution prevention, on all visiting vessels, regardless of nationality. Both the European Union and the US notify IMO of their intended policies regarding safety and pollution prevention, in order to offer the rest of the world a chance to adopt these proposed policies as their own. At this stage smaller states with large tonnage under their flag, like Panama Liberia and Cyprus, have an opportunity to try to influence the outcome of the preparatory procedure. However, the only hope of such states is to convince the "superpowers" that the proposed policies are too harsh or unnecessary. They have no real means to oppose the new proposals. Indeed, the US and to a lesser extend the EU have exhibited their determination to proceed with what amounts to "unilateral" action in implementing their policies. Port state control, in its present form, allows port states around the world to dictate their own standards to foreign vessels calling at their ports. The smaller states, even though they control a very large percentage of the world's tonnage, are bullied into conceding to the demands of the superpowers since attempts to oppose them would usually be hopeless.

On the legislative front, IMO appears to be equally autocratic. The organisation's secretariat, backed by states like the EU, the US, Norway and Japan, is consciously abusing the amendment procedures provided for in the major IMO conventions, in order to impose on the shipping industry rules and regulations which, even though they promote safety and pollution prevention, may interfere with commercial aspects of shipping. The ability of the organisation to introduce any new policy in the form of law, within a few months after its approval, based on the tacit amendment procedure in conjunction with the fact that "no more favourable treatment" clauses of these conventions exclude any possibility of non compliance, gives the organisation the ability to introduce legislation with direct effect on the shipping industry. Taking advantage of these two significant "weapons" IMO may introduce new rules and regulations which could even completely reform any pre-existing legislation, as in the case of the STCW 1995, without needing to achieve the necessary number of ratifications, or to convince the member states to accept the new proposals. Any government that wishes to oppose the introduction of any new legislation may initially declare that it rejects the proposals, and may seek to avoid compliance for vessels under

its flag for a specific period of time, allowed for under the different conventions. Alternatively, a government may choose to campaign against the proposed legislation and attempt to convince other states whose total number is no less than one third of the parties to the convention or 50% of the world's tonnage to reject the new amendments within the restricted time that lapses between the approval of these proposals at IMO and the coming into force. In any event, any such action would be with little significance: in the former case the "no more favourable treatment" clause would guarantee the implementation of the new legislation by the main port states (who have probably put forward the proposal in the first place) even on vessels flying under the flag of the state opposing the new legislation. In the latter case, it would probably result in the unilateral implementation of the rejected amendments by the superpowers acting in their capacity as port states. Thus, the combination of the ability of IMO to introduce tacitly new pieces of legislation, usually in the form of amendments to an existing convention, (albeit through an *abus de droit*), and the power of the port states (and the coastal states) to implement their national legislation at will, leaves no room for flag states to manoeuvre, either during the discussions for the introduction of any new legislation, or after such legislation has come into force.

In theory, IMO represents the collective will of its member states which, however, is largely influenced by the pressures exercised on the smaller states by the superpowers (and the organisation's secretariat which appears to be their puppet). These states determine their stand under the threat that any opposition could extend the phenomenon of unilateralism, depriving them even of their possibility of trying to influence the regulating process still taking place within IMO. Undoubtedly, IMO is only concerned with promoting safety of life and pollution prevention at sea. Nevertheless, the continuous introduction of new pieces of legislation cannot but influence other areas of the shipping industry and affect commercial practices. Indeed, the campaign of IMO against substandard vessels by targeting the shipping company, affected the running cost of shipping companies around the world significantly since each shipping company needs to spend a minimum figure to ensure that it complies with the provisions of instruments like the STCW and the ISM code. The relevant cost is a small percentage of the running costs of a large shipping company, but is a much more significant

percentage of the budget of a small company. It may be suggested that even though the effort of IMO is fuelled by the eagerness of the international shipping community to improve safety and pollution prevention standards, its campaign also targets the small "players" of the industry who will be left with no alternative but to leave the game, to the benefit of the larger players. IMO, who traditionally kept away from any commercial aspects of shipping, leaving this task to the hands of other organisations like the UNCTAD, now finds itself involved in the game of the large interests of shipping. The ease with which new proposals find their way into international conventions, within minimum time, offers a unique opportunity to the strong interests of the industry to dictate policies which could prove to be more costly to their competitors than to themselves. The weaker sides can no longer rely on the support of their flag states since the power of the strong flag states around the world is gradually diminishing.

This new reality with which the maritime industry is faced threatens to impose a different pace of change which may be too fast for the shipping industry, The industry is very sensitive to fast changes and the results of reforms usually appear only at a much later stage, when it could be too late to reverse any adverse results. There is no doubt that the efforts of IMO are likely to be successful in addressing matters of safety and pollution prevention. Nevertheless, the fact that this very effort directly affects other areas of the industry, requires more comprehensive research by IMO on the secondary consequences of its actions.

Private shipping law in its present form, is the result of a process which started with the Rhodian Maritime Law and continues till today. In its modern form, maritime law was developed in England by the Admiralty Court and was spread around the world. Indeed, up until now, there has been a distinct line separating any developments in private shipping law from any developments in the area of the regulation of matters of safety and pollution prevention. Private shipping law was influenced by international conventions to the degree that the British Parliament would allow. However, now that IMO is emerging as a *sui generis* legislator who has the power to reform well established principles of private shipping law, it appears that the evolution of this area

of law will no longer depend exclusively to the British Parliament and the English Courts. The introduction of the STCW 1995 and the ISM Code, even though they are likely to bring about positive changes in matters related with private shipping law, signifies the beginning of a process by which public shipping law interferes with private shipping law. This, supported by the fact that the European Union, of which Britain is a full member, demonstrates its determination to formulate and pursue its own policies over matters of shipping, suggests that the slow pace which used to characterise the development of private shipping law in England, and indeed gained the English Courts their international reputation of offering stability of law, is now exposed to the danger of changing. This, by itself, would not constitute a problem if any changes, were the result of a specific and well considered effort to introduce such changes. However, IMO, does not investigate matters of private shipping law at all. This organisation targets solely matters of safety and pollution prevention: any secondary consequences are merely coincidental. This very fact, threatens to deprive English shipping law of its good reputation. It is entirely up to the English judges to invent a formula which, on the one hand would allow them to implement beneficial changes (like those likely to come about after the introduction of the ISM Code and the STCW '95); on the other hand, it would give them the ability to exclude from the corpus of English private shipping law any element which might influence the stability of that law in a negative manner. This would protect private shipping law from the expediencies operating within IMO.

The twentieth century will be known, among other reasons, as the century within which a comprehensive system for the introduction of international legislation was established for the protection of the marine environment and the safety of life at sea, as well as the enforcement of this legislation. Within the second half of this century, the shipping world acquired a specialised organisation to deal with these matters and public international law empowered this organisation with all the necessary means to carry out its task. State practice imposed a new reality on the law of the sea, bringing into being an effective system of enforcement of international standards. This newly-established system, which was being formed during the last thirty years, is now in place and ready to be tested. Indeed, the next few years will suffice to evaluate the true value of this

international system for the regulation of shipping safety and pollution prevention, and to assess whether the shipping industry can sustain this new order. In this, the English legal system - being the protagonist in the establishment of private shipping law - will have a very significant say: if the changes are wholly accepted they will give IMO the green light to proceed with further and even more radical measures. If they are wholly rejected, this would constitute a blow to the organisation which might prove fatal and would be likely to lead to an increase in the phenomenon of unilateralism while at the same time it will deprive English maritime law from all the positive elements generated within IMO. If, however, English judges find ways of allowing this new order to make a helpful contribution where there is room for development in the evolution of private shipping law, then the international shipping community may gain the maximum benefit in so far as the area of law is concerned.

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APPENDIX 1

MEMORANDUM OF UNDERSTANDING ON PORT STATE CONTROL IN IMPLEMENTING AGREEMENTS ON MARITIME SAFETY AND PROTECTION OF THE MARINE ENVIRONMENT, 1982*

The Maritime Authorities of Belgium, Denmark, Finland, France, ,Germany (Federal Republic of) Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom of Great Britain and Northern Ireland, hereinafter referred to as "the Authorities"

Recalling the Final Declaration adopted on 2 December 1980 by the Regional European Conference on Maritime Safety which underlined the need to increase maritime safety and the protection of the marine environment and the importance of improving living and working conditions on board ship;

Noting with appreciation the progress achieved in these fields by the Intergovernmental Maritime Consultative Organisation and the International Labour Organisation;

Noting also the contribution of the European Communities towards meeting the above mentioned objectives;

Mindful that the principal responsibility for the effective application of standards laid down in international instruments rests upon the authorities of the State whose flag a ship is entitled to fly;

Recognising nevertheless that effective action by port States is required to prevent the operation of substandard ships;

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* Note: The present text incorporates the original text as amended by February 1995

Recognising also the need to avoid distorting competition between ports;

Convinced of the necessity, for these purposes, of an improved and harmonised system of port state control and of strengthening co-operation and the exchange of information

Have reached the following understanding:

Section 1. Commitments

1. 1 Each Authority will give effect to the provisions of the present Memorandum and the Annexes thereto, which constitute an integral part of the Memorandum.

1.2 Each Authority will maintain an effective system of port state control with a view to ensuring that, without discrimination as to flag, foreign merchant ships visiting the ports of its State comply with the standards laid down in the relevant instruments as defined in section 2.

1.3 Each Authority will achieve, within a period of 3 years from the coming into effect of the Memorandum, an annual total of inspections corresponding to 25% of the estimated number of individual foreign merchant ships, hereinafter referred to as "ships", which entered the ports of its State during a recent representative period of 12 months.

1.4 Each Authority will consult, cooperage and exchange information with the other Authorities in order to further the aims of the Memorandum.

Section 2. Relevant instruments

2.1 For the purposes of the Memorandum "relevant instruments" are the following instruments:

- the International Convention on Load Lines, 1966;
- the Protocol of 1988 relating to the International Convention on Load Lines, 1966;
- the International Convention for the Safety of Life at Sea, 1974;
- the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974;

- the Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974;
- the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto;
  the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978;
- the Convention on the International Regulations for Preventing Collisions at Sea, 1972:
- the Merchant Shipping (Minimum Standards) Convention, 1976; (ILO Convention No. 147).

