PORT STATE CONTROL: AN UPDATE ON INTERNATIONAL LAW APPROACHES TO REGULATE VESSELS ENGAGED IN ANTARCTIC NON-GOVERNMENTAL ACTIVITIES

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Information Paper submitted by the Antarctic and Southern Ocean Coalition (ASOC)

1.1 Executive Summary

At ATCM XXV, ASOC tabled IP 63 (agenda item 7), entitled “Port State Jurisdiction: An Appropriate International Law Mechanism to Regulate Vessels Engaged in Antarctic Tourism.” The Paper prompted some discussion, and since that ATCM there have been some notable developments on this topic by other international institutions, including IMO and FAO. These developments have confirmed that international law has now fully recognized that port states may affirmatively take measures to inspect vessels visiting their waters and enforce internationally-recognized maritime standards for ship operations and other environmental rules. Such port state regimes are in place in virtually every other part of the globe. In order to provide an added element of enforcement of maritime standards and the provisions of the Madrid Protocol, merchant and tourist vessels, bound for the Antarctic Treaty Area and engaged in non-governmental activities, and calling at departure ports, can be subject to inspection. This Information Paper updates the international law basis for a port state regime for the Antarctic, proposes a revised draft Memorandum of Understanding on this subject (starting on page 8), and responds to concerns raised by delegations at ATCM XXV.

Exclusive reliance on flag state jurisdiction is insufficient
Over the last several decades, flag state control has become an increasingly inadequate regulatory mechanism, resulting in the need for port states to exercise oversight and police their own waters for ships not operating in conformance with internationally-recognized maritime standards. In the 1970s and 80s, some ship owners turned to open registries, or “flags of convenience,” as a way of registering their vessels while avoiding burdensome regulation. As a result, with the intention of tapping this free-flow of revenue, the number of states with open registers grew. Some states with open registers did not have, and continue to lack, the resources to oversee their own vessels and certainly did not have the ability to regulate foreign vessels registered under their flag. Further, even if flag states had the means to patrol ships flying their flag, these ships rarely returned to their ports of registration and thus were infrequently, if ever, inspected. The general condition of ships plying the world’s waters deteriorated severely as a consequence of these under-regulated ships. Only recently, through the increased use of port state control, has the world community begun to improve maritime standards and improve the standards of ships from all parts of the globe. Through various international agreements, port state control has demonstrated its value and success in monitoring ships and is now a recognized and accepted form of jurisdiction in international law. Port state control is now also a fully accepted feature of international maritime law.

Under international law, port state control complements flag state control. Port state control is an important instrument for certifying that a ship meets the technical or other requirements contained in international maritime conventions. Ideally, the first responsibility for ensuring that ships comply with national and applicable international agreements regulating a ship’s condition rests with the flag state. It is commonly understood in international law that only states party to a treaty are bound by it. Therefore, states that have not ratified certain of the several maritime conventions setting out regulations for safety of human life at sea and protecting the environment need not abide by the rules defined therein. However, regardless of the compelling argument that many of the rules laid out in these conventions have become so widely accepted by the international community that they could qualify as rules of customary international law, it is also generally recognized in international law that a ship voluntarily entering a foreign port accepts the jurisdiction of that foreign state.

Port states thus may review the ship’s certificates issued by the flag state and conduct further investigation upon “clear grounds” of non-compliance with generally accepted maritime regulations. If necessary, the port state may detain the foreign ship until any and all deficiencies are rectified and must notify the flag state through its representative or consulate. Because all flag states are not party to the major safety and environmental maritime conventions, and on account of several flag states’ inability or disinclination to uphold the barest minimum standards on ships flying their flags, substandard ships sailing the world have posed significant safety hazards to human life and pollution risks to the environment. States invoke port state control to protect their ports and territorial waters from the potential dangers of substandard ships.

**Port state jurisdiction: the legal basis**

Port state jurisdiction is an essential tool for implementing and enforcing various international maritime conventions. Requirements for port state control have been
delineated in several key maritime conventions and evolved over time to become more extensive and inclusive. Relevant conventions include: International Convention on Load Lines, Article 21, 1966;\textsuperscript{xxix} International Convention for the Safety of Life at Sea (SOLAS) Chapter I, Regulation 19, 1974;\textsuperscript{x} International Convention for the Prevention of Pollution from Ships (MARPOL), Article 5(2), 1973/78;\textsuperscript{xxii} International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, Article X, 1978;\textsuperscript{xx} and the United Nations Law of the Sea Convention, Articles 218,\textsuperscript{xv} 219,\textsuperscript{xv} and 226(1)(c)\textsuperscript{xvii} of 1982.\textsuperscript{xviii} Article 218 of the UN Law of the Sea Convention, accepted as customary international law, provides the most far-reaching application of port state jurisdiction and control over marine pollution standards by providing port states with the authority to investigate pollution violations wherever they occur. That Article provides in pertinent part that “[w]hen a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.”\textsuperscript{xvix}

In addition to the larger international conventions, regional Memoranda of Understanding (MOU) on port state control have sprung up around the world of which the Paris Memorandum of Understanding of 1982 is the original and continues to serve as a model for subsequent agreements.\textsuperscript{xxx} These memoranda were created for the purpose of protecting human life at sea and the marine environment by filling the void left by flag states. Regional agreements that have been enacted include: Paris MOU on Port State Control, 1982; Viña del Mar Agreement, 1992 (Latin American Agreement on Port State Control); Tokyo MOU, 1993 (Asia-Pacific MOU on Port State Control in the Asia-Pacific Region); Caribbean MOU, 1996 (MOU on Port State Control in the Caribbean Region); Mediterranean MOU, 1997 (MOU on Port State Control for the Mediterranean Region); Indian Ocean MOU, 1998; and West and Central African MOU, 1998. Through the memoranda on port state control a worldwide network continues to develop to aid in the exchange of information and facilitate the crackdown on substandard ships.\textsuperscript{xxi}

For a regional memorandum to succeed, every state in that particular area must accede to the agreement. Less than full cooperation will result in the development of “ports of convenience,” much like “flags of convenience,” with delinquent ships avoiding ports with stricter standards in favor of those with more relaxed measures.\textsuperscript{xxii} The International Maritime Organization (IMO), committed to port state control,\textsuperscript{xxiii} has been a rallying force behind the enactment of a global port state control system through the proliferation of several smaller, regional agreements.\textsuperscript{xxiv} There has been some concern expressed by the Paris and Tokyo MOUs over the development and proliferation of newer agreements: namely, many of the more recent memorandum include as parties to the agreement states which have consistently and continuously appeared on the list of delinquent flag states.\textsuperscript{xxv} Regardless, a body of regional states working together\textsuperscript{xxvi} through port state control offers the most promising means yet to oversee standards on ships.\textsuperscript{xxvii}

Within the last year, the IMO and U.N. Food and Agricultural Organization (FAO) have adopted resolutions or other instruments confirming the legal propriety and practical utility of port state control as a means of controlling not only illegal, unregulated and unreported (IUU) fishing, but also enforcing other international environmental and resource laws. At the Eleventh Session of IMO’s Sub-Committee on Flag State Implementation, the
Organization adopted measures to promote the further adoption of regional port state control schemes. Additionally, IMO considered reporting procedures for port state control detentions of foreign-flagged vessels found noncompliant with generally accepted international maritime rules and regulations for vessel construction, design, equipment and manning (CDEM), as well as other rules of vessel operation. Likewise, in the FAO, the Committee on Fisheries (COFI) has favorably reported on port state control schemes.

**Application to the Antarctic Context**

In the past decade, non-governmental activities in Antarctica, particularly commercial tourism, have increased substantially, and appear set to continue to do so for the foreseeable future. This poses a risk not only to the Antarctic environment and its value for scientific research, but puts additional strain on the limited Antarctic governance regime provided through the Antarctic Treaty System. Any mechanism for port state measures must balance the need for effective enforcement of safety standards for vessels bound for the Antarctic, while, at the same time, ensuring that the adoption of such measures in no way constitutes a disparagement of Antarctica’s unique legal status under the Antarctic Treaty of 1959.

To date the Antarctic tourism industry has been effectively left to self-regulation through the International Association of Antarctica Tour Operators (IAATO). ASOC has consistently suggested that this is an insufficient basis for managing a major industry in Antarctica, and that States Parties have a duty to develop appropriate regulatory mechanisms. This arises from the need to invoke considerations beyond immediate commercial interests in dealing with this ten percent of the planet as a global commons, and the fact that even at present, not all tourism activity is conducted within the framework of IAATO membership.

Compounded with this development is the unique situation wherein an increasing proportion of the tour operators in the region are from third party states, not bound by the Antarctic Treaty or Madrid Protocol on Environmental Protection. Measures must be taken to protect the Antarctic environment and the values recognized therein, and to prevent accidents and threats to life and property. This means that a port state regime would have to be established to ensure not only that vessels are in compliance with internationally-recognized maritime standards for ship operations, but also that activities occurring in the Antarctic Treaty Area, which will be based on a vessel, are carried out in conformance with the specific environmental rules of the Madrid Protocol, and its annexes (both current and future), including the EIA provisions of Annex I and the specific prevention of marine pollution prevention provisions of Annex IV.

The challenge to managing non-governmental activities in Antarctica originates from the lack of effective jurisdiction in the Antarctic Treaty Area. In particular, states not party to the Antarctic Treaty or states that have not achieved consultative status are not bound by the Treaty, or at least may not have ratified the subsequent Madrid Protocol on Environmental Protection to the Antarctic Treaty (Protocol) of 1991. States free from any legal obligation under international law stemming from the Antarctic Treaty and Protocol may engage in the tourist trade unregulated in the Antarctic. The Antarctic Treaty intended to resolve the jurisdictional issue over individuals visiting the Antarctic, but, to date, this
question remains unanswered. Furthermore, states with departure ports serving Antarctica are unable to control tourist ships leaving for Antarctica by conventional means on account of a lack of jurisdiction because their ports are located outside the Antarctic area.

