

ILO CONVENTION NO. 147, PORT STATE CONTROL, AND THE HUMAN ELEMENT IN SHIPPING*

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In spite of the great strides achieved in the field of maritime safety during the past decades, largely on account of technological advances within the shipping industry, the question remains whether there has at all been any improvement in the well-being of the ordinary seafarer.¹ In a working environment reputed not only for its perennial hazards but also for its peculiar affinity with alienation and slavery-like conditions,² the confirmation that not much has changed in the somber world of the seafarer is rather distressing.

The welfare of seafarers as a legitimate object of a state's protective policy has been recognized since the middle of the 19th century.³ However, the limitations of the national approach cannot be more evident in a context where ship and seafarer are rarely within the physical view of state agencies. From the standpoint of effective legal regulation, the labor problems in seafaring are international in scope and, therefore, are a logical concern for international law.

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¹See P. CHAPMAN, *TROUBLE ON BOARD THE PLIGHT OF INTERNATIONAL SEAFARERS* (1992); C.V.D. Smith, *Human Rights Violations at Sea -- The Tip of the Iceberg*, II THE OCEAN -- AN INTERNATIONAL WORKPLACE PROCEEDINGS OF THE OCEANS 87 CONFERENCE, Halifax, September 28 - October 1, 1987 at 820; C. Down, *Address, THE LEGAL RIGHTS OF SEAFARERS CONFERENCE* (Nautical Institute and University of Wales, June 1985); P. Chapman, *Seafarers and their Problems*, in THE LEGAL RIGHTS OF SEAFARERS 12 (1985).

²See R. DANA, *TWO YEARS BEFORE THE MAST* (1969 ed.) for the classic account of seafarers' life. Also C. Forsyth and W. Bankston, *The Social-Psychological Consequences of Life at Sea: A Causal Model*, 11 MARIT. POL. MGMT. 123 (1984).

³E. GOLD, *MARITIME TRANSPORT* 119 (1981).

Since its creation in 1919, the International Labor Organization has taken a special interest in issues relating to seafarers.⁴ Ten Maritime Sessions of the International Labor Conference have in fact been convened since 1920, when the first Maritime Session adopted three Conventions and two Recommendations for seafarers⁵ - - the prelude to the ILO's continuing task of international standard-setting on seafarers' social and working conditions.⁶ Hand in hand with whatever labor legislation can be solicited at the national front to promote the overall welfare of seafarers, the ILO Conventions and recommendations indeed provide a useful source of rights for seafarers.⁷

Over 70 years of international standard-setting on maritime labor have passed and over a century of state legislative activity on the subject has gone by. However, the impression is widespread that the problem of enforcement, either under international law or municipal law, remains the most serious obstacle in the process of systematically vindicating the rights of victims of "modern-day slavery."⁸ If law and its institutions are equivocal or desperate in confronting the labor situation of seafarers globally,⁹ it would not come as a surprise to find out that the current discourse on

⁴INTERNATIONAL LABOUR OFFICE, MARITIME LABOUR CONVENTIONS AND RECOMMENDATIONS 2 (2nd ed, 1988); INTERNATIONAL LABOUR OFFICE, INTERNATIONAL LABOUR STANDARDS 62-64 (3rd ed. 1990); B.K. Nilssen, *Maritime Labour Law and International Conventions*, in THE LEGAL RIGHTS OF SEAFARERS, *supra* note 1, at 1.

⁵*Id.*, at 2, 4, 225, and 226. *The 74th (Maritime) Session of the International Labor Conference*, September - October 1987, 127 INTERNATIONAL LABOR REVIEW 173 (1988).

⁶As of the end of the 10th maritime session in 1987, there have been a total of 36 Conventions and 27 recommendations on maritime labor. Effectively, however, there are only 30 conventions and 23 recommendations, as six conventions have not entered into force or are no longer open to ratification because of the entry into force of revising conventions, and four recommendations have been replaced by superseding conventions on the same subject. *Id.*

⁷S.L.H. Wong, *The Legal Rights of Seafarers from Engagement to Discharge*, in the LEGAL RIGHTS OF SEAFARERS *supra* note 1, at 33; C.L. Napier and A.N. Matthews, *Litigation Relating to Seafarers' Contracts of Employment*, *id.*, at 74; F.J. Whitworth, *Rights and Obligations under Contracts of Employment*, *id.*, at 125.

⁸See generally THE LEGAL RIGHTS OF SEAFARERS, *supra* note 1. *Modern-day Slavery* is the term used by Rev. David Craig, Missions to Seamen, Halifax, to describe the situation of seafarers.

⁹Napier and Matthews, *supra* note 7, who imply that unless litigation is in a "friendly jurisdiction", like the United Kingdom, the administrative and judicial vindication of seafarer's rights could be frustrating.

ameliorative solutions advocate non-legal prescriptions for the empowerment of seafarers.¹⁰

Amidst a generally grim prognosis on the prospects of an international strategy to effectively safeguard the interests of maritime labor, there are momentary observations that point out the promise of a recent development in international law: port state control.¹¹ As a mechanism for enforcing international labor standards, port state control has definitely been noticed and is being watched very closely as an international legal institution potentially redressing the plight of seafarers. Is there cause for optimism?

This paper examines port state control in relation to the international law on maritime labor. Specifically, it analyzes how the aims of international labor conventions, with particular reference to ILO Convention No. 147,¹² are being served by port state control. The regime of ILO 147 in the context of port state control will perhaps illustrate the nature or direction of enfranchisement now taking place for seafarers as a labor group. At the same time, an analysis of this regime, especially as projected by the European system of port state control, could demonstrate its limitations as an institutional solution to the effectuation of international maritime labor law.

The first section of the paper describes ILO 147 and the innovative features that make it an appropriate instrument on port state control. The next section elaborates on the concept of port state control, with special attention given to the 1982 Paris Memorandum of Understanding on Port State Control. The third section dwells on the issue of how prominent ILO 147 has become or will become in the European agenda of port state control. This section intends to lay the groundwork for the formulation of basic questions about international maritime labor standards in a "new world

¹⁰CHAPMAN (1992), *op. cit. supra* note 1, especially at 133-147. See also Letalik, N *Legal Aspects Governing ASEAN Seafarer*, in M. BROOKS (Ed.) *SEAFARERS IN THE ASEAN REGION* 103 (1989) who puts emphasis on skills development and training. The attitudes and policies of the ITF in relation to empowerment activities of national unions is presented in C. Donn and G. Phelan, *Australian Maritime Unions and Flag of Convenience Vessels*, 33 J. OF INDUSTRIAL REL. 329 (1991).

¹¹E.g., *supra* note 1 references; *The 74th (Maritime) Session*, *supra* note 5; J. Eyre, *A Ship's Flag -- who cares?*, 16 MARIT. POL. MGMT. 179, 186 (1989).

¹²1976 Convention Concerning Minimum Standards in Merchant Ships (ILO CONVENTION No. 147), hereinafter ILO 147. Full text in International Labor Office, *International Labor Conventions and Recommendations 1919-1981* 923 (1982).

order" of shipping. Concluding reflections on the relationship between ILO 147 and the recent notion of the 'human element' in port state control are drawn in the last section.

I. ILO CONVENTION NO. 147

ILO 147, which entered into force on November 28, 1981, has been described as "undoubtedly the most notable achievement of the ILO in the maritime field and has strengthened the international will to eliminate substandard ships."¹³ It represents the culmination of a process in the ILO to address the twin problems of flags of convenience and sub-standard ships.¹⁴ Its world-wide ratification takes high priority in the program of the ILO.¹⁵

From a juridical perspective, ILO 147 is remarkable at least in two ways: first, it integrates, synthesizes, a multitude of standards set by several important maritime conventions; and second, while it mandates a more pronounced role for flag states in merchant shipping, it envisages the application and enforcement of its provisions through port state action. These two features, which cast a specific mold of port states' jurisdictional powers of port states, will be considered in turn.

The Range of ILO 147 Standards

The integration of substantive standards under ILO 147 occurs on account of the general obligation of a ratifying ILO member state to enact a broad range of laws and regulations applicable to ships registered in its territory. These laws and regulations cover the following:

- (i) safety standards, including standards of competency, hours of work and manning, so as to ensure the safety of life on board ship;
- (ii) appropriate social security measures; and

¹³M. Beg, *The Legal Responsibilities of an Employment Agency*, in *THE LEGAL RIGHTS OF SEAFARERS*, *supra* note 1, at 23 and 25.

¹⁴See E. Argiroffo, *Flags of Convenience and Substandard Vessels: A Review of ILO's Approach to the Problem*, 110 *INTERNATIONAL LABOUR REVIEW* 431, 451 (1974) in relation to Nilssen, *Maritime Labour Law and International Conventions*, in *THE LEGAL RIGHTS OF SEAFARERS*, *supra* note 1, at 1.

¹⁵Address on behalf of the Secretary-General of the ILO, *SAFE OPERATION OF SHIPS AND POLLUTION PREVENTION*, Fourth Ministerial Conference on Port State Control, Paris March 14, 1991 at 50.

(iii) shipboard conditions of employment and shipboard living arrangements, insofar as these, in the opinion of the Member, are not covered by collective agreements or laid down by competent courts in a manner equally binding on the shipowners and seafarers concerned[.]¹⁶

A textual examination of the Convention reveals that ILO 147 already defines the concrete terms by which a flag state can exercise its discretion in implementing this general obligation of legislative prescription. It does this by identifying the minimum set of standards which must be adopted when complying with the above-stated obligation. These standards are, in fact, an array of international conventions incorporated by reference into ILO 147. Curiously, an intricate method is used to assimilate these conventions into ILO 147 as minimum standards for adoption by a ratifying state. Two modalities of incorporating international minimum standards are employed in ILO 147, namely, "substantial equivalence" and "effective ratification".

ILO 147 employs the modality or principle of "substantial equivalence", enumerating in its Appendix Conventions to which the laws and regulations adopted by a ratifying state must be made substantially equivalent.¹⁷ These Conventions, which pertain to standards on social and working conditions on board a ship, are as follows:

- (1) Minimum Age Convention, 1973 (No. 138), or
Minimum Age (Sea) Convention (Revised), 1936 (No. 58), or
Minimum Age (Sea) Convention, 1920 (No. 7);
- (2) Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55),
or
Sickness Insurance (Sea) Convention, 1936 (No. 56), or
Medical Care and Sickness Benefits Convention, 1969 (No. 130);
- (3) Medical Examination (Seafarers) Convention, 1946 (No. 73);
- (4) Prevention of Accidents (Seafarers) Convention, 1970 (No. 134) (Articles 4 and 7);
- (5) Accommodation of Crews Convention (Revised), 1949 (No. 92);
- (6) Food and Catering (Ships' Crews) Convention, 1946 (No. 68) (Article 5);

¹⁶ILO 147, art. 2 (a).

¹⁷The principle seeks to avoid conflict between the Conventions listed in the Appendix, on the one hand, and a state's associated legislation, on the other. See footnote in Appendix in relation to the Certificates Convention. Substantial equivalence with a Convention, of course, no longer applies if a state has ratified that Convention. A member which ratifies ILO 147 must, according to Art. 2 (a) hereof, satisfy itself that the provisions of such laws and regulations [implementing ILO 147] are substantially equivalent to the Conventions or Articles of Conventions referred to in the Appendix to this Convention, in so far as the Member is not otherwise bound to give effect to the Conventions in question.

- (7) Officers' Competency Certificates Convention, 1936 (No. 53) (Articles 3 and 4);
- (8) Seamen's Articles of Agreement Convention, 1926 (No. 22);
- (9) Repatriation of Seamen Convention, 1926 (No. 23);
- (10) Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) [reiterated in Art. 2(c)]; and
- (11) Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

Secondly, through what may be referred to as the principle of "effective ratification" of ILO 147, the standards contained in some other Conventions are brought within the framework of laws and regulations sanctioned by ILO 147. The principle is explained in the provision that lists these other Conventions, which generally refer to safety:

Article 5

1. This Convention is open to the ratification of Members which -

(a) are parties to the International Convention for the Safety of Life at Sea, 1960, or the International Convention for the Safety of Life at Sea, 1974 or any Convention subsequently revising these Conventions; and

(b) are parties to the International Convention on Load Lines, 1966, or any Convention subsequently revising that Convention; and

(c) are parties to, or have implemented the provisions of, the Regulations for Preventing Collisions at Sea of 1960, or the Convention on the International Regulations for preventing Collisions at Sea, 1972, or any Convention subsequently revising these international instruments.

