The EC Directive on Port State Control in Context

The European Union

General

Towards the end of the 1970s the increasing number of substandard ships led to growing concern about environmental and safety aspects in international shipping. This increase could partly but not wholly be attributed to the flagging out by European and North American shipowners in favour of flags of convenience. However, the inability of the authorities of these flags of convenience to establish competent administrations undoubtedly contributed to the increase in the number of substandard ships. Other reasons can be mentioned as well, for example the character of the shipping industry which had changed dramatically since World War II. The following citation is illustrative of this latter aspect:

> "Today, ships are registered in one country, manned by multinational crews often rounded up by obscure agents in far off outposts, and operated by management companies in other countries. The owner has no real link with the country of origin and the beneficial ownership is most likely held by a banking consortium whose chief interest is the investment return. This is an environment where substandard ships thrive."[1]

Following the adoption of several regulatory Conventions, such as SOLAS 74, ILO No 147, and MARPOL 73/78, the Hague Memorandum of Understanding on Port State Control (Hague MOU) was established in 1978.[2] Only effective for a period of four years, the general surveillance procedure and the bi-annual information exchange were not sufficient to curb substandard vessels.[3] The *Amoco Cadiz* spill off the French coast in March 1978, which more or less coincided with the coming into effect of the Hague MOU, urged France to demand more stringent regulations with regard to the safety of shipping. This

[1] H. E. Huibers, "Regional Commitment has International Impact", (1995) 52 *Proceedings of the Marine Safety Council* No 2, p. 11.

[2] Participating Maritime Authorities came from: Belgium, Denmark, France, Federal Republic of Germany, the Netherlands, Norway, Sweden and the United Kingdom. The Hague MOU aimed at ensuring compliance with international agreements, chiefly ILO No 147, by foreign ships entering the ports of the Maritime Authorities. See P. B. Payoyo, *Port State Control in the Asia-Pacific. An International Legal Study of Port State Jurisdiction* (Diliman, Quezon City, Institute of International Legal Studies, University of the Philippines Law Center, 1993), pp. 69–76; G. C. Kasoulides, *Port State Control and Jurisdiction. Evolution of the Port State Regime* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1993), pp. 142–145.

[3] Kasoulides, n. 2, p. 145.

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finally led to the adoption of the 1982 Paris Memorandum of Understanding on Port State Control (Paris MOU) which superseded the Hague MOU.[4] It should be observed here that in addition to concerns for the environment, safety or health, the Paris MOU and its predecessor the Hague MOU, also had the object of curbing the adverse effects of substandard ships on fair competition in international shipping.[5]

In 1991 the IMO Assembly adopted Resolution A.682(17) "Regional Co-operation in the Control of Ships and Discharges". The resolution recognizes the importance of the Paris MOU in reducing substandard shipping and "invites Governments to consider concluding regional agreements on the application of port State control measures". This support for regional co-operation has contributed to the conclusion of the 1992 Latin American Agreement on Port State Control (Viña del Mar Agreement),[6] the 1993 Asia-Pacific Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MOU),[7] and the recent 1996 Memorandum of Understanding on Port State Control in the Caribbean Region (Caribbean MOU).[8] Other regional agreements are under consideration. The provisions of the Paris MOU have been adopted almost literally in the texts of the other regional agreements.[9] In the ensuing

[4] The Paris MOU took into account the Commission's Proposal for a Council Directive concerning the Enforcement, in Respect of Shipping using Community Ports, of International Standards for Shipping Safety and Pollution Prevention (COM (80) 360), (1980) OJ No C192/8 (further: Directive COM (80) 360). See Kasoulides, n. 2, pp. 145–149. As at 1 January 1996 participating Maritime Authorities come from: Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Spain, Sweden and the United Kingdom. The Port State Control (PSC) Committee is the executive body, composed of representatives of each Maritime Authority and of the Commission of the European Communities. The IMO and ILO participate as observers. Co-operating Maritime Authorities participating in PSC Committee meetings include Croatia, Japan and the United States. Ministerial Conferences on Port State Control attended by the Ministers responsible for maritime safety are occasionally organized for the purpose of evaluating the operation of the Paris MOU, setting out new policy lines and renewing its impetus. To date, five of these Conferences have taken place, the fifth on 14 September 1994 in Copenhagen.

[5] The fact that operating substandard vessels could save up to several hundred dollars daily has been confirmed in the 1996 OECD Report *Competitive Advantages Obtained by some Shipowners as a Result of Non-Observance of Applicable International Rules and Standards* (Doc. No. OCDE/GD(96)4).

[6] Participating Maritime Authorities come from: Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Panama, Peru, Uruguay, and Venezuela.

[7] Participating Maritime Authorities are: Australia, Canada, People's Republic of China, Fiji, Hong Kong, Indonesia, Japan, Korea (DPR), Malaysia, New Zealand, Papua New Guinea, Philippines, Russian Federation, Republic of Singapore, Solomon Islands, Thailand, Republic of Vanuatu, and the Socialist Republic of Vietnam.

[8] The participating Maritime Authorities are from: Anguilla, Antigua and Barbuda, Aruba, Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Grenada, Guyana, Jamaica, Montserrat, Netherlands Antilles, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, and the Turks and Caicos Islands. It is anticipated that the UK will soon sign the Caribbean MOU on behalf of several UK dependent territories.

[9] However, there is no formal agreement on how to maintain this uniformity, which could give rise to future friction between these regional agreements.

analysis attention is therefore focused on the Paris MOU with references to the other regional agreements where necessary.

The support for a regional approach in preventing the operation of substandard ships in Resolution A.682(17) seems to point at the same time to some apprehension at unilateral port state control programmes not exercised in accordance with the regulatory Conventions and relevant resolutions. In order to facilitate an assessment of the most preferable approach for Port State Control, Table 1 systematically compares certain aspects of unilateral, regional or global approaches.

Table 1

Aspects of the approaches	Unilateral	Regional	Global
Level of stringency in conformity with international law	As high as that state deems necessary	Compromise, but between states sharing certain interests and characteristics	Compromises lead to the lowest common denominator or, when higher, a possible undermining of the entire regime through non-compliance
Necessity of harmonization	Not required	Eased by shared interests and characteristics	Problematic
Effect on competitiveness	Loss depends on the market position of that state	Fair competition restricted to the region. Trade may shift to other regions	Fair competition
Operational costs	Maximal	Shared by the participants	Minimal
Effective use of information	None	Regional	Maximal availability
Scope of surveillance	Only within its own ports.	Within the region. Substandard ships possibly shift to developing States, contributing to local environmental degradation	Global
Adaption to changes	Minimal	Depends on effectiveness of the agreement	Likely to be very slow

Taking all displayed aspects into account, the regional approach for Port State Control seems to be the most preferable. The disadvantages of the regional approach can partly be addressed by establishing more regional agreements with the ultimate goal of global coverage. Assistance by the more experienced regional systems to those less experienced could gradually enhance global compliance with environmental and safety regulations.[10] Information exchange with or without mutual acceptance of inspection results are other options.[11]

An alternative for establishing more regional agreements is increasing the number of participants under existing regional regimes. Essential to an expansion which does not threaten the effectiveness of co-operation is that new participants can ensure the same level of enforcement as the existing ones. Were this not the case, the regional system would be undermined by ships seeking the least stringent port, a phenomenon also referred to as "port-shopping".[12]

This article searches for similarities and distinctions between the Paris MOU and the newly adopted EC Directive on Port State Control. The search provides material to facilitate an assessment of the impact of the Directive on the regime of Port State Control and the evaluation of the relationship between these two instruments. A comparison between the two instruments is simplified by using the same structure in the analysis. The treatment of the inspection procedures makes a distinction between the inspection of CDEM standards, discharge and navigational standards, and operational requirements. This substantive distinction is not made in either the Paris MOU or the EC Directive but is somewhat similar to the structure of the non-legally binding IMO Resolution A.787(19).[13]

The Paris MOU

General

An issue which should in any case be addressed in a legal analysis of the Paris MOU is the determination of its nature. At first sight the choice of form, a

[10] Inter-regional co-operation of Port State Control regional Secretariats already exists. 1994 Paris MOU Annual Report, p. 10.

[11] A computerized information system makes inspection results immediately available to the partners in the Paris MOU. The Paris MOU PSC Committee has adopted a common view on inter-regional electronic data exchange. See also Section 4.2, Caribbean MOU.

[12] New participants to the Paris MOU must conform to the geographical and qualitative criteria laid down in Section 8.2 and Annex 5. The geographical criterion limits accession to Maritime Authorities of European coastal states and states of the North Atlantic basin from North America to Europe. Since the participants under the Hague MOU were exclusively "European", it is submitted that this definition directly aims at including states such as Canada and the US that possess similar characteristics. Among the qualitative criteria listed in Annex 5 is the requirement for the acceding Maritime Authority to enforce compliance of standards with regard to ships flying its own flag, not just to foreign ships. A similar flag state obligation is not included in the Paris MOU itself and did therefore not apply to the original participants.

[13] Res. A.787(19) "Procedures for Port State Control" is also known as the "amalgamated PSC resolution" due to the comprehensive approach on Port State Control. Res. A.787(19) was adopted on 23 November 1995 and revokes Resolutions A.466(XII) as amended, A.542(13), A.597(15), MEPC.26(23) and A.742(18). Pursuant to Section 1.2.1 it applies to SOLAS 74, Load Lines (LL) 66, MARPOL 73/78, STCW 78, and the International Tonnage Convention (ITC) 69.

memorandum of understanding and not a treaty, suggests an unwillingness on the part of states to enter into binding treaty relationships.[14] The Annual Reports of the Paris MOU confirm this by consistently speaking of the Paris MOU as a "regional administrative agreement".[15] These observations alone are, however, not sufficient to categorize the Paris MOU as a non-legally (politically) binding agreement and not as a treaty.

Some preliminary issues need some attention before proceeding with the actual determination of the nature of the Paris MOU. The first submission is that it is possible and valid to distinguish between legal and non-legal rules.[16] This has encountered criticism by scholars who envisage a sliding scale of normativity.[17] The second observation concerns the question as to a possible distinction between legally binding and non-legally binding. There seems to be predominant support for the view that non-legal rules can be binding as well.[18]

When the position is taken that legal rules can be distinguished from non-legal rules and that the latter can be binding as well, the question remains as to the criterion by which these two categories of rules can be distinguished. According to Oppenheim "[t]he decisive factor in ascertaining the legal nature of an instrument as a treaty is not its description ... but whether it is intended to create legal rights and obligations between the parties."[19] Evidence of the intention as to the status of an international instrument can, *inter alia*, be provided by form, wording, types of parties, circumstances under which the instrument was

[14] Art. 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[15] See e.g. the 1990 MOU Annual Report, p. 31, n. 1.

[16] The various reasons a state may have for opting for the adoption of non-legal rules instead of legal rules are not addressed here. See A. Aust, "The Theory and Practice of Informal International Instruments", (1986) 35 ICLQ at pp. 788–793.