The problem here lies in the absence of adequate legislation in place to control Antarctic tourism. Annex IV to the Protocol on Environmental Protection, 1991, is too permissive and does not set out firm means for regulating tourism in the region. The Protocol mentions tourism in three places, Articles 3(4), 8(2), and 15(1)(a), but doesn’t specify how to enforce the rules. There is, as yet, no legal basis for port state jurisdiction to be applied to Protocol Annex IV. The Protocol contains no internationally recognized certificate on the fulfillment of technical requirements and no uniform international document certifying the fulfillment of conduct obligations (such as, for example, MARPOL’s Oil Record Book in accordance with MARPOL, Annex I, Appendix III, 1973/78). Under Annex IV, Articles 5(6) and 6(2) of the Protocol, use of garbage and sewage record books is merely an option that the parties may prescribe after considering their usefulness. Some states party to both the Antarctic Treaty and the Protocol have used Article VII(5) of the Antarctic Treaty when enacting the Protocol in their domestic legislation so as to reach not only their nationals, but also foreigners leaving on expeditions to Antarctica originating in their country. States party to the Protocol can incorporate port state inspections through Article 13, which requires each state to take the necessary measures and adopt appropriate rules and regulations for compliance with the Protocol.

Two further provisions in Annex IV allow port state inspection. Article 9(2) requires states parties with departure ports to build facilities to hold sludge and other garbage of vessels departing to or arriving from the Antarctic Treaty area. Article 14 stipulates that nothing in Annex IV will derogate from MARPOL 1973/78. MARPOL categorizes Antarctica as a “special area” and, under Annex I, Chapter I, Regulation 10(2)(a) and (3)(a), prohibits and/or restricts any discharge of oil or any oily mixture. Where breaches of Annex IV and MARPOL overlap, the port state that is a party to MARPOL could inspect the foreign ship. In addition, two major maritime conventions, the International Convention for the Prevention of Pollution from Ships (MARPOL) 1973/78 and the International Convention for the Safety of Life at Sea (SOLAS) 1974, are limited in breadth (to pollution principally from oil and the safety of humans, respectively) and thus cannot be used as a way to extend port state control to regulatory concerns in the Antarctic as raised in Protocol Annex IV. There need to be standardized international regulations in place before port states can exercise jurisdiction over foreign vessels. The only possible solutions, absent self-regulation, which in ASOC’s view is not a viable alternative, rest in an additional annex to the 1991 Protocol or a memorandum of understanding on port state control between as many states parties as possible.

The use of port state jurisdiction to oversee Antarctic tourism by regulating ships leaving “departure ports” for Antarctica is not a great leap in application. For that matter, Article VII of the Antarctic Treaty, already requires all parties destined for the Antarctic region to give advance notice – although states differ substantially in their interpretation of which expeditions are included. Departure port jurisdiction is based upon a state’s authority to set conditions for entry to its ports. The key here is the fine line between ships which arrive in a foreign port having committed a violation of international maritime law or presently in breach because of the condition of the vessel, and ships that have not yet committed any violation, but will be in violation once in the Antarctic Treaty Area because
they may not comply with the special environmental protections necessary for a voyage in the Antarctic. Port state control would be applied in anticipation of future activities by vessels presently in a departure state’s port.

In the context of liability, it is interesting to note there is general agreement that port states have an important role to play in preventing accidents. As a result, a strong argument can be made for the necessity of port states to inspect foreign vessels for compliance with international maritime agreements through port state measures.

ASOC also recognizes that the concept of port state control has applications to the regulation of other Antarctic activities, in addition to the subject of tourism and non-governmental activities discussed in this paper. Chief among these other areas of concern would be IUU fishing activities. This paper is without prejudice to a full discussion of the application of port state control to these other activities.

**An MOU, modeled on the Paris or Viña de Mar MOUs, is the best approach for port state control in the Antarctic Treaty System**

A memorandum of understanding modeled on the Paris MOU of 1982 or the Viña de Mar MOU of 1992 is a viable means of implementing an effective port state control regime to regulate vessels engaged in Antarctic non-governmental activities, including tourism. An Antarctic MOU on port state control would help enforce the Protocol, as well as other relevant maritime conventions. The concept of port state jurisdiction is not foreign in the Antarctic Treaty System. Several of the States party to the Antarctic Treaty are also signatories of the major maritime conventions, such as MARPOL, SOLAS, and the UN Law of the Sea Convention, wherein port state controls have been successfully invoked to uphold treaty provisions, and many are party to one or more of the existing MOUs. Because there are still states that are not party to all the maritime conventions, an alternative method is needed to reach the ships of these states so as to ensure their compliance with international maritime standards.

The goal for managing Antarctic non-governmental activities, including tourism, should be an MOU on port state control where at least all states with departure ports to the Antarctic Area are parties. A departure state agreement laying down minimum standards to be met by all vessels and aircraft leaving for Antarctica from a departure port must be formalized. Unsurprisingly departure ports are located in Southern hemisphere states which are Consultative Parties to the Antarctic Treaty. The key to the success of an MOU on port state control is the implementation of standardized regulations between state parties. But, it is one thing to have convention requirements, and entirely another thing to set out specific tools for enacting those standards. Port state control measures must be similar in every state party to the MOU. Tourist ships traveling to the Antarctic must have a benchmark by which to structure their actions. The requirements in each departure port must be uniform so that tour operators can know whether they are in compliance.

To this end, regular, harmonized inspections should be carried out. Parties to the MOU should agree on a checklist to be shared by all inspectors. Qualified persons who are properly authorized should carry out inspections. Certificates should be issued both to tour operators and vessels that meet the approval of the port state. Such certificates should be valid and recognized by other states party to the MOU on port state control for a period of
time, not to exceed six months,

wherein the vessel would not be subjected to further inspections, absent “clear grounds,” meaning prior notification by another authority or obvious and manifest violations.

Unlike the Paris MOU, with its aim for each state party to inspect twenty-five percent of the vessels entering their ports in a given year, an MOU on port state control in the Antarctic should strive to achieve a 100% inspection rate. The Antarctic region is highly vulnerable to environmental pollution and disturbance. On account of the extreme conditions, the Antarctic region would take significantly longer to purge itself of the effects of an environmental incident. Therefore, the port authority may detain a vessel failing its inspection until such time, and not any longer, as the problem is solved. Deficiencies must be rectified before a ship is allowed to leave port. The flag state, through its consul or nearest diplomatic representative (maritime authority) must be notified immediately of any detention of its ships. Military vessels and other State-owned vessels should take appropriate measures to ensure their ships are in compliance, particularly when they are engaged in commercial activities.

A comprehensive and continually updated database, shared by all the departure ports is essential to a successful port state control program governing tourism in the Antarctic. Through the Internet, states party to an MOU on port state control can quickly and easily access information about tourist vessels in their ports to determine whether the ships are in good standing. With all Antarctic departure ports operating off the same page, all tour operations will be held accountable to the identical standards and it will not be as easy for ships in violation to slip by unchecked. Additionally, the national authorities which support the port state measures should ideally be engaged in a constant process of mutual consultation and the provision of technical assistance to other such authorities, to ensure full information exchange and consistent enforcement of the MOU requirements. Part of this process would include liaising with the relevant classification societies, which serve an important role in accomplishing vessel surveys and compliance checks.

States party to an MOU on port state control will not afford preferential treatment to ships flagged under states not a party to the Antarctic Treaty System (ATS). This principle factors in the application of present maritime conventions, such as MARPOL. Chile, for example, holds states not party to MARPOL to the same inspections as states parties. To do otherwise would in effect encourage states not to become a party to maritime conventions in an effort to avoid additional restrictions.

Port state control is widely used now to enforce important maritime conventions. In addition, regional MOUs on port state control that have proliferated around the world employ this jurisdiction as a way to inspect any and all vessels entering their harbors for compliance with international maritime treaties. It is not difficult to take a step further and to envisage an MOU on port state control among, at the very least, states with departure ports to the Antarctic as a means of regulating Antarctic tourism in particular and enforcing the Protocol in general.

To facilitate this logical extension, please find a revised draft Antarctic Memorandum of Understanding attached to this Information Paper.
Draft Antarctic Memorandum of Understanding on Port State Control Measures

Those states exercising control over “departure ports” to Antarctica; hereinafter referred to as “the Authorities”:

Recalling the Madrid Protocol on Environmental Protection to the Antarctic Treaty of 1991 and, in particular, its restrictions on shipping in the Antarctic;

Bearing in mind the special legal and political status of Antarctica and the special responsibility of the Antarctic Treaty Consultative Parties to ensure that all activities in Antarctica are consistent with the purposes and principles of the Antarctic Treaty and Madrid Protocol;

Noting that nothing in a port state control measure scheme should disparage the unique legal status of the Antarctic region under the Antarctic Treaty of 1959;


Recalling the designation of Antarctica as a Special Conservation Area and other measures adopted under the Antarctic Treaty System to protect the Antarctic environment and dependent and associated ecosystems;

Convinced that the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems is in the interest of humankind as a whole;

Desiring to supplement and reinforce the purpose of the Madrid Protocol on Environmental Protection to the Antarctic Treaty so that it can meet evolving challenges to the Antarctic Treaty Area;

Mindful that the principal responsibility for the effective application of standards laid down in international instruments rests upon the authorities of the state whose flag a ship is entitled to fly;

Recognizing nevertheless that effective action by port states is required to prevent the operation of substandard ships;

Recognizing also the need to avoid distorting competition between ports and the need to ensure equal treatment of all participants;

Convinced of the necessity, for these purposes, of an improved and harmonized system of port state control and of strengthening co-operation and the exchange of information;

have reached the following understanding:
CHAPTER 2: SECTION 1 COMMITMENTS

1.1 Each Authority will give effect to the provisions of the present Memorandum and any Annexes thereto, which constitute an integral part of the Memorandum.

