

# THE TOKYO MOU: ITS IMPLICATIONS FOR TAIWAN

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## 1 Introduction

Most global ocean areas are operated by several Memorandums of Understanding (MoUs) on port State control. These MoUs' legal and political bases are rooted in the port State control concepts developed within the maritime conventions. The port State control allows ports to inspect foreign vessels to verify that the vessel conditions, equipment, personnel, and operations comply with the requirements of applicable domestic and international regulations. Adopted in 1982, the Paris MoU on Port State Control in Europe and the North Atlantic Ocean (Paris MoU)<sup>1</sup> was the first mechanism developed at the regional level—to exercise this power to inspect foreign vessels. In December 1993, signed was the MoU on Port State Control in the Asia-Pacific Region (Tokyo MoU).<sup>2</sup> Since then, a group of Asia-Pacific regional ports have cooperated with each other to harmonize their respective practices. Located in a strategically important international shipping route, Taiwan's ports face various challenges from this regional development; particularly as Taiwan is not an International Maritime Organization (IMO) Member State and has no means to take part in Tokyo MoU in any form. Thus, Taiwan unilaterally claimed its compliance with relevant conventions and instruments via its domestic regulations and established its port State control system with foreign governmental assistance.

This paper commences with port State jurisdiction and port State control concepts established under the law of the sea. Next, investigated at the regional level are the Tokyo MoU concepts and practices. Given Taiwan's status under international law impedes its international law approaches, this paper investigates how Taiwan responds to such regional development. Conclusively, this paper intends to point out—based on previous regional experiences—what areas Taiwan can improve on to effectively enforce its port State control system.

## 2 Port State Jurisdiction and Port State Control under the LOS Convention

### 2.1 Port State Jurisdiction

Upon the most extensive and comprehensive codification activities under the UN aegis,<sup>3</sup> the UN Convention on the Law of the Sea (LOS Convention)<sup>4</sup>—in 1982—was adopted to act as the most fundamental legal instrument of maritime activity governance. As the “constitution for the oceans,” this Convention establishes maritime zones, including those under coastal State jurisdictions (internal waters, archipelagic waters, territorial seas, contiguous zones, exclusive economic zones and continental shelves), as well as those outside coastal State jurisdictions (high seas and the Area). These establishments show that the LOS Convention does not deal with port State jurisdiction in great depth.

More specifically, over the internal waters and territorial seas, the coastal States enjoy full jurisdiction with the major exception of foreign vessels' innocent passage rights.<sup>5</sup> In facing any conditions breaches involving access admission to the coastal States' internal waters and ports, the coastal States are granted the right to take the necessary prevention steps.<sup>6</sup> In contrast, over the high seas, it is the flag States' responsibility to carry out the duties to exercise the jurisdictions and controls over vessels flying their respective flags or registries.<sup>7</sup> These flag States' duties include enforcing applicable international rules and standards established via the competent international organization or general diplomatic conference, along with domestic laws and regulations adopted accordingly with the LOS Convention to prevent, reduce, and control vessel-source pollution.<sup>8</sup> To complement this often ineffective flag State jurisdiction, the port States are granted enforcement jurisdiction regarding discharges from vessels outside of their waters.<sup>9</sup> The jurisdiction granted to port States is largely established in

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<sup>1</sup> *Paris Memorandum of Understanding on Port State Control (Paris MoU)*, opened for signature 26 January 1982, 21 ILM 1 (entered into force 1 July 1982).

<sup>2</sup> *Memorandum of Understanding on Port State Control in the Asia-Pacific Region (Tokyo MoU)*, opened for signature 2 December 1993<<http://www.tokyo-mou.org/>> at 15 April 2016 (entered into force 1 April 1994).

<sup>3</sup> Tullio Treves, *United Nations Convention on the Law of the Sea* (2008) U.N. Audiovisual Library International Library <<http://legal.un.org/avl/ha/uncls/uncls.html>> at 15 April 2016.

<sup>4</sup> *United Nations Convention on the Law of the Sea (LOS Convention)*, 1982, 1833 UNTS 397.

<sup>5</sup> Article 17 of the LOS Convention.

<sup>6</sup> Article 25(2) of the LOS Convention.

<sup>7</sup> Article 94 of the LOS Convention.

<sup>8</sup> Article 217 of the LOS Convention.