[17] For instance, W. M. Reisman, Remarks in the Panel "A Hard Look at Soft Law", 82 *Proceedings of the American Society of International Law*, 1988, pp. 373–377.

[18] P. van Dijk, "The Final Act of Helsinki–Basis for a Pan-European System", (1980) 11 NYIL 100, observes that "[a] commitment does not have to be *legally* binding in order to have binding force." Cf. A. Nollkaemper, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* (Dordrecht, Martinus Nijhoff Publishers, 1993), p. 201. However, in the *Qatar* v *Bahrain (Jurisdiction and Admissibility)* case the ICJ submits that the 1990 Minutes "enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement." (*ICJ Reports* 1994, para. 25). Consequently, J. Klabbers, "Qatar v. Bahrain: The Concept of 'Treaty' in International Law", (1995) 33 *Archiv des Völkerrechts*, p. 370, submits that "[i]f commitments, once consented to, by definition are of legal character, then the claim that some commitments can be merely politically binding is dismissed."

[19] L. Oppenheim, *International Law. A Treatise* (London/New York/Toronto, Longmans, Green and Co., 8th ed., Third Impression, 1958), Vol. I, pp. 899–900. Cf. Aust, n. 16, p. 794. The importance of intention as a requirement for the validity of a source of law also comes to the fore in Art. 38 of the Statute of the ICJ. The central role of the criterion of intention in the distinction between legal and non-legal rules has been criticized, *inter alia*, by Reisman, n. 17; G. Handl, "Environmental Security and Global Change: The Challenge to International Law", (1990) 1 YIEL 8.

concluded, (non-)registration, and (dis)agreement as to the status.[20] For the purpose of this article it would lead too far to enter into a detailed examination of all these factors. It is therefore submitted that due to the form of a memorandum of understanding, the non-mandatory style of its wording,[21] its conclusion between Maritime Authorities and not states, the absence of registration with the UN, and the apparent absence of a disagreement between its participants about the status of the instrument, give a strong presumption of something less than a treaty.[22] It is acknowledged that these arguments could not each lead to such a contention but together they can. This is not to say that provisions contained in non-legally binding documents could have no legal effects, for instance for national courts. Moreover, the classification of rules as legal or non-legal has no inherent implications for effectiveness in regulating behaviour.[23]

Although all regional agreements on Port State Control concern the exercise of enforcement, they are nevertheless all named as regimes of "control".[24] The precise legal distinction between port state enforcement and port state control is unclear, although it could signify that the former is a broader term encompassing adjudication as well. However, the non-legally binding nature of the regional agreements on Port State Control implies that the legal basis for enforcement must be found in national legislation or can sometimes directly arise from international conventions.[25] Participating in a port state control regime implies a political commitment to maintain an effective system of Port State Control through specified enforcement efforts of which the inspection of a certain minimum percentage of all ships entering the ports of a participating state is the most prominent.[26] The Preamble to the Paris MOU is mindful of the primacy of

[20] Aust, n. 16, pp. 800–804.

[21] The use of, for example, "have reached the following understanding" in the Preamble, "will take effect" in Section 8.4 and the consistent use of "will" instead of "shall" support this view.

[22] Kasoulides, n. 2, p. 447; Cf. H. H. M. Sondaal, *De Nederlandse Verdragspraktijk* ('s-Gravenhage, 1986), p. 37; but see E. W. Vierdag, *Spanningen tussen recht en praktijk in het verdragenrecht* (Deventer, Kluwer, 1989), pp. 52–55. Payoyo, above n. 2, p. 77, n. 74 maintains that "under Art. 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties, the Paris MOU is technically a treaty and solemnized as such."

[23] The opinion that there is no inherent difference between the effectiveness of legal and non-legal rules is, *inter alia*, pursued by Nollkaemper, n. 18, p. 251.

[24] Payoyo, n. 2, p. 79 submits that "control" is broadly understood as "the process of ensuring compliance with obligations assumed under international law".

[25] This depends on the state's approach in giving effect to international rules in the national sphere: dualism or monism.

[26] Section 1.3 of the Paris MOU lays down a minimum of 25 per cent. The corresponding commitment in de Viña del Mar Agreement sets the level at 15 per cent, in the Tokyo MOU 50 per cent, and in the Caribbean MOU 15 per cent. It should be noted that these latter regimes use the clause "will endeavour ... to achieve" in relation to this level, and not "will achieve" as in the Paris MOU. Payoyo, n. 2, p. 97 submits that this indicates that the latter agreements do not consider this commitment to possess a legal nature. Under Section 1.1 of the Caribbean MOU, Authorities are obliged to "take all necessary steps to ratify instruments relevant for the purposes of the Memorandum". This addresses the overall poor record of Caribbean MOU states in this respect.

flag state jurisdiction and considers port states as complementary in addressing the problem of substandard ships.

By participating in the Paris MOU the Maritime Authorities have taken upon themselves the duty to ensure that ships entering their ports comply with standards laid down in the so-called "relevant instruments". The participants in the Paris MOU do not prescribe standards individually or in concert, but concentrate exclusively on their harmonized enforcement.[27] The subject matter covered by these instruments are safety at sea, living and working conditions, and pollution prevention.[28] Although inspection first focused on CDEM standards, it was gradually expanded to discharge, navigational and operational standards.[29]

The "relevant instruments" listed in Section 2.1 are: Load Lines (LL) 66, LL Protocol 88, SOLAS 74, SOLAS Protocol 78, SOLAS Protocol 88, MARPOL 73/78, STCW 78, COLREG 72, and ILO No 147.[30] In this article the use of the words "IMO Conventions" or "regulatory Conventions" refers to and is meant to include these "relevant instruments". The obligation to apply these instruments is qualified to the extent that Authorities can only apply relevant instruments that have entered into force and to which their states are parties. The same goes, *mutatis mutandis*, for amendments to the relevant instruments.[31] Tables 2, 3, 4 and 5 (on pp. 266–268) which show the status of ratifications under the regional agreements, indicate that this status varies considerably between the participants to the same agreement. This is an obstacle to the uniform application of rules within all ports.

The Paris MOU authorizes inspection of ships regardless of its flag states being a party to a relevant instrument. This "no more favourable treatment" (NMFT) clause is laid down in Section 2.4 and reads:

> "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."[32]

[27] Within the Paris MOU, harmonization is furthered, *inter alia*, by the Working Group on Harmonization and by convening seminars for surveyors.

[28] The clear distinction between these three categories characterizes the subject matter of IMO and ILO Conventions. This distinction is also made in the EC Directive discussed below.

[29] The hesitation by the participants under the Paris MOU to engage in setting its own standards is, for example, illustrated by the decision to await IMO action regarding operational requirements. This reaffirms the strong commitment to multilateralism.

[30] LL Prot. 88 and SOLAS Prot. 88 have not yet entered into force. For the Viña del Mar Agreement the relevant instruments are: LL 66, SOLAS 74, SOLAS Prot. 78, MARPOL 73/78, STCW 78 and COLREG 72. For the Asia-Pacific MOU the relevant instruments are: LL 66, SOLAS 74, SOLAS Prot. 78, MARPOL 73/78, STCW 78, COLREG 72 and ILO No 147. For the Caribbean MOU: LL 66, SOLAS 74, SOLAS Prot. 78, MARPOL 73/78, STCW 78, COLREG 72, and ILO No 147.

[31] Section 2.3.

[32] Kasoulides, n. 2, p. 181 seems to maintain that the NMFT clause is applied, within the ambit of the Paris MOU, only to the relevant instruments that explicitly contain this clause and that, consequently, these instruments should not be imposed on vessels whose flag states have not ratified them.

Ships flying the flag of states not parties to a relevant instrument cannot therefore supply a certificate. Consequently, they receive a detailed inspection. The NMFT clause should, however, take account of the principle of non-discrimination and not lead to more severe inspections for ships flying the flag of non-parties to the relevant instruments. The conditions of, and on, such ships have to be compatible with the aims of a relevant instrument.[33] It is submitted that the NMFT approach conforms to the approach by the regulatory Conventions and the IMO Resolutions concerning Port State Control.[34] Moreover, there has been a general acquiescence by flag states and the maritime industry in the NMFT approach.[35]

An important provision is Section 3.2.3, which provides:

> "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."

This should be read in conjunction with Section 8.1, which reads:

> "The Memorandum is without prejudice to rights and obligations under any international Agreement."

Whereas Section 3.2.3 only concerns "relevant instruments", Section 8.1 includes in its scope of application "any international Agreement". Moreover, Section 3.2.3 concerns rights and Section 8.1 rights and obligations. In case of conflict between the Paris MOU and an international agreement, the latter therefore prevails. The jurisdiction granted under the LOSC would seem to fall under the scope of Section 8.1.

In addition to the observation laid down in Section 8.1 that the states participating under the Paris MOU are nevertheless bound by their obligations under any international agreement, Section 3.11 reaffirms a common provision in regulatory Conventions under which the port state is held to "avoid unduly

[33] Section 1.3 Annex 1.

[34] For some regulatory Conventions it is clear that the NMFT clause applies to the Convention or the protocol as a whole, for example: Art. II(3) SOLAS Prot. 1978; Art. I(3) SOLAS Prot. 1988; Art. I(3) LL Prot. 88; Art. X(5) STCW 78 (concerned with control generally); Art. 4(1) ILO No 147 (see E. Osieke, "Flags of Convenience Vessels: Recent Developments", (1979) 73 AJIL 506). The scope of the NMFT clause is not free from ambiguity with respect to Art. 5(4) of MARPOL 73/78 which reads: "With respect to the ships 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." Although this paragraph is placed in a provision which deals specifically with certificates and inspection regarding CDEM standards, the formulation "the requirements of the present Convention" indicates a broader interpretation. This is confirmed by Res. A.787(19) Section 1.5.1. This position was also adopted in Res. A.542(13) Section 5.1 to the Annex, and in Res. MEPC 26(23) Section 5.1 to the Annex. See also K. Hakapää, *Marine Pollution in International Law. Material Obligations and Jurisdiction* (Helsinki, Suomalainen Tiedeakatemia, 1981), p. 113. It is submitted that Art. 22 of LL 66 and Reg. I/20 of SOLAS 74 imply an NMFT approach as well.

[35] Kasoulides, n. 2, p. 156.

detaining or delaying a ship" subject to the right to compensation for any loss or damage suffered.[36] This provision functions as a safeguard for shipowners and operators by giving them right of access to domestic courts to demand, for example, the prompt release of their vessel.

Inspection

General

The need to make the most efficient use of limited resources for inspection has led to the practice of "targeting" certain ships or even certain owners, registers or classification societies. This is often accompanied by the publication of "blacklists" containing various data on the inspection results.[37] While these practices might be successful in reducing the number of substandard ships, uniform control procedures and ways of treating inspection results cannot always be guaranteed. This can easily result in the abuse or unfair treatment of the organizations or individuals involved.[38] It is submitted that the targeting policy seems at first sight to conflict with the principle of non-discrimination.[39] However, justification can be found in the experience gained in previous years of inspection and in the concern for safety, health and the environment.