1.2 Each Authority will maintain an effective system of port state control with a view to ensuring that, without discrimination as to flag, merchant ships and tourist vessels calling at a port of its state, or anchored off such a port, and bound for the Antarctic Treaty area, as defined by Article VII of the 1959 Antarctic Treaty, comply with the standards laid down in the relevant instruments as defined in section 2. Each Authority may also carry out controls on ships at off-shore installations.

1.3 Each Authority will inspect annually all merchant ships and tourist vessels, hereinafter referred to as “ships,” which enter its ports and are bound for the Antarctic Treaty area.

1.4 Each Authority will consult, cooperate, provide technical assistance, and exchange information with the other Authorities in order to further the aims of the Memorandum.

1.5 Each Authority, or any other body, as the case may be, will establish an appropriate procedure for pilot services and port authorities to immediately inform the competent Authority of the port state, whenever they learn in the course of their normal duties that there are deficiencies which may prejudice the safety of the ship, or which may pose a threat of harm to the marine environment.

CHAPTER 3: SECTION 2 RELEVANT INSTRUMENTS

2.1 For the purposes of the Memorandum “relevant instruments” are the following instruments:

- the Antarctic Treaty, 1959 (Antarctic Treaty);
- the International Convention on Load Lines, 1966 (LOAD LINES 66), with relevant amendments;
- the Protocol of 1988 relating to the International Convention on Load Lines, 1966 (LL PROT 88);
- the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74);
- the Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974 (SOLAS PROT 88);
- the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), with relevant amendments, Annexes, and measure;
- the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW 78);
- the International Convention on Search and Rescue, 1979 (SAR 1979); and 1988 Amendments (SAR 1988);
- the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG 72), and relevant amendments;
• the International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE 69);
• the Madrid Protocol on Environmental Protection to the Antarctic Treaty, 1991 (Madrid Protocol 1991) and its Annexes

2.2 Each Authority will apply those relevant instruments which are in force and to which its state is a party. In the case of amendments to a relevant instrument, each Authority will apply those amendments which are in force and which its state has accepted. An instrument so amended will then be deemed to be the “relevant instrument” for that Authority.

2.3 In applying a relevant instrument, the Authorities will ensure that equal treatment is given to ships of parties and non-parties. The Authorities will thereby apply the procedures specified in a future annex to this Memorandum.

CHAPTER 4: SECTION 3 INSPECTION PROCEDURES, RECTIFICATION AND DETENTION

3.1 In fulfilling their commitments, the Authorities will carry out inspections, which will consist of a visit on board a ship in order to check the certificates and documents referred to in a future annex. Furthermore, the Authorities will satisfy themselves that the crew and the overall condition of the ship, including the engine room and accommodation and including hygienic conditions, meets generally accepted international rules and standards.

In the absence of valid certificates or documents or if there are “clear grounds” for believing that the condition of a ship or of its equipment, or its crew does not substantially meet the requirements of a relevant instrument, a more detailed inspection will be carried out, as referred to in a future annex, or, as appropriate, an expanded inspection will be carried out as referred to in a future annex. Examples of “clear grounds” are given in this same annex.

The Authorities will include control on compliance with on board operational requirements in their inspections.

3.2 Nothing in these procedures will be construed as restricting the powers of the Authorities to take measures within their jurisdiction in respect of any matter to which the relevant instruments relate.

3.3 The Authorities will seek to avoid inspecting ships which have been inspected by any of the other Authorities, under this Memorandum, within the previous six months, unless they have clear grounds for inspection. The frequency of inspection does not apply to the ships exhibiting “clear grounds” for inspection in which case the Authorities will seek satisfaction whenever they deem this appropriate.

3.4 Inspections will be carried out by properly qualified persons authorized for that purpose by the Authority concerned and acting under its responsibility, having regard in particular to a future annex laying out the minimum criteria for port state control officers.

When the required professional expertise cannot be provided by the Authority, the port state control officer of that Authority may be assisted by any person with the
required expertise. Port state control officers and the persons assisting them will have
no commercial interest, either in the port of inspection or in the ships inspected, nor
will port state control officers be employed by or undertake work on behalf on non-
governmental organizations which issue statutory and classification certificates or
which carry out the surveys necessary for the issue of those certificates to ships.
Each port state control officer will carry a personal document in the form of an
identity card issued by his Authority in accordance with the national legislation,
indicating that the port state control officer is authorized to carry out inspections.

3.5.1 Each Authority will endeavor to secure the rectification of all deficiencies detected.
On the condition that all possible efforts have been made to rectify deficiencies, other
than those referred to in 3.6.1, the ship may be allowed to proceed to a port where any
such deficiencies can be rectified.

3.5.2 In exceptional circumstances where, as a result of the initial control and a more
detailed inspection, the overall condition of a ship and its equipment, also taking the
crew and its living and working conditions into account, is found to be sub-standard,
the Authority may suspend an inspection.
The suspension of the inspection may continue until the responsible parties have taken
the steps necessary to ensure that the ship complies with the requirements of the
relevant instruments.
Prior to suspending an inspection, the Authority must have recorded detainable
deficiencies in the areas set out in a future annex, as appropriate.
In cases where the ship is detained and an inspection is suspended, the Authority will
as soon as possible notify the responsible parties. The notification will include
information about the detention. Furthermore, it will state that the inspection is
suspended until the Authority has been informed that the ship complies with all
relevant requirements.

3.6.1 In the case of deficiencies which are clearly hazardous to safety, health or the
environment, the Authority will, except as provided in 3.7, ensure that the hazard is
removed before the ship is allowed to proceed to the Antarctic Treaty Area. For this
purpose appropriate action will be taken, which may include detention or a formal
prohibition of a ship to continue an operation due to established deficiencies which,
individually or together, would render the continued operation hazardous. A vessel
operator’s non-compliance with the provisions of Annex I of the Madrid Protocol
1991 shall be considered a hazard within the meaning of this section.

3.6.2 In the case of a detention, the Authority will immediately notify the flag state
administration in writing, which includes the report of inspection specified in an
annex to this Memorandum. Likewise, the recognized organization which has issued
the relevant certificates on behalf of the flag state administration will be notified
where appropriate. The parties above will also be notified in writing of the release of
detention.

3.6.3 Where the ground for a detention is the result of accidental damage suffered on the
ship’s voyage to a port or during cargo operations, no detention order will be issued,
provided that:
• due account has been given to the requirements contained in Regulation
 I/11(c) of SOLAS 74 regarding notification of the flag state administration, the
 nominated surveyor or the recognized organization responsible for issuing the
 relevant certificate;
• prior to entering a port or immediately after a damage has occurred, the master
 or shipowner has submitted to the port state control authority details on the
circumstances of the accident and the damage suffered and information about
the required notification of the flag state administration;
• appropriate remedial action, to the satisfaction of the Authority, is being taken
  by the ship; and
• the Authority has ensured, having been notified of the completion of the
  remedial action, that deficiencies which were clearly hazardous to safety,
  health or the environment have been rectified.

3.6.4 The following procedure is applicable in the absence of ISM certificates:
• Where the inspection reveals that the copy of the Document of Compliance or
  the Safety Management Certificate issued in accordance with the International
  Safety Management Code for the Safe Operation of Ships and for Pollution
  Prevention (ISM Code) are missing on board a vessel to which the ISM Code
  is applicable at the date of inspection, the Authority will ensure that the vessel
  is detained.
• Notwithstanding the absence of the documentation referred to immediately
  above, if the inspection finds no other deficiencies warranting detention the
  Authority may lift the detention order in order to avoid port congestion.
  Whenever such a decision is taken, the Authority will immediately inform all
  other Authorities thereof.
• The Authorities will take the measures necessary to ensure that all ships
  authorized to leave a port of their State under the circumstances referred to
  above will be refused access to any port within the states, the Authorities of
  which are signatories to the Memorandum, except in the situations referred to
  in 3.8.3, until the owner or operator of the vessel has demonstrated, to the
  satisfaction of the Authority in whose state detention was ordered, that the
  ship has valid certificates issued in accordance with the ISM Code.

3.7 Where deficiencies which caused a detention as referred to in 3.6.1 cannot be
remedied in the port of inspection, the Authority may allow the ship concerned to
proceed to the nearest appropriate repair yard available, as chosen by the master and
the Authority, provided that the conditions determined by the competent authority of
the flag state and agreed by the Authority are complied with. Such conditions, which
may include discharging of cargo and/or temporary repairs, will ensure that the ship
can proceed without risk to the safety and health of the passengers or crew, or risk to
other ships, or without being an unreasonable threat of harm to the marine
environment.
In such circumstances, the Authority will notify the competent authority of the region
state where the next port of call of the ship is situated, the parties mentioned in 3.6.2
and any other authority as appropriate. Notification to Authorities will be made in
accordance a future annex on exchange of messages by region states. The Authority
receiving such notification will inform the notifying Authority of action taken.

3.8.1 The Authorities will take measures to ensure that:
   a) ships referred to in 3.6.1 or 3.7 which proceed to sea without complying with
      the conditions by the Authority in the port of inspection; or
   b) ships referred to in 3.7 which refuse to comply with the applicable
      requirements of the relevant instruments by not calling into the indicated
      repair yard;
will be refused access to any port within the states, the Authorities of which are
signatories of the Memorandum, until the owner or operator has provided evidence to
the satisfaction of the Authority where the ship was found defective that the ship fully complies with all applicable requirements of the relevant instruments.