2.2 With respect to the Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention 147), each Authority will apply the instructions in Annex 1 for the application of ILO publication "Inspection of Labour Conditions on board ship: Guide-lines for procedure

2.3 Each Authority will apply those relevant instruments which are in force and to which its State is a Party. In the case of amendments to a relevant instrument each Authority will apply those amendments which are in force and which its State has accepted. An instrument so amended will then be deemed to be the "relevant instrument" for that Authority.

2.4 In applying a relevant instrument for the purposes of port state control, the Authorities will ensure that no more favourable treatment is given to ships entitled to fly the flag of a State which is not a Party to that instrument.

2.5 In the case of ships below 500 tons gross tonnage the Authorities will apply those requirements of the relevant instruments which are applicable and will to the extent that a relevant instrument does not apply take such action as may be necessary to ensure that those ships are not clearly hazardous to safety, health or the environment, having regard in particular to Annex I.

Section 3. Inspection procedures, rectification and detention

3. 1 In fulfilling their commitments the Authorities will carry out inspections, which will consist of a visit on board a ship in order to check the certificates and documents relevant for the purposes of the Memorandum. In the absence of valid certificates or documents or if there are clear grounds for believing that the condition of a ship or its

equipment, or its crew does not substantially meet the requirements of a relevant instrument, a more detailed inspection will be carried out. It is necessary that Authorities include control on compliance with on board operational requirements in their control procedures. Inspections will be carried out in accordance with the guidelines specified in Annex 1.

3.2.1 The Authorities will regard as "clear grounds" inter alia the following:

- a report or notification by another Authority;
- a report or complaint by the master, a crew member, or any person or organisation with a legitimate interest in the safe operation of the ship, shipboard living and work conditions or the prevention of pollution, unless the Authority concerned deems the report or complaint to be manifestly unfounded;
- other indications of serious deficiencies, having regard in particular to Annex 1.

3.2.2 For the purpose of control on compliance with on board operational requirements, specific "clear grounds" are the following:

- evidence of operational shortcomings revealed during port State control procedures in accordance with SOLAS 74, MARPOL 73/78 and STCW 1978;
- evidence of cargo and other operations not being conducted safely or in accordance with IMO guidelines;
- involvement of the ship in incidents due to failure to comply with operational requirements;
- evidence, from the witnessing of a fire and abandon ship drill, that the crew are not familiar with essential procedures;
- absence of an up-to-date muster list;
- indications that key crew members may not be able to communicate with each other or with other persons on board.

3.2.3 Nothing in these procedures should be construed as restricting the powers of the Authorities to take measures within its jurisdiction in respect of any matter to which the relevant instruments relate.

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

(1) passenger ships and roll-on/roll-off ships;

(2) ships which may present a special hazard, for instance oil tankers, gas carriers, chemical tankers and ships carrying harmful substances in packaged form;

(3) ships which have had several recent deficiencies.

3.4 The Authorities will seek to avoid inspecting ships which have been inspected by any of the other Authorities within the previous six months unless they have clear grounds for inspection. The frequency of inspections does not apply to the ships referred to in section 3.3, in which case the Authorities will seek satisfaction whenever they will deem this appropriate.

3.5 Inspections will be carried out by properly qualified persons authorised for that purpose by the Authority concerned and acting under its responsibility.

3.6 Each Authority will endeavour to secure the rectification of deficiencies detected.

3.7 In the case of deficiencies which are clearly hazardous to safety, health or the environment, the Authority will, except as provided in 3.8, ensure that the hazard is removed before the ship is allowed to proceed to sea and for this purpose will take appropriate action, which may include detention. The Authority will, as soon as possible, notify the flag State through its consul or, in his absence, its nearest diplomatic representative or its maritime authority of the action taken. Where the certifying authority is an organisation other than a maritime administration, the former will also be advised.

3.8 Where deficiencies referred to in 3.7 cannot be remedied in the port of inspection the Authority may allow the ship to proceed to another port, subject to any appropriate conditions determined by that Authority with a view to ensuring that the ship can so proceed without unreasonable danger to safety health or the environment, in such circumstances the Authority will notify the competent authority of the region State where the next port of call of the ship is situated, the parties mentioned in 3.7 and any other authority as appropriate. Notification to Authorities will be made in accordance with Annex 2. The Authority receiving such notification will inform the notifying Authority of action taken.

3.9 The provisions of sections 3.7 and 3.8 are without prejudice to the requirements of relevant instruments or procedures established by international organisations concerning notification and reporting procedures related to port state control.

3.10 The Authorities will ensure that, on the conclusion of an inspection. the master of the ship is provided with a document, in the form specified

in Annex 3, giving the results of the inspection and details of any action taken.

3. 11 'When exercising control under the Memorandum, the Authorities will make all possible efforts to avoid unduly detaining or delaying a ship. Nothing in the Memorandum affects rights created by provisions of relevant instruments relating to compensation for undue detention or delay.

Section 4. Provision of information

Each Authority will report on its inspections under the Memorandum and their results, in accordance with the procedures specified in Annex 4.

Section 5. Operational violations

The Authorities will upon the request of another Authority, endeavour to secure evidence relating to suspected violations of the requirements of operational matters of Rule 10 of the International Regulations for Preventing Collisions at Sea, 1972 and the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978, relating thereto. In case of suspected violations involving the discharge of harmful substances, an Authority, will, upon the request of another Authority, visit in port the ship suspected of such a violation in order to obtain information and where appropriate to take a sample of any alleged pollutant.

Section 6. Organisation

6.1 A Committee will be established composed of a representative of each of the Authorities and of the Commission of the European Communities. An observer from each of the International Maritime Organisation and the International Labour Organisation will be invited to participate in the work of the Committee.

6.2 The Committee will meet once a year or at such other times as it may decide.

6.3 The Committee will:

carry out the specific tasks assigned to it under the Memorandum;

- promote by all means necessary, including seminars for surveyors, the harmonisation of procedures and practices relating to the inspection rectification, detention and the application of 2.4;
- develop and review guidelines for carrying out inspections under the Memorandum;
- develop and review procedures for the exchange of information;
- keep under review other matters relating to the operation and the effectiveness of the Memorandum.

6.4 A secretariat provided by the Netherlands' Ministry of Transport and Public Works will set up and will have its office in The Hague.

6.5 The secretariat, acting under the guidance of the Committee and within the limits of the resources made available to it, will:

prepare meetings, circulate papers and provide such assistance as may be required to enable the Committee to carry out its functions;

- facilitate the exchange of information, carry out the procedures outlined in Annex 4 and prepare reports as may be necessary for the purposes of the Memorandum;
- carry out such other work as may be necessary to ensure the effective operation of the Memorandum.

Section 7. Amendments

7. 1 Any Authority may propose amendments to the Memorandum.

7.2 In the case of proposed amendments to sections of the Memorandum the following procedure will apply:

(a) the proposed amendments will be submitted through the secretariat for consideration by the Committee;

(b) amendments will be adopted by a two-thirds majority of the representatives of the Authorities present and voting in the Committee. If so adopted an amendment will be communicated by the secretariat to the Authorities for acceptance;

(c) an amendment will be deemed to have been accepted either at the end of a period of six months after adoption by the representatives of the Authorities in the Committee or at he end of any different period determined unanimously by the representatives of the Authorities in the Committee at the time of adoption, unless

within the relevant period an objection is communicated to the secretariat by an Authority:

(d) an amendment will take effect 60 days after it has been accepted or at the end of any different period determined unanimously by the representatives of the Authorities in the Committee.

7.3 In the case of proposed amendments to Annexes of the Memorandum the following procedure will apply:

(a) the proposed amendment will be submitted through the secretariat for consideration by the Authorities;

(b) The amendment will be deemed to have been accepted at the end of a period of three months from the date on which it has been communicated by the secretariat unless an Authority requests in writing that the amendment should be considered by the Committee. In the latter case the procedure specified in 7.2 will apply;

(c) the amendment will take effect 60 days after it has been accepted or at the end of any different period determined unanimously by the Authorities.

Section 8

8.1 The Memorandum is without prejudice to rights and obligations under any international Agreement.

8.2 A Maritime Authority of another State may, with the consent of the Authorities participating in the Memorandum, adhere to the Memorandum. For such an Authority the Memorandum will take effect upon such date as may be mutually agreed.

8.3 When the Memorandum takes effect, it will supersede the "Memorandum of Understanding between Certain Maritime Authorities on the Maintenance of Standards on Merchant Ships", signed at The Hague on 2 March 1978.

8.4 The Memorandum will take effect on 1 July 1982.

8.5 The English and French versions of the text of the Memorandum are equally authentic.

Signed at Paris in the English and French languages, this twenty-sixth day of January one thousand nine hundred and eighty-two.

APPENDIX 2

COUNCIL DIRECTIVE
of 19 June 1995

concerning the enforcement, in respect of shipping using Community Ports and sailing in the waters under the jurisdiction of the Member States of international standards for ship safety, pollution prevention and shipboard living and working conditions (port state control)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 84 (2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with Article 189c of the Treaty,

Whereas the Community is seriously concerned about shipping casualties and pollution of the seas and coastlines of the Member States;

Whereas the Community is equally concerned about on-board living and working conditions;

Whereas the Council, at its meeting on 25 January 1993, adopted conclusions that urged the Community and the Member States to ensure more effective application and enforcement of adequate international maritime safety and environment protection standards and to implement the new measures when adopted;

Whereas, in its resolution of 8 June 1993 on a common policy on safe seas (4), the Council urged the Commission to submit as soon as possible to the Council suggestions for specific action and formal proposals concerning criteria for the inspection of ships, including the harmonisation of detention rules, and including the possibility of publication of the results of the inspections and refusal of access to Community ports;

Whereas safety, pollution prevention and shipboard living and working conditions may be effectively enhanced through a drastic reduction of substandard ships from Community waters, by strictly applying international Conventions, codes and resolutions;

Whereas monitoring the compliance of ships with the international standards for safety, pollution prevention and shipboard living and working conditions should rest primarily with the flag State; whereas, however, there is a serious failure on the part of an increasing number of flag States to implement and enforce international standards; whereas henceforth the monitoring of compliance with the international standards for safety, pollution prevention and shipboard living and working conditions has also to be ensured by the port State;

