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The Effect of Port State Control on International Maritime Commerce: A Critic of The European Memorandum Of Understanding (Paris MOU) And The West and Central Africa Memorandum Of Understanding (Abuja MOU).

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Chapter 1

Introduction and Historical Back Ground of Port State Control

The deliberations at the United Nations conference on Trade and Development (UNCTAD) in the 1970s which called for a fairer terms of trade and development financing for under developed and developing countries influenced the adoption of the United Nations Convention on the Law of the Sea 1982, also known as UNCLOS111[1]. Prior to 1982, there have been the 1958 and 1960 treaties which were believed to be inadequate at the time of the conference. The new Treaty was passed with the aim of replacing the previous Treaties, establishing a comprehensive set of rules governing the ocean, facilitate international communication and promote peaceful uses of the seas and ocean, the equitable and efficient utilization of their resources, conservation of their living resources and the study protection and preservation of marine environment[2].

The Treaty gave every Nation Coastal or Land locked the right to register ships that will have a right to the use of their flags and be subject to their regulations and control with the condition of a genuine link between the state and the ship[3]. Genuine link could be in form of nationality of the owner(s) of the ship or by ownership of a registered company in that Nation. Such Nations shall also issue to the ships documents to that effect; this is the concept of flag state. Under this Treaty, Ships registered with flag states are bound by the domestic laws of that state and the state is saddled with the responsibility of exercising its jurisdiction over such ships. This jurisdiction is inclusive of civil, criminal and social[4].

It is generally believed that most flag states have failed in the administration of their duties- to monitor ships flying their flag and insist on the obligations and requirements

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[1] United Nations Convention on the Law of the Sea (UNCLOS111) 1982 herein referred to as the treaty. http://www.unlawoftheseatreaty.org/
[2] Supra note 1, Preamble to the treaty, http://un.org/Dept/LOS/Convention
[3] Supra note 1, Article 91, paragraph (1) and (2), Article 92 paragraph (1) and (2)

under international maritime conventions. The failure of flag states and that of other associated organisation such as the classification society and the insurers has lead to grievous maritime disasters[5], loss of life, property and pollution of the maritime environment not leaving economic loss out of the analysis. It is this and other antecedents' failure such as the problem associated with flag of convenience[6] that became a challenge for major maritime Nations. This situation arose as a negative economic reaction to effective flag state. Ships registered under this head (flag of convenience) enjoy the laxity in such ports of registration on international regulations matter. They rarely ever visit their home Nation during the whole of their service life, thus making the enforcement of international standard uneven[7]. More overtly put by Aleka Sheppard in her book Modern Maritime Law and Risk Management[8]

> "The failure of some flag States to exercise effective control on the enforcement of international safety regulations, the slackness of some shipping companies to observe safety issues, the poor performance of some classification societies…coupled with the increased public interest…led to measures to counterbalance these deficiencies…"

These challenges became a source of concern for maritime Nations (mainly Coastal States) thus, for example, the European Maritime Nations in a bid to overcome these worrisome situations teamed into a group and developed the concept of a regional port state control to serve as a second defence line for the safety and security of their coast[9]. This move produced the European Memorandum of Understanding popularly known as the Paris MOU. This idea has since been supported by the International Maritime Organisation (IMO), the United Nations agency responsible for the

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[4] Supra note 1, Article 94
[5] The Titanic, Amoco Cadiz oil spill, The Erika
[6] P. Cariou, M. Q. Magia, F. C. Wolff, an Economic Analysis of Deficiencies, Noted in Port State Control Inspection, World Maritime University, Sweden, Lund University and Nantes University
[7] ibid
[8] Aleka Mandaraka-Sheppard, Moden Maritime Law and Risk Management, 2nd ed., 2009, Informa

regulation and support of International Maritime activities including development of Laws, Treaties, Conventions, Regulations and Codes. It has further lead to the establishment of 8 (eight) other MOU's which includes Latin America MOU, Asia-Pacific MOU, Caribbean MOU, Indian Ocean MOU, Mediterranean MOU, Abuja MOU for West and Central Africa, Black Sea MOU and Riyadh MOU for the Gulf Region. The United States of America is not a member of any MOU but has the United State Coast Guide (USCG) which carries out Port State Control activities in accordance with the US Code of Federal Regulations and other International Conventions.

The ultimate responsibility for implementing conventions lies with the flag state;[10] while sovereign and other self governing states have the right to control any activity within their own borders including those of visiting ships. The control by these sovereign and self governing states over foreign flagged ships in their ports, verifying compliance with the requirement of the international marine conventions on the basis of the above philosophy is called port state control[11]. This control is authorised by the provisions of certain International Laws, Conventions, Protocols, Regulations, Codes, treaties[12] and are exercised through inspections as specified under these Laws amongst which are Regulation 19, Chapter 1 and Regulation 4, Chapter xi of The International Convention for the Safety of Life at Sea (SOLAS 74) 1974, and its protocol of 1978, Article 4 - 7 and 10, Regulation 8A+ of Annex 1, Regulation 15+ of Annex 11, Regulation 8+ of Annex 111 and Regulation 8+ of Annex v of The International convention for the Prevention of Pollution from Ships (MARPOL 73/78) 1973 and its protocol of 1978, Article 10 of The International Convention on Standards of Training, Certificating and Watch Keeping of Seafarers 1978 (STCW 78) and Article 20 and 21 of The International Convention on Load Lines 1966 (Load

[9] http://www.iomou.org/pscmain.htm
[10] Supra note 3
[11] Supra note 8

Line 66). Others include the Convention on the International Regulations for Preventing Collision at Sea 1972 (COLREG 72), International Convention on Tonnage Measurement of Ships 1969 (TONNAGE 69), Merchant Shipping (Minimum Standards) Convention 1976 (ILO convention No 147), IMO Resolution A797 (19) on procedure for port state control, International Maritime Dangerous goods Code, ILO Publication 'Inspection of Labour Conditions on Board Ship Guidelines for Procedure and European Union Directives on Port State Control[13].

Maritime safety and security regulations affects every aspect of marine activities including the marine environment, life at sea, the working conditions of the seafarers, piracy, terrorism and the physical and working structure of the ship. These various Laws and Conventions are geared towards the regulation of all marine concerns. Since most of the rules of port state in the various conventions are similar, the legal regimes to be investigated will be limited to three to avoid repetition.

The International convention for the Prevention of Pollution from Ships (MARPOL 73/78) 1973 and its protocol of 1978 is geared towards the safety of the marine environment which is one of the aims of IMO in its safety and security regime. The Convention encourages Nations to preserve, protect, maximise, reduce and control pollution of the maritime environment from ships flying their flags or foreign ships operating within their jurisdiction from operational or accidental cause[14]. The convention uses inspection and certification method to achieve its aims. Relevant to Port State Control are Articles 5 and 6 of the convention which makes ships subject to inspection from appointed or authorised port state officers of party states where they visit or of their own home port if their home ports are party states for the purpose of verifying whether they have discharged any harmful substance in violation of the provisions of the convention and its amendments.

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[12] DNV guide on Port State Control, http://exchange.dnv.com/portstatecontrol/text-document/psc
[13] http://www.abujamou.org
[14] AL Beach http://www.beach.com/English/Euinarticle/int

The convention sets standards and procedure[15] for port state control which must be obeyed by the ships. Monetary sanctions may be imposed save wilful and serious discharge in violation of the convention occurs in the territorial water of the affected state. Whatever decision the port state takes on the ship, the flag state must be informed for appropriate action. In addition to the power of the port state under the convention is a right to investigate and initiate proceedings for discharge violations wherever they have taken place, be it the internal territorial seas and Exclusive Economic Zone of any other state although this may only be done by a request from such state or the flag state. However, both the coastal and flag state have a right of pre emption and once this is invoked, the port state suspends all investigations and proceedings; the state taken over investigation and proceedings must continue the proceedings else loses its right to pre emption subsequently.[16]

The stability of ships on water is as important as the safety of the maritime environment for there to be any successful voyage. The stability of the ship on water can seriously be affected by over loading the ship which may cause the cargo to shift in the cause of the voyage resulting in serious loss of property even life; thus the evolution of this practice that ships indicate how low they may safely rest on the water[17]. The convention is concerned with the over loading and material alteration of a ship that makes it unfit and unsafe to withstand the ordinary peril of the sea.[18] Most merchant ships today are covered under The International Load Line Convention 1966 (LoadLine66) and its amendments which contains detailed regulations on the assignment of the freeboard and the specific limitation to which different types of ships may be loaded as ships may either be loaded to a greater or lesser degree depending on the zone and season, as potential hazards varies too.

