

THE MARITIME LIABILITY OF STATES

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Abstract

This article covers the maritime liability of states, focusing on their roles and responsibilities as the flag state, the coastal state and the port state. It emphasises the need for closer cooperation between coastal and port states and the International Maritime Organization (I.M.O.) to address third-party competencies concerning the flag state. The text also elaborates on the obligations of flag states and agreements with recognised organisations (R.O.), including the mandatory need to comply with international standards for maritime safety, navigation safety, marine environment protection, and crew living and working conditions. It further highlights the crucial role of flag states in establishing and maintaining an effective control system over their ships to ensure compliance with all international standards and regulations. In conclusion, the research calls for strict enforcement of flag state obligations to ensure maritime safety, prevent pollution from ships and maintain proper shipboard living conditions.

Keywords

Coastal State, Flag State, Maritime Liability, Maritime Safety, Paris MoU, Port State, Recognised Organisations (R.O.), Triple I Code, United Nations Convention on the Law of the Sea (UNCLOS).



Resumo

Este artigo aborda a responsabilidade marítima dos Estados, centrando-se nas suas funções e responsabilidades enquanto Estado de bandeira, Estado costeiro e Estado do porto. Salienta a necessidade de uma cooperação mais estreita entre os Estados costeiros e dos portos e a Organização Marítima Internacional (O.M.I.) para abordar as competências de terceiros relativas ao Estado de bandeira. O texto também desenvolve as obrigações dos Estados de bandeira e os acordos com organizações reconhecidas (O.R.), incluindo a necessidade obrigatória de cumprir as normas internacionais de segurança marítima, segurança da navegação, proteção do ambiente marinho e condições de vida e de trabalho da tripulação. Salienta ainda o papel crucial dos Estados de bandeira na criação e manutenção de um sistema de controlo eficaz dos seus navios para garantir o cumprimento de todas as normas e regulamentos internacionais. Em conclusão, o estudo apela à aplicação rigorosa das obrigações do Estado de bandeira para garantir a segurança marítima, prevenir a poluição causada pelos navios e o reforço das condições adequadas de vida a bordo.

Palavras-chave

Estado costeiro, Estado de bandeira, Responsabilidade marítima, Segurança marítima, Memorando de Entendimento de Paris, Estado do porto, Organizações reconhecidas (O.R.), Código Triplo I, Convenção das Nações Unidas sobre o Direito do Mar (UNCLOS).

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1. Introduction¹

According to each state's maritime laws, different authorities have various responsibilities depending on their quality. States can usually take on the duties of either the flag state or the coastal (and port) state.

Since the end of World War II, many of the flag state's powers have been transferred to coastal states, archipelagic states, specialised international agencies of the United Nations, and regional international organisations. These organisations include the International Maritime Organization (I.M.O.), the International Seabed Authority, the European Union, and international organisations on port state control. Compliance with and monitoring maritime safety requirements has led to the limitation of freedom of the seas.

The increased competencies of third parties concerning the flag state require closer cooperation between the coastal states and the I.M.O. It also demands a collection of competencies, mainly in maritime safety, that the I.M.O. and European Union now practice in the national case.

In addition to their supervisory powers, flag states are increasingly delegating powers to classification societies (usually included in the designation "recognised organisations" or R.O.), eroding their powers gradually, which are now exercised under strict regulatory standards.

Coastal states can monitor maritime traffic and intervene in situations previously reserved for flag states, such as exercising innocent passage rights in territorial waters. This right is one of the oldest customary international rules. Legitimising the coastal state's intervention substantially reduces the scope of the right of innocent passage.

This situation also justifies the gradual autonomous legal framework of international laws on maritime safety, which, like the Law of the Sea, should take precedence over the activities arising from the use of maritime space. A ship that does not comply with

¹ The framework and environment of maritime safety are laid down in our book, "The (New) Law of Maritime Safety—the Ship, States, Conventions and their Autonomy," 2nd edition, Almedina, Coimbra, Portugal, October 2023, ISBN 978-989-40-1295-5.



international maritime safety requirements cannot sail, just as it cannot sail if it does not respect the canons of the Law of the Sea.

Therefore, it is important to review the duties of states and R.O.s within this framework to understand the link that should exist between them and the respective international organisations.

2. Flag state obligations and agreements with recognised organisations (R.O.)

2.1. The general obligations arising from international conventions

The current situation highlights the importance of flag states in fulfilling and enforcing their duties. During its seventh session, the United Nations Commission on Sustainable Development (U.N.C.S.T.D.) recommended adopting measures to ensure flag states apply the International Maritime Organization (I.M.O.) conventions and other relevant conventions. This measure guarantees that flag states' ships comply with international and domestic standards.

Flag states are responsible for establishing and maintaining an effective control system over their ships. They must ensure that their vessels comply with international standards relating to maritime safety, navigation safety, marine environment protection, and crew living and working conditions. If all parties comply with their obligations, individual states may enjoy certain advantages by complying with instruments that promote maritime safety, protect the marine environment, and prevent pollution from ships and shipboard living conditions.

Articles 91 and 92 of UNCLOS require states to establish the requirements for attributing their nationality to ships, their registration in their territory, and the right to fly their flag. There must be a "substantial link" between the state and the ship. Article 94 establishes that flag states must effectively exercise their jurisdiction and control over ships flying their flag in administrative, technical, and social matters. They must keep a register of ships, in which the names and characteristics of the ships flying their flag are recorded, except those excluded from generally accepted international regulations due to their small tonnage and size.

Moreover, states must exercise jurisdiction under domestic law over any vessel flying their flag and the master, officers, and crew in administrative, technical, and social matters. Regarding maritime safety, flag states must take necessary measures on their ships to ensure safety at sea. Considering the applicable international instruments, this issue includes the ship's construction, equipment, seaworthiness, composition, working conditions, and crew training.

The measures to be taken by the flag state should include all those necessary to ensure that each ship, before its registration and after that at appropriate intervals, is examined by a duly qualified ship inspector. They should also carry on board the charts, maritime publications, navigational equipment, and instruments appropriate for safe navigation. Each vessel should be assigned to a master and appropriately qualified officers, particularly concerning manoeuvre, navigation, communications and the operation of



machinery. The competency and number of crew members should be appropriate to the vessel's type, size, machinery and equipment. Moreover, the master, officers, and, as appropriate, the crew should be thoroughly familiar with and observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of radio communications.

States can delegate powers to "recognised organisations", such as classification societies, to perform statutory tasks that were originally the state's responsibility. Although the ship's construction and technical regulations must comply with the flag state's laws, ensuring compliance with the ship and crew's regulations during their lifetime under that state's jurisdiction is even more crucial.

Article 93(3)(b) and (4) of UNCLOS, as confirmed and further developed by S.O.L.A.S. and S.T.C.W., emphasise the importance of monitoring compliance with these regulations.

2.2. The flag state's duties

The International Maritime Organization (I.M.O.) has outlined the duties of the flag state in Resolution A.1070 (28), also known as the "Triple I" Code or "Implementation of I.M.O. Instruments Code". This Resolution sets out the responsibilities of the flag state and those of the coastal and port states.

The flag state is responsible for creating policies and regulations to implement the requirements of all conventions and protocols on maritime safety and pollution prevention, to which it is a party. It should also assign corresponding administrative responsibilities to update and review the policies adopted. The flag state should also allocate resources and identify processes to implement a maritime safety and environmental protection program. This program should consist of issuing administrative instructions for enforcing international standards and interpretative instruments, including certificates issued by a classification society and compliance with applicable international instruments through an independent audit and inspection program.

The flag state should train, evaluate, and certify seafarers' competencies and carry out the necessary procedures for withdrawing, suspending, or cancelling certificates and endorsements issued by it to comply with international standards of training, certification, and watchkeeping for seafarers. It should investigate incidents and act on deficient ships following relevant international instruments.

The flag state should ensure that ships entitled to fly its flag are efficiently manned and take appropriate measures. Delegating powers to Recognised Organisations (R.O.s) is another important aspect of the flag state's duties. This issue means that these private entities can act on behalf of the state on ships flying their flag. They are delegated powers for conducting surveys, inspections, and audits, issuing certificates and documents, marking ships, and other statutory work required by I.M.O. or national legislation.