<sup>9</sup> Article 218 of the LOS Convention; Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (3<sup>rd</sup> ed, 1999) 350.

connection with territorial jurisdiction, which is one of customary international law's jurisdiction principles.<sup>10</sup> Hence, prior to the LOS Convention's adoption, technical maritime conventions developed by the IMO already contained provisions to authorize port States the powers to inspect foreign vessels. Prominent examples include: the 1929 Safety of Life at Sea Convention (SOLAS Convention), Article 21 of the 1966 Load Lines Convention (LL Convention), Regulation 6 of the 1978 Convention for the Prevention of Pollution from Ships (MARPOL Convention), as well as the Article X of the 1978 Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention). Thus, the roles and functions of the port States have been gradually expanded.<sup>11</sup>

## 2.2 Port State Control and the MoU

Based on the above-mentioned developments, the port State control system as an innovative exercise was established for the port States to inspect foreign vessels to verify that the vessel condition, equipment, personnel, and operations complied with generally accepted international rules and standards.<sup>12</sup> As the close coordination between the regional ports can effectively enforce and harmonize the port State control system, concluded has been the regional Memorandum of Understanding (MoU) on Port State Control. This regional MoU serves as an inter-governmental cooperative mechanism to regularly and systematically control ships.

### 2.2.1 Paris MoU on Port State Control

In 1982, as the first regional mechanism to develop as this type, the Paris MoU on Port State Control in Europe and the north Atlantic Ocean was adopted by the fourteen Maritime Administrations of European port States to timely respond to "a strong political and public outcry in Europe for more stringent regulations" raised from the 1978 Amoco Cadiz oil spill incident.<sup>13</sup> As of April 2016, it has been expanded to twenty-seven Maritime Administrations, including Canada and Russia.<sup>14</sup> It is not only the earliest developed to, but also the most up-to-date in incorporating the requirements of international instruments in pursuits of maritime safety, vessel-source pollution prevention, along with the board vessels' living and working conditions.<sup>15</sup> Following this initiative and based on the established principles, many other regional MoUs have been concluded. All these existing regional MoUs cover most of the world oceans.<sup>16</sup> Within the scope of internationally instruments legally binding to the port States,<sup>17</sup> namely the IMO and ILO Conventions, these MoUs aim to eventually eliminate the operation of substandard vessels via a harmonized system and to ensure all vessels operating in their respective regions meet international rules and standards.<sup>18</sup>

### 2.2.2 Tokyo MoU on Port State Control

#### **Reflecting the Paris MoU**

Inspired by the Paris MoU, signed in 1993 was the Tokyo MoU on Port State Control in the Asia-Pacific Region. Over the past years, the Tokyo MoU was subject to several amendments. The newest ones were adopted on 5 and

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<sup>10</sup> Bevan Marten, 'Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation', in Henrik Ringbom (ed) *Jurisdiction over Ships, Post-UNCLOS Developments in the Law of the Sea* (2015) 136; Erik Molenaar, 'Port and Coastal States', in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, and Tim Stephens (eds) *The Oxford Handbook of the Law of the Sea* (2015) 287-291.

<sup>11</sup> Louis B. Sohn and John E. Noyes, *Cases and Materials on the Law of the Sea* (2004) 412. This also reflects to Bevan Marten's view that international conventions play an important role in shaping port State jurisdiction, but did not create it, and rarely limit it. See Bevan Marten, above n 10, 117.

<sup>12</sup> Louis B. Sohn and John E. Noyes, above n 11, 409.

<sup>13</sup> Paris MoU on Port State Control, *A Short History of the Paris MoU on PSC* (2016) Paris MoU on Port State Control < <https://www.parismou.org/about-us/history> > at 15 April 2016.

<sup>14</sup> Paris MoU on Port State Control, *Organisation* (2016) Paris MoU on Port State Control < <https://www.parismou.org/about-us/organisation> > at 15 April 2016.

<sup>15</sup> Louis B. Sohn and John E. Noyes, above n 11, 410.

<sup>16</sup> As of April 2016, there are nine arrangements as such, including the Paris MoU on Port State Control, the Tokyo MoU on Port State Control in the Asia-Pacific region, the Acuerdo de Viña del Mar MoU in Latin America, the MoU on Port State Control in the Caribbean region, the Abuja MoU on Port State Control in the West and Central African region, the MoU on Port State Control in the Black Sea region, the Malta MoU on Port State Control in the Mediterranean region, the MoU on Port State Control in the Indian Ocean region, and the Riyadh MoU on Port State Control in the Persian Gulf region. IMO, *Port State Control* (2016) IMO < [http://www.imo.org/blast/mainframe.asp?topic\\_id=159](http://www.imo.org/blast/mainframe.asp?topic_id=159) > at 15 April 2016.

<sup>17</sup> For instance, Section 2.4 of the Tokyo MoU states that "[e]ach Authority will apply those relevant instruments which are in force and are binding upon it. In the case of amendments to a relevant instrument each Authority will apply those amendments which are in force and which are binding upon it."