3.8.2 In the circumstances referred to in 3.8.1.a, the Authority where the ship was found defective will immediately alert all other Authorities.
In the circumstances referred to in 3.8.1.b, the Authority in whose State the repair yard lies will immediately alert all other Authorities.
Before denying entry, the Authority may request consultations with the flag state administration of the ship concerned.

3.8.3 Notwithstanding the provisions of 3.8.1, access to a specific port may be permitted by the relevant authority of that port state in the event of force majeure or overriding safety considerations, or to reduce or minimize the risk of pollution, provided that adequate measures to the satisfaction of the competent authority of such state have been implemented by the owner, the operator or the master of the ship to ensure safe entry.

3.9 The provisions of 3.6.2 and 3.7 are without prejudice to the requirements of relevant instruments or procedures established by international organizations concerning notification and reporting procedures relating to port state control.

3.10 The Authorities will ensure that, on the conclusion of an inspection, the master of the ship is provided with a document, in the form specified in a future annex, giving the results of the inspection and details of any action taken.

3.11 Should any inspection referred to in 3.1 confirm or reveal deficiencies in relation to the requirements of a relevant instrument warranting the detention of a ship, all costs relating to the inspections in any normal accounting period will be covered by the shipowner or the operator or by his representative in the port state.
All costs relating to inspections carried out by the Authority under the provisions of 3.8.1 will be charged to the owner or the operator of the ship.
The detention will not be lifted until full payment has been made or a sufficient guarantee has been given for the reimbursement of the costs.

3.12 The owner or the operator of a ship or his representative in the state concerned will have a right of appeal against a detention decision taken by the Authority of that state. An appeal will not cause the detention to be suspended. The Authority will properly inform the master of a ship of the right of appeal.

3.13 Each Authority will, as a minimum, publish quarterly information concerning ships detained during the previous 3-month period and which have been detained more than once during the past 24 months. The information published will include the following:
- name of the ship;
- name of the shipowner or the operator of the ship;
- IMO number;
- flag state
- classification society, where relevant, and, if applicable, any other party which has issued certificates to such ship in accordance with the relevant instruments;
- reason for detention;
- port and date of detention.

3.14 When exercising control under the Memorandum, the Authorities will make all possible efforts to avoid unduly detaining or delaying a ship. Nothing in the Memorandum affects rights created by provisions of relevant instruments relating to
compensation for undue detention or delay. In any instance of alleged undue detention or delay the burden of proof lies with the owner or operator of the ship.

3.15 Authorities are permitted to assess reasonable fees and charges against vessels subject to inspection under this Memorandum. Such fees and charges must be uniform and may not discriminate, in form or fact, between vessels of different nationalities.

CHAPTER 5: SECTION 4 PROVISION OF INFORMATION AND TECHNICAL ASSISTANCE

Each Authority will report on its inspections under the Memorandum and their results, in accordance with the procedures specified in a future annex. Authorities shall cooperate with each other in offering technical assistance in all forms to facilitate the accomplishment of the purposes of this Agreement.

CHAPTER 6: SECTION 5 OPERATIONAL VIOLATIONS

The Authorities will, upon the request of another Authority, endeavor to secure evidence relating to suspected violations of the requirements on operational matters of Rule 10 of COLREG 72 and MARPOL 73/78. In case of suspected violations involving the discharge of harmful substances, an Authority will, upon the request of another Authority, visit in port the ship suspected of such a violation in order to obtain information and where appropriate to take a sample of any alleged pollutant. Procedures for investigations into contravention of discharge provisions are listed in a future annex.

CHAPTER 7: SECTION 6 ORGANIZATION

6.1 A Committee will be established, composed of a representative of each of the Authorities. An observer from the International Maritime Organization will be invited to participate in the work of the Committee.

6.2 The Committee will meet once a year and at such other times as it may decide.

6.3 The Committee will:
- carry out the specific tasks assigned to it under the Memorandum;
- promote by all means necessary, including seminars for port state control officers, the harmonization of procedures and practices relating to the inspection, rectification, detention and the application of 2.3;
• develop and review guidelines and procedures for carrying out inspections under the Memorandum;
• develop and review procedures for the exchange of information;
• coordinate programs of technical assistance and aid to Authorities under this Memorandum;
• harmonize the fees and charges assessed, pursuant to section 3.15;
• keep under review other matters relating to the operation and the effectiveness of the Memorandum.

6.4 A secretariat for the Committee will be established.
6.5 The secretariat, acting under the guidance of the Committee and within the limits of the resources made available to it, will:
• prepare meetings, circulate papers and provide such assistance as may be required to enable the Committee to carry out its functions;
• facilitate the exchange of information, carry out the procedures outlined in a future annex and prepare reports as may be necessary for the purposes of the Memorandum;
• carry out such other work as may be necessary to ensure the effective operation of the Memorandum.

CHAPTER 8: SECTION 7 AMENDMENTS

7.1 Any Authority may propose amendments to the Memorandum.
7.2 In the case of proposed amendments to sections of the Memorandum, the following procedure will apply:
• the proposed amendment will be submitted through the secretariat for consideration by the Committee;
• amendments will be adopted by a two-thirds majority of the representatives of the Authorities present and voting in the Committee. If so adopted, an amendment will be communicated by the secretariat to the Authorities for acceptance;
• an amendment will be deemed to have been accepted either at the end of a period of six months after adoption by the representatives of the Authorities in the Committee or at the end of any different period determined unanimously by the representatives of the Authorities in the Committee at the time of adoption, unless within the relevant period an objection is communicated to the secretariat by an Authority;
• an amendment will take effect 60 days after it has been accepted or at the end of any different period unanimously by the representatives of the Authorities in the Committee.

7.3 In the case of proposed amendments to annexes of the Memorandum the following procedure will apply:
• the proposed amendment will be submitted through the secretariat for consideration by the Authorities;
• the amendment will be deemed to have been accepted at the end of a period of three months from the date on which it has been communicated by the
secretariat unless an Authority requests in writing that the amendment should be considered by the Committee. In the latter case, the procedure specified in 7.2 will apply;
• the amendment will take effect 60 days after it has been accepted or at the end of any different period determined unanimously by the Authorities.

CHAPTER 9: SECTION 8

8.1 The Memorandum is without prejudice to rights and obligations under any international agreement, nor shall it be construed in any way in contradiction with the provisions of the Antarctic Treaty of 1959.

8.2 Any Maritime Authority, which complies with the criteria specified in a future annex laying out the qualitative criteria for observance of the Memorandum, may adhere to the Memorandum with the consent of all Authorities participating in the Memorandum.

8.3 The Memorandum will take effect on ___ day of ______________.
The International Maritime Organization “turned to port State control as a second line of defence because of doubts about the effectiveness of some flag States.” Fernando Plaza, The Future for Flag State Implementation and Port State Control, in CENTER FOR OCEANS LAW AND POLICY: CURRENT MARITIME ISSUES AND THE INTERNATIONAL MARITIME ORGANIZATION 199, 201 (Myron H. Nordquist & John Norton Moore eds., 1999) (Plaza is the Senior Deputy Director, Maritime Safety Division, International Maritime Organization.).

As was pointed out at the debate at ATCM XXV, the primary reason that vessel owners turn to open registries is to avoid onerous -- and costly -- manning regulations. But this is not the only sort of regulatory avoidance at work here, and it is clearly documented that vessel owners may also be seeking relief from particular taxation regimes, and environmental rules.

“Ship ownership has declined in the traditional maritime nations, most significantly in favour of the Far East and Southeast Asia. Six or seven of the ten leading flags are now open registers, and the open register fleet now totals about half of the world’s tonnage.” Id.

“Some of the open registers, and indeed certain national flags, have grown quickly – perhaps too quickly to permit their administrations to cope.” Id. In addition, “[a] number of national flags figure prominently in the upper reaches of the lists of port State control detentions, insurance loss and casualty figures and the like. But from the international industry’s point of view it is principally the open registers that are at issue.” Id. at 196.

“Many vessels today never come anywhere near their home port of registry.” Id. at 193.

“Towards the end of the 1970s, flagging out by European and North American ship owners in favour of flags of convenience increased considerably. The inability of these flag state authorities to establish competent administration undoubtedly contributed to the increase in the number of substandard ships. Other reasons also exist, but these mainly explain other recent attempts by IMO member states to combat the problem.” Mario Valenzuela, Enforcing Rules against Vessel-Source Degradation of the Marine Environment: Coastal, Flag and Port State Jurisdiction, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 485, 497 (Davor Vidas & Willy Østreng eds., 1999).

“[F]aced with the unpalatable fact that there continued to be a rogue element in shipping which was bringing down both the reputation and the commercial reward of the majority, effective port State control was welcomed from the state [by the shipping industry].” Horrocks, supra note 2, at 194.

“As experience in the high seas has indicated, flag state jurisdiction or jurisdiction based solely on nationality has not been the most reliable approach for ensuring the implementation of agreed rules and standards. Inspection and prosecution carried out in such context have had very limited effect. This situation has led to the emergence of alternative approaches that have the possibility of ensuring a more effective implementation of rules and regimes, first in terms of coastal state jurisdiction and more recently in terms of port state jurisdiction.” Francisco Orrego Vicuña, Port State Jurisdiction in Antarctica: A New Approach to Inspection, Control and Enforcement, in IMPLEMENTING THE ENVIRONMENTAL PROTECTION REGIME FOR THE ANTARCTIC 45, 49 (Davor Vidas ed., 2000).


