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Summary

Port state control plays a central role in maritime safety and protection of marine environment and it becomes more significant in protection of seafarers' rights. This thesis integrates discussion and consideration of different legal aspect of PSC in order to present a comprehensive view on it. First, the legal foundation of port state jurisdiction is examined. It is explored through its elements where PSC is a considerable part. Provisions, instituting the international legal regime on PSC are looked in greater detail. The question, whether there is a right of merchant vessels to access foreign ports, is answered.

Second part of the thesis examines the international and regional PSC framework and its mechanism. The essence of guidelines of the International Maritime Organisation on PSC and their comparison with the regional Memoranda of Understanding has been provided. The significant incorporation of the provisions of the IMO guidelines into the regional MoUs has been exhibited. Analysis and comparison of the regional MoUs among each other have been made, which indicate some degree of similarity among certain groups of the regional MoUs on one side and uniqueness of other MoUs on the other side. National legal arrangements of PSC has been shown on two different jurisdiction, namely UK and Ukraine.

Besides the side of public law, which PSC has arisen out of, PSC detention has legal implications for private law. Therefore, third part of the thesis discusses such issues as undue delay, effect of PSC detention on the contracts of affreightment and marine insurance, and allocation of the risk of PSC detention in time charter parties. PSC detention may cause damages or repudiation of the counterparty's obligations in relation to contracts of affreightment and marine insurance. It also may trigger to go the vessel off-hire in time charterparties.

The last part of the thesis focuses on contemporary development on PSC. The need and possibility for establishment of universal PSC regimes are discussed. The main problems of current PSC regimes and obstacles in establishment of one global PSC regime are identified. Although it was concluded that for the moment universal PSC regimes is not possible, the contemporary development of cooperation among the regional MoUs and even with a private sector has been exposed. Interrelation between PSC and flag state implementation has been shown through the use of the PSC statistics in Voluntary IMO Member State Audit Scheme and, in its turn, the relevance VIMSAS for assessment of ship's risk profile in Paris MoU. Distinctive features of PSC and flag state control are also explained. Taking into consideration that recognised organisations play a significant role for facilitation of shipping safety and protection of marine environment in general and PSC in particular, the possibility to reinforce the IMO regulation on ROs is discussed. The current regime on ROs has been examined, and effectiveness of ROs has been assessed with help of the PSC statistics. The thesis suggests an idea how to upgrade recently elaborated IMO code on ROs in order to strengthen the international regime on ROs.

Abbreviations

Abuja MoU	Memorandum of Understanding on Port State Control for West and Central African Region
AFL	International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001
Black Sea MoU	Memorandum of Understanding on Port State Control in the Black Sea Region
BUNKER	International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001
Caribbean MoU	Memorandum of Understanding on Port State Control in the Caribbean Region
COLREG	Convention on the International Regulations for Preventing Collisions at Sea, 1972
EMSA	European Maritime Safety Agency
Equasis MoU	Memorandum of Understanding on the establishment of the Equasis information system
CHS	Convention on the High Seas of 29 April 1958
CIC	Concentrated Inspection Campaigns
CLC	International Convention on Civil Liability for Oil Pollution Damage, 1969
FCR	Federal Code of Regulations
FSC	Flag State Control
FSI	Flag State Implementation
IACS	International Association of Classification Societies
ICJ	International Court of Justice
Indian MoU	Memorandum of Understanding on Port State Control for the Indian Ocean Region
ISPSU	Inspection of State Port Surveillance of Seaport of Ukraine
LOADLINE	International Convention on Load Lines, 1966
MARPOL	International Convention for the Prevention of Pollution from Ships, 1973, as amended
Mediterranean MoU	Memorandum of Understanding on Port State Control in the Mediterranean Region
MIMSAS	Mandatory IMO Member State Audit Scheme
MLC	Maritime Labour Convention, 2006
MPEC	Marine Environment Protection Committee
MSC	Maritime Safety Committee
MSCU	Merchant Shipping Code of Ukraine
MSM	Marine Safety Manual
NOA	Notice of Arrival
NVIC	Navigation and Vessel Inspection Circular
Paris MoU	Paris Memorandum of Understanding on Port State Control
PSCI	Ukrainian Port State Control Inspectorate

PSCP	Unites States Port State Control Programme
PSEJ	Port State Enforcement Jurisdiction
PSJ	Port State Jurisdiction
Riyadh MoU	Riyadh Memorandum of Understanding on Port State Control
RO	Recognised organisation
RSO	Recognised security organisation
SOLAS	International Convention for the Safety of Life at Sea, 1974, as amended
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
TCC	Technical Cooperation Committee
Tokyo MoU	Memorandum of Understanding on Port State Control in the Asia-Pacific Region
TONNAGE	International Convention on Tonnage Measurement of Ships, 1969
VIMSAS	Voluntary IMO Member State Audit Scheme
Viña del Mar MoU	Latin American Agreement on Port State Control of Vessels
UMRI	State Inspectorate of Ukraine for Maritime and Inland Water Transport Safety (Ukrmorrichinspektsia)
UNCLOS	United Nations Convention on the Law of the Seas of 10 December 1982
USCG	United States Coast Guard

1 Introduction

1.1 Overview

Shipping is a truly international industry with its uniqueness pertaining to the fact that a commercial ship plies from one jurisdiction to another. Therefore, there is strong necessity for international cooperation in order to achieve a challenging goal that it is safe ships and crew as well as clean seas. The part of shipping history is the history of maritime casualties and incidents such as *Titanic*, *Torrey Canyon*, *Amoco Cadiz*, *Erika* and *Prestige*, which caused loss of many lives and significant marine pollution. These marine catastrophes became a catalyst for emergence and development of the international maritime regulatory conventions such as International Convention for the Safety of Life at Sea and International Convention for the Prevention of Pollution from Ships. Elaboration of the internationally agreed standards with respect to construction, design and equipment of ships, navigation, manning, prevention of pollution, seafarers' educational and training qualification through the conclusion of respective conventions and provisions of United Nations Convention on the Law of the Seas crystallising respective international customary law and evolving them into the progressive development of international maritime law allowed to make a step further. Inspection regime was embedded into those regulatory conventions and subsequent regional cooperation on port state control developed. PSC has a number of legal facets to be examined and analysed.

First, the international legal foundation of port state jurisdiction with focus on PSC must be examined. Besides the international legal regime on PSC, there is a soft law comprised of the guidelines of the International Maritime Organisation and the regional Memoranda of Understanding, which constitute the international and regional PSC framework and establish its mechanism. The regional MoUs play a coordinating role and facilitate the cooperation among whole regions. Nevertheless, legal norms, which govern PSC inspections, are found in the national law of a port state. Therefore, it is important to understand how the international legal norms and guidelines on PSC are implemented in the national law of a port state.

There is also a private law aspect of PSC. Namely, it is legal implications arising out of PSC detention. It means that the foreign vessel, being in any port, may be prohibited to proceed to sea, unless those deficiencies, found during the PSC inspection, are rectified. Practically, it implies a financial loss for the charterers, deprived of the use of the vessel. Found deficiencies may be used as an evidence of the vessel's unseaworthiness, which may cause damages or even repudiation of the counterparty's obligations in relation to the contract of affreightment and marine insurance.

In order to understand the contemporary development of PSC, it is also important to examine affiliated mechanisms for facilitation of observance of the IMO regulations since, united by common goal, they start developing in tandem. There is possibility to interrelate PSC with flag state implementation now. Furthermore, it is possible to assess effectiveness of

recognised organisations with help of the PSC statistics. However, preliminarily, recent maritime casualties give grounds to consider current effectiveness of ROs as rather insufficient. Therefore, the prospects how to reinforce the current international regime on ROs must be discussed. In the end, there are academic suggestions that it is a time to construct one global PSC regime, which must be considered through the prism of the necessity and possibility as it may be a further step in the evolution of PSC.

1.2 Purpose and research questions

The purpose of this thesis is to draw the single picture showing all legal components of PSC and provide an analysis of each of them. There are following research questions to be answered in this thesis:

1. What is the notion, scope and basis for PSJ, which embraces PSC?
2. What triggered the development of PSC?
3. Does the right to access ports exist in international law?
4. What is the international and regional framework of PSC and their correlation?
5. What are the national arrangements on PSC?
6. What are the legal implications of PSC?
7. Is there a correlation and interdependence between PSC and FSI?
8. What is the role of ROs with respect to FSI and PSC?
9. What is the current ROs performance measured through PSC statistics?
10. Is there a possibility to reinforce international legal regime on ROs?
11. Is there a need for establishment of universal PSC regime?
12. Is it possible to establish universal PSC regime?

1.3 Scope and delimitations

The scope of the thesis covers legal aspects of PSC in terms of international legal basis of PSJ, IMO guidelines, regional PSC regimes, domestic arrangements of chosen states, legal implications for private shipping, interrelation with FSI, significance of ROs, contemplation of global regime. Delimitations of the thesis lie within merchant shipping. This thesis does not examine PSC fishery issues. The thesis focuses only on principal international maritime regulatory conventions dealing with PSC such as SOLAS, MARPOL, STCW, LOADLINE, TONNAGE, COLREG.

1.4 Research methodology and materials

The methodology employed in this thesis with a view to achieve its purpose is comprised of:

- the dogmatic method to illustrate the legal concepts of PSJ, PSC, FSI and FSC;
- the dialectical method to indicate the existing scholarly arguments on abovementioned legal concepts;

- the analytic method to find the interrelation between PSC and FSI, both PSC and FSI interrelation with ROs, and to examine the relevant legislation and judicial practice relating to PSC;
- the statistical method to show the performance of ROs;
- the comparative method to evaluate and contrast the regional MoUs and domestic law of chosen states.

During composing the thesis, different sources of materials are used. They are legal textbooks and articles, PhD and master theses, international conventions, IMO resolutions, the regional MoUs, EU and national legislation, judicial cases, IMO FSI Subcommittee documents, annual PSC reports and others.

1.5 Disposition

The thesis consists of four chapters and eleven subchapters aside from introduction and conclusions. Chapter two is devoted to the analysis of PSJ. It will examine the basis for PSC wherein the influence of the concept of ship registration on states' practice PSC is briefly looked and legal basis are analysed.

Chapter three focuses on the PSC framework and mechanism. First subchapter examines and compares the IMO guidelines with the regional MoUs. Second subchapter compares the regional MoUs among themselves wherein Paris and Tokyo MoUs and USCG PSC programme are looked in detail due their specificity. Third subchapter compares PSC in UK and Ukraine.

Chapter four analyses legal implications of PSC with focus on undue detention, allocation of detentions risks in time charterparties, an effect of detention on the marine insurance contract.

Chapter five explores other ways to assure the IMO regulatory instruments besides PSC. First subchapter analyses the interrelation between FSI and PSC. Subchapter two is devoted to the analysis of core mechanism of FSI, that is to say, RO and possibility to strengthen it. Third subchapter contemplates on the possibility of establishment of universal PSC regime.

2 Analysis of Port State Jurisdiction

The concept of PSJ is relatively new in contrast to flag state jurisdiction, which was initially established as one of the elements of manifestation of state sovereignty. Previously, port states, in general, did not enforce its jurisdiction over foreign ships entering their ports.¹ However, this practice has altered and evolved greatly during last sixty years. It is ironical that the development of one legal phenomenon, namely PSC was triggered by the malfunction of another legal phenomenon, namely FSC as one of the principal duties of a flag state, which is examined in chapter 5. The aim of this chapter is to examine different issues of PSJ in connection with PSC.

2.1 Bases for the current PSC regime

The notion of jurisdiction is a basic legal term associated with the power of a state to exercise its authority based on the international principle of state sovereignty.² The law of the seas underpinned by general international law contemplates three types of jurisdiction, namely flag, coastal and port state jurisdictions. The PSJ embraces PSC, as it is, in fact, much wider notion. In contrast to PSJ, flag state jurisdiction is associated with the concept of nationality.

2.1.1 The effect of the concept of nationality on the states' practice of enforcement of port state jurisdiction

The concept of the nationality of ships has arisen as a functional necessity to solve the list of problems. Merchant ships sail through different maritime zones and the argument is often raised that a ship appears to be in a legal vacuum while travelling on the high seas where no state has jurisdiction there. Though it is true, it would be difficult to contemplate the application of the territorial principle of jurisdiction in order to determine the legal regime of a ship as then it would have to comply with every requirement in all regards of local law of coastal states due to the necessity that a ship on the high seas must possess a nationality to be able to prove its existence".³ The extent of the jurisdiction exercised by the flag state is summarised in the article 94 of UNCLOS, which will be analysed thoroughly in subchapter 5.1. However, for the purpose of this subchapter it is enough to mention that the main responsibility for technical performance of a ship,

¹ Dr. Z. Oya Özçayır, *Port State Control* (LLP, London 2001) 74

² Malcolm N. Shaw, *International Law* (6th edn Cambridge University Press, Cambridge 2008) 645

³ Pourmotamed, *Parallel Registration of Ships* (Göteborg University, Sweden 2008) 15

which has relation to shipping safety and prevention of pollution, rests with a flag state.

From the second half of the twentieth century, shipping companies progressively more registered their ships with the flag states providing the service of open registries to foreign ships. The registration in such states offered financial and other advantages over the registration in home states. This practice resulted in emergence of a great number of substandard ships flying under so-called flags of convenience. Part of the economic rationale for flagging out, for example, was to escape from the requirements about manning imposed by certain states upon ships flying their flags.⁴ Another attractive incentive was a tonnage tax instead of an income tax required in home states. However, those open registry flag states were not in position to manage the hugely attracted fleet flying under their flag. Therefore, they did not properly discharge their international obligations as a flag state. Moreover, some of them were even negligent to carry out FSC, being more focused on the commercial part of registration. The main critics of this practice were based on lack of the genuine link between the flag state and the ship registered, which is required by UNCOLS. However, the concept of open registry flag state has sustained the test of the time that can be also proved that United Nations Convention on Conditions for Registration of Ships including the economic nexus of flag state with its ship did not enter into force due to lack of ratifications. Nevertheless, the response of the international community against substandard shipping did not hesitate long. The concept of PSC was employed and further developed.

2.1.2 Legal basis for port state jurisdiction

The primary legal sources proving for PSJ are found in international customary and treaty law. Customary international law entitles a port state with vast discretion to exercise jurisdiction over its ports. The ICJ in the Nicaragua case explicitly stated it and it was reflected in UNCLOS. Customary international law on PSJ is based on the fundamental principal of sovereignty integrated in the core of international law. The principal of sovereignty has several elements. The element that is responsible for PSJ is namely territorial sovereignty. The positive (in contrast to negative) aspect of territorial sovereignty signifies that a state has an exclusive competence over its own territory as Malcolm Shaw indicates.⁵ It was accurately stated that when a ship enters a foreign port it put them within the territorial sovereignty of the coastal state.⁶ The port is a part of state's internal waters, which have the same legal status as a part of land in contrast to territorial waters, for example. It is explained that the ship in the port is subject to the same jurisdiction as an alien on land.⁷ Therefore, a foreign ship must

⁴ David Anderson, *Modern Law of The Sea: Selected Essays* (Publications on Ocean Development, Volume 59 Martinus Nijhoff Publishers, Leiden/Boston 2008) 269

⁵ Shaw, *supra* note 2, 490

⁶ R.R. Churchill, A.V. Lowe, *The Law of the Sea* (3rd edition Juris Bulishing, Oxford 1999) 54

⁷ Ted L. McDorman, 'Regional Port State Control Agreements: Some Issues of International Law' (2000) 5 *Ocean & Coastal L.J.* 207

comply with local law as well as law of the flag state. It is stated that there is no any contradiction between port and flag state jurisdiction as according to international law it is clear that the authority of a port state surpasses.⁸ However, if a ship is forced to call the port due to emergency, that is to say, not voluntary, the ship shall be excepted from port state jurisdiction.⁹ Conventionally, port states seldom interfered with foreign flag vessels unless it is concerned with the public order of the state.