The Paris MOU decided on a strict policy on targeting ships with poor safety records after the *Braer* accident in 1993. The targeting criteria are embodied in Section 3.3:

> "In selecting ships for inspection, the Authorities will pay special attention to:
> 1 passenger ships, roll-on/roll-off ships and bulk carriers;
> 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 flying the flag of a State appearing in the three-year rolling average table of above average delays and detentions in the annual report of the Memorandum;
> 4 ships which have had several recent deficiencies."

[36] See e.g. Art. 7 of MARPOL 73/78. No right to compensation seems to be provided under Art. 4 of ILO No 147.

[37] This has occasionally led shipowners to disguise the true identity of their ships by changing their names. Currently ships can always be tracked down as they possess a unique IMO number.

[38] Australia, France, the United Kingdom, and the United States are some of the states that routinely name substandard vessels, coupled with their owners or managers. An example of unfair treatment is the fact that sometimes ships damaged in casualties are lumped in with cases of deficiency because of lack of maintenance.

[39] The principle of non-discrimination is embodied, *inter alia*, in Section 1.2 of the Paris MOU and in Art. 227 of LOSC.

Despite the fact that older ships are more likely to sustain damage or become total losses, the Paris MOU currently has no policy for targeting inspections on older ships but is expected to refine its target formula to include age as a criterion.[40] In addition to the annual publication of the inspection results the Port State Control Committee decided in 1994 to publish blacklists.[41]

CDEM standards

The key provision to the inspection procedure is embodied in Section 3.1 and although to a large extent similar to the inspection provisions of the specialized treaties, it contains some important differences.[42] Section 3.1 reads:

> "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 of 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."

Interesting is the provision that "Inspections will be carried out in accordance with the guidelines specified in Annex 1."[43] These include several IMO Resolutions, an ILO publication and the guidelines laid down in Annex 1 itself.[44] Where the view would be adhered to that the Paris MOU is legally

[40] 1994 Paris MOU Annual Report, p. 25.

[41] 1994 Paris MOU Annual Report, p. 26.

[42] Inspection procedures on CDEM standards are, *inter alia*, laid down in: Art. 21 LL 66; Art. 5 MARPOL 73/78; Reg. I/19 SOLAS 74; Art. 4 ILO No 147; and Art. X and Reg. I/4 STCW 78. COLREG 72 contains no provisions for Port State Control. Several of these Conventions use the word "control" instead of inspection. Art. X and Reg. I/4 STCW 78 are drafted in a manner which differs considerably from the other provisions.

[43] The title to Annex 1 of the Paris MOU, "Guidelines for surveyors", is somewhat unfortunate since surveys are not conducted by port states but rather by flag states, organizations acting on their behalf, charterers or insurance companies. It would have been more accurate to speak of "Guidelines for inspectors" in this context. An amendment to the Paris MOU presently under consideration proposes to replace "surveyor" for Port State Control Officer (PSCO) throughout the entire text of the Paris MOU. The abbreviation PSCO is also used in Res. A.787(19). The Caribbean MOU contains Annex 1A "Guidelines for Surveyors to be Observed in the Inspection of International Shipping", and Annex 1B "Guidelines for Surveyors to be Observed in the Inspection of Caribbean Cargo Ships Below 500 Tons Gross Tonnage and Ships of Traditional Build". Whereas Annex 1A is more or less identical to Sections 1–4 of Annex 1 of the other MOUs, Annex 1B reflects the specific character of shipping in the Caribbean region.

[44] After the adoption of new amendments these are expected to be (see Caribbean MOU):

- Procedures for Port State Control (IMO Resolution A.787(19));
- Principles of Safe Manning (IMO Resolution A.481(XII)) and Annexes which are Contents of Minimum Safe Manning Document (Annex 1) and Guidelines for the Application of Principles of Safe Manning (Annex 2);
- The provisions of the International Maritime Dangerous Goods Code;

binding on its participating Maritime Authorities, these guidelines would consequentially lose their initially non-binding character.

Section 3.2.1 mentions, *inter alia*, that the following can be regarded as "clear grounds" warranting inspection:

- a report or notification by another Authority;
- a report or complaint by the master, a crew member, or any person or organization with a legitimate interest in the safe operation of the ship, shipboard living and working conditions or the prevention of pollution unless the Authority concerned deems the report or complaint to be manifestly unfounded;
- other indication of serious deficiencies, having regard in particular to Annex 1.

An inspector must use his so-called "professional judgment" in deciding whether a "clear ground" exists.[45] The description "other indication of serious deficiencies, having regard in particular to Annex 1" is non-limitative. Moreover, the clause "having regard in particular to Annex 1" does not specify which of the serious deficiencies appearing in Annex 1 could be meant here. It is submitted that Section 6 Annex 1 has particular relevance in this respect since it is concerned, *inter alia*, with detainable deficiencies.

Furthermore, the clause "other indication of serious deficiencies" implies an inspection going beyond merely checking certificates. Under the Paris MOU it has become standard practice to make a "superficial round of inspection" over the ship in which the control officer is satisfied or notes deficiencies which constitute a "clear ground" for further investigation. The concepts of "clear grounds" and the "superficial round of inspection" are thus closely related. The "superficial round of inspection" is expected to be formally embodied in the text of the Paris MOU.[46]

The listing of examples of clear grounds and the consequential "superficial round of inspection" imply a deviation from the approach that inspections are in principle limited to a certificate check.[47] Since the determination of "clear grounds" justifies a departure from the certificate check, any indistinctness

Cont.

- ILO publication "Inspection of Labour Conditions on Board Ship: Guidelines for Procedure;
- The procedures laid down in this Annex to the Memorandum.

[45] Kasoulides, n. 2, p. 154. Payoyo, n. 2, p. 83 even speaks of "the concept of 'professional judgment' ". The term "professional judgement" appeared also in: Res. A.466(XII) Section 1 of Appendix 1 to the Annex; Res. A.542(13) Section 3.1, Appendix 1 to the Annex; Res. MEPC 26(23) Section 3.1, Appendix 1 to the Annex and in Res. A.787(19) Section 2.6.1.

[46] A tentative draft reads: "After checking the certificates and documents, the surveyor must satisfy himself by visual observation of the overall condition of the ship, including the engine room and accommodation including hygienic conditions."

[47] This initial limitation to a certificate check forms the basis of, *inter alia*, Art. 5(2) MARPOL 73/78, Reg. I/19 SOLAS 74, and Art. 226 LOSC. The newly amended Reg. I/4(1)(3) STCW 78 is the only provision in regulatory Conventions which gives examples of "clear grounds". Res. A.787(19) contains in Section 2.3 a list of examples of "clear grounds" which does not distinguish between the type of standard.

surrounding the concept of "clear grounds" has the risk of undermining the primacy of this certificate check. From the wording of Section 3.1, and corresponding provisions in IMO Conventions, it seems evident that "clear grounds" does not relate to the validity of the certificates proper, which could constitute a separate ground for an in-depth inspection. It seems therefore unavoidable that an inspection has to extend beyond the certificate check to facilitate the determination of these "clear grounds". It is submitted that this approach was not only unavoidable due to the absence of an interpretation of the clause "clear grounds" in IMO Conventions, but also finds support in the various IMO Resolutions on Port State Control.[48] Moreover, it would seem that an inspection in this form is still in conformity with customary international law.[49] This, of course, touches on the question of the relationship between treaties and customary international law, which cannot be properly addressed here. In any case, flag states and the maritime industry alike have acquiesced in the interpretation of the term "clear ground" and the "superficial round of inspection".[50] It is submitted that the current situation in international shipping as sketched in the cited passage above, warrants a liberal interpretation of the control provisions in the LOSC and the regulatory Conventions which have been drawn up prior to these developments. Without it, globally uniform standards in international shipping and a reduction in the number of substandard ships would hardly be attainable.

Once clear grounds have been established the surveyor conducts an in-depth inspection in the area(s) where clear grounds were found. The comprehensiveness of such an inspection will probably be limited by the scarcity of resources. Tentative drafts of amendments to the Paris MOU stipulate that after clear grounds have been established the surveyor should "carry out random detailed inspections as regards the ship's construction, equipment, manning, living and working conditions and compliance with on board operational procedures", in areas where clear grounds were not established. Moreover, it has been suggested that inspections can be suspended to await flag state action to ensure compliance with certain standards. This measure is another result of the limited resources by the port state.

[48] Res. A.787(19) defines "inspection" in Section 1.6.4 as "a visit on board a ship to check both the validity of the relevant certificates and other documents, and the overall condition of the ship, its equipment, and its crew". See also Sections 2.2.1 and 3.2. Applications of the clause "clear grounds" appeared in Res. A.466(XII) Section 5.1 of the Annex, and in Res. A.742(18) Section 1.6. Something similar to the "superficial round of inspection" appeared in Res. A.466(XII) Section 2, Appendix 1 to the Annex, where the inspection officer was allowed to gain an "impression" prior to the certificate check.

[49] R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester, Manchester University Press, new rev. ed., 1988), p. 217.

[50] M. Valenzuela, "International Maritime Transportation: Selected Issues of the Law of the Sea", in *Implementation of the Law of the Sea Convention Through International Institutions. Proceedings of the Law of the Sea Institute 23rd Annual Conference*, Soons (ed.) (Law of the Sea Institute, 1989), p. 210.

Discharge and navigational standards
Section 5 entitled "Operational violations" provides:

> "The Authorities will upon request of another Authority, endeavour to secure evidence relating to suspected violations of the requirements on 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."[51]

This provision thus applies to violations of Rule 10 of COLREG 72 concerning Traffic Separation Schemes and, more generally, to violations of MARPOL 73/78. Their incorporation in one single provision seems justified by the fact that it concerns violations the *locus delicti* whereof is beyond the port itself. The first sentence of this provision is governed by the words "endeavour to secure evidence" and has a much broader scope than the second sentence which contains the specific obligation to visit a ship suspected of an illegal discharge. Securing evidence could involve, for example, airborne surveillance of illegal discharges or eyewitness statements from the crew of another ship. The obligation to visit a ship contrasts with the discretion left to the port state under Article 6(5) of MARPOL 73/78, but finds its explanation in the purpose of co-operation.

The scope of Section 5 is restricted to the co-operation in the detection of operational violations and consequently requires a "request of another Authority". No geographic limitations as to the *locus delicti* are envisaged, which conforms to Article 6(5) MARPOL 73/78 containing the words "in any place".[52] The control of compliance with discharge and navigational standards on the own initiative of the port state based on its rights under international law, is not dealt with here but remains unaffected and covered by Section 3.2.3.