“It is precisely because exclusive flag state enforcement in the high seas as envisaged under traditional international law has become a rather limited and many times unreliable mechanism for the adequate observance of the legal order that other alternatives began to emerge.” Orrego, supra note 8 at 57. “The most significant development in this respect in contemporary international law relates to the concept of port state jurisdiction, which allows for a different kind of jurisdictional authority to intervene in matters concerning the marine environment and fisheries. A limited role for port state intervention had been envisaged under the MARPOL 73/78 Convention regarding inspection of certificates and the reporting and prosecution of certain violations. In order to allow for investigation and prosecution of violations which took place in the high seas and other areas, this approach was considerably enlarged in Article 218 of the UN Convention on the Law of the Seas (LOS Convention) in respect of marine pollution.” Id. at 58.

“There are those who would argue that we will never restore the traditional role of the flag State in a global sense and that we should look to port State control not just as a complement to the flag State, but as a substitute for it. There are others who argue that the whole concept of ‘flag’ is nonsense, that the link between the flag and the nationality of the operator has become so tenuous as to become meaningless, and that a ship’s IMO identification number is enough.” Horrocks, supra note 2, at 197-98. “[P]ort State control was never intended
to be, and must never become, a substitute for the responsibilities of the flag State. It is merely a failsafe, stepping into the breach if the owner has failed to take his obligations seriously and the flag State (or those authorised to act on its behalf) has failed to exercise its proper control functions.”  Id. at 195.

xii Germany emphasized that port state controls complement, but are secondary to, the ship inspections and controls carried out by the flag state. German working paper for XXI ATCM, April 1997.

xiii This was acknowledged by the Germans in their working paper for the XXI ATCM, April 1997.

xiv “If this system worked properly, port state control would be quite unnecessary. However, ships sometimes go for long periods without calling at their home ports. During these intervals, things can go wrong, and it must be acknowledged that not every flag state is equally strict when it comes to regular inspections of the vessels that fly its flag.” Dutch working paper for the XX ATCM, March 1996.

xv Initially, the “flag state must establish whether a vessel sailing under its flag complies with international requirements. If so, the flag state issues a certificate for the vessel, which is, in theory, recognised by other states.” Dutch working paper for XX ATCM, March 1996.

xvi “By voluntarily seeking admission to the port of a foreign State, a vessel impliedly accepts the jurisdiction of that State even in respect of matters arising outside its EEZ. States historically exercised restraint, but in recent years the need to extend jurisdiction, especially for the purpose of ensuring the safety of shipping and the prevention of marine pollution, has been recognised and developed, in particular by the Paris Memorandum of Understanding (MOU) on Port State Control of 1982. Under that the participant States undertake to maintain an effective system to ensure that vessels visiting their ports comply with SOLAS and MARPOL, irrespective of whether the flag State of the ship concerned is party to those conventions.” British working paper for XXI ATCM, April 1997.

xvii Port state control is “an essential instrument over and above certification and control by the flag state. PSC inspections are restricted in the first instance to checks on the certificates issued by the flag state. More thorough inspections to follow only if the port state finds clear grounds [emphasis added] for conducting them.” Dutch working paper for XX ATCM, March 1996.

xviii The Netherlands defined clear grounds as: “the ship, its equipment or its crew does not correspond substantially with the requirements of the relevant conventions or… the master or crew members are not familiar with essential shipboard procedures relating to the safety of ships or the prevention of pollution.” Dutch working paper for XX ATCM, March 1996.

xix “Although flag States are responsible for ensuring that ships flying their flags meet IMO standards, conventions such as SOLAS, the STCW and the MARPOL 73/78 Conventions, give governments the right to inspect ships visiting their ports to ensure that they meet convention requirements. Envisaged very much as a back-up to action by the flag state, port state control (PSC) has become much more important in the last few years – partly because flag state implementation alone has proved unable to detect and eliminate substandard shipping.” Plaza, supra note 1, at 204-05.

xx “What is the alternative?…[T]here are still some flag State Administrations which do not comply with their international obligations…[W]ithout effective regional PSC [(Port State Control)], the standards of international shipping would certainly decline. It is becoming increasingly apparent that PSC is essential to an determined attempt towards compliance with safety and environmental standards, and any cost involved has to be accepted. The cost of doing nothing, in human terms, would be so high as to be intolerable.” Plaza, supra note 1, at 207-08.

xvi (1) “Ships holding a certificate issued under Article 16 or Article 17 [issue of certificate by another government] are subject, when in the ports of other Contracting Governments, to control by officers duly authorized by such Governments. Contracting Governments shall ensure that such control is exercised as far as is reasonable and practicable with a view to verifying that there is on board a valid certificate under the present Convention. If there is a valid International Load Line Certificate (1966) on board the ship, such control shall be limited to the purpose of determining that: (a) the ship is not loaded beyond the limits allowed by the certificate; (b) the position of the load line of the ship corresponds with the certificate; and (c) the ship has not been so materially altered in respect to the matters set out in sub-paragraphs (a) and (b) of paragraph (3) of Article 19 that the ship is manifestly unfit to proceed to sea without danger to human life. If there is a valid International Load Line Exemption Certificate on board, such control shall be limited to the purpose of determining that any conditions stipulated in that certificate are complied with. (2) If such control is exercised under sub-paragraph (c) of paragraph (1) of this Article, it shall only be exercised in so far as may be necessary to ensure that the ship shall not sail until it can proceed to sea without danger to the passenger or the crew. (3) In the event of the control provided for in this Article giving rise to intervention of any kind, the officer carrying out the control shall immediately inform in writing the Consul or the diplomatic representative of the State whose flag the ship is flying of this decision and of all the circumstances in which intervention was deemed to be necessary.” International Convention on Load Lines, Article 21, 1966.
State on the basis of such an investigation may, subject to section 7, be suspended at the request of the coastal

shall be transmitted upon request to the flag State or to the coastal State. Any proceedings instituted by the port

terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation

zone of the State instituting the proceedings. (3) When a vessel is voluntarily within a port or an off-shore

termination of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to

violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic

requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the

applicable international rules and standards established through the competent international organization of

investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that

of a non-Party than is given to ships entitled to fly the flag of a Party.” International Convention on Standards

delayed it shall be entitled to compensation for any loss or damage resulting therefrom. (5) This Article shall be

taking such steps as will ensure that the ship shall not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment. That Party may, however, grant such a ship permission to leave the port or off-shore terminal for the purpose of proceeding to the nearest appropriate repair yard available.” International Convention on the Prevention of Pollution from

xii “Every ship holding a certificate issued under Regulation 12 or Regulation 13 [Issue of Certificate by another Government] of this Chapter is subject in the ports of the other Contracting Governments to control by officers duly authorized by such Governments in so far as this control is directed towards verifying that there is on board a valid certificate. Such certificate shall be accepted unless there are clear grounds [emphasis added] for believing that the conditions of the ship or of its equipment does not correspond substantially with the particulars of that certificate. In that case, the officer carrying out the control shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without danger to the passengers or the crew. In the event of this control giving rise to the intervention of any kind, the officer carrying out the control shall inform the Consul of the country in which the ship is registered in writing forthwith of all the circumstances in which intervention was deemed to be necessary, and the facts shall be reported to the Organization.” International Convention for the Safety of Life at Sea, Chapter I, Regulation 19, 1974.

xiii “A ship required to hold a certificate in accordance with the provisions of the Regulations is subject while in the ports or off-shore terminals under the jurisdiction of a Party to inspection by officers duly authorized by that Party. Any such inspection shall be limited to verifying that there is on board a valid certificate, unless there are clear grounds [emphasis added] for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate. In that case, or if the ship does not carry a valid certificate, the Party carrying out the inspection shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment. That Party may, however, grant such a ship permission to leave the port or off-shore terminal for the purpose of proceeding to the nearest appropriate repair yard available.” International Convention on the Prevention of Pollution from Ships, Article 5(2), 1973/78.

(1) “Ships, except those excluded by Article III, are subject, while in the ports of a Party, to control by officers duly authorized by that Party to verify that all seafarers on board who are required to be certificated by the Convention are so certificated or hold an appropriate dispensation. Such certificates shall be accepted unless there are clear grounds for believing that a certificate has been fraudulently obtained or that the holder of a certificate is not the person to whom that certificate was originally issued. (2) In the event that any deficiencies are found under paragraph (1) or under the procedures specified in Regulation I/4, ‘Control Procedures’, the officer carrying out the control shall forthwith inform, in writing, the master of the ship and the Consul or, in his absence, the nearest diplomatic representative or the maritime authority of the State whose flag the ship is entitled to fly, so that appropriate action may be taken. Such notification shall specify the details of the deficiencies found and the grounds on which the Party determines that these deficiencies pose a danger to persons, property or the environment. (3) In exercising the control under paragraph (1) if, taking into account the size and type of the ship and the length and nature of the voyage, the deficiencies referred to in paragraph (3) of the Regulation I/4 are not corrected and it is determined that this fact poses a danger to persons, property or the environment, the Party carrying out the control shall take steps to ensure that the ship will not sail unless and until these requirements are met to the extent that the danger has been removed. The facts concerning the action taken shall be reported promptly to the Secretary-General. (4) When exercising control under this Article, all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is so detained or delayed it shall be entitled to compensation for any loss or damage resulting therefrom. (5) This Article shall be applied as may be necessary to ensure that no more favourable treatment is given to ships entitled to fly the flag of a non-Party than is given to ships entitled to fly the flag of a Party.” International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, Article X, 1978.

xv (1) “When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization of general diplomatic conference. (2) No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings. (3) When a vessel is voluntarily within a port or an off-shore terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag State for investigation of such a violation, irrespective of where the violation occurred. (4) The records of the investigation carried out by a port State pursuant to this article shall be transmitted upon request to the flag State or to the coastal State. Any proceedings instituted by the port State on the basis of such an investigation may, subject to section 7, be suspended at the request of the coastal
State when the violation has occurred within its internal waters, territorial sea or exclusive economic zone. The evidence and records of the case, together with any bond or other financial security posted with the authorities of the port State shall in that event be transmitted to the coastal State. Such transmission shall preclude the continuation of proceedings in the port State.” United Nations Law of the Sea Convention, Article 218, 1982.