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[15] Article 4, 7 and 10 of MARPOL 73/78
[16] MARPOL-How to do it, IMO London 2002ed., http://books.google.co.uk/books?id=x77dRepu7luc&pg=PA22
[17] http://dieselship.com/free-articles/ll-ship-constructions-end-na-02Dec2009
[18] Circular No PSC 002 port state control memo of understanding http://www.svg-marad.com/Downloads/circulars/port%20statedirective02-2002

Accordingly, the main purpose of the convention is to make sure international voyage are loaded to a limit that ascertains safety of life and property in a uniformed manner.[19] Article 20 of the convention makes ships covered by it subject to port state control and Article 21 authorises port state control to board foreign ships to check the validity of the ships certificate and the position of the load line marks, to verify that the ship is not over loaded and that the ship has not been materially altered to make it unsafe. The port state is authorised also to take actions that ensures ships do not sail until they can do so without causing danger to themselves or persons on board them[20].

The International Convention for the Safety of Life at Sea (SOLAS 74) 1974 in its successive form has been regarded generally as the most important international treaties on the safety of life of merchant ships[21]. Its main aim is to specify minimum standards for the construction, equipment and operation of ships compatibility with their safety. In doing this, the convention provides that contracting governments should inspect ships of other contracting states if there are clear grounds for believing that the ships and its equipments do not comply with the requirements of the convention. Regulation 19 Chapter 1 and Regulation 4 Chapter ix are material to port state control. While chapter 1 provides generally for the survey of various types of ships and significant documentation of them to ensure they meet the requirement of the convention and the control of ships in ports of other states, SOLAS adopted the International Security Management (ISM) Code 1994 and incorporated it into chapter ix with the aim of imposing a risk management regime upon the ship owners and managers through a Safety Management System (SMS) since lack of risk management was identified as the Achilles' heel of port state control. This Code has changed the structure and focus of marine security and safety from being State and Government sole responsibility to incorporate the ship owners and managers; this

[19] Preamble to the convention
[20] ibid

has been an overdue concept and the final arrival is very welcomed. Unlike other Conventions and Laws, the ISM Code is non prescriptive, but requires ship owners and managers to develop for their ship a safety management system which will help them manage their ships in a safe and fit manner as required by other Conventions.[22] Although all the conventions and Laws are directed towards different aspect of maritime security and safety, they all have a common pattern for enforcement under the port state control which is the inspection of the various certificates relating to the numerous aspects of safety and security and if need be an inspection of the ship which may sometimes lead to the detention of the ship.

Although the maritime industry has other regulators and auxiliary organisations aiding its successful operations, only the flag state as the primary operator and regulator is being held and criticised for the failure of maritime safety and security. The Classification Society, Insurance Company, Shipowner, Charterer, Protection and Indemnity Clubs are other organisations which owe responsibility no matter how small to the maritime industry. Under the current safety and security regime, efforts have been made by every organisation to restore sanity to the industry.

Classification society play very important role in the maritime safety net. They were established in 1968 when marine insurers started demanding an independent inspection of the hull and equipment of a ship requiring insurance cover[23]. It services are required by all stake holders in the industry save for the cargo owner who does not have a direct relationship with it. The ship owners, insurance companies and the flag state that do not have the finances or administrative capacity to carry out its function relies on classification societies to carry out survey of ships on their behalf. Also, ship builders rely on their technology for ship designs hence, most of the merchant ships where built to their specification. These importances have earned it recognition with international conventions such as SOLAS and LOAD LINE.

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[21] http://www.imo.org/about/conventions/lostofconvention/page
[22] Supra note 8

The international association of classification societies which has a consultative status within the IMO develops rules and guidelines called code of ethics and a system certification scheme which its members are guided by for the maintenance of a uniformed standard. However, not all classification society are members of this association and it is believed that the non members are those favourable to the lax flag states and compromised shipowners in the violation of international and domestic rules and standards as regards marine safety and security. The aim of the society with regards to port state control according to the code is to verify that the structure, strength and integrity of the ship's hull; and its appendages are reliable and functioning in order to maintain essential services on board for the benefit of all stake holders. It achieves this by using its developed rules to verify compliance with international standards or domestic statutory regulation. Thus, the industry in general relies on their activities and judgements.

However, the society (IACS) has disclaimed the use of its issued certificate as a warranty of safety, fitness for purpose or seaworthiness of the ship; it rather requires that

> "it should be seen as an attestation of the ships compliance with the developed and published rules issued by the society".[24]

Its ratio is that the decision to survey a ship and keep it in a standard and worthy state is voluntary of the ship owner and not the society. In essence, the society is not a guarantor of safety at sea or seaworthiness as they are not in charge of the manning, operation or maintenance of the ship between its periodic surveys.[25]

This disclaimer is unfounded as the reason given does not flow from the disclaimer. It cannot possibly be argued that a society or an association who prescribes a regulation of such impotence should deny reliability on such regulation for the sole

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[23] http://iacs.org.uk/documents/public/explained
[24] ibid
[25] Classification society- what, why and how?
http://www.iacs.org.uk/documentt/public

purpose of denying future liability. This disclaimer has raised international curiosity as to the true purpose of the society and in turn has attracted a lot of law suit from owners and third party interest of ships which failed after a survey by the society[26] and as expected different decisions were reached by the Judges. In the American case of "the Sundancer"[27], per G. C. Pratt J. it was held that the purpose of classification certificate is not to guarantee safety, but merely to allow "the sundancer" take advantage of the insurance rate available to a classified ship. However, in the later case of "Nicholas H"[28] the court per Lord Steyn held that the society is to promote safety of life and property at sea in public interest. However, presently, there is no uniformity as to the purpose of the society[29]which makes accountability from its member almost impossible and renders its implementation a futility especially for the commercial ship owner. However, classification is required by most insurers before insurance policy are being granted thus, this may be one good reason for classifying ships.

As important as insurance is to shipping, some ship owners will not insurer their ship in extreme economic situation. These classes of ships are suspected of been without most or any valid certificate and are prime target for port state control inspection[30]. The insurer is in a unique position in the maritime industry as it can influence decision made by any of its sectors as well as put pressure on the ship owners to promote quality shipping and to marginalise the operation of substandard ships. The majority of ship owners are open to influence by adjustment of the conditions of insurance cover and depending on the type of cover the insurer will be interested in

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[26] Supra note 5
[27] Sundancer sci, cruise inc, v. the American Bureau of Shipping 7F301 1077 (1994) AMC1
[28] Infra note 100
[29] Bean Diederich Durr: an Analysis of the Potential Liability of Classification Society: Developing role, current disorder and future prospect http://web.uct.ac.za/depts/shiplaw/these/durr.htm
[30] British Maritime Law Association, The Role of Cargo Owner/Shippers and marine Insurers in quality shipping campaign http://www.bmla.org.uk/documents/therole_of_cargo_owner

the ships management. Previously, this demand was thought to be impossible but with the introduction of the ISM Code its impossibility has become a thing of the past. Thus, some insurers request the ISM Code certificate as a condition for compliance[31].

Usually, the conditions imposed by the insurers are closely related to the actual risk insured against. Insurers will not impose extreme conditions due to the competitive nature of the business. That notwithstanding, some have more business weight than others and are able to influence practice and management within the industry. Leading in this categories are the protection and indemnity clubs whose members are both insurers and insured. Hence, they have taken the lead on issues which directly influence safety standards and advising members of the need to take reasonable steps to avoid data recognition problems in electronic systems. Although the insurers are in commercial business, they have a shared interest in removing substandard ships and their operations from the industry, both to improve safety and provide a level playing field for responsible owners.[32]

The eradication of substandard shipping is the responsibility and for the benefit of all stake holders in the industry the shipowners not excluded[33]. Been that shipowner have the primary responsibility to maintain the ship and ensure they are in compliance with all regulations international and domestic, the competitive nature of the business should not be an excuse to compromise standards. Unfortunately, this is not so as in a bid to maximise profit, the shipowners cut cost to the detriment of lives and property at sea, even the environment.

With the introduction of port state control especially the adoption of the ISM Code which has introduced a safety management system for shipowners, changes has began to emerge as the shipowners are left with no other choice than detention and possible ban from a lucrative region on failing to oblige its ship with the provision of

[31] ibid
[32] ibid

the International regulations. The decision of a region may also affect the inspection targeting rate for the ship at other port of call since the exchange of information system amongst operators through the IMO regulation is operative. It is also worthy of` note that the court of a port state do not interfere in port state detention thus, in the event of detention, the ship owner is again only left with a choice which is to put the ship in a seaworthy state according to the rules and regulations of a detaining port.[34]

Presently, the effectiveness of international and domestic maritime regime is made practicable by the introduction of regional port state controls, which are operative via the different memoranda of understandings. Relevant to this essay are the European Memorandum of Understanding (Paris MOU) and West and Central Africa Memorandum of Understanding (Abuja MOU).