For the purpose of the early notification of pollution incidents, the Paris MOU co-operates with the Contracting Parties of the Bonn and Lisbon Agreements. Contacts have, for this purpose, also been made with the Secretariats of the Barcelona and the Helsinki Conventions.

Following a request from another Authority, Section 5 of the Paris MOU does not go beyond the collection of evidence. In case discharge or navigational standards have indeed been violated this does not warrant detention. This

[51] In the Caribbean MOU this is laid down in Section 4.3, under Section 4 "Provision of information".

[52] Kasoulides, n. 2, p. 164 submits, however, that "the request from another authority is limited to a suspected violation occurring within its territorial limits".

situation should be distinguished from detention on the ground that the ship or crew is unable to prevent pollution of the marine environment throughout the forthcoming voyage.[53] The Paris MOU follows the approach taken under Article 6(5) of MARPOL 73/78 insofar as it does not take action itself. The possibility for the port state to institute proceedings with respect to discharge violations pursuant to Article 218 of LOSC has not been specifically dealt with under the Paris MOU, but is not excluded.

Operational requirements

In co-ordination with developments within the IMO, Section 3.1 was amended to stipulate the necessity for Authorities to include control on compliance with onboard operational requirements in their control procedures.[54] Section 3.2.2 provides specific "clear grounds" in relation to a control on the compliance with onboard operational requirements:

- evidence of operational shortcomings revealed during Port State Control procedures in accordance with SOLAS 74, MARPOL 73/78 and STCW 78, as amended;
- evidence of cargo and other operations not being conducted safely or in accordance with IMO guidelines;
- involvement of the ship in incidents due to the 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.

It is submitted that several of these "clear grounds" with respect to operational requirements require a judgment by the inspection officer which can hardly be guaranteed to be objective. This is particularly so in developing countries where inspection officers are often unable to communicate in another language than their own.

Rectification and detention

Where no deficiencies have been found, the ship will not be subjected to inspections in ports falling under the Paris MOU within the next six months, unless there are "clear grounds" for inspection or it concerns ships appearing on the targeting list.[55] The Paris MOU uses so-called "formal detentions" during which deficiencies can be dealt with. Formal detentions do not necessitate the ship remaining longer within port than was envisaged for loading or unloading.

[53] Section 6.3 Annex 1 under 9. See also Section 6.4.6 and 6.4.7 Annex 1.
[54] The amendment took effect on 24 July 1992.
[55] Section 3.4.

Section 3.7 provides that:

> "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."[56]

This general rule, which is specified in Section 6 Annex 1, is followed by a notification requirement.[57] Article 219 of LOSC authorizes detention where applicable international rules and standards relating to seaworthiness have been violated and damage to the marine environment is consequently threatened. Conversely, Section 3.7 uses the term "deficiencies" instead of "seaworthiness" and embodies, in addition to "environment", "safety" and "health" as reasons for detention.[58] These factors seem to make the competence to detain under the Paris MOU wider than under the LOSC. However, under the Paris MOU detention is the ultimate sanction whereas Article 230 of LOSC permits monetary penalties and, in certain cases, imprisonment. This does not prevent states participating under the Paris MOU from imposing other sanctions in conformity with national or international law.[59]

Worth noting in this respect is that under Section 6.4.9 Annex 1 of the Paris MOU, several deficiencies within the field of ILO No 147 are categorized as "detainable". This supports the view that detention as a form of enforcement action is available under Article 4 ILO No 147.[60] Non-compliance with operational requirements could also warrant detention.[61]

Section 3.8 stipulates:

> "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,

[56] See Section 3.1 Annex 1 of the Paris MOU which stipulates that detention shall be "used in conjunction with advice from the flag State".

[57] Section 6 Annex 1 is entitled "Guidelines for the detention of ships of all sizes" and employs as criterion for detention in Section 6.2: "if the deficiencies on a ship are sufficiently serious to merit a surveyor returning to the ship to satisfy himself that they have been rectified before the ships sails". Section 6 Annex 1 includes moreover a non-exhaustive list of deficiencies, grouped under relevant Conventions and/or Codes, which are considered serious enough to warrant detention. This approach has also been followed under Res. A.787(19) Appendix 1.

[58] Section 6.2 Annex 1 uses, instead of "unseaworthy", the term "unsafe", which covers hazards to safety, health or the environment.

[59] See also Section 3.2.3.

[60] Under Art. 4(1) ILO No 147 port states have the competence to send a report to the flag states if the ship does not conform to the Convention. In case conditions on board are "clearly hazardous to safety or health" port states are allowed to take the necessary measures. Although detention is not explicitly referred to, para. (2) mentions that the port state "shall not unreasonably detain or delay a ship". The 1989 ILO Guidelines for Procedures for the Inspection of Labour Conditions on Board Ships (Doc. No. MEIBS/1989/1/Rev.) explicitly confirm the authority to detain on p. 5.

[61] See, *inter alia*, Section 6.3 Annex 1 under 7, 8 and 12.

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."[62]

Section 3.8 deviates quite substantially from Article 219 of LOSC which simply allows the detaining states to "permit the vessel to proceed to the nearest appropriate repair yard". First, Section 3.8 seems to suggest that the next port of call is not necessarily a repair yard. Secondly, the Maritime Authority may subject the ship to "any appropriate conditions", a competence not embodied in the LOSC nor under the regulatory conventions. These conditions could of course require the ship to proceed to the next appropriate repair yard. Thirdly, the observations regarding the terms "deficiencies", "safety" and "health" which were made in respect to Section 3.7 apply here as well. Taken together, Section 3.8 seems to give the port state more discretion in enforcement than Article 219 of LOSC.

A weak point in this approach is the fact that there are no guarantees that these conditions are met once the ship is beyond the jurisdictional reach of the enforcing port state. An attempt to address this problem is provided by including these ships on the targeting list in Section 3.3.

Conclusions

The Paris MOU is regarded as an administrative agreement without legal binding force. In some minor aspects it deviates from the regime of port state jurisdiction as laid down in the LOSC and the regulatory conventions. It has been pointed out that some of these differences are inevitable due to the wording and structure of the relevant provisions of the LOSC and the regulatory conventions. The approach taken by the Paris MOU is moreover sanctioned by various IMO Resolutions. There seems indeed a considerable degree of cross-influence between the Paris MOU and the relevant IMO Resolutions which could in time lead to more or less identical instruments. Since both instruments are legally non-binding, the added value of the Paris MOU should then be sought in the inspection targets and the specific co-operation provisions. Acceptance by flag states and the maritime industry of the Paris MOU seems to be widespread. Ensuring continuous acceptance may prove to be largely dependent on a uniform and high level of performance by inspection officers.

Although this is primarily a legal analysis, a remark on the effectiveness of the Paris MOU is warranted in light of the conclusion of the EC Directive on Port State Control discussed below. An assessment of the effectiveness of the Paris MOU is by no means a simple matter. It requires close examination of data but also a general insight into everyday reality in international shipping. Inspection results of the Paris MOU show that the number of deficiencies, number of delays and detentions, and the percentage of delays and detentions of the individual

[62] This is followed by a notification requirement.

ships inspected have increased in recent years.[63] The extent to which this can be attributed to the increase in the number and stringency of the inspections can, however, not be fully determined.

The EC Directive on Port State Control

General

EC Council Directive 95/21/EC on Port State Control was adopted on 19 June 1995 (hereinafter the Directive) and should be fully implemented by EU Member States (hereinafter Member States) not later than 30 June 1996.[64] In full the Directive bears the title "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 Directive, like the Paris MOU, makes a clear distinction between these three categories of standards.

The Directive is the first comprehensive approach on the part of the EC to the issue of Port State Control.[65] By formulating specific action on Port State Control the Directive responds to requests thereto laid down in the Council Resolution on a Common Policy on Safe Seas of 8 June 1993.[66] The use of a Directive implies that Member States have to implement the contents thereof but are left free to choose the form and method of implementation. The Directive cannot be used as a direct basis for enforcement, a situation comparable to that under the Paris MOU.

The purpose of the Directive is the drastic reduction of substandard ships in the waters under the jurisdiction of EU Member States. This is envisaged by increasing compliance with international instruments and relevant Community legislation on maritime safety, protection of the marine environment and living and working conditions on board ships of all flags. Moreover, the Directive establishes common criteria for control of ships by the port state and harmonizes procedures on inspection and detention. Proper account is taken of the commitments made by the Maritime Authorities of the Member States under the Paris MOU.[67]

The reason underlying the decision for Community action on these issues is reflected by the preamble to the Directive which considers:

[63] For data see the Annexes to the Paris MOU Annual Reports.
[64] (1995) OJ L157/1.
[65] However, the subject matter of other Directives relate to the problem of substandard shipping. For example, Art. 12(1)(a) of Directive 94/57/EC of 22 November 1994 ((1994) OJ L319/20) provides that the non-fulfilment of the criteria for classification societies "shall be taken as one of the primary criteria for selecting ships for inspection"; and Art. 10 of Directive 94/58/EC of 22 November 1994 ((1994) OJ L319/28) obliges Member States to give priority to the inspection of certain ships with respect to the level of vocational training and competence of their crews.
[66] (1993) OJ C271/1.
[67] Art. 1.

> "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;"[68]

In normal cases this would be no more than a standard formulation justifying Community action, but since all relevant Member States were also involved in the Paris MOU this could signify that a more binding commitment at the level of the Member States was deemed necessary.[69] By reducing substandard shipping the Directive also seeks to contribute to the ultimate goal of a level playing field in international shipping. The shipping industry of the Member States would seem to benefit from this approach.

A comparison between the Directive and the Paris MOU warrants some general observations. First, the Directive is aimed at the Member States of the EU whereas the Paris MOU is an agreement between several Maritime Authorities. The wording of the Directive also leaves less discretion to Member States than the Paris MOU to the Maritime Authorities participating under it.[70] This is in conformity with the non-legally binding nature of the Paris MOU and the legally binding nature of a EC Directive.

Secondly, the Directive's approach in the determination of the body of conventions, protocols and amendments which will be applied under it, differs considerably from the one taken under the Paris MOU. A minor point is that whereas the Directive includes the 1969 International Convention on Tonnage Measurement of Ships, the Paris MOU does not. More important, however, is the fact that Article 2(1) includes "the Protocols and amendments to these Conventions and related codes of mandatory status, *in force at the date of adoption of this Directive*" (emphasis added) under the definition of "Conventions". Conversely, Section 2.1 of the Paris MOU lists each particular protocol falling under the term "relevant instrument", and Section 2.3 of the Paris MOU determines that only conventions, protocols and amendments "in force" will be applied. The inclusion of the clause "in force at the date of adoption" indicates the necessity for a continuous updating and specification of the protocols, amendments and related mandatory codes which should be applied by the

[68] The Common Position (EC) No 2/95 on Directive 95/21/EC ((1995) OJ C93/25, on p. 42) reads "In order to enhance the effectiveness of such a Port State Control system ...".