2. This Convention is further open to the ratification of any Member which, on ratification, undertakes to fulfil the requirements to which ratification is made subject by paragraph 1 of this Article and which are not yet satisfied.¹⁸

Effective ratification of ILO 147 thus entails either a prior ratification of, or a soonest accession to, already existing safety Conventions or any subsequent revisions to these Conventions.¹⁹

¹⁸ILO 147, art. 5.

¹⁹This updating mechanism introduced in the "effective ratification" principle, *i.e.*, allowing adherence to subsequently revising safety conventions as a sufficient condition for ratifying ILO 147, could be applied to the "substantial equivalence" principle. Hence, ratification of the 1978 Standards of Training Certification and Watchkeeping Convention, which relates to the same subject as the Convention on Officers' Competency Certificates (No.

The content of standards involved in the effective ratification principle is obviously inextricably mingled with the standards defined by the substantial equivalence principle. This is to be expected considering that it is not feasible to separate safety standards in the effective ratification clause with the standards on social and working conditions in the substantial equivalence clause. In the methodology of this paper, the enforcement of standards laid down in the Conventions involved in the effective ratification of ILO 147 will not be considered. Enforcement of ILO 147 standards will, therefore, refer to the application of ILO 147-Appendix standards which are not independently enforced through other Conventions, specifically Conventions under the auspices of the International Maritime Organization (IMO).

Basically, the enforcement mechanisms in ILO 147 relate to the social and working conditions' on the Appendix Conventions, enumerated above, inasmuch as the conventions under "effective ratification" already have their respective enforcement regimes. Again, enforcement of the ILO 147 Appendix Conventions must be seen as closely interwoven with the enforcement of the safety Conventions already mentioned. Thus, the Safety of Life at Sea Convention may be seen as a more detailed version of ILO Convention No. 134 on the Prevention of Accidents. What ILO 147 ultimately seeks to achieve, admittedly, is for states which effectively ratify ILO 147 to integrate not only social, labor and safety standards but also the administration or enforcement of all Conventions referred to in ILO 147.

Enforcement mechanisms will now be discussed on the basis of the concept of "control" in international law.

Control under ILO 147

How states, or ultimately the ships registered in their territories, are made to comply with ILO 147 standards is dealt with by a system of control under ILO 147. "Control" may be broadly understood as the process of ensuring compliance with obligations assumed under international law,²⁰ and

53), is substantially equivalent to implementing Convention No. 53. See Appendix footnote in text of ILO 147. This is consistent with the treatment of ILO as simply providing for *minimum* standards.

²⁰The theoretical approach to the understanding of control in international law is strongly advocated by Soviet writers. See S.A. Ivanov, *The International Labour Organization: Control Over Application of the Conventions and Recommendations on Labor*, in W.

is closely associated with the idea of a machinery of international law.²¹ Control under ILO 147, which is effectuated by states-parties to this treaty,²² takes place at two levels: at the flag state level, and at the level of the port state. Noticeably, the scheme of control established in ILO 147 is what sets it apart from all the other maritime-related ILO Conventions.

The role of the flag state in "self-control"²³ is not limited to the promulgation of laws and regulations in order to comply with international standards²⁴ in the field of merchant shipping. All the other maritime labor conventions that came before ILO 147 have been using this approach in defining the rigor of flag state implementation required.²⁵ What ILO 147 additionally provides is a control machinery that directs each flag state to assure itself that ILO 147 standards are continuously safeguarded in their enforcement. This completes the meaning of *pacta sunt servanda* under ILO 147.²⁶

Thus, ILO 147, commands a flag state "to exercise *effective jurisdiction or control over ships*" in respect of safety and employment

BUTLER, CONTROL OVER COMPLIANCE WITH INTERNATIONAL LAW 153 (1991) which gives a view to the institutional activities in the ILO in relation to its control activities. "The essential purpose of control is to ensure that the freely assumed obligations are honoured, and thus to further a responsible and conscious approach by the parties to the very act of ratification." See also I. Lukashuk *Control in Contemporary International Law* in BUTLER, *id.*, at 5, who defines control as "the process of processing information called upon to determine the conformity of behaviour of subjects to norms of international law"; and M. Lazarev, *On a Theoretical Concept of Control Over the Fulfillment of International Obligations of States* in BUTLER, *id.*, at 17 who states: "Control enables one to verify and embody in real legal relations behavior which was programmed in a norm, enables the spirit of life to be imparted to a dead letter. Here is the watershed between the ideal and the real in international legal relations."

²¹Lukashuk, *id.*, at 5.

²²"The ILO control machinery created in the 1920s has been especially improved. It can now be characterized as follows: above all, control is effectuated not only over the application of ratified conventions, but also over unratified conventions and recommendations which, naturally, do not impose legal obligations on a state....[t]he most important aspect of control machinery, of course, is control over compliance with the ratified conventions." Ivanov, *Supra* note 20 at 153. See also Khlestov in BUTLER, *supra* note 20, at 24-25 on forms of control by a state party to a treaty.

²³Khlestov, *supra* note 20, at 25.

²⁴*Passim* 6-10.

²⁵Any ILO Convention or Recommendation is uniformly addressed to member states as flag states for them to undertake "self-control" in the form of adopting national measures to implement conventional obligations voluntarily assumed.

²⁶"Self-control is closely linked with the principle of *pacta sunt servanda*." Khlestov, *supra* note 20, at 25.

standards;²⁷ "to *satisfy itself* that measures for the effective control of other shipboard conditions of employment and living arrangements, where it has no effective jurisdiction, are agreed" upon between shipowners and seafarers' organizations;²⁸ "to *ensure that adequate procedures* - - subject to over-all supervision by competent authority - - *exist*" for engagement of seafarers or investigation of complaints;²⁹ "to *ensure* that seafarers employed on ships registered in its territory are properly qualified or trained for the duties for which they are engaged";³⁰ and "to *verify* by inspection or other appropriate means" that ships comply with relevant international standards.³¹ The requirement for continuous active self-control by a flag state is also satisfied indirectly by the holding of "official inquiries into any maritime casualties" involving its ships³² and the provision, when this is feasible, for advice to its nationals "on the possible problems of signing up on a ship which has not ratified" ILO 147.³³

On the other hand, the control effectuated at the level of the port state presents a highly unique approach in the overall compliance machinery of ILO 147. Its underlying premise is the obvious likelihood that a state which becomes a party to the Convention is not only a flag state (state of ship's registration) but is also a port state (state in whose ports or offshore terminals a ship registered in another state may be found) in its own right. The language of ILO 147, however, expresses a discretionary application of control powers by the port state.³⁴ This contrasts with flag state/self-control which is mandatory upon ratification of ILO 147. The permissive character of port state control, in this sense, follows the port state control approach that has already been instituted by the IMO in earlier Conventions.³⁵

²⁷ILO 147, art 2(b). Emphasis supplied.

²⁸ILO 147, art. 2(c). Emphasis supplied.

²⁹ILO 147, art. 2 (d) (i) and (ii). Emphasis supplied.

³⁰ILO 147, art. 2 (e). Emphasis supplied.

³¹ILO 147, art. 2(f). Emphasis supplied.

³²ILO 147, art. 2 (g).

³³ILO 147, art. 3. *See also* ILO Recommendation Nos. 107 (1958) and 108 (1958) which inspired the adoption of ILO 147.

³⁴*I.e.*, a port state "may prepare a report", or "may take measures". ILO 147, art. 4 (1).

³⁵*See e.g.* Article 21 of the 1966 International Convention on Load Lines (LOADLINES 1966); Regulation 19 of The 1974 International Convention on the Safety of Life at Sea (SOLAS 74); and Articles 5 and 6 of the 1973 International Convention on the Prevention of Pollution from Ships (MARPOL 73/78).

Article 4 outlines the port state control procedure of ILO 147. It has to be quoted in full:

(1) If a Member which has ratified this Convention and in whose ports a ship calls in the normal course of its business or for operational reasons receives a complaint or obtains evidence that the ship does not conform to the standards of this Convention, after it has come into force, it may prepare a report addressed to the government of the country in which the ship is registered, with a copy to the Director-General of the International Labor Office, and may take measures necessary to rectify any conditions on board which are clearly hazardous to safety and health.

(2) In taking such measures, the Member shall forthwith notify the nearest maritime, consular or diplomatic representative of the flag state and shall, if possible, have such representative present. It shall not unreasonably detain or delay the ship.

(3) For the purpose of this Article, "complaint" means information submitted by a member of the crew, a professional body, an association, a trade union or, generally, any person with an interest in the safety of the ship, including an interest in the safety or health hazards to its crew.

Port state control, thus, takes the form of (1) preparing a report and/or (2) taking measures to rectify hazardous conditions. From the language of Article 4, these control procedures are clearly optional but once undertaken trigger a duty of care, *i.e.*, no unreasonable detention or delay, and a duty of notification on the part of the port state.³⁶ Moreover, a sanctioning procedure emerges from the exercise of port state control, with the possible delay or detention of a ship as a consequence of control.

An innovative feature of control in ILO 147 is the participation accorded to private or non-governmental agencies in initiating port state control. This arrangement must have logically emerged from the tradition of participation of non-governmental sectors³⁷ in ILO's control structure as an international organization. The IMO has subsequently adopted this feature in prescribing procedures for the control of ships.³⁸

As stated in ILO 147,³⁹ port state control can be commenced upon a complaint or information submitted by "any person with an interest in the

³⁶A distinction must then be made between the discretion to undertake control and the duty that must be undertaken once control procedures are initiated. Cf. ILO 147, Art. 4 (1) and (2).

³⁷See Ivanov, *supra* note 20.

³⁸IMO Res. A.466 (XII), sec. 4.1, on Procedures for the Control of Ships.

³⁹ILO 147, art. 4(3).

safety of the ship, including an interest in safety or health hazards to its crew" including crew members, trade unions, and professional associations. ILO 147 is admittedly an instrument that pioneers the formal involvement of private, non-governmental actors in the international legal process of control in the maritime field.⁴⁰

In the overall scheme of control in ILO 147, port state control is undoubtedly conceived as merely complementary to flag state control in enforcing compliance with ILO standards, the latter being the predominant mode of control relied upon due to its mandatory character. Flag state jurisdiction is, indeed, the overwhelming vehicle for control in all maritime conventions.⁴¹ So long as port state control is dispensed as an optional or permissive regime, it can be said that its role in making the overall machinery of international maritime law effective is at best uncertain. There are in fact only very few states which have unilaterally exercised port state control under ILO 147⁴² and not enough is known about the character of their port state control activities to enable one to generalize about their effects in the overall machinery of international law. Beyond unilateral port state control, nevertheless, is mandatory port state control - a phenomenon which challenges the view that

[i]nternational law imposes no mandatory requirement of control - merely compliance, as always - - and offers no independent external criteria to instruct States as to what control machinery is to be preferred. We are probably some time off before sufficient experience has been accumulated under a variety of control devices to assess their individual effectiveness and then proceed to apply the comparative method in order to ascertain what machinery works best under which circumstances.⁴³

⁴⁰Khlestov, *supra* note 20, at 27, citing the 1966 International Convention on Civil and Political Rights which provides for a control organ consisting of private citizens serving in their personal capacities. See also P. Sands, *The Role of Non-Governmental Organizations in Enforcing International Environmental Law* in BUTLER, *supra* note 20, at 61, who observes the emergence of control roles of some environmental NGOs starting in the late 1980s.