Second source of law on PSJ is UNCLOS provisions. PSJ under UNCLOS contains two distinctive elements: PSC and port state enforcement jurisdiction vis-à-vis marine pollution. PSEJ relates to the port state's authority to prosecute ships and to impose fines on them for violations of international rules and standards on pollution from ships. The principal distinction between PSC and PSEJ is that in the case of PSC, the administrative measures of control, such as detention of a ship in the port until corrective measures have been taken or ordering it to proceed to the nearest shipyard for repairs, and no prosecution of the ship for the alleged breach of its legislation or an international convention is initiated. Hence, prosecution of ships is a distinctive feature of PSEJ.¹⁰ The common characteristic of PSC and PSEJ that is both are derived from an initiative on protection of marine environment. The concept of PSJ over enforcement of the international conventions with respect to protection of marine environment is quite new. The article 211(3) of UNCLOS lays the basis of PSJ under which states may establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for calls at their offshore terminals.¹¹ While establishing state laws with regard to prevention, reduction and control of pollution, states should introduce legislation within certain limitations. The article 211 gives major an emphasis to agreed international rules and standards.

The article 218(1) of UNCLOS provides that port states can institute proceedings in respect of any discharge from a vessel outside the internal waters, territorial sea or exclusive economic zone of the port state in violation of applicable international rules and standards (primarily MARPOL) established through the competent international organisation (commonly agreed to be IMO). The article 218 (2) says that no proceedings under the first paragraph shall be instituted regarding the violation in the internal waters, territorial sea or EEZ of another state unless requested by that state, the flag state, or a state threatened by the

⁸ R.R. Churchill, A.V. Lowe, *supra* note 4

⁹ *Ibid*

¹⁰ Ho-Sam Bang, 'Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea' (2009) 40 J. Mar. L. & Com. 292

¹¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 14 November 1994) p. 107

<http://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm>
accessed 27 October 2011

discharge violation or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or EEZ of the state instituting the proceedings. This is a far reaching power even though it remains very much contingent upon the wishes of the flag and coastal states. The article 218(3) requires the port state to investigate possible discharge violations when requested by the flag or coastal state. The coastal state is the state off whose coast the violation is alleged to have occurred. Under the article 218(4), proceedings commenced pursuant to the requested investigation must be suspended at request of the state where the violation occurred. The article 219 obliges port states to prevent unseaworthy vessels from sailing. The article 94(6) asks port states to notify the flag state if a ship fails the conditions required to be upheld by the flag state under the article 94. Pursuant to the article 226 detention can be for no longer than it is essential for the purposes of investigation. The article 226(1)(b) requires prompt release once a violation is found but a bond or financial security must be given before release — what constitutes prompt release can be litigated before the Law of the Sea Tribunal under the article 292. According to the article 228, the flag state has a right of pre-emption. If it starts proceedings within 6 months the port state's proceedings are suspended. If the flag state is notorious for its reluctance in enforcing international standards the proceedings are not suspended. Pursuant to the article 228(2) a penalty cannot be imposed after three years from the date of the violation. Pursuant to the article 230, money penalties are demanded but there are some exceptions. The article 231 requires the notification to the flag state and other states of measures taken. Under the article 233 (subject to the article 42) an incident occurring in a strait used for international navigation is exempt from this PSC. The article 236 explains these provisions do not apply to war ships or ships claiming sovereign immunity.¹²

Erik Jaap Molenaar describes the necessity for PSJ as not only to serve national interests of a port state but the interests of international community to police such areas of shipping and use of seas as safety at sea, marine environment protection, sustainable utilization of marine living resources and safeguarding of marine biodiversity.¹³ Besides being the effective means to enforce the respective international rules, PSC plays a significant role in remedying distorted completion within shipping business caused by flag states, which require less stringent standards applicable to the ships flying their flag. Mr. Molenaar also points out that if port state jurisdiction is optional and to take actions against substandard ships is left to the discretion of a port state, then some ports may attempt to benefit from it as a port of convenience. It is, definitely, a weighty argument in support of the statement that the exercise of PSJ is not only the right of a port state but also an important duty under UNCLOS. Furthermore, there are several objective

¹² Brian F. Fitzgerald, 'Port State Jurisdiction and Marine Pollution Under UNCLOS III' (1995) 11 *MLAANZ Journal* 37

¹³ Erik Jaap Molenaar, 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use' in David Freestone, Richard Barnes and David Ong (eds), *The law of the Sea: Progress and Prospects* (Oxford University Press, Oxford 2006) 192

factors, which induce to operate as convenient as possible. Local economy of a port may be greatly dependent on calling foreign vessels that generates revenue from port fees, use of port facilities and services, or port state may be dependent on import of certain commodities as iron ore, oil or grain. Consequently, such port state will not be interested to enforce internationally agreed standards and will tend to attract substandard ships. Even though PSC was devised for protection of marine pollution, many IMO conventions recognise PSC and contain the provisions that allow such control. In fact, the first provision on PSC in the international convention is found in the article 61 of SOLAS 1914, which envisaged following:

Every ship holding a Safety Certificate issued by the officers of the Contracting State to which it belongs, or by persons duly authorised by that State, is subject in the ports of the other Contracting States to control by officers duly authorised by their Governments in so far as this control is directed towards verifying that there is on board a valid Safety Certificate, and, if necessary, that the conditions of the vessel's seaworthiness correspond substantially with the particulars of that certificate ; that is to say, so that the ship can proceed to sea without danger to the passengers and the crew.¹⁴

SOLAS 1914 was a response to the *Titanic* catastrophe. However, the first version of SOLAS did not enter into force due to the First World War. The contemporary regime of PSC is greatly based on SOLAS 1974 and MARPOL 73/78, lately other IMO conventions were introduced with PSC provisions. Currently, PSC is provided by the regulation 19 of chapter I, regulation 6.2 of chapter IX, regulation 4 of chapter XI-1 and regulation 9 of chapter XI-2 of SOLAS, as modified by the SOLAS Protocol 1988; the article 21 of LOADLINE, as modified by the LOADLINE Protocol 1988; articles 5 and 6, the regulation 11 of Annex I, regulation 16.9 of Annex II, regulation 8 of Annex III, regulation 13 of Annex IV, regulation 8 of Annex V and regulation 10 of Annex VI of MARPOL; the article X of STCW; the article 12 of TONNAGE and the article 11 of AFS. The article 4 of ILO 147 contemplates PSC basis and soon entering into force MLC provides it explicitly with the regulation 5.2.1.

It is notable that SOLAS does not contain the article on PSC in contrast to other applicable conventions. It may be regarded as a discrepancy of SOLAS as the legal norm containing regulation of PSC is placed on lower level within annexes. If a provision of an annex is in contradiction with an article, the article should prevail. However, it seems that it should not create a problem as articles of SOLAS are of a very general nature. They contain the most of norms, which are general for any international convention or treaty, for example, as entry into force, amendments, denunciation, depositary, languages. The rest of articles contain general obligations of parties to the convention, provisions on application and special cases for force majeure and carriage of persons in emergencies and few others. Nevertheless, there is a potential intrinsic problem. What if any provision of

¹⁴ International Convention for the Safety of Life at Sea (adopted 20 January 1914, not entered into force) p.90

<<http://www.imo.org/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Documents/SOLAS%201914.pdf>> accessed 29.11.2012

an annex appears to be in contradiction with the regulation 19, then, the question arises whether the regulation 19 will prevail. The immediate answer might be that “yes”, it will, taking into consideration that the provision on PSC is placed in the Annex I which is titled as “General provisions”. The position of this provision indicates on its general nature and other regulations must be in conformity with it. Therefore, it can be argued that if any provision of SOLAS is not in accordance with the regulation 19, then, the regulation on PSC must prevail. However, this situation can be seen from a different angle. Namely, if a contradictory provision contains a specific rule then it must prevail, as it is applicable only in certain cases or on certain conditions. Although there is a little chance to happen for such situation, it does not justify its existence.

There are several features, pertaining to every regulation on PSC of the respective conventions:

- an inspection shall be conducted only by officers duly authorized by the government of a port state;
- an inspection shall be limited to the check of certificates unless there are clear grounds to consider the ship as substandard;
- where the certificate has expired or ceased to be valid, PSCO shall take steps to ensure that the ship shall not sail until it can proceed to sea without danger to the ship, marine environment or persons on board;
- the flag state and RO where appropriate of the ship detained shall be notified;
- all possible efforts shall be taken to avoid undue detention or delay of a ship;
- unduly detained or delayed ship shall be entitled to compensation for any loss or damage suffered.

As Mr. Molenaar states PSJ has become increasingly complex. It is not just a corollary of the updating of the relevant international instruments but also their continuous development into related or entirely new subject areas.¹⁵ Indeed, PSC is internationally introduced through the earlier SOLAS safety provisions and then institutionalised by UNCLOS with MARPOL in view. However, now PSC embraces much more areas such as seafarers’ labour conditions under ILO 147 and soon MLC, mandatory marine insurance of oils spills through CLC and BUNKER, which are applicable instruments under Paris MoU. It indicates that PSJ is an evolving concept and perhaps, now it is not possible to deduce those areas as international customary law, however we are, definitely, witnessing the progressive development of PSJ.

2.2 The right of merchant vessels to access foreign ports

There are speculations on the academic ground and international forum about the issue whether merchant ships are entitled to access foreign ports

¹⁵ Molenaar, *supra* note 13, 202

according to international law.¹⁶ It must be analysed as it, definitely, constitutes a part of port state regime. Furthermore, a consequence of PSC may be possible the denial of a port access to the particular vessel because of their substandard condition. Paris MoU exercises the right belonged to port states to control access to their ports. If a vessel is found to be substandard for several times in connection with flying the flag of poor performing state it will be banned to call the ports in Paris MoU region.

As it was explained in the previous subchapter, the distinctive feature of internal waters from other maritime zones (territorial sea, contiguous zone, exclusive economic zone) is that a state has, in general, full sovereignty over it. However, it was states in the *Saudia Arabia v. Aramco* case that: “according to a great principle of public international law, the ports of every state must be open to foreign merchant vessels and can only be closed when the vital interests of the state so require.”¹⁷ Lately, ICJ in the *Nicaragua* case asserted that it is “by virtue of its sovereignty that the coastal state may regulate access to its port.”¹⁸ It is possible to say that customary international law does not recognize the existence of the right of access to a port by a foreign vessel. However, it presumed that ports are open unless a state indicates otherwise, so it is a presumption only and not a legal obligation.

1923 Convention and Statute on the International Regime of Maritime Ports provide that vessels, except fishing vessels, of contracting parties have a right of port access. It has been asserted that the convention was a codification of international customary law respecting port access. However, it is not in consistency with *Nicaragua* case.

Besides the convention, there are some bilateral agreements between states providing for the reciprocal right to access the ports for the ships flying their flag.¹⁹ It is again demonstrates that this right is not within generally provided.

There are certain limitations of port state jurisdiction to deny access to foreign ships. According to the international trade law principal of the most favourable nation, if the state A grants access to the state B, the other states shall enjoy the same regime of access to the ports of state A as the state B has, provided that all states are party to the General Agreement on Trade and Tariffs. However, this does not constrain the state A from denying access to the particular ship of the state B or other states if it is found to be substandard. Therefore, this limitation does not interfere with PSC. Another limitation is that according to UNCLOS and international customary law, a ship in distress shall be granted access to foreign ports. However, the catastrophe of *Prestige* showed that this right may be neglected, that is, in fact, a very negative practice and it was highly criticised by the international community. Hence, there is no a general right of access to foreign ports.

¹⁶ George C. Kasoulides, *Port State Control and Jurisdiction* (Martinus Nijhoff publishers, London 1993) 2-5

¹⁷ *Saudi Arabia v. Arabian American Oil Co.*, 27 I.L.R. 117, 212 (Arb. Trib. 1958)

¹⁸ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Order of 26 September 1991, I.C.J. Reports 1991, 111

¹⁹ Gero Brugmann, ‘Access to Maritime Ports’ (Dr. jur. thesis, The University of New South Wales 2003) 35

3 The PSC framework and mechanism

There are several layers of norms of different nature with respect to PSC, which constitute its organisational and legal framework as well as its mechanism. The first level, which was discussed in previous chapter, establishes general universal principals of PSC, mainly contained in UNCLOS and its legal foundation through international maritime regulatory conventions. The next level lies within IMO guidelines, which provide internationally recommended framework on which, further, regional MoUs are based. The last level in this chain is particular state's arrangements on PSC. Each level has own peculiarities: scope, legal nature, application, etc. Therefore, the left two levels must be studied in detail and that is a purpose of this chapter.

3.1 IMO guidelines on PSC

The first IMO endeavour to bring the recommendatory framework of PSC occurred in 1981.²⁰ Since that, there were few amending resolutions²¹ with the current version adopted in 2011.²² Gradually, the IMO PSC guidelines have been becoming well elaborated and sophisticated.

The current resolution provides for the basic guidance (although it is quite thorough) for conduction of PSC inspections, encourages consistency in the conduction of such inspections and brings clarity for the procedure of deficiencies assessment. While discussing the issue of the IMO resolutions on PSC, the most important to highlight is their non-obligatory nature. In contrast to some other IMO resolutions, which are made mandatory through direct reference to them in the IMO regulatory conventions such as SOLAS and MARPOL,²³ the procedures for PSC has only persuasive character.

²⁰ IMO Resolution A.466(12) Procedures for the Control of Ships (adopted 19 November 1981)

²¹ IMO Resolution A.542(13) Procedures for the control of ships and discharges under Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (adopted 17 November 1983); IMO Resolution A.597(15) Amendments to the Procedures for the Control of Ships (adopted 19 November 1987); Resolution MEPC.26(23) Procedures for the control of ships and discharges under Annex II of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto MARPOL73/78 (adopted 8 July 1986); IMO Resolution A.742(18) Procedures for the control of operational requirements related to the safety of ships and pollution prevention (adopted 4 November 1993); IMO Resolution A.787(19) Procedures for Port State Control (adopted 23 November 1995); IMO Resolution A.882(21) Amendments to the Procedures for Port State Control (adopted 25 November 1999)

²² IMO Resolution A.1052(27) Procedures for Port State Control, 2011 (adopted 30 November 2011)

²³ See p. 65

Nevertheless, it will be shown that the significant volume of the provisions of the IMO guidelines on PSC are incorporated into the regional MoUs that indicates a considerable success of IMO to bring the global consistent regime of PSC.