Whereas a harmonised approach to the effective enforcement of these international standards by the Member States in respect of ships sailing in the waters under their jurisdiction and using their ports will avoid distortions of competition;

Whereas a framework in Community law for harmonising inspection procedures is fundamental to ensuring the homogeneous application of the principles of shipping safety and prevention of pollution which lie at the heart of Community transport and environment policies;

Whereas pollution of the seas is by nature a trans-boundary phenomenon; whereas, in accordance with the principle of subsidiarity, the development of the means of taking preventive action in this field as regards the seas adjacent to the Member States is best done at Community level, since Member States cannot take adequate and effective action in isolation;

Whereas the adoption of a Council Directive is the appropriate procedure for laying down the legal framework and the harmonised rules and criteria for port State control;

Whereas advantage should be taken of the experience gained during the operation of the Paris Memorandum of Understanding (MOU on Port State Control (PSC), signed in Paris on 2 January 1982;

Whereas the inspection by each Member State of at least 25 % of the number of individual foreign ships which enter its ports in a given year in practice means that a large number of ships operating within the Community area at any given time have undergone an inspection;

Whereas further efforts should be made to develop a better targeting system;

Whereas the rules and procedures for port-State inspections, including criteria for the detention of ships, must be harmonised to ensure consistent effectiveness in all ports, which would also drastically reduce the selective use of certain ports of destination to avoid the net of proper control;

Whereas the casualty, detention and deficiency statistics published in the Commission's communication entitled A common policy on safe seas' and in the annual report of the MOU show that certain categories of ships need to be subject to an expanded inspection;

Whereas non-compliance with the provisions of the relevant Conventions must be rectified; whereas ships which are required to take corrective action must, where the deficiencies in compliance are clearly hazardous to safety, health or the environment, be detained until such time as the non-compliance has been rectified;

Whereas a right of appeal should be made available against decisions for detention taken by the competent authorities, in order to prevent unreasonable decisions which are liable to cause undue detention and delay;

Whereas the facilities in the port of inspection may be such that the competent authority will be obliged in authorise the ship to proceed to an appropriate repair yard, provided that the conditions for the transfer are complied with; whereas non-complying ships would continue to pose a threat to safety, health or the environment and to enjoy commercial advantages by not being upgraded in accordance with the relevant provisions of the Conventions and should therefore be refused access to all ports in the Community;

Whereas there are circumstances where a ship which has been refused access to ports within the Community has to be granted permission to enter; whereas under such circumstances the ship should only be permitted access to a specific port if all precautions are taken to ensure it safe entry;

Whereas, given the complexity of the requirements of the Conventions as regards a ship's construction, equipment and manning, the severe consequences of the decisions taken by the inspectors, and the necessity for the inspectors to take completely impartial decisions, inspections must be carried out only by inspectors who are duly authorised public service employees or other such persons, and highly knowledgeable and experienced;

Whereas pilots and port authorities may be able to provide useful information on the deficiencies of such ships and crews;

Whereas co-operation between the competent authorities of the Member States and other authorities or organisations is necessary to ensure an effective follow-up with regard to ships with deficiencies which have been permitted to proceed and for the exchange of information about ships in port;

Whereas the information system called Sirenac E established under the MOU provides a large amount of the additional information needed for the application of this Directive;

Whereas publication of information concerning ships which do not comply with international standards on safety, health and protection of the marine environment, may be an effective deterrent discouraging shippers to use such ships, and an incentive to their owners to take corrective action without being compelled to do so;

Whereas all costs of inspecting ships which warrant detention should be borne by the owner or the operator;

Whereas for the purposes of implementing this Directive use should be made of the Committee set up pursuant to Article 12 of Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods (I in order to assist the Commission with the task of adapting Member States' inspection obligations on the basis of experience gained, taking into account developments in the MOU, and also adopting the Annexes as necessary in the light of amendments to the Conventions, Protocols, codes and resolutions of relevant international bodies and to the
MOU,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Purpose

The purpose of this Directive is to help drastically to reduce substandard shipping in the waters under the jurisdiction of Member States by:

- increasing compliance with international and relevant Community legislation on maritime safety, protection of the marine environment and living and working conditions on board ships of all flags,

- establishing common criteria for control of ships by the port State and harmonising procedures on inspection and detention, taking proper account of the commitments made by the maritime authorities of the Member States under the Paris Memorandum of Understanding on Port State Control (MOU).

Article 2

Definitions

For the purpose of this Directive including its Annexes:

1.'Conventions' means:

- the International Convention on Load Lines 1966 (LL 66(,

  the International Convention for the Safety of Life at Sea, 1974 (Solas 74),

- the International Convention for the Prevention of Pollution from Ships, 1973, and the 1978 Protocol relating thereto (Marpol 73/78),

- the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STEW 78),

- the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (Colreg 72),

- the International Convention on Tonnage Measurement of Ships, 1969 and

the Merchant Shipping (Minimum Standards(Convention, 1976 (ILO No 147),

together with the Protocols and amendments to these Conventions and related codes of mandatory status, in force at the date of adoption of this Directive.

2. 'MOU' means the Memorandum of Understanding on Port State Control, signed in Paris on 26 January 1982, as it stands at the date of adoption of this Directive.

3 'Ship' means any seagoing vessel to which one or more of the Conventions apply, flying a flag other than that of the port State.

4. 'Off shore installation' means a fixed or floating platform operating on or over the continental shelf of a Member State.

5. 'Inspector' means a public-sector employee or other person, duly authorised by the competent authority of a Member State to carry out port-State control inspections, end responsible to that competent authority.

6. *'Inspection'* means a visit on board a ship in order to check both the validity of the relevant certificates and other documents and the condition of the ship, its equipment and crew, as well as the living and working conditions of the crew.

7. 'More detailed inspection' means an inspection where the ship, its equipment and crew as a whole or, as appropriate, parts thereof ate subjected, in the circumstances specified in Article 6 (3(, to an in-depth inspection covering the ship's construction, equipment, manning, living and working conditions and compliance with on-board operational procedures.

8. 'Expanded inspection' means an inspection as specified in Article 7.

9. 'Detention' means the formal prohibition of a ship to proceed to sea due to established deficiencies which, individually or together, make the ship unseaworthy.

10. 'Stoppage of an operation' means a formal prohibition of a ship to continue an operation due to established deficiencies which, individually or together, would render the continued operation hazardous.

Article 3

Scope

1. This Directive applies to any ship and its crew:

- calling at a port of a Member State or at an off-shore installation, or

  anchored off such a port or such an installation.

Nothing in this Article shall affect the rights of intervention available to a Member State under the relevant international Conventions.

2. In case of ships of a gross tonnage below 500, Member States shall apply those requirements of a relevant Convention which are applicable and shall, to the extent that a Convention does not apply, take such action as may be necessary to ensure that the ships concerned are not clearly hazardous to safety, health or the environment. In their application of this paragraph, Member States shall be guided by Annex 1 to the MOU.

3. When inspecting a ship flying the flag of a State which is not a party to a Convention, Member States shall ensure that the treatment given to such ship and its crew is no more favourable than that given to a ship flying the flag of a State which is a party to that Convention.

4. Fishing vessels, ships of war, naval auxiliaries, wooden ships of a primitive build, government ships used for non-commercial purposes and pleasure yachts not engaged in trade shall be excluded from the scope of this Directive.

Article 4

Inspection body

Member States shall maintain appropriate national maritime administrations, hereinafter called 'competent authorities', for the inspection of ships and shall take whatever measures are appropriate to ensure that their competent authorities perform their duties as laid down in this Directive.

Article 5

Inspection commitments

1. The competent authority of each Member Sate shall carry out an annual total number of inspections corresponding to at least 25 % of the number of individual ships which entered its ports during a representative calendar year.

2. In selecting ships for inspection the competent authority shall give priority to the ships referred to in Annex I.

3. Member States shall refrain from inspecting ships which have been inspected by any Number State within the previous six months, provided that:

- the ship is not listed in Annex I, and

- no deficiencies have been reported, following a previous inspection, and

- no clear grounds exist for carrying out an inspection.

4. The provisions of paragraph 3 shall not apply to any of the operational controls specifically provided for in the Conventions.

5. The Member States and the Commission shall cooperate in seeking to develop priorities and practices which will enable ships likely to be defective to be targeted more effectively.

Any consequent amendment of this Article, except to the figure of 25 % in paragraph 1, shall be made under the provisions of Article 19.

Article 6

Inspection procedure

1.The competent authority shall ensure that the inspector shall as a minimum:

(a) check the certificates and documents listed in Annex II, to the extent applicable;

(b)satisfy himself of the overall condition of the ship, including the engine room and accommodation and including hygienic conditions.

2. The inspector may examine all relevant certificates and documents, other than those listed in Annex II, which are required to be carried on board in accordance with the Conventions.

3. Whenever there are clear grounds for believing, after the inspection referred to in paragraphs 1 and 2, that the condition of a ship or of its equipment or crew does not substantially meet the relevant requirements of a Convention, a more detailed inspection shall be carried out, including further checking of compliance with on-board operational requirements.

'Clear grounds' exist when the inspector finds evidence which in his professional judgement warrants a more detailed inspection of the ship, its equipment or its crew.

Examples of 'clear grounds' are set out in Annex III.

4. The relevant procedures and guidelines for the control of ships specified in Annex ~ shall also be observed.

Article 7

Expanded inspection of certain ships

1. Where there are clear grounds for a detailed inspection of a ship belonging to the categories listed in Annex V, Member States shall ensure that an expanded inspection is carried out.

2. Annex V, section B, contains non-mandatory guidelines for expanded inspection.

3. The ships referred to in paragraph 1 shall be subject to an expanded inspection by any of the competent authorities of the Member States only once during a period of 12 months. However, these ships may be subject to the inspection provided for in Article 6 (1) and (2).

4. In the case of passenger ships operating on a regular schedule in or out of a port in a Member State, an expanded inspection of each ship shall be carried out by the competent authority of that Member State. When a passenger ship operates such a schedule between-ports in Member States, one of the States between which the ship is operating shall undertake the expanded inspection.

Article 8

Report of inspection to the master

1. On completion of an inspection, a more detailed inspection, or an expanded inspection, the master of the ship shall be provided by the inspector with a document in the form specified in Annex 3 to the MOU, giving the results of the inspection and details of any decisions taken by the inspector, and of corrective action to be taken by the master, owner or operator.