In delegating powers to the R.O., the state must ensure compliance with the application requirements of the international instruments in force. The following requirements must be met:



- a) The state must ensure the R.O. has adequate technical, management, and research resources to complete the assigned tasks. These tasks must be performed to the standards required for recognised R.O.s acting on behalf of the state and following I.M.O. international instruments under Appendix 1 of Resolution A.739 (18).
- b) The delegation of powers must be based on a formal written agreement between the state and the R.O. This agreement should include, at minimum, the requirements required by the I.M.O. under Appendix 2 of Resolution A.739(18). It should be in the format of M.S.C./Circ. 710-MEPC/Circ. 307.
- c) The state must issue specific instructions determining what action to take if a ship does not conform to the maritime safety conditions required to sail. These measures should include conditions that pose a high risk to the marine environment.
- d) The state must provide the R.O. with the appropriate instruments of national laws and regulations implementing the conventions. These instruments should specify for their flagships if those standards are higher than the requirements of the conventions. The R.O. should be required to keep up-to-date records to validate the implementation of the requirements.

The flag state should promote the supervision and monitoring of R.O.s with adequate resources to verify compliance with their international obligations. Through certified and technically qualified inspectors, it should also promote supplementary surveys to ensure that flag vessels comply with the requirements foreseen in the applicable international instruments.

Regarding the enforcement of all obligations, the flag state should take the necessary measures to ensure that ships which fly their flag and the entities and persons under their jurisdiction comply with international standards, which include the following:

- a) Banning flagships from sailing in violation of international standards;
- b) Ensuring the periodic inspection of flag vessels, including the crews, their certification, and their technical knowledge appropriate to the duties and conditions on board;
- c) Ensuring that the crew is capable of responding to emergencies and performing functions vital to maritime safety or the prevention or reduction of pollution;
- d) Providing national legislation for adequate and sufficiently dissuasive sanctions to prevent infringement of the applicable rules;
- e) Approving procedures for following up on reports of violations of international standards by flagships and the holders of certificates issued under their responsibility.

Regarding maritime incidents, the flag state is responsible for conducting investigations, gathering statistical data, and responding to pollution incidents and deficiencies reported by ports or coastal states. The I.M.O. emphasises the importance of qualified inspectors conducting investigations and surveys and investigating ship incidents.



Let us try to list the framework of the obligations of the flag states as follows:

(i) Responsibility in the field of human and material resources²

The flag state must ensure the human and material resources to meet its international obligations, notwithstanding the delegation of powers to the R.O.s. This delegation requires compliance with certain guidelines, particularly those issued by the European Union, and cannot question the Maritime Administration's supervision of these entities.

(ii) Responsibility for the application of the Maritime Safety Conventions (including those relating to training and certification of seafarers and conditions on board)

Flag states must ratify the 1982 United Nations Convention on the Law of the Sea (UNCLOS) as the general regulatory instrument for all maritime activity, including the status of ships, spaces under maritime jurisdiction, the right of navigation and the general powers of states as flag, port or coastal states.

They must then approve and ratify the main conventions on maritime safety, particularly those resulting from the work of the I.M.O. and the I.L.O. These conventions include the six indicated in the "Triple I" Code and the Maritime Labour Convention, 2006 (M.L.C.), concluded in the framework of the I.L.O., in addition to the CLC/FUND92 Conventions.

However, states are also called upon to ratify other I.M.O. conventions, most of which appear in the list of abbreviations at the beginning of this paper.

(iii) Responsibility in the application of the Conventions

Flag states should encourage internal mechanisms to implement international conventions, such as regular inspections of ships and issuing certificates of compliance (S.O.L.A.S.) or crew competency certificates (S.T.C.W.), which must be provided nationally.

(iv) Responsibility for the supervision of inspections

Under I.M.O. Resolution A.1070 (28), flag states should establish appropriate controls over R.O.s carrying out ship inspections on their behalf, with adequate resources. State delegation should be restricted to internationally recognised R.O.s, as provided in Appendices 1 and 2 of Resolution A.739 (18).

(v) Responsibility for implementing the International Safety Management Code (I.S.M. Code)

Flag states must implement the I.S.M. Code requirements for auditing safety management systems (SMS) on flagships and shore-based companies responsible for navigation. Flag states should also establish procedures for issuing and cancelling Safety Management Certificates (S.M.C.) and Company Documents of Compliance (DOC).

(vi) Ensuring Maritime Safety

The flag state is responsible for "safety" and "security," which means that it is responsible for fully applying the international conventions—particularly the seven referred to—

² We will follow, in this point and part, the headings contained in the paragraph "Responsabilidades do Estado de Bandeira" in work prepared by Sardinha, Álvaro on "Registo de navios e Estados de Bandeira", Coleção Mar Fundamental, CMF0042013, Lisbon, September 2013.



including the International Ship and Port Facility Security Code (I.S.P.S.), which incorporates the S.O.L.A.S. Convention, concerning the approval of security plans and the issuing of international certificates for flagged ships.

Another convention that states are also encouraged to ratify is the I.L.O. Seafarers' Identity Documents Convention, ILO 185 of 2003.

(v) Responsibility for implementing the Standards of seafarers' competence

When flag states comply with the necessary administrative measures to implement the current version of the S.T.C.W. Convention (which vides the competence and certification of internationally qualified seafarers), they will be included in the S.T.C.W. "white list" (updated by the IMO MSC). Therefore, they must submit reports every five years, identifying the shortcomings in training and certification systems and the corrective measures taken to standardise them.

On the other hand, under Resolution A.1070 (28), flag states are required to issue certificates and endorsements that accurately reflect sea- farers' competencies under S.T.C.W., and endorsement applies to foreign seafarers on flagged ships, even if they have certificates of competency issued abroad and provided that the foreign certificate and the issuing country comply with S.T.C.W. regulations.

It is, therefore, indispensable that flag states keep records of certificates issued to national seafarers and endorsements to foreign seafarers, giving prompt replies confirming their validity.

(vi) Responsibility for the application of Maritime labour standards

Flag states should apply the Maritime Labour Convention, 2006 (MLC/LLC), particularly by monitoring the application of standards for working conditions, food and catering, medical care, and accommodation on board.

Flag states are also advised to take appropriate measures to approve Ships' Declarations of maritime labour compliance and issue maritime labour certificates.

(vii) Approval of the security manning and seafarers' hours of work

Flag states should approve the various safe manning levels for flagged ships and the issuance of safe manning documents and monitor compliance with the minimum standards on seafarers' hours of rest under the S.T.C.W. and M.L.C. conventions, with the relevant record.

(viii) Responsibility for incident investigation

Under the S.O.L.A.S. and M.A.R.P.O.L. Conventions and I.M.O. Resolution A.849, the flag state is required to conduct investigations into "serious" and "very serious" incidents on its ships and immediately following an accident, to cooperate with other states in the investigation of incidents in which flagged ships may be involved.



The Maritime Incident Investigation Office and the Aeronautical Meteorology Authority (G.A.M.A.) activity deserves particular attention³.

As an investigative body in the maritime transport sector, we investigate incidents quickly and effectively, identify their causes, and publish corresponding reports. Our ultimate goal is to issue maritime safety recommendations that can help reduce maritime accidents. We follow several international instruments to guide our activities, including the S.O.L.A.S. Convention and the Incident Investigation Code (I.A.C.). The I.A.C. requires a flag state safety investigation into every serious incident, including total loss of the ship, death, or serious damage to the environment, to prevent similar incidents in the future.

As part of the "III Maritime Safety Package" or the Erika III Package, the European Union published Directive 2009/18/E.C. of the European Parliament and the Council on 23 April 2009. This directive establishes the principles governing the investigation of incidents in the maritime transport sector. Additionally, Commission Regulation (E.U.) No 1286/2011 of 9 December 2011 provides a common methodology for investigating maritime incidents drawn up under the directive's provisions. This legislation aims to minimise the risk of maritime incidents, increase safety at sea for people, ships, and goods, and reduce the risk of these incidents affecting the marine environment.

Here are some key points that flag states should keep in mind:

- a) Movement of ships between flags: The flag state receiving a flagship transfer must ensure that the ship complies with international standards. The home state should provide all the necessary information, including survey reports confirming that the ship is correctly classed.
- b) Repatriation of seafarers: Normally, it is the employer's responsibility to repatriate seafarers. However, the flag state should ensure subsidiary measures to repatriate the seafarers to their country of residence on flagged ships if the employer becomes insolvent.
- c) I.M.O. Member State Audit Scheme: Flag states should participate in the I.M.O. Member Audit Scheme to improve the implementation of international instruments. Flag states may benefit from technical assistance programs, and publication of their audit reports is encouraged.
- d) Participation in I.M.O. and I.L.O. meetings: Flag states should participate in I.M.O. diplomatic conferences and technological sub-committees, main I.L.O. maritime meetings, and meetings of the Maritime Safety Committee (M.S.C.), Marine Environment Protection Committee (M.E.P.C.), Legal Committee (LEG), and biannual meetings of the I.M.O. General Assembly.
- e) Consultation with shipowners: Flag states must allow shipowners and all flag vessel operators to participate in drafting and amending international and internal maritime safety legislation.