[33] ibid
[34] ibid

Chapter 2

Port State Control: European Memorandum of Understanding (Paris MOU) and West and Central Africa Memorandum of Understanding (Abuja MOU) In View

The inspection of foreign ships in national port to verify compliance that its conditions and equipment, manning and operations meet's with international rules and regulations are the basis for port state control[35]. The jurisdiction of port state control has been discussed previously; however, maritime nations have conflicting maritime authorities both as flag, coastal and sometimes port state. While all maritime nations are flag states, not all are coastal and port state. For the avoidance of doubt, a maritime nation is a nation with marine interest such as shipping business and all nations of the world have authority under UNCLOS[36] to so be.

While most states are maritime and coastal states, the difference lies in the enforcement process which is dependent on the level of interest which a state has in maritime security and safety. The interest could either be towards environmental protection, shipping or both[37]. The jurisdiction could further be divided into coastal and port state. While the focus of the costal state is mainly to protect the territorial integrity and maintain resource, border protection and national obligations of the international community to provide maritime and aviation search and rescue services (SAR), port state control is generally directed towards ensuring that foreign ships are seaworthy, pollution risk free, provide a healthy and safe working environment and comply with relevant international conventions, codes and regulations especially those of the IMO and ILO. It is with this later jurisdiction (PSC) that this essay is concerned.

The international nature, technical diversity, complex management and crewing structure of commercial shipping require International Corporation. These and other

[35] http://www5.imo.org/sharepoint/blast
[36] See Chapter 1 on Flag State Authority
[37] Captain Ambrose Rajadural, Regulation of shipping: The Vital Role of Port state, 18 MLAANZ Journal 2004

issues have lead to the developments of regional port state agreements known as memorandum of understanding (MoU). Currently there are nine of these MoUs[38] in the world and the Imo is strongly in support of the development. The IMO has since the inception of the MoUs made regulations for PSC inspections and procedures[39] for the various MoUs and channelled resources for the successful implementation of the goals of the MoUs including training of officers and purchasing of facilities.

The MoUs are developed in regional fora; although they are not intended to be legally binding on parties, there is the general expectation that parties will act in a way consistent with the aims of the region. The region primarily serves as a conduit for sharing PSC inspection data, exchange of relevant experiences, knowledge and technology towards combating risk posed by substandard ships. Leading on the list of these MoUs is the European MoU for Europe coastline and Canada, popularly known as the Paris MoU (PMoU).

The MoU was originally assented to by 14 European states and Canada but presently has 27 members as a result of the European Union. The MoU is an administrative agreement between its maritime authorities to share the responsibilities of inspecting ships entering their region for compliance with international regulations[40]. The aim of the MoU is to share the inspection workload and to create an electronic database of all ships entering the region which is shared and monitored by all members. The PMoU database is known as The Hybrid European Targeting and Inspection System (THETIS). The MoU has seen a lot of amendments and developments which have helped it retain its position as the best.

The intervention of the European Union (EU) in maritime issues has enhanced the position of this MoU. While MoUs are not legally binding on parties, the EU states are legally bound by EU Directives thus; the EU makes Directives through its designated

[38] As Listed in Chapter 1
[39] IMO Regulation A787 (19) Port State Procedure
[40] Stuart Blesel, Port State Control and Paris Memorandum of Understanding http://www.parismou.org

body- EU Council on maritime issues. The Council uses the European Maritime Safety Agency (EMSA) as its driver to disseminate EU Directives to the participating members of the MoU which becomes binding on members. These Directives have also been amended severally[41] to meet with current technology and practice especially those of the IMO and ILO. Thus it will be more appropriate to discuss PMoU on the terms of the new innovations as stated in the EC Directive 09/16/EC on PSC.

The PMoU regulation covers safety of life at sea, prevention of pollution by ships and living and working conditions on board ships. It applies to everyone commercial or private, regardless of tonnage[42]. The new directive[43] which came into force in January 2011 is known as the third maritime safety package. It aims to reward good performing ships and target poor performing ships[44], to enable member states considerable freedom in the selection of ships for inspection and to curtail over inspection without clear reason while other ships slip the net. The general idea to harmonise port state system and fair approach is still very essential to the directive.

The new directive introduced a new regime known as the new inspection regime (NIR), this NIR makes use of the THETIS. The THETIS is a targeting and information system. The system contains all the functionalities stemming from the NIR requirement. The NIR requires that for there to be an effective working of the MoU, all member state should have in place the necessary arrangements to facilitate the collection and reporting of ship arrival and departure information through their own national system. With the NIR, a ship risk profile is continuously updated, based on inspection result, port state control officers (PSCO) are alerted about when to inspect a ship based on ship call information. This is the most advanced system of its kind

[41] Directive 95/21/EC, 98/25/EC, 98/42/EC, 99/97/EC, 01/106/EC, 02/84/EC, and currently, 09/16/EC
[42] Supra note 4
[43] Directive 09/16/EC

and it cost the EMSA substantial investment. The system is capable of calculating and attributing to each ship in the database a risk profile which is continuously upgraded. Also, it calculates the achievement level of the inspection commitment of each member state monitoring missed inspections and records reasons for missed inspection. The most important of all its function is its ability to directly process ship call information from the member states through safe sea net, the EU's ship traffic monitoring and information system. This it uses to automatically indicate the ships due for inspection in all port and anchorage area of the PMoU region.

Allowing for continuity alongside innovation, the directive maintains and reinforces some of the requirement of the previous regimes these includes detention and banning of substandard ship where necessary. In particular, the directive recognises the need for mechanisms allowing ship owners to appeal against a detention or a refusal of access issued by a member state. The various authorities are supposed to establish and maintain appropriate procedures for this purpose. However, an appeal does not suspend a detention or a refusal of access but where the appeal is upheld, there is an automatic rectification, including any necessary amendments in the information recorded in THETIS. This provides a more solid alternative to the existing remedy of the PMoU review panel, which although probably quicker and easier as a process is still limited to an essential advisory function vis a vis the sanctioning port state.

The need for appropriate competence and training of PSCOs carrying inspections in the PMoU region is also reflected. There is a harmonised training scheme which offers training and qualification for PSCOs of all member state participating in the PMoU and it is supported by EMSA, EMSA organises several training weeks every year for member state and for other regional MoUs such as the Abuja MoU, dedicated to sessions focusing separately on new and inexperienced PSCOs. The

[44] EMSA, A New Inspection Regime for Port State Control in all Paris MoU Countries 2010 http://www.emsa.europa.eu/news_a_press_center/Hem/464-a published on the

activities of the EMSA in the area of port state control are not limited to THETIS and NIR, as it is also committed to the long term goal of making PSC system increasingly more efficient and robust. To achieve these goals, it is important that PSCOs have equipments available to facilitate their daily work. To this end, EMSA has developed Rulecheck a database that facilitates access to relevant regulations and PSC procedures. This allows the PSCOs to for instance quickly identify convention references relating to deficiency found on board and thereby deliver to the master a complete inspection report. Finally, it is developing a comprehensive distance learning package for PSCOs which is promising to be the biggest ever e-learning development in the area of PSC[45]. The overall effect of this is to improve PSC system by improving efficiency, reducing inspection time to avoid unnecessary delay of ship in ports and most of all creating uniformity in PSC system in the region.

Unfortunately, the West and Central African MoU (Abuja MoU) cannot boast of much. Since its inception 11(eleven) years ago, activities preceding its take off are yet to be concluded. Actually, not all the countries in the region have accepted membership of the MoU and some of those who have accepted membership are yet to complete their registration process and formal acceptance of membership[46]. The MoU is in response to the global initiative spearheaded by the IMO for the eradication of substandard ships, development of safe and healthy working conditions of seafarers and preservation of the marine environment. The successful implementation of the MoU requires adequate allocation of human, financial and material resources, through political will and commitments of the various maritime Administrators[47] to conduct regular port state inspections and submit of inspection reports to the secretariat. Immediate to the success of the MoU is the encouragement of parties to the MoU to deposit instrument of acceptance for a formal acceptance of membership

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17/11/2010 updated 13/04/2011
[45] ibid
[46] Supra note 13
[47] Maritime Authorities of the different Countries involved in the Port State Control

into the MoU, compile comprehensive data on PSCOs in the region and PSC inspections, publishing reports of inspections and harmonising of port state inspection procedures and practice. These should be pursued concurrently with the task of building the institute itself with a functional structure to facilitate attainment of the targets. Member state will also have to support the secretariat by performing their obligations under the MoU.

