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REGIONAL PORT STATE CONTROL AGREEMENTS: SOME ISSUES OF INTERNATIONAL LAW*

Ted L. McDorman **

I. INTRODUCTION

The primary characterization of the relationship of ports both international and domestic is that of competition. Ports vigorously compete in terms of costs and services for international shipping business whether that business be container vessels, bulk carriers or cruise ships. The great ports of the world, for example, Hong Kong, Singapore, and Rotterdam, have competitive advantages compared with lesser ports because of geography and history. Nevertheless, these great ports, like others, are alert to competition and the need to acquire and retain vessel traffic.

Until recently, ports were inclined to treat vessel safety and vessel environmental standards in the same competitive mode. In most of the world, competition between ports of different countries operated to ensure that a country did not adopt port laws unfavorable to vessel traffic. Strict environmental requirements and safety standards applied to visiting vessels could increase the cost of transportation and make a port less competitive. Moreover, the shipping industry argued that host states applying differing local standards would create a checker-board of regulations that would increase compliance costs unreasonably and inhibit ocean trade. While certain states, such as the United States, because of its unique geographical, economic and political situation, could unilaterally apply strict port laws,¹

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1. See generally PHILIPPE BOISSON, *SAFETY AT SEA: POLICIES, REGULATIONS & INTERNATIONAL LAW* 457-60 (Denis Mahaffey, trans. Paris: Bureau Veritas, 1999) (a brief summary of the U.S. position regarding port state control); see also David G. Dickman, "Port States, the United Nations Convention on the Law of the Sea, and the U.S. Coast Guards' Port State Control Initiative," paper presented at the 1995 Law of the Sea Continuing Legal Education course held in Seattle at the University of Washington School of Law.

other countries feared that adoption of strict port laws would have the significant economic repercussions suggested by the shipping industry. However, the increasing concern about sub-standard vessels plying the oceans of the world—by the public, as a result of publicity surrounding oil tanker disasters such as the *Exxon Valdez*; by the shipping industry, because of their poor public image; and by governments, in response to the public and industry—created a demand for a cooperative or *regional* approach to encourage port states to enhance enforcement of marine pollution and vessel safety laws against visiting vessels.

This demand has been responded to with the adoption of regional arrangements for port state control. The first regional arrangement for port states was created in Europe through the 1982 Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, known as the Paris Port State Control MOU.² This was followed by the 1992 Latin American Agreement on Port State Control,³ then came the 1993 Tokyo Port State Control MOU,⁴ the 1996 Caribbean Port State Control MOU,⁵ and the 1997 MOU on Port State Control in the Mediterranean Region.⁶ Most recently, there is the Port State Control MOU for the Indian Ocean and East Africa⁷

2. See Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, 21 I.L.M. 1 (1982) [hereinafter Paris Port State Control MOU].

In 1995 the European Community adopted a directive on port state control which is similar to the Paris Port State Control MOU. See *The EC Directive on Port State Control in Context*, 11 INT'L J. MAR. & COASTAL L. 241, 268–88 (1996). The genesis of the EC Directive was the view that some port authorities were reluctant to apply the Paris MOU. Regarding the 1995 EC Directive on port state control, see generally BOISSON, *supra* note 1, at 462–64. Tatjana Keselj, *Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memorandum of Understanding*, 30 OCEAN DEV. & INT'L L.J. 127, 146–148.1 (1999).

3. See generally *Latin American Port State MOU* (visited Feb. 28, 2000) <<http://www.sudnet.com.ar/ciala/>>.

4. See generally Memorandum of Understanding on Port State Control in the Asia-Pacific Region, Dec. 1, 1993, reprinted in *NEW DIRECTIONS IN THE LAW OF THE SEA: REGIONAL AND NATIONAL DEVELOPMENTS* (Roy S. Lee and Moritaka Hayashi, eds., Dobbs Ferry, N.Y. Oceana Publications, Release 97-1, November 1997). There have been several amendments made to the Tokyo MOU since its original adoption. See *Tokyo MOU Site* (visited Feb. 28, 2000) <www.ijnet.or.jp/tokymou/> (This web site contains the most recent, complete version of the Tokyo MOU, the one referred to in this contribution, and the 1998 Annual Report of the Tokyo MOU.) [hereinafter Tokyo Port State Control MOU].

5. See generally Memorandum of Understanding on Port State Control in the Caribbean Region, 36 I.L.M. 231 (1997).

6. See generally *Memorandum of Understanding on Port State Control in the Mediterranean Region Signed*, 2 IMO NEWS, 1997, at 2.

7. See *West and Central African Nations Agree to Establish Port State Control Regime*, 2 IMO NEWS, 1998, at 31.

and the West and Central African MOU.⁸ Preparations are being made for a port state control MOU for the Persian Gulf.⁹

All the regional port state control arrangements are substantively similar and follow the model of the 1982 Paris Port State Control MOU. For example, all the port state control MOUs contain wording in the preamble which indicates the need for a regional approach "to prevent the operation of substandard ships" in order "to avoid distorting competition between ports".¹⁰

All the regional port state control MOUs encourage the appropriate national port authorities to inspect visiting vessels to ensure that those vessels have been constructed, are equipped, crewed and operated in compliance with the standards set by the relevant international treaties.¹¹ Where vessels are detected as not being in compliance with the standard-setting conventions, the host state may prevent the offending vessel from leaving until the defects have been remedied.¹² The hope is that as more countries and regions adopt port state control, enforcement of international vessel standards will be enhanced and vessel-owners will undertake to comply with the standards voluntarily rather than risk detection of substandard vessels and face potential delays and penalties.