The resolution A.1052 (27) applies 8 instruments, namely they are: SOLAS, SOLAS Protocol 1988, LOADLINE, LOADLINE Protocol 1988, MARPOL, STCW, TONNAGE and AFS.²⁴ Practice of regional MoUs with respect to applicable instruments is quite diverse with range from 7 to 15 instruments.²⁵ Indeed, it is of cornerstone obstacles for harmonisation of regional MoUs as it is a matter of regional policy among states wherein IMO position reflects the approach of compromise among them. Within the same section two very important principles are embedded, which are found universal recognition in the regional MoUs. First, is no favourable treatment principle according to which ships of non-Parties or below convention size should be given no more favourable treatment in order to ensure that equivalent surveys and inspections are conducted and an equivalent level of safety and protection of the marine environment is ensured.²⁶ Where ships of non-parties states to IMO regulatory conventions are not provided with appropriate certificates, or crew members do not possess STCW certificates, it should be satisfied that such ship or crew do not present a danger to ship or persons on board or an unreasonable threat of harm to the marine environment. Another principle stipulates that in exercising PSC, only those provisions of the conventions, which are in force and which states have accepted, should be applicable.²⁷ Hence, within one regional PSC regime there might be different practice of application of instruments, which is quite undesirable for the matter of consistency, especially in those regions where the cooperation on PSC is weak.

²⁴ IMO Resolution A.1052(27), *supra* note 22, sec. 1.2.1

²⁵ See p. 23

²⁶ IMO Resolution A.1052(27), *supra* note 22, sec. 1.2.2, 1.5;

Paris Memorandum of Understanding on Port State Control (adopted 26 January 1982, entered into force 01 July 1982), sec. 2.4;

Memorandum of Understanding on Port State Control in the Asia-Pacific Region (signed 1 December 1993, entered into force 01 April 1994), sec. 2.5;

Memorandum of Understanding on Port State Control for the Indian Ocean Region (adopted 05 June 1998, entered into force 01 April 1999), sec. 2.4;

Memorandum of Understanding on Port State Control in the Black Sea Region (signed 07 April 2000, entered into force 19 December 2000), sec. 2.4;

Latin American Agreement on Port State Control of Vessels (adopted 05 November 1992, entered into force for each member upon notification), sec. 2.3;

Memorandum of Understanding on Port State Control in the Caribbean Region, 1996 (signed 09 February 1996, entered into force each member upon notification), sec. 2.4;

Memorandum of Understanding on Port State Control for West and Central African Region (signed 22 October 1999, entered into force each member upon notification), sec. 2.4;

Memorandum of Understanding on Port State Control in the Mediterranean Region (adopted 11 July 1997, entered into force each member upon notification), sec. 2.4;

Riyadh Memorandum of Understanding on Port State Control in the Gulf Region (signed June 2004, entered into force each member upon notification), sec. 2.4

²⁷ *Ibid*, IMO Resolution A.1052(27), *supra* note 22, sec. 1.3; Paris MoU, sec. 2.3; Tokyo MoU, sec. 2.4; Indian MoU, sec. 2.3; Black Sea MoU, sec. 2.3; Viña del Mar MoU, sec. 2.2; Caribbean MoU, sec. 2.3; Abuja MoU, sec. 2.3; Mediterranean MoU, sec. 2.3; Riyadh MoU, sec. 2.3

Sections 1.7 of the resolution A.1052(27) provides essential definitions. Two of them are found reflection in the text of MoUs. Section 1.7.5 defines an inspection as “a visit on board a ship to check both the validity of the relevant certificates and other documents, and the overall condition of the ship, its equipment and its crew” that is in correspondence with equivalent provisions of almost all regional MoUs.²⁸ Paris MoU does not contain such definition. However, there are some modifications made in the text of MoUs as well. Provisions of number of MoUs are complemented with the check of the living and working conditions of the crew.²⁹ In contrast, some other MoUs do not contain this complement but have the focus on hygienic conditions on board.³⁰

Another very important definition of “clear grounds” is given by the resolution,³¹ which is incorporated with slight differences in the MoUs.³² “Clear grounds” are defined as “evidence that the ship, its equipment, or its crew does not correspond substantially with the requirements of the relevant conventions or that the master or crew members are not familiar with essential shipboard procedures relating to the safety of ships or the prevention of pollution.” Again, Paris MoU does not enclose the definition in the body text of the MoU but it is stipulated in the ninth annex thereto. The implication when there is a belief for clear grounds is a conduction of more detailed inspection. The types of inspections and other provisions relating to the inspection process must be looked in detail.

The given definition of an inspection above is within the meaning of the initial inspection. It is stipulated that in the conduction of initial inspection the validity of the relevant certificates and other documents and the overall condition of the ship should be checked.³³ If the certificates are valid and the PSCO has general impression of a good standard of maintenance onboard then inspection should be confined to reported or observed deficiencies.³⁴ It is very important provision, which sometimes may be neglected by inexperienced PSCO. As any further check is a loss of time for a shipowner, PSCO must be very cautious about it, of course, in no prejudice of quality of an inspection. In conjunction with this provision another caution is stipulated that “all possible efforts should be made to avoid a ship being unduly detained or delayed. If a ship is unduly detained or delayed, it should be entitled to compensation for any loss or damage suffered”³⁵ that finds acceptance of all regional MoUs.³⁶ Therefore, it is very important to have

²⁸ Tokyo MoU, sec. 3.1; Indian MoU, sec. 3.1; Black Sea MoU, sec. 3.1.1; Viña del Mar MoU, sec. 3.3; Caribbean MoU, sec. 3.1; Abuja MoU, sec. 3.1.1; Mediterranean MoU, sec. 3.1.1; Riyadh MoU, sec. 3.1

²⁹ Black Sea MoU, sec. 3.1.1; Abuja MoU, sec. 3.1.1; Mediterranean MoU, sec. 3.1.1

³⁰ Tokyo MoU, sec. 3.1; Indian MoU, sec. 3.1; Riyadh MoU, sec. 3.1

³¹ IMO Resolution A.1052(27), *supra* note 22, sec. 1.7.2

³² Tokyo MoU, sec. 3.1; Indian MoU, sec. 3.2.1; Black Sea MoU, sec. 3.2.1; Viña del Mar MoU, sec. 3.3; Caribbean MoU, sec. 3.1; Abuja MoU, sec. 3.2.1; Mediterranean MoU, sec. 3.2.1; Riyadh MoU, sec. 3.2

³³ IMO Resolution A.1052(27), *supra* note 22, sec. 2.2.5

³⁴ *Ibid*, sec. 2.2.4

³⁵ *Ibid*, sec. 2.1.4

³⁶ Paris MoU, sec. 3.13; Tokyo MoU, sec. 3.13; Indian MoU, sec. 3.10; Black Sea MoU, sec. 3.10; Viña del Mar MoU, sec. 3.13; Caribbean MoU, sec. 3.11; Abuja MoU, sec. 3.10; Mediterranean MoU, sec. 3.10; Riyadh MoU, sec. 3.21

detailed instruction for PSCO how to conduct inspection. Before embarking onboard PSCO may gain the impression of standard of maintenance of a ship from such items as the condition of her paintwork, corrosion or pitting or unrepaired damage.³⁷

The resolution provides the examples of clear grounds among which there are the absence of principal equipment or arrangements required by the applicable conventions; evidence from a review of the ship's certificates that a certificate or certificates are clearly invalid; evidence from the PSCO's general impressions and observations that serious hull or structural deterioration or deficiencies exist that may place at risk the structural, watertight or weathertight integrity of the ship; indications that key crew members may not be able to communicate with each other or with other persons on board.³⁸

It is also provided for the requirements on professional profile, qualifications and training to be met by PSCOs. As a general rule, only qualified officers whose qualification corresponds to the level of experienced flag state surveyors with ability to communicate in English with key crew should carry out PSC. PSCOs engaged in inspecting operational requirements should be qualified as a master or chief engineer and have appropriate seagoing experience or have qualifications in a maritime related field sufficed the educational standards required by the maritime administration and be specially trained to ensure adequate competence and skills. PSCO training should include necessary knowledge of the provisions of the applicable conventions, which are relevant to the conduct of PSC, taking into account the latest IMO model courses for PSC.³⁹ When the required professional expertise cannot be provided by the PSCO, any person with the required expertise may assist him.

The resolution contains important cautionary rule that PSCOs should not have any commercial interest in the carrying out inspections and inspecting ships. Moreover, assuring independence and impartiality of PSCO, they should not be employed by or otherwise engaged in the work of ROs. It is notable that Tokyo and Caribbean MoUs in contrast to the rest of MoUs⁴⁰ have not incorporated this rule that gives the ground for possible prejudicially conducted inspections in those regions if, for example, PSCOs have association with ROs. Perhaps, those provisions could be more elaborated to address the problem of bribery existing in some PSC regions. Additionally, the resolution stipulates that PSCO should carry identity card issued by the port state and indicating that the PSCO is authorized to carry out the control.

Chapter four of the IMO resolution A.1052 contains reporting requirements. Section 4.1.1 concerns that the master of the ship is provided with a document showing the results of the inspection. Details of any action taken by the PSCO, and a list of any corrective action to be initiated by the master

³⁷ IMO Resolution A.1052(27), *supra* note 22, sec. 2.2.1

³⁸ *Ibid*, sec. 2.4.2

³⁹ *Ibid*, sec. 1.9

⁴⁰ Paris MoU, sec. 3.3; Indian MoU, sec. 3.5.3; Black Sea MoU, sec. 3.5.3; Viña del Mar MoU, annex 5; Abuja MoU, sec. 3.5.3; Mediterranean MoU, sec. 3.5.3; Riyadh MoU, sec. 3.10

and/or company must be included. As it may be qualified as one of essential rights of the master and shipowner with respect to PSC, this provision is included in every MoU.⁴¹

Furthermore, in the case of a detention, at least an initial notification should be made to the flag state administration as soon as practicable.⁴² As foreign ship is under sovereign jurisdiction of flag state, it is crucial to notify it about any detention of a ship under its flag. Every MoU acknowledges this practice.⁴³ Although the wording of the rule is quite different among MoUs. The resolution provides for the situation where “the ship has been allowed to sail with known deficiencies, the authorities of the port State should communicate all the facts to the authorities of the country of the next appropriate port of call, to the flag State, and to the recognized organization, where appropriate.”⁴⁴ To allow the ship is to sail without rectified deficiencies is very dangerous as it may lead to a casualty if the shipowner has not voluntary incentive to do it. However, sometimes it is an only option as it may happen that it is possible to take repair only in the next port of call. Where, in the exercise of PSC, a party denies a foreign ship entry to the ports or offshore terminals under its jurisdiction, whether or not as a result of information about a substandard ship, it should forthwith provide the master and flag state with reasons for the denial of entry.⁴⁵ For the moment, there is only one regional MoU, namely Paris MoU that utilises the right of port state to ban access of ships to the ports of the region as ultimate measure for substandard ships.⁴⁶ This provision of the resolution is incorporated in the annex four of Paris MoU.

In accordance with SOLAS regulation I/19, article 11 of MARPOL, article 21 of LOADLINE, or article X(3) of STCW, IMO must be reported about every case of a detention of a ship. Section 4.1.5 of IMO resolution A.1052(27) stipulates that such deficiency reports should be made in accordance with the form given in appendix 13 or 16, as appropriate, or may be submitted electronically by the port state or a regional PSC regime. On receiving a report on detention, the flag state and, where appropriate, the RO through the flag state administration should, as soon as possible, inform IMO of remedial action taken in respect of the detention.⁴⁷ In the interest of making information regarding deficiencies and remedial measures generally available, a summary of such reports should be made by the IMO in order that the information can be disseminated to all member states to the applicable conventions. In the summary of deficiency reports, an indication should be given to the flag state action or whether a comment by the flag

⁴¹ Paris MoU, sec. 3.10; Tokyo MoU, sec. 3.12; Indian MoU, sec. 3.6.1; Black Sea MoU, sec. 3.6.1; Viña del Mar MoU, annex 3, sec. 1.1.1; Caribbean MoU, sec. 3.10; Abuja MoU, sec. 3.6.1; Mediterranean MoU, sec. 3.6.1; Riyadh MoU, sec. 3.12

⁴² IMO Resolution A.1052(27), *supra* note 22, sec. 4.1.3

⁴³ Paris MoU Sec. 3.7; Tokyo MoU Sec. 3.8; Indian MoU Sec. 3. 3.6.2; Black Sea MoU 3.7; Viña del Mar MoU Annex 3 Sec. 1.1.3; Caribbean MoU 3.7; Abuja MoU Sec. 3.7; Mediterranean MoU 3.7; Riyadh MoU Sec. 3.16

⁴⁴ IMO Resolution A.1052(27), *supra* note 22, sec. 4.1.4

⁴⁵ *Ibid*, sec. 4.1.2

⁴⁶ Paris MoU, sec. 4

⁴⁷ IMO Resolution A.1052(27), *supra* note 22, sec. 4.2.1

state concerned is outstanding.⁴⁸ The appropriate IMO Committee should periodically evaluate the summary of the deficiency reports in order to identify measures that may be necessary to ensure more consistent and effective application of IMO instruments, paying close attention to the difficulties reported by the member states to the relevant conventions, particularly in respect to developing countries in their capacity as port states.⁴⁹ The devised reporting system ensures the awareness of member states about performance of flag states and provides vital practical information about difficulties encountered. Furthermore, section 5.1.3 provides for the recommendations to address such difficulties, when recognized by the appropriate IMO Committee be incorporated into the applicable IMO instrument and any modifications relating to the procedures and obligations should be made in the port state documentation. Application of this provision is able to facilitate sustainable development of effective functioning of PSC globally.

3.2 Analysis of regional PSC regimes

It is possible to distinguish ten regional PSC regimes, which cover almost the whole globe. Further, it is possible and appropriate to classify them into regional MoUs and domestic arrangements of particulate states. According to this classification, there are nine regional PSC MoUs and USCG PSC programme.

According to Dr. Özçayir, the origins of PSC lie in the Hague MoU signed in 1978.⁵⁰ However, it is deemed here that it would be more appropriate to put it as the actual history of development of and cooperation on PSC since 1978. The origins of PSC may be traced back to the first version of SOLAS, which was adopted in 1914 after sinking *Titanic* as it was showed in 2.1.2 subchapter.⁵¹

The chronological appearance of regional MoUs is shown in the table below. The first contemporary regional MoU is Paris MoU, which was evolved from Hague MoU after *Amoco Cadiz* incident catalysed strengthening PSC in Europe. Some states participate in several MoU simultaneously. For example, Russian Federation participates in Paris, Tokyo and Black Sea MoU.

Regional MoU	Foundation year	Number of participating/cooperating states currently
Paris MoU	1982	27
Viña del Mar MoU	1992	13/2
Tokyo MoU	1993	18/1
Caribbean MoU	1996	25

⁴⁸ *Ibid*, sec. 5.1.1

⁴⁹ *Ibid*, sec. 5.1.2

⁵⁰ Dr. Z. Oya Özçayir, 'The Use of Port State Control in Maritime Industry and Application of the Paris Mou' (2009) 14 OCLJ 208

⁵¹ *See* p. 14

Mediterranean MoU	1997	10
Indian MoU	1998	20
Abuja MoU	1999	22
Black Sea MoU	2000	6
Riyadh MoU	2004	6

As it was accurately indicated by Dr. Özçayır that MoU is not an international convention, it is an administrative agreement, which does not create internationally binding obligations for state parties. It is aimed to build a framework of cooperation among the maritime authorities of a region or a group of states with similar position on PSC. MoU provides uniformity and harmonization for application, among participating states, of the right of a port state to ascertain that calling ships are in compliance with internationally agreed rules and standards on maritime safety and protection of marine environment within its jurisdiction. The term “commitment” is employed in the wording of the MoU texts instead of using words such as obligation, duty, etc reflecting mandatory nature of the provisions.