³ G.A.M.A. was established by Decree-Law No. 236/2015 on 14 October, succeeding the Prevention and Investigation of Maritime Incidents Office (G.P.I.A.M.), then created by Law No. 18/2012 of 7 May. That diploma also contains G.A.M.A.'s mission and duties.



- f) Performance of flag states: Assessing flag states through the white, grey, and black lists of the Memoranda of Understanding (MoUs) on Port State Control (P.S.C.) is crucial for the service provision market and the regularity of port state control inspections. The U.S. Coast Guard also follows these assessment lists, publishing its own and considering the published lists of the two main MoUs: Paris and Tokyo. A flag's performance is an important factor for shipowners and associated R.O.s when choosing a flag, along with other issues related to labour and welfare costs and possible tax and parafiscal exemptions the flag state offers. However, the classifications of flag states in the various lists can lead to regular and compulsory inspections with different regularities by the port state, which may result in delays, penalisation for charterers, and affect the flag's reputation.

2.3. Agreements with recognised organisations

The European Union's port state control system was established on 22 November 1994, with the approval of Council Directive 94/57/E.C. The directive laid down common standards and rules for inspecting and surveying organisations responsible for ships and maritime administrations' activities. Decree-law no. 115/96 was implemented into national law on 6 August 1996.

Directive 94/57/E.C. underwent various minor amendments over time and was amended in 2009 by Directive 2009/15/E.C. to strengthen the monitoring of Recognized Organisations (R.O.s)⁴ and revise the penalties for failing to meet minimum criteria. Decree-Law No. 13/2012 implemented the 2009 directive into Portuguese national law on 20 January 2012. This law sets out various measures that the Portuguese state must follow when dealing with organisations responsible for inspecting, surveying, and certifying ships to comply with international sea safety conventions and prevent marine pollution.

Under international conventions, flag states must issue statutory certificates for maritime safety and pollution prevention. These conventions include the International Convention for the Safety of Life at Sea (S.O.L.A.S. 74), the International Convention on Load Lines (L.L. 66), the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), the International Convention on Tonnage Measurement of Ships (TONNAGE 69), and the International Convention on the Control of Harmful Anti-Fouling Systems on Ships (A.F.S.). However, member states must authorise the certification of compliance and delegation of safety and pollution prevention certificates by Recognised Organisations that meet certain criteria under these conventions. Establishing rules to assess these organisations' technical capability and suitability is crucial to ensure their recognition and authorisation.

To strengthen the monitoring of R.O.s and amend certain provisions of Directive, the European Parliament and the Council adopted 94/57/E.C., Directive 2009/15/E.C. on 23 April 2009. The directive consolidated successive amendments into a reformulated text.

⁴ Recognised Organisations (R.O.) comply with the provisions of Regulation (E.C.) No. 391/2009 of the European Parliament and the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations.



Directive 94/57/E.C. provided agreements between member states and R.O.s to be concluded by the respective countries' decisions. Under Directive 2009/15/E.C., the European Commission was responsible for recognising R.O.s, meaning that member states can only conclude agreements with structures recognised by the Commission. However, the primary international maritime safety and marine pollution prevention instruments require flag states to adopt appropriate regulations.

The text describes the responsibilities of Recognized Organizations (R.O.s) for inspecting, surveying, and certifying ships to comply with international conventions on maritime safety and prevention of marine pollution. These organisations are responsible for issuing safety certificates and certificates of crew competence, conducting inspections, approving plans and schemes, conducting tests and trials, and approving stability books, surveys, and audits of ships flying the national flag. The law and agreements with the flag states delegate these responsibilities to R.O.s under certain requirements. However, R.O.s are excluded from immunity from civil liability provided for in Article III/4 of the CLC92 and may be sued extra-contractually. This situation raises the issue of civil liability for classification societies.

The law provides a specific regime that defines R.O.s' responsibilities for the signatory states of each agreement. The Portuguese state must prepare a formal agreement with the organisation acting on its behalf and control the acts and operations carried out by that organisation. Agreements to be concluded with flag states shall include provisions on civil liability whereby the Portuguese state shall be entitled to indemnity or financial compensation in cases where an R.O. is held liable by a court of law or arbitration tribunal for an incident as follows:

- a) For loss or damage to property or personal injury or death, if it is proved in that court of law that the damage was caused by a wilful act or omission or gross negligence of the R.O., its bodies, employees, agents, or others who act on its behalf in any capacity;
- b) For personal injury or death, if it is proved in that court of law that the damage was caused by any negligent or reckless act or omission of the R.O., its employees, agents, or others who act on its behalf in any capacity;
- c) For material damage, if it is proved in that court of law that the damage was caused by any negligent or reckless act or omission of the R.O., its employees, agents, or others who act on its behalf in any capacity.

Where classification societies (the main "recognised organisations") act on behalf of a state, their liability falls under the terms mentioned. It is stated that if there is any liability, it does not follow the rules specified in the C.L.C./Fund⁵.

These rules are designed to make the indemnity process faster and more efficient by involving insurers and P&I.

Another issue that may arise is using an apparent owner (registered) instead of a real owner (e.g. of a company that only owns that vessel) or ensuring the holding company

⁵ On the figure of channelling, see the chapter on "The C.L.C. 92 and Fund 92 Conventions".



is held liable when the owner company is part of a group. This process could result in the withdrawal of legal personality⁶.

The question under consideration here is the liability of classification societies towards injured parties who suffer damage due to a marine spill and sue them directly. Although classification societies may be held liable non-contractually and are not covered by immunity under Article III of the C.L.C., the regime resulting from European and national law only covers liability towards flag states. This measure is to the extent that they act on their behalf under the agreements. The general liability regime applies in all other cases, meaning they are neither immune under the C.L.C. nor benefit from a specific regime.

The shipyards' liability (e.g., due to faulty construction or materials used) and the classification societies' liability should be assessed independently. The former may be limited under the agreement with the respective flag state.

Flag states, namely Portugal under Decree-Law no. 13/2012, demand compensation from classification societies in cases where, acting on their behalf, they cause loss or damage to property, personal injury or death, whether due to intentional act omission or gross negligence, personal injury or death, if such injury or death was caused by negligence, reckless act or omission; and material damage, if the damage was caused by negligence, reckless act or omission.

The use of these subjective elements is in line with the exoneration clauses of the shipowner's liability in the CLC92, i.e., wilful misconduct (including those mentioned above as "willful act, omission or gross negligence" of the statute) and "reckless" acts committed by the agent preclude him from benefiting from the limitation of liability under Article V/2. However, the imputation of liability by the state may also be made based on mere negligence, which is outside the scope of Article V/2 of the CLC92.

It is important to note that the classification society's position is not comparable to that of the shipowner or operator. This assessment relies on the fact that the author of conduct may give rise to extra-contractual civil liability. The shipowner or operator is the one who, in fact, or by law, by themselves or through their representatives, assumes control and direction of the ship.

Although certificates issued by classification societies do not guarantee a vessel's seaworthiness, they confirm that it meets certain maritime safety conditions as international conventions require. It is evident from Article 1(3) and Article 2 of Decree-Law No 13/2012 of 20 January that the conditions above are mentioned as follows:

"The acts and operations to be carried out by recognised organisations include inspections, approval of plans and schemes, conducting tests and

⁶ Under the terms of Article 7, ships have legal personality and capacity in the cases and for the purposes provided for by law. The current C.P.C. stipulates in its Article 12, under the heading "Extension of legal personality", as follows: "The following also have legal personality a) Inheritance in abeyance and similar separate estates whose owner is not determined; b) Associations without legal personality and special committees c) Civil companies d) Commercial companies, until the date of definitive registration of the contract by which they are under the terms of article 5 of the Commercial Companies Code; e) Condominiums resulting from horizontal property, concerning the actions falling within the scope of the powers of the administrator; f) Ships, in the cases provided for in special legislation."



trials, approval of stability books, surveys and audits of ships flying the national flag".

And which are provided for,

"in the following international conventions, together with the protocols and amendments to it, and related codes of mandatory status, in their up-to-date version" (S.O.L.A.S. except chapter XI-2, i.e. the I.S.P.S. Code, the LOAD LINES Conventions, M.A.R.P.O.L. and other conventions and codes that are included in the flag state Agreement); and

"acts and operations as provided for in the following E.U. instruments on maritime safety and the prevention of pollution" (as amended, Directive 97/70/E.C. setting up a harmonised safety regime for fishing vessels of 24 metres in length and over, Directive 98/18/E.C. on safety rules and standards for passenger ships, Regulation (E.C.) No 782/2003 on the prohibition of organotin compounds on ships, and Regulation (E.C.) No 783/2003 on the prohibition of organotin compounds on ships) No 98/18/E.C. on safety rules and standards for passenger ships, Regulation (E.C.) No 782/2003 on the prohibition of organotin compounds on ships and Regulation (E.C.) No 336/2006 on implementing the International Safety Management Code within the Community).