The wide-scale adoption of port state control is an attempt to develop an exception to the competitive relationship of ports within the same region. Port state control has as its foundation and operational ethic cooperation amongst regional ports. That cooperation has as its goals safer ships and cleaner seas, and is built upon the view that the goals can only be accomplished if all the regional ports apply and enforce the same rules in a similar manner to visiting vessels. Where the ports cooperate by agreeing to apply the same rules in a similar manner, then no single port seeks or acquires competitive advantage by offering to overlook sub-standard vessels.

The focus of this contribution is upon three international law questions that arise regarding port state control: 1) What is the international legal foundation of port state control?; 2) What are the international treaties that regional port state control authorities apply to visiting vessels and does international law place any limits on the law that a port state can apply to a visiting vessel?; and 3) What are the international legal principles applicable to a port state respecting the controlling of vessel access to or the departure from ports?

8. See *MOU Port State Control in the Indian Ocean*, 3 IMO NEWS, 1998, at 28.

9. See Fernando Plaza, *Port State Control: An Update*, 4 IMO NEWS, 1997, at 30.

10. Tokyo Port State Control MOU, *supra* note 4, Preamble, ¶¶ 7, 8.

11. See *id.* § 3.1.

12. See *id.* § 3.6.

II. THE INTERNATIONAL LEGAL BASIS OF PORT STATE CONTROL: PORT STATE V. FLAG STATE

The essence of port state control is the application by the port state of its national laws to visiting vessels. As one commentary states: "By entering foreign ports and other internal waters, ships put themselves within the territorial sovereignty of the coastal State."¹³ As explained elsewhere: "As a port is part of a State's internal waters over which a State can exercise the same jurisdiction as if the internal waters were part of the land of the State, a foreign vessel in port is subject to the same jurisdiction as an alien on land."¹⁴ Thus, the international legal principle is that, within a port, the host state has absolute jurisdiction over visiting vessels in the same manner as if the visiting vessel were a foreign citizen vacationing or doing business in the host country. The result being that a visiting vessel is subject to and must comply with the laws and regulations of the host country. There are, however, several potential exceptions. First, if the visiting vessel is a government vessel, issues of sovereign or diplomatic immunity may arise. Second, if a vessel is not voluntarily in port but had to put into port because of an emergency or weather, there may be a limitation in customary international law on the authority of the port state regarding that vessel.¹⁵

While the international legal basis of port state control over visiting vessels is clear, reference must be made to flag state jurisdiction and the potential conflict between the laws of a port and the laws of the flag.

International law embraces the fiction that ships are floating land masses of the state where the vessel is registered and that the law applicable to the ship is the law of the state of registry—the flag state.¹⁶ Thus, a vessel is required to comply with those treaties binding upon the flag state. Moreover, enforcement of applicable treaties against vessels is to be undertaken by the flag state. A failure of a flag state to enforce the applicable treaties against its own vessels gives rise to claims against the flag state by other states that are parties to the relevant treaties.¹⁷

13. R.R. CHURCHILL AND A.V. LOWE, *THE LAW OF THE SEA* 54 (3rd ed., 1999).

14. T.L. McDorman, *Port State Enforcement: A Comment on Article 218 of the Law of the Sea Convention*, 28 J. MAR. L. AND COM. 305, 308 (1997).

15. See CHURCHILL AND LOWE, *supra* note 13, at 54, 56–57.

16. See United Nations Convention on the Law of the Sea, art. 91(1), 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter the 1982 Law of the Sea Convention]; see generally E.D. BROWN, *THE INTERNATIONAL LAW OF THE SEA* (Aldershot: Dartmouth Publishing 1994).

The necessary connection between the vessel and the state of registry has been a major international issue. Article 91(1) of the 1982 Law of the Sea Convention refers to the need for a "genuine link" between the vessel and state of registry. See CHURCHILL AND LOWE, *supra* note 13, at 207.

17. Respecting flag state control and enforcement, see BOISSON, *supra* note 1, at

There is no conflict in international law between the authority of a port state over a visiting vessel and the authority of the flag state respecting that vessel. International law is clear that the authority of the port state is superior to that of the flag state while the vessel is in port.¹⁸

While there is no conflict in international law between the authority of a port state and the flag state, the legal certainty does not accurately reflect the tension between the port state and the flag state. Traditionally, port states rarely interfered with foreign flag vessels voluntarily in port. Unless the activity of a visiting vessel or on board a visiting vessel directly affected the populace of the port, host states declined to exercise legal authority over visiting vessels.¹⁹ International commerce and sensibilities regarding flag state sovereignty supported port state forbearance in exercising authority over visiting foreign vessels. Port state control, while clearly supportable by international law, interferes with the traditional expectations of visiting foreign vessels to be left alone while in port.

III. PORT STATE ENFORCEMENT OF LAWS AND STANDARDS ON VISITING VESSELS

A. The Principle

While international law recognizes that a port state can apply its national laws to visiting vessels,²⁰ fundamental to cooperative regional port state control is that a *common* set of laws and standards will be applied by the authorities of the regional ports to visiting vessels. The common set of laws and standards agreed upon in regional port state MOUs are those created by the various international treaties that deal with safety and environmental standards for vessels.²¹

375–83; *see also* PATRICIA W. BIRNIE AND ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 264–73 (1992).

18. *See* CHURCHILL AND LOWE, *supra* note 13, at 54; *see also* McDorman, *supra* note 14, at 308.

19. *See* CHURCHILL AND LOWE, *supra* note 13, at 65–67.

20. *See supra* part II.