It is showed in the previous subchapter that MoUs incorporate significantly provisions and principles elaborated in the IMO resolutions on the procedure for PSC. Moreover, relevant provisions on PSC of MoUs are very similar in comparison with each other. Annex 1 contains the comparison table of relevant provisions of MoUs, which illustrates the compositional similarity of regional MoUs. Provisions, which are similar among majority of MoU are coloured in bright green. Where there are two groups of MoUs with similar provisions, the minor group is coloured in dark green. However, some typical provisions are of slight difference among MoUs to accommodate interests of regional states. Individually modified and exclusive provisions have own colour pertaining to the particular MoU. For example, in contrast to other MoUs containing the same type of provision Riyadh MoU explicitly indicates that those exceptional circumstances must be recognised by authority in order to provide access to specific port for ship to minimize the risk of loss of life or of pollution. Provisions, relating to the relevant instruments, are found to be similar among MoUs with two differences. One is minor, namely that some MoUs use wording “below 500 GT” and some employ the wording “non-convention sized ships”. Another one is cardinal pertaining to the list of applicable instrument. In fact, it is one of major differences and the obstacle for harmonisation of regional MoUs. The table below shows the application of relevant instruments among MoUs. There are only five instruments that are in common for all MoUs.

No	Instruments	1	2	3	4	5	6	7	8	9
1	LOAD LINES 66									
2	LL PROT 88									
3	SOLAS 74									
4	SOLAS PROT 78									
5	SOLAS PROT 88									
6	MARPOL									
7	STCW 78									

8	COLREG 72									
9	TONNAGE 69									
10	ILO 147									
11	ILO P147									
12	CLC 1969									
13	CLC PROT 1992									
14	AFS 2001									
15	BUNKER 2001									

1- Abuja MoU; 2 - Black Sea MoU; 3 - Caribbean MoU; 4 - Indian MoU; 5 - Mediterranean MoU; 6 - Paris MoU; 7 - Riyadh MoU; 8 - Tokyo MoU; 9 - Viña del Mar MoU.

Another major difference is a selection scheme for ships to be inspected. Selection scheme of majority of MoUs can be analysed as two-element system where parts thereof are percentage of annual total of inspections and rules giving special attention (priority) in selecting ships for an inspection. Paris MoU stands alone as it has much more advanced selection scheme. It will be examined in the next subchapter. Tokyo MoU is a hybrid between typically used selection scheme and Paris MoU using targeting system. Hence, it also deserves an attention to look more thoroughly. The table below shows percentage of annual total of inspections among MoUs.

The lowest percentage belongs to Indian and Riyadh MoUs with 10 percents. Tokyo MoU states take the commitment to inspect very high percentage of calling vessels, namely 80 percents and Paris MoU gives priority to calling ships through the analysis of ship risk profile based on different factors. Hence, Paris MoU aims to inspect every calling vessel with Priority I. Fifteen percents are prevailing among other MoUs and Viña del Mar MoU aims to inspect a bit more, namely 20 percents. Riyadh, Abuja, Mediterranean MoUs have no computerised targeting system and Caribbean is under development.

MoUs	Percentage
Abuja MoU	15
Black Sea MoU	15
Caribbean MoU	15
Indian MoU	10
Mediterranean MoU	15
Paris MoU	100% Priority I, Priority II to be used for completing percentage of annual total of inspections
Riyadh MoU	10
Tokyo MoU	80
Viña del Mar MoU	20

Another major difference of Paris and Tokyo MoU from the rest is the use of multi-faceted listing system showing performance of flag states and ROs, which is utilised in the selection scheme. Black Sea MoU and Indian MoU publish the watch lists, which are different from each other. Black Sea MoU watch list is comprised of the ships, which have been detained for several

three or more times by the Black Sea MOU during the last 24 months. Indian MoU puts those ships on the watch list, which according to section 3.8.2 of the Indian MOU, proceed to sea without complying with the conditions agreed to by the authority of the port of inspection, or do not proceed to the nominated repair port. Additionally, other organisations such as classification societies, secretariats' of other MOUs and flag states not being members of the Indian MoU also provide alerts on various vessels from time to time. It shows the willingness of Indian MoU to cooperate for the benefit of the maritime community in general, which is, actually, in lack among MoUs. Exclusive cardinal difference of Paris MoU from the rest is the use of the right to refuse access to those ships, which were found substandard for several times during specified period taking into consideration performance of flag state of the ship as ultimate measure to eliminate substandard ships from the Paris MoU waters.

Generally, all MoUs have a common structural architecture. It is comprised of preamble, sections on general commitments, relevant instruments, inspection procedures, rectification and detention, provision of information, operational violations, training programmes and seminars, organization, financial mechanism, amendments, administrative provisions and annexes where relevant.

Analysing the provisions of MoUs together with comparison table of Annex 1 it is possible to derive several conclusions. Majority of MoUs uses typical wording of provisions. Paris MoU is almost completely distinguished from the rest of MoUs as it uses own wording and some conceptually different provisions which, in general, can be characterised as much more stringent and effective. It is possible to find some provisions of Tokyo MoU, which were adopted from Paris MoU. However, in general, Tokyo MoU is different from Paris MoU and rest of them. It is also possible to find some common provision just between Tokyo and Indian MoU. There is a group of MoUs, which are quite similar with each other, namely Black Sea, Abuja, Mediterranean, Riyadh, Indian MoUs within which Abuja and Mediterranean MoUs are almost identical. Caribbean MoU is quite similar with this group. However it employs own wording in many cases and uses not all typical provisions. Based on wording of provisions, Viña del Mar MoU can be almost completely distinguished from the rest of MoU, although same typical provision are used. Since Paris and Tokyo MoUs are conceptually different and in the same time being the most effective, they must be examined in detail further.

3.2.1 Paris MoU

One of the main distinguishing characteristics of Paris MoU is its inspection and selection scheme. It is provided in the Annex 8 of Paris MoU. Based on the ship risk profile scheme determines the scope, frequency and priority of inspections. Overriding or unexpected factors might trigger an inspection in between periodic inspections, which is referred to as an additional inspection. All ships in the information system are assigned either as high, standard or low risk based on generic and historic parameters of the ship risk profile. Generic parameters include ship's type, age; flag state

performance, RO performance and company performance. Historic parameters include number of deficiencies recorded in each inspection and detentions within previous 36 months.

High risk ships are those ships, which meet the criteria to a total value of 5 or more weighting points. Low risk ships are ships which meet all the criteria of the low risk parameters and have had at least one inspection in the previous 36 months. Low risk parameters mean ship's flag state is to be within white list and IMO audited, ship's RO performance ought to be high or RO recognized by one or more Paris MoU member states, ship's company performance must be measures as high, 5 or less deficiencies and no detention within last 36 months. Standard risk ships are ships which are neither high-risk ships nor low risk ships.

The black, grey and white list for flag state performance is established annually taking account of the inspection and detention history over the preceding three calendar years and is adopted by the Paris MoU Committee. The performance of all ROs is measure in similar way and indicated as high, medium, low and very low. The same gradation is used to measure company performance through the analysis of the detention and deficiency history of all ships in a company's fleet whereas the company is the ISM company for the ship. The formula for company performance consists of two elements, the deficiency index and the detention index. The deficiency index is the ratio of the total points of all deficiencies of all ships in a company's fleet to the number of inspections of all ships in the company's fleet within the last 36 months. This ratio is compared with the average for all ships inspected in the Paris MoU over the last 3 calendar years to determine whether the index is average, above average or below average. Detention index is calculated in the same manner. When counting deficiencies each ISM related deficiency is weighted at 5 points. Other deficiencies are valued at 1 point.

The selection scheme for inspection has priority system. Priority one includes ships with overriding factor, high risk ships not inspected in last 6 months, standard risk ships not inspected in last 12 months, ship not inspected in last 36 months. Priority two includes high risk ships not inspected in last 5 months, ship with unexpected factors, standard risk ships not inspected in last 10 months, low risk ships not inspected in last 24 months.

The following overriding factors are considered sufficiently serious to trigger an additional inspection at priority one:

- ships reported by another member state excluding unexpected factors;
- ships involved in a collision, grounding or stranding on their way to port;
- ships accused of an alleged violation of the provisions on discharge of harmful substances or effluents;
- ships which have been manoeuvred in an erratic or unsafe manner whereby routing measures, adopted by the IMO, or safe navigational practices and procedures have not been followed;
- ships which have been suspended or withdrawn from their class for safety reasons after last PSC inspection;
- ships which cannot be identified in the database.

Unexpected factors could indicate a serious threat to the safety of the ship and the crew or to the environment but the need to undertake an additional inspection is for the professional judgement of the authority. It includes, *inter alia*, ships which did not comply with the reporting obligations, previously detained ships (3 months after the detention) and ships reported with problems concerning their cargo, in particular noxious or dangerous cargo. Ships with unexpected factors which have not been inspected may be reported to the information system and remain eligible for inspection in subsequent ports as priority two.

Inspections are categorised as periodic or additional due to overriding or unexpected factor and based on its scope as initial, more detailed and expanded. Initial and more detailed inspections correspond to general practice laid down in IMO resolution on PSC. Expanded inspection must be looked closer. It includes 14 risk areas. They are documentation, structural condition, weathertight condition, emergency systems, radio communication, cargo operations including equipment, fire safety, alarms, living and working conditions, navigation equipment, life saving appliances, dangerous goods, propulsion and auxiliary machinery, pollution prevention. The expanded inspection will take account of the human elements covered by ILO, ISM and STCW and include operational controls as appropriate.

This selection scheme is designed to accurately concentrate on substandard ships, while quality ships will be rewarded by undergoing less frequent inspections. The overall priority is given to ships with high risk profile.

Paris MoU contains reporting obligations for arriving ships. A ship, which is eligible for an expanded inspection and bound for a port or anchorage of a Paris MoU member state, shall notify its arrival 72 hours in advance to the authority or earlier if required by national provisions. Other ships shall notify its arrival at least 24 hours in advance, or at the latest, at the time the ship leaves the previous port, if the voyage time is less than 24 hours, or if the port of call is not known or it is changed during the voyage, as soon as this information is available.

Another peculiarity of Paris MoU which, in fact, distinguishes it from the rest of MoUs, is banning ships being systematically found substandard. Section four of Paris MoU provides for banning rules. In accordance with section four, a ship should be refused access to ports and anchorages of member states in few cases based on ship's flag state performance and number of detentions or prevention of operation orders. It is imposed refusal of access on the ship, which flies the flag of a state appearing in the grey list and has been detained in the course of the preceding 24 months or flies the flag of a state appearing in the black list and has been detained during last 36 months. The ship also should be refused access when it has been issued with a prevention of operation order under the system of mandatory surveys for the safe operation of regular ro-ro ferry and highspeed passenger craft services more than twice in the course of the preceding 24 months and belongs to gray listed flag state, or in the course of the preceding 36 months and belongs to black listed flag state.

The refusal of access order shall be lifted after a period of three months has passed from the date of issue of the order and when a formal request is filed supplemented by required evidences that the ship is in conformity with

requirement of applicable instruments. If the ship is subject to a second refusal of access, the period shall be 12 months. Any subsequent detention in a port or anchorage shall result in the ship being refused access to any port or anchorage. This third refusal of access order may be lifted after a period of 24 months has passed from the issue of the order and only if:

- the ship flies the flag of a state appeared in the white list;
- the statutory and classification certificates of the ship are issued by RO, which are recognized by one or more of the Paris MoU member states;
- the ship is managed by a company with a high performance;
- application of formal request with required evidences of ship compliance.

The last but not the least important distinguishing characteristic of Paris MoU is that it is a regime with the regime inside. EU states which are party to Paris MoU shall comply with EU legislation on PSC.⁵² In 1995 EU enacted own legislation incorporating Paris MoU as there were no consistency in applying the MoU correctly among EU states.⁵³ The directive integrates main provisions of Paris MoU and where necessary complements in order to comprehensively implement Paris MoU by EU states and accommodate specificity of EU policy on shipping safety and prevention of marine pollution facilitated by EMSA. The main difference between provisions of Paris MoU and the directive is that latter provisions are mandatory for EU states and if they are found not in compliance with EU directive, the proceeding against violating state may be initiated in European Court of Justice that in fact happened with Italy in 1997 when it failed to enact national legislation on PSC implementing the Directive 95/21/EC on PSC.⁵⁴

Due to its peculiarities, Paris MoU can be characterised as most rigorous as well as the most effective in achieving aimed goal to eliminate substandard ships from its waters. The PSC detention dynamics in annex 3 shows that Paris MoU had the lowest detention rate with 3,61 in 2011. Since 1995, the Paris MoU detention rate dropped in three times, which clearly indicates its effectiveness.

3.2.2 Tokyo MoU

As it was indicated above, the main difference of Tokyo MoU from the rest is its targeting system. Table below shows targeting factors and its value.⁵⁵ The target factor of the calling ship is the sum of the Target Factor Values.

Element	Target Factor Value
Ship Age	<ul style="list-style-type: none"> – 0-5 years: 0 point – 6-10 years: 5 points

⁵² European Parliament and the Council Directive (EC) 2009/16 on port State control [2009] OJ L131/57

⁵³ Özçayir, *supra* note 1, 254

⁵⁴ *Ibid*, 255

⁵⁵ <http://www.krs.co.kr/kor/dn/Pro/pdf/Target%20System.doc.pdf> accessed 01.12.2012

	<ul style="list-style-type: none"> - 11-15 years: 10 points - 16-20 years: 10 +1 point for each year exceeding 15 years - >20 years: 15 +2 points for each year exceeding 20 years
Ship type	4 points for ships with type codes 13, 30, 40, 55, 60, 61,70, 71 and of 15 years of age and over 0 points for all others
Ship flag (excess of average detention based upon 3 year rolling average figure)	+1 for each percentage point in excess (decimal number rounded up)
Deficiencies	0,6 points for each deficiency found in last 4 initial inspections or follow-up inspections with new deficiency (decimal number rounded up)
Detentions	Depending on number of detections during the last 4 initial inspections or follow-up inspections with new deficiencies: 1 detention – 15 points 2 detentions – 30 points 3 detentions – 60 points 4 detentions – 100 points
Classification Society	Non IACS –10 points
Outstanding deficiencies – from last 3 inspections (a deficiency recorded in the APCIS in the last initial inspections or associated follow-up ones and not marked as rectified)	2 points for each outstanding deficiency
Time since last initial inspections	6-12 months – 3 points 12-24 months – 6 points Over 24 months or never inspected in Tokyo MoU region (including new ships) – 50 points

It depends on member state how to treat the target factor. However, the guidelines are drawn according to which if the target factor exceeds a hundred points, the ship should be given priority one. If target factor between 41 and 100 it shall be priority two. Priority three is within range from 11 to 40.

3.2.3 USCG PSC programme

United States has elaborated own unique PSC regime which is analysed here apart in contrast to regional MoUs due to its singularity. The legal framework of PSCP is constituted by federal legislation both codified in US Code and separate acts and FCR. However, those legal provisions are just an umbrella for PSCP organisation. The mechanism of PSCP is explained

by the USCG published directives (MSMs) and NVICs, which do not have the status of law in contrast to regulation of PSC mechanism in EU.

