Making a case

for the

Voluntary IMO Member State Audit Scheme

By

Mr. L. D. Barchue, Sr.*
Head, Member State Audit and Internal Oversight Section,
Office of the Secretary-General
International Maritime Organization

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Introduction

1 This paper will look at some of the contemporary issues associated with the regulatory and enforcement paradigm of international shipping and will broach the concept of principal actors in the shipping industry, their roles and the issue of accountability, which may have precipitated the need for the development of an audit regime for maritime administrations. It would also discuss one of the principles of the Voluntary IMO Member State Audit Scheme, which has often been used by governments to protect their interests, but can now be averred as one of the pillars that would encourage Member States to volunteer for audits. The positive impact of a successful Audit Scheme could have on the implementation and enforcement of shipping regulations would be highlighted.

What may have precipitated the consensus development of the Audit Scheme?

2 The regulatory and enforcement paradigm of international shipping has a number of actors. The actors and their roles are as follows:

.1 IMO, as a specialized agency of the UN, has the responsibility to develop universal technical safety, security and pollution prevention standards relating to ships and shipping activities;

.2 GOVERNMENTS have the duty to implement and enforce these standards;

.3 RECOGNIZED ORGANIZATIONS have a duty to be impartial and exercise due diligence in carrying out statutory tasks assigned to them by governments;

.4 SHIPPING COMPANIES are responsible for the consistent application of the same standards to individual ships; and

.5 SHIPBOARD PERSONNEL (seafarers) have the task of putting into operation the various safety, security and anti-pollution measures applicable to the ship.

3 It is obvious from the mix of actors that regulating and enforcing shipping standards could become disjointed if the actors were to act independently. Fortunately, this does not always happen; but when it does, the result has been loss of life, environmental damage and economic loss, amongst others. It is precisely to eliminate independent regulatory action by individual actors with the associated consequences, as well as to continuously develop mechanisms to retain confidence amongst nation States that international shipping is safe, secure and environmental sound, that the IMO was formed and has been most successful.

4 Notwithstanding this success, the prevailing situation and modus operandi of the actors in shipping do not provide the level playing field to unequivocally measure the effectiveness of the regulatory and enforcement regime. To highlight this point, one needs to briefly examine the state of play of the principal actors.

5 Under various treaties, governments/flag States are ultimately responsible for ensuring compliance with the provisions of such treaties. However, some of these same treaties provide unrestrained powers to flag States to delegate statutory work. They also provide additional latitude for States to determine their own shipping standards through the phrase “to the satisfaction of the Administration” and equivalency and exemption provisions. As a result, national laws to implement international shipping treaties vary considerably and this leads to:
1. partial or full delegation of statutory work to non-State entities;
2. different degrees of implementation and enforcement;
3. ship registration becoming an attractive and legitimate business in the absence of State accountability; and
4. some shipowners enjoying considerable economic advantage due to the lack of uniform flag State enforcement.

6. With respect to recognized organizations (ROs), they are granted authority to act on behalf of flag States and, as such, they form part of the State’s enforcement mechanism. A number of ROs also have other business interests with ships entitled to fly the flag of the State which has delegated authority to such ROs. This leads to the intensification of commercial pressures on the ROs concerned, which sometimes create conflict between the recognized organizations’ role as certifier and inspector on behalf of the flag State and their commercial relationship with shipowner/clients. For those ROs that are also classification societies, the ultimate sanction for non-compliance by a ship with the classification rules is the loss of class. In the absence of universally accepted transfer of class agreements, there is no mechanism to ensure that the ‘gaining’ society will take responsibility and remedial action with respect to any outstanding conditions/items left at the time the ship is transferred.

7. The inclusion of resolution A.739(18) – “Guidelines for the authorization of organizations acting on behalf of the Administration” and resolution A.789(19) – “Specifications on the survey and certification functions of recognized organizations acting on behalf of the Administration” as mandatory requirements in regulation 1 of SOLAS Chapter XI-1: Special measures to enhance maritime safety has not fully produced the desired result. Parties to SOLAS periodically provide information to the IMO on the authorization granted to recognized organizations based on the aforementioned regulation; but there is no independent mechanism to verify that the provisions of both resolutions are unscrupulously adhered to by Parties and ROs. As a consequence, there is no clear universal understanding of the responsibilities of authorized ROs, the competence of such organizations and their representatives and, their accountability to the international community.