21. A recent comprehensive study by Dr. Edgar Gold listed eighty-three international treaties and related instruments as dealing with vessel-source marine environmental pollution and vessel safety. *See* EDGAR GOLD, *GARD HANDBOOK ON MARINE POLLUTION* 56, 88–95 (Gard: Arendal, Norway, 2nd edition, 1998). The treaties were grouped into four categories. First were treaties which create jurisdictional competences for national governments to deal with national-flag vessels and, more importantly, foreign-flag vessels that are within waters claimed by a state. The most important of these treaties is the 1982 United Nations Convention on the Law of the Sea, *supra* note 16. Second are the treaties that create liability and compensation schemes in the event of vessel-source marine pollution damage. The two best known of these treaties are the International Convention on the Civil

The essence of port state control is the addition of another group of states, those states with ports visited by vessels, with the responsibility to enforce international vessel standard conventions. Flag state jurisdiction has not been altered. The preamble of the various port state control MOUs note that the "principal responsibility" for implementing international standards on a vessel continues to rest with the flag state.²² In other words, all the regional port state control MOUs are aware of the need to strike a balance between exercising the authority international law cedes to a port state with the responsibilities of flag states and, more importantly, economic realities.

The superior position of the authority of a port state over visiting vessels vis-a-vis the authority of the flag state can lead to the situation where a port state can apply an international treaty against a visiting vessel even though the flag state of the visiting vessel is not a party to that treaty. Usually an international treaty is only applicable and enforceable between states which are parties to the treaty. Flag states have argued that port states should not impose international agreements against visiting vessels to which the flag state is not a party. The flag state argument is based on the concern that a commercial vessel may face conflicting laws, that of the port state and the flag state. Moreover, it is argued that since a vessel is always subject to flag state laws and, only while in port subject to host state laws, that the law of the flag state should be respected. However, under principles of international law, once a foreign vessel voluntarily enters into a port of a country, that vessel becomes subject to the laws and regulations of the host country irrespective of whether those laws and regulations are based upon treaties to which the flag state of the visiting vessel is also a party.²³

B. The Applicable Treaties

The goal of regional port state control is that each inspecting authority will apply a uniform set of standards as contained in the designated international treaties. For example, the Tokyo Port State Control MOU sets

Liability for Oil Pollution Damage, Nov. 29, 1969, 9 I.L.M. 45 [hereinafter CLC]; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, done Dec. 18, 1971, 11 I.L.M. 284 (1972) [hereinafter the Fund Convention] (both of which have been updated by amendments and protocols). Third are the conventions which create standards for vessel construction and operation and are directed specifically to the issue of marine environmental pollution. Finally, there are the general maritime safety conventions that apply to all ocean-going vessels. It is these latter two categories of treaties that are the standard-setting conventions relevant to regional port state control. See *infra* part III(B).

22. See, e.g., Tokyo Port State Control MOU, *supra* note 4.

23. See *supra* part II.

out eight international conventions which are to be enforced by the port authorities against all visiting vessels:²⁴

- the 1966 International Convention on Load Lines;²⁵
- the 1974 International Convention for the Safety of Life at Sea (SOLAS);²⁶
- the 1978 Protocol to the 1974 SOLAS Convention;²⁷
- the 1973 Convention for the Prevention of Pollution from Ships (MARPOL)²⁸;
- and the 1978 Protocol;²⁹
- the 1978 Convention on Standards for Training, Certification and Watchkeeping for Seafarers;³⁰
- the 1972 International Regulations for Preventing Collisions at Sea;³¹
- the 1969 Convention on Tonnage Measurement of Ships;³² and
- the 1976 Merchant Shipping (Minimum Standards) Convention of the International Labor Organization (ILO Convention No. 147).³³

However, some variation in the treaty standards applied by port states under regional MOUs can occur. Section 2.4 of the Tokyo MOU,³⁴ for example, directs that each inspecting authority is only to apply those

24. See Tokyo Port State Control MOU, *supra* note 4, part II(a).

25. International Convention on Load Lines, *done* Apr. 5, 1966, T.I.A.S. No. 6331, 640 U.N.T.S. 133 (entered into force July 21, 1968).

26. International Convention for the Safety of Life at Sea, *done* Nov. 1, 1974, T.I.A.S. No. 9,700, 1184 U.N.T.S. 2 (entered into force May 25, 1980) [hereinafter ICSLS].

27. Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, *done* Feb. 17, 1978, T.I.A.S. No. 10,009, 17 I.L.M. 579 (entered into force May 1, 1981) [hereinafter SOLAS].

28. International Convention for the Prevention of Pollution from Ships (MARPOL), *done* Nov. 2, 1973, 12 I.L.M. 1319.

29. Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL), *done* Feb. 17, 1978, 17 I.L.M. 546 (entered into force Oct. 2, 1983).

30. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, *done* July, 7, 1978, reprinted in 6D Benedict on Admiralty doc., 14-6, at 14-483 (Frank L. Wiswall ed., 7th ed. rev. 1998) (entered into force Apr. 28, 1984).

31. Convention on the International Regulations for Preventing Collisions at Sea, *done* Oct. 20, 1972, T.I.A.S. No. 5,857, 1050 U.N.T.S. 16 (entered into force July 15, 1977) [hereinafter Collision Regulations].

32. International Convention on Tonnage Measurement of Ships, *done* June 23, 1969, T.I.A.S. No. 10,490 (entered into force July 18, 1982).

33. Convention Concerning Minimum Standards in Merchant Ships, Oct. 29, 1976, 15 I.L.M. 1288 (entered into force Nov. 28, 1981) [hereinafter ILO Minimum Standards Convention].