PSCP is executed by USCG, which was created by combining the Lifesaving Service with the Revenue Cutter Service on 28th January 1915.⁵⁶ It is military service and a branch of the armed forces of the United States. The Coast Guard is a service in the Department of Homeland Security, except when operating as a service in the Navy.⁵⁷ The Secretary of the Department in which USCG operates is authorized to confer Coast Guard related duties and powers upon the Commandant.⁵⁸ The Commandant is specifically authorized to designate any officer as a “captain of the port” for such ports or adjacent high seas or water over which the U.S. has jurisdiction to facilitate execution of Coast Guard duties prescribed by law.⁵⁹

Legal foundation PSC is found in the relevant section envisaging also principal of reciprocity for foreign vessels.⁶⁰ It provides for the foreign vessel of a country having inspection laws and standards similar to those of the United States and that has an unexpired certificate of inspection issued by proper authority of its respective country, is subject to an inspection to ensure that the condition of the vessel is as stated in its current certificate of inspection. A foreign country is considered to have inspection laws and standards similar to those of the United States when it is a party to SOLAS to which the United States Government is currently a party. A foreign certificate of inspection may be accepted as evidence of lawful inspection only when presented by a vessel of a country that has by its laws accorded to vessels of the United States visiting that country the same privileges accorded to vessels of that country visiting the United States.

United States is party to several major international regulatory conventions such as SOLAS, MARPOL, TONNAGE, LOADLINE, STCW, COLREG, AFL.⁶¹ It is odd that the section 3303 does not reflect the commitment to all conventions. In general, it may be deduced that legal regulation PSC in USA is rather fragmented. Although standards for foreign vessels calling US port should be based on international conventions, there are national requirements to be observed as well. For example, double hull requirements imposed under the Oil Pollution Act of 1990 or navigation safety regulations found in the part 164 of 33 CFR.

In order to understand PSCP further, MSMs must be analysed. MSM is the primary policy and procedural statement for the marine safety programs of USCG. MSM must be used in accordance with appropriate marine safety laws and regulations. In any case of conflict between provisions of the manual and any statute or regulation, the legal requirements shall be observed.⁶²

⁵⁶ MSM, volume I, 2-5

⁵⁷ 14 USC, sec. 1

⁵⁸ *Ibid.*, sec. 631

⁵⁹ *Ibid.*, sec. 634

⁶⁰ 46 USC, sec. 3303

⁶¹ IMO Status of Conventions

<<http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Copy%20of%20status-x.xls>> accessed 22.11.2012

⁶² MSM, *supra* note 56, 1-2

Volume I of MSM provides as general framework of USCG work and blueprint definition of PSC in section 4.C.7 of chapter 4 on law enforcement. Chapter 7 contains provisions on professional training and qualification of USCG officers. Main provisions on PSC are found in section D of volume II of MSM. Subsection C contains PSC related definitions including clear grounds, control, deficiencies, detention, substandard ship, which are in conformity with IMO guidelines on PSC with slight modification to accommodate specificity of USCG work. Peculiar definitions are boarding, contravention, intervention.

Boarding means attending a vessel to conduct an examination, cargo monitor, cargo loading supervision, deficiency check, or other USCG business which includes at sea boarding. The definition of boarding is much wider than definition of inspection under IMO PSC IMO guidelines and MoU. The definition of contravention has similar scope with deficiencies, however it is wider, namely an act, procedure, or occurrence that is not in accordance with a convention or other mandatory instrument.

Intervention implies a control action taken by a port state in order to bring a foreign flag vessel into compliance with applicable international convention standards when a ship's flag state cannot or is not willing to exercise its obligations under an international convention to which it is a party. This may include requesting appropriate information, requiring the immediate or future rectification of deficiencies, detaining the vessel, or allowing the vessel to proceed to another port for repairs. An intervention is not synonymous with a detention. As it is shown, it has much broader scope.

USCG PSC examinations consist of annual examination, reexamination or deficiency follow-up examination. Any of these examinations may be broadened in scope or depth into an expanded examination, if clear grounds exist that lead a boarding team to believe that the condition of the ship or its equipment does not correspond with the certificates or the ship does not comply with applicable laws or conventions. Annual examination shall normally consist of an examination of the vessel's certificates, licenses and documents, and a general examination of the entire vessel include examining and testing specific equipment, and conducting operational testing and emergency drills with the vessel's crew.⁶³

A re-examination is an examination to ensure that a vessel has remained in compliance with appropriate U.S. laws or international conventions between annual examinations. It shall normally consist of an examination of the vessel's certificates, licenses and documents, and a general examination conducted by walking through the vessel. Follow-up examination is performed to ensure previously identified deficiencies have been corrected. It may be limited in scope to an examination of the specific items identified as deficiencies during a previous boarding.⁶⁴

USCG also exercises as a part of PSC cargo supervision. It is the process of supervising explosives or radioactive materials transfers.⁶⁵

In general, USCG PSCP has many similarities with procedures stipulated by IMO guidelines and regional PSC MoU. However, it has unique features to

⁶³ MSM, Volume II, D1-7

⁶⁴ *Ibid.*, D1-8

⁶⁵ *Ibid.*, D1-9

accommodate US concerns for security and peculiarity of USCG operation due to its status as a part of Department of Homeland Security and US Navy.

The foreign vessels bound for the United States should submit NOA to the National Vessel Movement Centre.⁶⁶ The rules are quite time stringent. If the voyage lasts more than 96 hours, NOA must be submitted at least 96 hours before entering the port or place of destination if less than before departure but at least 24 hours before entering the port or place of destination. Information provided in NOA includes information on the vessel, voyage, cargo, each member on board, each person on board in addition to crew, ISM Code Notice, ISPS Code Notice.

PSCP employs a quite sophisticated targeting system. USCG screens the vessels prior to arrival at the first US port of call, using three risk-based tools to determine the threat a vessel poses to a US port. These risk-based tools collectively referred to as the Compliance Verification Examination Matrices that prioritizes vessel compliance examinations and security boarding.⁶⁷ There are three matrices. The first is High Interest Vessel Matrix that is risk-based tool used to evaluate the security risk of a vessel entering into port. The second screening tool is the ISPS/MTSA Security Compliance Targeting Matrix evaluating risk factors applicable to a foreign-flag vessel's compliance with international and domestic security standards. The third matrix evaluates risk factors applicable to a vessel's compliance with international safety and environmental standards. It is called the PSC Safety and Environmental Protection Compliance Targeting Matrix. The use of second and third matrices allows to identify those vessels posing the greatest risk of being substandard.

The ISPS/MTSA Security Compliance Targeting Matrix uses several risk factors. They are ship management, flag state; recognized security organization, the individual vessel's security compliance history and last ports of call information. The matrix is used to target those vessels posing the greatest risk of noncompliance with SOLAS Chapter XI-2, ISPS Code, and the regulations issued under Maritime Transportation Security Act.

PSC Safety and Environmental Protection Compliance Targeting Matrix uses similar risk factors. They are ship management, flag state, classification society, compliance history, and vessel type. The risks associated with each of these factors are evaluated using USCG examination data developed over previous years.

NVIC 06-03 contains comprehensive instructions on reporting for PSCO in the case of detention.

Subpart 1.03 of title 46 of FCR envisages the right of appeal. Section 1.03-15 provides for that any person directly affected by a decision or action taken by or on behalf of the USCG shall follow the procedures contained in this section when requesting that the decision or action be reviewed, set aside, or revised. According to set procedure when requesting that a decision or action to be reconsidered or reviewed, such request must be made within 30 days after the decision is rendered or the action is taken. When making a formal appeal of a decision or action, it must be submitted

⁶⁶ 33 FCR 160

⁶⁷ NVIC 06-03, Enclosure (1), p. 1

in writing and received by the authority to whom the appeal is required to be made within 30 days after the decision or action being appealed, or within 30 days after the last administrative action required by this subpart. Upon written request and for good cause, the 30 day time limit may be extended by the authority to whom the appeal is required to be made. A formal appeal must contain a description of the decision or action being appealed and the appellant's reason(s) why the decision or action should be set aside or revised. When considering an appeal, the Commandant or a District Commander may stay the effect of a decision or action being appealed pending determination of the appeal. While a request for reconsideration or review or a formal appeal is pending, the original decision or action remains in effect, unless otherwise stayed. Failure to submit a formal appeal in accordance with the procedures and time limits results in the decision or action becoming final agency action. Any decision made by the Commandant, or by the Deputy for Operations Policy and Capabilities, or by an office chief pursuant to authority delegated by the Commandant is final agency action on the appeal.

The initial appeal should be filed to the USCG officer in command where the decision was made or action was taken.⁶⁸ If the appeal is not satisfied, the further formal appeal may be forwarded to the District Commander.⁶⁹ In the case if the appeal is further declined, it may be finally made to USCG headquarters.⁷⁰

It is shown that USCG PSC Programme is drastically different from other regional PSC regimes based on MoUs. Therefore, it stands alone in the classification. In the same time, it operates on the national level based on US legislation and organisationally implemented by USCG through its PSC programme. However, in order to analyse methodically how PSC operates on the national level it is necessary to examine at least two other states participating in different regional PSC MoUs.

3.3 Comparison of PSC in UK and Ukraine

It is chosen to compare how PSC operates in legal dimension in UK and Ukraine due to their drastic difference. UK participates in Paris MoU and Ukraine is a member of Black Sea MoU. They belong to different legal systems and different implementation approaches are used in these countries. However, MoU does not create international mandatory obligation for participating state to implement it but in order to exercise PSC port state must enact the legislation sanctioning and subsequently PSC. Those legislation should be in conformity with provisions of MoU. Therefore, implementation method is a relevant part of consideration.

UK is a common law country where dualistic approach is adopted for implementation. Therefore, international legal provisions are implemented when a national piece of legislation incorporating them is enacted. The primary sources of English maritime law are statutes and case law. Part IV

⁶⁸ 46 FCR 1.03-20

⁶⁹ *Ibid.*, 1.03-25

⁷⁰ *Ibid.*, 1.03-15(h)

of Shipping Safety Act 1995 governs the question of shipping safety including enabling provision for PSC. Section 95 provides for where a ship (including foreign ship) which is in a port in the UK or at sea in UK waters, appears to a relevant inspector to be a dangerously unsafe ship, the ship may be detained. Subsection 3 stipulates further that the officer detaining the ship shall serve on the master of the ship a detention notice, which shall specify the matters, which make the ship a dangerously unsafe ship and require the ship to comply with the terms of the notice until it is released by a competent authority. Subsection four implements important provision of many regulatory convention providing for PSC and IMO guidelines, namely in the case of a foreign ship is detained, the officer detaining the ship shall cause a copy of the detention notice to be sent as soon as practicable to the nearest consular officer for the country to which the ship belongs.

The more detailed provisions on PSC are found in secondary legislation.⁷¹ Part one of the regulations is devoted to implementation of the Directive 2009/16/EC on PSC. Section four of the regulations impose a duty on the Secretary of State to ensure in each calendar year that the UK has carried out its share of the total number of inspections to be carried out annually within the European Union and the Paris MOU region.

Section 4(3) in conjunction with sections five and six provides for notion and types of inspection in accordance with Paris MoU and the Directive. Other sections incorporate the respective provisions of Paris MoU and the Directive on report of inspection to the master, professional profile of inspectors, rectification and detention, effect of refusal of access notice, power to permit prohibited ships to enter port, duty on pilots and port authorities to report anomalies, duty on port authorities to report ship arrivals and departures, etc.

Sections 14, 15 and 16 provides for appealing and compensation procedure. Section 15 of the regulations specifies that any dispute in relation to detention notice or refusal of access shall be referred to a single arbitrator appointed by agreement between the parties for that dispute to be decided by him. In order to initiate procedure, the respective notice shall be given to the relevant inspector within 21 days from the service of the detention notice by the master or shipowner. The giving of the notice shall not suspend the operation of the detention or refusal of access notice unless, on the application of the person requiring the reference, the arbitrator so decides.

Where the arbitrator decides that the facts of the case did not constitute a valid basis for the inspector's opinion, the arbitrator must cancel the detention notice or refusal of access notice, or affirm it with such modifications it may be appropriate.

According to section 16 if it is proved if there were not valid basis for detention or refusal of access, the arbitrator must award owner of the ship compensation in respect of any loss suffered in consequence of such detention or refusal of access.

Subsection 6 of section 15 sets the qualification requirements for the arbitrator as following:

⁷¹ Merchant Shipping (Port State Control) Regulations 2011

- a person holding a certificate of competency as a master mariner or as a marine engineer officer class 1, or a person holding a certificate equivalent to any such certificate;
- a naval architect;
- a person with 7 year legal experience qualified for judicial appointment or an advocate or solicitor with 7 years' standing;
- a person with special experience of shipping matters, of the fishing industry, or of activities carried on in ports.

Section 18 of the regulations provides for PSC offenses. According to this section where a ship enters a port or anchorage in breach of detention notice or fails to proceed to the repair yard specified when permitted to leave port or to fails to comply with the requirement that the deficiency be rectified within 30 days, the owner and master are each guilty of an offence, and liable on summary conviction to a fine not exceeding the statutory maximum, or on conviction on indictment to imprisonment not exceeding two years, or a fine, or both. Where a ship is eligible for an expanded inspection fails to give notification for arrival or leave the port or anchorage when the inspection is not completed, the owner and master are each guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale. The section also envisages offences for pilots and port authorities when failing to fulfil their duties with respect to PSC.

It can be concluded that UK legislation on PSC properly implements Paris MoU and EU directive on PSC. Provisions are systematic and very accurately and succinctly drafted. It again proves that UK is a state with one of the best maritime legislation in the world reflecting its history and concerns. Next jurisdiction in line to be examined is Ukraine.

Ukraine belongs to the civil law family. It is a monistic state with supremacy of international law. According to article 9 of Constitution of Ukraine: "International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine [*the Parliament of Ukraine, - inserted for the purpose of clarity*], are part of the national legislation of Ukraine."⁷²

The cardinal source of maritime law is MSCU, which was enacted in 1995. According to the article 3 of the code, the state regulates merchant shipping through central executive authority in the sphere of transport. Paragraph two of the article envisages that central executive authority in the sphere of transport in cooperation with other central executive authorities concerned shall develop and approve regulations on merchant shipping; instructions, rules for carriage of cargos, passengers, post and luggage; rules for intermodal transportation with sea leg, which are mandatory for all legal entities and physical persons. These functions are assigned on the Ministry of Infrastructure of Ukraine in accordance with section 1 of the Regulation on the Ministry of Infrastructure of Ukraine.⁷³

Cabinet of Ministries of Ukraine (the government of Ukraine) imposes the duties arising out of participation in the Black Sea MoU on the Ministry of

⁷² Constitution of Ukraine of 28.06.1996 № 254к/96-BP

<<http://www.rada.gov.ua/const/conengl.htm>> accessed 03 December 2012

⁷³ Regulation on the Ministry of Infrastructure of Ukraine sanctioned by the Order of President of Ukraine of 12 May of 2011 № 581/2011

<<http://www.mtu.gov.ua/repository/1/file/polozhennia.doc>> accessed 03.12.2012

Infrastructure of Ukraine and UMRI operating within the ministry.⁷⁴ This provision provides for organisational implementation of commitments of Ukraine arising out of the Black Sea MoU. Although the Black Sea MoU has no mandatory force for participating states, it is embedded among those international organisation in the list of according to which Ukraine accepted internationally compulsory obligations. The wording of the resolution is quite obscure. It is rather technical emanating from organisational nature of the purpose designed by the legislators, therefore it is not clear which legal status is given to Black Sea MoU in Ukrainian legislation.