<sup>18</sup> John Fitzpatrick, *Measures to Enhance the Capability of a Flag State to Exercise Effective Control over a Fishing Vessel* (2000) FAO < <http://www.fao.org/docrep/005/y3274e/y3274e0d.htm> > at 15 April 2016.

6 October and enforced on 5 October 2015 and 1 December 2015 respectively.<sup>19</sup> With its full vitality, the Tokyo MoU has been considered as a proper regional regime of port State control; particularly as it has achieved the highest inspection number and rate amongst existing regional MoUs.<sup>20</sup> The Tokyo MoU is, in every other respect, identical to the Paris MoU and generally reflective of the Paris MoU's established framework.<sup>21</sup> For instance, like the Paris MoU's Section 2.4, the Tokyo MoUs adopted the "no more favourable treatment" under its Section 2.5 to ensure that no more favorable treatment will be granted to ships flying the flags of non-Tokyo-MoU-Members.

## **Members and Observers**

As of April 2016, the Tokyo MoU consists of twenty Member Authorities, one Cooperating Member Authorities and five Observers in the Asia-Pacific region. Amongst these, noteworthy is that both China and Hong Kong (China) are full MoU Members, while Macao (China) enjoys Observer status. Also, the United States Coast Guard (USCG) enjoys Observer status of the Tokyo MoU. This is even though the United States is not a party to any of the MoUs on Port State Control. For Observers, the MoU is not legally binding on them. However, they still apply the principles behind the MoU concepts. For instance, the USCG operates a program in which vessels operating within its jurisdiction are systemically inspected to verify their substantial compliance with applicable domestic plus international laws and regulations.

## **Legal Instruments Included**

According to the Tokyo MoU, this regional port State control system is currently operated on the basis of the following instruments that includes the: (1) International Convention on Load Lines, 1966; (2) Protocol of 1988 relating to the International Convention on Load Lines, 1966; (3) International Convention for the Safety of Life at Sea, 1974 as amended; (4) Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974; (5) Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974; (6) International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 relating thereto; (7) International Convention on Standards for Training, Certification and Watchkeeping for Seafarers, 1978, as amended; (8) Convention on the International Regulations for Preventing Collisions at Sea, 1972; (9) International Convention on Tonnage Measurement of Ships, 1969; (10) Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention No. 147); (11) Maritime Labor Convention, 2006 (MLC, 2006); (12) International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001; as well as (13) Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT 1992),<sup>22</sup> which is less than seventeen instruments incorporated in the newest Paris MoU amendment.<sup>23</sup>

Also, questions might be raised as to whether the Tokyo MoU Members are the contracting parties of these conventions and whether the participation of these Members in the Tokyo MoU makes the conventions which have not been signed and ratified legally binding on them. Take China as an example. Although China is a contracting party of the above-mentioned IMO conventions,<sup>24</sup> it has not ratified the ILO Convention No. 147 and just ratified the MLC on 12 November 2015 which will enter into force for China on 12 November 2016.<sup>25</sup> This fact shows that the Tokyo MoU would to a certain degree indirectly make the conventions binding on the MoU Members which have not signed or ratified them. For this, the Tokyo MoU provides a special provision regarding the conventions adopted by the ILO. The implementations of the ILO Convention No. 147 and MLC will not require any alternations to structure or facilities involving accommodation for ships whose keels were laid down before 1 April 1994 and 20 August 2013 respectively.<sup>26</sup> This arrangement seems to reduce the reluctance of the Tokyo MoU Members to accept the MoU contents, as the Tokyo MoU Members may not fully ratify the IMO and ILO conventions incorporated into the Tokyo MoU.

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<sup>19</sup> Tokyo MoU, *Memorandum of Understanding* (2016) Tokyo MoU <[http://www.tokyo-mou.org/organization/memorandum\\_of\\_understanding.php](http://www.tokyo-mou.org/organization/memorandum_of_understanding.php)> at 15 April 2016.

<sup>20</sup> Haijiang Yang, *Jurisdiction of the Coast State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2006) 106.

<sup>21</sup> G. P. Pamborides, *International Shipping Law: Legislation and Enforcement* (1999) 74.

<sup>22</sup> Section 2.1 of the Tokyo MoU.

<sup>23</sup> Section 2.1 of the Paris MoU.

<sup>24</sup> IMO, *Status of Conventions* (2016) IMO <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/status-x.xls>> at 15 April 2016.

<sup>25</sup> ILO, *Ratifications for China* (1996-2012) ILO

<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:103404](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103404)> at 15 April 2016.