34. Tokyo Port State Control MOU, *supra* note 4.

international conventions which are in force and binding for that port state.³⁵ All the above noted treaties are legally in force. Moreover, the record of state ratification of the treaties in the Tokyo MOU region is very good, with four of the eight instruments having been ratified by all the Tokyo MOU states.³⁶ However, the 1978 Protocol to the 1974 SOLAS Convention³⁷ has not been ratified by Canada, Fiji, Papua New Guinea, the Philippines or Thailand. MARPOL³⁸ has not been ratified by Fiji, the Philippines or Thailand. The Philippines is the only Tokyo MOU state not to be a party to the 1972 Collision Regulations.³⁹ Many of the Tokyo MOU states are not parties to the 1976 Merchant Shipping (Minimum Standards) Convention.⁴⁰ Variation in enforcement will also exist where amendments are made to any of the eight conventions since the Tokyo MOU directs that, while amendments are part of the listed conventions, a port state is only to enforce amendments that it has formally adopted.⁴¹

In 1998 the International Safety Management Code ("ISM Code") came into effect. The ISM Code, originally adopted as a recommendation by the International Maritime Organization (IMO) in 1993, was effectively formalized as an amendment to the 1974 SOLAS Convention ("Chapter IX") in 1994.⁴² The ISM Code requires vessels to carry a "document of compliance" from either government administrators or their delegates that the vessel owner has put in place a safety management system for a vessel that complies with the Code.⁴³ The port authorities involved in the Tokyo MOU, for example, have embraced the ISM Code and in 1998 commenced inspected visiting vessels to determine if the vessels had the requisite document of compliance and whether the conditions on a vessel are consistent with the document of compliance.⁴⁴ Vessel owners have noted that the flexible requirements of the ISM Code could lead to abuses by port state authorities.

35. See *id.* § 2.4.

36. Fifteen states, plus Hong Kong, adhere to the Tokyo port state control MOU. The states are: the People's Republic of China, Indonesia, Japan, Korea, Malaysia, the Philippines, the Russian Federation, Singapore, Thailand, Australia, Fiji, New Zealand, Papua New Guinea, Vanuatu and Canada. See *id.* § 8 (providing a list of the ratifications of the applicable Tokyo MOU conventions).

37. See Protocol of 1978 to SOLAS, *supra* note 27.

38. See MARPOL Convention, *supra* note 28.

39. See Collision Regulations, *supra* note 31.

40. See ILO Minimum Standards Convention, *supra* note 33.

41. See Tokyo Port State Control MOU, *supra* note 4, § 2.4.

42. See International Maritime Organization, *Maritime Safety* (visited Feb. 28, 2000) <www.imo.org/imo/convent/safety.htm>; see also ICSLS *supra* note 26; BOISSON, *supra* note 1, at 295-96 (respecting the origin of the ISM Code).

43. See generally BOISSON, *supra* note 1, at 297-304 (regarding the ISM Code).

44. See Annual Report of the Tokyo Port State MOU 1998, *supra* note 4.

C. Application of the Treaties: Vessel Inspection

In an ideal world, either all vessels visiting a port would be in compliance with the relevant port state regulations without the need of inspection or, alternatively, all visiting vessels would be inspected by the relevant port state control authorities to determine compliance with the designated international treaties. Neither ideals are realistic. Therefore, a key component of regional port state control is to ensure that sufficient inspections are undertaken to provide a high degree of confidence that sub-standard vessels are being detected and to provide an impetus to ship owners to voluntarily comply with vessel standards. The Paris Port State Control MOU deals with this by encouraging each state to inspect twenty-five percent of all vessels which enter its ports.⁴⁵ Reportedly, the twenty-five percent requirement has led to ninety percent of all vessels using ports in the European region being inspected.⁴⁶ The Tokyo MOU takes a different approach. The Tokyo MOU set a regional target that, by the year 2000, fifty percent of all ships operating in the region were to be inspected, leaving the question of how many inspections each state was to undertake to be determined annually by the Port State Control Committee.⁴⁷

Under each of the regional port state control MOUs detailed procedures have been adopted and are applied regarding the conducting of vessel inspections. Understanding the commercial nature of ocean trade and the cost factors involved in extensive port time, the Tokyo MOU, for example, provides that inspection activities are to be conducted so as "to avoid unduly detaining or delaying a ship."⁴⁸ Moreover, the Tokyo MOU directs that, in selecting vessels to inspect, port authorities are to "give clear priority to," amongst others: passenger ships; oil tankers, gas carriers and similar ships "which may present a special hazard"; vessels which have had recent deficiencies; and vessels which have not been inspected within the previous six months.⁴⁹

Since 1996 the fifty percent threshold has been reached in the Tokyo MOU region. In 1998, regional port authorities inspected 14,545 vessels from 104 countries.⁵⁰ The estimated number of vessels in the Tokyo MOU region was 24,226, thus, approximately sixty percent of vessels using ports in the region were inspected. Of the 14,545 vessels inspected pursuant to

45. See Paris Port State Control MOU, *supra* note 2, § 1.3.

46. See Gerhard Kiehne, *Investigation, Detention and Release of Ships under the Paris MOU on Port State Control: A View from Practice*, 11 INT'L J. MAR. & COASTAL L. 217, 219 (1996).

47. See Tokyo Port State Control MOU, *supra* note 4, § 1.4.

48. *Id.* § 3.12.

49. *Id.* § 3.3.