\[xvii\] “Subject to section 7, States which, upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their offshore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and, upon removal of the causes of the violation, shall permit the vessel to continue immediately.” United Nations Law of the Sea Convention, Article 219, 1982.

\[xviii\] (1)(c) “Without prejudice to applicable international rules and standards relating to the seaworthiness of vessels, the release of a vessel may, whenever it would present an unreasonable threat of damage to the marine environment, be refused or made conditional upon proceeding to the nearest appropriate repair yard. Where release has been refused or made conditional, the flag State of the vessel must be promptly notified, and may seek release of the vessel in accordance with Part XV.” United Nations Law of the Sea Convention, Article 26(1)(c), 1982.

\[xix\] Of interest, the United Kingdom noted of Articles 219 and 226(1)(c) that they “empower the State to prevent a foreign vessel from leaving if it is in violation of applicable international rules and standards relating to seaworthiness and thereby threatens the marine environment (or imposes unreasonable demands on rescue services) [emphasis added].” British working paper for XXI ATCM, April 1997.

\[xx\] United Nations Law of the Sea Convention, Article 218, para. 1, 1982. Article 218 thus “gives port states express power to investigate and prosecute discharge violations wherever they have taken place beyond their national jurisdiction. This power covers both high seas offences and violations within the coastal zones of another state, although in this case the port state may only act in response to a request from the state concerned.” Valenzuela, supra note 6, at 496. This article “empowers a State to take legal proceedings…even if the discharge [violation] occurs outside that State’s territorial sea and Exclusive Economic Zone.” British working paper for XXI ATCM, April 1997. “There is no evidence that port states have resorted to this extended method for enforcement; port state practice remains firmly within the more limited regime of control provided for by MARPOL and other IMO regulatory conventions, preferring to have recourse to new powers of port state control made possible by substantial amendments through the extended use of the ‘tacit agreement procedure’ within IMO.” Valenzuela, supra note 6, at 496.

\[xxi\] In 1982, fourteen countries initially signed the Paris MOU. Since then, the number as expanded to nineteen administrations. www.parismou.org/atwork/cover.html.

\[xxii\] “[A] global port State control network, composed of several regional agreements, is emerging. This poses new challenges to the IMO. The need for harmonization of procedures, a common code of conduct, interchange of information and coordination among the various regimes (which ostensibly vary as to their capabilities and human resources), is fully recognized, and the next steps to be taken are in this direction.” Plaza, supra note 1, at 209.

\[xxiii\] “IMO has welcomed and supported all the above initiatives and…are now looking forward to taking this process a little further by encouraging these regional systems to apply effectively the spirit and the letter of the Memorandum, and to formalize the transfer of information from one to the other. In the past, substandard operators whose activities in one region were curtailed by the introduction of PSC Agreements simply moved their ships into other areas where the enforcement of port State control was less enthusiastic. These areas are now becoming fewer and hopefully, within a few years they will have disappeared altogether – leaving the substandard ship with nowhere to hide.” Id. at 207.

\[xxiv\] “We [IMO] must concentrate our efforts on making port State control more effective.” Id. “The IMO has developed a global project to provide assistance to emerging PSC agreements in order to facilitate the harmonization of procedures, inter-regional co-operation, and exchange of information between the various agreements.” Id. at 206.

\[xxv\] “As to the important (though supplementary to that of the flag States) role of port States in the universal effort to eradicate substandard ships, IMO’s policy is aimed at putting in place a global PSC system. Consisting of regional systems provided in the respective memoranda of understanding or agreements, which, once operational and effective, deprive substandard ships of any area of operation, six of these systems on port State regional agreements are now in operation.” Id. at 205. “Following the success of the Paris MOU, in operation since 1982, and after the IMO Secretary-General initiative in proposing A.682(17) regional co-operation on port State control in 1991, IMO has been proactive in preparing the seed agreements for effective co-operation in this field. These agreements are aimed at achieving global coverage through port State control regional inputs.” Id.
vessels are therefore not bound by the terms of the Protocol because, as a general rule of international law, only those vessels which are either non-Treaty parties or non-Consultative Parties which have yet to accede to the Protocol. These vessels are often not registered in the territory of Treaty Parties (i.e. Bahamian-registered cruise ships).” Id. at 100.  

This is just a start. The growth of port State control worldwide has even more exciting implications. As more and more statistics and data are gathered and exchanged by the different PSC Secretariats and communicated to the IMO, we [IMO] will dramatically increase our knowledge on substandard shipping.” Id. at 72.


However, “not all tour operators are members of IAATO and thus bound by its by-laws and guidelines….” Id. at 86.

“[P]ractical compliance by tour operators and their clients with the standards of tourism regulation has to date largely been achieved….Crucial to this whole approach has been the attitude and influence of IAATO which represents the great majority of tour operators active in the Antarctic. Two factors have undoubtedly influenced IAATO policy: Firstly, the realisation that, faced with the possibilities of draconian measures on tourism (i.e., an Annex to the Protocol), it was preferable to introduce self-regulation than have regulations enforced on the industry. Secondly, there was the desire, prompted by an environmentally knowledgeable and critical tourism clientele, to maintain high environmental standards.” Id. at 83.

“[S]elf-regulation is…threatened, as is the important pole-position that IAATO has maintained to date in the Antarctic tourism industry. The first signs of this were in 1996 when the 400 tourist-per-vessel limit set by IAATO bylaws were broached.” Id. at 84. “If IAATO is to maintain its well-deserved reputation as a responsible organisation and ensure that self-regulation remains effective, a mechanism will need to be found to bring the operators of these large vessels within the regulatory regime. This may pose the greatest challenge to IAATO in the immediate future.” Id. at 85.

Many tourists are not nationals of Treaty Parties and “the vessels and aircraft in which they travel to Antarctica are often not registered in the territory of Treaty Parties (i.e. Bahamian-registered cruise ships).” British working paper for XXI ATCM, April 1997. “A significant proportion (around 40 per cent in 1995-96 [in 1995-96 season, almost 50% of tourist vessels visiting Antarctica were flagged with non-Treaty Parties (British working paper for XXI ATCM, April 1997)]) of tourist vessels operating in the Antarctic are flagged with states which are either non-Treaty parties or non-Consultative Parties which have yet to accede to the Protocol. These vessels are therefore not bound by the terms of the Protocol because, as a general rule of international law, only
states that are party to a treaty are held under its provisions.” Richardson, supra note 20, at 82. This number has only escalated in the subsequent years.

xiv There is a lack of effective jurisdiction “especially over expeditions mounted by, or from, States which are not parties to the Protocol.” British working paper for XXI ATCM, April 1997. Antarctica has a unique juridical status because territorial jurisdiction, “the normal mechanism[ ] of control” does not apply. Richardson, supra note 20, at 81.

xv “The greatest cause for concern relates to the non-Consultative Parties that have a major tourist interest in the Antarctic. For example, the Canadian registered company ‘Marine Expeditions’ has a dominant share of the Antarctic ship-borne tourism industry.” Richardson, supra note 20, at 85.

xvi Article IX(1) “Representatives of the Contracting Parties named in the preamble to the present Treaty shall meet at the City of Canberra within two months after the date of entry into force of the Treaty, and thereafter at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding: (e) questions relating to the exercise of jurisdiction in Antarctica.” Antarctic Treaty, Article IX, 1959.

xvii [Antarctic] Treaty did not resolve the question of jurisdiction over nationals of Treaty Parties who are not observers or exchanged scientists; nor did it address the question of jurisdiction over third-State nationals. Article IX(1)(e) envisaged the questions relating to the exercise of jurisdiction in Antarctica would become the subject of Measures, but none have been adopted by the Consultative Parties.” British working paper for XXI ATCM, April 1997.

xviii “Since the departure ports are situated outside the Antarctic area, it is doubtful whether action can be taken under the Antarctic Treaty against a foreign ship on its way to or from Antarctica which does not comply with the requirements of annex IV to the Environmental Protocol.” British working paper for XX ATCM, March 1996.

xix Annex IV does not establish a means for regulation. German working paper for XXI ATCM, April 1997. “[P]ort authorities cannot stop ships which do not comply with non-MARPOL requirements from leaving port on the basis of the Environmental Protocol [Annex IV].” Dutch working paper for XX ATCM, March 1996. The British noted that “comprehensive implementation of the provisions of the Protocol…faces a major obstacle,” namely, the problem where an offence is committed in breach of legislation to implement regulatory requirements, such as those in the Madrid Protocol. British working paper for XXI ATCM, April 1997.

xx Article 3(4) “Activities undertaken in the Antarctic Treaty area pursuant to scientific research programmes, tourism [sic] and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required in accordance with Article VII(5) of the Antarctic Treaty, including associated logistic support activities, shall: (a) take place in a manner consistent with the principles in this Article; and (b) be modified, suspended or cancelled if they result in or threaten to result in impacts upon the Antarctic environment or dependent associated ecosystems inconsistent with those principles.” Madrid Protocol on Environmental Protection to the Antarctic Treaty, 1991.

xxi Article 8(2) “Each party shall ensure that the assessment procedures set out in Annex I are applied in the planning processes leading to decisions about any activities undertaken in the Antarctic Treaty area pursuant to scientific research programmes, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII(5) of the Antarctic Treaty, including associated logistic support activities.” Madrid Protocol on Environmental Protection to the Antarctic Treaty, 1991.