Further exploring organisational component of implementation of respective commitments of Ukraine on PSC, the authority of UMRI must be examined. According to subsection 38 of section 3 of the Regulation on UMRI⁷⁵, it exercises PSC for the compliance of the vessels calling ports of Ukraine, territorial sea, internal waters without dependence on flag, standards of merchant shipping safety and prevention of marine pollution from ships. The main portion of provisions on PSC are also accommodated in secondary legislation,⁷⁶ blueprint thereof is paragraph two of the article 90 of MSCU which stipulates that the rules for the control of ships with purpose to assure shipping safety shall be adopted by central executive authority in the sphere of transport with the concurrence of central executive authority in the sphere of fishery.

Section 1.1. of the rules stipulated that these regulations are designed to establish an organisation of state control in the ports for observance by ships of requirement of international conventions, MSCU, act of Ukraine on shipping safety and prevention of pollution of environment. The rules apply to seagoing and river ships in spite of flag and form of ownership, which are present in Ukrainian ports and internal waterways of Ukraine. Section 1.3 provides for that the rules are designed in conformity with, inter alia, SOLAS, MARPOL, STCW, LOADLINE, TONNAGE, ILO 147, COLREG, IMO resolution A. A.787(19) with amendments by A.882(21), IMO resolution A.847(20), Black Sea MoU.

According to the rules, all ship are subject at least two types of control. Section 1.5 provides for that all ships are subject to the control by inspectors of ISPSU and selective control by UMRI. The inspectors of UMRI exercise both flag state control on Ukrainian ships and PSC on foreign ships. The control of foreign ships by ISPSU being the first type of control is national device envisaged by the article 90 of MSCU. According to paragraph one of this article, each ship before proceeding to sea are subject to the control which is exercised by ISPSU for the purpose to check ship documents,

⁷⁴ Resolution of Cabinet of the Ministries of Ukraine of 13.09.2002 № 1371 on the organisation of participation of central executive authorities in the activity of international organisations, member thereof is Ukraine <<http://zakon1.rada.gov.ua/laws/show/1371-2002-%D0%BF?test=4/UMfPEGznhhDY0.ZiHFFQmFHI47Us80msh8Ie6>> accessed 03.12.2012

⁷⁵ Regulation on the State Inspection of Ukraine on safety at maritime and river transport sanctioned by the Order of President of Ukraine of 08 April of 2011 № 447/2011 <<http://sismit.gov.ua/polozhennya-pro-ukrmorrichinspektsiyu.aspx>> accessed 03.12.2012

⁷⁶ Rules for the control of ships with purpose to assure shipping safety approved by Order of Ministry of Transport of Ukraine of 17 July 2003 № 545 <<http://zakon2.rada.gov.ua/laws/show/z0353-04>> accessed 03.12.2012

establishment of correspondence of main characteristics of the ship to ship documents as well as to check observance of manning requirements. In the case of absence of ship documents or presence of sufficient grounds to suggest that the ship is in conformity with requirement on shipping safety, ISPSU may carry out inspection. With purpose to check and rectify deficiencies that prevent giving the permission to leave the port, ISPSU may conduct follow up inspection. Furthermore, according to the article 91 of MSCU, any foreign ship may be detained by the harbour master for much more expanded list of ground in contrast to international regime envisage by regulatory maritime conventions. The article provides for before leaving the port each ship is obliged to obtain the permission for that from the harbour master. The harbour master shall refuse to give the permission in case of:

- a) unseaworthiness of the ship, violating requirements on her loading, supply, manning and presence of other deficiencies that pose a danger for navigational safety, health of persons onboard or environment;
- b) infringement of ship documents requirements;
- c) default of payment of imposed dues, fines or other payments;
- d) decision of state authorities duly authorised by law (customs, sanitary and quarantine service, fishing inspection, central executive authority for protection of environment and immigration and border control service)

Before leaving the port each ship is obliged to obtain the permission for that from the harbour master. The harbour master shall refuse to give the permission in case of:

- a) unseaworthiness of the ship, violating requirements on her loading, supply, manning and presence of other deficiencies that pose a danger for navigational safety, health of persons onboard or environment;
- b) infringement of ship documents requirements;
- c) default of payment of imposed dues, fines or other payments;
- d) decision of state authorities duly authorised by law (customs, sanitary and quarantine service, fishing inspection, central executive authority for protection of environment and immigration and border control service)

The harbour master may detain a ship on the grounds indicated in paragraph two of the article until discovered deficiencies according to conclusion of ISPSU or until payment of owing dues, fines or other payments.

Section 2.1 of the rules elaborates provisions on port surveillance control exercised by ISPSU, which is headed by harbour master. Port surveillance control covers examination of ship document, ship's condition of hull, mechanisms, installations, appliances, observance of operational requirements on shipping safety and prevention of pollution from ship by crew, crew competency in personal survival, fire safety and fire fighting as well as personal safety and civil duties.

Section 2.1.3 stipulated that in order to ascertain seaworthiness and readiness of a ship to proceed at sea, inspector of ISPSU obliged to check:

- number of crew in accordance with crew list and minimum safe manning certificate;

- ship's condition of life-saving appliances and crew knowledge of procedures on ship alarms;
- the ship is furnished and provided with alarm and fire fighting means and all types of ship provision in accordance with current norms;
- the ship is furnished with navigational equipment and appliances
- presence onboard of shipboard damage control manuals and publications for intended voyage corrected according sailing date;
- compliance of ship's loading (stowage, securing and separation of cargo) with ship and normative document concerning safe carriage of cargoes;
- presence and accuracy of conclusion by shippers, carriers, consignees of the contract of compulsory insurance of liability of subject of sea carriage of dangerous cargoes in the waters under jurisdiction of Ukraine in the case of occurrence of negative consequences during carriage of dangerous cargoes.
- calculation of stability and if it is necessary according to ship's type, calculation of general strength for cargo operations and intended voyage;
- securing of deck, heavy lift and large scale cargo in accordance with instructions on securing general cargo on seagoing ships;
- correspondence of number of passengers to passenger ship safety certificate and quantity of life-saving appliances onboard;
- availability and observance of established order of radio communication between the ship and shipowner, presence and good condition of distress means of communication.

Port surveillance control is a device, which is inherited by Ukraine and other post Soviet Union countries like Russian Federation which also has similar provisions (namely articles 79 and 80) in its Merchant Shipping Code which are derived from the article 74 of USSR Merchant Shipping Code enacted in 1968. There was limited access of foreign ships to USSR waters and strict connections of Soviet ships with the state. Therefore, port surveillance control was effective mean to ascertain shipping safety and prevention of marine pollution from ships. However, nowadays, it is rather remnant of its times as it does not corresponds to the needs of contemporary reality where there are more calling foreign ships to Ukrainian ports as the ships under Ukrainian flag. It is not unjustified burden to force foreign ships to comply with to control regimes especially taking into consideration that port surveillance control is devised with view on not only international conventions but national legislation and normative document as well which are, definitely, alien to foreign ships. Another problem is that port surveillance control has overlapping areas with PSC. Therefore, foreign ships may be double-checked with same scope. The problem is partially solved by ISPSU inspectors by simply being reluctant and even sometimes negligent to fulfilment of their duties thoroughly. It is not an appropriate approach to be employed by a state. There must be some changes introduced in primary legislation of Ukraine, especially taking into account that there is not any primary framework implementation legislation with respect to shipping safety and prevention of marine pollution, instead of scattered pieces of regulations in subsidiary legislation, contemplated by international

maritime conventions in contrast to UK legislation, namely Merchant Shipping Act 1995. With inception of MIMSAS, Ukraine will be forced to make its legislation in conformity with international conventions. However, it would be much better for state's prestige and credibility to do it voluntarily without being internationally shamed and penalised once more time.

Section 2.2 of the rules contains provisions on PSC. According to section 2.2.1., foreign ships while being present in Ukrainian ports are subject to PSC, which is exercised by PSCI. Organisation of the operation of PSCI is carried out by UMRI.

PSCI carries out an inspection of ships in following cases:

- on a selective basis, taking into consideration that annual overall quantity of inspections shall cover not less than 15 percent of general quantity of foreign merchant ships visiting ports of Ukraine;
- on the basis of the information of PSCI on necessity to conduct more detailed inspection.
- upon receiving information from foreign PSC Inspectorate about substandard ship or ship with deficiencies, discovered by PSC Inspectorate in the previous port, which were not rectified, proceeding to Ukrainian port;
- upon receiving information from crew members or other persons about lack of compliance with requirement of international conventions, pollution of environment from ship or infringement of conditions of carriage of cargos or passengers etc.

In accordance with section 2.2.3. inspection shall be carried out in accordance with recommendations of the Committee of Black Sea MoU based on IMO resolution A.787(19) with amendments adopted by A.882(21). UMRI shall be responsible for reporting the respective information on the exercise of PSC to IMO and Black Sea MoU bodies.

Section 2.2.4 envisages that inspection of the ship shall be conducted in the presence of the master and chief engineer or persons acting for them or persons designated by the master or chief engineer in order not to interfere with normal work of the ship or crew.

On completion of an inspection PSCI composes report in accordance with form A or form B in case of detention. The forms are in correspondence with the section E of Black Sea PSC Manual. While completing a report in the form B it is necessary to indicate name, number of rule, paragraph, subparagraph of the instrument, requirements thereof were violated. Evident deficiencies, listed in the report in the form B, with respect to ship's hull, her mechanisms, installations and appliances shall be photographed. Film shall be kept in the files and photographs upon request shall be forwarded to governmental bodies of Ukraine concerned or flag state.

Costs related to revisiting the ship by PSC inspector with a purpose to check whether the measures have been taken to rectify the deficiencies causing a detention of the ship shall be covered by the shipowner.

Section 2.2.9 sets if the decision to detain a ship is taken, reports must be forwarded to the harbour master, UMRI and the flag state administration of a ship.

Section 2.2.10 provides for the actions of harbour master shall be aimed that the permission to leave the port for a ship shall be given after rectification of

all deficiencies discovered by PSCI, which are clearly hazardous to shipping safety, and protection of environment. If deficiencies causing the detention of the ship cannot be rectified in the port of inspection, the ship may be allowed to proceed to the nearest repair yard or another port chosen by the master of the ship subject to observance of coordinated with the harbour master, UMRI and flag state administration.

To give a permission to leave the port in accordance with section 2.2.9, the harbour master shall receive the consent of the administration of shipping yard where the ship proceeds for a repair and ascertain that necessary measures are taken to ensure the safe passage.

According to section 2.2.14, if the inspection revealed the information about discharge of noxious substances by the ship in the ports, at the remote from the coast terminal or on the territorial sea of Ukraine, UMRI shall inform the competent authorities of Ministry of Ecology and natural resources of Ukraine for investigation and prosecution of perpetrators in accordance with current legislation.

There is no provision with respect to appeal procedure. The section 3 of the rules only reiterate wording of Black Sea MoU with respect to undue delay with few more general directions for PSCI. It is stated on the website of Black Sea MoU that “[t]he Master of the vessel, owner or operator has the right to appeal against a detention decision. Evaluation will be made by Authority immediately after reception of an appeal note.”⁷⁷ However, it does not refer to any legal document, which would stipulate the appeal procedure. In the case of legal vacuum, there are clear grounds for violation of ship owners’ rights. There might be UMRI working document providing with framework on appeal procedure, as it was a practice of Ukrainian Shipping Safety Inspectorate that is a predecessor of UMRI. However, it is not published and it is not registered by the Ministry of Justice of Ukraine that a requirement for all regulations issued by state authorities in Ukraine. Therefore, it has a power of internal instruction for the use of UMRI personnel.

There is a general procedure in the case of disputes with involvement of state authorities under the Code of Administrative Justice. According to the paragraph one of the article 6 of the code, each person has a right to bring an action before the administrative court in accordance with procedure stipulated by the code if it is considered that the person’s rights, liberties or interests are violated by action or omission to act by a subject of state powers. According to paragraph 6 of the article, foreigners and persons without citizenship and foreign legal entities enjoy the same right of judicial protection as citizens and legal entities of Ukraine. The article 99 of the code sets 6 months limitation of action from the moment the person got aware or should get aware of violation of his or her rights. The administrative procedure envisages the right to appeal to the court of appeal and further to the court of cassation instance.

According to the article 122 administrative case must be tried and adjudicated within reasonable period but not longer that on month from the

⁷⁷ National arrangements on PSC, p. 14

<<http://www.bsmou.org/files.php?file=PDF/NationalArrangements5.pdf>> accessed 07.12.12

day of commencing proceeding. This procedure is general and does take into account specific character of shipping where every day of delay for a ship causes tremendous expenses. However, at least this procedure gives opportunity to seek a legal remedy for undue detention or delay. It would be more preferable to have in place special procedure for appeal of detention cases, which would take in to consideration peculiarities of this type of cases as it is in UK. It would benefit both parties to disputes as shipowner enjoying professional and prompt treatment assuring justice in sophisticated entanglements of shipping and state authorities as if they are found liable for undue detention, the compensation to be paid for expenses incurred will depend on the time that is necessary for adjudication of the case.

4 Legal implications of PSC detention

4.1 Undue detention

As it was shown in subchapter 3.1, all regional MoUs contain provision with respect to undue delay in line with IMO PSC guidelines.⁷⁸ However, MoUs as well as IMO resolutions on PSC have only recommendatory nature and cannot be invoked in the legal dispute as applicable law by a shipowner. The aim of respective instruments is to provide global and regional organisational framework on PSC among port states in order to harmonise the state practice of carrying out PSC. They do not create any legal obligations or rights for states or ship owners under jurisdiction of port state seeking to protect themselves from undue detention. Legal foundation of PSC is mainly found in international maritime conventions as explained in subchapter 2.1. Majority of the conventions contain the provision, which addresses the issue of undue detention. The article 13 of AFS, article of 7 MARPOL, regulation 19(f) of chapter I of SOLAS and article X(4) of STCW stipulate uniformly that:

All possible efforts shall be made to avoid a ship being unduly detained or delayed [under the provision of the convention].

When a ship is unduly detained or delayed [under the provision of the convention], it shall be entitled to compensation for any loss or damage suffered.

However, it shall be underlined that undue detention provision does not solve the problem comprehensively because for those states with dualistic approach of implementation there must be a national legislation incorporating this provision to be operable in the realm of domestic law. Even though undue detention provision is, obviously, self-implementing, as its wording does not require any further steps for its implementation, it is still possible for the court in the jurisdiction with monistic approach to refuse to apply it. Obstacle to applying undue detention provision may pose as whole convention is not self-implementing or more narrowly the whole provision providing for PSC, within which undue detention provision is found in some conventions, is not self-implementing. Therefore, it may be decided that undue detention provision shall not be separately applicable. Hence, the best way to give effect to this provision is to incorporate it in national legislation dealing with PSC.

Another implication of this provision may be seen from purely international prospective. Any flag state may bring a case against a port state before ICJ on behalf of its shipowner, which suffered a loss from undue detention, subject to possibility to establish jurisdiction of ICJ. Even if a convention, under which a detention was based, does not provide for undue detention

⁷⁸ See p. 19

provision such as LOADLINE, it is still possible for flag state to argue for applicability of this principle of law, as there are grounds for consideration of undue detention provisions of above-mentioned conventions to recognise them as a part of international customary law. Particular practice of the states must be seen through the prism of duration, consistency, repetition, generality and *opinio juris* in order to establish an international custom.⁷⁹ In the *Asylum* case it was stated by ICJ that continuity and repetition of international custom shall be: “in accordance with a constant and uniform usage practised by the States in question”.⁸⁰ The comparison of wording of the relevant conventions shows its clear uniformity as minimum as well as the fact, that majority of states is a party to those conventions, is proper indicator of generality. *Opinio juris* is not an arguable question as the practice is evidenced by international conventions and the condition of duration is most likely to be satisfied. However, to say that international custom with respect to undue detention exists, it requires further investigation of the issue, which is far beyond the scope of this thesis.