50. See Annual Report of the Tokyo Port State MOU, *supra* note 4, at fig. 1.

the Tokyo Port State Control MOU in 1998, 63.7 percent (9,226) of the vessels were found to have deficiencies.⁵¹

*D. A Limitation on the Law a Port State
Can Apply to a Visiting Vessel*

It must be noted that the laws and regulations that a port state can apply to a visiting vessel are not without legal limit. Customary international law directs that a port state can only enforce laws that relate to *activities* of a foreign vessel that take place *while the vessel is in port*.⁵² This includes enforcing laws regarding construction, design, safety, crewing and equipment standards that a vessel must meet. The 1982 Law of the Sea Convention, which can be taken to be customary international law on this point, provides that a port state also can enforce laws that relate to *activities* of a foreign vessel that took place *in the waters of the host state* prior to a vessel's entry into port.⁵³ The qualification is that, in this situation, the laws to be enforced by a port state must have been enacted "in accordance with" the Law of the Sea Convention or the "applicable international rules and standards" for vessel-source pollution prevention, reduction and control.⁵⁴ However, where an *activity* of a foreign vessel, such as a pollution discharge, *takes place on the high seas* or in the waters of a third state, and that activity does not affect the port state, customary international law does not permit a host state to enforce its laws regarding that activity against a visiting foreign vessel in its ports.⁵⁵ In such situations, the law that is applicable is that of the flag state or the coastal state where the activity took place.⁵⁶ Article 218 of the Law of the Sea Convention, referred to as the port state enforcement provision, attempts to create an enforcement capacity for a port state in the situation where a foreign vessel discharges a pollutant on the high seas or in the waters of another state in contravention of existing international standards.⁵⁷ It is highly questionable whether Article 218 of

51. See *id.* at tbl. 4.

52. See McDorman, *supra* note 14, at 311-12.

53. See 1982 Law of the Sea Convention, *supra* note 16, part XII, art. 220(1).

54. McDorman, *supra* note 14, at 309-10.

55. See 1982 Law of the Sea Convention, *supra* note 16, part VII. The most obvious exception to this statement concerns vessels engaged in piracy activities. Other excepted activities may include slave trading, drug trafficking and unauthorized broadcasting on the high seas. See *id.*

56. See generally McDorman, *supra* note 14, at 312-14. This limitation that exists on a port state is the result of the concept of extra-territoriality. For the exceptional activities noted in note 55, the basis of the jurisdiction of a port state would be the universality principle of jurisdiction as accepted in customary international law or the specifics of the 1982 Law of the Sea Convention.

57. See McDorman, *supra* note 14, at 314-15; see generally Keselj, *supra* note 2, at 135-38 (for a full discussion of Article 218 port state enforcement).

the Law of the Sea Convention⁵⁸ has emerged as part of customary international law. Moreover, few countries have extended their law to embrace a port state enforcement power of this type and none of the regional port state control accords discussed above have adopted expressly the contents of Article 218 of the Law of the Sea Convention. One commentator noted that the port state MOUs "do not devote great attention to discharge violations committed by vessels."⁵⁹ However, the International Maritime Organization has adopted a resolution outlining the type of evidence a port state control officer should look for to determine if there has been a discharge violation under the MARPOL Convention⁶⁰ and, under the Paris Port State Control MOU, that discharges are also receiving some attention.⁶¹

IV. INTERNATIONAL LAW ISSUES REGARDING VESSEL ACCESS TO AND DEPARTURE FROM PORTS

A. Access to Port

1. Under Customary International Law

Primarily, port state control concerns the application of local laws and standards to visiting vessels and does not seek to prevent vessel access to ports. Nor is port state control directly concerned with the placing of conditions on vessels in order to gain access to ports. Economic and trade considerations condition ports to encourage access to virtually all commercial vessels.⁶² However, a consequence of port state control may be the placing of conditions on commercial vessels for port access and the possible denial of port access to a particular vessel because of their substandard condition. The 1995 EU Directive provides that port access can be denied to vessels where the shipowner has failed to bring the vessel into conformity with the relevant standards.⁶³ None of the regional port state control MOUs explicitly deals with the issue of denial of port access.

58. See 1982 Law of the Sea Convention, *supra* note 16, at 1312.

59. Keselj, *supra* note 2, at 143.

60. See *id.* at 137–38; International Convention for the Prevention of Pollution from Ships, *supra* note 28.

61. See Keselj, *supra* note 2, at 144.

62. See BOISSON, *supra* note 1, at 171–73, for a discussion concerning interesting access to port questions arise respecting nuclear-powered vessels, vessels carrying hazardous cargoes, and oil tankers in distress. For a discussion concerning access to port questions that arise respecting fishing vessels, see *infra* notes 78–79, and accompanying text; FRANCISCO ORREGO VICUNA, *THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES* 261–65 (Cambridge: Cambridge University Press, 1999).

63. See BOISSON, *supra* note 1, at 174.

It is an important corollary to the international legal principle that a host state has authority over foreign vessels voluntarily in port that a port state can prohibit the entry into port of any vessel. Despite this apparent logic, it has been asserted that there is an international right of access to ports. The arbitrator in *Saudia Arabia v. Aramco* commented: "According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require."⁶⁴ More recently and more persuasively, the International Court of Justice in the *Nicaragua* decision, noted that it is "by virtue of its sovereignty that the coastal State may regulate access to its port."⁶⁵ Put another way, customary international law does not recognize the existence of a right of access to a port by a foreign vessel. A recent reviewer of the issue concluded:

There is no evidence of a rule of general international law requiring states to open their ports to all foreign vessels or even to all merchant vessels. While there is a presumption that ports are open unless a state indicates otherwise, it is a presumption only and not a legal obligation.⁶⁶

Moreover, a host state can impose what conditions it thinks reasonable on foreign vessels seeking access to a port. Support for this arises from Article 211(3) of the 1982 Law of the Sea Convention,⁶⁷ which directs that a port state can "establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports . . ."⁶⁸ The only limitation is that "due publicity" of the requirements are to be communicated to the competent international organization. The economic realities of ocean trade, however, operate to keep conditions on access to port from becoming so restrictive that vessels elect to bypass the ports of certain countries.