<sup>26</sup> Section 2.2 of the Tokyo MoU.

## Governing Structure and Inspection Procedures

The Tokyo MoU also establishes a governing body, the Port State Control Committee, located in Tokyo, to carry out specific tasks assigned to it under the MoU; promote by all means necessary that includes: training and seminars, harmonization of procedures and practices relating to inspection, rectification and detention whilst having regard to Section 2.4; develop and review guidelines for carrying out inspections under the MoU; develop and review procedures for the exchange of information; and keep under review other matters relating to the MoU's operations and effectiveness. Under the Committee's coordination, each Maritime Authority will determine an appropriate annual percentage of individual foreign merchant ships for inspection.<sup>27</sup> In respect of shipping industry costs and operations, inspections should be done at an acceptable rate and thus avoided should be unnecessary inspections. The inspection should consist of a visit on board a ship in order to check certificates and documents. These are coupled with surveys of the overall satisfaction of the crew and the ship's overall condition, its equipment, machinery spaces and accommodation, hygienic conditions, as well as the meeting of the relevant instruments' requirements.<sup>28</sup> In selecting ships for inspection, the Maritime Authorities will determine the priority order based on the New Inspection Regime introduced in 2014.<sup>29</sup> In deficient cases, which are clearly hazardous to safety, health or the environment, the Maritime Authorities will ensure that the hazards are removed before the ship is allowed to proceed to sea. For this purpose, appropriate action will be taken that might include the 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.<sup>30</sup> Under the Tokyo MoU, appeal procedures are also provided.<sup>31</sup> The company of a ship or its representative has an appeal right against a detention taken by the Maritime Authority of the port State. Thus, the Port State Control Officer should properly inform the shipmaster of such right prior to detention. Also, the shipmaster should be advised to use the official domestic procedure if an appeal against a detention order is desired.

## Statistics

Though some doubts have been raised about the Tokyo MoU's efficiency,<sup>32</sup> the efforts of its Member Authorities are all to view. Under the Tokyo MoU, the target annual inspection rate set in 1993 was 50% by the year 2000.<sup>33</sup> According to its Annual Reports, the inspection rate since then has increased to 65% in 2000 and 69% in 2014.<sup>34</sup> In 2003, 20,124 inspections were carried out on ships registered under 98 flags, while in 2014, 30,405 inspections were carried out on ship registered under 99 flags. In 2003, 1,709 detentions were carried out on ships registered under 67 flags, while in 2014, 1,203 ships registered under 64 flags were detained due to serious deficiencies found on board. These statistics show an 8.49% detention rate in 2003 and a decrease to 3.96% in 2014.<sup>35</sup> Thus, this decrease in detention rates may demonstrate that the Tokyo MoU has been effective as less serious deficiencies are found and that the vessel conditions seem to have improved.

Amongst the Tokyo MoU Members, in 2014, China conducted 7,361 inspections with a 38.66% inspection rate and Hong Kong (China) conducted 736 inspections with a 14.34% inspection rate. Both China and Hong Kong (China) contributed up to 26.63% of total inspections conducted within the Tokyo MoU region. Following the inspections, 476 detentions were made by China with a 6.47% detention rate and 47 detentions were made by Hong Kong (China) with a 6.39% detention rate.<sup>36</sup> Along with Australia's 7.9% detention rate, these three Tokyo MoU Members performed the three highest detention rates in 2014.<sup>37</sup> Unequivocally, China – with or without Hong Kong – has become an influential player in the Tokyo MoU regime.

In conclusion, the regional MoUs are developed as a type of instruments to implement port State control at present type, such as the Paris MoU and Tokyo MoU, although doubts exist primarily due to its inefficiency. Should be considered are other forms of international cooperation on port State control being able to increase the effective

<sup>27</sup> Section 1.4 of the Tokyo MoU.

<sup>28</sup> Section 3.1 of the Tokyo MoU.

<sup>29</sup> Section 3.3 of the Tokyo MoU.

<sup>30</sup> Section 3.7 of the Tokyo MoU.

<sup>31</sup> Tokyo MoU, *Appeal Procedures of Member Authorities of the Tokyo MoU* (2016) <<http://www.tokyo-mou.org/doc/Appeal%20Procedures.pdf>> at 15 April 2016.

<sup>32</sup> Ho-Sam Bang, 'Recommendations for Policies on Port State Control and Port State Jurisdiction' (2013) 44 *Journal of Maritime Law and Commerce* 115.

<sup>33</sup> Haijiang Yang, above n 20 (2006) 105.