8. On the other side of the divide are shipowners, companies and ship managers. The change from “traditional” shipowner to the syndicate or “asset player”, the increasing use of bareboat or demise charter, time charter, single voyage or spot charter and single ship companies have made it more difficult to establish the identity of the party ultimately responsible for the ship. Whilst the introduction of the ISM Code has consolidated ownership and management of a ship into the definition of the “company”, there is still some latitude in the regulatory and enforcement regime which allows the principal actors (governments, recognized organizations and companies) to remain fully unaccountable for their actions.

9. To address the issue of accountability, a new approach had to be considered. Whilst the ISM Code had reasonably addressed the issue with respect to companies, and the 1995 amendments to the 1978 STCW Convention had addressed the training and shipboard operational competencies of seafarers, as well as accountability amongst Parties to that Convention through the “White List” process, a universal approach had to be developed to review governments role in the implementation and enforcement of international shipping treaties. Thus, the Voluntary IMO Member State Audit Scheme could serve as the vehicle to establish and improve accountability amongst Member States of IMO with respect to their treaty(s) obligations. This
new approach could also foster accountability amongst the various actors in the shipping industry as governments would begin to demand equal accountability of ROs, companies and seafarers.

**Development of the Voluntary IMO Member State Audit Scheme**

10 The IMO Council, at its eighty-eighth session in June 2002, considered and approved, in principle, a proposal by nineteen Member States for the development of an IMO Model Audit Scheme, which drew on the model of the ICAO Universal Safety Oversight Audit Programme.

11 That decision set in train an unparalleled level of co-operation amongst Member States for the development of the Voluntary IMO Member State Audit Scheme. Within that train was the approval, in 2003, by the Maritime Safety Committee (MSC) and the Marine Environment Protection Committee (MEPC) of the proposal by the Sub-Committee on Flag State Implementation (FSI) to develop a Code for the implementation of mandatory IMO Instruments. It was subsequently agreed that the Code would be developed in such a manner that it would also serve as the audit standard under the Audit Scheme.

12 The Council, at its eighty-ninth session in November 2002, requested the Maritime Safety Committee, the Marine Environment Protection Committee and the Technical Co-operation Committee (TCC) to consider the desirability of holding a joint working group (JWG) to develop the documentation for the Audit Scheme. Having agreed to the request of the Council, the JWG was established and it met for the first time during MSC 77 in June 2003. The outcome of that first meeting of the JWG was a clear strategy, with timeframe, for the concurrent development of the documentation for the Audit Scheme and the Code for the implementation of mandatory IMO instruments – the former by the JWG and the latter by the FSI Sub-Committee.

13 The process would be driven directly by the Council, which for the first time, had taken an initiative that would transform the character of monitoring the implementation of IMO instruments. The established sectorial approach, characterized by each Committee having exclusivity to monitor compliance within the context of its assigned responsibility under the respective treaty, would not apply to the Audit Scheme. Whilst it is an accepted fact that the principal IMO safety and environmental protection treaties do not assign to the Organization and its respective bodies defined monitoring or overt assessment role of how Parties to such treaties execute their responsibilities, the 1995 amendment to the 1978 STCW Convention had indeed established and demonstrated that Parties to IMO treaties were prepared to accept a degree of peer review. Furthermore, the increasing use of port State control records and casualty statistics as criterion for measuring the performance of flag States assisted in forging the need for the development of an IMO methodology for monitoring the level of compliance by its Member States to their treaty obligations.

14 With the foregoing in view, the Council, in June 2003, took a number of important decisions, amongst which were the following:

1. approval of the objectives of the Scheme and that sovereignty and universality; consistency, fairness, objectivity and timeliness; transparency and disclosure; quality and inclusiveness; and continual improvement should be the principles of the Scheme;

2. endorsement of the JWG’s decision that the scope should be comprised of sections on IMO instruments; obligations and responsibilities of a Member State;

3. endorsement of the safety-and security-related areas and environmentally-critical areas for the Scheme;
endorsement of the capacity-building and technical co-operation aspects of the Scheme;

agreement, in principle, that the Secretary-General should be assigned certain tasks relating to the functioning of the Scheme; and

approval of a draft Assembly resolution on the Voluntary IMO Member State Audit Scheme, which was later adopted by the Assembly in November 2003 as resolution A.946(23). The resolution endorsed the decisions and work of the Council and formally established the Audit Scheme.

As is evident from the decisions taken, establishing the fundamentals for the development and future implementation of the Audit Scheme were carried out expeditiously by the Member States. Thus, the work required to bring the Scheme to fruition had to be undertaken with similar vigour, with a view to the completion of the Framework and Procedures documentation for adoption by the Assembly in November 2005. The work was carried out through two correspondence groups, one on the Code, which reported to the FSI Sub-Committee, with subsequent approval of the Code by the MSC and MEPC, and the second, the correspondence group on the development of the Framework and Procedures for the Audit Scheme, reporting to the JWG, which in turn reported to the MSC, MEPC, TCC and the Council.