2. International Port Access Treaties

International treaty law may provide for a right of vessel access to ports. For example, the 1923 Convention and Statute on the International Regime

64. *Saudia Arabia v. Arabian American Oil Co.*, 27 I.L.R. 117, 212 (Arb. Trib. 1958).

65. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14,111 (June 27).

66. Louise de La Fayette, *Access to Ports in International Law*, 11 INT'L J. MAR. & COASTAL L. 1, 22 (1996).

67. See 1982 Law of the Sea Convention, *supra* note 16.

68. *Id.* (a nuanced examination of Article 211(3) of the 1982 Law of the Sea Convention, *supra* note 16, is provided by Keselj, *supra* note 2, at 132-35).

of Maritime Ports⁶⁹ provides that vessels, except fishing vessels, of contracting parties have a right of port access. This treaty, however, has a very limited membership.⁷⁰

It has been asserted that this Convention was a codification of customary law principles respecting port access and remains as the definitive normative standard.⁷¹ This assertion is inconsistent with the conclusion of the International Court in the *Nicaragua* case⁷² and with virtually all commentators.

Vessel access rights also may be part of bilateral navigational treaties or treaties on friendship and cooperation.⁷³ Such treaties, however, would only bind the specific partners and do not create a right of access for vessels of non-parties.

3. The Effect of International Trade Law

For commercial vessels carrying goods, international trade agreements, such as those administered by the World Trade Organization (WTO),⁷⁴ appear to have some application to restrictions on port access and conditions that may be imposed on vessels entering port. The ability of a port state to deny access to merchant vessels or to impose conditions on the vessel seeking entry to port could appear as an interference with the goods being carried and traded by the vessel and, hence, with international trade.

In the principal treaty administered in 1994 by the WTO, the General Agreement on Tariffs and Trade (GATT),⁷⁵ there is nothing *explicit* to contradict a port state's ability to restrict access to port or to impose conditions on vessels entering port. However, if a WTO member state, closed all of its ports to merchant vessels in order to prevent trade with a WTO member state, denying a foreign state access to its market, prohibited access of vessels of a particular flag, but not other vessels, or imposed conditions on certain flagged vessels that were not imposed on other

69. See Convention and Statute on the International Regime of Maritime Ports, Dec. 9, 1923, 58 L.N.T.S. 285.

70. As of 1993, only thirty-seven countries were parties. Neither Canada nor the United States have joined the treaty.

71. See BOISSON, *supra* note 1, at 169.

72. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

73. See Brown, *supra* note 16, at 39.

74. See Marrakesh Agreement Establishing the World Trade Organization, *done* Apr. 15, 1994, 33 I.L.M. 1144, in particular Annex 1 for a listing of the agreements administered by the WTO.

75. General Agreement on Tariffs and Trade, *done* Apr. 15, 1994 55 U.N.T.S. 194, which is now referred to as the General Agreement on Tariffs and Trade, 1994.

vessels, such measures would be a breach of Article XI of GATT, which prohibits the imposition of measures to prevent the importation of goods.⁷⁶

Besides these patent situations, the only 1994 GATT provision that appears relevant to access to ports is Article V, entitled "Freedom of Transit." The provision applies to "[g]oods (including baggage), and also vessels and other means of transport" that are in transit "across" the territory of one state to another state.⁷⁷ It appears that the obligation in Article V is that goods in transit are not to be unduly interfered with, nor discriminated against, by the transit state.⁷⁸

It is reported that, in a 1989 quarrel between the European Community (EC) and Canada respecting Canada's closure of its ports to EC fishing vessels, the EC invoked Article V.⁷⁹ The EC reportedly argued that Canada's policy of conditioning its port access of foreign fishing vessels on whether the flag state gave economic benefits to Canadian fish products and whether the species harvested by the foreign fishing vessels competed with Canadian fish was inconsistent with Article V. When Canada dropped these conditions, the EC withdrew its complaint.⁸⁰ The port closure applied to EC fishing vessels which were not engaged in selling their fish, thus no trade in goods was affected by the Canadian action. It is doubtful whether GATT in 1947 or Article V would have been applicable. However, conditioning access to ports of certain flag vessels (either fishing, merchant, governmental or cruise liners) on the receiving of trade benefits or market access seems antithetical to the spirit, if not the rules, of international trade law.⁸¹

76. See Edmond McGovern, *International Trade Regulation*, § 5.2 (Exeter: Globefield Press, loose-leaf service, updated September 1999) (Regarding GATT, Article XI).

77. GATT, Article V (1). See also JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 506 (1969).

78. See McGovern, *supra* note 76, § 8.61; see generally, JACKSON, *supra* note 77, at 506-51.

79. See La Fayette, *supra* note 66, at 20.

80. See *id.* LaFayette notes that Canada continued to keep its ports closed to EC fishing vessels on the grounds that the EC vessels were overfishing a depleted stock. Article XX(g) of the GATT allows a state to impose measures inconsistent with other GATT obligations where the measure is related to the conservation of an exhaustible natural resource. La Fayette surmises that the EC either took the view that GATT was no longer applicable to the port closures or accepted that the closures were consistent with Article XX (g) which acted as a valid exception to Article V. *Id.* at 20-21. See also ORREGO VICUNA, *supra* note 62, at 264-65.