⁴¹These include not only IMO-administered Conventions but also the 1982 Convention on the Law of the Sea. See Sections 5 and 6, Part XII of the 1982 Convention on "Protection and Preservation of the Marine Environment". For an account of the port state enforcement regime under the 1982 Law of the Sea Convention see R. Legatski, *Port State Jurisdiction Over Vessel Source Pollution*, 2 HARV. ENVIR. L. REV. 448 (1977).

⁴²E.g. Japan, which ratified ILO 147 and has an existing manual for port state control. See *Summary Record on the February 1992 Preparatory Meeting of Asia-Pacific Regional Cooperation on Port State Control* at 8.

⁴³BUTLER, *supra* note 20, at 1.

Can port state control be made mandatory at the international level? Why should it be made mandatory? How will this affect the degree of compliance with international obligations by flag states? What impact could mandatory port state control have on the overall balance of jurisdiction between port states, on the one hand, and flag states on the other, in the enforcement of ILO 147? To these questions, the European experience on regional port state control would seem to provide tentative but convincing answers. This development will now be perused in some detail.

II. THE EUROPEAN EXPERIENCE OF PORT STATE CONTROL

Historical Notes on a Regional Port State Control System in Europe

In a now obscure document called the Hague Memorandum of 1978,⁴⁴ predecessor of the celebrated Paris Memorandum of Understanding on Port State Control, a turning point in the development of control in international maritime law is realized. This Memorandum, an initiative of the Dutch Government, was signed by eight Western European countries,⁴⁵ and set for its ambition the concerted implementation of ILO 147 to ensure that living and working conditions on board foreign flag ships visiting European ports comply with the standards in this Convention.⁴⁶ ILO 147, through the 1978 Hague Memorandum, set the initial stage for the mandatory exercise of port state control at the international level.⁴⁷

The grounding of the *Amoco Cadiz* off the coast of France in March 1978 led to a new appreciation of port state control and wrought pressures that were brought to bear on the momentum already gained by the Hague

⁴⁴Memorandum of Understanding between certain Maritime Authorities on the Maintenance of Standards on Merchant Ships, The Hague, March 2, 1978. This Memorandum took effect on July 1, 1978.

⁴⁵Belgium, Denmark, France, Federal Republic of Germany, Netherlands, Norway, Sweden, United Kingdom of Great Britain and Northern Ireland. See *A European View on Port State Control. A Summary of the History of the Memorandum of Understanding on Port State Control and a View on its Future Development* at 2. Unpublished paper distributed during the PACEM IN MARIBUS XVIII CONFERENCE, PORTS AS NODAL POINTS IN A GLOBAL TRANSPORT SYSTEM, International Ocean Institute, August 1990.

⁴⁶*The Paris Memorandum -- A ten year old adult*. Report by the Secreariat, 26-05-92. Doc. PSCC20/03A at 4.

⁴⁷It is however, doubtful whether port state control under ILO 147 could have been exercised then, even individually, by the Hague Memorandum signatories in 1978 inasmuch as ILO 147 had not yet entered into force. See Art. 4 (1), ILO 147 on the requirement of its entry into force before the exercise and assertion of port state control authority can be allowed.

Memorandum. The events that eventually led to the adoption of the 1982 Paris Memorandum of Understanding on Port State Control,⁴⁸ describing the fate of ILO 147 therein, is retold, thus:

At this stage, the Commission of the European Communities initiated the development of a so-called Directive for the Member States concerning the enforcement of international regulations on the safety of shipping and the prevention of pollution in respect of ships calling at Community ports. While such a Directive was prepared in Brussels, the Ministers responsible for maritime safety of thirteen European countries, together with the representatives of the Commission of the European Communities, the IMO and the ILO met in Paris in December 1980 and agreed that it would be their mutual aim to eliminate the operation of substandard ships which, in their view could best be achieved by means of preventive action. In that context, the Ministers decided upon an international agreement which would be based on the draft-Directive of the European Communities *and* the earlier accomplished Hague Memorandum. This explains the inclusion of ILO No. 147 in the list of relevant instruments [in the Paris MOU].⁴⁹

The inclusion of ILO 147 in a much expanded scheme of port state control through the Paris MOU meant that mandatory port state control covered a broader field of international law. Not only standards on maritime safety and acceptable working conditions on board ship were to be promoted; the cause of environmental protection was, likewise, seen as compelling. It was in fact the catastrophic environmental pollution which attended the *Amoco Cadiz* incident, and which instigated the process to involve a large profile for the environmental concern in port state control, that provided the dominant motivation for the 1982 MOU. The eventual incorporation of ILO 147 in the MOU regime with its environmental agenda had consequently created a new legal context in implementing the control provisions of ILO 147. What cannot be rebutted at this point is the merging of environmental, safety, and labor interests into the Paris MOU.

⁴⁸Text in 21 ILM 1 (1982). Hereinafter MOU.

⁴⁹A EUROPEAN VIEW ON PORT STATE CONTROL, *supra* note 45, at 2.

*The Port State Control Regime Under the Paris Memorandum*⁵⁰

On January 26, 1982, 14 European states,⁵¹ through their respective maritime authorities, signed a Memorandum of Understanding committing themselves to "maintain an effective system of port state control" with a view to ensuring that foreign merchant ships visiting their respective ports comply with standards laid down in certain "relevant instruments."⁵² These relevant instruments are as follows:

- (1) the International Convention on Load Lines, 1966;
- (2) the International Convention on the Safety of Life at Sea, 1974;
- (3) the Protocol of 1978 relating to the International Convention on the Safety of Life at Sea, 1974;
- (4) the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto;
- (5) the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978;
- (6) the Convention on the International Regulations for Preventing Collisions at Sea, 1972; and
- (7) the Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention 147).⁵³

The system of port state control envisaged by the Paris MOU consolidates and expands already existing port state control provisions authorized by the IMO.⁵⁴ Under the MOU, port state control involves several procedures which may be grouped into two broad categories: (1)

⁵⁰For introductory materials on port state control under the MOU, see *The Memorandum of Understanding on Port State Control*, an undated brochure published by the MOU Secretariat; *Research Paper No. 27*, which is part of the survey of international environmental instruments and agreements pursuant to UNCED PrepCom Decision 2/25, in ROBINSON (Ed.) AGENDA 21 & THE UNCED PROCEEDINGS 1205, 1297-1299 (1992); G. Kasoulides, *The Paris Memorandum of Understanding: A Regional Regime of Enforcement*, in D. FREESTONE & T. IJLSTRA, *THE NORTH SEA: PERSPECTIVES ON REGIONAL ENVIRONMENTAL COOPERATION* 180 (1990); and A. Lowe, *A Move Against Substandard Shipping*, 6 MARINE POLICY 326 (1982). Every year since 1983 the MOU Secretariat publishes an ANNUAL REPORT which details information on the MOU and related developments.

⁵¹The MOU took effect on July 1, 1992. See Sec 8.4, MOU. Poland joined as an MOU party effective January 1, 1992. See MOU incorporating 11th amendment (Hereinafter, Amended MOU).

⁵²MOU, sec. 1.1.

⁵³MOU, sec. 2.1. In the Amended MOU, two other relevant instruments have been added: the Protocol of 1988 relating to the International Convention on Load Lines, 1966; and the Protocol of 1988 relating to the International Convention on the Safety of Life at Sea.

⁵⁴IMO Res. A.466 (XII), Res. A.481 (XII), and Res. A.542(13). See MOU, sec. 1.1, Annex 1.

mandatory ship inspection, and (2) cooperation among the maritime authorities involved. These two institutional elements make the European port state control system distinctive and in many ways imaginative from the standpoint of the development or improvement of the control machinery of international law. A brief description of these elements will show how the MOU operates in effecting a method of control in international law.

The institution of mandatory port state inspection recognizes, first, the right or authority of the state to carry out inspections of merchant ships visiting its ports. Not surprisingly, this authority is already found in the provisions of the "relevant instruments"⁵⁵ which are sought to be enforced. Secondly, it acknowledges certain principles that govern the right of inspection by port states:

(1) Each port state authority undertaking inspections can only apply the relevant instruments which are in force and to which its state is a party;⁵⁶

(2) There should be no discrimination as to the flag of ships subject to inspection;⁵⁷

(3) Inspecting port state authorities applying a relevant instrument "will ensure that no more favorable treatment is given to ships entitled to fly the flag of a State which is not a party to that instrument."⁵⁸

(4) "In selecting ships for inspection, the Authorities will pay special attention to: 1) passenger ships and roll-on/roll-off ships; 2) ships which may present a special hazard, for instance oil tankers, gas carriers, chemical tankers and ships carrying harmful substances in packaged form; 3) ships which have had several recent deficiencies."⁵⁹

(5) "Inspections will be carried out by properly qualified persons authorized for that purpose by the Authority concerned and acting under its responsibility."⁶⁰

Thirdly, the manner of carrying out an inspection is laid down in fairly specific terms under the MOU. This is the heart of port state control

⁵⁵Viz., LOADLINES, SOLAS, MARPOL, COLREGS, STCW, and ILO 147. *Supra* note 35.

⁵⁶MOU, sec. 2.3.

⁵⁷MOU, sec. 1.2.

⁵⁸MOU, sec. 2.4.

⁵⁹Amended MOU, sec. 3.3.

⁶⁰MOU, sec. 3.5.

and is realized through the pivotal activity of surveyors/inspectors whose role is outlined in an Annex to the MOU.⁶¹ An inspection

consist[s] of a visit on board ship in order to check the certificates and documents relevant for the purposes of the Memorandum. In the absence of valid certificates or documents or if there are clear grounds for believing that the condition of a ship or its equipment, or its crew does not substantially meet the requirements of a relevant instrument, a more detailed inspection will be carried out.⁶²

The "clear grounds" which warrant "a more detailed inspection" are likewise spelled out in the MOU.⁶³

The immediate purpose of an inspection, it must be assumed, is to discover deficiencies, or demonstrations of non-compliance with standards laid down in the relevant instruments being enforced. The finding of a deficiency then triggers the duty on the part of the inspecting authority to "endeavor to secure the rectification of deficiencies detected."⁶⁴ However, "in the case of deficiencies which are clearly hazardous to safety, health or the environment, the Authority will ... ensure that the hazard is removed before the ship is allowed to proceed to sea and for this purpose will take appropriate action, which may include detention."⁶⁵

The exercise of what appears to be a "double-bladed" duty of endeavoring to rectify deficiencies and/or detaining a ship constitutes the essence of control under the MOU regime of port state enforcement. Once more it must be stated that the basis of this intervention is found in the provisions of the various international conventions sought to be enforced.⁶⁶ The MOU does not provide for new substantive rights or duties on the part of the participating states, except of course the duty to carry out port state control. This is the reason why the MOU provides: "When exercising control under the Memorandum, the Authorities will make all possible efforts to avoid undue detaining or delaying a ship. Nothing in the Memorandum affects

⁶¹*Annex 1: Guidelines for Surveyors.* The annexes "constitute an integral part" of the MOU, sec. 1.1, MOU.

⁶²MOU, sec. 3.1.

⁶³Amended MOU, secs. 3.2.1 and 3.2.2.

⁶⁴MOU, sec. 3.6.

⁶⁵MOU, sec. 3.7. A narrow exception to this rule is stated in sec. 3.8.

⁶⁶*Supra* notes 35 and 55. Notification and reporting requirements in the relevant instruments are likewise reiterated in the MOU. *See* Secs. 3.7, 3.8, 3.9, and 3.10.

rights created by provisions of relevant instruments relating to compensation for undue detention or delay."⁶⁷

Although inspection is invariably a duty that has to be performed by the MOU states, this duty is counterpoised with the other obligations or rights of these states recognized by the relevant instruments.⁶⁸ Hence, the right of a port state, for instance, to deny entry to its ports or off-shore terminals to a ship which does not comply with the provisions of MARPOL⁶⁹ can not be prejudiced by the duty to inspect under the MOU.