In the case of deficiencies warranting the detention of a ship, the document to be given to the master in accordance with paragraph I shall include information about the future publication of the detention order in accordance with the provisions of this Directive.

Article 9

Rectification and detention

1. The competent authority shall be satisfied that any deficiencies confirmed or revealed by the inspection referred to in Articles 6 and 7 are or will be rectified in accordance with the Conventions.

2. In the case of deficiencies which are clearly hazardous to safety, health or the environment, the competent authority of the port State where the ship is being inspected shall ensure that the ship is detained, or the operation in the course of which the deficiencies have been revealed is stopped. The detention order or stoppage of an operation shall not be lifted until the hazard is removed or until such authority establishes that the ship can, subject to any necessary conditions, proceed to sea or the operation be resumed without risk to the safety and health of passengers or crew, or risk to other ships, or without there being an unreasonable threat of harm to the marine environment.

3. When exercising his professional judgement as to whether or not a ship should be detained, the inspector shall apply the criteria set out in Annex VI.

4. In exceptional circumstances, where the overall condition of a ship is obviously substandard, the competent authority may suspend the inspection of that ship until the responsible parties have taken the steps necessary to ensure that it complies with the relevant requirements of the Conventions.

5. In the event that the inspections referred to in Articles 6 and 7 give rise to detention, the competent authority shall immediately inform, in writing, the administration of the State whose flag the ship is entitled to fly (hereinafter called 'flag administration' or the Consul or, in his absence, the nearest diplomatic representative of the State, of all the circumstances in which intervention was deemed necessary. In addition, nominated surveyors or recognised organisations responsible for the issue of the ship's certificates shall also be notified where relevant.

6. The provisions of this Directive shall be without prejudice to the additional requirements of the Conventions concerning notification and reporting procedures related to port State control.

7. When exercising port State control under this Directive, all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is unduly detained or delayed, the owner or operator shall be entitled to compensation for any loss or damage suffered. In any instance of alleged undue detention or delay the burden of proof shall lie with the owner or operator of the ship.

Article 10

Right of appeal

1. The owner or the operator of a ship or his representative in the Member State shall have a right of appeal against a detention decision taken by the competent authority. An appeal shall not cause the detention to be suspended.

2. Member States shall establish and maintain appropriate procedures for this purpose in accordance with their national legislation.

3. The competent authority shall properly inform the master of a ship referred to in paragraph 1 of the right of appeal.

Article 11

Follow up to inspections and detentions

1. Where deficiencies as referred to in Article 9 (2) cannot be rectified in the port of inspection, the competent authority of that Member State may allow the ship concerned to proceed to the nearest appropriate repair yard available, as chosen by the master and the authorities concerned, provided that the conditions determined by the competent authority of the flag State and agreed by that Member State are complied with. Such conditions shall ensure that the ship can proceed without risk to the safety and health of passengers or crew, or risk to other ships, or without there being an unreasonable threat of harm to the marine environment.

2. In the circumstances referred to in paragraph 1, the competent authority of the Member State in the port of inspection shall notify the competent authority of the State where the repair yard is situated, the parties mentioned in Article 9 *(5(* and any other authority as appropriate of all the conditions for the voyage.

3. The notification of the parties referred to in paragraph 2 shall be in accordance with Annex 2 to the MOU.

The competent authority of a Member State receiving such notification shall inform the notifying authority of the action taken.

4. Member States shall take measures to ensure that ships referred to in paragraph 1 which proceed to sea:

(i) without complying with the conditions determined by the competent authority of any Member State in the port of inspection; or

(ii) which refuse to comply with the applicable requirements of the Conventions by not calling into the indicated repair yard;

shall be refused access to any port within the Community, until the owner or operator has provided evidence to the satisfaction of the competent authority of the Member State where the ship was found defective that the ship fully complies with all applicable requirements of the Conventions.

5. In the circumstances referred to in paragraph 4 (i), the competent authority of the Member State where the ship was found defective shall immediately alert the competent authorities of all the other Member States.

In the circumstances referred to in paragraph 4 (ii), the competent authority of the Member State in which the repair yard lies shall immediately alert the competent authorities of all the other Member States.

Before denying entry, the Member State may request consultations with the flag administration of the ship concerned.

6. Notwithstanding the provisions of paragraph 4, access to a specific port may be permitted by the relevant authority of that port State in the event of *force majeure* or overriding safety considerations, or to reduce or minimise the risk of pollution or to have deficiencies rectified, provided adequate measures to the satisfaction of the competent authority of such Member State have been implemented by the owner, the operator or the master of the ship to ensure safe entry.

Article 12

Professional profile of inspectors

1. The inspections shall be carried out only by inspectors who fulfil the qualification criteria specified in Annex VII.

2. When the required professional expertise cannot be provided by the competent authority of the port State, the inspector of that competent authority may be assisted by any person with the required expertise.

3.The inspectors carrying out port State control and the persons assisting them shall have no commercial interest either in the port of inspection or in the ships inspected, nor shall the inspectors be employed by or undertake work on behalf of non-governmental organisations which issue statutory and classification certificates or which carry out the surveys necessary for the issue of those certificates to ships.

4.Each inspector shall carry a personal document in the form of an identity card issued by his competent authority in accordance with the national legislation, indicating that the inspector is authorised to carry out inspections.

A common model for such an identity card shall be established in accordance with the procedure in Article 19.

Article 13

Reports from pilots and port authorities

1. Pilots of Member States, engaged in berthing or unberthing ships or engaged on ships bound for a port within a Member State, shall immediately inform the competent authority of the port State or the coastal State, as appropriate, whenever they learn in the course of

their normal duties that there are deficiencies which may prejudice the safe navigation of the ship, or which may pose a threat of harm to the marine environment.

2. If port authorities, when exercising their normal duties, learn-n that a ship within their port has deficiencies which may prejudice the safety of the ship. or poses an unreasonable threat of harm to the marine environment, such authority shall immediately inform the competent authority of the port State concerned.

Article 14

Cooperation

1. Each Member State shall make provision for cooperation between its competent authority, its port authorities and other relevant authorities or commercial organisations to ensure that its competent authority can obtain all relevant information on ships calling at its ports.

2.Member States shall maintain provisions for the exchange of information and cooperation between their competent authority and the competent authorities of all other Member States and maintain the established operational link between their competent authority, the Commission and the Sirenac E information system set up in St Malo, France.

3.The information referred to in paragraph 2 shall be that specified in Annex 4 to the MOU, and that required to comply with Article 15 of this Directive.

Article 15

Publication of detentions

Each competent authority shall as a minimum publish quarterly information concerning ships detained during the previous three-month period and which have been detained more

than once during the past 24 months. The information published shall include the following:

name of the ship, name of the shipowner or the operator of the ship, IMO number, flag State,

the classification society, where relevant, and, if applicable, any other Party which has issued certificates to such ship in accordance with the Conventions on behalf of the flag State,

reason for detention,

port and date of detention.

Article 16

Reimbursement of costs

1. Should the inspections referred to in Articles 6 and 7 confirm or reveal deficiencies in relation to the requirements of a Convention warranting the detention of a ship, all costs relating to the inspections in any normal accounting period shall be covered by the shipowner or the operator or by his representative in the port State.

2.All costs relating to inspections carried out by the competent authority of a Member State under the provisions of Article 11 (4) shall be charged to the owner or operator of the ship.

3.The detention shall not be lifted until full payment has been made or a sufficient guarantee has been given for the reimbursement of the costs.

Article 17

Data to monitor implementation

1. Member States shall supply the following information to the Commission and the MOU Secretariat:

- number of inspectors working on their behalf on port State inspection in accordance with this Directive. For authorities where inspectors perform port-State inspections on a part-time basis only, the total must be converted into a number of full-time employed inspectors,

- number of individual ships entering their ports in a representative calendar year within the previous five-year period.

2. The information listed in paragraph 1 shall be forwarded within three months following the entry into force of this Directive and thereafter by 1 October once every three calendar years.

Article 18

Regulatory Committee

The Commission shall be assisted by the Committee set up pursuant to Article 12 of Directive 93/75/EEC in accordance with the procedure laid down in that Article.

Article 19

Amendment procedure

This Directive may be amended in accordance with the procedure laid down in Article 18, in order to:

(a) adapt the inspection and publication obligations of Member States mentioned in Article

5 (except the figure of 25 % referred to in paragraph 1 thereof), and in Articles 6, 7 and 15 on the basis of the experience gained from implementation of this Directive and taking into account developments in the MOU;

(b) adapt the Annexes in order to take into account amendments which have entered into force to the Conventions, Protocols, codes and resolutions of relevant international organisations and to the MOU.

Article 20

Implementation

1. Member States shall adopt the laws, regulations and administrative provisions necessary to implement this Directive not later than 30 June 1996 and shall forthwith inform the Commission thereof.

2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by Member States.

3. Member States shall communicate to the Commission the text of the provisions of national law which they have adopted in the field governed by this Directive.

Article 21

This Directive shall enter into force on the 20th day following that of its publication.

Article 22

This Directive is addressed to the Member States.

Done at Luxembourg, 19 June 1995.