81. It should be noted that any trade benefit given by a foreign state to a port state would also have to be given to other WTO members pursuant to the most favoured nation concept. See generally McGovern, *supra* note 78, § 8.3. Moreover, the dispute settlement process of the WTO is open for states to complain about the action of other states which, while not inconsistent with the wording of GATT, 1994, amounts to a "nullification or impairment" of benefits that are supposed to accrue to the complaining state. This situation is referred to as a "non-violation complaint." This is discussed in McGovern, *supra* note 76, at § 2.27. It would be an interesting argument whether a foreign state could claim that a port

All the above situations involve the port state denying access or imposing conditions based upon the flag of the merchant vessel, but not addressed is the situation where access is denied or conditions are to be met that are determined by the vessel itself rather than the flag. *Prima facie*, provided the port state determines access and imposes conditions based on the peculiarities of the vessel (i.e., the vessel is sub-standard) and without discrimination on the basis of flag or between foreign and national vessels, and the measure is not designed to be a disguised trade barrier, then no trade law issue arises.⁸²

Access to and use of port facilities is considered one of the three pillars of the negotiations that have taken place regarding Maritime Transport Services under the umbrella of the WTO and the General Agreement on Trade in Services (GATS). These negotiations reached an impasse in 1994 and again in 1996 and further discussions are not expected until 2000.⁸³ The thrust of these negotiations is to curtail national laws and policies which protect local providers of shipping services from international competition. In this context, access to and use of port facilities can be allocated or manipulated in order to favor national flag vessels.⁸⁴ It does not appear that the negotiations on Maritime Transport Services are directly concerned with national regulations regarding vessel access to ports or the environmental and safety conditions that may be imposed on visiting

state was nullifying or impairing a trade benefit due to the foreign state by discriminating against certain vessels of that foreign state in order to obtain economic advantage.

82. It has been suggested that environmental conditions imposed by a port state amount to a so-called "trade-related environmental measure" that might be inconsistent with international trade law. See Erik Jaap Molenaar, *Residual Jurisdiction Under IMO Regulatory Conventions*, in *COMPETING NORMS IN THE LAW OF MARINE ENVIRONMENTAL PROTECTION* 213–16 (H. Ringbom, ed., 1997). The scenario envisioned is where goods on board a vessel are denied access to the port state because of the environmental (or safety) requirements that must be met by the vessel. The argument is that Article XI (1) of GATT, 1994 prohibits measures which amount to an embargo and importing states cannot look behind the good, e.g. at the vessel, in order to block entry of goods. However, international trade law does not seek to interfere with national environmental laws where those laws are directed at protection of the national environment. Environmental requirements imposed on visiting vessels would be for the purpose of protection of the local environment and, hence, would not be inconsistent with international trade law even if certain visiting vessels (and their cargoes) were denied entry.

More generally, Article XX(b) of GATT, 1994 allows national laws otherwise inconsistent with trade law where the laws are "necessary to protect human, animal or plant life or health." Vessel environmental and safety laws imposed as a condition of entry or that result in a denial of access would seem to fit within this exception.

83. See World Trade Organization, *Maritime Transport Services*, ¶¶ 2–3 (last modified Nov. 16, 1998) <<http://www.wto.org/wto/services/w65.htm>>.

84. See T.L. McDorman, *The Impact of International Trade Ideology on Fishing and Shipping*, in *SUMMARY AND SELECTED PAPERS OF THE SEAPOL TRI-REGIONAL CONFERENCE* 161, 165–66 (Kathleen I. Matics and T.L. McDorman eds., 1995).

vessels. The WTO Secretariat in its 1998 report on Maritime Transport Services noted the geographic expansion of the port state control "principle" which was referred to as "the right recognized to the state of the harbour where the ship calls to arrest and detain substandard ships for safety reasons."⁸⁵ The WTO Secretariat made no comment that the port state control "principle" or phenomenon was problematic or that it was seen as being problematic under international trade law.

While the international trade agreements administered by the W.T.O. may affect the ability of a port state to deny access to foreign vessels or to impose burdensome conditions on foreign vessels entering port, the effect is limited to those situations where the port state is using port access as a means to deny entry of the good being carried by the vessel and not in those situations where the port state's concern is solely with the sub-standard condition of the vessel.

B. Departure from Port

A final international law issue to be noted concerns the authority of a host state to detain, seize or arrest, and thus prevent the departure from port of a visiting foreign vessel. This is a critical aspect of port state control since the various MOUs mandate that where deficiencies are determined to exist port authorities are to secure rectification and provide information to other port authorities on the results of inspections. Where a deficiency is clearly hazardous to safety, health or the environment a port authority may require removal of the hazard prior to allowing a vessel to depart.⁸⁶ Thus, vessel detentions are to be rare. Of the 14,545 vessels inspected pursuant to the Tokyo Port State Control MOU in 1998, 63.7 percent (9,266) of the vessels were found to have deficiencies.⁸⁷ However, only 1,062 vessels from sixty two states were actually detained. Thus, only 11.5 percent of vessels with deficiencies were detained and only 7.3 percent of all vessels inspected were detained. One inhibition on the detention of visiting vessels is the potential of lawsuits by the vessel owner where a port authority inappropriately detains a vessel.⁸⁸

The right of a foreign vessel to depart port is tied to the penalties that may be imposed against the vessel because of breaches of the statutory law of the host state or because of court orders and arrest that may arise from

85. See World Trade Organization, *supra* note 83, at ¶ 30.

86. See Tokyo Port State Control MOU, *supra* note 4, § 3.7.

87. See *Annual Report on the Tokyo Port State Control in the Asia-Pacific Region*, 1998 (visited Feb 23, 2000) <<http://www.ijnet.or.jp/tokiomou/contents.html>>.

