

Power in the hands of the few

Wave Point Consulting's [Darryl Anderson](#) explains why MoUs are changing the face of Port State Control



**Darryl
Anderson**

Nine regional Memorandums of Understandings (MoUs) have fundamentally strengthened the power of Port State Control on shipping. But there are challenges ahead and how PSC responds to the evolving market will be critical to its sphere of influence in the future.

Whether responding to changes in ship technology, environmental issues, the Maritime Labour Convention, ship ownership, vessel registration, or the direction of maritime trade flows, the coming years will be interesting ones for PSC.

To evaluate the impact that the PSC regime is having on regionalism in shipping, it is essential to understand the central rights, rules, and choices that are available to those who operate commercial vessels, and to those countries with international ports.

The interaction of national maritime administrators with the individual players in the international shipping community is based on Article 25 of UNCLOS. This clause specifically empowers countries to take necessary steps to prevent any breach of the standard shipping conventions by foreign vessels that call into their harbours. In addition, Articles 216 and 218 enable a Port State to enforce international anti-dumping and anti-pollution measures, while Article 219 permits countries to take administrative measures to prevent substandard vessels from sailing from their harbours. Legitimacy for PSC inspections is found in these articles. The only limitation is that any steps taken that invoke PSC must be reasonable, public, and not discriminatory.



A uniform PSC approach is needed to enforce the Maritime Labour Convention

PSC has since evolved into a regional policy tool that supplements Flag State control and responsibility in maritime matters. Thus, the effectiveness of PSC stems from the legal position of coastal states *vis-à-vis* the Flag State that has primary responsibility for enforcing IMO conventions. PSC operating procedures are governed by resolution A.787 (19) adopted by the IMO Assembly in 1995.

The origins of shipping's enforcement squad

In response to the difficulty of tackling substandard shipping, the international community developed an international regime to help address a problem that could not be solved by the actions of any one country alone.

In 1948, the international community adopted a convention formally establishing the International Maritime Consultative Organisation (IMCO), which was renamed the International Maritime Organisation (IMO) in 1982. The convention entered into force in 1958. The IMO expresses its reason for being in the motto 'safer shipping and cleaner seas'.

Negotiations for the 1982 United Nations Conference on the Law of the Sea (UNCLOS) took place during the years 1973 to 1982. As negotiations progressed, the international community came to the realisation that the problem of non-compliance with IMO regulations could not be corrected by flag state enforcement alone.

During the UNCLOS negotiating process, compromises were needed if the international community was to develop a new legal framework for ocean governance. UNCLOS resulted in coastal states being given limited power in the control they could exercise over

vessels navigating in their territorial seas; however, they were given express powers within the internal waters in which their harbours were located. Article 25(2) of UNCLOS formally expressed this principle.

It is from this basis that PSC officials are able to exercise their authority. Examples of the conventions that can thus be enforced (using the regime of PSC) by coastal states include SOLAS 74, the Internal Convention on Load Lines 1966, MARPOL 73/78, STCW 78, TONNAGE 69, and the Maritime Labour Convention 2006.

PSC comes into play when shipowners, Recognised Organisations and Flag State administrations have failed to comply with the requirements of the international maritime conventions.

Although it is well understood that the ultimate responsibility for implementing conventions is left to the Flag States, Port States are entitled to control foreign ships visiting their own marine terminals to ensure that any deficiencies found are rectified before they are allowed to sail.

In this respect, Port State Control is regarded as a measure complementary to the Flag State control. **SN**

SHARED GOALS

Crucial to the successful operation of PSC is the sharing of information gained about particular ships or their owners or operators between the jurisdictions, within which those ships trade. In recognition of this fact, the IMO has developed a global project to assist regional PSC agreements in the harmonisation of their operations, the development of their human resources capabilities, and in the co-operation and exchange of information among signatories.

Currently, there are nine such regional Port State Control Memorandums of Understanding covering geographic areas of the world.

The oldest and perhaps the most mature PSC MoU is in the North Atlantic region. Given the wide geographic scope of some MoU regions (such as Tokyo) it is perhaps surprising that not every country is a participant. As a United Nations organisation, however, the IMO can only encourage countries in these efforts; it cannot require them to comply.