[69] The assumed failure of the Paris MOU also comes to the fore when the preamble to the Directive observes that harmonization "would also drastically reduce the selective use of certain ports of destination to avoid the net of proper control;". These ports are also addressed as "ports of convenience". Austria and Luxembourg are Member States but not involved in the Paris MOU since they are landlocked and without ports.

[70] For example, Art. 20(1) which provides that "Member States shall adopt the laws, regulations and administrative provisions necessary to implement this Directive", and the use of "shall" throughout the Directive.

Member States.[71] The Regulatory Committee set up pursuant to Article 12 of Directive 93/75/EEC is charged with this task.[72]

The third observation, which is related to the second, is that the Directive does not contain a provision as Section 2.3 of the Paris MOU does which stipulates that each Maritime Authority applies only those Conventions, protocols or amendments to which its state is a party. Although much depends on the definition of the clause "in force" in Article 2(1), this could entail that Member States are also obliged to apply the instruments which they have not ratified or acceded to.[73]

The NMFT clause is laid down in Article 3(3) and is also apparent in the reference in the purpose of the Directive to "all ships", and in Article 3 referring to "any ship". Article 3(3) is not taken literally from the corresponding Section 2.4 of the Paris MOU but the essence remains the same.[74]

The widely recognized obligation for port states not to cause undue detention or delay subject to compensation is laid down in Article 9(7). However, added thereto it is provided that "[i]n any instance of alleged undue detention or delay the burden of proof shall lie with the owner or operator of the ship." This approach aims at stimulating compliance and thereby fits in closely with the general attitude of the Directive which reaffirms the primary responsibility of the flag state.

Inspection

General

The inspection of vessels is covered by Articles 5, 6 and 7. While Article 5 lays down the inspection commitments, Articles 6 and 7 concern the inspection procedure. The principal commitment of the Paris MOU to inspect 25 per cent of all ships has been retained in Article 5(1) of the Directive, although the wording has become stricter.[75]

The targeting policy laid down in Article 5(2) stipulates that "[i]n selecting ships for inspection the competent authority shall give priority to the ships referred to in Annex I." Section 3.3 of the Paris MOU merely provides that "[i]n selecting ships for inspection, the Authorities will pay special attention to ...", and does not explicitly make it a priority to inspect the enumerated categories of ships. The Directive thus leaves less discretion in the targeting policy for Member States in comparison to the Paris MOU.

[71] COM (80) 360, Art. 2, contains no qualification *ratione temporis* and provides in para. (4) the possibility of adding future international instruments to the list of "relevant Conventions".

[72] Personal communication with Mr. J. P. den Boer of the EC.

[73] This is similar to the approach taken in Art. 2 of Directive COM (80) 360.

[74] The NMFT clause also appears in other relevant EC Directives, for example in: Art. 5(1) Directive 93/75/EEC; Art. 12(1)(a) Directive 94/57/EC; and Arts. 8(4) and 10 Directive 94/58/EC.

[75] Some examples of this are that the new text uses "shall carry out" instead of "will achieve", and "at least 25% of the number" instead of "corresponding to 25% of the estimated number".

Annex I contains eight criteria in apparently random order including, *inter alia*, ships whose certificates have been issued by a classification society not recognized under Council Directive 94/57/EC, and ships which have failed to comply with the reporting requirements laid down in Directive 93/75/EEC.[76] Although partly overlapping with the criteria in Section 3.3 of the Paris MOU, the criteria in the Directive result in a considerably larger group of vessels. No 7 Annex I concerns "[s]hips which are in a category for which expanded inspection has been decided (pursuant to Article 7 of the Directive)". It is unclear whether this refers to earlier inspections or whether the ships under Article 7 and, by reference, Annex V must be given priority for inspection as well.

CDEM standards

The inspection procedure is laid down in Article 6 although Article 7 entitled "Expanded inspection of certain ships" forms an integral part of the inspection procedure as a whole. The first phase of the inspection procedure is formed by the "inspection" as defined in Article 2(6) and set out in Article 6(1) and (2), which are basically the same provisions. "Inspection" thus entails checking certificates and the "overall condition of the ship".[77]

The second phase of the inspection procedure is the "more detailed inspection" in case of "clear grounds" pursuant to Article 6(3) and defined in Article 2(7). This is an in-depth inspection of the entire ship or parts thereof, covering "the ship's construction, manning, living and working conditions and compliance with on-board operational procedures". Worth noting is that this enumeration does not seem to include the design of the ship.

In addition to the requirement embodied in the Paris MOU and the regulatory Conventions that "clear grounds" relate to the belief that "the condition of a ship or of its equipment or crew does not substantially meet the relevant requirements", Article 6(3) provides that:

> "'Clear grounds' exist when the inspector finds evidence which in his professional judgment warrants a more detailed inspection of the ship, its equipment or its crew."

The Directive therefore seems to contain two ways for constituting a "clear ground": first, the traditional "belief criterion", and secondly the "evidence criterion". While the first criterion has a more objective character, the second is clearly subjective. It is not clear whether this has been the intention or an example of careless drafting, but it constitutes in any case a deviation from the approach taken in the Paris MOU and the regulatory Conventions.

Annex III gives a non-limitative enumeration of examples of "clear grounds". The first example in Annex III is "[s]hips identified in Annex I, with the exception of No 1". In addition to the obligation to give priority to the

[76] Adopted 13 September 1993 ((1993) OJ L247/19).

[77] This is the so-called "initial inspection" under the Paris MOU, also known as the "superficial round of inspection".

inspection of the ships listed in Annex I, an inspection of these ships will always give rise to a "clear ground" and, consequently, to a "more detailed inspection".

Situations not listed in Annex III can nevertheless give rise to "clear grounds" when they can be brought under the "belief" criterion mentioned above. Article 6(4) stipulates that the "Procedures for the control of ships" in Annex IV, which are identical to Section 1.1 Annex 1 of the Paris MOU, shall also be observed. This makes these instruments legally binding for Member States, although originally they did not have that status. Interesting to note moreover, is that this Annex IV of the Directive categorizes under point 8 the "Annex I to the Paris MOU guidelines for surveyors". This cross-reference thus brings a comprehensive inspection procedure under the procedure of the Directive, which can easily cause confusion.

The categories of ships listed in Annex V will be subjected to an "expanded inspection" under Article 7 where it has been decided to conduct a "more detailed inspection" with respect to these ships.[78] These ships include oil tankers, bulk carriers, gas and chemical tankers, all of which have passed a certain age, and passenger ships. Special attention to older ships is justified on the ground that they are more accident-prone. Through No 7 Annex I and No 1 Annex III, these ships have priority of inspection and when inspected, automatically give rise to a "clear ground", subsequently a "more detailed inspection" and finally an "expanded inspection".

Where the overall condition of a ship is obviously substandard, Article 9(4) authorizes the suspension of the inspection until the responsible parties have taken the steps necessary to ensure compliance with the relevant requirements of the Conventions. This provision expressly reaffirms that the primary responsibility for ensuring that ships comply with "relevant requirements" lies not with the port state but with the "responsible parties". The Directive gives no further guidance on the meaning of the phrase "responsible parties", but it would seem that the owner or operator of the ship is primarily meant here. The responsibility of the flag state is thus indirectly reaffirmed.

Inspections must be carried out by inspectors fulfilling the qualification criteria set out in Article 12 and Annex VII.[79] Article 12(3) specifically aims at ensuring the impartiality of the inspector. More generally, Article 4 embodies the obligation to maintain an authority competent to perform the duties laid down in the Directive. These are important provisions stressing the key role of competent inspectors and authorities in a uniform, non-discriminatory and equitable exercise of Port State Control.

Discharge and navigational standards

The Directive makes no reference to violations of navigational standards such as Rule 10 of COLREG 72. Moreover, the exclusively co-operative approach

[78] Art. 7(1) speaks of a "detailed inspection" where a "more detailed inspection" is probably meant.

[79] The importance of qualified inspectors is also recognized in Res. A.787(19) Sections 2.4–2.6.

followed by Section 5 of the Paris MOU has not been pursued in the Directive. As a "clear ground" warranting a "more detailed inspection", Annex III embodies under No 6 that "[t]he ship has been accused of an alleged violation of the provisions on discharge of harmful substances or effluents". It seems, however, that a "clear ground" is not established unless there has been an "accusation". Other Member States can fulfil this requirement by sending a report or a notification.[80] In the absence of the initiative of other Member States the threshold for meeting this requirement is probably not set too high since Article 6(2) of MARPOL 73/78 imposes no similar restrictions. Neither the Directive nor the Paris MOU contains provisions which envisage the detention for illegal discharges.[81]

Operational requirements

Article 5(4) provides that the rule that certain ships will not be inspected under certain circumstances "shall not apply to any of the operational controls specifically provided for in the Conventions". This indicates that a ship can be inspected for compliance with operational requirements at any time and as often as that port state deems fit. A justification for this approach can be found in the continuously changing composition of crews on the same ship.

Article 6(3) contains the phrase "including *further* checking of compliance with on-board operational requirements" (italics added). This seems to imply that the checking of compliance with on-board operational requirements forms part of the "inspection" pursuant to Article 6(1+2), and that additional inspection follows in the case of "clear grounds". Examples of operational requirements the non-compliance with which would constitute a "clear ground" are given in Nos 8–11 Annex III. No 8 refers to Article 8 of the Directive 94/58/EC of 22 November 1994[82] on the minimum level of training of seafarers, which forms an elaboration of the communication requirement embodied in Section 3.2.2 of the Paris MOU.

Rectification and detention

Article 5(3) provides that ships inspected by any Member State within the previous six months shall not be inspected, provided that the ship is not listed in Annex I, no deficiencies have been reported following a previous inspection, and no clear grounds exist for carrying out an inspection. Although this provision is highly similar to Section 3.4 of the Paris MOU, the circumstance that it is limited to inspections carried out "by any Member State" causes a discrepancy between the two instruments. An amendment by the European Parliament to the effect that this provision would also cover inspections by MOU participants that are

[80] See No 2, Annex III.
[81] See for a preventive approach Sections 2.9, 3.6 and 3.7, Annex VI of the Directive.
[82] (1994) OJ L319/28.

not members of the EU, was not accepted by the Council. The Council took the position that:

> "the Community cannot accept the inspections carried out by inspectors in countries over which it has no jurisdiction. Member States nevertheless remain free to recognize inspections carried out by other members of the MOU."[83]

The issue whether or not the Community has jurisdiction over other countries seems to be of no particular relevance in this respect. Nothing would, in principle, prevent the Community from accepting the outcome of inspections carried out in non-Member States.

Article 9(1) contains the obligation that the competent authorities must be satisfied that deficiencies are rectified. Like the Paris MOU, detention is authorized where deficiencies are "clearly hazardous to safety, health or the environment". Subject to minor editorial changes, the criteria for the detention of ships contained in Annex VI have been directly copied from Section 6 Annex I of the Paris MOU. In relevant places throughout Annex VI the more discretionary term "should" has been replaced by "must".