xxii Article 15(1) “In order to respond to environmental emergencies in the Antarctic Treaty Area, each Party agrees to (a) provide for prompt and effective response action to such emergencies which might arise in the performance of scientific research programmes, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII(5) of the Antarctic Treaty, including associated logistic support activities.” Madrid Protocol 1991.

xxiii This is the German position. German working paper for XXI ATCM, April 1997. “[B]ecause of the atypical nature of Antarctic tourism with its major involvement by third parties and the peculiarities of jurisdiction in Antarctica, the ability of the Protocol adequately to regulate tourism was not universally accepted by Treaty parties. Fundamental differences existed over the interpretation and application of the Protocol regarding the extent to which it addressed tourism and over the need for additional, tougher regulations in the form of a further mandatory Annex to the Protocol. [new paragraph] That ambiguity prevails is apparent also from the various domestic legislation introduced so far to enact the Protocol. For example, some parties to the Protocol have incorporated the notion of port state control to provide for regulation of those expeditions (including tourist cruises) departing to Antarctica from their territory irrespective of whether the vessel is registered with that
party or whether the expedition members are nationals of that party and thus subject to national jurisdiction.” Richardson, supra note 20, at 76. The British remarked in their working paper for the XXI ATCM: “A Treaty Party can exercise jurisdiction over expeditions organized in its territory even if the organiser or the members of the expedition [read: tourist cruises, yachts, etc.] are not nationals of that Party…” British working paper for XXI ATCM, April 1997. “The Twenty-first Antarctic Treaty Consultative Meeting made note of a statement by the United Kingdom to the effect that the United Kingdom, New Zealand and to some extent Finland have established port state jurisdiction in their domestic legislation in respect of Antarctica.” Orrego, supra note 8, at 63-64.

iv “Each Contracting Party shall, at the time when the present Treaty enters into force for it, inform the other Contracting Parties, and thereafter shall give them notice in advance, of (a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory” Antarctic Treaty, Article VII(5), 1959. 

v “This has been done so that national legislation relates not only to their nationals but also to expeditions – irrespective of nationality – which are organised in, or depart to Antarctica from, that state’s territory.” Richardson, supra note 20, at 89. “It is usual practice for most expeditions, especially tourist cruises, to use as their final place of departure for Antarctica one of the ports adjacent to the continent (the so-called ‘gateway ports’).” British working paper for XXI ATCM, April 1997.

vi (1) “Each Party shall take measures within its competence, including the adoption of laws and regulations, administrative actions and enforcement measures, to ensure compliance with this Protocol.” Madrid Protocol on Environmental Protection to the Antarctic Treaty, Article 13, 1991.

vii Article 13 “requires the Parties to exert appropriate efforts to see that no-one engages in activity contrary to the Protocol; and ATCPs are required to draw the attention of other States to any activity undertaken by them or their nationals which affect the implementation of the Protocol.” British working paper for XXI ATCM, April 1997. “State practice developing under the Protocol confirms this perspective.” Orrego, supra note 8, at 62. See Antarctic Treaty (Environmental Protocol) Act, 1980; United Kingdom Antarctic Act, 1994; and New Zealand (Environmental Protection) Act, 1994. Orrego, supra note 8, at 63.

viii (2) “Each Party at whose port ships depart en route to or arrive from the Antarctic Treaty area undertakes to ensure that as soon as practicable adequate facilities are provided for the reception of all sludge, dirty ballast, tank washing water, other oily residues and mixtures, and garbage from ships, without causing undue delay, and according to the needs of the ships using them.” Madrid Protocol on Environmental Protection to the Antarctic Treaty, Annex IV, Article 9, 1991.

ix “This commitment, which entails some form of port state intervention, also relates to the ports of other parties, including those adjacent to the Antarctic Treaty area.” Orrego, supra note 8, at 64.

x “With respect to those parties which are also Parties to Marpol 73/78, nothing in this Annex shall derogate from the specific rights and obligations thereunder.” Madrid Protocol on Environmental Protection to the Antarctic Treaty, Annex IV, Article 14, 1991.

xi “In respect of MARPOL 73/78 parties, this means that the more stringent provisions of this instrument shall prevail….Although Article 14 refers only to MARPOL 73/78 parties, the implications of the MARPOL Convention are potentially more comprehensive since its principles have become generally agreed rules and standards under the 1982 LOS Convention [UN Law of the Sea Convention], which can reach a larger number of states and eventually could also qualify as a rule of customary international law. Such standards could therefore eventually apply to all parties to the Protocol irrespective of their participation in MARPOL 73/78. Moreover, these same principles could also eventually apply to vessels of third states operating in the Antarctic and which are bound by the general rules of the LOS Convention.” Orrego, supra note 8, at 65.

xii “[S]pecial areas” listed in MARPOL and its annexes now include the Mediterranean, the Black Sea, the Baltic Sea, the Red Sea, and the Persian Gulf. “The Gulf of Aden and the Antarctic have subsequently been added to the list. Most recently, Northwest Atlantic waters have become in 1998 another special area.” Valenzuela, supra note 6, at 489. “As MARPOL lists Antarctic area as a special area in Annexes I, II and IV, port state controls (e.g. by way of inspection of the Oil Record Book or the Cargo Record Book) may be used to ascertain whether the special requirements laid down by MARPOL regarding navigation of the Antarctic area are being observed.” German working paper for XXI ATCM, April 1997. Germany went on to note that “[s]uch controls can only be carried out by port states which are States Parties to the MARPOL Convention and its Annexes. This is currently not the case for all States Parties to the Antarctic Treaty.” German working paper for XXI ATCM, April 1997.

xiii (2)(a) “Subject to the provisions of Regulation 11 of this Annex, any discharge into the sea of oil or oily mixture from any oil tanker and any ship of 400 tons gross tonnage and above other than an oil tanker shall be prohibited, while in a special area…. (3)(a) Subject to the provisions of Regulation 11 of this Annex, any discharge into the sea of oil or oily mixture from a ship of less than 400 tons gross tonnage, other than an oil
tanker, shall be prohibited while in a special area, except when the oil content of the effluent without dilution does not exceed 15 parts per million or alternatively when all of the following conditions are satisfied: (i) the ships is proceeding en route; (ii) the oil content of the effluent is less than 100 parts per million; and (iii) the discharge is made as far as practicable from the land, but in no case less than 12 nautical miles from the nearest land.” MARPOL Annex I, Chapter I, Regulation 10, 1973/78.

Breaches of Annex IV are also breaches of MARPOL 73/78 and could be subject to measures by the port state which is a party to MARPOL 73/78. In the case of other breaches, the ship could be inspected but not prevented from departing. Possible alternatives that were suggested for port state jurisdiction beyond the strict confines of MARPOL-related situations were voluntary arrangements, notification of the captain of any defects found, and information to Antarctic observers and to the Consultative Meeting.” Vicuña, supra note 8, at 65.

Annex IV to the Protocol, which is concerned with the prevention of marine pollution, has been generally considered a weaker instrument than MARPOL 73/78. While under MARPOL 73/78 both the flag state and port state exercise specific controls in terms of certificates, inspection and other measures, these mechanisms appear to be somewhat looser, or nonexistent, under Annex IV. The broad sovereign immunity exclusion under Article II of this Annex has compounded the problem since most of the ships operating in the Antarctic are warships, naval auxiliary or other ships owned or operated by a state; the fact that each party shall take into account the importance of protecting the Antarctic environment in this context is certainly not a sufficient guarantee.” Id. at 64.

Germany noted this point. German working paper for XXI ATCM, April 1997.

The problem is not helped by the fact that the nations which continue to exert influence in IMO tend to be the traditional maritime nations whose share of the world fleet – and thus whose share of the financial contribution – is eroding. However carefully these nations present their arguments, there is always a touch of ‘maritime imperialism’ about it – of the haves telling the have-nots how to run their business.” Horrocks, supra note 2, at 195-96.

Article VII(5) “Each Contracting Party shall, at the time when the present Treaty enters into force for it, inform the other Contracting Parties, and thereafter shall give them notice in advance, of (a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory; (b) all stations in Antarctica occupied by its nationals; and (c) any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article I of the present Treaty.” Antarctic Treaty, 1959.

“[I]t is a generally accepted principle of international law that states are under no legal obligation to grant merchant vessels access to their ports, although a presumption of being ports-opened may operate in certain circumstances.” Orrego, supra note 8, at 59.

Australia’s proposals for state responsibility for damages sustained in Antarctica (widely panned): “should responsibility lie with the party in whose territory the expedition was organised or with the party from whose territory it departed to Antarctica, with the party under which the vessel was flagged or the party whose nationals were involved in the expedition, or with the parties whose stations were to be visited in Antarctica?” Richardson, supra note 20, at 86.

“It is particularly interesting to note that the negotiations concerning liability under the Protocol have considered contributions to be made to the Fund ‘on the basis of taxes levied on the departure for Antarctica’. …Whatever the implications of this approach for the financing of the Fund, the fact remains that the practice involves an exercise of a kind of port state jurisdiction for the purpose of collection. The question of the port of departure has also been raised in the context of the identification of the liable entity.” Orrego, supra note 8, at 63.

Regulation through port state jurisdiction…if more widely adopted – and especially if the standards to be employed at departure ports could be harmonised between Consultative Parties – could be an effective measure. It would ensure the maintenance of high standards of environmental care in the Antarctic. A major advantage of such jurisdictional control is that it could be extended quite appropriately to vessels and aircraft departing to Antarctica, including those of non-Contracting Parties.” Richardson, supra note 20, at 90.