Added to this list is the document provided for in Article 3(c) of the law as mentioned above, which corresponds to the typical document issued by the classification societies – the "Class Certificate" – defined as follows:

"a document issued by a recognised organisation, certifying the fitness of a ship for a particular use following the rules and procedures laid down and made public by that recognised organisation".

In this very substantial collection of powers that classification societies may exercise, some on behalf of the flag state and others on their behalf, it is noted that they all correspond to the verification of maritime safety standards⁷. Moreover, the unseaworthiness may be related to the intervention of those societies.

⁷ We do not agree with the traditional reasoning of the U.S. case law cases "The Great American " and "Amoco Cadiz" (in 26 Great American Insurance Co v Bureau Veritas 338F. Supp. 999 (S.D.N.Y., 1972), Oil Spill by the Amoco Cadiz 1986 A.M.C.,1945), in which the company's liability was excluded on the ground that it was not its task to guarantee the seaworthiness of the means but merely to carry out inspections since, in present times, it can, of course, be held partly responsible for the unseaworthiness. Generally speaking, common case law, including case law in North America, the United Kingdom, Australia and New Zealand, has traditionally been in favour of classification societies not being held liable in the form of contractual liability, either because the shippers must continue to be held contractually liable or because the inspections carried out, the certificates issued and the unseaworthiness condition is not sufficiently close. However, the Erika case has changed this stance, which, even so, and to a lesser extent, had been followed by continental case law. The company concerned was the Italian R.I.N.A. in a French court. The experts concluded that the high level of corrosion of the tanks that caused the accident was beyond what was acceptable for a classification society and that they were out of line with the thickness recorded in 1997



It is important to note that the shipowner's liability under the CLC92 differs from the responsibility of classification societies. While classification societies are not immune from liability under the CLC92, this should not affect the channelling mechanism.

The legal diploma determines the maximum compensation that classification societies can pay for the exercise of flag state powers. According to Joint Order no. 9258/2012, the maximum amounts of compensation are set at €4,000,000 and €2,000,000 in the cases provided for in Article 10(a) (ii) and (iii) of Decree-Law no. 13/2012 of 20 January.

It does not make sense to apply the regime of the CLC92 to classification societies, as their liability is assessed based on different criteria. The L.L.M.C. Convention only covers the limitation of liability of shipowners and assistant owners by Articles 1(1) and (2).

Although there are different international conventions related to the limitation of liability in the maritime sector (such as the Visby Rules, C.L.C., L.L.M.C., H.N.S. and BUNKERS Conventions), none apply to classification societies. The CMI has been working on a convention to limit the liability of classification societies since 1992. It focuses on the terms of agreements between societies and shipowners or between them and flag states but does not provide for limiting liability.

No limitation liability system is contained in a specific legislative instrument for exercising states' powers and powers delegated by states. One possible way of imposing a limitation of liability for such cases might be through tonnage limitations and harmonisation with

and 1998 by R.I.N.A., which should have detected this non-compliance during the 1999 inspection. In 2008, the Paris Criminal Court found, among others, R.I.N.A. liable for the crime of pollution in the form of negligence for renewing the ship's certificate with substandard standards and was sentenced to a fine of €375,000. IOPC FUND also sued R.I.N.A. in civil proceedings to recover the compensation paid to victims of the spill in the Court of Lorient.

In the *Prestige* case, experts assessed that A.B.S. (the classification society) had failed to inspect the two ballast tanks responsible for the initial leak and subsequently for the ship breaking in two. However, A.B.S. insisted that it was unnecessary. The Kingdom of Spain brought an action against A.B.S. in New York Court with a claim for \$1bn based on its negligence in classifying the ship. The court ruled that the proceedings should be conducted under the C.L.C. – to which Spain and the Bahamas, as flag states, were parties – and that. Therefore, this claim should first have proceeded in the Spanish courts. On appeal, Spain invoked the conviction of R.I.N.A. for negligence in the *Erika* accident. The case was referred back to the first instance by the decision of the court of appeal, which found that R.I.N.A. was liable. However, the court found that the negligence (recklessly) of the company had not been proven since it had not been proved that the damage was proximate to the cause invoked since A.B.S. invoked the damage that occurred during the de-rigging operation in St Petersburg as a possible cause. The court's reluctance to condemn nevertheless resulted in the absence of precedent and an applicable liability limit that would render the activity of the sorters ruinous due to their exposure. In *Joshi, R., A.B.S. handed Prestige victory, and A.B.S. scored Prestige victory. Fairplay, Lloyd's List, 03-08-2010.*

However, Directive 2001/105/E.C. on the liability of classification societies vis-à-vis flag states, with liability limits – which is not unrelated to the successive situations of non-accountability in maritime accidents concerning inspections and certifications that did not correspond to the real state of the materials or equipment – although it does not cover contracts, in their name, of companies such as, for example, those tending to class status – have shed new light on the issue.

Meanwhile, without an express limitation of societies' liability for cases outside the exercise of public powers, given the amounts of compensation involved and the difficulty—because remote—in proving liability, it will be very difficult for any court to consider such imputation to be "fair" since it becomes unreasonable or disproportionate. Moreover, not even insurers consider policies of this nature to apply to classification societies, which always have a subsidiary role in guaranteeing maritime safety.

Nonetheless, it may, here or there, prove decisive in the same light as a vice in the construction of a ship. See the articles by Vaughan, Barbara, *The Liability of Classification Societies*, in <https://comitemaritime.org/wp-content/uploads/2018/05/Vaughan-The-Liability-of-Classification-Societies-UCT-LLM.pdf> and by Young Min, *Limitation of liability of classification societies*, World Maritime University, 2011, in [https://commons.wmu.se/cgi/viewcontent.cgi?article=1296&context=all_dissertations.](https://commons.wmu.se/cgi/viewcontent.cgi?article=1296&context=all_dissertations))



international and national regimes concerning the limitation of classification societies, such as the European Union.

2.4. Flag state obligations in the European Union legal order and the review process

Flag state status is crucial at the European Union level to ensure maritime safety, security, and pollution prevention. Flag states are responsible for ensuring that the ships in their fleet comply with the provisions of UNCLOS and the relevant I.M.O. and I.L.O. conventions.

Directive 2009/21/E.C. was added to the "Third Maritime Safety Package" (or Erika III) in 2005. This directive establishes the legal regime of the flag state in the European Union. It develops the regime provided in the UNCLOS and the I.M.O. conventions and resolutions and regulates the following:

- a) The conditions under which a ship can operate under the flag of a member state.
- b) Follow-up actions should be taken upon becoming aware of the detention of a ship flying the flag of a member state.
- c) The identification and obligation to register the particulars of vessels registered in a member state.
- d) The flag state auditing process, including the quality management system, for flag state-related activities and the assessment of internal requirements.
- e) The procedure for ensuring compliance with the M.L.C. Convention (Directive 2013/54/E.U. establishing the measures to be adopted by states to justify compliance with the Convention).

The European Commission, reinforcing its essential role in ensuring high maritime safety, security, and sustainability standards for maritime transport and coordination between member states, completed an evaluation of Directive 2009/21/E.C.⁸ in 2018.

Over the past ten years, several legislative and regulatory changes have been made at the I.M.O. and E.U. levels. In 2016, the "Triple I" Code became mandatory, and various technological and I.T. advancements have made updating the above directive crucial.

Hence, the directive must be revised, considering the European Council's conclusions⁹ in "An E.U. Waterborne Transport Sector—Future outlook: Towards a carbon-neutral, zero-accidents, automated, and competitive E.U. Waterborne Transport Sector."¹⁰

⁸ https://ec.europa.eu/transport/modes/maritime-transport-fitness-check_en. In this analysis, the European Commission document Ref. Ares (2020) 5376446 – 09/10/2020 ("Inception Impact Assessment") informs the public of the terms of the proposed revision of Directive 2009/21/E.C. and its rationale and objectives.)

⁹ Approved by the Council on 5 June 2020.

¹⁰ Recalling and concluding the previous Council conclusions under the heading "Priorities for the U.E.'s Maritime transport policy until 2020: Competitiveness, Decarbonisation, Digitalisation to Ensure Global Connectivity, and Efficient Internal Market and a World-class Maritime Cluster".