The MoU is structured along the line of other MoUs and aims to function in accordance with the aforementioned regulations and convention especially those of the IMO and ILO. However, unlike its European counterpart, it lacks the unity of purpose and financial strength to function as most of its member states are yet to recover from apathy; while others are labouring under the current economic depression. All these have earned the region the worse remark in the discussion of maritime security and safety. It has also exposed the region to various maritime risk including piracy and a safe haven for substandard shipping.

Recently, changes have been introduced to the region when in 2010 a new administration was inaugurated to administer the MoU[48]. The government of the host nation called on other member state to renew their interest and corporate in the running of the organisation. Since then, the MoU has being undergoing reorganisation and restructuring. Capital of which is the resurgence of interest of member states, establishment of a register of PSCOs in the region, some of the countries who have not formally accepted or signed the MoU have now commenced the process of formal acceptance of membership. The funding pattern has also changed from being solely the responsibility of the host nation to receiving contributions from other member states. The area of staffing and other resources have received donations too from the Nigerian Maritime Administration and Safety Agency (NIMASA), the Nigerian Port Authority (NPA) and the Nigerian Shippers Council (NSC). Although this is an aberration, as officers of the PSC are supposed to

be independent and without any affiliations commercial or otherwise to other maritime agencies in the region,[49] i.e. costal state maritime agency, flag state agency or the shipping companies, Abuja MoU PSCOs are seconded from the various maritime agencies of the host nation however, this is a good point to start for the region who previously had no staff.

Due to the above recent developments, the purposefulness and focus of the MoU has been noticed by the IMO and other member states that have now shown interest, willingness to support and participate in the activities of the MoU. Although the MoU is still very behind all other MoUs, it aims to standardise to the level of PMoU in no distant time.

Some of its major challenges are lack of PSCOs and training facilities for its existing officers, inspection facilities which are not cheap and considering the current economic situation in the region, while PMoU can afford THETIS, most Nations in the region cannot boast of reliable power supply to power basic facilities like harbour lightens and computers, the region is also not advanced in technology and its use and finally most of the leaders of the member states do not see the immediate benefit of maritime safety and security system as they currently do not experience much traffic in their region. Thus, while some of the countries are making maximum effort to carry out port state control activities and keep the region safe;[50] some others[51] have actually contracted out their ports and its administration while others have simply abandoned theirs or have opened their port free for all sort.

The region has to show serious dedication and commitment to the issue of port state control as the new regime has zero tolerance on maritime insecurity, pollution and lack of safety. The effect of these are grievous commercial implication on both the economy of the individual Nation and merchant shipping with its ancillary

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[48] http://www.thisdaylive.com/articlea/abuja-memorandum-of-understanding.Dec2010
[49] Supra note 39
[50] Nigeria, Ghana, South Africa
[51] Liberia

international commercial transactions thus, should be treated with a degree of responsibility.

Chapter 3

International Commercial Maritime Control and Maritime Administrative Control

According to writer and analyst Dr. J. P. Rodrigue,

> "Marine transportation has always been the dominant support of global trade and the most globalised industry in terms of ownership; control and commercial usage"[52].

Most sea going vessels are commercial and vary in size, type and purpose. The concept of marine transportation has lead to international trade which has allowed for an expanded global market for both goods and services that otherwise may not have been available thus, the business is very competitive.

For a very long time, marine transportation was regulated by English laws hence, the rules and regulation as applicable in many countries today were developed from the English common law, Statute and Judicial precedents. Again, maritime transportation is a trade which is governed by the law of contract and generally do not have a single reference book as statute and the freedom of the various parties in the agreement to contract on their standard terms are largely respected in situations of dispute unless it can be regarded as unfair and unreasonable.[53]

While maritime law which regulates the activity on international and domestic waters has advanced since its inception to include modern day security and safety regimes, the same cannot be said of International commercial Regulations (ICR) which is still largely based on customary usage. However, due largely to unequal commercial strength, by international and corporate bodies, some international Rules and Regulations have been created to support existing ICR. Currently, there are four major Conventions running side by side depending on the preference of the parties and the rules of application of International Law. These Conventions are the Hague Rules 1924, Hague Visby Rules 1968, Hamburg Rules 1978 and Rotterdam Rules

[52] Dr. J.P Rodrigue, Dr. T. Notteboom and Dr. B. Slack Maritime Transportation http://people.hofstra.edu/geptrans/eng/ch3en/con3en/ch3c4e

2008. The Hague and Hague Visby Rules are very closely related and are wildly in use till today; although the Hamburg Rules has 25 parties as required for its coming into force, it has had no major impact on world trade till date this is largely due to its obvious favouritism to shippers.[54] However, these three Rules can be used side by side unlike Rotterdam which specifically requires any country which assents to it to repeal all other Rules to which it is a member.

Maritime Administrative control as previously noted aims to eradicate substandard shipping thereby creating cleaner seas and safer ports. On the other hand, ICR (customary or legal instrument) are concerned about seaworthiness and provides for an implied warranty of seaworthiness in all its regulations amongst others. The Regulations requires that the shipowner provides a seaworthy ship before and at the beginning of the voyage except for the Rotterdam Rules which provides that the duty under the warranty runs throughout the voyage. The difference in standards and duty required by the Maritime Administrative Control and ICR of the shipowner raises contractual issues for the shipowner and the charterer as port state control inspection may take place before, after or during a charter. The issues of different standard and duty arose as a result of the various interpretations that have been given to the terms used under both administration- “substandard” popularly associated with maritime administrative control and “seaworthy” by the various ICR. Since parties are bound by the terms of their contract; the issue of these terms will be discussed as it determines whether a shipowner owes any responsibility to a charterer or insurer when in default with maritime administrative requirements.

It is the duty and primary responsibility of the shipowner both under maritime administration and ICR to keep the ship up to standard and seaworthy respectively. However, while a substandard ship has been described as a ship that through its physical condition, its operations or the activities of its crew fails to meet basic

[53] Infra notes 83 and 84

standards of seaworthiness and thereby poses a threat to life and /or the environment,[55] a standard ship is technically sound and complies with mandatory international conventions, is regularly maintained, manned by qualified trained personnel[56] who are well paid and properly treated by their employers and have a good off shore based management thus, the substandard ship is not solely a function of vessel condition.[57] On the other hand, "seaworthiness" has been defined as the ability to withstand the ordinary stress of wind, wave and other weather which the ship might normally be expected to encounter.[58] Also, it was defined in the Marine Insurance Act[59] as a ship which is reasonably fit in all respect to encounter the ordinary peril of the seas of the adventure insured[60].

Although the terms are usually used interchangeably under the maritime administrative regime as suggested by the IMO definition of substandard[61], the distinction was drawn in the definition by the Navigations Act[62] which defines "seaworthiness" as a fit state to encounter the ordinary peril of the sea and "substandard" as a seaworthy ship whose condition on board are clearly hazardous to safety or health[63]. This suggest that the terms are not synonymous and therefore proof of detention by PSCO in itself need not necessarily serve as proof of breach of contractual obligations requiring a ship to be maintained in a seaworthy condition. This means that the duty to keep a ship standard is wider than the contractual duty of seaworthiness which is a fundamental standard; a bottom bench mark of which to

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[54] Ms Anomi Wanigasekera, Comparison of Hague-Visby and Hamburg Rules, http://www.juliusandcreasy.com/inpage/publications
[55] SSY Consultancy and Research Ltd for OECD Maritime Transport Committee: The Cost to Users of Substandard Shipping http://www.oecd.org/data/oecd/27/18/1827388.pdf.
[56] Principally IMO Conventions Load Line 66, SOLAS 74, MARPOL 73/78, STCW 95, COLREG 72, TONNAGE 69 and ILO 174
[57] Supra note 37
[58] Bryan A Garner, Black's Law Dictionary 8th ed.
[59] S 45 (4) MIA 1906
[60] Dixon v Sadler (1839) 5 M & W 405,affd, (1814) 8 M & W 405
[61] Supra note 39
[62] Navigation Act 1912
[63] Ibid s 207 and 207 (A)

remain within the purview of legality and to hold a shipowner liable to a charterer or insurer for breach of PSC requirement of "standardness" is extending his contractual terms and duties according to the interpretation of the Navigations Act. In the same light, it will be unfair to suggest that a ship detained by PSCO owes no duty to the other contracting parties.