The second institutional pillar of port state control -cooperation among the Maritime Authorities involved⁷⁰ - supports inspection or control procedures in a manner that will improve their efficiency and effectiveness. Thus, a quantitative target of inspections to be achieved is provided;⁷¹ the Authorities will, generally, seek to avoid inspecting ships already inspected by any of the other Authorities within the previous six months;⁷² each authority will report on the conduct and results of its inspections through a computerized information center;⁷³ and, upon the request of another authority, an authority will assist in the prosecution of operational violations suspected to have been committed by ships.⁷⁴ The central mechanism of cooperation is through the Committee established under the MOU⁷⁵ which is mandated, among other important tasks, to harmonize procedures and develop guidelines relating to inspection.⁷⁶ The Committee is supported by a Secretariat based in the Hague.⁷⁷

Cooperation among the MOU states also seeks to "avoid distorting competition between ports."⁷⁸ This is achieved through harmonized

⁶⁷MOU, sec. 3.11.

⁶⁸MOU, sec. 8.1, Amended MOU; Sec. 3.2.3.

⁶⁹MARPOL 73/78, art. 5 (3).

⁷⁰The principle is generally stated in sec. 1.4, and in the last preambular paragraph of MOU.

⁷¹MOU, sec. 1.3.

⁷²MOU, sec. 3.4.

⁷³MOU, Annex 4, sec. 4. The MOU Secretariat facilitates, among others, information exchange, MOU, sec. 6.5.

⁷⁴MOU, sec. 5, MOU which refers to violations under MARPOL 73/78 and COLREGS 1972.

⁷⁵MOU, sec. 6.1. The IMO and ILO are given observer status in the Committee, and the Commission of the EEC is accorded full membership.

⁷⁶MOU, sec. 5.3.

⁷⁷MOU, secs. 6.4 and 6.5.

⁷⁸MOU, 6th preambular paragraph.

inspection practices, and by the implied policy in the MOU to have the participating states ratify all the relevant instruments enumerated in the MOU.⁷⁹

Two crucial features of the framework of cooperation which are of quite recent origin and arose out of the experience of implementing the MOU invite close attention. These are: (1) the expansion of the geographic scope of operation the MOU, and (2) the intensification of the inspection regime by the inclusion of "operational control". These developments have profound implications for ILO 147.

Not much will be said about the expanded geographic coverage of the MOU. This subject is better treated elsewhere. What can be said at this juncture, however, is that not only has the possibility of expanded MOU membership been realized;⁸⁰ more importantly, so-called "co-operating states" have been accommodated under the MOU.⁸¹ This is potentially significant for the re-definition of the functional MOU region⁸² with a resultant broadening of mandatory port state control over labor standards. Equally significant is the policy of the MOU to support other regional

⁷⁹The ANNUAL REPORTS published by the Secretariat since 1983 monitor the ratifications of relevant instruments by MOU states.

⁸⁰Accession of Poland as participating state was accomplished recently. Were it not for the break-up of the USSR, it would have become a full participating member State under the MOU. See 1991 ANNUAL REPORT 4, 6.

⁸¹The US and Canada, through their Coast Guard services, have joined the MOU as co-operating States in 1986 and 1987, respectively. See 1986 and 1987 ANNUAL REPORTS. The former USSR became a co-operating partner in 1989. 1989 ANNUAL REPORT 5. A co-operating state is allowed access to the MOU computer system based in France. Furthermore,

[t]o avoid the complexities of compatibility between the European countries and Canada's recognition of the various IMO conventions that are covered by the memorandum it was agreed that the Canadian Coast Guard, along with the United States Coast Guard, would be considered "Co-operators" in the inspection of foreign vessels and no legal agreement would be entered into. As such there is no legal requirement at this time for Canada or any European country to accept inspections completed by the other.

Private communication of R. Lanteigne, Chief Ship Operations of the Canadian Coast Guard to author. Feb. 9, 1993.

⁸²Cf. "The geographical scope of operation of the Memorandum of Understanding on Port State Control and its consequences for the access of potential new signatories." Adopted by the Port State Control Committee, Antwerp 31 May 1990.

systems of port state control.⁸³ Until recently, efforts to establish regional port state control systems in the Asia-Pacific and South America have been endorsed by the MOU partners. Acting on the Paris MOU precedent, the IMO has likewise encouraged the development of these regional systems.⁸⁴ What emerges, then, as the foreseeable ideal fostered by the Paris MOU experience is a regional and inter-regional framework for global port-state control. This could mean a much larger scope of application of ILO 147 world-wide.

Operational control, or "control on compliance with on-board operational requirements",⁸⁵ is the subject of a very recent amendment to the MOU.⁸⁶ Its purpose is to resolve the so-called "human element" problem in shipping, a concern that was urgently brought to the attention of the MOU states in the aftermath of dramatic shipping accidents involving passenger ships in European waters.⁸⁷ While the inclusion of operational control in the MOU definitely introduces a qualitative change in the intensity and nature of port state control inspections, it also raises the question of its interface with or relevance to the *human element* under ILO 147. How does the new thrust of port state inspections under the MOU affect control of ILO 147 standards? This question will be appreciated against the background of the enforcement of ILO 147 under the MOU, which will now be discussed.

III. CONSIDERATION OF SOCIAL AND WORKING CONDITIONS UNDER THE MOU: SOME QUESTIONS AND ANSWERS

It was already stated that the seminal idea of a mandatory international system of port state control was embedded in the 1978 Hague Memorandum, predecessor of the 1982 Paris MOU. The original idea of a "substandard ship" that was worked out through port state control at the international level was, therefore, based on an assessment of social and working conditions on board ships through the ILO 147 framework. When

⁸³*Id.*; see also Final Declaration of the "Safe Ships on Clean Seas Conference, The Hague, 23 April 1986" in 1985/1986 ANNUAL REPORT, and 1991 ANNUAL REPORT 7.

⁸⁴IMO RES. A.682 (17) on "Regional Co-operation in the Control of Ships and Discharges."

⁸⁵Amended MOU, secs. 3.1 and 3.2.2.

⁸⁶The amendment, which incorporates IMO Res. A.681 (17) on "Procedures for the Control of Operational Requirements Related to the Safety of Ships and Pollution Prevention," took effect on 24 July 1992. *PSCircular for Surveyors* No. 8, July 1992.

⁸⁷See 1990 and 1991 ANNUAL REPORTS. *Infra*, at 44.

the Paris MOU was concluded, a more expanded definition of a "substandard ship" was used, as indicated in the list of relevant instruments being enforced through port state control. Labor conditions on board ship, understood in the composite sense outlined by the Conventions in the Appendix of ILO 147, became only one among several considerations to be given attention by surveyors conducting MOU inspections.⁸⁸

The Appendix to ILO 147 lists 11 regulatory areas of compliance defining standards on social and working conditions on board ships.⁸⁹ In the original 1982 MOU text, only six of these were considered for port state control enforcement: minimum age, medical examination, food and catering, crew accommodation, accident prevention and occupational health, and officers' competency certificates.⁹⁰ Hence, the deficiencies related to ILO 147 which were reported since 1982 have pertained to these six items only. One cannot find in the *Annual Reports* a deficiency, for instance, relating to seamen's articles of agreement, medical care, or collective bargaining.

Perhaps the omission of some labor conventions in the inspection framework of the 1982 MOU, or for that matter the Hague Memorandum of 1978, can be explained by the practical difficulties of detecting violations under these Conventions through "objective inspections" by MOU surveyors. This characteristic of control under the MOU will further be described below. It is clear though that from the very start, the MOU operated on the basis of the non-enforcement of five or so other areas of labor standards under ILO 147.

In the Final Declaration of the Hague Ministerial Conference in April 1986, the Port State Control Committee was requested, in view of the forthcoming Maritime Session of the ILO that would take place in September/October 1987, "to keep the [ILO] situation under review and, in

⁸⁸Annex I of the MOU lists guidelines for surveyors in the following areas: Sec. 1 - General; Sec. 2 - Safety of the ship; Sec. 3 - Minimum manning standards and certification; Sec. 4 - Accident prevention, health and hygiene, which treats of ILO 147; and Sec. 5 - Ships below 500 tons gross tonnage.

⁸⁹Viz. (1) minimum age, (2) sickness and medical care, (3) medical examination, (4) prevention of accidents, (5) crew accommodation, (6) food and catering, (7) officers' competency certificates, (8) seamen's articles of agreement, (9) repatriation of seamen, (10) freedom of association, and (11) right to organize and collective bargaining.

⁹⁰Except the last, the five subjects are subsumed under a section title "Accident prevention, health and hygiene." 'Officers' certificates of competence' is treated under the section "Minimum manning standards." Appendix 1, MOU.

due course, to make decisions as appropriate."⁹¹ The year 1987 also saw the emergence of an initiative, led by the Netherlands' Minister of Transport and Public Works, which recognized "the need to intensify, where possible, port state control with regard to seafarers' living and working conditions" and invited the Port State Control Committee "to re-examine the provisions of ILO Convention 147 in order to see whether requirements, subject to objective inspection, could be added to Annex 1 to the memorandum."⁹² This was prompted by the observation that there was growing public interest in the stringent enforcement of requirements on living and working conditions for seafarers and that port state control could play a more prominent role in this area.⁹³ A working group in the Port State Control Committee was thus set up "to explore the possibility of expanding the range of ILO requirements that can be inspected objectively."⁹⁴

The working group, in consultation with the ILO, was able to submit proposals to the 1988 MOU Port State Control Committee Meeting. After these proposals were referred to surveyors for their practical suggestions and comments, the final draft-proposals were adopted by the Committee by way of amendments to the MOU. The amendments were accepted by the MOU parties on March 12, 1989 and became effective on May 11, 1989.⁹⁵ Developments within the ILO later in the same year induced a further amendment to these amendments.

The October 1989 ILO Meeting of Experts on the Procedures for Inspection of Labour Conditions on Board Ships⁹⁶ saw the adoption of a document entitled *Inspection of Labour Conditions on Board Ship: Guidelines for Procedure*.⁹⁷ In its November 1990 meeting, the MOU Committee decided to have these Guidelines referred to or reflected in the MOU.⁹⁸ The re-drafting of the MOU to take account of these Guidelines led to what is now

⁹¹The text of the Declaration in the 1985/1986 ANNUAL REPORT, Annex 7.

⁹²1987 ANNUAL REPORT 9-10.

⁹³*Id.*

⁹⁴*Id.* at 10; 1988 ANNUAL REPORT 10. Underscoring supplied.

⁹⁵1988 ANNUAL REPORT 11. The section 4 title in Annex 1, MOU, was changed to "Accident Prevention, Health and Hygiene, and Guidance regarding Articles of Agreement, Repatriation, Shipowners' Liability in cases of Sickness, Injury or Death of Seafarers, and Trade Union rights." *Id.*, at 27.

⁹⁶As reported in the 1989 ANNUAL REPORT.

⁹⁷1990 ANNUAL REPORT 14-15. For text see International Labour Office. *Inspection of labour conditions on board ship: Guidelines for procedure* (Geneva, 1990) hereafter, GUIDELINES.

⁹⁸1990 ANNUAL REPORT 15.

the present text of the MOU, *i.e.* Amended MOU, 1992, incorporating the 11th amendment.

It is to be noted that the final text of the amendments⁹⁹ do not really incorporate, in a legal sense, the Guidelines in the MOU. What the present MOU provision on ILO 147 does is simply to make reference to the ILO Guidelines and clarify the position of a surveyor, and therefore the MOU, in relation to these Guidelines. Once and for all, the question of "objective inspection" of social and labor conditions is settled.

As it now stands, the MOU ranks or classifies the ILO 147 Appendix Conventions into two groupings, depending on whether violations of or deficiencies related to a particular Convention can result in the delay or detention of a ship. Conventions which, with respect to the control function of a surveyor, can be enforced on a ship with the threat of delay or detention for non-compliance with its standards are the following:

- a. the Minimum Age Convention, 1973 (No. 138); or the Minimum Age (Sea) Convention (Revised), 1936 (No. 58); or the Minimum Age (Sea) Convention, 1920 (No. 7);
- b. the Medical Examination (Seafarers) Convention, 1946 (No. 73);
- c. the Prevention of Accidents (Seafarers) Convention, 1970 (No. 134) (Articles 4 and 7);
- d. the Accommodation of Crews Convention (Revised), 1949 (no. 92);
- e. the Food and Catering (Ships' Crews) Convention, 1946 (No., 68) (Article 5);
- f. the Officers' Competency Certificates Convention, 1936 (No. 53) (Articles 3 and 4).¹⁰⁰

The MOU provides in this regard that a surveyor shall "use his professional judgement to determine whether the conditions on board give rise to a hazard to the safety or health of the crew which necessitates the rectification of conditions, and may if necessary detain the ship until

⁹⁹The amendment entered into effect on 8 December 1991. 1991 ANNUAL REPORT 20. The new section 4 title now reads "Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)."