<sup>34</sup> Tokyo MoU, *Annual Report of Port State Control in the Asia-Pacific Region 2000* (2000) Tokyo MoU <<http://www.tokyo-mou.org/doc/ANN00.pdf>> at 15 April 2016; Tokyo MoU, *Annual Report on Port State Control in the Asia-Pacific Region 2014* (2014) Tokyo MoU <<http://www.tokyo-mou.org/doc/ANN14.pdf>> at 15 April 2016.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, 23.

<sup>37</sup> *Ibid.*

implementation of port State control.<sup>38</sup> Other than this, given the coasts and ports' prosperity, China and Hong Kong (China) have, to a great degree, contributed to the enforcement of the Tokyo MoU. The next section focuses on Taiwan's practices to view how it responds to the Tokyo MoU's developments.

### 3 Tokyo MoU's Implications for Taiwan

To investigate how Taiwan responds to the port State's regional development surrounding it, one must first be cognizant of Taiwan's status in international law and accompanying challenges.

#### 3.1 Status of Taiwan under International Law

Although the Republic of China was the Member of the UN Charter and one of the five UN Security Council Permanent Members, since the establishment of the People's Republic of China in 1949, the government of the Republic of China lost the Chinese Civil War and relocated to Taiwan, the international situation that the Republic of China faced had been more and more unfavorable to it from the 1950s to 1970s. Eventually, Taiwan or more specifically the Republic of China was expelled from the UN in 1971 by the UNGA Resolution 2758,<sup>39</sup> and thus replaced by the People's Republic of China as the only lawful representative of China to the UN. Since then, Taiwan has lost much formal participation opportunities in international society. Exceptions only exist for it as the Separate Customs Territory for World Trade Organization participation,<sup>40</sup> along with the Fishing Entity in the Regional Fisheries Management Organizations.<sup>41</sup>

#### 3.2 Possibility of Taiwan's Participation in the IMO and the Tokyo MoU

Taiwan's significant maritime sector is—as discussed in the following—in a position to share information with other port State control authorities within the region. Thus, it is of benefit for the international community to include both Taiwan's IMO and Tokyo MoU's involvements. Concerning Taiwan's IMO participation, the Convention on the IMO was first accepted—on 1 July 1958—on behalf of the Republic of China. Since then, the Republic of China had been an IMO Member. However, following the changing international situation and with the supporting statement of the Socialist States, the People's Republic of China took place in the IMO on 1 March 1973.<sup>42</sup> Possessions, territories or organic political members geographically outside or not fully integrated into their superior State governments which are the IMO Members, may be granted the Associate Member status.<sup>43</sup> The notifications in writing should be submitted by the Member or by the UN to the Secretary-General of the UN.<sup>44</sup> The Special Administrative Regions of the People's Republic of China, namely Hong Kong and Macao, became IMO Associate Members due to their former colonial States (the United Kingdom and Portugal). On 7 June 1967 and 2 February 1990 respectively, such States made notifications under Article 8 of the Convention on the IMO.<sup>45</sup> Even with the reunification with the People's Republic of China (1997 for Hong Kong and 1999 for Macao), both Hong Kong and Macao have retained their Associate Member status. For Taiwan, it has been claimed as a province by the People's Republic of China as based on the “one China” policy. However, Taiwan—coupled with its internal differences—would not officially agree with the aforesaid claim due to Taiwan's de facto independent sovereignty and jurisdiction. Given this political background, Taiwan is not even an IMO full Member or Associate Member.

Taiwan's approaches for IMO access would be to participate in the NGOs that have obtained the “Consultative Status Observer” status in the IMO. This approach was also proposed by the ROC National Association of Chinese Shipowners to Taiwan's Ministry of Foreign Affairs. John Cartner, Richard Fiske, and Tara Leiter once mentioned that the Asian Shipowners Forum, whose Members included Taiwan had applied for the “Consultative Status Observer” status by the end of 2009, and thus could play as a bridge for Taiwan to access to the IMO.<sup>46</sup> However, facts have shown that the Asian Shipowners Forum have still not gained such status.

<sup>38</sup> Suggested is to conclude ‘a MoU on Cooperation between States bordering Enclosed or Semi-enclosed Seas with regard to the Harmonised Exercise of Port State Jurisdiction over Illegal Discharges from Ships.’ Ho-Sam Bang, above n 34, 129.

<sup>39</sup> UN, *UNGA Resolution 2758 (XXVI). Restoration of the Lawful Rights of the People's Republic of China in the United Nations* (1971).

<sup>40</sup> Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3<sup>rd</sup> ed, 2013) 105.

<sup>41</sup> Rosemary Rayfuse, ‘Regional Fisheries Management Organization’, in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, and Tim Stephens, above n 10, 444.