Positively, the courts have come to the aid of commercial parties who would have suffered some form of loss as a result of this definition discrepancy by extending the meaning of seaworthiness in different cases to accommodate the requirements of the current maritime administration. This is important because, the absence of a certificate at all point of the voyage will delay or prevent a voyage just as easily as a damaged engine would or even an inefficient master.[64] According to Field J in Kopitoff v. Wilson[65]

> "… where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly and necessarily held to warranty that the ship is good, and in a condition to perform the voyage about to be undertaken,…is seaworthy,.. fit to meet and undergo the perils of the sea and other incidental risk to which she must of necessity be exposed in the cause of the voyage…."

This means the warranty is absolute and the test is that of an ordinary careful and prudent owner.

Where the ship is physically defective or inadequate to sail, the shipowner will be held liable for failing to provide a seaworthy ship. In the case of Stanton v. Richardson[66], the pumping equipment in the ship could not adequately deal with the surplus of water from a cargo of wet sugar and this rendered the ship unseaworthy. According to the court, the failure of the shipowner to provide proper equipment

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[64] Simon Everton, What Would be an Effective deterrent to Substandard Shipping? Charles Taylor Consulting Prize Essay
[65] (1876) 1 Q. B. D. 377
[66] (1875) L. R. 9 C. P. 390

rendered the ship unseaworthy. In Standard oil co of New York v. Clan Line Steamers Ltd[67] the court per Lord Atkinson stated that, the incompetence of a master (Crew) can constitute unseaworthiness; this he called

"a disabling lack of skill and a disabling lack of knowledge".

Also, in Hongkong fir Shipping Co Ltd v. Kawasaki Jisan Kawasaki Ltd[68] the issue of incompetent and insufficient crew was revisited. In this case, the charterparty provided that the ship was to be *"in every way fitted for ordinary cargo service".* The engine of the ship was old and required special expertise from the crew to operate them. Apart from the fact that the crew were insufficient, the chief engineer was addicted to drinking and had repeatedly neglected his duties. The court held there was such incompetence which rendered the ship unfit for "ordinary cargo service" thus, unseaworthy. Thus, in the resent case of Manifest Shipping & Co Ltd v. Uni-Polaris Insurance CO & La Reunion Europeene (The Star Sea)[69] reaffirming the judgment at first instance, the Court of Appeal stated that unseaworthiness clearly included the staffing of the ship with incompetent or insufficient crew.

Inadequate documentation of a ship has also been held to be unseaworthy.[70] The courts are however careful not to extend the rule to non legal documentary requirements. In Alfred C Toepfer Schiffahrsgesellschaft mbH v. Tossa Marine Co Ltd (The Derby)[71] the International Transport Workers Federation's (ITF) blue card was held in favour of the shipowner not to be a requirement by any law which was relevant to the ship. Thus, the charterer could not claim loss of earnings against the shipowner. Therefore, the documentary requirement must go to the root of the ship's

[67] (1924)Ac100@120
[68] (1962) 2 QB 26
[69] (1997) 1 Lloyd's Rep 360
[70] Cheikh Boutros Selim El-Khoury and others v. Ceylon Shipping Lines Ltd (The Madeleine) (1967) 2 Lloyd's Rep 224
[71] (1985) 2 Lloyds Rep 325

ability to sail. In this later instance, its non compliance would render the ship unseaworthy[72].

Furthermore, for a shipowner to fulfil the requirements of seaworthy, the ship must be cargoworthy. Since cargoworthiness refers generally to the physical attributes of the ship, it is a matter of seaworthiness. In Owner of Cargo on Ship "Maori King" v. Hughes[73] it was held that the machinery in the ship were to be fit at the time of shipment as machinery to carry such goods under the ordinary conditions of an ordinary voyage otherwise the warranty of seaworthiness would not have been met and the ship will be unseaworthy. However, the courts have distinguished this duty of cargoworthiness from the duty to stow which does not lead to unseaworthiness. This was illustrated in "The Thorsa"[74], which relied on the test in Kopitoff v. Wilson, the court held that, since it was not contended that the ship was not in any way defective in design or in structure, or in condition or equipment, at the time she sailed it was not unseaworthy.

In that case, the ship was to carry a cargo of chocolates from Genoa to London. A cargo of gorgonzola cheese was held in the same hold. Bad weather meant that the holds had to be kept shut and as a result of poor ventilation, the chocolate were contaminated by the cheese. The owner of the chocolates argued that the ship was unseaworthy as a result of the bad stowage. The shipowners attempted to rely on a clause which provided that a ship was not liable for loss or damage arising from "any act, neglect or default in management, loading or stowing of the ship". The clause would be inapplicable if the damage was caused not by mere stowage but unseaworthiness. Thus the court held judgment in favour of the shipowner as the damage was caused by mere stowage and not unseaworthiness.

What the courts succeeded in doing in these cases is the unification of the terms "substandard and unseaworthy". The implication of which will depend on the proof of

[72] Ciampe v. British Steam Navigation Co Ltd (1915) 2 KB 774
[73] (1895) 2 Q. B. 550, Kopitoff v. Wilson supra 59

it. This means where it can be proved that the ship is unseaworthy as a result of it being substandard, the contractual parties will be able to seek recourse depending on the terms of their contract. In clear terms, where a ship is being detained by PSCO for been substandard, a proof of substandardness invokes the shipowner's duty of seaworthiness and a right of action for the shipper. Thus, the shipper is able to challenge the shipowner and if successful, he will be entitled to remedies under the terms of their contract.

Proof of unseaworthiness[75] depends on the law of the contract. According to Andrew Smith J, in Project Asia Line Inc of Delaware & United Shipping Services Ltd v. Andrew Shone (the Pride of Donegal)[76], unseaworthiness is always an issue of fact. Thus, under the various regulations it needs to be proved. The burden of proof under The Hague and The Hague Visby is on the claimant like every other civil action. He has to proof that the ship was unseaworthy at the time of commencement and it was that unseaworthiness that caused the loss or damage[77]. However, the law further requires to shipowner to use "due diligence" in providing a seaworthy ship. The effect of this is that, where unseaworthiness has been found, the shipowner must show he exercised due diligent before and at the commencement of the voyage to escape liability otherwise he will be bound.

This provision of due diligence before and at the commencement of the voyage has an implication to limit the effect of maritime administrative regime on International Commerce. This is so as PSC inspections are carried out at different ports of call including the port of dispatch. What then will be the implication in a situation where the port of dispatch is not a PSC efficient port or do not possess adequate facility to carry out relevant port state inspection and on arrival at a foreign port the ship is

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[74] (1916) P. 257
[75] Proof of substandardness was dealt with in chapter 2 of this essay
[76] Commercial Court (UK), 24 January 2002 (Unreported)
[77] International Packers v Ocean Steamship Co (1955) 2 Lloyd's Rep 218, Kuo International Oil Ltd v. Daisy Shipping Co Ltd (The Yamatogawa) (1990) 2 Lloyd's Rep 39

detained for failing to meet port state requirement of "standardness"? Will the shipowner be exonerated because before and at the commencement of the voyage the ship was "seaworthy"?

The duty to provide a seaworthy ship is an absolute duty. However, under the relevant Regulations save for the Rotterdam Rules, the duty attaches "before and at the beginning of the voyage". Previously it was argued that the responsibility stops once the ship has sailed, however, judicial activism has pushed this reasoning some steps further to come in line with commercial practicalities and it is the current reasoning that, for the provisions of the regulations to be meaningful and applicable in maritime administrative regime, a stage by stage diligence at the beginning of a multiple voyage is what is meant as due diligence[78]. This is because PSC inspections take place at different ports and times in the voyage which may lead to detention of the ship or any other sanction.

The maritime authorities of various Nations have delegated the duty of inspecting foreign ships visiting or calling at their ports to their PSCO[79]. PSCOs are instructed to exercise their discretion in the way and manner in which they carry out their jobs. They determine how long an inspection will last and if the result of the inspection will lead to the detention of a ship, if the ship will be allowed to sail and to what extent the ship can sail after inspection. All these as previously noted can delay a ship as much as a broken down engine; thus needs to be given consideration in the interpretation of international Conventions. According to Smith L J in The Vortigern [80]

> "for the doctrine of seaworthiness to be effective, the shipowner can extend the implied and existing warranty to the commencement of each stage of the voyage; that way, the clear intention of the parties can be reached and the undoubted and admitted warranty complied with."

[78] Infra note 80
[79] Supra note 39

The Hamburg Rules recognises carrier's liability; thus, bases liability on a presumed fault. Article 5 (1) places the burden of proof on the carrier who should show that the loss, damages or delay occurred despite all measures reasonably taken by him, his agent or servants to avoid the occurrence and its consequence. However, where damage was caused by fire the burden shifts to the claimant. In line with these previous argument is the new Rotterdam Rules which requires the shipowner to exercise due diligence in providing a seaworthy ship throughout the duration of the contract i.e. from the beginning and during the voyage. Under this Rules, the duty of seaworthiness is fundamental and more practicable. The aim of all the above is to establish a practical commercial application of the doctrine of standardness through seaworthiness.