For the Council
The President
B.PONS

APPENDIX 3

COUNCIL REGULATION (EC) No 3051/95
of 8 December

on the safety management of roll-on/roll-off passenger ferries (ro-ro ferries)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing he European Community, and in particular Article 84 (2) thereof,

Having regard to the proposal from the Commission ,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure referred to in Article 189c of the Treaty (3),

Whereas the Community is seriously concerned by shipping casualties with loss of life;

Whereas the International Safety Management Code providing for the safe operation of ships and for pollution prevention, hereinafter referred to as the 'ISM Code', was adopted by the International Maritime Organisation (IMO) through Assembly Resolution A.741(18) of 4 November 1993 in the presence of the Number States and, through its incorporation into the International Convention on the Safety of Life at Sea 1974, will apply to ro-ro passenger vessels from 1 July 1998;

Whereas this represents one of a series of measures to improve safety at sea; whereas the ISM Code is not yet of a mandatory but of a recommendatory nature;

Whereas safety of human life at sea may be effectively enhanced by applying the ISM Code strictly and on a mandatory basis;

Whereas the Community's most urgent concern is for the safety management of ro-ro passenger ferries; whereas a uniform and coherent implementation of the ISM Code in all Member States can constitute a step towards the safety management of ro-ro passenger ferries;

Whereas in its resolution of 22 December 1994 on the safety of roll-on/roll-off passenger ferries (4), the Council invited the Commission to submit a proposal on the advance mandatory application of the ISM Code to all regular roll-on/roll-off passenger ferry services operating to or from European ports, in compliance with international law;

Whereas strict and mandatory application of the ISM Code is required to ensure the establishment and proper maintenance of safety management systems by companies operating seagoing ro-ro passenger ferries both at ship and at company level;

Whereas action at Community level is the best way to ensure advance mandatory enforcement of the provisions of the ISM Code and effective control of its application, while avoiding distortion of competition between different Community' ports and ro-ro ferries; whereas only a regulation, which is of direct applicability, can ensure such enforcement; whereas advance implementation requires that the Regulation be applicable as from 1 July 1996;

Whereas the advance mandatory implementation of the ISM Code to all ro-ro ferries regardless of their flag also takes into account the request contained in point 2 of IMO Resolution A.741(18) which strongly urges Governments to implement the Code as soon as possible, giving priority *inter alia* to passenger ships;

Whereas the safety of ships is the primary responsibility of flag States; whereas Member States can ensure compliance with adequate safety management rules by ferries flying their flag and companies operating them; whereas the only way to ensure the safety of all ro-ro ferries, irrespective of their flag, operating or wishing to operate on a regular service from their ports is for the Member States to require effective compliance with safe rules as a

condition for operating on a regular service from their ports;

Whereas companies operating to-to ferries exclusively in sheltered waters between ports in the same Member State constitute a more limited risk and will need to assume a proportionately greater administrative work-load than other companies, and should therefore enjoy a temporary derogation;

Whereas it is necessary to identify the requirements under which the provisions of the ISM Code are enforced and to define the conditions for the issue and verification of the document of compliance and of the safety management certificate;

Whereas Member States might find it necessary to delegate or rely upon specialised bodies in order to fulfil their obligations pursuant to this Regulation; whereas the appropriate way of ensuring a uniform and adequate level of control is to require that such bodies should only be those which meet the requirements of Council Directive 94/57/EC of 22 November 1994 on common roles and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations;

Whereas a Member State must have the possibility of suspending the operation of certain ro-ro ferries from its ports where it considers that there is a risk of serious danger to safety of life or property or the environment, subject to a decision to be taken in the framework of a regulatory committee, to which the Member States must conform;

Whereas a simplified procedure involving a committee of a regulatory nature is necessary to amend this Regulation taking into account developments at international level;

Whereas the rapid introduction of these safety rules raises specific technical and administrative problems for Greece because of the very large number of companies established in Greece operating ferries under the Greek flag and exclusively between Greek ports; whereas a derogation of limited duration to cover this situation Should therefore be granted bearing in mind in addition that regular passenger and ferry services between Greek ports have been excluded until 1 January 2004 from the freedom ro provide services granted by Council Regulation (EEC) No *3577/92* of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage);

HAS ADOPTED THIS REGULATION:

Article 1

The purpose of this Regulation is to enhance the safe management, safe operation and pollution prevention of to-to passenger ferries operating to or from ports of the Member States of the Community on a regular service by ensuring that companies operating ro-ro ferries comply with the ISM Code through:

the establishment and proper maintenance of shipboard and shore-based safety management systems by companies, and

the control thereof by flag and port State administrations.

Article 2

For the purpose of this Regulation and with a view to the implementation of the ISM Code:

(a) 'ro-ro ferry' means a seagoing passenger vessel with facilities to enable road or rail vehicles to roll on and toil off the vessel, and carrying more than 12 passengers;

(b) 'regular service' means a series of ro-ro ferry crossings operated so as to serve traffic between the same two or more points, either:

1. according to a published timetable; or

2. with crossings so regular or frequent that they constitute a recognisable systematic series

(c) 'company' means the owner of a to-to ferry or any other organisation or person such as the manager, or the bareboat charterer, who has assumed responsibility for operating the ro-ro ferry from the owner;

(d) 'recognised organisation' means a body recognised in compliance with the provisions of Directive 94/57/EC

(e) 'ISM Code' means the International Management Code for the Safe Operation of Ships and for Pollution Prevention, adopted by' the IMO through Assembly Resolution A.741(18) of 4 November 1993, and annexed to this Regulation;

(f) 'administration' means the Government of the State whose flag the ro-ro ferry is entitled to fly;

(g) 'document of compliance' means the document issued to companies in conformity with paragraph 13.2 of the ISM Code;

(h) 'safety management certificate' means the certificate issued to ro-ro ferries in conformity with paragraph 13.4 of the ISM Code;

(i) 'sheltered waters' means areas where the annual probability of the significant wave height exceeding 1,5 m is less than 10 %, and in which a ro-ro ferry is at no time more than six nautical miles from a place of refuge where shipwrecked persons can land.

Article 3

The Regulation shall apply to all companies, operating at least one ro-ro ferry to or from a port of a Member State of the Community on a regular service regardless of its flag.

Article 4

1. All companies shall comply with all the provisions of paragraphs 1.2 to 13.1 and of paragraph 13.3 of the ISM Code, as if the provisions thereof were mandatory, as a requirement for their vessels to provide regular services to or from a port of a Member State of the Community.

2. By way of derogation from paragraph 1, companies operating a ro-ro ferry or ferries on a regular service exclusively. in sheltered waters between ports situated in the same Member State may defer compliance with the provisions of this Regulation until 1 July 1997.

Article 5

1. Member States shall comply with the provisions of paragraphs 13.2, 13.4 and 13.3; of the ISM Code as if the provisions thereof were mandatory, in relation to companies and ro-ro ferries.

2. For the purposes of paragraph 1, Member States may only authorise, or rely upon, fully' or in part, a recognised organisation.

For the purposes of paragraph 13.2 of the ISM Code, a Member State may only issue documents of compliance tot a company which has its principal place of business on its own territory. Prior to such issue, the Member States shall consult the administration of the States whose flag the ro-ro ferries of that company are entitled to fly, if that administration is not that of the issuing Member State.

3. The document of compliance shall only be valid for five years from the date of its issue, provided always that a verification takes place once a year, in order to confirm the proper functioning of the safety management system, and to confirm that possible modifications introduced since the latest verification satisfy' the provisions of the ISM Code.

4. The safety management certificate shall only be valid for five years from the date of its issue, provided always that an intermediate verification takes place at least every 30 months or more frequently in order to confirm the proper functioning of the safety management system and to confirm that possible modifications introduced since the latest verification satisfy the provisions of the ISM Code. -

5. For the purposes of this Regulation, and in particular Article 6, each Member State shall accept a document of compliance or a safety management certificate issued by the administration of any other Member State or by a recognised organisation acting on its behalf.

6. A Member State shall recognise the documents of compliance and safety management certificates issued by, or on behalf of, the administrations of third countries if it is satisfied that they demonstrate compliance with the provisions of this Regulation. Documents of compliance and safety management certificates issued on behalf of administrations of third countries may only be recognised if they have been issued by a recognised organisation.

Article 6

Member States shall satisfy themselves that all companies providing regular ro-ro ferry services to or from their ports comply with the provisions of this Regulation.

Article 7

Where a Member State considers that a company, notwithstanding the fact that it holds a document of compliance, cannot operate a ro-ro ferry on a regular service to or from its ports on the grounds that there is a risk of serious danger to safety of life or property, or the environment, the operation of such service may be suspended until such time as the danger is removed.

In the above circumstances the following procedure shall apply:

(a) the Member State shall inform the Commission and the other Member States of its decision without delay, giving substantiated reasons therefor;

(b) the Commission shall examine whether the suspension is justified for reasons of serious danger to safety and the environment;

(c) it will be decided, in accordance with the procedure laid down in Article 10 (2), whether or not the decision of the Member State to suspend the operation of such service is justified for reasons of serious danger to safety of life or property', or the environment and, if the suspension is not justified, that the Member State concerned will be requested to withdraw the suspension.

Article 8

In order to take account of the general terms of the ISM Code, the Commission shall review the implementation of this Regulation three years after its entry into force and propose any appropriate measures.

Article 9

In order to take account of developments at international level and, in particular, in the IMO,

(a) the definition of the 'ISM Code' in Article 2;

(b) the periods of validity of the document of compliance and/or the safety management certificate and the frequency of verification relating thereto in Article 5 (3) and (4);

(c) the Annex;

(d) the definition of 'recognised organisation' in Article 2;

may be amended, in accordance with the procedure laid down in Article 10 (2), in particular to introduce into the Annex guidelines for administrations for the implementation of the ISM Code.

Article 10

1. The Commission shall be assisted by the Committee established by Article 12 (1) of Council Directive 93175/EEC.

2. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall he delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is requited to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

3. (a) The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

(b) If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall without delay, submit to the council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

(c) if, on the expiry of a period of 40 days from the date of referral to the Council, the Council has not acted, the proposed measures shall he adopted by the Commission.

Article 11

This Regulation shall enter into force on 1 January 1996.

It shall be applicable as from I July 1996.

By way of derogation from the first subparagraph, this Regulation shall not apply until 31 December 1997 to companies which are incorporated under Greek law, which have their principal place of business in Greece, and which operate ro-ro ferries registered in and flying the flag of Greece providing regular services exclusively between ports situated in Greece.

This Regulation shall be binding in its entirety and directly applicable in all Member States

Done at Brussels, 8 December 1995.