It may appear to be a complicated process for developing something that was unanimously agreed by the Member States. However, the scope of the Scheme include, in addition to safety and environmentally-critical areas, the provision of technical assistance for the implementation of the Scheme and post audit activities. Therefore, it was necessary to include the various bodies of IMO with direct responsibility for the relevant areas covered by the Scheme within the development process.

Another aspect of the development of the documentation of the Audit Scheme was the decision of the Council in June of 2004 for pilot audit projects to be undertaken by interested Member States. The outcome of the pilot audit projects would inform the work of the JWG. Six Member States took up the offer to conduct pilot audits using the draft Framework and Procedures as were developed by the JWG in 2004. The six Member States formed two separate pilot audit groups, with one group comprising of Cyprus, the Marshall Island and the United Kingdom and the other of France, the Islamic Republic of Iran and Singapore.

The results of the pilot audits were most encouraging as both groups found the draft documentation, as had been developed at the time, to be workable, effective and consistent with the principles of the Scheme. The Member States concerned reported that they had learned from the exercise and had benefited from the findings of the pilot audits. Several recommendations were made for improving the draft documentation and the JWG, which held its final meeting in March 2005, took the recommendations on board in the finalization of the document.

What was also evident from the comments made by those that participated in the pilot audit projects was that the agreed principles for the Scheme, if accepted and respected by all, provided a sound basis for establishing confidence between the auditee and auditors. In respecting the principles of the Scheme by all concerned, any apprehension that may exist in the implementation of the Scheme would be easily removed and professional and unbiased audits would proceed, with the outcome being equally respected and agreed.

Work on the development of the documentation for the Audit Scheme by the JWG and that of the FSI Sub-Committee on the Code have been completed. The Council considered and
approved the final draft of the Framework and Procedures for the Scheme in June 2005, whilst
the MSC and MEPC have approved the draft Code for the implementation of mandatory IMO
instruments. The Framework and Procedures, along with the Code, would be considered for
adoption by the 24th regular session of the Assembly in November 2005.

Implementing the Audit Scheme

21 The way forward for the Audit Scheme presents many challenges and again it would
require the continued commitment and willingness of Member States to deliver their share of
responsibilities. A thorough look at the documentation for the Scheme would lead one to think
of a daunting task ahead, mired with complexities, extensive procedures and not least both
human and financial resource implications. These issues, which include amongst others,
nomination of suitably qualified auditors; training of such auditors in the documentation for the
Scheme; Member States volunteering for audits; selection and composition of individual audit
teams, taking into account the specificity of the Member State (i.e. language and/or interpretation
requirements, the extent of the maritime activities to be audited); and financing of the audit visit
are, of themselves, time-consuming and possible sources of bottlenecks that could hinder the
smooth execution of the overall audit plan. However, proper planning would minimize the
impact of any bottlenecks that could possibly appear.

22 On the other hand, there is the question of whether sufficient Member States will
volunteer to be audited, given the well-known less than 50% response rate to the Self Assessment
Scheme, which is viewed by some as the precursor to the Audit Scheme. To assuage this
concern, a powerful argument can be made that the issue of “sovereignty”, which has protected
States from outside interference in their domestic affairs and has consistently been used in the
protection of the notion of “exclusive flag State jurisdiction on ships entitled to its flag”, may yet
be one of the powerful tools that would convince Member States to volunteer for audits.

23 In the context of the Audit Scheme, the Framework has, as one of the principles, the
generally accepted understanding of sovereignty. That principle is as follows:

“Sovereignty and universality

Audits should be constructive in approach and carried out on a voluntary basis, at the
request of the Member State to be audited, and in accordance with established procedures.
Nevertheless, the benefits of the scheme would be greater if all Member States of the
Organization volunteered themselves to be audited. Audits should therefore be organized
and conducted in such a way as to encourage Member States to submit to audit. All
Member States will benefit from positive and constructively conducted audits.”

This statement is in recognition that a Member State cannot be forced to submit to audit, nor can
the audit be conducted in such a manner that would usurp the national laws and procedures.
Rather, a co-operative approach has to be taken with a view to achieving the desire outcome.