Where unseaworthiness has being proved, the modern position is as stated in the Hongkong Fir Shipping Co Ltd v. Kawasaki Jisen Kawasaki Ltd[81] case. It no longer allows the claimant repudiate the contract automatically as the terms of seaworthiness is not a condition but an intermediate or innominate term; where it is serious and defeats the commercial purpose of the contract of carriage, the claimant can treat the contract as repudiated but where the breach is of minor consequence, a repudiation may not be exercised. In the reasoning of Diplock LJ,

> "the decision of shipowners to undertake to tender a seaworthy ship has become the most complex of contractual undertakings due to the numerous decisions as to what can make a ship unseaworthy... it can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the ship".

As every commercial contract, a shipowner seeking to escape liability must expressly exclude liability in the contract or any document which can be read into the contract

[80] (1899) p.140
[81] Supra 68

as part of the contract documents. How far these exclusion clauses can go was expressed in the case of Photo Productions Ltd v. Securicor Transport Ltd[82] that in theory the parties are free to provide for the widest ranged exclusion clauses, the courts attitude however would be to construe such clauses narrowly. The rule was more succinctly expressed in The Owners of Cargo on Board SS Waikato v. New Zealand Shipping Co[83] according to the court in that case,

> "it is clear that exceptions do not apply to protect the shipowner who furnishes an unseawosrthy ship where the unseaworthiness caused damage unless the exceptions are so worded as clearly as possible to exclude or vary the implied warranty of seaworthiness".

Here clarity of the terms used is of utmost importance and where such is present; the court will not hesitate to give effect to the clause. Thus, in the case of Cargo ex Laertes[84], the word "latent defect in machinery even existing at the time of shipment" was found by the court to be sufficiently protecting the shipowners form liability.

Apart from the contract of charter, all marine insurance policies are furnished with implied warranty of seaworthiness. In fact for marine insurance, seaworthiness is by far the most important of all its implied warranties thus, in the case of Douglas v. Scougall[85] it was stated that

> "there is nothing in the law of marine insurance more important to commerce and the preservation of human life than the strict compliance with the warranty of seaworthiness".

Hence an assured privy to the contract of insurance of its ship is under a duty to disclose any details about the ship which might render her unseaworthy, either prior to the commencement of the voyage or once the voyage has commenced. Where the assured fails to disclose such information which may affect the insurer's intention to

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[82] (1980) A. C. 827, (1980) 2 W. L. R. 283, HL
[83] (1899)1 Q. B. 56
[84] 12 D. P.187
[85] (1816) 4 DOW 276, Wilkie v. Geddes (1815) 3 DOW 60

insure the ship, and effectively misleads the insurer, the insurer can void the contract. Here the duty to disclose is absolute and continues throughout the relationship of assures and insurers save at litigation. The implication of the above is that the shipowner may loss his cover under the policy and be left to bear the consequence of his action himself i.e. pay damages to the charterer; fix or replace his ship depending on the degree of the case.

The implication of all the judicial decisions previously examined is to bring practicality into international commerce where the new maritime administration is concerned; so that where a ship has been found substandard or unseaworthy by PSCOs, the shipper can invoked their contractual terms thereby making the carrier liable for damages. Thus, the shipper, insurer or any other party involved and entitled under the contract could either repudiate the contract or claim damages depending on the intensity of the damage done. However, the contractual loss are more than just law suits, repudiation and claim of damages and the parties affected are more than just the shipowners, charterers and insurers; everybody involved in the chain of commerce are affected down to the final consumer who bears the high cost of acquiring the final goods.

CHAPTER 4

COMMERCIAL IMPLICATIONS OF PORT STATE CONTOL

It is expensive and competitive to maintain a shipping business thus, shipowners crave for the cheapest means to maximise cost. Safety and security as prescribed by international standards are expensive and the ultimate burden for a safe and pollution free operation rest with the shipowner though he has other agents and masters, his liability is personal[86]. The shipowner with the help of inefficient control authorities has been allowed to limit the maintenance of the ship to basic necessities if any so as to maximise profit for himself. This was the initial attraction of flag of convenience. However, under PSC, this is no longer tolerated. A shipowner who fails to keep his ship in line with internationally recommended standards stands a chance of his ship facing strict sanction of different magnitude in its port of call or of departure.

The PSC and ICR place the burden and liability of "substandardness" and "seaworthiness" on the shipowner. This means at every point in time, it is the responsibility of the shipowner to keep the ship standard and seaworthy. The rules governing international maritime administration[87] requires every ship calling at a port home or foreign to be inspected to ensure they comply with maximum International standard of safety and security by such port where they call, berth or anchor. In most ports this responsibility has been delegated to PSCOs[88] who have been mandated to use their discretion in assessing the state of the ship and were necessary prescribe sanctions. Inspection could be brief or prolonged depending on the discretion of the inspecting officer. During inspection, were the PSCO notes conditions on board the ship which are incompatible with international regulations or complains are laid about

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[86]Riverstone Meat Co Pty v. Lancashire Shipping Co (The Muncaster Castle) (1961) 1 Lloyds Rep 57, Art iii (1) of the Hague Rule

[87] See chapter one

[88] The authority to delegate stem from International Maritime Conventions and Regulations as listed in chapter 1 especially the IMO Convention A787 (19) and the Paris MOU

the management of the ship by its staff, this may necessitate a detailed inspection which may lead to a discovery of substandardness and may earn the ship a detention or a ban from the region depending on the severity of the offence and its frequency.

Detention could either be for detailed inspection, for the ship to be put in proper repair or to rectify the deficiency which makes the ship substandard before it is allowed to sail. Sometimes, the ship may be substandard but the port of inspection may not have the requisite facility to put it in good repair in such circumstance, the ship may be allowed to sail to the nearest port[89] of repair either on its own where it is evaluated not to cause damage of any kind before it gets to such other port or it is compelled to use the assistance of a tow. As has been earlier discussed, it is not only structural defect that makes a ship substandard but lack of relevant documentation of a ship and its men on board it at the time of inspection,[90] the quality of men on board the ship, the quality of facilities on board the ship, the welfare of the staff on board the ship and even the on shore management of the ship will render the ship substandard.[91]

Detentions may be major or minor; minor detentions are not the cause of commercial dispute as the ship may be released before the set departure time but, major detentions. Detentions are unlike arrest of ship, there is no requirement for prior consideration of the relative merit of detention by a judge. Although there is some attempt to temper this power in International conventions, ultimately the universal power to provisionally detain a ship is vested in the delegated PSCO. IMO Resolution A787(19) article 2.1-2.6 provides the basis for this delegation of power; it provides that parties to particular conventions may grant general or specific authority to PSCOs, it went further to specify the specifications and duties of the PSCOs.[92] Therefore in practice there is no legal avenue for the shipowner to prevent a

[89] Supra note 39
[90] Supra note 70
[91] Supra note 67
[92] Supra note 39, See also Section 3.3 of the PMOU

provisional detention order being issued and once detained; the owner cannot immediately procure the ships release by lodging financial security with relevant parties as can normally be done in the case of an arrested ship. The only remedy available to the detained ship is to be brought to maximum compliance with the requirement of the detaining port state or region. Even where the detention is contested and the shipowner seeks to use his right of appeal, a right of appeal does not grant an automatic release of the ship until the process is completed and the ship is formally realised.

Whatever the particular circumstances are; the effects are multiple and the responsibilities are of the shipowner. The courts have held in a pectoral of cases as exhausted in the previous chapter that the shipper could bring action against the shipowner as a result of substandardness and the insurer may avoid the contract depending on the nature of the agreement between the parties. However, these are not the most serious effect substandard shipping has on shipping business. The cost are huge, detention will be entered into the detention register of the detaining port/ region, details of which will be sent to the flag state and IMO[93]. The various detention registers are public documents which will be made available for all interested. This could mean potential charterers, insurers and lawyers having access to the report and basing their decision on future business relation with the ship and its owner. Potential clients other than charterers are entitled to view these documents and there is no gain saying to what extent this information would affect their choice of hire.

The detention record of a ship also affects its chance of insurance which might attract a higher insurance rate. Another thing a detention record does to a ship is that it attracts more frequent inspections leading to more delay record for the ship which makes the ship less attractive in the market. This may also make other ships owned by the shipowner attractive to PSCOs for inspection and attract a higher insurance premium too causing general delay and disruption for the shipowner on the whole.