For the Council
The President
J. Borrell Fontelles

APPENDIX 4

Resolution A. 741(18)

Adopted on 4 November 1993

THE ASSEMBLY,

RECALLING Article 15(j) of the Convention on the International Maritime Organisation concerning the functions of the Assembly in relation to regulations and guidelines concerning maritime safety and the prevention and control of marine pollution from ships,

RECALLING ALSO resolution A.680 (17), by which it invited Member Governments to encourage those responsible for the management and operation of ships to take appropriate steps to develop, implement and assess safety and pollution-prevention management in accordance with the MO Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention,

RECALLING ALSO resolution A.596 (15), by which it requested the Maritime Safety Committee to develop, as a matter of urgency, guidelines, wherever relevant, concerning shipboard and shore-based management, and its decision to include in the work programme of the Maritime Safety Committee and the Marine Environment Protection Committee an item on shipboard and shore-based management for the safe operation of ships and for the prevention of marine pollution, respectively,

RECALLING FURTHER resolution A.441 (Xl), by which it invited every State to take the necessary steps to ensure that the owner of a ship which flies the flag of that State provides such State with the current information necessary to enable it to identify and contact the person contracted or otherwise entrusted by the owner to discharge his responsibilities for that ship in regard to matters relating to maritime safety and the protection of the marine environment,

RECALLING FURTHER resolution A.443 (XI), by which it invited Governments to take the necessary steps to safeguard the shipmaster in the proper discharge of his responsibilities in regard to maritime safety and the protection of the marine environment,

RECOGNISING the need for appropriate organisation of management to enable it to respond to the need of those on board ships to achieve and maintain high standards of safety and environmental protection,

RECOGNISING ALSO that the most important means of preventing maritime casualties and pollution of the sea from ships is to design, construct, equip and maintain ships and to operate them with properly trained crews in compliance with international conventions and standards relating to maritime safety and pollution prevention,

NOTING that the Maritime Safety Committee is developing requirements for adoption by Contracting Governments to the International Convention for the Safety of Life at Sea (SOLAS), 1974, which will make compliance with the Code referred to in operative paragraph 1 mandatory,

CONSIDERING that the early implementation of that Code would greatly assist in improving safety at sea and protection of the marine environment,

NOTING FURTHER that the Maritime Safety Committee and the Marine Environment Protection Committee have reviewed resolution A.680 (17) and the Guidelines annexed thereto in developing the Code,

HAVING CONSIDERED the recommendations made by the Maritime Safety Committee at its sixty-second session and by the Marine Environment Protection Committee at its thirty-fourth session,

1. ADOPTS the International Management Code for the Safe Operation of Ships and for Pollution Prevention (International Safety Management (ISM) Code), set out in the annex to the present resolution;

2. STRONGLY URGES Governments to implement the ISM Code on a national basis, giving priority to passenger ships, tankers, gas carriers, bulk carriers and mobile offshore units which are flying their flags, as soon as possible but not later

than 1 June 1998, pending development of the mandatory applications of the Code;

3. REQUESTS Governments to inform the Maritime Safety Committee and the Marine Environment Protection Committee of the action they have taken in implementing the ISM Code;

4. REQUESTS the Maritime Safety Committee and the Marine Environment Protection Committee to develop guidelines for the implementation of the ISM Code;

5 REQUESTS ALSO the Maritime Safety Committee and the Marine Environment Protection Committee to keep the Code and its associated guidelines under review and to amend them as necessary;

6. REVOKES resolution A.680 (17).

APPENDIX 5

International Safety Management Code

PREAMBLE

1 The purpose of this Code is to provide an international standard for the safe management and operation of ships and for pollution prevention.

2 The Assembly adopted resolution A.443(Xl), by which it invited all Governments to take the necessary steps to safeguard the shipmaster in the proper discharge of his responsibilities with regard to maritime safety and the protection of the marine environment.

3 The Assembly also adopted resolution A.680(17), by which it further recognized the need for appropriate organization of management to enable it to respond to the need of those on board ships to achieve and maintain high standards of safety and environmental protection.

4 Recognizing that no two shipping companies or shipowners are the same, and that ships operate under a wide range of different conditions, the Code is based on general principles and objectives.

5 The Code is expressed in broad terms so that it can have a widespread application. Clearly, different levels of management, whether shore-based or at sea, will require varying levels of knowledge and awareness of the items outlined.

6 The cornerstone of good safety management is commitment from the top. In matters of safety and pollution prevention it is the commitment, competence, attitudes and motivation of individuals at all levels that determines the end result.

1 GENERAL

1.1 Definitions

1.1.1 International Safety Management *(ISM)* Code means the International Management Code for the Safe Operation of Ships and for Pollution Prevention as adopted by the Assembly, as may be amended by the Organization.

1.1.2 Company means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the Code.

1.1.3 *Adrhinistration* means the Government of the State whose flag the ship is entitled to fly.

1.2 Objectives

1.2.1 The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular to the marine environment and to property.

1.2.2 Safety-management objectives of the Company should, inter alia:

1 provide for safe practices in ship operation and a safe working environment;

2 establish safeguards against all identified risks; and

3 continuously improve safety-management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.

1.2.3 The safety-management system should ensure:

1 compliance with mandatory rules and regulations; and

2 that applicable codes, guidelines and standards recommended by the Organization, Administrations, classification societies and maritime industry organizations are taken into account.

1.3 Application

The requirements of this Code may be applied to all ships.

1.4 Functional requirements for a safety-management system

Every Company should develop, implement and maintain a safety management system (SMS) which includes the following functional requirements:

1 a safety and environmental protection policy;

2 instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;

3 defined levels of authority and lines of communication between, and amongst, shore and shipboard personnel;

4 procedures for reporting accidents and non-conformities with the provisions of this Code;

5 procedures to prepare for and respond to emergency situations; and

6 procedures for internal audits and management reviews.

2 SAFETY AND ENVIRONMENTAL PROTECTION POLICY

2.1 The Company should establish a safety and environmental-protection policy which describes how the objectives given in paragraph 1.2 will be achieved.

2.2 The Company should ensure that the policy is implemented and maintained at all levels of the organization both, shipbased and shore-based.

3 COMPANY RESPONSIBILITIES AND AUTHORITY

3.1 If the entity who is responsible for the operation of the ship is other than the owner, the owner must report the full name and details of such entity to the Administration.

3.2 The Company should define and document the responsibility, authority and interrelation of all personnel who manage, perform and verify work relating to and affecting safety and pollution prevention.

3.3 The Company is responsible for ensuring that adequate resources and shorebased support are provided to enable the designated person or persons carry out their functions.

4 DESIGNATED PERSON(S)

To ensure the safe operation of each ship and to provide a link between the Company and those on board, every Company, as appropriate, should designate a person or persons ashore having direct access to tht~ highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution-prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required.

5 MASTER'S RESPONSIBILITY AND AUTHORITY

5.1 The Company should clearly define and document the master's responsibility with regard to:

1 implementing the safety and environmental-protection policy of the Company;
2 motivating the crew in the observation of that policy;
3 issuing appropriate orders and instructions in a clear and simple manner;
4 verifying that specified requirements are observed; and

5 reviewing the SMS and reporting its deficiencies to the shor~ based management.

5.2 The Company should ensure that the SMS operating on board the ship contains a clear statement emphasizing the master's authority. The Company should establish in the SMS that the master has the overriding authority and the responsibility to make decisions with respect to safety and pollution prevention and to request the Company's assistance as may be necessary.

6 RESOURCES AND PERSONNEL

6.1 The Company should ensure that the master is:

1 properly qualified for command;
2 fully conversant with the Company's SMS; and
3 given the necessary support so that the master's duties can be safely performed.

6.2 The Company should ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements.

6.3 The Company should establish procedures to ensure that new personnel and personnel transferred to new assignments related to safety and protection of the environment are given proper familiarization with their duties. Instructions which are essential to be provided prior to sailing should be identified, documented and given.

6.4 The Company should ensure that all personnel involved in the Company's SMS have an adequate understanding of relevant rules, regulations, codes and guidelines.

6.5 The Company should establish and maintain procedures for identifying any training which may be required in support of the SMS and ensure that such training is provided for all personnel concerned.

6.6 The Company should establish procedures by which the ship's personnel receive relevant information on the SMS in a working language or languages understood by them.

6.7 The Company should ensure that the ship's personnel are able to communicate

effectively in the execution of their duties related to the SMS.

7 DEVELOPMENT OF PLANS FOR SHIPBOARD OPERATIONS

The Company should establish procedures for the preparation of plans and instructions for key shipboard operations concerning the safety of the ship and the prevention of pollution. The various tasks involved should be defined and assigned to qualified personnel.

8 EMERGENCY PREPAREDNESS

8.1 The Company should establish procedures to identify, describe and respond to potential emergency shipboard situations.

8.2 The Company should establish programmes for drills and exercises to prepare for emergency actions.

8.3 The SMS should provide for measures ensuring that the Company's organization can respond at any time to hazards, accidents and emergency situations involving its ships.

9 REPORIS AND ANALYSIS OF NON~ONFORMIIIES, ACCIDENTS AND HAZARDOUS OCCURRENCES

9.1 The SMS should include procedures ensuring that noncon'~rmities, accidents and hazardous situations are reported to the Company, investigated and analysed with the objective of improving safety and pollution prevention.

9.2 The Comp~y should establish procedures for the implementation of corrective action.

10 MAINTENANCE OF THE SHIP AND EQUIPMENT

10.1 The Company should establish procedures to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements which may be established by the Company.

10.2 In meeting these requirements the Company should ensure that:

1 inspections are held at appropriate intervals;
2 any non-conformity is reported, with its possible cause, if known;
3 appropriate corrective action is taken; and
4 records of these activities are maintained.

10.3 The Company should establish procedures in its SMS to identify equipment and technical systems the sudden operational failure of which may result in hazardous situations. The SMS should provide for specific measures aimed at promoting the reliability of such equipment or systems. These measures should include the regular testing of stand-by arrangements and equipment or technical systems that are not in continuous use.

10.4 The inspections mentioned in 10.2 as well as the measures referred to in 10.3 should be integrated into the ship's operational maintenance routine.

11 DOCUMENTATION

11.1 The Company should establish and maintain procedures to control all documents and data which are relevant to the SMS.

11.2 The Company should ensure that:

1 valid documents are available at all relevant locations;
2 changes to documents are reviewed and approved by
authorized personnel; and
3 obsolete documents are promptly removed.

11.3 The documents used to describe and implement the SMS may be referred to as the Safety Management Manual. Documentation should be kept in a form that the Company considers most effective. Each ship should carry on board all documentation relevant to that ship.

12 COMPANY VERIFICATION, REVIEW AND EVALUATION

12.1 The Company should carry out internal safety audits to verify whether safety and pollution-prevention activities comply with the SMS.

12.2 The Company should periodically evaluate the efficiency of and, when needed, review the SMS in accordance with procedures established by the Company.

12.3 The audits and possible corrective actions should be carried out in accordance with documented procedures.

12.4 Personnel carrying out audits should be independent of the areas being audited unless this is impracticable due to the size and the nature of the Company.