One obstacle to compliance is the need for technical and financial assistance to enforce regulations. A second difficulty is ensuring active participation of all members within the region since the ongoing support of all members is crucial. A third challenge is that some countries perceive involvement in PSC MoUs as a loss of sovereignty and for geopolitical reasons may choose not to be a member although they may choose to participate as observers.

PSC has traditionally focused on the technical aspects of substandard shipping. This is clearly shown by the Paris MoU and Tokyo MoU agreeing to harmonise their lists of deficiency codes, implemented in early 2012. For the purpose of increasing the pressure on substandard ships, the Tokyo MoU Port State Control Committee decided to publish a list of under-performing ships that have been detained three or more times by the Tokyo MoU in the past 12 months. The under-performing ships are subjected to more frequent inspections at each port of call within the Tokyo MoU region.

In February 2013, the list of under-performing ships was dominated by entries from the following Flag States: Belize, Cambodia, Comoros, Kiribati, Mongolia, Panama, Saint Kitts and Nevis, Sierra Leone, Thailand, Tuvalu, and the United Republic of Tanzania.

SETTING STANDARDS

It is not hard to foresee that shipping standards and the impact of ship technology will continue to be a driving force in the development of PSC. In those trades subject to a great deal of intra-regional shipping, this author would politely suggest that there is a strong possibility that we will have, in effect, different shipping standards in various regions of the world.

As the pace of and adoption of technology quickens there continues to be a strong possibility that the owners of older tonnage may choose to deploy vessels in regions with the least robust PSC inspection efforts, or in coastal trades not subject to PSC.

The number of environmental issues affecting the

shipping industry is enormous. There are provisions under the IMO to deal with environmentally sensitive marine areas, for example, the North American Air Emission Control Area, and environmental navigation restrictions put in place to protect Australia's Great Barrier Reef.

Currently, PSC inspectors do perform checks related to the safety of navigation and pollution prevention equipment aboard ships. I believe, however, that officials from coastal states will begin to face increasing pressure to integrate their transportation safety, environmental protection and ultimately prosecution efforts to satisfy the public that the shipping industry is maintaining its social licence to operate.

The behaviour of the Paris PSC MoU participants indeed suggests this is likely to occur in the future because they have already responded to other important developments such as the various EU directives, which address not only marine safety but also environmental concerns.

The more a group of countries pushes the collective boundaries of what is an acceptable subject for PSC enforcement practice, the more likely it is to cause a diversity of opinions to arise. Given the regional history of PSC MoUs, one can readily foresee that distinct regional differences will remain, as the international shipping industry responds to local environmental impacts resulting from growth in shipping traffic.

LABOUR LAW

The coming into force of the Maritime Labour Convention 2006 (MLC, 2006) in August 2013 might also serve to generate further momentum towards regionalism in shipping. Subject to a few exceptions, the convention applies to all ships, whether publicly or privately owned, that are ordinarily engaged in commercial activities. The convention is the culmination of many years of persistent work to consolidate and update a broad range of fragmented labour standards into a single convention.

The policy intent was the creation of one global instrument that addresses all the issues faced by seafarers. As a result, the MLC 2006 covers conditions of employment, accommodation, food and catering, health protection, medical care, welfare and social issues, and recreational facilities.

In November 2011, Canada was the host authority for the first specialised training course pursuant to the Tokyo Memorandum of Understanding. The theme of the training course, held in Vancouver, British Columbia, was the Maritime Labour Convention 2006. Port State Control officers received in-depth training on key features of the convention including the inspection of its own national flagged vessels in port and the enforcement of the new convention standards on foreign-flagged ships under the 'no more favourable treatment' requirement.

In practical terms, this means that ships of all countries (irrespective of ratification) will be subject to inspection in any country that has ratified the convention, and to possible detention if they

In definition

Flag State: the party that regulates the vessel, construction and operation through its laws anywhere in the world

Coastal State: the Law of the Sea Convention allows the Coastal State to subject foreign flag vessels to its laws concerning pollution prevention, which can work concurrently with the Flag State

Port State Control (PSC): the inspection of foreign ships in the harbours of coastal states to verify the condition of the ship and to ensure compliance with major international maritime conventions. **SN**

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do not meet the minimum standards of the new convention.