Were the ship is a merchant ship, it may be under a current charter and have goods on board it. The goods which could be perishable and may have actually perished before the goods are delivered or where they are not perishable, the delivery due date may have elapsed during detention.

Where the detained ship was sent for repairs, this will attract a higher cost of repair than would have been the case if the ship were fixed out of port as the inspecting officer would insist on an extreme standard compared to what the shipowner would normally have done. Also, the mechanic is most likely to hike the price of repair as he is not sure when next he will get a client. Whatever the case may be, this will affect the budget of the ship as they are unplanned expenses. The effect of litigation or arbitration and damage cost which he pays to the various parties resulting from detention is also burn by the shipowner. The sum total of all these is a direct reduction if not a total loss in income for the shipowner for sailing a substandard ship. Again, if the deficiencies are severe or becomes frequent, in some advanced region such as the PMOU[94] region the ship stands a risk of being banned. The implication of a ban is grievous compared to detention, delay or more frequent inspections. When a ship is banned from a region, it means that it cannot sail in the waters (international or local) of the countries who are party to that MoU. While detention and the likes will dictate and limit the class of client that will be attracted to trade with the ship; a ban will dictate the type of clients and the region the ship can trade and may signal the end of the business. Bans are common with PMOU region and other regions with sophisticated PSC system. It operates as a final sanction to keep substandard ships and bad shipowners away from their waters and coastlines and ultimately out of business. Incidentally, these regions are high economic regions with high tonnage which means business for the shipowner thus; the shipowner cannot afford to be limited. Furthermore, in the light of comity and international security, other regions

[93] Supra note 39
[94] Section 4 PMOU, also EU Council Directive 95/21/EC June 1995

may implement the terms of the ban. The direct implication on the shipowner is loss of trade or trade marginalisation which may not be of any significant benefit to the shipowner depending on the nature of his trade. At this point, the shipowner should have lost most of his valued clients, its insurance cover or will be open to paying a higher insurance premium and restricted to less economic regions for trade.

Why it is internationally recommended that nations should carry out PSC activities and different nations have come together based on this recommendation to form MOUs to regulate their PSC activities, not all MOUs are functional. According to John Mansell in his book "Flag State Responsibility"[95]

> "a Nation in exercising its sovereignty can make the conscious economic decision not to exercise certain aspect of its authority i.e. as a flag state in order to attract tonnage where he does not or cannot conform to acceptable standards. Accordingly, the sovereign act of a grant of Nationality through registration can be a negation of sovereign responsibility. The sovereign Nation may choice to ignore whatever they want. This protection enables some flag state to ignore UNCLS".

This means, Nations cannot be compelled to obey International Treaties which they have assented to. By the doctrine of sovereignty, a mere assent of international legislation does not automatically make the legislation operative in that Nation unless the Nation domesticates such legislation in to its laws.[96] Put it differently, the primary characterisation of the relationship of ports international and domestic is that of competition. Ports vigorously compete in terms of cost and services for international shipping business whether that business is container, cruise or bulk. Since all ports and Nations do not have equal opportunities, there is that commercial tendency for

[95] Mansell John N.K., Flag State Responsibility, 2009, Springer
[96] A. o. Enabulele and C. O. Imoedemhe, Unification of the Application of International Law, 2008, vol 123 EJCL http://www.ejcl.org/123/art123-1.pdf.

lowered standards thus; the Nation may not be minded to enforce all international legislation assented to.[97] This situation is particularly true of the Abuja MOU region.

Most states in this region have prevented the region from having any form of PSC and consequently have encouraged substandard shipping. This they achieved by not participating in PSC activities like signing up to the regional MOU and contributing their developmental quota to the MOU. The absence of a functional PSC in the region has made the region an open haven for substandard shipping thereby exposing the region to all the danger associated with substandard shipping such as piracy, pollution, collusion; lose of life and properties and the likes. This also creates lack of uniformity with the application of international legislations and in-attraction for compliant ships.

Recently, St. Maarten in Philipburg, Netherlands attracted the newest and biggest ever cruise ship “Oasis of the Seas” with 5000 passengers which is quintuple the population of the small island to its port by investing 35million dollars in the upgrade of the port. Also, Nassau in Florida USA had to enlarge harbour surface size to attract this same ship and others in its category.[98] This is so because the shore visit (be it cruise or merchant ship) pumps so much money into the economy of any country. It is self-limiting for Nations to avoid PSC participation in this outbreak of globalisation and international dependency. Apart from the aforementioned limitations, owners of compliant ships will not want to risk the danger of economic association and price cut after invested so much to put their ships to compliance. Also, Abuja MOU region is not very economically viable as most of its member’s states neither produce nor manufacture anything. The bulk of the trade in the region is distribution of goods manufactured in Europe and Asia. To the uses of substandard ships, the implication is very glaring- an end to this business opportunities. Although this is not a true picture of all the countries in this region as Nigeria, South Africa,

[97] Ted L. McDorman, Regional Port State Control Agreement: Some Issues for International Law. 5, Ocean and Coastal Law Journal 207 (2000)

Ghana and Ivory Coast have notable domestic maritime agencies. However, the aforementioned listed Countries are insignificant achievement making save to conclude that there is no PSC activity in the region.

For a deficient ship, the situation for a shipowner is precarious. Why he may not be aware of the situation that lead to the deficiency or have employed an expert to investigate or repair the ship before the ship is inspected and detained, his liability is personal both for his agent and that of an independent carrier. According to the court in the Muncaster Castle[99],

> "no other conclusion was possible than to say that the shipowners obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done. In other words, Art iii (1) requires due diligence by whom he may have committed the work of fitting the ship for sea and this obligation of due diligence is personal to the shipowner".

While others affected can claim damages from him and the insurer may escape liability, the shipowner is saddled with his responsibility.

The shipowner has lost the possibility of claiming against the classification society where a classed ship is found deficient after been classed by the classification society. This became obvious when the House of Lords in "The Nicholas H" [100] upheld the provision of the ethics code of the IACS which stated that, Classification Society cannot be sued for damages in the event of a classed ship becoming deficient. The court held in that case that

> "classification societies act for the collective welfare. Imposing liability on them might well force them into taking a protective stand; there is

[98] Mighty Ship: Oasis of the Seas, http://www.youtube.com/watch?v=dMHDIEAQgmc
[99] Supra 86
[100] Marc Rich and Co AG and others v. Bishop Rock Marine Co Ltd (the Nicholas H) (1995) 3 All ER 307 @ 332

the risk of them becoming unwilling to survey the very ship which most urgently requires independent examination"

This completely leaves the shipowner with no protection against substandard shipping or any means of recouping his loss under the circumstance.

However, although it is popularly stated that no ship is safe and it is the aim of PSC to attain a system of safer ships and cleaner seas, by ensuring maximum security and safety and well informed and trained men onboard a ship, not all situations of deficiency are caused by substandard shipping, some are a function of inefficient port state authority while others are as a result of inconsistency in port state control administration.

Inefficient port state administration is a common feature in Abuja MOU region where there are lack of PSCOs and requisite training facilities. Where there are any, they are sometimes not familiar with PSC requirements and at other times, it is seen as a means of extorting the shipowners. Some other reasons for inefficiency may be lack of motivation from the job and inadequate supervision. For example, in the container handling industry, overloaded containers are a widespread problem because industry operators usually turn blind eyes to their safety significance. They ignore box weight rule which requires them to adjust the equipment whenever an overweight container has been lifted and management may be tempted to over look the safety breach. In fact in 2009, the Danish carrier Maesk line was caught up in an incident involving inaccurate cargo weights as a container stack toppled over while the chartered Aso Teultusky Racer was being unloaded in Bremhaven resulting in 18 boxes being lost overboard[101].

On the other hand, inconsistency affects every port state region. While the highly sophisticated PMOU region has an inspection manual listing exhaustive details of the topics eligible for inspection; it is clearly stated on the first page of the manual that PSCOs are to use their discretion in deciding how detailed an inspection should be.

Although this system has its advantage which includes effective targeting of scarce resources and the avoidance of burdensome routines, it is not without known and copious disadvantages. According to Keith Hawkins[102],

> "while the flexibility of discretion can be valuable in individualising the application of the law, its subjectivism can also be a cause of inconsistency in decision outcomes; apparently, similar case may not be treated in the same way by decision makers. An obvious corollary is that discretion can impose similar outcome on apparently different case".