12.5 The results of the audits and reviews should be brought to the attention of all personnel having responsibility in the area involved.

12.6 The management personnel responsible for the area involved should take timely corrective action on deficiencies found.

13 CERTIFICATION, VERIFICATION AND CONTROL

13.1 The ship should be operated by a Company which is issued a document of compliance relevant to that ship.

13.2 A document of compliance should be issued for every Company complying with the requirements of the SM Code by the Administration, by an organization recognized by the Administration or by the Government of the country, acting on behalf of the Administration in which the Company has chosen to conduct its business. This document

should be accepted as evidence that the Company is capable of complying with the requirements of the Code.

13.3 A copy of such a document should be placed on board in order that the master, if so asked, may produce it for the verification of the Administration or organizations recognized by it.

13.4 A certificate, called a Safety Management Certificate, should be issued to a ship by the Administration or organization recognized by the Administration. The Administration should, when issuing the certificate, verify that the Company and its shipboard management operate in accordance with the approved SMS.

13.5 The Administration or an organization recognized by the Administration should periodically verify the proper functioning of the ship's SMS as approved.

APPENDIX 6

ADDITION OF A NEW CHAPTER IX TO THE ANNEX TO THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA, 1974

The following new Chapter IX is added to the Annex.

CHAPTER IX
MANAGEMENT FOR THE SAFE OPERATION OF SHIPS

Regulation 1
Definitions

For the purpose of this chapter, unless expressly provided otherwise:

1. 'International Safety Management (ISM) Code' means the International Management Code for the Safe Operation of Ships and for the Pollution Prevention adopted by the Organisation by resolution A.741(18), as may be amended by the Organisation, provided that such amendments are adopted, brought into force and take effect in accordance with the provisions of article VIII of the present Convention concerning the amendment procedures applicable to the Annex other than Chapter 1.

2. 'Company' means the owner of the ship or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship and who on assuming such responsibility has agreed to take over all the duties and responsibilities imposed by the International Safety Management Code.

3. 'Oil tanker' means an oil tanker as defined in regulation II-1/ 2.12.

4. 'Chemical tanker' means a chemical tanker as defined in regulations VII / 8.2.

5. 'Gas carrier' means a gas carrier as defined in regulation VII/11.2.

6. 'Bulk carrier' means a ship which is constructed generally with single deck, top-side tanks and hopper side tanks in *cargo* spaces, and is intended primarily to carry dry cargo in bulk, and includes such types as ore carriers and combination carriers.

7. 'Mobile offshore drilling unit (MODU)' means a vessel capable of engaging in drilling operations for the exploration for or exploitation of resources beneath the sea-bed such as liquid *or* gaseous hydrocarbons, sulphur or salt.

8. 'High speed Craft' means a craft as defined in regulation X/1.2.

Regulation 2
Application

1. This chapter applies to ships, regardless of the date of construction. as follows:

   a. passenger ships including passenger high speed craft, not later than 1 July 1998;

   b. oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high speed craft of 500 gross tonnage and upwards, not later than 1 July 1998; and

   c. other cargo ships and mobile offshore drilling units of 500 gross tonnage and upwards, not later than 1 July 2002.

2. This chapter does not apply to government-operated ships used for non-commercial purposes.

Regulation 3
Safety Management requirements

1. The company and the ship shall comply with the requirements of the International Safety Management Code.

2. The ship shall be operated by a Company holding a Document of Compliance referred to in Regulation 4.

Regulation 4
Certification

1. A Document of Compliance shall be issued to every company which complies with the requirements of the International Safety Management Code. This document shall be issued by the Administration, by an organisation recognised by the Administration, or at the request of the Administration by another Contracting Government.

2. A copy of the Document of Compliance shall be kept on board the ship in order that the master can produce it on the request for verification.

3. A Certificate, called a Safety Management Certificate, shall be issued to every ship by the Administration or an organisation recognised by the Administration. The Administration or organisation recognised by it shall, before issuing the Safety Management Certificate, verify that the company and its shipboard management operate in accordance with the approved safety management system.

Regulation 5
Maintenance of conditions

The safety management system shall be maintained - in accordance with the provisions of the International Safety Management Code.

Regulation 6
Verification and control

1. The Administration, another Contracting Government at the request of the Administration or an organisation recognised by the Administration shall, periodically verify the proper functioning of the ship's safety management system.

2. Subject to the provisions of paragraph 3 of this regulation, a ship required to hold a certificate issued pursuant to the provisions of regulation 4.3 shall be subject to control in accordance with the provisions of regulation XI/4. For this purpose such certificate shall be treated as a certificate issued under regulation I/12 or I/13.

3. In cases of change of flag State or company, special transitional arrangements shall be made in accordance with the guidelines developed by the Organisation.

APPENDIX 7

STATUS OF CONVENTIONS

01/10/97

	IMO Convention 48	IMO amendments 91	IMO amendments 93	SOLAS Convention 74	SOLAS Protocol 78	SOLAS Protocol 88	Stockholm Agreement 96	LOAD LINES Convention 66	LOAD LINES Protocol 88	TONNAGE Convention 69	COLREG Convention 72	CSC Convention 72	CSC amendments 93	SFV Protocol 93	STCW Convention 78	STCW-F Convention 95	SAR Convention 79	STP Agreement 71 *	STP Protocol 73	INMARSAT Convention 76	INMARSAT amendments 94	INMARSAT OA 76	INMARSAT OA amendments 94	FACILITATION Convention 65	MARPOL 73/78	MARPOL Annex III	MARPOL Annex IV	MARPOL Annex V	LC Convention 72	LC Protocol 96	INTERVENTION Convention 69	INTERVENTION Protocol 73	CLC Convention 69	CLC Protocol 76	CLC Protocol 92	FUND Convention 71	FUND Protocol 76	FUND Protocol 92	NUCLEAR Convention 71	PAL Convention 74	PAL Protocol 76	PAL Protocol 90	LLMC Convention 76	LLMC Protocol 96	SUA Convention 88	SUA Protocol 88	SALVAGE Convention 89	OPRC Convention 90	HNS Convention 96
Afghanistan												X																	X																		
Albania	X																															X	X			X	X										
Algeria	X		X	X	X			X		X	X			X		X			X		X		X	X	X	X	X					X			X											
Andorra																																															
Angola	X			X	X			X			X			X																																	
Antigua & Barbuda	X			X	X			X		X	X			X										X	X	X	X	X					X	X		X											
Argentina	X		X	X	X	X		X	X	X	X	X		X		X			X		X		X	X	X	X	X	X		X								X	X	X				X		X	
Armenia																																															
Australia	X	X	X	X	X	X		X	X	X	X	X	X	X		X			X	X	X	X	X	X	X		X	X		X	X	X	X	X	X	X	X			X		X	X	X	X	
Austria	X			X	X			X		X	X	X		X									X	X	X	X	X																X	X			
Azerbaijan	X			X				X		X	X			X														X																			
Bahamas	X			X	X			X		X	X	X		X					X		X		X	X	X		X			X	X	X	X	X	X	X	X		X	X		X				
Bahrain	X			X				X		X	X			X					X	X	X	X									X	X	X	X	X	X									
Bangladesh	X			X				X		X	X			X			X	X	X		X									X																
Barbados	X			X	X			X		X	X	X		X		X							X	X	X		X	X		X	X	X	X		X	X			X	X		X				
Belarus				X				X			X	X							X		X			X	X	X	X	X																		
Belgium	X	X		X	X			X		X	X	X		X		X			X	X	X	X	X	X	X	X	X	X		X	X	X	X		X	X		X	X	X		X				
Belize	X		X	X	X			X		X	X			X										X	X	X	X					X	X													
Benin	X			X				X		X	X	X		X									X							X		X			X					X					
Bhutan																																															
Bolivia	X													X																																	
Bosnia & Herzegovina	X																																														
Botswana																																															
Brazil	X	X	X	X	X			X		X	X	X		X		X			X		X		X	X				X				X														
Brunei Darussalam	X			X	X			X		X	X			X					X		X			X								X	X		X											
Bulgaria	X	X	X	X	X			X		X	X	X		X					X		X			X	X	X	X			X																
Burkina Faso																																															
Burundi																																															
Cambodia	X			X	X			X		X	X													X	X	X	X					X														
Cameroon	X	X		X				X			X			X		X			X		X		X							X		X	X		X											
Canada	X	X	X	X				X		X	X	X		X		X			X		X		X	X				X				X	X		X	X							X	X	X	X	
Cape Verde	X			X				X			X			X									X					X																		
Central African Republic																																															
Chad																																															
Chile	X	X		X	X	X		X	X	X	X	X		X		X			X		X		X	X	X	X		X		X	X	X										X	X			
China	X	X	X	X	X	X		X	X	X	X	X		X		X			X		X		X	X	X			X	X		X	X	X	X							X	X	X		
Colombia	X			X	X			X		X	X			X					X		X		X	X	X	X	X	X				X	X													
Comoros																																															
Congo	X			X				X			X																		X																		
Costa Rica	X																		X		X								X																	
Cote d'Ivoire	X			X	X			X		X	X			X		X							X	X	X	X	X	X	X		X		X												
Croatia	X			X	X			X		X	X	X		X					X		X		X	X	X	X	X	X	X		X	X	X									X				
Cuba	X	X	X	X	X			X		X	X	X		X	X				X		X		X	X				X	X																	
Cyprus	X	X	X	X	X			X		X	X	X		X		X	X	X	X	X	X	X	X		X			X	X		X	X	X	X	X	X									
Czech Republic	X			X	X	*		X	*	X	X	X		X					X		X		X	X	X	X	X	X																	
Dem. People's Rep. Korea	X		X	X	X			X		X	X	X		X									X	X	X	X	X	X																	
Dem. Rep. of the Congo	X							X			X			X															X																	
Denmark	X	X	X	X	X	X	X	X	X	X	X	X		X		X			X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X			X		X	X	X	X	
Djibouti	X			X				X			X													X					X			X													
Dominica	X		X																																											
Dominican Republic	X			X				X			X													X					X	X		X													
Ecuador	X			X				X		X	X			X		X								X	X	X	X	X		X		X													
Egypt	X	X	X	X	X	X		X	X		X			X			X	X	X		X		X	X	X	X	X	X	X		X	X	X	X	X			X		X	X		X	X	X	X	
El Salvador	X									X	X																																				X
Equatorial Guinea	X			X	X	X		X	X	X	X			X										X	X	X	X	X			X		X							X			X			
Eritrea	X			X				X		X	X			X																																
Estonia	X	X	X	X	X			X		X	X	X	X	X										X	X	X	X			X		X														
Ethiopia	X			X	X			X		X	X	X		X																																
Fiji	X			X				X		X	X	X		X									X							X		X			X										
Finland	X	X	X	X	X	X		X	X		X	X		X		X			X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X			X			X	
France	X	X		X	X	X		X	X	X	X	X		X		X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	X			X		X	X		X	
Gabon	X			X				X		X				X					X		X			X	X	X	X	X			X		X			X									
Gambia	X			X				X		X	X	X		X		X							X	X	X	X	X				X		X										X			
Georgia	X		X	X		X		X		X	X	X		X		X							X	X	X	X	X																X		X	X	
Germany	X		X	X	X	X	X	X	X	X	X	X		X		X			X	X	X	X	X	X	X	X	X	X			X	X	X	X	X	X	X	X			X		X	X		X	
Ghana	X		X	X	X			X		X	X			X					X		X		X	X							X		X													