In December 2019, the European Commission published a communication presenting "The European Green Deal". The communication emphasised the importance of moving towards a zero-pollution state and an economy living with climate neutrality. This communication meant that sustainable mobility for maritime transport needs to be implemented as one of the international modes of transport.

In addition, new developments and technologies have emerged to support the transformation towards "green" shipping, which does not rely on fossil fuels for energy production. Information and communication technologies are now necessary for adopting intelligent controllers, management and monitoring systems, and high levels of automation, which can increase the efficiency of the transport system.

This increased efficiency will positively impact climate and environmental health. However, achieving these objectives also presents new challenges for member states, flag states, shipowners, and ships. In 2016, the "Triple I" Code came into force, but the applicable E.U. legislation was not aligned with its content. The Commission's evaluation of the directive has also highlighted several problem areas that need to be reviewed to ensure a high quality of ships flying the flag of a Member State uniformly.

The following problems were identified by the Commission at the time, together with the final one on COVID-19:

- a) The member states risk being unable to ensure compliance with their international responsibilities as flag states other than by delegating powers to R.O.s. Namely, they must provide the human and material resources to ensure control over the fleet and the R.O.s acting on their behalf.
- b) A maritime safety and pollution prevention culture must be sufficiently attractive and rewarded. This issue is essential because the directive's current form of flag state assessment (for maritime administrations and their fleet), based on the lists published by the Paris MoU (white, grey and black), is dated (i.e. static) and crude. This situation only partly reflects the existing state of maritime safety and, to a large extent, because it focuses too much on "non-compliance".
- c) At the Union level, the current procedure focuses more on "non-conformities" than a preventive perspective based on risk profiles.
- d) Although flag state audits are now mandatory in the I.M.O. and the E.U., they need to be harmonised to ensure that they are enforceable, uniform and mandatory and that corrective actions are available to other member states to ensure continuous improvement in flag quality.
- e) Flag states should maintain their fleet register and information, which should be converted into an accessible and modern IS/IT database.
- f) Some member states continue to use second and international registers outside the E.U. ("overseas"), which may lead to the non-application of international law, contrary to maritime safety standards.
- g) The COVID-19 pandemic had a substantial consequence on the activities of member states' authorities and a non-harmonised posture in the resumption of activities. This posture is also felt at the level of decarbonisation measures on ships and their



certification. Therefore, the importance of remote inspections of member states during crisis periods should be considered, as should a closer link by this means for decarbonisation measures.

The scope of this initiative to revise Directive 2009/21/E.C. on flag states includes the analysis of Directive 2009/16/E.C. (port state control), directive 2009/18/E.C. (incident investigation) and directive 2002/59/E.C. (V.T.M.I.S. directive on the responsibility of the coastal state for vessel radar monitoring systems), to adopt a harmonised legal system. The idea behind this revision is harmonising directive 2009/21/E.C. with the "Triple I" Code. In addition, specific objectives should be set, such as the following:

- a) Adequate monitoring of R.O.s;
- b) Ensure the implementation of the I.M.O. audit measures, with a view to the high standards of the flags of the member states;
- c) Promote and reward a culture of maritime safety, security and pollution prevention to improve the quality of maritime transport;
- d) Promote a preventive and proactive approach to that culture;
- e) Digitalise ship registers and ensure uniform reporting and sharing;
- f) Harmonise member states' responses in situations of "force majeure";
- g) Support maritime administrations applying E.U. rules and I.M.O. conventions more effectively.

As indicative measures, the following may be elected:

- a) Strengthen the rules, requests and procedures necessary for carrying out inspections ("survey/audit") and controlling the flagged fleet;
- b) Discourage the employment of non-exclusive consultants and inspectors (or similar, i.e. generally working for private companies) by maritime administrations;
- c) Apply modern techniques to assess the performance of flag states and fleets ("risk approach");
- d) Use the systems and services of E.M.S.A. (the Union Maritime Information and Exchange System) for risk assessment;
- e) Increase the use of electronic information (e-Certificates/e- Registers/e-Logbooks and other similar documents) and require modernisation of ship records and certificates;
- f) Clarify the scope, clarifying whether the directive applies to second and international registers outside the E.U.;
- g) Improve training and education by sharing the experience and skills of flag state personnel and their inspectors.



2.5. The duties of the coastal state

The duties and rights of the coastal state derive from the provisions of Articles 24 and 25 of UNCLOS¹¹. However, it is Article 56(1)(a) of UNCLOS which specifically grants the coastal state a series of powers of the jurisdiction in its EEZ (which, in general, are not exclusive except for certain countries that are economically dependent on the zone such as Iceland):

- a) The purpose of exploring and exploiting, conserving and managing the living or non-living natural resources of the waters overlying the seabed and its subsoil; and
- b) other activities involve exploiting and using the area for economic purposes, such as producing energy from water, currents, and wind.

In addition to other rights and duties mentioned in UNCLOS, the coastal state has the authority to create and use artificial islands, installations, and structures, conduct scientific research, and safeguard the marine environment. The International Maritime Organization's "Triple I" Code outlines the responsibilities of coastal and port states.

As regards the responsibility of the coastal state, the duties are essentially confined to the following areas of action:

- a) Radio communications services;
- b) Weather services and warnings;
- c) Search and rescue services;
- d) Hydrographic services;
- e) Establishment of navigation corridors;
- f) Mandatory reporting systems for ships;
- g) Vessel traffic services (V.T.S.); and
- h) Navigation aids.

¹¹ Article 24

Coastal State duties

1. The coastal state shall not hamper the innocent passage of foreign ships through the territorial sea except under this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal state shall not:

Impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage or discriminate in form or fact against any state's ships carrying cargo to, from or on behalf of any state.

2. The coastal state shall give appropriate publicity to any danger to navigation it knows within its territorial sea.

Article 25

Rights of protection of the coastal state

1. The coastal state may take the necessary steps in its territorial sea to prevent passage, which is not innocent.

2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal state also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject. 3. The coastal state may, without discrimination in form or, in fact, among foreign ships, temporarily suspend the innocent passage of foreign ships in specified areas of its territorial sea if such suspension is essential for protecting its security, including weapons exercises. Such suspension shall take effect only after having been duly published.



It should also be noted that, by S.O.L.A.S. Chapter V Regulation 13, the coastal state is responsible for a range of matters in the context of maritime signalling, namely providing navigational aids to shipping in a quantity and composition appropriate to the volume of traffic and the risk posed by the waterway ensuring that the navigational aids provided comply with international standards and regulations (issued by IALA – International Association of Lighthouse Authorities) and ensuring a system for the timely dissemination of information on changes in the operation of navigational aids (for example, on their position or transmission characteristics).

3. Port State duties

Port state control is a second line of defence to enforce flag state compliance. Although the responsibilities of P.S.C. and flag states are separate, a legal framework for inspection procedures is necessary to ensure that port states apply the principles of maritime safety and pollution prevention uniformly.

Recently, the European Union reformed its inspection system in line with the Paris MoU. The previous quantitative limit of inspecting 25% of ships annually per member state was replaced by a collective objective based on risk criteria that requires inspecting all ships calling at European Union ports. This change has increased the frequency of inspections, improved quality standards, and helped combat unfair competition from substandard ships. The "Triple I" Code lists port state obligations and is being revised to align with European Union law. The Code's duties are derived from international instruments and relate to surveying and inspecting foreign ships at ports under applicable international conventions and domestic legislation.

If coastal states are willing and committed, port state control can improve maritime safety and prevent pollution. The International Maritime Organization (I.M.O.) should continue to play a major role in encouraging the application and implementation of international conventions, such as the "Triple I Code" and flag state audits that started in 2016.



Meanwhile, the European Union has decided to open the review period for the three basic maritime safety directives simultaneously¹². Directive 2009/16/E.C. was approved together with Directive 2009/15/E.C.¹³.

Later, Directive 2013/38/E.U. amended it, making it mandatory to include the Maritime Labour Convention, 2006 (M.L.C. 2006), the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 (A.F.S. 2001), and the International Convention on Civil Liability for Damage Resulting from Pollution caused by Bunker Oil, 2001 (Bunkers Convention, 2001), as part of the requirement for port state control.