<sup>42</sup> UNCTC, *Convention on the International Maritime Organization* (2016) UN <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XII-1&chapter=12&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-1&chapter=12&lang=en)> at 15 April 2016.

<sup>43</sup> John A. C. Cartner, Richard Fiske, and Tara Leiter, *The International Law of Shipmaster* (2013) 43.

<sup>44</sup> *Convention on the International Maritime Organization*, 1948, 289 UNTS 48, art 8.

<sup>45</sup> UNCTC, above n 44.

<sup>46</sup> John A. C. Cartner, Richard Fiske, and Tara Leiter, above n 45, 43.

Regarding Taiwan's participation in the Tokyo MoU, Section 8.2 of the Tokyo MoU provides that any Maritime Authority meeting required criteria under Annex I to the MoU can be a Member Authority or Cooperating Member Authority. Further provided is that any Maritime Authority or an intergovernmental organization wishing to participate as an Observer to the MoU needs to submit in writing an application to the Committee. No matter to become a Member Authority, Cooperating Member Authority or Observer, required is the unanimous consent of the authorities present and voting at the Committee meeting.<sup>47</sup> Different criteria and responsibilities are also set for different types of participation.<sup>48</sup> In Taiwan's case, the major obstacle of its participation would be to get the unanimous consent of the authorities present, as China is one of the Maritime Authorities present and it usually opposes Taiwan's participation in intergovernmental organizations.<sup>49</sup> The status of Taiwan and the situation that it is facing are different from the cases of Hong Kong and Macao.

Although Taiwan is not able to participate in the IMO and Tokyo MoU, among the top twenty shipping operators in the world, three originated from Taiwan, including Evergreen Line, Yang Ming Marine Transport Corp., and Wan Hai Lines. Also, as Taiwan is not able to formally sign and ratify the IMO conventions, how the IMO conventions would be binding on it is then doubtful. Thus, Taiwan voluntarily and unilaterally claimed its compliance commitment with IMO resolution 787(19).<sup>50</sup> Through this unilateral statement, the international instruments that Taiwan claimed to comply with became legally binding on it.<sup>51</sup> Although within Taiwan's port State control system, the "no more favourable treatment" clause is not expressly covered, in Taiwan's general practice, it is able to apply laws sourced from international conventions to foreign vessels as a matter of domestic law, like the MoUs on Port State Control.<sup>52</sup>

### 3.3 Taiwan's Domestic Laws

In respect of the port State control system, considering that a port State need not be a signatory of such conventions to exercise port State control, Taiwan has adopted the following domestic laws to authorize the port State control to be implemented and administered.

Article 58 of the Commercial Port Law—as amended and promulgated in 2011—states that “[t]he Procedures for Port State Control and its regulations announced by the commercial port authority according to the International Maritime Organization or other relevant authorities, should implement examination of ship certificate, security, equipment, crew quotas and other matters towards the entrance and departure of foreign merchant ships.”

Article 59 of the Commercial Port Law—as amended and promulgated in 2011—states that “[w]hen the commercial port authority executes foreign merchant ship control examination, they should hand it to the master to sign after information have been recorded in the inspection record. If there are any violations, the commercial port authority has to be improved in a limited time,” and “[a]fter foreign merchant ships have made improvements according to the preceding paragraph, they should request the commercial port authority for reexamination, and pay for the reexamination fees as well. The amounts should be stipulated by the commercial port authority, and check and ratified by competent authority.”

Article 60 of the Commercial Port Law—as amended and promulgated in 2011—further states that “[w]hen foreign merchant ships seriously violate control examination regulations, influence ship navigation safety of ship personnel, and can seriously threaten marine environment, the commercial port authority have to retain ships till improvements are completed, in order for them to be approved to navigate,” and “[w]here foreign merchant ships violate control examination regulation, our country has no repairing equipment technology, and no accessory material to provide to change or retain illegal ships. Those that will influence port safety or public interests, have to produce entry level verification proof, and receive approval from commercial port authority to be able to navigate.” These Commercial Port Law provisions provide the legal basis for Maritime Authorities to detain commercial vessels. A ship may be detained if it is found to be operating under a certificate issued in accordance with applicable conventions that are found to be invalid, and if either its condition or that of its crew fails to correspond substantially with applicable conventions. The ship will not be permitted to sail until compliance with such conventions is demonstrated in order to ensure the safeties of the vessel, crew, and marine environment.<sup>53</sup>

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<sup>47</sup> Sections 2 and 3 of the Tokyo MoU.

<sup>48</sup> Sections 2, 4 and 5 of Annex I to the Tokyo MoU.