Inconsistency has a corrosive effect on the capacity of smart regulatory systems to enlist the active commercially motivated compliance of operators. The result of PSC inspections in PMOU countries are published on publicly available websites, the effect been that freight rates are affected which reduces the commercial advantage of ships that were cheap because they were substandard; on the other hand, this is raising awareness as stakeholders now visit these publications. This helps to remove the substandard ships that are driving down the freight rates. It may also put the ship in a precarious position of the difficulty in obtaining insurance. Also, since the traffic of each ship is published, would be charterer and others can assess the likelihood of the ships been inspected while under their charter along with the cost of possible delay. Again, the operators can by this publication know how the traffic is computed and workout how to reduce it to in turn reduce their chances of inspection, detention, expensive repairs and delays. Although inconsistency has inhibited the collaboration of the market with smart regulatory practice, never the less, it has not defeated such collaborations[103]

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[101] Janet porter, p2 Lloyd's list 2010
[102] Keith Hawkins, The use of Legal Discretion: Perspective from Law and Social Science, oxford : Clarendon press 1992
[103] Michael Bloor, Ramesh Datta, Yakorgihuskiy and Tom Horlick-Jones, Unicon among the Cedars: on the Possibility of Effective 'Smart Regulation' of Globalised

Chapter 5

Port State Control; Is It The Answer?

The inability of some flag state, shipping companies and classification society to keep up with international maritime standards coupled with the increased public interest on maritime security and safety led to the development of new measures to counterbalance increasing maritime deficiencies.[104] Most prominent of this measure is the port state regime (previously discussed) which is foremost for its zero tolerance to non observance of international maritime regulations backed with effective and immediate sanctions on violators. Its operations are carried out by Countries which have formed themselves into regions and established maritime authorities in such regions. These various maritime authorities exercise their powers through their well trained and independent staff known as PSCO who are monitored by an organised system especially in the Europe region. The high point of achievements for PSC is the incorporation and implementation of the Safety Management System (SMS) Code which was adopted by the IMO as part of the ISM Code which is the new chapter ix of SOLAS.

The SMS Code changes the responsibility of maritime security and safety from being the sole responsibility of the flag state to include active participation by shipowners. It requires the shipowners to develop and maintain a safety management system in line with the code; a switch from prescriptive rule base to process and participation base system. Although this is a welcomed development, it is in itself one of the greatest problems of PSC as it gives room for discretion which in turn result in discrepancies between SMS developed by various shipowners and what is ideal by the PSCOs.[105] However, the use of discretion helps to prevent prescriptive regime. While a

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Shipping Industry (article)http://sls.sagepub.com/content/15/4/534 for further studies on inconsistency

[104] Supra note 8

prescriptive regime is only skin-deep with the sole aim of getting the required certificate, a discretionary regime helps the shipowner develop and maintain a principle of security, safety and maintenance which is easier for him to practice and acceptable by PSC. No doubt PSC has improved maritime security and safety generally, and it is widely in uses now for the enforcement of international maritime conventions and standards. This is achieved during inspection by PSC practicing states.

However, PSC like every other maritime regime is not without Achilles heels. Chief amongst this is the resistance of states to assent to international conventions or the negative use of state sovereignty to flaunt international regulations or even the delay in domestication of assented international regulations.[106] This is a trait synonymous with states and ratification, assenting and domestication of international regulations. It is a matter of private policy to protect individual state interest. Various international treaties including UNCLOS, SOLAS and MARPOL have previously suffered the same fate.[107] With regards to PSC the non compliance of regional members to the terms of the various regional MOUs is less than welcomed. According to Plaza Fernando[108],

> "For a regional memorandum to succeed, every state in that particular area must accede to the agreement. Less than full co-operation will result in the development of "ports of convenience" much like "flag of convenience" with delinquent ships avoiding port with stricter standards in favour of those with more relaxed measures"

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[105] See note 102 for a detailed exposition of the implication of the used of discretion by PSC
[106] http://www.unlawoftheseatreaty.org
[107] ibid
[108] Fernando Plaze, the Future for Flag State Implementation and Port State Control in Center for Ocean Law Policy. Current Maritime Issues and The IMO http://www.asoc.org/storage/documents/Meetings/ATCM/XXVI/ip-44portstate.pdf

PSC is not cheap both for the state and the shipowners. For Abuja MOU member states to participate in PSC, the various government has to be willing and capable of investing so much in the upgrade of the port as was done in St. Maarten, Philipburg Netherlands and Nassau, Florida USA[109], fitted with technological resources as experienced With the PMOU region, well trained independent staff with the opportunity of continues training, mentoring and monitoring. This is almost impossible when considering the current financial crisis, but its security and safety importance far outweighs the expenses and to consider that shore visit pumps in so much into the economy of any visited state should also be an extra motivating factor.

For the above to be effective, it must be done on a regional basis. Few states in a region cannot effectively practice PSC. Full cooperation from every member of the region is what is required from every member of the state as PSC requires a lot of cooperation for effective exchange of information in the area of inspection, monitoring, targeting and sanctioning of visiting and home ships in the region[110]. The member states must be willing to participate and actually participate for all these to be possible. They must contribute their quarter to the development of the region by providing fund to sponsor project such as PSCO's training and uniform standard port facility

Also, after examining the commercial effect of substandard shipping, a prudent shipowner will find it not commercially practical to continue in the practice of substandard shipping thus, the only available alternative for him is compliance with PSC regulations which will enable him trade in PSC active regions. A good point to start will be understanding PSC and its needs. PSC requires that ships flying the high seas should comply with all relevant domestic and international requirements especially those regulating safety and security. It further requires that the ship be classed by reputable classification society and insured by a reputable institute. That

[109] Supra 98
[110] Supra note 39

the physical structure of the ship should be in a state to encounter the ordinary peril of the sea, its crews should be well trained and maintained and general safety of passengers and goods should be guaranteed. To achieve this, it requires the shipowner to develop and maintain a safety management system (SMS) in line with the IMO's SMS Code and other relevant guidelines. The SMS should be effective and practicable allowing for a flexible working and reflecting the needs of frequently visited PSC regions.

To enhance the productivity of PSC, regions such as the PMOU are still developing strategies to farcify identified loopholes to ensure that substandard shipping is totally and permanently kicked out of the shipping industry. One of such innovations is the development of a worldwide network to aid in the exchange of information. Also, the UK protection and Indemnity club in conjunction with Lloyds register has produced a pocket checklist for use on board to assist in prevention of detention by PSCOs due to MARPOL related deficiency. The checklist is known as the Marine Pollution Prevention Pocket Check List. The check list provides areas that must be up to standard and highlights areas where operational deficiencies are frequently found.[111]

In the same light MOU giants such as Paris and Tokyo have noted proliferation of smaller MOU regions whose member states include states which have consistently appeared on the list of delinquent flag state. Hence, they have put together a monitoring body of regional states working together through PSCOs the most promising means yet to oversee standards of ships[112]. Again, there has been a call for the harmonization of PSC procedures, interchange of information and coordination process which currently varies according to the capability and human resources of each region. The call has been made to IMO as the preferred body to coordinate this unification as the current individualised regulations and codes has so

[111] http://www.parismou.org
[112] http://www.asoc.org/stage/documents/meetings&ATCML

far caused inconsistency for compliant shipowners thereby making them deficient in some cases and costing them extra fund and bad reputation.

The IMO has welcomed this latter call and are now looking forward to taking the process a little further by encouraging the various regional groups to apply effectively the spirit and letter of their MOUs and to formalize the transfer of information between the groups. In the past, operators of substandard ships whose activities [113]in one region have being curtailed by the introduction of PSC agreement simply moved their ships into other areas where the enforcement of port state control was less enthusiastic. These areas are now becoming fewer and hopefully within a few years, they will have disappeared altogether leaving substandard ship with no hiding place.

PSC is gaining popularity with fewer ships turning up with deficiencies. For states and shipowners practicing PSC, the commercial benefit is overwhelming. For the state, it means safer ships and cleaner ports not leaving out the economic boost that comes with port visit by ships. Economic boost as previously emphasised in the examples sighted with St Maarten and Nassau ports; shows that port visit be it cruise or cargo ships pumps a lot of money into the economy of the visited port state either through its supplies or purchase of goods or services or both. On the other hand, for the shipowner, it means less PSC charges, inspection, and detention hence, there will be no record of the ship in any deficiency list (blacklisting), which would have affected the hire rate and cost of hire of the ship thus, the shipowner will enjoy a favourable insurance premium for the ship and other ships in his fleet, culminating in good profit. Although the cost of achieving this feat of PSC efficiency is high for both parties (the states and the shipowners), the reward when compared to its consequences is worth the challenges for all stake holders.

THE WORD LIMIT FOR THIS DISSERTATION IS 15000 WORDS

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