“The ATS has long been linked to major global conventions, which in turn have introduced the concept of port state jurisdiction. Consequently, this concept actually became, or potentially became, applicable to the Antarctic or activities there. This is particularly the case of the IMO conventions, MARPOL 73/78 and above...
all SOLAS, as well as of the 1982 LOS Convention. Under the later Convention, port state jurisdiction for the purposes of marine pollution and preservation of the environment also became available to the Antarctic, of course limited by the extent to which the Antarctic Treaty Consultative Parties were also parties to these global instruments.” Orrego, supra note 8, at 61.

It follows that the general framework of international law is broad enough in respect of port state jurisdiction to allow major developments under the ATS, or under its principal conventions, such as CCAMLR. This conclusion may even be reached independently from conventional developments of the law, since this type of jurisdiction appears also increasingly present in terms of customary international law after it departed from the limited ruling of the PCIJ in the Lotus case. It is worth noting that this approach has been present in historical practice under the Antarctic Treaty. In fact, when Italy, before acceding to the Treaty, organised a private expedition in 1976, the Argentine authorities denied the ship permission to sail from the port of Buenos Aires, a situation which prompted a discussion about the rules of international law, the Antarctic Treaty and the meaning of its Article X.” Id. Article X reads: “Each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty.” Antarctic Treaty, 1959.

“The introduction of port state jurisdiction in respect of the Antarctic would not only close the existing jurisdictional loophole in the ATS but it would also redress the jurisdictional balance that has been upset in the evolution of the port regime taking place. Port state jurisdiction would be exercised in the ports of any party to the Protocol or the respective arrangements, but above all by those countries whose ports are closer to the Antarctic and used for departure or arrival, the so called ‘gateway ports’. While gateway port countries, which are mainly located in the Southern Hemisphere, might incur financial commitments resulting from these obligations, or some form of liability for failure to comply with the inspection obligations, these situations might be solved through the various forms of assistance and cooperation established in the regimes established for this purpose. [new paragraph] Irrespective of their position as claimants or non-claimants, these countries would acquire a new role as port states. The fact that most gateway port countries are claimant countries does not in any way alter the added effectiveness that port state jurisdiction would bring into the ATS.” Orrego, supra note 8, at 68.

The Dutch made reference to a “memoranda of understanding” in the context of port state control in their working paper for XX ATCM, March 1996.

In view of the fact that it is a sine qua non condition to be Party to a Convention in order to be able to enforce it on a visiting foreign ship, the effectiveness of port State control in a particular region will be minimal until such time as the majority of the participating countries have ratified and are able to effectively implement the relevant instruments contained in the proposed draft agreement of co-operation.” Plaza, supra note 1, at 208.

As noted by the IMO: “While regional differences must be taken into consideration, it is important to standardize procedures as far as possible. Otherwise, ships are often faced with differing and, in certain cases, contradictory procedures as they sail from one region to another. [new paragraph] To assist in this process, IMO is developing a global strategy for PSC and, through the work of the FSI Sub-Committee, has incorporated in the procedures for port State control the professional profile, training and qualification requirements and general operating guidelines for PSC officers. In this way we hope to ensure that, while the systems may be regional, the standards applied will be universal. This will take time but we are prepared to wait.” Id.

“To this end it would be essential that the mechanism for enactment and implementation of port state jurisdiction be collectively defined within the ATS, since otherwise different standards and levels of stringency could be applied. This harmonisation of standards can be achieved within the framework of a joint regime. The distinction between the port of departure, mainly concerned with the inspection relating to personnel and expeditions, and port state jurisdiction, which relates to the inspection of the ship and its activities, may be appropriately introduced in this context. A kind of Regional Memorandum of Understanding for port state jurisdiction in the Antarctic might also be an adequate approach to this effect, under which special certificates of Antarctic worthiness may also be issued. As with many developments under the ATS, it could suffice to enact the port state jurisdiction and inspection regime by means of a resolution of an Antarctic Treaty Consultative Meeting.” Orrego, supra note 8, at 68-69.

Paris MOU, Section 3.1: “In fulfilling their commitments the Authorities will carry out inspections, which will consist of a visit on board a ship in order to check the certificates and documents as referred to in section 2 of Annex 1. Furthermore, the Authorities will satisfy themselves that the crew and the overall condition of the ship, including the engine room and accommodation and including hygienic conditions, meet generally accepted international rules and standards. In the absence of valid certificates or documents or if there are clear grounds for believing that the condition of the ship or of its equipment, or its crew does not substantially meet the requirements of a relevant instrument, a more detailed inspection will be carried out, as referred to in section 5
of Annex I, or, as appropriate, an expanded inspection will be carried out as referred to in section 8 of Annex I.”
Paris MOU, Section 3.1, 1982.

“In the interests of the coordination and exchange of information…. which are essential to effective enforcement, a revised checklist should take more account of current methods of inspecting ships in gateway ports….This could draw on a checklist based on MARPOL 73/78. to which the gateway ports could add an extra list of items with regard to which annex IV to the Environmental Protocol goes further than MARPOL, or – in ports in states which are not party to MARPOL or have not implemented all MARPOL’s annexes – with regard to which the Environmental Protocol goes further than the items on which they inspect ships pursuant to MARPOL. At any rate, such a checklist should not extend beyond items included in the Environmental Protocol.” Dutch working paper for XX ATCM, March 1996.

Section 3.5, Paris MOU: “Inspections will be carried out by properly qualified persons authorized for that person by the Authority concerned and acting under its responsibility…. Paris MOU, Section 3.5, 1982.

Section 3.4, Paris MOU: “The Authorities will seek to avoid inspecting ships which have been inspected by any of the other Authorities within the previous six months, unless they have clear grounds for inspection.” Paris MOU, Section 3.4, 1982. Through an up-to-date, port authorities will be able to track recent ship inspections effectively.

The Paris MOU sets out a detailed list of “clear grounds” for inspection in Annex I, Section 4.

Current problems with inspection to be avoided: “Although targeting is now well developed – by flag, by ship type, by age and by a number of other factors – it must be constantly improved. For instance, there is still not enough positive targeting, (e.g. by ‘rewarding’ ships that are known to be good by increasing the period between inspections). There are still far too many inconsistencies on the part of inspectors, even within the same region. There is still substantial incompatibility between the different port State control authorities. There is a persistent belief that inspectors too often select a good ship for inspection because good ships create much less hassle than poorly-run ships. While the conscientious operator has nothing to fear from port State control, it still carries with it too many irritations.” Horrocks, supra note 2, at 194.

Paris MOU, Section 3.15: “When exercising control under the Memorandum, the Authorities will make all possible efforts to avoid unduly detaining or delaying a ship.” Paris MOU, Section 3.15, 1982.

Paris MOU, Section 3.7.1: “In the case of deficiencies which are clearly hazardous to safety, health or the environment, the Authority will, except as provided in 3.8, ensure that the hazard is removed before the ship is allowed to proceed to sea. For this purpose will take appropriate action, which may include detention or a formal prohibition of a ship to continue an operation due to established deficiencies which, individually or together, would render the continued operation hazardous.” Paris MOU, Section 3.7.1, 1982.

Section 3.7.2: “In the case of a detention, the Authority will immediately notify the flag State Administration in writing, which includes the report of inspection specified in Annex 3, Likewise, the recognized organization which has issued the relevant certificates on behalf of the flag State Administration will be notified, where appropriate. The parties above will also be notified in writing of the release of detention.” Paris MOU, Section 3.7.2, 1982.

Chile’s enforcement of international maritime conventions and domestic standards on the inspection of ships that operate in the Antarctica, specifically under MARPOL, is “[n]ot applicable to warships or to ancillary naval units; neither is it applicable to ships which, even though the property of a State or at its service, are rendering temporary government services of a non commercial nature. Notwithstanding the above, each Party must ensure that the appropriate measures are taken so that ships that are owned by, or at the service of the State, act in accordance with the Convention’s purposes and goals.” Chilean working paper for April 1996, interpreting MARPOL 1973/78.

Paris MOU, Section 1.4: “Each Authority will consult, cooperate and exchange information with the other Authorities in order to further the aims of the Memorandum.” Paris MOU, Section 1.4, 1982. “The European port State control arrangement, or Paris MOU, as well as the US Coast Guard’s Vessel Boarding Program, now have substantial data banks and have become increasingly focused. Other regional agreements, such as the Tokyo MOU for the Asia-Pacific area, are not far behind.” Horrocks, supra note 2, at 194. For example, the Paris MOU “set up and developed an extensive data base – the SIRENAC system located at St. Malo, France, which contains a variety of vessel history and other tracking information relating to previous deficiencies, rectification and detentions.” Barston, supra note 57, at 89.

“There needs to be sound coordination and exchange of information among the international observers responsible for supervising compliance with annex IV to the Environmental Protocol in the Antarctic ports and the inspectors responsible for port state control checks in the gateway ports if the Antarctic marine environment is to be given effective protection against pollution by shipping on its way to and from Antarctica.” Dutch working paper for XX ATCM, March 1996.
Paris MOU, Section 2.4: “[T]he Authorities will ensure that no more favourable treatment is given to ships of non-Parties or to ships below convention size.” Paris MOU, Section 2.4, 1982.

“With respect to the ships of non-Parties to the Convention, Parties shall apply the requirements of the present Convention as may be necessary to ensure that no more favourable treatment is given to such ships.” MARPOL, Article 5(4), 1973/78.

“Chile…carries out inspections of vessels from States not parties to the MARPOL 73/78 Convention or to the Antarctic Treaty, so as to ensure non preferential treatment of these vessels.” Chilean working paper for XX ATCM, April 1996. Chile exercises port state jurisdiction not only under MARPOL 73/78, SOLAS and related national legislation, but also in respect of vessels from states not parties to MARPOL 73/78 or to the Antarctic Treaty ‘so as to ensure non preferential treatment of these vessels’.” Orrego, supra note 8, at 66 (referring to the Chilean working paper for XX ATCM, April 1996).