A new instrument under Article 9 is the possibility to order the "stoppage of an operation" when the continuation thereof would render the operation hazardous.[84] Moreover, the Directive introduces a new procedure for the conditional release of ships. Pursuant to Article 11(1) ships may 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."

The possibility of "conditions" to a release was provided already in Section 3.8 of the Paris MOU. However, neither instrument gives any guidance on the exact character of these "conditions". The new element in this Directive is the procedure for the conditional release which clearly awaits initiative by the flag state who has to determine the conditions upon which the port state can agree or not.[85] This again underlines the responsibility of the flag state. Article 11(4) provides a sanction for non-observance of paragraph (1) by stipulating that ships which do not comply with the conditions under which they were released shall be refused access to any port within the Community. This is subject to certain exceptions, such as *force majeure*.

Innovatory in the Directive is the explicit reference to the right of the owner or the operator of a ship to an appeal against the decision to detain. Article 10 stipulates that the procedure of appeal will not suspend the detention and cannot

[83] Common Position (EC) No 2/95 on Directive 95/21/EC ((1995) OJ C93/25, on p. 44).
[84] The definition is laid down in Art. 2(10).
[85] See, however, Section 3.1 Annex 1 of the Paris MOU.

be resorted to in respect of an order to stop an operation. The introduction of this safeguard against the excessive use of Port State Control does not necessarily mean that a right of appeal is currently absent under the jurisdiction of Member States.

No mention is made of the burden of proof in these proceedings. Since Article 9(7) explicitly addresses this aspect in relation to compensation for undue delay or detention, the absence in Article 10 would seem to indicate that the burden of proof lies with the port state. This would conform to the usual situation in criminal or administrative proceedings.

The publication of information on detained ships is made mandatory under Article 15, a policy known as "blacklisting". The information shall be published each quarter and shall include, *inter alia*, the names of the ship, shipowner or operator, flag state and where relevant the classification society. The manner in which the tool of "blacklisting" is used under the Paris MOU is consistent with the Directive.[86]

Where inspections warrant the detention of a ship, Article 16 provides for the reimbursement of all costs relating to the inspection, which shall be covered by the shipowner or the operator. This economic instrument should work as a deterrent and shows some similarity with the situation in many legal systems where the party losing a civil case ends up paying the costs of the proceedings.

Conclusions

Although the Directive clearly builds on the Paris MOU it nevertheless contains many contrasts. On a more general level it could be submitted that the Directive leaves Member States less discretion and aims at more stringent inspections with respect to a larger number of ships. The Directive introduces some innovatory provisions intended not only to strengthen but also improve the sound exercise of Port State Control and to reaffirm the primary responsibility of flag states with respect to ships flying their flag. These include the qualitative criteria for inspectors, the rights of appeal with respect to detentions, banning of ships, reimbursement of inspection costs, and the possibility to suspend inspection. The Directive does not prescribe new standards and, consequently, does not support the perceived trend in the EU to move towards the establishment of its own standards in matters concerning international shipping.[87] One of the most important differences with a more specific character is perhaps that the structure of the Directive is entirely different from that of the Paris MOU. This does not add to transparency in the already highly complex and technical subject matter.

[86] 1994 Paris MOU Annual Report, p. 26.

[87] A. Nollkaemper and E. Hey, "Implementation of the LOS Convention at Regional Level: European Community Competence in Regulating Safety and Environmental Aspects of Shipping", (1995) 10 IJMCL 282. An example of the trend to set its own standards can be found in Art. 8(3) of Directive 94/58/EC on which the preamble considers "[w]hereas Article 8(3) is necessitated by the fact that the relevant standards, to be established through an amendment to the 1978 STCW Convention, have not yet been agreed in the IMO;".

Moreover, the Directive contains several provisions which have been not been very clearly drafted.

While the object of the Directive to strengthen the operation of the Paris MOU is not objectionable, it raises doubts and concerns about its relationship with the Paris MOU. The choice of a Directive as the form in which the policy of the EC takes shape, makes its substance legally binding on the Member States, in contrast with the non-legally binding nature of the Paris MOU. The Directive does not shift the exercise of enforcement of the regulatory conventions to the EU level, a situation similar to the Common Fisheries Policy of the EU. However, whereas the Paris MOU depends on political pressure to ensure compliance with the rules set out under it, the Commission of the EU has the possibility to start judicial proceedings before the ECJ against Member States on the ground of non-compliance with their obligations under the EC Treaty.[88] Assessing the effectiveness of procedures to ensure compliance in general and in the sphere of the EU cannot, of course, be addressed here.

Uncertainty surrounding the relationship between the Directive and the Paris MOU is also relevant with respect to the issue of uniformity. Since Canada, Norway, Poland and the Russian Federation are not Member States, they are therefore not bound by the Directive.[89] To remedy this threat to uniformity, the EC Commission and the Paris MOU Secretariat have explored the possibility of adherence by non-Member States to the Directive on a voluntary basis.[90] While a commitment might be obtained, will all non-Member States be able to reach the same level of compliance of the strengthened Directive?

The substantive overlap between the Paris MOU and the Directive raises doubts about the future of the Paris MOU. The Preamble to the Directive mentions that for the purpose of its implementation account should be taken of developments in the MOU, which implies that the two regimes will continue to operate alongside each other. According to the Preamble to the Directive, the Committee set up pursuant to Article 12 of Council Directive 93/75/EEC will play a significant role in the implementation of the 1995 Directive. No attention is, however, paid to the relation between this Committee and the Port State Control Committee of the Paris MOU. A more general question is whether two co-existing regimes will not cause too much confusion in the shipping industry. The PSC Committee of the Paris MOU is at this moment in the process of drawing up amendments which aim at removing all discrepancies with the

[88] Art. 169 of the EC Treaty. See also Art. 171 of the EC Treaty. The PSC Committee has no specific competence to ensure compliance with the Paris MOU but rather a general obligation under Section 6.3 to "keep under review other matters relating to the operation and the effectiveness of the Memorandum".

[89] Since Norway is a party to the European Economic Area (EEA), account should be taken of the relevant provisions of the EEA Agreement. See e.g. EEA Agreement, Art. 99.

[90] 1994 Paris MOU Annual Report, p. 24.

[91] These amendments are expected to be adopted at a PSC Committee meeting in May 1996 in Poland. Personal communication with Mr. H. Huibers from the Paris MOU Secretariat.

Directive.[91] A better overall solution would perhaps have been to make the Paris MOU binding for Member States, for example by incorporating the Paris MOU as a whole in a Directive. This option ignores, however, the continuous strife over the distribution of competence between Member States and the EC as an organization.

Table 2

Status as at 1 March 1996 of the relevant instruments for the purposes of the Paris MOU.

	LL		SOLAS			MARPOL 73/78				STCW 78	COLREG 72	ILO 147
	66	Prot. 88	74	Prot. 78	Prot. 88	I/II	III	IV	V			
Belgium	–		–	–		–	–	–	–	–	–	–
Canada	–		–			–				–	–	–
Denmark	–	–	–	–	–	–	–	–	–	–	–	–
Finland	–		–	–		–	–	–	–	–	–	–
France	–	–	–	–	–	–	–	–	–	–	–	–
Germany	–	–	–	–	–	–	–	–	–	–	–	–
Greece	–	–	–	–	–	–	–	–	–	–	–	–
Ireland	–		–	–		–			–	–	–	–
Italy	–	–	–	–	–	–	–	–	–	–	–	–
Netherlands	–	–	–	–	–	–	–		–	–	–	–
Norway	–	–	–	–	–	–	–		–	–	–	–
Poland	–		–	–		–	–	–	–	–	–	–
Portugal	–		–	–		–	–	–	–	–	–	–
Russian Fed.	–		–	–		–	–	–	–	–	–	–
Spain	–	–	–	–	–	–	–	–	–	–	–	–
Sweden	–	–	–	–	–	–	–	–	–	–	–	–
United Kingdom	–		–	–		–	–	–	–	–	–	–
Croatia	–		–	–		–	–	–	–	–	–	
Japan	–		–	–		–	–	–	–	–	–	–
USA	–	–	–	–	–	–	–		–	–	–	–

Table 3

Status as at 1 March 1996 of the relevant instruments for the purposes of the Viña del Mar Agreement.

	LL 66	SOLAS		MARPOL 73/78				STCW 78	COLREG 72
		74	Prot. 78	I/II	III	IV	V		
Argentina	–	–	–	–	–	–	–	–	–
Brazil	–	–	–	–				–	–
Chile	–	–	–	–	–	–		–	–
Colombia	–	–	–	–	–	–	–	–	–
Ecuador	–	–		–	–	–	–	–	–
Mexico	–	–	–	–				–	–
Panama	–	–	–	–	–	–	–	–	–
Peru	–	–	–	–	–	–	–	–	–
Uruguay	–	–	–	–	–	–	–	–	–
Venezuela	–	–		–	–	–	–	–	–

Table 4

Status as at 1 March 1996 of the relevant instruments for the purposes of the Tokyo MOU.

	LL 66	SOLAS		MARPOL 73/78				STCW 78	COLREG 72	ILO 147
		74	Prot. 78	I/II	III	IV	V			
Australia	–	–	–	–	–		–	–	–	
Canada	–	–		–				–	–	–
China	–	–	–	–	–		–	–	–	
Fiji	–	–						–	–	
Hong Kong	–	–	–	–	–			–	–	
Indonesia	–	–	–	–				–	–	
Japan	–	–	–	–	–	–	–	–	–	–
Korea (DPR)	–	–	–	–	–	–	–	–	–	
Malaysia	–	–	–					–	–	
New Zealand	–	–	–					–	–	
Papua New Guinea	–	–		–	–	–	–	–	–	
Philippines	–	–						–		
Russian Federation	–	–	–	–	–	–	–	–	–	–
Singapore	–	–	–	–	–			–	–	
Solomon Islands								–	–	
Thailand	–	–							–	
Vanuatu	–	–	–	–	–		–	–	–	
Vietnam	–	–	–	–				–	–	

Table 5

Status as at 10 January 1996 of the relevant instruments for the purposes of the Caribbean MOU.