*/ Clarification has been sought in respect of the succession by the Czech Republic to these treaties

STATUS OF CONVENTIONS

01/10/97

	IMO Convention 48	IMO amendments 91	IMO amendments 93	SOLAS Convention 74	SOLAS Protocol 78	SOLAS Protocol 88	Stockholm Agreement 96	LOAD LINES Convention 66	LOAD LINES Protocol 88	TONNAGE Convention 69	COLREG Convention 72	CSC Convention 72	CSC amendments 93	SFV Protocol 93	STCW Convention 78	STCW-F Convention 95	SAR Convention 79	STP Agreement 71	STP Protocol 73	INMARSAT Convention 76	INMARSAT amendments 94	INMARSAT OA 76	INMARSAT OA amendments 94	FACILITATION Convention 65	MARPOL 73/78	MARPOL Annex III	MARPOL Annex IV	MARPOL Annex V	LC Convention 72	LC Protocol 96	INTERVENTION Convention 69	INTERVENTION Protocol 73	CLC Convention 69	CLC Protocol 76	CLC Protocol 92	FUND Convention 71	FUND Protocol 76	FUND Protocol 92	NUCLEAR Convention 71	PAL Convention 74	PAL Protocol 76	PAL Protocol 90	LLMC Convention 76	LLMC Protocol 96	SUA Convention 88	SUA Protocol 88	SALVAGE Convention 89	OPRC Convention 90	HNS Convention 96
Portugal	X			X	X			X		X	X	X			X		X			X		X		X	X	X	X	X	X	X	X	X	X								X	X			
Qatar	X			X				X		X	X				X					X	X	X	X							X		X	X	X		X										
Republic of Korea	X	X	X	X	X	X		X	X	X	X	X			X		X			X	X	X	X		X	X		X	X			X	X	X	X		X								
Republic of Moldova																																															
Romania	X			X				X		X	X	X			X					X		X			X			X														X	X			
Russian Federation	X	X	X	X	X			X		X	X	X			X	X	X			X		X		X	X	X	X	X	X	X	X	X			X	X		X	X							
Rwanda																																															
Saint Kitts and Nevis																																X			X												
Saint Lucia	X																												X																		
St. Vincent & Grenadines	X			X	X			X		X	X				X		X	X						X	X	X	X				X															
Samoa	X			X	X			X			X				X																															
San Marino																																															
Sao Tome & Principe	X																																														
Saudi Arabia	X		X	X	X			X		X	X	X			X		X	X	X	X	X	X									X	X												X		
Senegal	X			X	X			X		X	X				X		X			X		X		X	X	X	X			X		X												X	
Seychelles	X	X		X	X	X		X	X		X				X									X	X				X			X			X						X	X		X	
Sierra Leone	X			X				X							X																	X			X										
Singapore	X	X	X	X	X			X		X	X				X		X			X	X	X	X	X	X	X						X	X	X											
Slovakia	X	X	X	X	X	X		X	X	X	X	X			X					X	X	X	X	X	X	X	X	X																	
Slovenia	X			X	X			X		X	X	X			X									X	X	X	X	X	X		X	X	X			X									
Solomon Islands	X										X				X														X																
Somalia	X						X																																							
South Africa	X			X	X			X		X	X	X			X		X			X	X	X	X		X	X		X	X	X	X	X													
Spain	X	X	X	X	X	X		X	X	X	X	X			X		X			X		X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	
Sri Lanka	X			X				X		X	X				X			X	X	X		X		X	X	X	X		X		X			X										
Sudan	X			X				X							X																															
Suriname	X			X				X																X	X	X	X	X	X	X																
Swaziland																																															
Sweden	X	X	X	X	X	X	X	X	X	X	X	X			X		X	X	X	X		X		X	X	X	X	X	X	X	X	X	X	X	X	X		X		X	X	X	X	X	X	
Switzerland	X		X	X	X			X		X	X				X			X		X		X		X	X	X	X	X	X	X	X	X	X	X	X			X	X		X	X	X	X	
Syrian Arab Republic	X							X		X	X													X	X				X		X			X											
Tajikistan																																															
Thailand	X	X	X	X				X		X	X				X				X	X	X	X		X																						
the former Yugoslav Republic of Macedonia	X																																														
Togo	X			X	X			X		X	X	X			X									X	X	X	X								X										
Tonga				X				X		X	X				X		X							X	X	X	X	X	X	X	X	X			X			X							X	
Trinidad & Tobago	X	X	X	X				X		X	X				X		X							X																			X	X			
Tunisia	X		X	X	X			X		X		X			X					X		X		X	X	X	X	X	X	X	X	X		X	X		X							X	
Turkey	X			X				X		X	X	X			X		X			X		X		X			X																		
Turkmenistan	X																																														
Tuvalu				X				X		X	X				X									X	X	X	X			X		X													
Uganda																																															
Ukraine	X			X	X			X		X	X	X			X		X			X	X	X	X	X	X	X	X	X	X	X	X					X	X				X	X			
United Arab Emirates	X		X	X	X			X		X	X				X		X			X		X						X		X	X	X		X									X		
United Kingdom	X	X	X	X	X		X	X		X	X	X			X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X		X	X	X	X	X	
United Rep. of Tanzania	X							X							X																															
United States	X			X	X	X		X	X	X	X	X			X		X			X	X	X	X	X	X	X		X	X		X	X											X	X	X	X	
Uruguay	X			X	X			X		X	X				X		X							X	X	X	X	X					X			X									X	
Uzbekistan																																															
Vanuatu	X			X	X	X		X	X	X	X	X			X		X							X	X	X	X		X		X	X	X	X		X	X		X						
Venezuela	X			X				X		X	X				X		X							X	X	X	X				X		X	X										X	
Viet Nam	X			X	X			X		X	X				X									X																						
Yemen	X			X				X		X	X	X						X	X					X							X	X	X	X			X								
Yugoslavia	X			X	X			X		X	X	X			X					X		X		X	X	X	X	X	X		X	X	X												
Zambia								X																X																						
Zimbabwe																																															
Hong Kong, China (Associate Member)	X			X	X			X		X	X	X			X		X	X	X					X	X	X		X	X			X	X			X	X		X		X		X		

SUMMARY OF
STATUS OF CONVENTIONS

01/10/97

Convention	Entry into force date	No. of Contracting States	% world tonnage*
IMO Convention	17-Mar-58	155	95.91
1991 amendments	-	32	-
1993 amendments	-	49	-
SOLAS 1974	25-May-80	135	98.26
SOLAS Protocol 1978	01-May-81	88	91.95
SOLAS Protocol 1988	-	28	41.73
Stockholm Agreement 1996	01-Apr-97	8	9.34
LL 1966	21-Jul-68	140	98.19
LL Protocol 1988	-	28	41.69
TONNAGE 1969	18-Jul-82	117	97.50
COLREG 1972	15-Jul-77	130	96.20
CSC 1972	06-Sep-77	63	64.47
1993 amendments	-	4	-
SFV Protocol 1993	-	2	4.35
STCW 1978	28-Apr-84	129	97.55
STCW-F 1995	-	1	2.71
SAR 1979	22-Jun-85	56	49.11
STP 1971	02-Jan-74	15	23.95
SPACE STP 1973	02-Jun-77	14	22.17
INMARSAT C 1976	16-Jul-79	81	93.07
1989 amendments	[26-Jun-97]	37	-
1994 amendments	-	24	-
INMARSAT OA 1976	16-Jul-79	81	-
1989 amendments	[26-Jun-97]	37	-
1994 amendments	-	22	-
FAL 1965	05-Mar-67	78	56.73
MARPOL Annex I/II	02-Oct-83	100	93.47
MARPOL Annex III	01-Jul-92	81	78.21
MARPOL Annex IV	-	66	41.46
MARPOL Annex V	31-Dec-88	83	82.02
LC 1972	30-Aug-75	77	67.64
1978 amendments	-	20	-
LC Protocol 1996	-	1	1.18
INTERVENTION 1969	06-May-75	70	66.57
INTERVENTION Protocol 1973	30-Mar-83	40	44.20
CLC 1969	19-Jun-75	98	88.54
CLC Protocol 1976	08-Apr-81	55	67.26
CLC Protocol 1992	30-May-96	29	50.29
FUND 1971	16-Oct-78	74	62.02
FUND Protocol 1976	22-Nov-94	35	57.00
FUND Protocol 1992	30-May-96	26	46.73
NUCLEAR 1971	15-Jul-75	14	23.01
PAL 1974	28-Apr-87	23	35.59
PAL Protocol 1976	30-Apr-89	18	35.33
PAL Protocol 1990	-	2	0.57
LLMC 1976	01-Dec-86	28	42.60
LLMC Protocol 1996	-	0	-
SUA 1988	01-Mar-92	33	39.23
SUA Protocol 1988	01-Mar-92	31	39.11
SALVAGE 1989	14-Jul-96	23	26.65
OPRC 1990	13-May-95	32	37.78
HNS Convention 1996	-	0	-

* *Source Lloyd's Register of Shipping/World Fleet Statistics as at 31 December 1996*