¹⁰⁰ Amended MOU, sec. 4.1, Annex 1. This practically follows the same listing of ILO 147 Conventions in the original 1982 MOU.

appropriate corrective action is taken."¹⁰¹ In its treatment of the degree of hazard necessary for port state control intervention, this provision is liberal and potentially goes beyond the ILO Guidelines respecting the enforcement of these Conventions. The Guidelines provide:

The inspector should not unreasonably detain or delay a ship owing to its failure to meet the required standards. Consideration should be given to detaining a ship until corrective action is taken only when the failure to satisfy the required standards poses clear hazards to the safety of the vessel or to the safety or health of the crew.¹⁰²

On the other hand, the Conventions the enforcement of which palpably can not provoke immediate rectification of relevant deficiencies nor lead to any detention or delay of the ship under control - - and are therefore excluded from the main sanctioning regime of the MOU - - are the following:

- a. the Seamen's Articles of Agreement Convention, 1926 (No. 22);
- b. the Repatriation of Seamen Convention, 1926 (No. 23);
- c. the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55); or the Sickness Insurance (Sea) Convention, 1936 (No. 56); or the Medical Care and Sickness Benefits Convention, 1969 (No. 130);
- d. the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87);
- e. the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).¹⁰³

This MOU provision, and the next one to be quoted, are new in the context of European port state control. Under the original 1982 regime, no reference at all was made to these Conventions. Their status under the MOU was, thus, hitherto undefined. With the amendments, the control action authorized under the MOU respecting these five areas of labor standards is ascertained, and stated as follows:

If the surveyor receives a complaint to the effect that the standards laid down in the conventions listed in paragraph 4.3 are not met, the matter should be

¹⁰¹*Id.*

¹⁰²GUIDELINES at 16. ILO 147 uses the terms "clearly hazardous to safety or health" to qualify the condition requiring intervention measures. ILO 147, art. 4(1).

¹⁰³Amended MOU, sec. 4.3, Annex 1.

reported to the nearest maritime, consular or diplomatic representation of the flag State for further action. If deemed necessary, the appropriate authority may prepare a report to the flag state, if possible with evidence, with a copy to the ILO.¹⁰⁴

Compared with the original 1982 MOU provisions respecting ILO 147, or for that matter the 1978 Hague Memorandum, it is clear that the latest elaboration of ILO 147 in the MOU has not changed the extent of control in regard to social and working conditions on board ship. Owing perhaps to the alleged difficulty of "objectively inspecting" the traditionally excluded areas of labor standards under port state control, the enforceable Conventions under ILO 147 remain the same. The "control" (if it can be called such) action for the excluded conventions, it may be noticed, is passive. It does not involve any initiative or active investigation on the part of the port state surveyor; there is no directive to inspect the relevant standards embodied in these Conventions. Even cognizance of violations pertaining to these standards, suspected or real, can only be taken after a complaint is received. A complaint then leads, ostensibly but not compulsorily, to the filing of a report for action by the flag state. As a result, with respect to the excluded conventions, the MOU adopts a more restrictive view of port state control. In contrast, the Guidelines entertain the possibility not only of delay or detention but also active inspection of all relevant labor standards involved, including efforts to rectify deficiencies when these are confirmed to exist.¹⁰⁵

The consequence of a ship's delay or detention cannot be overemphasized in the context of port state control, whether the object is to enforce labor or other standards. In the port state control regime under the MOU - - or any of the relevant instruments - - detention, delay, and the threat thereof, unarguably furnish a most effective deterrent against violations of international standards by ships.¹⁰⁶ Hence, in the ten years of existence of the MOU, it is reported that detentions have cost shipowners approximately US\$115 million, excluding investment cost for replacing defective equipment.¹⁰⁷ The sanction of delay or detention, moreover, provides the whole underpinning to the preventive approach - - built upon

¹⁰⁴Amended MOU, sec. 4.4, Annex 1.

¹⁰⁵See GUIDELINES *supra* note 97. Even detention on the basis of the Recommendation(!) on Vocational Training is allowed by the GUIDELINES. *Id.*, at 24-25.

¹⁰⁶Newbury, R. *Implementation of Port State Control* in THE LEGAL RIGHTS OF SEAFARERS *supra* note 1, at 119.

¹⁰⁷The Paris Memorandum - a ten year old adult, *supra* note 46, at 7. In its ten year period of operation, it is reported that there has been 3,800 ships detained under the MOU. *Id.*, at 6.

the policy of compelling rectification of deficiencies - - that had always justified the MOU regime.¹⁰⁸ Without the sanction of detention or delay, in other words without active port state control, there is hardly any international legal attribution of "substandard" to the conditions of a ship, its equipment, or its crew. In this instance, whether a ship which seriously violates certain ILO 147 standards - - but is not itself detained under port state control - - is substandard is entirely a matter for the flag state to decide.

In sum, it should be again asked whether port state control under the MOU is an effective comprehensive tool in promoting the seafarer's rights under ILO 147. There seems to be no easy and quick answer to this question. In fact, the MOU model of port state control provokes further questions of a fundamental nature about the very nature of international labor law in the maritime field. These questions no doubt invite a second look at port state control under the MOU insofar as enforcement of labor standards is concerned.

1. What is the meaning of "substandard labor conditions on board ship"? Should the labor Conventions enumerated and the standards laid down in ILO 147 be distinguished as to their enforcement by port states? Or should these be considered as an integral minimum whole in implementing the definition of a substandard ship? The dichotomy of ILO 147-Appendix Conventions introduced by the MOU puts forward the conclusion that there exist severable minimum standards under ILO 147, and substandard labor conditions are those susceptible only to the necessity of "objective inspection" by port state surveyors.

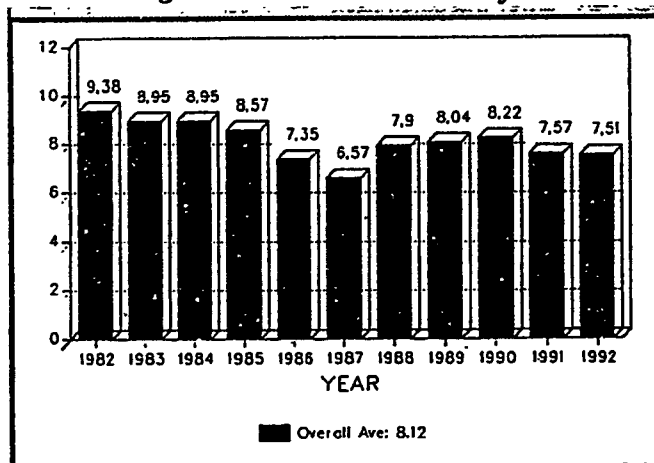
2. Are there labor standards on board ship that can be enforced only by a flag state, and to which no effective port state control can be extended, absolutely or progressively? In the balance of jurisdiction or control achieved by the MOU, there are indeed labor standards violations which cannot be policed by the port state and are, hence, entirely left for the flag state to rectify.¹⁰⁹ But given the character of seafarers' predicaments, individually and collectively, is it practicable and prudent to reserve to flag states the exclusive power of control over certain ILO 147 standards?

¹⁰⁸A European view on port state control, *supra* note 45, at 2.

¹⁰⁹This is confirmed by Chapman, *supra* note 1, esp. at 95-114 on "maritime law and the protection of seafarers."

3. What percentage of all ILO 147 violations at any given time is accounted for by those Conventions *not* actively enforced through port state control? There are no available figures on this type of "allowable" deficiencies, but the literature strongly suggests that overwhelming numbers of seafarers' problems are concerned with wages, repatriation, and wrongful dismissal¹¹⁰ - issues pertaining to standards in the enforcement of which the MOU registers only a slight vigilance. The consistently high numbers of ILO deficiencies directly connected with safety, i.e., falling under the ILO Convention 134/SOLAS regime, contrast sharply with the lower number of ILO 147 industrial relations-associated deficiencies in relation to the total deficiencies yielded by port state control under the MOU. This confirms that the MOU has adequately canvassed a predominant number of ILO 147 violations respecting the workplace, but not quite with respect to the worker.¹¹¹ From the MOU inspection results for a ten-year period, what clearly appears is that ILO 147 labor relations-related deficiencies are not at all that conspicuous. The trends are illustrated in Figure 1 of this paper.

Figure 1. ILO 147 Deficiencies
As Percentage of Total Number of Yearly Deficiencies



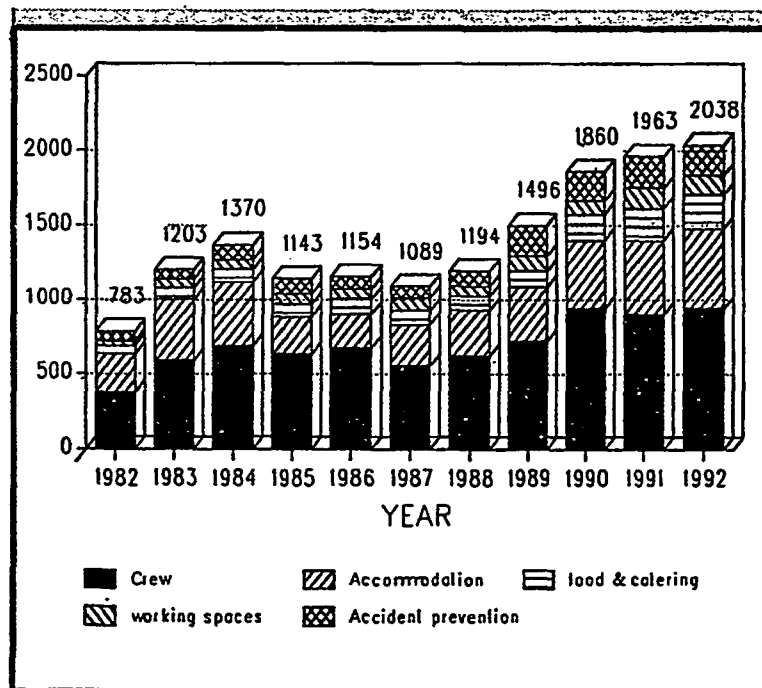
¹¹⁰Wong, *supra* note 7, at 68; Napier and Matthews, *supra* note 7, at 76, 84; Smith, *supra* note 1, at 821. Chapman, *supra* note 1, at 145-146 on his proposals for reform "to greatly improve the life of seafarers" which touch on issues like the right of self-organization, wages and social security.

¹¹¹In an interview with Capt. Allan Knight, Marine Surveyor of the Canadian Coast Guard Maritimes Region, he maintains that vessels with ship safety problems are usually also the vessels with outstanding social and labor problems. *Personal Interview with Capt. Allan Knight*. 14 December 1992.

Source: 1983/1984 -1992 MOU Annual Reports.

Note: The following reported categories of deficiencies have been considered in computing the above percentages: (1) crew, (2) accommodation, (3) food and catering, (4) working spaces, and (5) accident prevention. These figures, thus, reflect the enforcement of the STCW Convention-aspect of ILO 147. The impossibility of isolating ILO 147 safety standards from safety standards under IMO Conventions, for the purpose of approximating the degree of enforcement of ILO 147, should be obvious.

**Figure 2. ILO 147 Deficiencies
With Specification of Deficiency Type**



Source: 1983/1984-1992 MOU Annual Reports.

