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Banning of substandard vessels

Dennis L. Bryant

Customary international law, as evidenced in the United Nations Convention on the Law of the Sea (UNCLOS) provides for reasonable freedom of navigation. With regard to foreign vessels wishing to enter the ports or territorial sea of a nation, UNCLOS provides that the coastal nation may adopt laws and regulations, in conformity with international law, relating to (among other things) safety of navigation and prevention of pollution. These laws and regulations, though, shall not apply to the design, construction, manning, or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

Port states have very clear rights (indeed, obligations) under various international conventions to exercise control measures, up to and including detention, with respect to any foreign vessel voluntarily in its waters the condition of which does not correspond substantially with the particulars of its certificates. The rules are less clear regarding the right of the port state to keep out (i.e., ban) from its waters a foreign vessel that wishes to make entry.

Various port states have adopted protocols for examining visiting foreign vessels to ensure compliance with applicable domestic and international requirements. These protocols are commonly referred to as port state control (PSC) programs. The most highly developed of the various national PSC programs is administered by the US Coast Guard. Many regional groupings have also been organized by port states to coordinate PSC programs. The two leading such regional groupings are the Paris Memorandum of Understanding (MOU) on Port State Control and the Tokyo MOU. Others exist in Latin America, the Black Sea, and the Arabian Gulf regions.

Paris MOU

The Paris MOU includes specific provisions for access refusal measures. Vessels subject to refusal of access consist of: (1) gas and chemical tankers; (2) bulk carriers; (3) oil tankers; and (4) passenger ships. Port state control authorities in a member state are to ensure that a ship in any of these categories is refused access if the ship either: (a) flies the flag of a state appearing on the Paris MOU black list and has been detained more than twice during the preceding 24 months in a Paris MOU port; or (b) flies the flag of a state described as "very high risk" or "high risk" by the Paris MOU and has been detained more than once during the preceding 36 months in

a Paris MOU port. In order for the access refusal order to be lifted, the vessel owner or operator must address a formal request to the authority of the state that imposed the order. The request must be accompanied by a certificate from the flag state administration showing that the vessel fully conforms to applicable provisions of the international conventions. The request must also be accompanied, where appropriate, by a certificate from the classification society showing that the vessel conforms to stipulated class standards. The access refusal order may only be lifted following a re-inspection of the vessel at an agreed port by inspectors of the authority that imposed the order and if evidence is provided to the satisfaction of the authority that the vessel fully complies with applicable international requirements. The re-inspection shall consist of an expanded inspection as provided for in the MOU. All costs of the expanded inspection are to be borne by the owner or operator.

USCG

The US Coast Guard recently issued a Policy Letter on the banning of substandard foreign vessels. Such banning has been ordered intermittently in the past, but a more formal protocol has now been established. A foreign vessel that has been detained three times within the previous twelve months will be subjected to an International Safety Management (ISM) Code expanded examination if it is determined that failure to effectively implement the vessel's Safety Management System (SMS) is a contributing factor for the substandard conditions that led to the detentions. If the vessel fails its expanded examination following three detentions within the previous twelve months, a Letter of Denial will be sent to the vessel's Owner and Company informing them that the vessel will be denied entry into any port or place in the United States unless specific actions are completed to the satisfaction of the US Coast Guard. The vessel's flag administration and appropriate Memorandum of Understanding (MOU) secretariats will be notified of this action. These requirements will not be impacted regardless of whether the vessel is sold, placed under new management, reflagged, or renamed. Upon satisfactory review of all the submitted information required by the Letter of Denial, the Coast Guard will issue a Letter of Acceptance. Upon the vessel's return to a port or place in the United States, it will be subjected to a Priority I Port State Control (PSC) Examination prior to entry. Only after satisfactory completion of the expanded examination will a previously banned vessel be allowed entry into a port or place of the United States.

Previous instances where a vessel has been banned from entry into a port or place of the United States have generally been based on the order of a federal court following conviction of the owner or operator of a maritime-related criminal offense, such as falsification of an oil record book (ORB). Coast Guard records show that, as of September 1, 2010, three foreign vessels are currently banned from operating in the United States: (1) *Cosette* (IMO 6617025), a ro-ro cargo ship operating under the Bolivian flag; (2) *Wilmina* (IMO 9151840), a crude oil tanker operating under the Norwegian International Ship Register; and (3) *Island Intrepid* (IMO 7033161), a container ship operating under the flag of St. Vincent and the Grenadines. This list is subject to change without prior notice.

Other port states

Examination has not revealed any other port states or regional port state control organizations that have established formal protocols for the banning of substandard vessels. All of those states or organizations, though, have taken measures to increase the level of inspections to which previously detained vessels are subjected upon re-entry into one of their ports.

Summary

Measures for the banning of substandard vessels are a natural progression in the evolution of port state control programs. When accompanied by adequate safeguards to ensure that the measures are targeted at vessels truly being operated in a manner that places the crew, cargo, ship, and the environment at an unacceptable risk, these steps will provide reputable owners and operators a level playing field in their commercial endeavors.