<sup>49</sup> Vincent Wei-Cheng Wang, 'Taiwan's Participation in International Organizations', in Edward Friedman (ed) *China's Rise, Taiwan's Dilemma and International Peace* (2006) 151.

<sup>50</sup> IMO, *IMO Resolution A.787(19) Procedures for Port State Control* (1995).

<sup>51</sup> Martin Dixon, *Textbook of International Law* (2013) 59-60.

<sup>52</sup> Bevan Marten, above n 10, 118.

<sup>53</sup> Maritime Transport Network Portal, *Taiwan's PSC Administration* (2008) MOTC, Taiwan <[http://eng.mtnet.gov.tw/psc\\_eng/02.html](http://eng.mtnet.gov.tw/psc_eng/02.html)> at 15 April 2016.

Furthermore, Taiwan's domestic laws provide rules to authorize the Maritime Authority to determine which rules and standards are to be referred to. Namely, Article 75 of the Commercial Port Law—as amended and promulgated in 2011—states that “[w]hen commercial port safety and management items involve international affairs, competent authorities shall refer to international conventions, agreements, and rules, methods, standards, suggestions of its supplementary rules.” Also, Article 101 of the Law of Ships—as promulgated in 2010—states that “[f]or other rules and regulations on ship technology and management, the competent authority may refer to the standards, recommendations, measures or procedures set down in the relevant international conventions or agreements and their annexes, and adopt them for promulgation and enforcement.” Article 89 of the Seafarer Act—as amended and promulgated in 2014—states that “[f]or matters not provided herein which involving in international transactions, the competent authority may adopt and implement the rules, regulations, guidelines, standards, recommendations and programs set forth under the relevant international conventions or agreements and their protocols thereof.” Through these provisions, granted to its Maritime Authority by the legislators are the rights to determine which relevant conventions to incorporate into domestic laws. Such model was adopted by Taiwan to transform international law into its domestic laws in the maritime affairs field. Unlike its international law practices, such as trade law (amending or adopting domestic laws to comply with WTO Agreements) and human rights law (adopting the enforcing act), this mode is rather unique. A major reason would be for this field's technicality. Also, a similar provision is provided in the civil aviation field, as Article 121 of the Civil Aviation Act—as amended and promulgated in 2001—states that “CAA may, making reference to the standards, recommendations, measures or procedures outlined in relevant international conventions and annexes thereto, propose to MOTC for adoption of provisions involving international affairs not covered in this Act, for their promulgation and implementation.”

### 3.4 Legal Instruments Included

From the official websites of Taiwan's port State control system, the following applicable conventions have been identified. They are the: (1) International Convention on Load Lines 1966; (2) Protocol of 1988 relating to the International Convention on Load Lines, 1966; (3) International Convention on Tonnage Measurement of Ships, 1969; (4) Convention on the International Regulations for Preventing Collisions at Sea, 1972; (5) International Convention on Standards for Training, Certification and Watchkeeping for Seafarers, 1978, as amended; (6) International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 relating thereto; (7) Merchant Shipping (Minimum Standards) Convention, 1976 (ILO Convention No. 147); (8) International Convention for the Safety of Life at Sea, 1974 as amended; (9) Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974; and (10) International Ship and Port Facility Security (ISPS) Code, 2002. Thus, a ship found not compliant with terms with the aforesaid conventions shall be deemed as holding invalid certificates and henceforth subject to detention.<sup>54</sup>

Compared to the applicable conventions covered under the Tokyo MoU and Taiwan's port State control system, Taiwan's port State control system fails to cover the: (1) Maritime Labour Convention, 2006 (MLC, 2006), (2) International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001, (3) Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC PROT 1992), and (4) Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974. Obviously, amongst the instrument covered under Taiwan's port State control system, the ISPS Code is the only one adopted later than the establishment of Taiwan's system in 2001. Not being up-to-date can to a certain degree explain the reasons why Taiwan's system covers fewer instruments and why the Maritime Labour Convention and the International Convention on the Control of Harmful Anti-fouling Systems on Ships are left behind. Also, excluded are the issue of civil liability for oil pollution damage and the newest Protocol relating to the International Convention for the Safety of Life at Sea. More improvement in this regard is thus required.