	LL 66	SOLAS		MARPOL 73/78				STCW 78	COLREG 72	ILO 147
		74	Prot. 78	I/II	III	IV	V			
Anguilla										
Antigua and Barbuda	–	–	–	–	–	–	–		–	
Aruba	–	–	–	–	–			–	–	
Bahamas	–	–	–	–	–		–	–	–	
Barbados	–	–	–	–	–		–	–	–	–
Bermuda	–	–	–	–	–		–	–	–	
British Virgin Islands									–	
Cayman Islands	–	–	–	–	–		–	–	–	
Dominica										
Grenada										
Guyana										
Jamaica	–	–		–	–	–	–	–	–	
Montserrat									–	
Netherlands Antilles	–	–	–	–	–			–	–	

	LL 66	SOLAS		MARPOL 73/78				STCW 78	COLREG 72	ILO 147
		74	Prot. 78	I/II	III	IV	V			
Saint Kitts and Nevis										
Saint Lucia										
Saint Vincent & Grenadines	–	–	–	–	–	–	–	–	–	
Suriname	–	–		–	–	–	–			
Trinidad and Tobago	–	–						–	–	
Turks and Caicos Islands									–	

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Appendix

Council Directive 95/21/EC 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 ([1]),

Having regard to the opinion of the Economic and Social Committee ([2]),

Acting in accordance with Article 189c of the Treaty ([3]),

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;

1 OJ No C 107, 15.4.1994, p. 14 and OJ No C 347, 8.12.1944, p. 15.
2 OJ No 393, 31.12.1994, p. 50.
3 Opinion of the European Parliament of 27 October 1994 (OJ No C 347, 8.12.1994, p. 15), Council common position of 14 March 1995 (OJ No C 93, 13.4.1995, p. 25) and European Parliament Decision of 18 May 1995 (not yet published in the Official Journal).

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 harmonization of detention rules, and including the possibility of publications 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 harmonized 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 harmonizing inspection procedures is fundamental to ensuring the homogenous 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 subsidiary, the development of the means of taking preventive action in this field as regards the seas adjacent tot he 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 harmonized 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 26 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 batter targeting system;

Whereas the rules and procedures for port-State inspections, including criteria for the detention of ships, must be harmonized 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;

[4] OJ No C 271, 7.10.1993, p. 1.

Whereas non-compliance with the provision 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 to authorize 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 post 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 authorized 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 cooperation between the competent authorities of the Member States and other authorities or organizations 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 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 ([1]) 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:

[1] OJ No L 247, 5.10.1993, p. 19.

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 harmonizing 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 authorized by the competent authority of a Member State to carry out port-State control inspections, and 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 are 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 crews:

—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 State 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 Member 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 IV 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.

2. In the case of deficiencies warranting the detention of a ship, the document to be given to the master in accordance with paragraph 1 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 judgment 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 adminstration') 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 recognized organizations 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 detention

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 minimize 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 inspection 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 organizations 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 authorized 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 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 organizations 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 organizations 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

ANNEX I

SHIPS TO BE CONSIDERED FOR PRIORITY INSPECTION
(as referred to in Article 5 (2)) (*)

1. Ships visiting a port of a Member State for the first time or after an absence of 12 months or more. In applying these criteria Member States shall also take into account those inspections which have been carried out by members of the MOU. In the absence of appropriate data for this purpose, Member States shall rely upon the available Sirenac E data and inspect those ships which have not been registered in the Sirenac E database following the entry into force of that database on 1 January 1993.
2. Ships flying the flag of a State appearing in the three-year rolling average table of above-average detentions and delays published in the annual report of the MOU.
3. Ships which have been permitted to leave the port of a Member State on condition that the deficiencies noted must be rectified within a specified period, upon expiry of such period.
4. Ships which have been reported by pilots or port authorities as having deficiencies which may prejudice their safe navigation (pursuant to Council Directive 93/75/EEC of 13 September 1993 and Article 13 of this Directive).
5. Ships whose statutory certificates on the ship's construction and equipment, issued in accordance with the Conventions, and the classification certificates, have been issued by an organization which is not recognized under the terms of Council Directive 94/57/EC of 22 November 1994 ([1]) on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations.
6. Ships which have failed to comply with the obligations laid down in Council Directive 93/5/EEC.
7. Ships which are in a category for which expanded inspection has been decided (pursuant to Article 7 of this Directive).
8. Ships which have been suspended from their class for safety reasons in the course of the preceding six months.

ANNEX II

LIST OF CERTIFICATES AND DOCUMENTS
(referred to in Article 6 (1))

1. International Tonnage Certificate (1969)
2. —Passenger Ship Safety Certificate,
   —Cargo Ship Safety Construction Certificate,
   —Cargo Ship Safety Equipment Certificate,
   —Cargo Ship Safety Radiotelegraphy Certificate,
   —Cargo Ship Safety Radiotelephony Certificate,
   —Cargo Ship Safety Radio Certificate,

* The sequence of the criteria is not indicative of the order of their importance.
[1] OJ No l 319, 12.12.1994, p. 20.

—Exemption Certificate,
—Cargo Ship Safety Certificate.

3. International Certificate of Fitness for Carriage of Liquefied Gases in Bulk;
—Certificate of Fitness for the Carriage of Liquefied Gases in Bulk.
4. International Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk;
—Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk.
5. International Oil Pollution Prevention Certificate.
6. International Pollution Prevention Certificate for the Carriage of Noxious Liquid Substances in Bulk.
7. International Load Line Certificate (1966);
—International Load Line Exemption Certificate.
8. Oil record book, parts I and II.
9. Cargo record book.
10. Minimum Safe Manning Document;
—Certificates of Competency.
11. Medical certificates, (see ILO Convention No 73 concerning Medical Examination of Seafarers).
12. Stability information.
13. Copy of Document of Compliance and Certificate issued in accordance with The International Management Code for the Safe Operation of Ships and for Pollution Prevention (IMO Resolution A.741 (18).
14. Certificates as to the ship's hull strength and machinery installations issued by the classification society in question (only to be required if the ship maintains its class with a classification society).

ANNEX III

EXAMPLES OF 'CLEAR GROUNDS' FOR A MORE DETAILED INSPECTION

(as referred to in Article 6 (3))

1. Ships identified in Annex I, with the exception of No. 1.
2. A report or notification by another Member State.
3. A report or complaint by the master, a crew member, or any person or organization with a legitimate interest in the safe operation of the ship, shipboard living and working conditions or the prevention of pollution, unless the Member State concerned deems the report or complaint to be manifestly unfounded, the identity of the person lodging the report or the complaint must not be revealed to the master or the shipowner of the ship concerned.
4. The ship has been involved in a collision on its way to the port.
5. The oil record book has not been properly kept.
6. The ship has been accused of an alleged violation of the provisions on discharge of harmful substances or effluents.

7. During examination of the certificates and other documentation, (see Article 6 (1) (a) and (2)), inaccuracies have been revealed.

8. Indications that the crew members are unable to comply with the requirements of Article 8 of Directive 94/58/EC of 22 November 1994 on the minimum level of training of seafarers [1].

9. Evidence of cargo and other operations not being conducted safely, or in accordance with IMO guidelines, e.g. the content of oxygen in the inert-gas mains supply to the cargo tanks is above the prescribed maximum level.

10. Failure of the master on an oil tanker to produce the record of the oil discharge monitoring and control system for the last ballast voyage.

11. Absence of an up-to-date muster list, or crew members not aware of their duties in the event of fire or an order to abandon ship.

ANNEX IV

PROCEDURES FOR THE CONTROL OF SHIPS
(as referred to in Article 6 (4))

1. Procedures for the Control of Ships (IMO Resolution A.466 (XII)), as amended.

2. Principles of Safe Manning IMO Resolution A.481 (XII) and Annexes which are Contents of Minimum Safe Manning Document (Annex I) and Guidelines for the Application of Principles of Safe Manning (Annex 2).

3. Procedures for the Control of Ships and Discharges under Annex I to Marpol 73/78 (IMO Resolution A.542 (13)).

4. Procedures for the Control of Ships and Discharges under Annex II to Marpol 73/78 (IMO Resolution MEPC 26 (23)).

5. Procedures for the Control of Operational Requirements Related to the Safety of Ships and Pollution Prevention (IMO Resolution A.742 (18)).

6. The Provisions of the International Maritime Dangerous Goods Code.

7. International Labour Organization (ILO) publication Inspection of Labour Conditions on Board Ship: Guidelines for Procedure.

8. Annex I to the Paris MOU guidelines for surveyors.

ANNEX V

A. CATEGORIES OF SHIPS SUBJECT TO EXPANDED INSPECTION
(as referred to in Article 7 (1))

1. Oil tankers, five years or less from the date of phasing out in accordance with Marpol 73/78, Annex I, Regulation 13G, i.e.

   —a crude oil tanker of 20 000 tonnes deadweight and above or a product carrier of 30 000 tonnes deadweight and above, not meeting the requirements of a new oil tanker as defined in Regulation 1 (26) of Annex I to Marpol 73/78, will be subject to expanded inspection 20 years after its date of delivery as indicated on the

Supplement, Form B, to the IOPP Certificate, or 25 years after that date, if the ship's wing tanks or double-bottom spaces not used for the carriage of oil meet the requirements of Regulation 13G (4) of that Annex, unless it has been reconstructed to comply with Regulation 13F of the same Annex,

—an oil tanker as mentioned above meeting the requirements of a new oil tanker as defined in Regulation 1 (26) of Annex I to Marpol 73/78 will be subject to expanded inspection 25 years after its date of delivery as indicated on the Supplement, Form B, to the IOPP Certificate, unless it complies with or has been reconstructed to comply with Regulation 13F of that Annex.

2. Bulk carriers, older than 12 years of age, as determined on the basis of the date of construction indicated in the ship's safety certificates.
3. Passenger ships.
4. Gas and chemical tankers older than 10 years of age, as determined on the basis of the date of construction indicated in the ship's safety certificates.

B. NON-MANDATORY GUIDELINES FOR EXPANDED INSPECTION OF CERTAIN CATEGORIES OF SHIPS

(as referred to in Article 7 (2))

To the extent applicable the following items may be considered as part of an expanded inspection, inspectors must be aware that it may jeopardize the safe execution of certain on-board operations, e.g. cargo operation, if tests having a direct effect thereon, are required to be carried out during such operations.

1. SHIPS IN GENERAL (categories in section A)

—Black-out and start of emergency generator,
—Inspection of emergency lighting,
—Operation of emergency fire-pump with two firehoses connected to the fire main-line,
—Operation of bilge pumps,
—Closing of watertight doors,
—Lowering of one seaside lifeboat to the water,
—Test of remote emergency stop for e.g. boilers, ventilation and fuel pumps,
—Testing of steering gear including auxiliary steering gear,
—Inspection of emergency source of power to radio installations,
—Inspection and, to the extent possible, test of engine-room separator.

2. OIL TANKERS

In addition to the items listed under section 1, the following items may also be considered as part of the expanded inspection for oil tankers:

—Fixed-deck foam system
—Fire-fighting equipment in general,
—Inspection of fire dampers to engine room, pump room and accommodation,
—Control of pressure of inert gas and oxygen content thereof,
—Check of the Survey Report File (see IMO Resolution A.744 (18)) to identify possible suspect areas requiring inspection.

3. BULK CARRIERS

In addition to the items listed under section 1, the following items may also be considered as part of the expanded inspection for bulk carriers:

—Possible corrosion of deck machinery foundations,
—Possible deformation and/or corrosion of hatch covers,
—Possible cracks or local corrosion in transverse bulkheads,
—Access to cargo holds,
—Check of the Survey report File, (see IMO Resolution A.744 (18)) to identify possible suspect areas requiring inspection.