4. Delay or detention under the MOU and ILO 147 is warranted when there exists a "clear hazard to health or safety" on account of deficiencies detected. This is the test and the common denominator for the determination of substandard conditions under the MOU and ILO 147. But could a finding of grossly substandard social and working conditions under the terms of ILO 147 inevitably lead to a conclusion on the existence of a "clear hazard to health and safety"? For example, is it possible to detain a well-provisioned ship none of whose on-board personnel have ever been paid their wages, on the ground that a safety issue is at stake?

Under the MOU, the ingredients of a possible expanded definition of "health and safety", *i.e.*, to include good morale arising from fair terms in the Articles of Agreement, or membership in a union, or existence of social security, are left to flag state control. Port state control is generally inclined to confirm physical conditions. Affirmation of a physically fit vessel and crew would appear to be the strict aim of the "safety and health" control of ILO 147 standards under the MOU. The only "non-physical" dimension of health and safety recognized by the MOU for purposes of inspection involves certification control of seafarers either under the STCW Convention or Convention No. 53. And the inadequacies of certification control have eventually become evident to the MOU states by the emergent recognition of the *human element* in shipping.

5. What exactly is the relationship between social and working conditions on board ship, on the one hand, and safety and environmental protection, on the other? Does control of safety and environmental standards, which is a major concern of the MOU, enhance or tether the more expansive enforcement of ILO 147 through port state control? Conversely, could active port state control of the legally unenforced ILO 147 Conventions under the MOU assist in promoting control of safety and environmental standards?

The practice of port state control under the MOU seems to generate the impression that, notwithstanding the "objective inspection" criterion, only labor standards that have immediate bearing on physical safety and environmental issues can be accorded active port state control procedures. This proposition is confirmed, ironically, by a novel and crucial "non-physical" health and safety aspect of social and working conditions on board ship: the "human element", whose control has assumed a very high priority in the MOU agenda. It can be maintained that the MOU approach to labor standards control evolved in tandem with, and as a necessary

component of, the basic port state control strategy promotive of maritime safety and environmental protection standards. Confirmed is the hypothesis that substandard social and working conditions on board ship do not always of necessity translate to proof of a substandard ship in terms of safety and environmental protection. The discussion of this argument will conclude the paper.

IV. A CONCLUDING NOTE ON THE HUMAN ELEMENT IN SHIPPING

Excursus: Control of the "human element"

The Paris MOU initiative, viewed in its entirety as an historically maturing campaign against substandard ships, had to determine the elements of a "substandard ship" as a notion buttressed by international law. The awareness that many ships in European waters did not comply with the requirements in various maritime safety conventions allowed for the elaboration of criteria for a substandard ship.¹¹² It could be maintained as well that the MOU's criteria for defining substandard ships was meant to overcome the difficulties and issues associated with the increasing numbers of "flags of convenience" or "open registry" ships (or what others may view as "substandard flags").¹¹³

Given the scope of control necessarily implied from the inspection provisions of the MOU, a substandard ship is, therefore, one which, after inspection, can be delayed or detained in port on account of serious violations of the relevant instruments.¹¹⁴ These violations by or deficiencies in a ship, if unrectified, present an unreasonable risk to "safety, health, and the marine environment"¹¹⁵ and, by definition, render a ship substandard. It was already explained what "unreasonable risk to health and safety" means under the MOU in the context of ILO 147.

Since 1982, the basis of a finding by MOU surveyors of substandard tonnage rested on the triadic test of safety, health, and marine environment. And the uniform interpretation of what are health, safety, and

¹¹²"A European view of port state control" *supra* note 45, at 1.

¹¹³"The Paris memorandum - a ten year old adult" *supra* note 46, at 7 points out that shipowners must take seriously the high cost of port state control when they consider flagging out to less traditional maritime registers.

¹¹⁴These violations are described as "deficiencies" in the statistical reports of the MOU. See ANNUAL REPORTS.

¹¹⁵MOU, secs. 3.7 and 3.8.

environmental criteria for substandard ships was made possible by the efforts to harmonize inspection procedures. These criteria used to identify substandard ships are further specified in the inspection reports and statistics of the MOU. From the reported "categories of deficiencies" used by the MOU countries, the actual application of the aforesaid criteria for substandard ships is revealed.

Using the categories of deficiencies indicated below, the Annual Reports show a trend of an increasing number of absolute deficiencies identified throughout the years. Figure 4 illustrates this progression in terms of deficiency rates. Moreover, as seen in Figure 5, the number of detentions from 1987 to 1991 has also been on the rise, in opposition to an earlier downward trend. With these minimal indicators, one can conclude that there was, indeed, an increasing number of substandard ships identified by port state control under the MOU.¹¹⁶

TABLE I. MOU Deficiency Categories

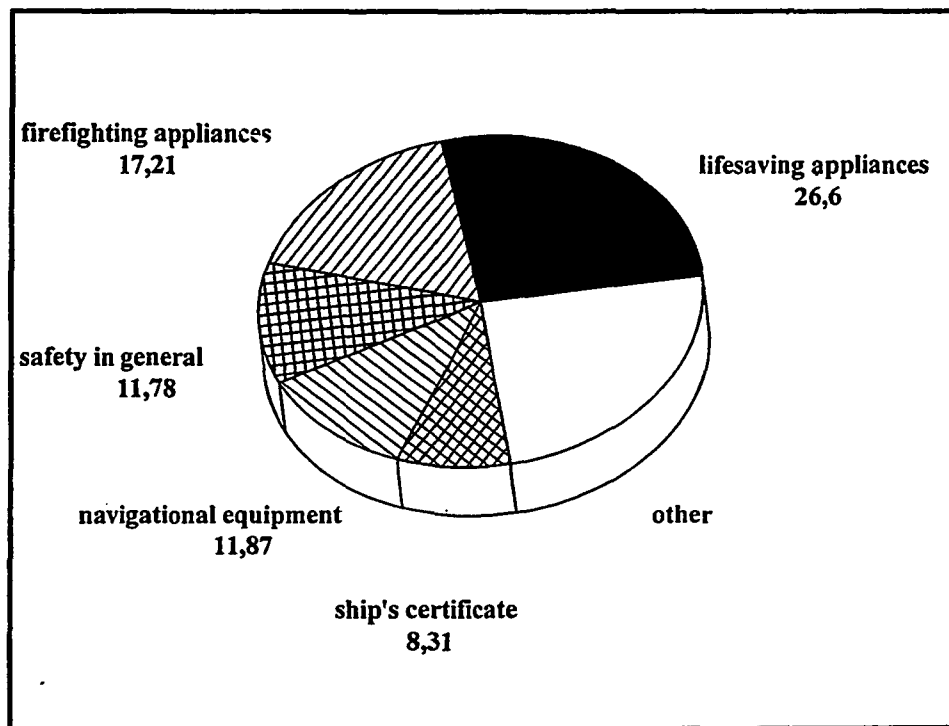
MAJOR CATEGORIES OF DEFICIENCIES ¹¹⁷	
Ships Certificates	Load Lines
Crew	Mooring Arrangements
Accommodation	Propulsion/Aux Machinery
Food and Catering	Navigation
Working Spaces	Radio
Life Saving Appliances	Marine Pollution - Annex I
Fire Fighting Appliances	Deficiencies Specific for Tankers
Accident Prevention	Marine Pollution - Annex II
Safety in General	All other deficiencies
Alarm Signals	Deficiencies not clearly
Cargo	Hazardous

Source: Annual Reports (See Figure 3 for the breakdown of the total number of yearly deficiencies into major categories and Table 2 for the specific items under each of these categories).

¹¹⁶1991 ANNUAL REPORT 28.

¹¹⁷Source: Annual Reports. See ANNEX 2 for the specific items under each of these categories.

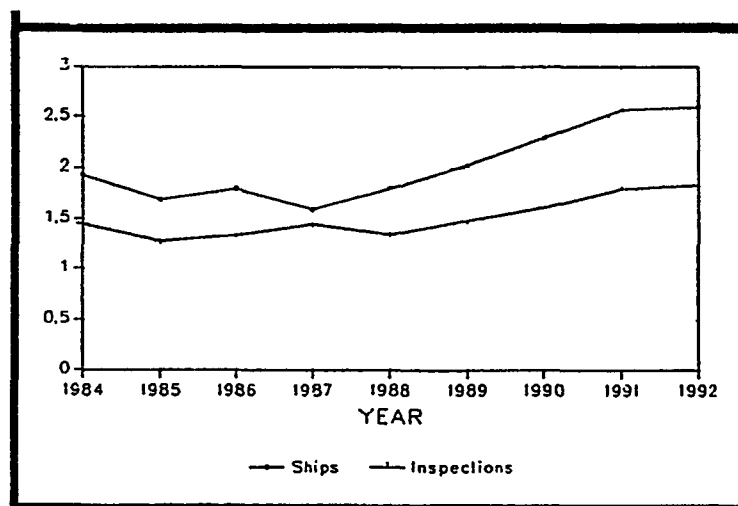
**Figure 3. Major Deficiency Categories
As Average Percentage of Total Number of Yearly Deficiencies**



Source: 1983/84-1991 ANNUAL REPORTS

Note: The "other" deficiency category includes ILO 147-related specific deficiencies.

Figure 4.
ILO 147 Deficiency Rates

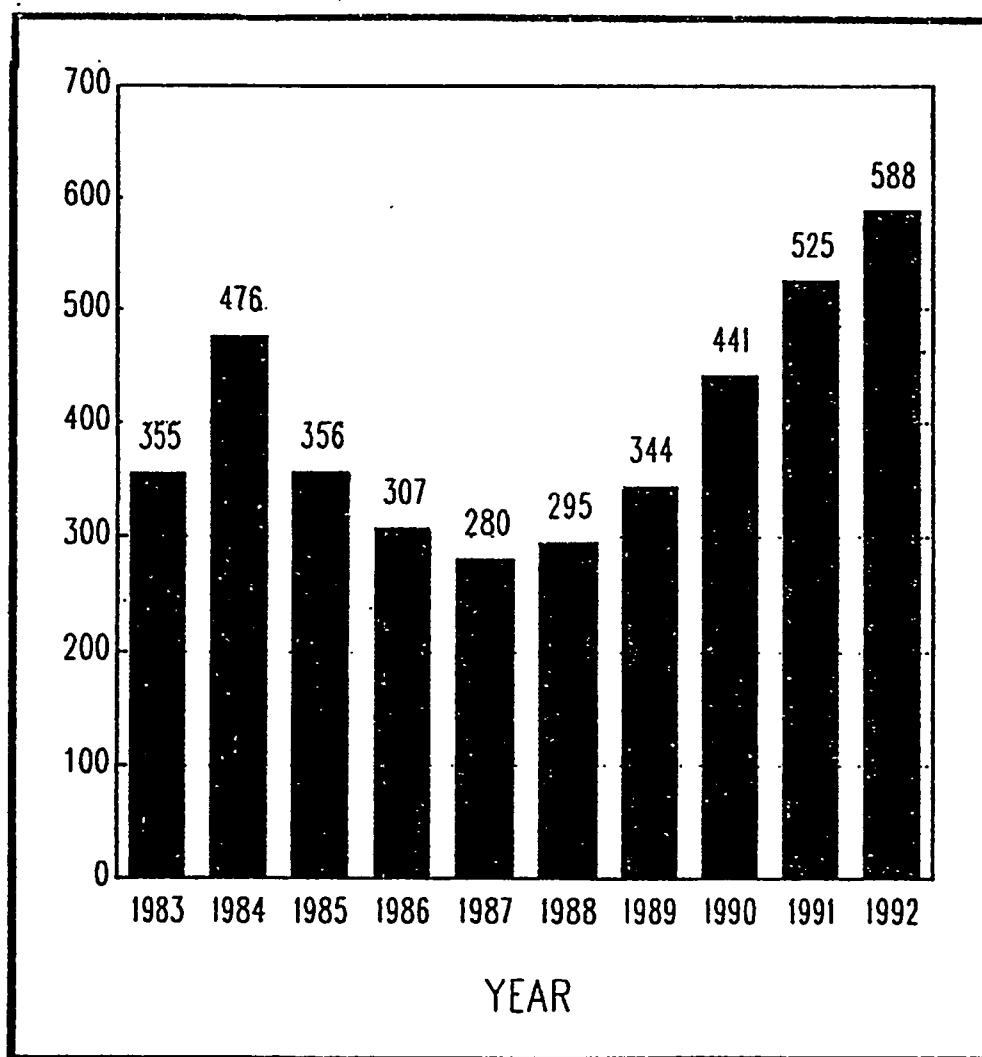


YEAR	DR re Ships	DR re Inspections
1984	1.93	1.45
1985	1.69	1.28
1986	1.80	1.34
1987	1.60	1.45
1988	1.80	1.35
1989	2.03	1.49
1990	2.30	1.62
1991	2.57	1.80
1992	2.60	1.84

Source: 1983/1984-1992 MOU Annual Reports.