88. See John Hare, *Port State Control: Strong Medicine to Cure a Sick Industry*, 26 GA. J. INT'L & COMP. L. 571, 590-92 (1997).

commercial disputes. International law does not inhibit local courts from imposing injunctions or like measures arising from commercial disputes against foreign vessels. Moreover, the ability of a host state to detain a foreign vessel in port as a result of a commercial dispute would appear to be consistent with international law, although qualifications on this power of detention may arise from the 1952 Arrest of Sea-Going Ships Convention.⁸⁹

The more significant issue here is the ability of a foreign vessel to depart port where the host state has determined that the vessel is not in compliance with laws and standards related to the construction, design, equipment, operation or crewing of a vessel. There does not appear to be any restriction in international law regarding the type of penalty that can be levied against a foreign vessel which, while in port, breaches such laws or standards. Thus, detention, arrest or seizure of a visiting vessel would be possible. The 1982 Law of the Sea Convention only imposes limitations on penalties where foreign vessel activities, e.g. pollution discharges which breach the host state's laws, take place in the host state's territorial sea or exclusive economic zone. In such situations, only monetary penalties are to be imposed, except if, in the territorial sea, the alleged illicit activity was "a willful and serious act of pollution."⁹⁰ More generally, the Law of the Sea Convention in Articles 219 and 226(1)(c) permits a host state to take "administrative measures" to prevent any vessel deemed "unseaworthy" and which "would present an unreasonable threat of damage to the marine environment" from departing port.⁹¹ The flag state of a vessel detained pursuant to these provisions would be entitled to pursue prompt release of the vessel through the dispute settlement procedures of the Law of the Sea Convention.⁹²

89. International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, May 10, 1952, 439 U.N.T.S. 193. In March 1999, a new International Convention on Arrest of Ships was adopted. See *United Nations/International Maritime Organization Diplomatic Conference on Arrest of Ships*, Mar. 19, 1999, U.N. Doc. A/Conf.188/6 (1999), available at <<http://www.unctad.org/en/docs/imo99db.pdf>>.

90. See 1982 Law of the Sea Convention, *supra* note 16, at 1315.

91. See SHABTAI ROSENNE AND ALEXANDER YANKOV, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY, Vol. IV, 273-78 (Dordrecht: Martinus Nijhoff, 1991); see also Keselj, *supra* note 2, at 139-40.

92. See *The M/V Saiga* (Saint Vincent and the Grenadines v. Guinea), 37 I.L.M. 360 (International Tribunal for the Law of the Sea, 1997); Bernard H. Oxman, *The M/V Saiga*, 92 AM. J. INT'L L. 278, 278-82 (1998); see generally 11 INT'L J. MAR. AND COASTAL L. (1996) (see various learned articles for support).

V. CONCLUSION

The legal jurisdiction exercised by port authorities over foreign vessels voluntarily in port pursuant to regional port state control MOUs is consistent with the international law of the sea. The international law of the sea provides that a port state has extensive authority over vessels voluntarily in port. Subject to treaty rights, access to a port can be denied and conditions on foreign vessel access can be imposed. There are few limitations on the laws that a host state can apply to a visiting vessel regarding construction, design, equipment, operation and crewing. Finally, the host state has wide powers of detention, arrest and seizure of vessels in port where local laws are breached. However, the regional port state control MOUs are an attempt to avoid competition among ports and to balance the legal capacity of a port state with the economic needs and traditional expectations of the global shipping industry.

How effective have regional port state control MOUs been in reducing marine environmental pollution and the number of sub-standard vessels? The results appear to be favorable, although mixed. Regarding reducing marine environmental pollution, Dr. Edgar Gold attributes the 99.9995 percent safe arrival of oil to its destination, in part, to enhanced port state controls.⁹³ Ronald B. Mitchell attributes tanker owner compliance with international vessel standards to the increased probability of detection and detention arising in large measure from regional port state control arrangements.⁹⁴ However, Professor John Hare has observed that vessel losses have not decreased, which might be an expected outcome from effective port state control and the reduction of sub-standard shipping.⁹⁵ Based on a detailed study of the workings of the Paris Port State Control MOU, Peter B. Payoyo noted that the number of sub-standard vessels had not gone down, but had in fact increased.⁹⁶ Payoyo was optimistic, however, that as aged fleets were replaced and regional port state control MOUs became more wide-spread, that "truly dramatic results" would occur. In a recent examination of port state control, T. Keselj concluded:

Of great alarm is the considerable difference in practice among states party to the MOUs. While in certain ports a high number of

93. See GOLD, *supra* note 21, at 317-18. "Ship-source marine pollution has been reduced to the lowest-ever level through a combination of stricter coastal and port state controls, better shipboard technology and operations and overall value of the product." *Id.*

94. RONALD B. MITCHELL, *INTENTIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE* 267 (Cambridge: MIT Press 1994).

95. See Hare, *supra* note 88, at 592-93.

96. Peter Bautista Payoyo, *Implementation of International Conventions through Port State Control: An Assessment*, 18 MARINE POL'Y 379, 392 (1994).

inspections and detentions has been effected, in other ports the exercise of such enforcement powers has not been set properly in motion, either due to the inefficiency of port authorities or because visiting vessels were in such supposedly good condition that there was no need for such controls. It seems that the first reason is more correspondent to reality. Such a difference has apparently provoked a 'port shopping' phenomenon, wherein vessels prefer to visit ports where the controls are more lax.⁹⁷

Thus, while the effectiveness of port state control relies on port authority cooperation rather than competition, competition still exists. An attempt to reduce the "port shopping" phenomenon, i.e. port competition, was behind the decision by the European Community to issue its directive on port state control rather than continuing to rely on the Paris MOU.⁹⁸

Based on the favorable, but mixed, evidence of the effectiveness of regional port state control MOUs to the present, all observers agree that there is an important future for regional port state control initiatives and that ultimately the results will be safer ships and cleaner seas.

97. Keselj, *supra* note 2, at 148.

98. See EC Directive on Port State Control in Context, *supra* note 2, at 271.