There are a number of issues that gave rise to the need for minimum international standards for seafarers. It is fair to say that working and living conditions, occupational health and safety, causes of fatigue, crew retention and motivation, and recruitment are some of the most universal reasons for the adoption of the MLC. The International Labour Organization intends to use the performance indicators of deficiencies, detentions and seafarers' complaints as measures to gauge the effectiveness and success of the MLC 2006. What remains to be seen is the extent to which a uniform PSC approach will be brought to bear in regards to enforcement.

OUTSIDE HELP

Of the top 35 shipowning countries, 17 are located in Asia, 14 in Europe and four in the Americas. Four countries – Greece, Japan, Germany and China – own almost half of the world tonnage (49.7%). The United Nations Conference on Trade and Development (UNCTAD) reported that the use of open registries has increased: an estimated 71.5% of the world tonnage is now registered under a foreign flag – that is, under a flag of a different nationality from that of the owner. The most enthusiastic adopters of open registry flags are owners based in the developing countries of Asia.

It is not necessarily the case that a country exercises close control or supervision over the ship owning companies based within its borders. As a result, the traditional distinction between open registries and 'national' flags is becoming increasingly blurred. This suggests that the real economic interests of a Flag State and rights of the Coastal State have become much more indirect. As a result, this could place greater reliance on PSC as an enforcement tool since the direct link to the country of ownership has been weakened.

The Lloyd's Register, Qinetiq and Strathclyde University report *Global Marine Trends 2030* and UNCTAD data both confirm that developing countries' contribution to world maritime trade is increasing. In 2011, a total of 60% of the volume of seaborne trade originated in developing countries and 57% of this trade was delivered on their territories. Developing countries are now major world players both as exporters and importers, a very significant shift away from earlier trade patterns when PSC was originally envisioned.

While membership of a PSC MoU is usually geographically based, the membership composition may not necessarily reflect the current, or future, direction of cargo flows. UNCTAD projects that by 2025 the fast-growing developing economies led by China will grow an average of 4.7% per year between 2011 and 2025, with Brazil, China, India, Indonesia, the Republic of Korea and the Russian Federation expected to account for more than 50% of global growth.

In terms of maritime trade a major portion of the growth is occurring on South-South and intra-regional

Port State Control MoUs

Name	Date signed	No of members*	Primary geographic scope
Paris	1982	27	North Atlantic basin from North America to Europe including the west coast of Canada
Vina del Mar	1992	13	Latin & South America
Tokyo	1993	18	Asia-Pacific region
Caribbean	1996	14	Caribbean
Mediterranean	1996	10	Western Mediterranean
Indian Ocean	1999	16	Arabian Sea & Bay of Bengal
Abuja	1999	22	Atlantic coast of Africa
Black Sea	2000	6	Black Sea
Riyadh	2005	6	Persian Gulf

*Note: the number refers to number of member authorities. Some MoUs may also have co-operating member authorities, and observer authorities.

trade routes. South-South inter-regional trade is also expected to grow in importance.

REGIONAL EVOLUTION

Whether the existing MoU structures can respond to this shift in maritime trade is open to debate. However, especially in the Indo-Pacific basin, it would not come as a surprise to see sub-regional MoUs develop to deal with the specific issues faced in the intra-regional Asia trades and the rapidly expanding inter-regional traditional trade lanes.

A key issue for the future is whether both advanced countries and those from rapidly developing states have the institutional capacity, political appetite, or commercial will to use PSC in a uniform manner. An uneven international appetite, or unequal application of the PSC policy tool will no doubt contribute to increased regionalism in the years ahead.

Shipping regionalism will also be driven by the extent that underdeveloped countries remain outside of the PSC MoU system. To avoid succumbing to the trends driving regionalism in their entirety, the respective MoU members may need to reconsider the inclusion and role of co-operating Member Authorities and Observer Authorities, since the scope of interested parties is now no doubt wider than just the Flag and Coastal State, as was in the past. **SN**



PSC inspectors will probably add checks of navigation and pollution prevention equipment to their remit

Credit: AMSA

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