4. GAS AND CHEMICAL TANKERS

In addition to the items listed under section 1, the following items can also be considered as part of the expanded inspection for gas and chemical tankers:

—Cargo tank monitoring and safety devices relating to temperature, pressure and ullage,
—Oxygen analysing and explosimeter devices, including their calibration. Availability of chemical detection equipment (bellows) with an appropriate number of suitable gas detection tubes for the specific cargo being carried,
—Cabin escape sets giving suitable respiratory and eye protection, for every person on board (if required by the products listed on the International Certificate of Fitness or Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk or Liquefied Gases in Bulk as applicable),
—Check that the product being carried is listed in the International Certificate of Fitness or Certificate of Fitness for the Carriage of Dangerous Chemicals in Bulk or Liquefied Gases in Bulk as applicable,
—The fixed fire-fighting installations on deck whether they be foam or dry chemical or other as required by the product carried.

5. PASSENGER SHIPS

In addition to the items listed under section 1, the following items may also be considered as part of the expanded inspection for passenger ships.

—Testing of fire detection and alarm system,
—Testing of proper closing of fire doors,
—Test of public address system,
—Fire drill where, as a minimum, all sets of fireman's outfits must be demonstrated and part of the catering crew take part,
—Demonstration that key crew members are acquainted with the damage control plan.

If deemed appropriate the inspection may be continued while the ship is on passage to or from the port in the Member State, with the consent of the shipmaster or the operator. Inspectors must not obstruct the operation of the ship, nor must they induce situations that, in the master's judgment, could endanger the safety of the passengers, the crew and the ship.

ANNEX VI

CRITERIA FOR DETENTION OF A SHIP
(as referred to in Article 9 (3))

Introduction

Before determining whether deficiencies found during an inspection warrant detention of the ship involved, the inspector must apply the criteria mentioned below in sections 1 and 2.

Section 3 includes examples of deficiencies that may for themselves warrant detention of the ship involved (see Article 9 (3)).

1. Main criteria

When exercising his professional judgement as to whether or not a ship should be detained the inspector must apply the following criteria:

Timing:

Ships which are unable to proceed to sea must be detained upon the first inspection irrespective of how much time the ship will stay in port.

Criterion:

The ship is detained if its deficiencies are sufficiently serious to merit an inspector returning to satisfy himself that they have been rectified before the ship sails.

The need for the inspector to return to the ship is a measure of the seriousness of the deficiencies. However, it does not impose such an obligation for every case. It implies that the authority must verify one way or another, preferably by a further visit, that the deficiencies have been rectified before departure.

2. Application of main criteria

When deciding whether the deficiencies found in a ship are sufficiently serious to merit detention the inspector must assess whether:

1. the ship has relevant, valid documentation;
2. the ship has the crew required in the Minimum Safe Manning Document.

During inspection the inspector must further assess whether the ship and/or crew is able to:

3. navigate safely throughout the forthcoming voyage;
4. safely handle, carry and monitor the condition of the cargo throughout the following voyage;
5. operate the engine room safely throughout the forthcoming voyage;
6. maintain proper propulsion and steering throughout the forthcoming voyage;
7. fight fires effectively in any part of the ship if necessary during the forthcoming voyage;
8. abandon ship speedily and safely and effect rescue if necessary during the forthcoming voyage;

9. prevent pollution of the environment throughout the forthcoming voyage;
10. maintain adequate stability throughout the forthcoming voyage;
11. maintain adequate watertight integrity throughout the forthcoming voyage;
12. communicate in distress situations if necessary during the forthcoming voyage;
13. provide safe and healthy conditions on board throughout the forthcoming voyage.

If the answer to any of these assessments is negative, taking into account all deficiencies found, the ship must be strongly considered for detention. A combination of deficiencies of a less serious nature may also warrant the detention of the ship.

3. To assist the inspector in the use of these guidelines, there follows a list of deficiencies, grouped under relevant conventions and/or codes, which are considered of such a serious nature that they may warrant the detention of the ship involved. This list is not intended to be exhaustive.

3.1 General

The lack of valid certificates as required by the relevant instruments. However, ships flying the flag of States not party to a convention (relevant instrument) or not having implemented another relevant instrument, are not entitled to carry the certificate provided for by the Convention or other relevant instrument. Therefore, absence of the required certificates should not by itself constitute reason to detain these ships; however, in applying the 'no more favourable treatment' clause, substantial compliance with the provisions is required before the ship sails.

3.2 Areas under the Solas Convention (References are given in brackets)

1. Failure of the proper operation of propulsion and other essential machinery, as well as electrical installations.
2. Insufficient cleanliness of engine room, excess amount of oily-water mixtures in bilges, insulation of piping including exhaust pipes in engine room contaminated by oil, improper operation of bilge pumping arrangements.
3. Failure of the proper operation of emergency generator, lighting, batteries and switches.
4. Failure of the proper operation of the main and auxiliary steering gear.
5. Absence, insufficient capacity or serious deterioration of personal life-saving appliances, survival craft and launching arrangements.
6. Absence, non-compliance or substantial deterioration of fire detection system, fire alarms, firefighting equipment, fixed fire-extinguishing installation, ventilation valves, fire dampers, quick-closing devices to the extent that they cannot comply with their intended use.
7. Absence, substantial deterioration or failure of proper operation of the cargo deck area fire protection on tankers.
8. Absence, non-compliance or serious deterioration of lights, shapes or sound signals.
9. Absence or failure of the proper operation of the radio equipment for distress and safety communication.
10. Absence or failure of the proper operation of navigation equipment, taking the provisions of Solas Regulation V/12(o) into account.

11. Absence of corrected navigational charts, and/or all other relevant nautical publications necessary for the intended voyage, taking into account that electronic charts may be used as a substitute for the charts.
12. Absence of non-sparking exhaust ventilation for cargo pump rooms (Solas Regulation 11-2/59.3.1).

3.3 Areas under the IBC code (References are given in brackets)

1. Transport of a substance not mentioned in the Certificate of Fitness or missing cargo information (16.2).
2. Missing or damaged high-pressure safety devices (8.2.3).
3. Electrical installations not intrinsically safe or not corresponding to code requirements (10.2.3).
4. Sources of ignition in hazardous locations referred to in 10.2 (11.3.15).
5. Contraventions of special requirements (15).
6. Exceeding of maximum allowable cargo quality per tank (16.1).
7. Insufficient heat protection for sensitive products (16.6).

3.4 Areas under the IGC Code (References are given in brackets)

1. Transport of a substance not mentioned in the Certificate of Fitness or missing cargo information (18.1).
2. Missing closing devices for accommodations or service spaces (3.2.6).
3. Bulkhead not gastight (3.3.2).
4. Defective air locks (3.6).
5. Missing or defective quick-closing values (5.6).
6. Missing or defective safety values (8.2).
7. Electrical installations not intrinsically safe or not corresponding to code requirements (10.2.4).
8. Ventilators in cargo area not operable (12.1).
9. Pressure alarms for cargo tanks not operable (13.4.1).
10. Gas detection plant and/or toxic gas detection plant defective (13.6).
11. Transport of substances to be inhibited without valid inhibitor certificate (17/19).

3.5 Areas under the Load Lines Convention

1. Significant areas of damage or corrosion, or pitting of plating and associated stiffening in decks and hull affecting seaworthiness or strength to take local loads, unless proper temporary repairs for a voyage to a port for permanent repairs have been carried out.
2. A recognized case of insufficient stability.
3. The absence of sufficient and reliable information, in an approved form, which by rapid and simple means, enables the matter to arrange for the loading and ballasting of his ship in such a way that a safe margin of stability is maintained at all stages and

at varying conditions of the voyage, and that the creation of any unacceptable stresses in the ship's structure are avoided.

4. Absence, substantial deterioration or defective closing devices, hatch closing arrangements and watertight doors.
5. Overloading.
6. Absence of draft mark or draft mark impossible to read.

3.6 Areas under the Marpol Convention, Annex I (References are given in brackets)

1. Absence, serious deterioration or failure of proper operation of the oily-water filtering equipment, the oil discharge monitoring and control system or the 15 ppm alarm arrangements.
2. Remaining capacity of slop and/or sludge tank insufficient for the intended voyage.
3. Oil Record Book not available (20 (5)).
4. Unauthorized discharge bypass fitted.

3.7. Areas under the Marpol Convention, Annex II (References are given in brackets)

1. Absence of the P&A Manual.
2. Cargo is not categorized (3 (4)).
3. No cargo record book available (9 (6)).
4. Transport of oil-like substances without satisfying the requirements or without an appropriately amended certificate (14).
5. Unauthorized discharge bypass fitted.

3.8 Areas under the STCW Convention

Number, composition or certification of crew not corresponding with safe manning document.

3.9 Areas under the ILO Conventions

1. Insufficient food for voyage to next port.
2. Insufficient potable water for voyage to next port.
3. Excessively unsanitary conditions on board.
4. No heating in accommodation of a ship operating in areas where temperatures may be excessively low.
5. Excessive garbage, blockage by equipment or cargo or otherwise unsafe conditions in passageways/accommodations.

3.10 Areas which may not warrant a detention, but where e.g. cargo operations have to be suspended

Failure of the proper operation (or maintenance) of inert gas system, cargo-related gear or machinery are considered sufficient grounds for stopping cargo operation.

ANNEX VII

MINIMUM CRITERIA FOR INSPECTORS
(as referred to in Article 11 (1))

1. The inspector must be authorized to carry out port-State control by the competent authority of the Member State.

2. Either:

   —The inspector must have completed a minimum of one year's service as a flag-State inspector dealing with surveys and certification in accordance with the Conventions,
   —and be in possession of:

   (a) a certificate of competency as master, enabling that person to take command of a ship of 1 000 GT or more (see STCW, Regulation II/2); or
   (b) a certificate of competency as chief engineer enabling him to take up that task on board a ship whose main power plant has a power equal or superior to 3 000 KW, (see STCW, Regulation III/2); or
   (c) have passed an examination as a naval architect, mechanical engineer or an engineer related to the maritime fields and worked in that capacity for at least five years,

   —The inspectors mentioned under (a) and (b) must have served for a period of not less than five years at sea as officer in the deck or engine-department respectively.

   Or:

   The inspector must:

   —hold a relevant university degree or an equivalent training, and
   —have been trained and qualified at a school for ship safety inspectors, and
   —have served at least two years as a flag-State inspector dealing with surveys and certification in accordance with the Conventions.

3. Ability to communicate orally and in writing with seafarers i the language most commonly spoken at sea.

4. Appropriate knowledge of the provisions of the international conventions and of the relevant procedures on port-State control.

5. Inspectors not fulfilling the above criteria are also accepted if they are employed by the competent authority of a Member state for port-State control at the date of adoption of this directive.