¹² They were transposed by Decree-Law no. 61/2012, dated 14 March 2012, that has revoked Decree-Laws no. 195/98 of 10 July, 156/2000 of 22 July, 284/2003 of 8 November, and 58/2007 of 13 March. The laws above were transposed by Decree-Law no. 195/98 of 10 July, which approved the Inspection of Foreign Ships (RINE) regulation, according to its preamble and the terms of Council Directive no. 95/21/E.C. of 19 June 1995, and Commission Directive no. 96/40/E.C. of 25 June 1996, concerning the inspection of ships by the port state. Subsequently, Decree-Law no. 195/98 of 10 July was amended by Decree-Laws no. 156/2000 of 22 July and 284/2003 of 8 November, transposing Council Directive 98/25/E.C. of 27 April 1998, Commission Directive 98/42/E.C. of 19 June 1998, Commission Directives 1999/97/E.C. of 13 December 1999, and 2001/106/E.C. of 19 December 2001, and 2002/84/E.C. of 5 December 2002. Decree-Law no. 58/2007 of 13 March was approved to improve the above transpositions. It introduced changes to the legal framework applicable to the intervention of the competent authorities. It defined a new national regulatory framework that clarified the practices to be followed by the administration in compliance with E.U. regulations.

To increase the safety of ships calling at Community ports and reduce the consequences of incidents caused by them, the European Parliament and the Council adopted Directive 2009/16/E.C. of 23 April 2009. The directive introduced a profound reform of the existing inspection system, replacing the quantitative minimum limit of 25% of ships inspected annually per member state with a collective objective: inspecting all ships calling at European Union ports. The frequency of inspections of high-risk ships was increased to every six months, while the number of inspections of quality ships not presenting a high-risk profile was reduced.

Decree-Law No. 61/2012 reformulated the successive amendments to Directive No. 95/21/E.C. of the Council of 19 June 1995 in a consolidated text, simplifying or amending certain provisions to enhance the effectiveness and quality of port State control.

¹³ The Commission had opened a revision of the three directives concerning the Port State Control Directive (2009/16), Maritime Accident Investigation Directive (2009/18) and Flag State Control Directive (2009/21). Revision of Directive 2009/16 provides a legally binding inspection regime based on the Paris Memorandum of Understanding (Paris MoU). Possible measures envisaged by the Commission are:

Include fishing vessels within the scope of port state control;

Develop a system for the harmonised use and acceptance of electronic statutory certificates throughout the U.E.;

Mandate the use of available electronic information, electronic certificates and other complementary information and certification;

E.M.S.A. develops training programmes for P.S.C.O.s adopting a more pro-active (rather than as now a more reactive) safety, security and pollution prevention approach;

Establish an incentive scheme for well-performing and environmentally friendly ships; Strengthen the rules regarding the banning mechanism so that substandard ships which have been shown repeatedly to not conform with the applicable standards can be banned from U.E. waters no matter their flag;

Regulate conditions and time frame for postponement of inspections;

Examine the impact of green technology, new fuels, and autonomous shipping on P.S.C.

Revision of Maritime Accident Investigation Directive (2009/18). The directive sets out the U.E. regime on investigating accidents in the maritime transport sector.

Main problem: Establishing a permanent accident investigation body with adequate resources and expertise and the ability to respond at short notice is seen as a heavy resource burden and time-consuming task for smaller member states and states with small fleets. As a result, accidents go unreported or are not carried out promptly, expertly, and independently.

Aim: Revision could help better focus on using resources and address shortages in expertise. Revision of Flag State Control Directive (2009/21) – Establishes the U.E. regime on legal compliance with international flag State requirements.

Main problem: U.E. legislation and the I.M.O. rules need to be aligned; this leads to differences in application and the need for harmonisation in M.S.

Aim: The revision aims to align U.E. legislation with I.M.O. rules, increase the use of electronic information (e-Certificates, e-Registers, e-Logbooks and other e-documents) and digitalise M.S. ship registers, and promote a proactive safety, security, and pollution prevention approach.



Once this prior recognition step has been taken (which now falls outside the scope of national powers), the legal framework establishes the obligation to enter into a formal agreement between the state and the organisation acting on its behalf. With this issue, the control of the organisation's acts and operations should be noted. However, the state retains the prerogative to define which act or acts it wishes to see included in the agreements.

Therefore, the acts and tasks to be undertaken by recognised organisations may include inspections, approval of plans and diagrams, conducting tests and trials, approval of stability books, surveys and audits of ships flying the national flag, and the issue of safety certification of ships on behalf of the state.

These European and national provisions align with I.M.O. Assembly Resolution A.739(18), according to which flag states should establish appropriate controls over the "recognised organisations" that carry out ship surveys on their behalf and should adequately resourced to this end.

Another important aspect concerns the performance of flag states, which are considered today to be one of the essential standards for evaluating each state's performance concerning the application of and compliance with international regulations on maritime safety by ships flying their flag.

Indeed, even in the case of a ship-owning company (called a "company" in the provisions) which complies with international standards and is committed to quality and compliance with the required rules, the performance of the flag it chooses may directly affect the "company's" results.

Now, ships flying a flag which, in general, and among all the ships registered under that flag, reach higher average levels of non-compliance during port state inspections are generally subject to stricter control and a greater number of inspections. For compliant companies, this situation of recurrent inspections entails unnecessary delays. It may lead to greater penalties for charterers and a decrease in the international value of companies, even though the ships may be compliant.

The concept of "Port State Control" appears for the first time in the text of the 1914 S.O.L.A.S. Convention, adopted following the sinking of the Titanic. Even in this early version, the control was intended to ensure that a ship sailing to another state's port had a valid certificate and was safe for passengers, crew and cargo to undertake (or continue) the voyage.

The concept has been successively updated and refined. The internationally applicable rules require all ships calling at ports to be checked for compliance with all requirements, thus avoiding a competitive disadvantage for ships flying the flags of states not a party to the Convention. Furthermore, flagging out is discouraged to lower maritime safety standards and living conditions on board.

The "no more favourable treatment" principle¹⁴ is widely recognised and enforced in most I.M.O. international instruments. Port state control has become essential to international

¹⁴ A ship flying the flag of a non-contracting country (of a given international convention) cannot be treated differently from a ship flying the flag of a contracting country. In practice, the ship will have to comply with



compliance with regulatory standards. Even if a specific international convention does not bind the flag state, the ship must comply with the regulations to operate in international traffic.

The port state control regime corrects foreign vessels' non-compliance due to deficient control by their respective flag states. It is a complementary measure to flag state control based on the state's authority over its ports and adjacent maritime and river areas. Flag state control aims to remove ships from ports that significantly breach internationally agreed-upon safety standards.

Port state control became crucial with the progressive increase in ship incidents in the 1970s, which resulted in various catastrophic consequences. On average, 230 ships were lost annually, corresponding to 1 million tonnes. In the second half of the seventies, the average amount of spilt oil per year was higher than 350,000 tonnes, and in 1979, it reached a maximum of close to 630,000 tonnes.

In 1976, I.L.O. Convention No. 147 concerning minimum standards for merchant ships was adopted. The trade union associations, particularly the International Transport Workers Federation (I.T.F.), fought for its application, creating the "Flags of Convenience" figure for flag states that did not apply it. It was a time of significant flagging, from traditional flags to flags that lowered maritime safety standards.

In the 1970s, several I.M.O. conventions, such as S.O.L.A.S., Load Lines, and C.O.L.R.E.G., were already in force. However, many countries either did not follow them or had to regulate them. Eight countries¹⁵ have, therefore, decided to expand the topic of living conditions on board to other areas related to maritime safety. On 2 March 1978, the "Hague Memorandum"¹⁶ was created to cover this material expansion.

On 16 March 1978, just two weeks after the Memorandum was signed, the Amoco Cadiz¹⁷ experienced an accident off the coast of Brittany. This incident resulted in the spillage of 227,000 tonnes of crude oil and 360 kilometres of polluted coastline, making it evident that a more forceful international intervention was necessary.

In December 1980, 14 European countries and representatives of the European Communities, the I.M.O. and the I.L.O., met at a diplomatic conference¹⁸ in Paris. The 2nd Ministerial Conference was also held in Paris in January 1982, and the Memorandum of Understanding (MoU) on Port State Control (P.S.C.) was adopted and signed on 26 January 1982 by the same 14 European State authorities.

the regulations of the Convention, even though it may not have a certificate under that international instrument.)

¹⁵ Belgium, Denmark, France, Federal Germany, the Netherlands, Norway, Sweden and the United Kingdom.

¹⁶ The North Sea Agreement between eight Maritime Authorities on the Maintenance of Standards on Merchant Ships – I.L.O. Conv n° 147, S.O.L.A.S. 60 & 74, and Load Lines 66.

¹⁷ The ship broke up 3.1 miles off the coast due to a rudder malfunction. In 1978, the total hydrocarbon spill reached 400,000 tonnes, more than half the amount resulting from the Amoco Cadiz spill.

¹⁸ Belgium, Denmark, Finland, France, Germany, Federal, Greece, Italy, Ireland, Netherlands, Norway, Portugal, Sweden, Spain and the United Kingdom. It was called the Regional European Conference on Maritime Safety 1980.