Note: A Deficiency Rate expresses the number of deficiencies in relation to the number of individual ships and the number of inspections annually. Rising rate tendencies indicate that more deficiencies per individual ship and per inspection are observed. See e.g. 1991 MOU Annual Report at 30.

Figure 5. Number of Delays/Detentions



Source: 1983/1984-1992 MOU Annual Reports.

Notwithstanding the relative success of the MOU in recognizing substandard ships on the basis of the "deficiency categories" outlined above, serious maritime disasters have occurred in European waters involving ships invariably subject to port state control. Thus, the *Herald of Free Enterprise* calamity in 1987 and the sinking of the *Scandinavian Star* in 1990, both involving tragic human losses in passenger ships,¹¹⁸ have at once cast doubt on the viability of the control assumptions in the MOU. What these disasters accomplished in effect was to put into question the prevailing understanding of a "substandard ship" under the MOU. Is control under the MOU really effective as a preventive strategy against maritime casualties? Self-criticism in MOU circles resulted in the widespread acceptance of a more fundamental category of "deficiency" which was at work and which has hitherto not been addressed by the MOU.¹¹⁹ Hence, the notion of the *human element*.

The so-called *human element*, *human factor*, *human error*, *personnel fault*, or *human failure* in shipping is a concept that has a history of its own which cannot be fully elaborated here. However, the background for its recognition as a valid underpinning for control in international law must be drawn. Moreover, this backdrop needs to be identified if the relationship of the *human element* with control under ILO 147 is to be elucidated.

Essentially, the concept of *human element* conveys the idea that maritime catastrophes or incidents involving ships are often due to the human factor and are rarely the result of *acts of god* or mechanical failures. This is admittedly quite a new concept, and its initial systematic articulation as a safety consideration in shipping policy may be traced back to the seventies.¹²⁰ It is also necessary to note that in the social sciences, this

¹¹⁸Tanker accidents are also noted at about this time, as officially noticed in *Council of the European Communities Resolution of 19 June 1990 on the Prevention of Accidents Causing Marine Pollution* (90/C 206/01). Text in POWER, V. EC SHIPPING LAW 724 (1992).

¹¹⁹1990 ANNUAL REPORT 3-4; 1991 ANNUAL REPORT 4.

¹²⁰HUMAN ERROR IN MERCHANT MARINE SAFETY (Maritime Transport Research Board, Washington DC June 1976). For a review of the human factor in the UK, see DEPARTMENT OF TRANSPORT, MARINE DIRECTORATE. THE HUMAN ELEMENT IN SHIPPING CASUALTIES (1991). GOLD, E. HANDBOOK ON MARINE POLLUTION (1985) argues the thesis that deficiencies in human skill is the weak link in the safety chain of ship operations; see also C. Forsyth, *Factors affecting tanker safety* 18 MARIT. POL. MGMT. 313, 315 (1991). In D. MOREBY, THE HUMAN ELEMENT IN SHIPPING (1975) there is only a vague awareness of the concept. Moreby is, perhaps, more concerned with the broad question of human relations in the maritime industry - as a variable in ship management rather than a causative element in maritime accidents.

understanding of the *human element* has been analyzed in the context of man-machine interactions,¹²¹ or mistakes and *latent errors* in human behaviour especially posing a threat to the safe operation of high-risk technologies.¹²²

Within the IMO, concern about the human element is initially seen in the adoption of the 1978 Standards of Training Certification and Watchkeeping (STCW) Convention whose primary object was to set up global minimum professional standards for seafarers.¹²³ The establishment of the World Maritime University in July 1983 and the various IMO-led activities on cooperation in maritime training are part of the "human element" program in the STCW Convention.¹²⁴ During the mid-80s, a new hallmark in IMO's initiative on the human element was begun with the consideration of the fatigue factor in ship operations - a human element aspect that was seen to have been neglected by the STCW Convention.¹²⁵ After about eight years of deliberation, a new IMO Assembly Resolution on fatigue will be adopted in 1993.¹²⁶

Another significant turn in IMO's approach to the human element problem was made with the adoption in 1990 of the IMO Assembly Resolution on "Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention" to promote improved operational practices on ships, this time by shifting a significant burden onto ship management, afloat and ashore, in addressing the *human element* for safety and pollution prevention.¹²⁷ This Resolution was soon reviewed and revised in light of European pressure in the IMO which sought a more rigorous implementation of the *human element* concept and to compel enforcement of operational

¹²¹W. Wagenaar and J. Groenweg, *Accidents at Sea: Multiple Causes and Impossible Consequences*, 27 INT'L. J. OF MAN-MACHINE STUDIES 587 (1987).

¹²²See J. REASON, HUMAN ERROR (1990); W. P. Singleton, *The Human Factor in Oil Pollution* in WARDLEY-SMITH (Ed). THE PREVENTION OF POLLUTION 233 (1979).

¹²³See *The STCW Convention* 1 IMO NEWS 6-10 (1984).

¹²⁴See J. Cowley, *IMO and National Administrations* 4 IMO NEWS (1988), 1 IMO NEWS (1989); Shen Zhaoqi, *IMO and the Training of Maritime Personnel* 4 IMO NEWS 12-13 (1985).

¹²⁵It was the International Federation of Ship Masters Association which first called the attention of the IMO to the "fatigue factor." 4 IMO NEWS 5 (1985). For the developments that took place in the IMO since then, see 4 MO NEWS 12 (1986); 1 IMO NEWS 5, 12 (1988); 2 IMO NEWS 10 (1990); 2 IMO NEWS 19 (1992).

¹²⁶3 IMO NEWS 7 (1992).

¹²⁷IMO RES. A. 647 (16). For the background of this Resolution see *Shipboard Management for Maritime Safety and Pollution Prevention* 3 IMO NEWS 7-10 (1988); 1 IMO NEWS 5 (1990).

standards.¹²⁸ At this point, it is worth mentioning that developments in the MOU policy regarding the regulation of the *human element* in port state control have had an enormous impact on the IMO's consideration of the *human element*. In the 1991 (17th) Assembly of the IMO, two significant Resolutions were adopted which elaborate on the IMO's current policy thrust on the *human element*: Resolution A.680 (17) revising the earlier Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention, and Resolution A.681 (17) on "Procedures for the Control of Operational Requirements related to the Safety of Ships and Pollution Prevention."¹²⁹ Amendments to the SOLAS, STCW and MARPOL Conventions to accommodate operational proficiency, in addition to preparations for a Code for safe management and operation of ships, are presently being worked out on the basis of new IMO understanding of the human element in shipping: "In matters of safety and pollution prevention, it is commitment, competence, attitudes, and motivation of individuals at all levels that determine end results."¹³⁰

Within the MOU framework, it appears that the *human element* idea was given a serious look sometime in 1990, when discussions to limit the effects of human failure-induced ship casualties became highly conspicuous in light of the *Herald of Free Enterprise* and *Scandinavian Star* tragedies.¹³¹ It was also during this time that the MOU Secretariat took note of the growing concern aired in several international fora regarding the apparent lack of adherence to proper shipboard operations.¹³² These considerations "resulted in an assessment of the role of the port state with regard to the human element, particularly in relation to on-board operational requirements."¹³³

The control of the *human element* by port states under the MOU through the mechanism of compliance with on-board operational requirements received political support during the Fourth Ministerial Conference on Port State Control which was held on March 14, 1991 and

¹²⁸3 IMO NEWS 16 (1990); 1 IMO NEWS 14 (1991); 2 IMO NEWS 6, 11 (1991); *Passenger and Crew Safety on Board Ship*, 3 IMO NEWS 3-14 (1991).

¹²⁹See 4 IMO NEWS 8-9 (1991).

¹³⁰MSC/MEPC Working Group Considers Human Element 3 IMO NEWS 4 (1992).

¹³¹See 1990 ANNUAL REPORT 1.

¹³²*Id.*, at 5.

¹³³*Id.*, at 1. "Control of Operational requirements" in this context must be distinguished from the "operational violations", adverted to in previous ANNUAL REPORTS, which really refers to violations of the COLREGS Convention and prohibited substance discharges under MARPOL Annex I and II, MOU, s ec. 5.

resulted in the introduction of an amendment to the 1982 MOU.¹³⁴ The relevant portion of the Ministerial Declaration,¹³⁵ reads:

The Ministers stressed that investigations into the cause of serious casualties indicate that they could often be attributed to the fact that appropriate operational standards had not been complied with.

The Ministers took note of the decisions laid down in the final declaration of the Third International Conference on the Protection of the North Sea to the effect that control by port states to ensure compliance with operational requirements in respect of maritime safety and pollution should be intensified, preferably within the framework of the Memorandum of Understanding on Port State Control.

The Ministers supported these decisions and agreed on an intensified control by port states on compliance with those operational requirements explicitly specified in the relevant instruments. Recognizing the compelling need for further action, they decided to take the necessary steps within the IMO to develop further measures for adequate operational standards and to clearly identify the explicit rights and obligations of port states to control such measures.¹³⁶

The amendments to the MOU, which took effect on July 24, 1992,¹³⁷ are now at the dawn of their implementation. Certainly, pursuing the objectives of these amendments will consume a vast amount of commitment on the part of the MOU states. The amendments, after all, address what is almost unanimously accepted as the core safety and marine environment problem of present day shipping: the *human element*.

The significant amendments to the MOU, which basically relate to the manner of carrying out an inspection, read:

SECTION 3.1

In fulfilling their commitments, the Authorities will carry out inspections, which will consist of a visit on board ship in order to check the certificates and documents relevant for the purposes of the Memorandum. In

¹³⁴REPORT OF THE CONFERENCE. *Safe Operation of Ships and Pollution Prevention*, FOURTH MINISTERIAL CONFERENCE ON PORT STATE CONTROL Paris, 14 March 1991.

¹³⁵The Declaration echoes the MINISTERIAL DECLARATION OF THE THIRD INTERNATIONAL CONFERENCE ON THE PROTECTION OF THE NORTH SEA signed on March 8, 1990, text of FINAL DECLARATION in I YRKBK. INT'L. ENVL. L. 658, esp. par. 24.

¹³⁶*Supra* note 133, at 73.

¹³⁷PSC Circular for Surveyors No. 8, July 1992.

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 Annex 1 [of the MOU] and [IMO] Resolution A.681 (17).¹³⁸

SECTION 3.2.2

For the purpose of control on compliance with on board operational requirements, specific "clear grounds" are the following:

- * evidence of operational shortcomings revealed during port State control procedures in accordance with SOLAS 74, MARPOL 73/78 and STCW 1978;
- * evidence of cargo and other operations not being conducted safely or in accordance with IMO guidelines;
- * involvement of the ship in incidents due to failure to comply with operational requirements;
- * evidence, from the witnessing of a fire and abandon ship drill, that the crew are not familiar with essential procedures;
- * absence of an up-to-date muster list;
- * indications that key crew members may not be able to communicate with each other or with other persons on board.¹³⁹

The concept of operational control, indeed, adds a new *deficiency category* in the catalogue of inspection deficiencies under the MOU. In instances where the operational proficiency or capabilities of a crew are suspect or where there is failure in a ship's operational system, delay or detention of the ship is warranted under the MOU.¹⁴⁰

¹³⁸*Cf. supra* note 62. The underlined provisions are the amendments introduced to address the "human element" concern.