### 3.5 Taiwan's Practice of Port State Control

Based on these provisions, a port State control system was to be established in Taiwan. In September 1998, the Canadian Trade Office in Taipei (hereinafter referred to as CTOT) was contracted to assist Taiwan's Ministry of Transportation and Communications (hereinafter referred to as MOTC) to develop Taiwan's port State control system. CTOT, together with the Canadian Coast Guard, submitted their proposal to the MOTC. The MOTC, with a mandate to implement a port State control system covering all domestic ports open to foreign shipping, joined with Transport Canada, Canada's federal-level transportation authority, and CTOT to determine the most effective

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<sup>54</sup> Maritime Transport Network Portal, *Applicable Conventions* (2008) MOTC, Taiwan <[http://eng.mtinet.gov.tw/psc\\_eng/02-01.html](http://eng.mtinet.gov.tw/psc_eng/02-01.html)> at 15 April 2016.

way to implement such a system in Taiwan. The cooperative project was defined to cover ship safety, pollution prevention, as well as shipboard living and working conditions. Since the Canada-Taiwan agreement's introduction in January 2001, the port State control system has been in place in Taiwan for several years. This agreement aims to establish a port State control system that meets or exceeds, in all respects, the Tokyo MoU's requirements. It requires foreign merchant ships calling at, or anchoring off, Taiwan ports to comply with applicable convention standards. The Maritime and Port Bureau, MOTC is the office in charge of the port State control system in Taiwan.

According to its official website, Taiwan considers that after the port State control system's establishment, immediate results have been realized in enhanced ship safety, reduced marine environmental pollution, along with improved living and working conditions on board.<sup>55</sup> Within this system, the recording and reporting schemes shall comply and agree with that currently used by Tokyo MoU signatories. The system further allows for the delay or detention of ships identified as substandard or unsafe. Contained is an appeal process available to shipowners to challenge Port State Control Officer decisions. To improve the Port State Control Officers' professional qualifications and to augment port State control activities in the Asia-Pacific region, the system also fosters effective and comprehensive technical cooperation programs. In addition, training courses, seminars and visits to ports in other countries sponsored by the MOTC are applied as tools for Port State Control Officers to raise professional standards and sharing experiences.

According to statistics between 2003 and 2014,<sup>56</sup> the inspection rate has increased from 4.65% to 12.3%. The deficiency rate was 74.2% in 2003 and 87.3% in 2014. However, it did not show the steadily increased trend as it once dropped to 43.4% in 2005. The detention rate was 5.43% in 2003 and 25.37% in 2014. With this rough increase trend, it still had a slight drop to 19.63% in 2010. Compared the inspections conducted by Taiwan to those by China and Hong Kong (China) under the Tokyo MoU, the inspection rate of Taiwan in 2014 is much lower than that of China and slightly lower than that of Hong Kong (China). However, just these statistics cannot conclude Taiwan's efficiency or inefficiency as the detention rate of Taiwan in 2014 is several times higher than those of China and Hong Kong (China).

Even so, some scholars have mentioned that Taiwan's system can still improve in some areas, such as establishing an independent governmental agency to carry out the port State control duty, enacting comprehensive domestic laws for enforcing the system, establishing full-time task of port State control, recruiting and training more qualified persons as Port State Control Officers, as well as increasing informal contacts with Tokyo MoU or foreign State's port State control authorities to exchange information and experience on the implementation.<sup>57</sup>

#### 4 Conclusion

With all of the above-mentioned, Taiwan has shown its willingness to comply with relevant conventions, both IMO and ILO ones by adopting specific provisions in its domestic laws and establishing the port State control system based on the model of the Tokyo MoU. However, in terms of the scope of legal instruments, obviously Taiwan's port State control system does not fully reflect the Tokyo MoU's. Should be improved is being up-to-date. Even so, one should consider that Taiwan is not a full Member State of the IMO or any regional MoU on Port State Control, its willingness to comply with these instruments can thus be encouraged. Furthermore, mentioned should be its experience in establishing the port State control system based on a bilateral agreement with Canada. Therefore, this could also be a model for the entity *sui generis* that is not able to participate in the IMO or regional MoUs on Port State Control to establish an effective system.

Overall, demonstrated is that regardless of the international cooperation forms and the MoU's signing on port State control, there are still some directions that States can move to for further enhancing the port State control's enforcement. That would be the comprehensive domestic laws to reflect the relevant IMO and ILO conventions and the best practice of the domestic administrative system of port State control. Overall, Taiwan still has some room for improvement.

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<sup>55</sup> Maritime Transport Network Portal, above n 55.

<sup>56</sup> Maritime and Port Bureau, MOTC, *Taiwan Port State Control Annual Report 2014* (2015), MOTC <<http://www.motcmpb.gov.tw/MOTCMPBWeb/wSite/public/Attachment/f1443680786533.pdf>> at 15 April 2016.

<sup>57</sup> Rong-Her Chiu, Chien-Chung Yuan, and Kee-Kuo Chen, 'The Implementation of Port State Control in Taiwan', (2008) 16(3) *Journal of Marine Science and Technology* 207-213.