The P.S.C. operates based on national legislation (and thus continues for non-EU countries) – based on state jurisdiction over foreign ships in its ports¹⁹. I.M.O. guidelines develop basic principles for port state control²⁰.

The overall objective (mission) of the P.S.C. was to enhance maritime safety, protect the marine environment, and improve working and living conditions on board, thus contributing to the elimination of substandard ships²¹.

The main objectives of the port state control are to ensure the safety of shipping and ports, protect the marine environment of coastal states and prevent substandard ships from operating. It also aims to prevent these ships from gaining a competitive advantage by not complying with international standards for maritime safety and living conditions on board.

The Paris MoU was the first to adopt P.S.C. regionally, which could also be adopted by individual states worldwide. However, since the 1990s, several regional agreements on P.S.C. have been established, totalling nine currently.

The port state control generally inspects foreign ships in national ports to ensure compliance with international conventions and proper management and operation according to applicable rules²².

The European Council adopted Directive 95/21/E.C. on 19 June 1995 to establish a harmonised framework for port state control and avoid distortions of competition.

This directive encouraged member states to apply international standards for ship safety, pollution prevention and shipboard living and working conditions to ships calling at Community ports or sailing in waters under their jurisdiction.

The Community diploma thus embodied the integration of the P.S.C. norms (more specifically, of the Paris MoU) into Community Law. The following year was the turn of Directive 96/40/E.C.

Transposing these directives, Decree-Law no. 195/98 of 10 July approved the Ship Inspection Regulation (RINE) – subsequently amended by Decree-Law no. 156/2000, Decree-Law no. 284/2003, Decree-Law no. 58/2007 and Decree-Law no. 61/2012.

In the meantime, the Community framework has undergone several changes – namely, through Directive 2001/106/E.C., Directive 2009/16/E.C. and Regulation 428/2010/E.C. – together with successive amendments to the Paris MoU²³.

¹⁹ Article 25(2) of UNCLOS develops the relevant I.M.O. and I.L.O. Conventions.

²⁰ I.M.O. then published the following guides: Contents of Minimum Safe Manning Document (I.M.O. Resolution A.481 (XII), Annex 1) and Guidelines for the Application of Principles of Safe Manning (I.M.O. Resolution A.481 (XII), Annex 2), Resolution A.542(13) Procedures for the control of ships and discharges, A.597(15) Amendments to the procedures for the control of ships, M.E.P.C.26(23) Procedures for the control of ships and discharge and A.742(18) Procedures for the control of operational requirements related to the safety of ships and pollution prevention and Resolution A.1052(27) Procedures for port state control, 2011.

²¹ This designation is commonly given to ships that do not comply, in whole or in part, with the requirements of the International Conventions and present a risk to the safety of navigation and the marine environment.

²² The I.M.O. provides the P.S.C. procedures in Resolution A.787 (19) as amended by Resolution A. 1052 (27). Nine regional agreements exist: Paris MoU, Tokyo MoU, Indian Ocean MoU, Mediterranean MoU, Acuerdo Latino, Caribbean MoU, Abuja MoU, Black Sea MoU and Riyadh MoU.

²³ Currently, the legislation applicable to P.S.C. nationally is as follows:



Directive 2009/16/E.C. was implemented into national law through Decree-Law no. 61/2012 of 14 March, which significantly reformed the inspection system. The directive replaced the previous system, where each member state had to inspect at least 25% of the ships annually, with a new collective objective based on risk criteria. This new system means that all ships calling at European Union ports are now subject to inspection.

The frequency of inspections for high-risk ships has increased to every six months. Conversely, the number of inspections for quality ships with a low-risk profile has fallen. The purpose of these changes was to reduce unfair competition. The new rules penalise substandard ships that do not comply with international standards regarding maritime safety, preservation of the marine environment and conditions on board. At the same time, the compliant (i.e. low-risk) ships now benefit from a lighter inspection regime.

Recently, the P.S.C. has been required to verify compliance with the mandatory provisions of the M.L.C. 2006 if the vessel's flag state has ratified the Convention. If the flag state has yet to ratify the Convention, the P.S.C. ensures that such ships are treated favourable to ships flying the flag of a party state to the Convention. The ship shall be subjected to a more detailed inspection in this case.

It is important to note that introducing these rules into E.U. law does not apply to Norway, Russia, or Canada, which are also members²⁴.

Like other regional agreements, the Paris MoU has some limitations. It is a voluntary adherence instrument that lacks a supervision or sanctioning system, meaning each country operates under its legislation.

The Paris MoU is a system of standardised procedures for port state control. It aims to reduce the presence of ships that do not meet applicable standards in maritime safety, maritime security, protection of the marine environment, and living and working conditions on board from the waters under the national jurisdiction of the acceding

a) Decree-Law no. 27/201, of 6 February, proceeds with the 1st amendment to Decree-Law no. 61/2012 of 14 March, transposing into national law Directive 2013/38/E.U. of the European Parliament and of the Council of 12 August 2013, amending Directive 2009/16/E.C. of 23 April 2009, on port state control.

b) Decree-Law No. 61/2012 of 14 March 2012 establishes the common criteria for port state control of foreign vessels calling at national ports and anchorage areas and the procedures for inspection, detention, and information to be observed by the competent national authorities within this framework. It transposes Directive 2009/16/E.C. of the European Parliament and the Council of 23 April 2009 on port State control.

c) Regulation (E.U.) No 1257/2013 of the European Parliament and the Council of 20 November 2013, on ship recycling and amending Regulation (E.C.) No 1013/2006 and Directive 2009/16/E.C.

d) Directive 2013/38/E.U. of the European Parliament and of the Council of 12 August 2013, amending Directive 2009/16/E.C. of 23 April 2009, on port state control.

e) Commission Implementing Regulation (E.U.) No 1205/2012 of 14 December 2012, amending Regulation (E.U.) No 802/2010 as regards company performance.

f) Directive 2009/16/E.C. of the European Parliament and the Council of 23 April 2009 on port state control.

g) Commission Regulation (E.U.) No 802/2010 of 13 September 2010, implementing Article 10/3 and Article 27 of Directive 2009/16/E.C. of the European Parliament and the Council regarding companies' performance.

h) Commission Regulation (E.U.) No 801/2010 of 13 September 2010, implementing Article 10/3 of Directive 2009/16/E.C. of the European Parliament and the Council regarding the criteria for flag states.

i) Commission Regulation (E.U.) No 428/2010 of 20 May 2010, implementing Article 14 of Directive 2009/16/E.C. of the European Parliament and the Council regarding expanded inspections.)

²⁴ The current 27 members of the Paris MoU are Belgium, Bulgaria, Canada, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovenia, Spain, Sweden and the United Kingdom.



countries. The Paris MoU area covers the waters of European coastal states and the North Atlantic basin from North America to Europe.

The Paris MoU publishes an annual report on its activities, including many pieces of information, such as the black, grey, and white lists of flag states and recognised organisations. The Paris MoU Committee approves these lists by analysing the results of the inspections carried out each year. They represent the quality levels of the recognised flags and organisations, highlighting those presenting high risks (black list). These lists analyse the total number of inspections and detentions suffered by merchant ships under P.S.C. procedures.

In the Paris MoU annual report for 2020, out of 70 flags, 39 are on the White List (Portugal is in position 24), 22 are on the grey list, and nine are classified on the black list. The importance of these lists is so high that ships belonging to the grey and black lists can be banned from European Union ports if they meet several requirements.

4. Port state control

During a ship's port state control visit, the P.S.C.O. examines all the documents and certificates. In addition, a general inspection of the ship's various areas is conducted to check if the vessel is in good condition as per the certificates. If no issues are found, the P.S.C.O. issues a "clean" inspection report (Form A) to the ship's master.

However, some deficiencies were found during the inspection. In that case, the inspection report will include the deficiencies (Form B), the actions that must be taken, and the deadline for correcting them.

The ship's details and the inspection result are then entered into the Thetis inspection database. This database is the information system used to carry out the port state control regime in the European Union. It contains data on all the inspections carried out in the European Union and Paris MoU region, including compliance verification with onboard operational requirements, especially if deficiencies are identified.

Several ships are selected daily for port state control inspection throughout the region. The selection process is made after consulting the Thetis system, which is hosted and managed by the European Maritime Safety Agency (E.M.S.A.). This system identifies ships due for inspection according to certain pre-determined selection criteria. The information system also provides the ships and the reports of previous inspections in the Paris MoU region.