There is limited number of cases involving the issue of undue detention. The *Lantau Peak* case is one of reported cases from Canadian jurisdiction. It was finally adjudicated by Federal Court of Appeal in 2005 by overturning the trial court decision.⁸¹ At trial level, the plaintiffs, two Malaysian companies one of which was the owner of detained vessel *Lantau Peak*, brought an action against Canadian government and two Transport Canada (Canadian authority responsible for PSC) steamship inspectors in tort for negligence in the Federal Court.⁸² The key facts of the case are the following. The ship arrived in Vancouver on April 5, 1997 to load coal for a return voyage to Japan. En route from Kawasaki to Vancouver, the crew discovered eight detached frames of vessel’s hull and upon arrival five more frames had become detached. On the day of arrival two steamship inspectors boarded the vessel and performed PSC inspection as a result of which the vessel was detained. Consequently, it was taken off-hire the same day. Majority of detainable deficiencies were due to corrosion of the hull as stated in the PSC report. The Detention Order pronounced that it should not be lifted until the structural deficiencies were repaired and until the adequacy of the repairs had been verified by port state authorities. PSC inspectors required that all frames that were wasted beyond 17% of their original thickness on construction had to be renewed. The shipowner agreed to repair all detached frames but disputed necessity of replacement of those frames with wastage beyond 17% as according to the ClassNK (the ship’s classification society) rules the rest of frames were within allowed limits of wastage. The PSC Detention Order was appealed to the Chairman of the Board of Transport Canada.

⁷⁹ Shaw, *supra* note 2, 75-76

⁸⁰ *Asylum Case (Colombia v. Peru)* ICJ Rep 17, p. 284

⁸¹ Her Majesty the Queen in Right of Canada v. Budisukma Puncka Sendirian Berhad [2005] FCA 267 <<http://decisions.fca-caf.gc.ca/en/2005/2005fca267/2005fca267.html>> accessed 10 December 2012

⁸² Budisukma Puncka Sendirian Berhad v. Her Majesty the Queen in Right of Canada [2004] FC 501 <<http://decisions.fct-cf.gc.ca/en/2004/2004fc501/2004fc501.html>> accessed 10 December 2012

The ship was not released from detention until 13th of August. During this period, there was extensive communication among Transport Canada, the shipowner of *Lantau Peak*, ClassNK and Malaysian Ministry of Transport as a flag state. It was mainly concentrated on two issues: scope of repairs to be done in general and particularly the amount of repairs to be done in Vancouver before the ship might sail in ballast to China where the remainder of works should be done as it was much cheaper for the shipowner as argued by him. Throughout the detention, the shipowner, ClassNK and Malaysian government made representations to Transport Canada that *Lantau Peak* was seaworthy and limits of corrosion prescribed by the Transport Canada was unnecessary more stringent than that imposed by class. The possibility to tow the vessel to repair yard in China was also considered. However, the proposed condition, under which she may be towed, was not satisfactory for the shipowner. Finally, the appeal decision was made by the Chairman on the 18th of July according to which the frames with web wastage of 33% was to be renewed prior to departure from Vancouver and the rest frames with wastage of 25% to be repaired upon arrival in China. After one year and a half the shipowner brought an action against Transport Canada for recovery of expenses incurred by unnecessary repair expenses on the view of the shipowner and the loss of hire resulting from the considerable period of detention.

What was the applicable law, whether steamship inspectors owed duty of care to the shipowner, whether classification society rules on wastage limits were to be accepted by steamship inspectors, and whether they were negligent in conduction of the inspection were the key issues before the trial judge to consider.

First, the judge rejected the defendants' argument that detention was made pursuant to the provisions of the Canada Shipping Act 1985, in particular section 310 which read as:

Right of inspector to board ships

(1) A steamship inspector, in the performance of his duties, may go on board any ship at all reasonable times and inspect the ship, or any of the machinery or equipment thereof, or any certificate of a master, mate or engineer, and if he considers the ship unsafe, or, if a passenger ship, unfit to carry passengers, or the machinery or equipment defective in any way so as to expose persons on board to serious danger, he shall detain that ship.

Right of inspector to detain ship

(2) A steamship inspector may detain any ship in respect of which any of the provisions of this Act have not been complied with, if, in his opinion, detention is warranted in the circumstances.⁸³

It was found instead that detention was made under authority of SOLAS and Tokyo MoU:

As in the present case, if the reasons for a detention are pursuant to the non-binding provisions of SOLAS through voluntary recognition of international convention obligations, why can't the detention itself be on the basis of the same recognition? I can see no reason, except for the argument that a hypothetical ship owner might not agree and argue that there is no legal

⁸³ *Ibid.*, para. 74

authority to detain. The counter to this argument is the cooperation expected under the MOU. In such a case, and indeed in the present case, it is possible to view the MOU as the “enforcement” mechanism. While the preamble to the MOU specifically states that it “is not a legally binding document and is not intended to impose any legal obligation on any of the Authorities”, nevertheless, it has proved to be an effective enforcement tool.⁸⁴

Second, the court established that PSC inspectors owe duty of care to the shipowner by asserting that:

In my opinion, by becoming an Authority to the MOU, Canada has agreed to respect this standard of care [namely undue detention provision in the Tokyo MoU – added for clarity]. However, the MOU is careful to state that the MOU “is not a legally binding document and is not intended to impose any legal obligation on any of the Authorities”; this means that an Authority cannot be sued directly under the MOU for breach of an agreement to respect a standard of care. Indeed, as stated, the Plaintiffs make it clear that they are not attempting to do so in bringing this action. Essentially, by bringing this action the point being made is that the proviso in the MOU does not mean that an Authority is unaccountable for its actions in detaining a ship under the MOU; the Authority and its servants are still liable for negligent conduct as a matter of maritime common law.⁸⁵

It is rather surprising that the accent was given to the provision of MoU than the respective provision of regulation 19(f) Chapter I of SOLAS. Unfortunately, this statement was not elaborated and therefore, it is not clear how it was deduced that it was “a matter of maritime common law”. Instead, the reasoning was based on general tort law, namely neighbour principle enunciated in *Donoghue v. Stevenson* case.⁸⁶

The answer on left questions was well represented by the following two paragraphs:

Because of the above analysis, I find that a reasonable and prudent Port State Control inspector would not have imposed a 17% wastage standard; in my opinion, its imposition constitutes a breach of the duty of care owed to the Plaintiffs, and, as such, constitutes negligent conduct on the part of Inspector Warna.

A point should be made on the issue of verification of grounds for detention. As mentioned above, the verification would naturally come from evidence that would be expected and accepted in the shipping industry, including the Authorities to the MOU. In my opinion, on the evidence I have heard in the trial, the only verification that exists as a stable part of Port State Control inspection is that which comes from meeting the standards of a particular ships’ Classification Society. In my opinion, it is not reasonable to dismiss this verification out of hand. This is exactly what was done in the present case.⁸⁷

It shall be added that it was found as well that that breach of duty of care owed to the shipowner was also contributed by failure of inspectors to carry out properly more detailed inspection with engagement of professional

⁸⁴ *Ibid.*, para. 87

⁸⁵ *Ibid.*, para. 107

⁸⁶ *Donoghue v. Stevenson* [1932] A.C. 562

⁸⁷ *Lantau Peack* case, *supra* note 82, paras. 169-170

naval architects for their expertise on the overall state of the hull and failure of Chairman of the Board of Transport Canada to render appeal decision more expeditiously. Hence, the trial judge awarded damages to be paid to the shipowner.

However, Federal Court of Appeal due to number of errors reversed the decision, notably by an application of the wrong legal regime to the facts of the case. The appellate court concluded that the authority under which inspection was carried out and detention was made, was the section 310 of the Canada Shipping Act 1985. Furthermore, it was stated that:

Canada became a contracting party and acceded to SOLAS on May 8, 1978. SOLAS specifies minimum standards for the construction, equipment and operation of merchant ships and prescribes various certificates that ships must carry in order to demonstrate that they have met these standards. States that have ratified SOLAS implement the treaty by incorporating its requirements into domestic legislation. In Canada, this has been done under the Act as well as by means of regulations enacted pursuant to it. Therefore, while it may be correct to say that Canada has not implemented SOLAS in its entirety, it has incorporated much of the treaty into domestic law through the Act.⁸⁸

and

As noted above, the Act is the core piece of domestic legislation affecting navigation and shipping. It is through this legislation that Canada's participation in international instruments is implemented. In the same vein, it is through the regulatory powers of the Act that Canada carries out its undertakings under the MOU relating to inspections... The Act is also, as we shall see, the source of the authority under which the decisions under review were made in this case.⁸⁹

The Court of Appeal criticised that the shipowner had not appealed the decision of the Chairman of the Board of Transport Canada to the Minister as second level of appeal stipulated by the section 307(3) of Canada Shipping Act 1985.

The appellate court concluded that inspector should be liable only if the decision for detention were unreasonable. It was found that the vessel was unseaworthy and the decision was made within inspectors' discretion. The rule, employed by the steamship inspector while taking decision on the permissible limits of corrosion, was endorsed by the appellate court. It states that "[t]he more corrosion is widespread, the more the accepted percentage of tolerance of corrosion goes down, especially if a large number of longitudinal frames are wasted on the ship."⁹⁰ Furthermore, "decision as to the extent to which repairs are necessary before going back to sea involves a certain degree of complexity, the authority and responsibility for the taking of such a decision rest with the Canadian Steamship Inspection Service, not with a Class NK surveyor."⁹¹

Therefore, it was ruled that the plaintiff's action should be dismissed.

⁸⁸ *Lantau Peack* case, *supra* note 81, para. 23

⁸⁹ *Ibid.*, para. 26

⁹⁰ *Ibid.*, para. 95

⁹¹ *Ibid.*, para. 104

4.2 Effect of PSC detention on the contracts of affreightment and marine insurance

The PSC detention may have serious impact on the contracts of affreightment and marine insurance. In certain circumstances, the fact of detention can serve as *prima facie* evidence for the breach of the contract by the shipowner. This subchapter aims to give succinct answers on two primary questions:

- what is the difference and correlation between statutory and private law seaworthiness;
- in what way the detention has impact on the warranty of seaworthiness in the contract of affreightment and marine insurance.

First, it is important to investigate how private law contractual obligation of shipowner to ascertain that the ship under his control is seaworthy relates to public law obligation to operate a ship in safe and environmentally nonhazardous way and if there is an overlap between these two concepts, and what might be implications arising out of PSC detention. Before diving into consideration in detail of these two different understandings of seaworthiness in private and public law, it must be underlined that in first case it will lead to the breach of the contract and in a latter case will entail violation of statutory regulations. In order to identify distinctive features of them, some similarities should be found. Going back to the origin of the doctrine of seaworthiness it can be seen that underlying reason to justify its existence is a concern for protection of different interests exposed to a marine adventure from possible threats arising out of such marine adventure.⁹² From the outset, provisions with respect to seaworthiness appeared in the contract of carriage of goods by sea as just emphasis on importance for merchant to receive evidences that a ship is well prepared for the voyage. However, gradually it evolved into mandatory rule of law with its acme of acknowledgement by Marine Insurance Act 1906 in the modern time.⁹³ Regulatory notion of seaworthiness is also derived from a concern but of different nature, namely about safety of life at sea and protection of marine environment, which was triggered by major ship disasters beginning from *Titanic* after which, as response to the outcry of western world, SOLAS was adopted in 1914.⁹⁴

The notion of maritime safety consisting of ship safety (mainly construction and equipment), navigational safety, cargo safety, personal and occupational safety is at the heart of statutory seaworthiness. It also embraces safety management, ship operation and manning standards.

⁹² Baris Soyer, *Warranties in Marine Insurance* (Cavendish Publishing Limited, London 2001) 56

⁹³ Robert Merkin, *Marine Insurance Legislation* (3d edition LLP, London 2005) 45

⁹⁴ Özçayir, *supra* note 1, p. 74

In contrast to statutory seaworthiness, the concept of private law seaworthiness is somewhat different. It is easier to discern their difference through the prism of liability for the violation of public maritime safety regulation and breach of private law maritime safety warranty. Violation of public maritime safety regulation triggers administrative, regulatory, criminal sanctions whereas breach of private law maritime safety warranty may lead to the damages or repudiation of the contract. In general, it can be said that implied warranty of seaworthiness is broader term whereas statutory seaworthiness is built-in. If a vessel has detainable deficiencies it is no fit for the intended voyage that it is a standard in private maritime law. However, fitness for intended voyage goes beyond what it is required by public law. For example, it stipulates that the vessel should be enough bunkered for the intended voyage or holds to be prepared for the carriage of the particular cargo.

The substantial difference lying between these two concepts is a standard, which is used to define a seaworthiness of a ship. In private law the test, employed to determine whether a ship is seaworthy, was adopted by the judges from early edition of *Carver on Carriage by Sea*.⁹⁵ Approved passage states that:

The ship must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. To that extent the shipowner... undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed, the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy...⁹⁶

In contrast to the private law definition of seaworthiness, the public law notion of seaworthiness may be defined as full or in exceptional cases substantial compliance with relevant regulatory conventions by a ship. Although regulatory maritime law does not have the clear definition of statutory seaworthiness, it has been derived from the definition of unseaworthy ship. The definition of unseaworthy ship may be construed from two correlated elements of PSC provision of relevant conventions. With combination of definition of clear grounds and those ship to be detained by PSCO, the unseaworthy ship may defined as a substantially substandard ship posing a threat to ship, persons on board or marine environment.

Substance of the public law standard of seaworthiness is composed of those precise technical, legal, administrative and managerial requirements of regulatory conventions *vis-à-vis* a ship whereas private law standard of seaworthiness is envisaged in very general way based on what “ordinary careful and prudent owner would require his vessel to have”. It is beyond doubt that ordinary careful and prudent owner would require his vessel to comply with those requirements of regulatory conventions but this rule

⁹⁵ *McFadden v Blue Star Line* [1905] 1 KB 706; *FC Bradley & Sons Ltd v Federal Steam Navigation Co* (1926) 24 Lloyd's Rep 454

⁹⁶ Martin Dockray, *Cases and Materials on Carriage of Goods by Sea* (3d edition Cavendish Publishing Limited, London 2004) 46

extrapolates further to those matters, which is a concern of such owner being engaged in particular trade for intended voyage.

Furthermore, these two concepts operate in different way. The definition of private law seaworthiness given above states that the ship shall be seaworthy at the commencement of the voyage. Therefore, this obligation is discharged after departure of the ship whereas under requirements of statutory seaworthiness, a ship must comply with relevant regulatory conventions continually.

Finally, implied warranty of seaworthiness and statutory obligation of seaworthiness shall be differentiated by their ability to be modified. Absolute obligation of seaworthiness provided by common law may be substituted by a duty to exercise due diligence provided by Hague or Hague/Visby Rules. It is worthy to mention that according to the article 3(8) of the convention, any further limitation of or exemption from of liability shall be void. In contrast to flexibility of the private law, requirements of statutory seaworthiness are rigid and cannot be traded. If a flag state wishes to have own standards to be applicable to the ships flying its flag, such standards shall be equivalent to those, which are prescribed by relevant regulatory conventions.