¹³⁹This is an entirely new provision in the MOU.

¹⁴⁰Amended MOU, sec. 3.1 and Sec. 3.2.2 in relation to Item 3 of the Annex to IMO Res. A.681(17) and Annex 1. A ship is entitled, in accordance with a port State's procedures, to compensation for loss or damage in the event of undue delay or detention. In case of dispute, the onus of proving that undue delay was not caused rests with the port State. *See* Item 1.8, Annex, IMO Res. A.681 (17).

MOU CHECKLIST FOR A SUBSTANDARD SHIP

Physically Safe Vessel

+

Physically Sound Marine Environment

+

Physically Fit Crew

+

Human Element

To be sure, the immediate purpose of operational control, considering the nature of the maritime disasters that gave rise to its motivations, is to promote safety more than anything else. But its relevance to pollution prevention is equally clear too, as indicated by *human element* deliberations by and developments within the MOU States and IMO. Indeed, it can be said that control procedures on the human element make safety and pollution prevention two sides of the same coin.

To recall an earlier query, it may now be asked what the *human element* under the MOU makes of the *human element* under ILO 147. If the control procedures of the MOU are based on the interlinked aims of safety, environmental protection, and healthy social and working conditions, operational control is bound to have an impact on the control of social and labor standards. The concrete effects of operational control within the MOU framework on the enforcement of the ILO 147 Appendix Conventions cannot be neglected if one is to fully appreciate the issues of humanity dramatized by present-day seafarers.

The Human Element and ILO 147

It was suggested earlier that the MOU, although it has spearheaded an international initiative on mandatory port state inspection of working and social conditions on board ships, does not purport to enforce

ILO 147 in its entirety.¹⁴¹ Unlike the case of the other relevant instruments where the functions of the flag state have, in an administrative sense, been effectively taken over by the MOU states, there are ILO 147 standards which have been ultimately left for flag states to enforce with respect to ships brought under port state control. More particularly, the MOU has opted not to subject to port state control social and working conditions which are reported to be the main source of miseries suffered by today's seafarers. For the MOU states, this is as it should be for the MOU is "an instrument *exclusively* intended to foster maritime safety in its widest sense"¹⁴² and not a human rights instrument as is ILO 147, or any ILO Convention for that matter.¹⁴³ Insofar as ILO 147 is concerned the main thrust of port state control under the MOU - - promotion of maritime safety, maritime health, and marine environmental protection¹⁴⁴ - - is not premised on a human rights dimension in resolving the problem of substandard ships.

The perspective that the MOU is not a human rights instrument is important to constantly bear in mind. This ultimately justifies the MOU position that the International Labour Office's orientation to port state control, embodied in the 1990 Guidelines, is somewhat incongruent with its approach. This also explains the MOU states' inclination to have their influence and concerns brought to bear on the IMO whose motto has always been "safe ships and clean seas".¹⁴⁵ To the extent, therefore, that ILO 147 standards are or could be instrumental in promoting the safety objective, these standards are relevant for the MOU.

With operational control now secured solidly within the framework of the MOU, the accent on safety is all the more amplified. Again, notwithstanding the emphasis on the *human element*, a human rights presupposition is not *ipso facto* involved. If at all there is a message sent across to activists on seafarers' rights, it is the plain fact that it is competence or professionalism,¹⁴⁶ rather than dignity or compassion in seafaring, which is at stake in the control of the *human element*. With

¹⁴¹*Supra*, at 33-35. Amended MOU, sec. 4, Annex 1.

¹⁴²The Paris Memorandum - a ten year old adult *supra* note 46, at 10.

¹⁴³See W. Jenks, *The ILO Approach to Human Rights* INTERNATIONAL LABOUR OFFICE. SOCIAL POLICY IN A CHANGING WORLD, SPEECHES BY WILFRED JENKS 11 (1976).

¹⁴⁴See Paris Ministerial Declaration, 14 March 1991 *supra* note 133; Final Declaration of *Safe Ships on Clean Seas Conference*, Hague, 23 April 1986, 1985/86 MOU ANNUAL REPORT; FIRST ANNUAL REPORT (1 July 1982-30 June 1983).

¹⁴⁵See *The International Maritime Organization FOCUS ON IMO*, February 1992.

¹⁴⁶IMO Res. A.681(17).

operational control, it cannot be expected that there will be, qualitatively and quantitatively, more attention to or enforcement of rights of seafarers.¹⁴⁷ Instead, the essential focus will be on seafarers' responsibilities and obligations.

Because operational control does not involve enforcement of individual seafarers' rights but verification of their collective responsibilities, and on account of the high priority occupied by the *human element* in the MOU's new scheme of control procedures, it is doubtful whether the MOU states will reconsider the extent of enforcement of ILO standards in port state control. Progressive developments within the MOU (just like in the IMO), as the historical evidence proves, follow from maritime casualties that discretely give rise to a lesson for international law and institutions. For a moment, what crosses the mind is the occurrence of a maritime disaster that will unconditionally provoke the international community or the MOU States to effectively enforce the entirety of ILO 147. But is there any conceivable maritime disaster that can induce the MOU states to intensify control of ILO 147 standards other than what is already the human rights tragedy that has plagued the world of seafarers since centuries past? It may be safe to conclude that seafarers cannot expect more ILO 147 standards to be actively enforced through the MOU under this model of port state control.

There is no question that port state control has been one of the great achievements in the machinery of contemporary international law. It has opened up new possibilities in the national and international administration and enforcement of maritime law and seems to be achieving results that have previously been elusive to flag states. Its application in a regional setting, through the Paris MOU innovation, is demonstrative of a legitimately ambitious concerted effort to comprehend and then overcome the problem of substandard ships. How the MOU has dealt with labor standards in the maritime sector illustrates just that process where a port state control system is consciously engineered to yield immediate results and achieve long term objectives.

Regional port state control was, in its origins, motivated by the policy interest of promoting acceptable social and working conditions on board ships. The 1978 Hague Memorandum, it may be recalled, took its cue from ILO 147. Barely had this ILO 147-based initiative commenced when

¹⁴⁷Whitworth *supra* note 7, at 125, 135-136 suggests that port state control could and should be extended to check on crew agreements.

the 1982 Paris MOU was adopted, and the safety and environmental policy interests of port states gained high prominence, perhaps eclipsing the purely labor interest profile in the European campaign against substandard ships. Indeed, the number of inspections and detentions reported since the Paris MOU took effect proved that the safety and environmental agenda was paramount.

When the labor agenda in the MOU was again resurrected in the later part of the 1980s, its consideration practically coincided with the discussions on a subject in the safety agenda that had become politically urgent at that time: the *human element*. This time the notion of social and labor conditions on board ship acquired a new meaning, validating the previous outlook on the degree of enforcement intensity of ILO 147 standards under the MOU, but at the same time highlighting the centrality of crew obligations, their technical competence, and professionalism.

Whether the resultant MOU formula to eliminate substandard ships will achieve further success, hinged as it is on the pivotal notion of the *human element*, remains to be seen. In the meantime, a proposition from the Office of the ILO Director-General calls for attention. It represents another substantive quotation in this paper, and appropriately the final one:

Mr. Chairman, coming back to my opening comments on the links between safety, pollution prevention and working and living conditions, I will have to make a very obvious observation; there will always be risks associated with human activities and that, indeed, also applies to shipping. We have all read statistics telling us that a high percentage of all accidents is due to the so-called *human error*. *Human error* is, however, a very diffuse and general sort of classification. The discussion often seems to focus on whether seafarers have properly followed procedures without looking into the reasons behind mistakes and misjudgments. This can blur the interaction between the technological and social system in the work situation and result in accidents.

What I have just said does not deny that workers themselves -- in this case seafarers -- directly or indirectly can create accidents, nor does it imply that automatically they are not responsible for accidents. But it points to the vital fact that situations, over time, "make" people. It influences their degree of alertness and shapes their attitudes. For the ILO improved safety cannot be accepted as a contribution to overall safety unless the social and labour consequences are considered and taken into account. General and specific remedies for improving safety should be based on a thorough understanding of all aspects of safety. In this context education and training, operational qualifications of the crews, satisfactory recruitment of able and motivated

personnel and acceptable working and living conditions are important. They will be crucial factors in the future.¹⁴⁸

¹⁴⁸FOURTH MINISTERIAL MEETING ON PORT STATE CONTROL *supra* note 133, at 88-89. Closing Ceremony address by Mr. V.M. Morozov, representing the Director-General of the International Labour Office.

Table 2**Specification of Most Common Deficiencies****SHIPS' CERTIFICATES**

- safety equipment certificate
- safety construction certificate
- passenger ship safety certificate
- radio safety certificate
- load line certificate
- certificate of fitness (liquefied gases in bulk)
- certificate of fitness (chemicals in bulk)
- IOPP-certificate/NSL-certificate
- other

CREW

- certificates of competency
- number/composition of crew
- medical certificate
- other

ACCOMMODATION

- cleanliness accommodation/parasites
- ventilation/heating
- sanitary facilities
- drainage
- lighting
- pipes/wires/insulation
- sick bay
- medical equipment
- other

FOOD AND CATERING

- galley/handling spaces
- provisions
- fresh water/piping/tanks
- other

WORKING SPACES

- ventilation/heating

lighting
other

ALARM SIGNALS

general alarm
fire alarm
other

LIFE SAVING APPLIANCES

life boats
life boat inventory
rescue boats
rescue boat inventory
life rafts
launching arrangements for survival craft/rescue boat
distress signals/pyrotechnics
life buoys
life jackets/thermal protective aids
portable radio for survival craft/EPIRBs
line throwing apparatus
training/instruction manual
other

FIRE FIGHTING APPLIANCES

prevention
inert gas system
detection
fire fighting equipment
fixed fire extinguishing installation
appliances (general equipment)
personal equipment
pumps
fire dampers/valves/quick closing devises/remote control
international shore connection
other

ACCIDENT PREVENTION

personal equipment
protection machine/machinery parts
pipes/wires/insulation
other

SAFETY IN GENERAL

- closing devices/watertight doors
- signs/indications
- safety plan
- musters and drills
- stability/strength
- construction deck/beams/hull/bulkheads
- steering gear
- hull damage impairing seaworthiness
- ballast tanks/fuel tanks/other tanks
- emergency lighting/batteries/switches
- electrical equipment in general
- pilot ladders
- gangway/accommodation ladders
- means of escape
- other

CARGO

- stowage
- grain
- dangerous goods
- loading or unloading equipment
- holds and tanks
- other

LOAD LINES

- overloading
- fireboard marks
- railing/catwalks
- cargo hatchways/other hatchways
- portable/non-portable hatchway cover (beams/tarpaulins, etc.)
- windows/side scuttles
- doors
- ventilation/air pipes/casings
- other

MOORING ARRANGEMENTS

- ropes/wires
- anchoring devices
- winches/capstans
- other

PROPULSION AND AUXILIARY MACHINERY

- propulsion/main engines
- cleanliness of engine room
- auxiliary machinery
- bilge pumping arrangements
- guards/fencing
- insulation
- other

NAVIGATION

- navigational equipment
- radar
- gyro compass
- magnetic compass
- lights/shapes/sound signals
- signalling lamp
- nautical charts
- nautical publications
- other

RADIO

- auto alarm
- main installation
- reserve installation
- VHF installation
- direction finder
- other

MARINE POLLUTION - ANNEX I

- oil record book
- retention of oil on board
- oily water separating equipment
- oil discharge monitoring and control system
- 15 ppm alarm arrangements
- standard discharge connection
- pollution report - Annex I
- other

DEFICIENCIES SPECIFIC FOR TANKERS

- pump rooms/handling spaces
- cargo transfer
- instrumentation

fire protection cargo deck area
personal protection
other

MARINE POLLUTION - ANNEX II

cargo record book
P + A Manual
efficient stripping
residue discharge systems
ventilation procedures/equipment
ship type designation - annex II
pollution report - annex II
other

ALL OTHER DEFICIENCIES

OTHER DEFICIENCIES NOT CLEARLY HAZARDOUS