Each ship is assigned a Ship Risk Profile (S.R.P.), which determines the priority and frequency of inspections based on generic and historical parameters. Thetis vessels are categorised as either high-risk (H.R.S.), standard risk (S.R.S.), or low-risk (L.R.S.) based on specific criteria, namely:

- a) High-risk ships (H.R.S.) achieve at least five points according to the S.R.P. calculation.
- b) Low-risk ships (L.R.S.) meet all low-risk parameters criteria and have been inspected within the last 36 months.
- c) Standard risk ships (S.R.S.) do not fall under either H.R.S. or L.R.S. categories.



The vessel's risk profile is calculated daily and considers factors such as inspection history over the last 36 months and the performance of the ship-owning company²⁵.

When evaluating a ship's risk profile, one of the criteria considered is the performance of the shipowner responsible for the fleet's I.S.M. code. The evaluation is based on the detention history and deficiencies of the vessels in the fleet, which are classified as very low, low, medium, or high. The calculation is done daily, considering a performance period of 36 months. The shipowner's rating is not dependent on a minimum number of inspections, except for situations where a shipowner has had no inspections in the last 36 months, considered an "average performance"²⁶.

The Paris MoU presents annual lists of flags and recognised organisations along with their respective risk levels. These lists are based on the total number of inspections and detentions for fleets flagged over three years. A fleet must have undergone at least thirty inspections to be included in the list²⁷.

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For the periodic inspection, the selection is made as follows:

- a) High-risk ship: Between 5 and 6 months after the last inspection in the Paris MoU region, the port state may inspect the ship, but after the sixth month, the port state is obliged to do so;
- b) Standard risk ship: Between 10 and 12 months after the last inspection in the Paris MoU region, the port state may inspect the ship, but after the 12th month, it is obliged to do so;
- c) Low-risk ship: Between 24 and 36 months after the last inspection in the Paris MoU region, the port state may inspect the ship, but it is obliged to do so after the 36th month.

The start of the period for the next periodic inspection begins again after any inspection. Depending on the severity of the occurrence, additional inspections may be required based on dominant or unexpected factors. In the first case, these factors may include a collision or a discharge of harmful substances. In the second case, inspections may be triggered by complaints from the crew or other interested parties, non-compliance with reporting obligations, or outstanding I.S.M. Code deficiencies. Reported cargo problems, particularly those related to hazardous or noxious cargoes, may also warrant inspections.

The selection system is divided into two priorities, namely:

²⁵ For the S.R.P. calculation, see <https://www.parismou.org/inspections-risk/library-faq/ship-risk-profile>.

²⁶ To calculate the performance of the shipowner, see <https://www.parismou.org/inspections-risk/company-performance-calculator>.

²⁷ The annual risk lists are on <https://www.parismou.org/detentions-banning/white-grey-and-black-list>.



- a) Priority I: Ships must be inspected because either the inspection deadline has passed or a dominant or overriding factor exists.
- b) Priority II: Ships may be inspected because they are due for inspection or because the port state considers the unexpected factor warrants inspection.

If no unexpected factors are reported and the ship does not have priority status, member states are not obligated to inspect it. However, the ship will be subjected to Priority I inspection if any dominant factors are found. In case of unexpected factors, the port state may decide to carry out an additional inspection, but it will remain Priority II unless something significant is detected.

The P.S.C.O.'s inspections are classified into three categories: Initial Inspection, More Detailed Inspection, and Expanded Inspection. Additionally, the Paris MoU Committee conducts a Concentrated Inspection Campaign yearly to focus on specific technical or operational areas to be checked in greater detail within a specific timeframe.

The Initial Inspection involves checking the ship's certificates and documents, general condition, hygiene, and compliance with international rules and standards. If any deficiencies are found, they must be rectified within the time specified in the inspection report; otherwise, the ship will be detained if they pose a risk to the safety of navigation, shipboard living and working conditions, or the environment. The P.S.C.O. will issue a detention notice to the master, and the ship's owner/operator will be informed. They have the right to appeal; details can be found on the back of the detention form notice, which may differ in Paris MoU member states.

The More Detailed Inspection is triggered if there are clear grounds for believing that the condition of the ship, its equipment, or its crew does not substantially meet the requirements of an applicable Convention.

The Expanded Inspection examines the overall condition and compliance of the documentation, structure, emergency systems, navigation equipment, life-saving appliances, and pollution prevention. It also covers specific areas where concentrated inspection campaigns have found high deficiencies. These campaigns occur annually over three months and are combined with a regular inspection.

The Paris MoU Committee identifies, on an annual basis, a specific technical or operational area (or areas) to be checked in more detail within a certain timeframe. These actions are developed in a "Concentrated Inspection Campaign".

During an initial inspection, the P.S.C.O. visits the ship to check the certificates and documents, the general condition and hygiene of the ship (including the navigating bridge, accommodation, galley, decks, bow, and cargo holds), and the engine room. The inspection also verifies compliance with international rules and standards and whether deficiencies found by an authority at a previous inspection have been rectified within the specified time frame.

If any deficiencies that pose a risk to the safety of navigation, shipboard living and working conditions, or the environment are found, the ship is detained. The P.S.C.O. issues a detention notice to the master, formally prohibiting the ship from proceeding to



sea. The master and the ship's owner/operator are informed, and the latter has the right to appeal. The Notice of Appeal and details can be found on the back of the detention form notice, and they differ among the Paris MoU member states.

Following an initial inspection, if there are clear grounds to believe that the condition of the ship, its equipment, or its crew does not substantially meet the requirements of an applicable convention, a more detailed inspection is triggered. This inspection entails a detailed examination of all or part of the ship, its equipment, and crew concerning its construction, equipment, crewing, and compliance with onboard operational procedures.

The expanded inspection covers the overall condition and compliance of the documentation, the structure, the water tightness, emergency systems, radio communications, cargo operations, fire safety, alarms, shipboard living and working conditions, navigation equipment, life-saving appliances, dangerous goods, propulsion and auxiliary machinery, and pollution prevention. When clear grounds exist, a more detailed inspection may also be conducted.

Concentrated inspection campaigns are annual inspections conducted over three months (September/November) focusing on areas where P.S.C.O.s have found high deficiencies or new covenant requirements have recently come into force. They are combined with regular inspections²⁸.

Thetis uses a Ship Risk Profile (S.R.P.) to assess each ship's risk level. This assessment determines the priority, interval, and scope of ship inspections. Based on their generic and historical parameters, including their flag, ships are graded as high, normal, or low risk.

The ship's risk profile is calculated daily, considering changes in dynamic parameters like age, the 36-month historical record, and the company's performance standard. The profile is also recalculated after each inspection and when performance tables for the flag state and recognised organisations are updated.

Regarding the importance of inspections, let us recall the July 2012 maritime accident of the M.S.C. Flaminia, which involved a serious fire on board.

5. Conclusion

Nowadays, maritime liability and states' roles and responsibilities as either the flag state or the coastal (and port) state are of the utmost importance.

²⁸ Over the years, the following topics have been the focus of a "Focused Inspection Campaign Concentrated Inspection Campaign" (C.I.C.): emergency procedures and systems (2019), Annex VI to the Convention M.A.R.P.O.L. (2018), Safety of Navigation, including CEDIS (2017), M.L.C. 2006 (2016); Crew familiarisation regarding confined space entry (2015), Hours of Rest (2014), Propulsion and auxiliary machinery (2013), Fire Safety Systems Fire (2012), safety and structural load lines (2011), Stability at Breakdown Tanker (2010), Life-savings: marine rescue launching devices (2009), Safety of Navigation: Solas chapter V (2008), Implementation of the International Safety Management (I.S.M.) Code (2007), MARPOL 73/78 Annex I (2006), Global Maritime Distress Safety (GMDSS) (2005), Work and living situations: working and living conditions (2004), Operational Compliance on Passenger Ships (2003) and International Safety Management (I.S.M.) Code (2002).



We have highlighted the need for closer cooperation between coastal states and the International Maritime Organization (I.M.O.) to address third parties' increased competencies regarding the flag state.

The obligations of flag states and agreements with recognised organisations (R.O.) are also explained in a general way, including the mandatory need to comply with international standards relating to maritime safety, navigation safety, marine environment protection, and crew living and working conditions.

At last, we must emphasise the critical role of flag states in establishing and maintaining an effective control system over their ships to ensure adherence to all international standards and regulations.

Everything has no consequences without requiring strict enforcement of flag state obligations to ensure maritime safety, prevent pollution from ships, and improve shipboard living conditions.

As Don Merrell said (in "*I Chose to Look the Other Way*"),

*I could have saved a life that day,
But I chose to look the other way.
It wasn't that I didn't care,
I had the time, and I was there.*

*But I didn't want to seem a fool,
Or argue over a safety rule.
I knew he'd done the job before,
If I spoke up, he might get sore.*

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