24 From an esoteric point of view (maritime affairs), sovereignty can be seen and argued
from many different perspectives other than the well-known arguments referred to in the
preceding paragraphs. Sovereignty is the shared acceptance amongst nation States that, within a
defined geographical boundary, the people therein have constituted and accepted a legal and social
framework that will govern their internal behaviour and security, as well as their external
interaction with other nation States. This “gentlemen agreement” has provided the guarantee that
the rights and privileges of the people of a State will receive reciprocal acceptance and treatment
by the peoples of other States. This may sound like a classic definition of what is the norm;
however, in the context of maritime activities, particularly those involving the extension of such sovereignty to ships, there is a second part.

25 The extension of sovereignty to a ship entitled to fly the flag of State is largely guaranteed through international treaties. Parties to such treaties accept, *ipso facto*, that the other party is conforming to the agreed rules of play. The treaties referred to are primarily those adopted through the IMO relating to international shipping. The famous clause contained in a number of such treaties, which refers to “no more favourable treatment for non-Party ships” provides sufficient latitude for intervention on a non-Party ship when such ship is within a State’s defined and accepted geographical boundary. This is an accepted fact and ships have been denied trade entry rights to ports or have been subjected to thorough port State control intervention if the flag State is not a Party to one of the relevant treaties.

26 On the other hand, the assertion of sovereign rights by flag States to ships entitled to fly their flag in dealings amongst States that are Party to various treaties is a diminishing notion. One needs only to look at the trend in port State control interventions, legal recourse by coastal and other States relating to alleged pollution from ships, and interdiction agreements on the high seas of ships suspected of conveying illegal cargo or activities. Notwithstanding this trend, the issue of a ship being the sovereign territory of the flag State has not been totally removed and still command some degree of respect amongst Parties to IMO treaties.

27 In the context of compliance monitoring, coastal/port States may not continue to accept that the foreign sovereign entity (the ship) can enter the sovereign jurisdiction of another State, with the ship enjoying the protection of its sovereignty provided for under various treaties, whilst its flag State remains unaccountable on its compliance with obligations attendant to the treaties concerned. It is this other aspect of sovereignty and the increasing trend of intervention by coastal and port States that could provide additional impetus for Member States to volunteer for audit.

28 The need for a recognized mechanism to constructively assess Member States compliance with their obligations can not be over emphasised. Such an assessment, as envisaged under the Audit Scheme, could provide a basis for maintaining the status quo of mutual acceptance and recognition of compliance based on the successful implementation of the Audit Scheme by all Member States. This could stem any further erosion of the notion of the ship as the sovereign territory of the flag State, even within the territory of another State. It would restore a certain degree of surety that the ship entitled to fly the flag of a Party to the relevant treaties should first be given the benefit of the doubt as being in compliance with the relevant standards.

29 In the context of the Audit Scheme, how coastal States meet their obligations under the various treaties would also become transparent and could promote further the safety of navigation in coastal waters and the protection of the marine environment, whilst at the same time it could increase local commitment to the provision of search and rescue services for both domestic and international users of the sea.

30 With respect to port States, there could be more judicious exercise of their rights granted under international treaties, which would be commensurate with their responsibilities to both the ship, its crew and the associated flag State. Best practices in port State control could be readily accepted and those port State control activities that are below par could also be curtailed.

**What could be some of the other results of the Audit Scheme?**

31 Governments:
.1 improved and full reporting to IMO on the implementation treaty obligations;
.2 better investigations of casualties and port state control detention;
.3 more rigorous delegation of authority to recognized organizations;
.4 better trained and properly certificated seafarers;
.5 better communication between flag and port States;
.6 acceptance of the need to improve performance;
.7 closer monitoring and accountability by companies (shipowners); and
.8 greater awareness of the need to establish measures to protect coastal and marine resources.

32 Recognized organizations:
.1 better accountability to governments;
.2 more contribution and participation in the technical rule making process;
.3 more research and innovation in design concepts; and
.4 more decisive action in dealing with deficiencies identified during port State control and statutory surveys.

Conclusion

33 Whilst this paper has used one of the principles of the Scheme for advancing the argument for Member States volunteering for audits, all of the stated principles could equally be used to support the need for the Scheme. In this respect, on the principle of universality, it could be argued that the Scheme does not differentiate between Member States and that all Member States could benefit from audits. As have been repeatedly mentioned by the Secretary-General of IMO, the Audit Scheme should be one that, “rather than causing embarassment to those to be audited by exposing their weaknesses, would instead bring both sides closer together - the one helping the other in pursuit of the common goals of enhanced safety and environmental protection”. It is this singularity of purpose that would buttress a sucessful Audit Scheme and promote further the free movement of ships that are fully compliant with internationally agreed standards.