Having showed vivid distinction between public and private law concepts of seaworthiness, the latter shall be looked more thoroughly in order to understand how the detention may influence it.

The origins of the implied warranty of seaworthiness may be traced back to the *Lyon v Mellis* case.⁹⁷ In this case, the defendant agreed to lighter a cargo owned by the plaintiffs from the quayside at a river to a vessel in the dock. The lighter leaked and partly capsized, damaging the cargo. The defendant's defence was based on a public notice limiting liability of lighter men. However, the judge stated that it was a term of every contract for the carriage of goods, implied by law that the vessel is tight and fit for the purpose. Therefore, the owner of the lighter was found liable for damages.⁹⁸ Unfortunately, it is not possible within the scope of this thesis to examine all chain of cases on seaworthiness to show its development up to now. However, it is essentially important to show modern development of the doctrine and its elements. With a view on this particular purpose, it is most appropriate to take the *Eurasian Dream* case⁹⁹ for analysis, since it contains an essential restatement of the main elements of the modern law on seaworthiness.¹⁰⁰

Eurasian Dream was a car carrier, which was burned down together with her cargo of new and second-hand vehicles due to number of causes. The claimant's (the cargo owner) position was that the vessel was unseaworthy in many respects and, therefore, the shipowner is liable for damages. It was established by the court that the cause of fire was simultaneous and proximate refuelling and jump-starting operations carried out by stevedores during discharge of the cargo in the port at Sharjah. The crew did not supervise the cargo operations carried out by stevedores and initial fire was

⁹⁷ *Lyon v Mellis* (1804) 5 East 428

⁹⁸ Dockray, *supra* note 96, p. 45

⁹⁹ *The Eurasian Dream* [2002] 1 Lloyd's Rep 719

¹⁰⁰ Dockray, *supra* note 96, p. 46

not extinguished right away as the crew were improperly trained in fire fighting. Furthermore, the master was improperly instructed on fighting procedures of *Eurasian Dream* and Emergency Procedures Manual (and the other manuals prepared by the company responsible for a technical management of the ship) failed to give proper guidance. Therefore, the master failed to properly apply the CO₂ system to extinguish the fire. Finally, there was lack of walkie-talkies, some fire extinguishers appeared to have been defective and the main valve of the CO₂ system appeared to have been corroded.

Mr. Justice Cresswell reviewed relevant legal principles on the doctrine of seaworthiness. The test of “prudent owner” was applied¹⁰¹ and it was stated that the components of the duty to provide a seaworthy ship were as follows:

- (1) The vessel must be in a suitable condition and suitably manned and equipped to meet the ordinary perils likely to be encountered while performing the services required of it. This aspect of the duty relates to the following matters.
 - (a) The physical condition of the vessel and its equipment.
 - (b) The competence / efficiency of the master and crew.
 - (c) The adequacy of stores and documentation.
- (2) The vessel must be cargoworthy in the sense that it is in a fit state to receive the specified cargo.¹⁰²

and as Hague Visby rules were incorporated into the bill of lading it was earlier stated that:

In relation to due diligence, proof of unseaworthiness fulfils the same function as *res ipsa loquitur* does in ordinary cases of negligence: *The Amstelslot*, [1963] 2 Lloyd’s Rep. 223 at p. 235 per Lord Devlin; *The Fjord Wind*, [2000] 2 Lloyd’s Rep. 191 at p. 205. In practical terms, the reasoning is: “a ship should not be unseaworthy if proper care is taken” (per Lord Justice Stuart-Smith).¹⁰³

Hence, *Eurasian Dream* was found unseaworthy due to inadequacy of the documentation supplied to the vessel, deficiencies and insufficiency of vessel’s equipment, and want of competence and efficiency on the side of the master and the crew. This case concerned majority of components of seaworthiness but one component, namely cargoworthiness was not considered. It is worthy to mention that cargoworthiness is rather peculiar to private law concept of seaworthiness whereas the rest of components have much more correlation with statutory seaworthiness and, in fact, they are even based on statutory regulations. For example, in the *Eurasian Dream* case, the argument, that the ship had been inadequately supplied with documentation, was based on the regulation of part E (operational requirements) of Chapter II-2 (Construction – Fire protection, fire detection and fire extinction) of SOLAS. In the *Tattersall v National Steamship Co* case, the implied warranty to make a ship seaworthy was construed in relation to conditions for receiving and carriage of the cargo onboard.¹⁰⁴ In

¹⁰¹ *The Eurasian Dream* case, *supra* note 99, para. 125

¹⁰² *Ibid.*, para. 128

¹⁰³ *Ibid.*, para. 123

¹⁰⁴ *Tattersall v National Steamship Co* (1884) 12 QBD 297

that case, shipped cattle were infected with foot and mouth disease because of negligently cleaned and not disinfected cargo compartments. The judge interpreted the bill of lading clause on the limitation of liability of the shipowner as not applicable for the damage incurred by the cargo owner. It was considered the damage was not within contemplated perils of the clause and it was rather caused due to negligence from the side of the shipowner. Another sphere of application of implied warranty of seaworthiness is marine insurance. Section 39 of Marine Insurance Act 1905 stipulates that:

- (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
- (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.
- (3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.
- (4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.
- (5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

From the wording of subsection four, it is clear the implied warranty of seaworthiness is applicable only to voyage policies. It is notable that the definition of seaworthiness is essentially the same in comparison to that used in the carriage of goods. However, there are also peculiar cases to marine insurance. In the *Gibson v Small* case, it was given the tailor-made test whether the ship is seaworthy pertaining to marine insurance contract called as the prudent uninsured shipowner test:

...the contract, so construed, contains a condition that the ship insured has the degree of fitness for the service it is engaged in, which is expressed by seaworthiness; it being now settled that the term 'seaworthy', when used in reference to marine insurance, does not describe absolutely any of the states which a ship may pass through, from the repairs of the hull in a dock till it has reached the end of its voyage, but expresses a relation between the state of the ship and the perils it has to meet in the situation it is in; so that a ship, before setting out on a voyage, is seaworthy, if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage.¹⁰⁵

Hence, now it is possible to give a clear answer on the question how PSC detention influences the contract of affreightment and marine insurance. In the case of marine insurance contract, PSC detention may signify the breach of implied warranty of seaworthiness by the shipowner. The breach of implied warranty of seaworthiness entails that the insurer is discharged from the liability as from the date of the breach of warranty. This rule is so strict

¹⁰⁵ *Gibson v Small* (1853) 4 HL Cas 384

for the simple reason that fulfilment of the warranty is a condition precedent to further liability of the insurer. Furthermore, it reflects the fact that the rationale of warranties in insurance law is that the insurer only accepts the risk if the warranty is fulfilled.¹⁰⁶

It is not so easy to give straight answer with respect to the contract of affreightment. The implied warranty of seaworthiness was categorised by Lord Diplock as an innominate term in the *Hong Kong Fir Shipping Co v Kawasaki* case by saying that:

...the shipowner's undertaking to tender a seaworthy ship has, as a result of numerous decisions as to what can amount to "unseaworthiness", become one of the most complex of contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.

Consequently the problem in this case is, in my view, neither solved nor soluble by debating whether the shipowner's express or implied undertaking to tender a seaworthy ship is a "condition" or a "warranty". It is like so many other contractual terms an undertaking one breach of which may give rise to an event which relieves the charterer of further performance of his undertakings if he so elects and another breach of which may not give rise to such an event but entitle him only to monetary compensation in the form of damages.¹⁰⁷

As Lord Diplock said, there are two possible scenarios depending on severity of the breach. One gives mere entitlement for seeking damages caused by the breach and another is more severe, that is to say, the right to repudiate the contract. The test employed by Lord Diplock to determine how to qualify the innominate term is whether a charterer had been deprived of substantially the whole benefit of the contract.

In carriage of goods by sea, unseaworthiness does not affect the carrier's liability unless it causes the loss.¹⁰⁸ To say in different words, in order to get awarded damages, it must be, first, proved that unseaworthiness that is alleged by the claimant, has led to the loss or damage incurred by the aggrieved party. It was reaffirmed in the *Smith, Hogg v Black Sea and Baltic General Insurance* case that:

causes may be regarded not so much as a chain, but as a network. There is always a combination of co-operating causes, out of which the law, employing its empirical or common sense view of causation, will select the one or more which it finds material for its special purpose of deciding the particular case...¹⁰⁹

Therefore, PSC detention may serve as a *prima facie* evidence in the court only when the grounds for detention have a relation to the damage or loss of

¹⁰⁶ Susan Hodges, *Cases and Materials on Marine Insurance Law* (Cavendish Publishing Limited, London 1999) 227

¹⁰⁷ *Hong Kong Fir Shipping Co v Kawasaki* [1962] 2 QB 71

¹⁰⁸ *The Europa* [1908] P 84; *Kish v Taylor* [1912] AC 604

¹⁰⁹ *Smith, Hogg v Black Sea and Baltic General Insurance* [1940] AC 997; *Leyland Shipping Co v Norwich Union Fire Insurance Co* [1918] 1 AC 369

the cargo. However, the proof may be much facilitated by the PSC report that is a huge advantage.

4.3 Allocation of PSC detention risk in time charter parties

Off-hire clause of time charter parties contemplate suspension of payment of hire against agreed eventuality due to which there is a loss of time and charterer is deprived from use of the vessel. The research question, that is posed in this subchapter, is whether PSC detention is allocated within wording of off-hire clauses of standard proforma charter parties.

To begin with, the nature and types of off-hire clauses shall be examined. Off-hire clause is of protective character for charterers as it suspends the fundamental right of a shipowner to receive a payment of the hire. Rhidian Thomas describes an off-hire clause as a remedy the charterers may assert without legal formalities although the ambit of an off-hire clause may contemplate different situations falling within operation of the clause whether the shipowner is liable or not.¹¹⁰ However, if the cause of an off-hire event is attributable to a charterer then the right to invoke the off-hire clause is lost. On the other hand, if the owner is in breach of the obligation under time charter party, the charterer may seek a remedy by a separate action without prejudice to the off-hire clause.¹¹¹ Off-hire clause is entirely independent from any breach of a contract by the shipowner. In *The Ioanna* case it was pronounced that: “[o]ff-hire events are not necessarily a breach of contract at all. So one should not be too surprised if one finds that cl. 51 [the off-hire clause] leads to a different answer than would ensue in the case of a claim for damages for breach of contract.”¹¹²

Another important principle applicable to off-hire clauses is the burden to show that the off-hire clause operates in relevant circumstances lies on the charterer. In *Royal Greek Government v. Minister of Transport* case it was stated that:

The cardinal rule ... in interpreting such a charter-party as this, is that the charterer will pay hire for the use of the ship unless he can bring himself within the exceptions. I think he must bring himself clearly within the exceptions. If there is a doubt as to what the words mean, then I think those words must be read in favour of the owners because the charterers are attempting to cut down the owners' right to hire.¹¹³

There are three main components comprising of off-hire clause. They are causes (off-hire events) and consequences of the causes, which are separately divided into hindering or preventing the working of the vessel, and loss of time. Subject to construction of the clause or separate paragraph

¹¹⁰ Prof. D. Rhidian Thomas, *Legal Issues relating to Time Charterparties* (Informa, London 2008) 137

¹¹¹ *The Bridgestone Maru No. 3* [1985] 2 Lloyd's Rep 62

¹¹² *The Ioanna* [1985] 2 Lloyd's Rep 164

¹¹³ *Royal Greek Government v. Minister of Transport* (1948) 82 Lloyd's Rep 199

of the clause, loss of time may or may not be depended on hindering or preventing the working of the vessel. Through analysis of majority of standard proforma, charter parties all off-hire clauses in terms of PSC detention may be classified into two categories. First represents off-hire clauses with explicit inclusion of PSC detention as an off-hire event. Second embodies the rest of off-hire clauses where PSC detention as an off-hire event may be construed impliedly. The good example of first category is the clause 21(a)(v) of Shelltime 4 which reads as:

“due to detention of the vessel by authorities at home or abroad attributable to legal action against or breach of regulations by the vessel, the vessel’s owners, or Owners (unless brought about by the act or neglect of Charterers); then; without prejudice to Charterers’ rights under Clause 3 [duty to maintain] or to any other rights of Charterers hereunder, or otherwise, the vessel shall be off-hire from the commencement of such loss of time until she is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which such loss of time commenced; provided, however, that any service given or distance made good by the vessel whilst off-hire shall be taken into account in assessing the amount to be deducted from hire.”

Second category is the largest as charterers’ concern about PSC detention is relatively new. In spite of PSC detention is not explicitly mentioned in majority of off-hire clauses, it may be inferred from the wording with help of reventant case law. Second category itself can be divided into two subcategories. First subcategory includes the off-hire clauses with sweeping-up phrase. Second subcategory is singled out by inclusion of an arrest of the vessel at the suit of a claimant as one of off-hire events, which was put in the same line with a detention by port authorities by judges. Off-hire clauses may contain both a sweeping-up phrase and legal arrest as off-hire event at one time but it does no matter for categorisation of the content of off-hire clauses. It is important to examine first subcategory in detail. The classic off-hire clause representing first subcategory is the clause 15 of NYPE 1946, which reads as:

“That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire.”

This clause contains all three elements where the certain causes are listed such as grounding, and in the end of the list the sweeping-up phrase “any other cause” is added. According to the *ejusdem generis* rule of construction, “any other cause” shall be deemed in line with other causes of the sentence such as deficiency of men or damages to hull. It means that “any other cause” shall be construed as to refer to the same kind of causes,

which were specifically mentioned.¹¹⁴ Rhidian Thomas indicates these various causes are common in that they relate in one or another way to the chartered vessel “in herself” as they are internal in nature having an effect on the vessel is working, her efficiency or availability.¹¹⁵ In *The Laconian Confidence* case, it was stated by the court, “...a consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel or cargo...”¹¹⁶

The PSC detention is external cause in nature as it is a measure imposed by port authorities. However, is triggered by substandard condition of the ship. In this case, PSC detention is not very external as it is associated with the internal condition of the vessel. Therefore, there are two operative causes: the external cause attributable to the port authorities, which immediately affect the detention of the vessel and the internal cause, which is underlying cause related to the condition of the vessel.¹¹⁷ In support of this statement, it is appropriate to refer to the *obiter dictum* asserted in the *The Mastro Giorgis* case:

Sometimes, however, there is a combination of causes. The immediate cause may be extraneous, such as a refusal to grant free pratique, or a refusal to allow the vessel to leave the port. But it may be necessary to go behind the immediate cause to find the underlying cause. If the port authorities refuse to allow a vessel to leave because her classification certificates are not in order, or because she has an insufficient number of certificated officers, then she would plainly be off-hire, even though the immediate cause of the detention was the “extraneous” action of the authorities. The action of the authorities in such a case would appear extraneous, but in reality it is not.¹¹⁸

Another later *obiter dictum* in *The Laconian Confidence* case pronounces in unison that “where the authorities act properly or reasonably pursuant to the (suspected) inefficiency or incapacity of the vessel, any time lost may well be off hire even in the absence of the word ‘whatsoever’.”¹¹⁹ It is complemented that it is not necessary that an internal cause shall be established as a question of fact or law, it is sufficient that there was reasonable belief in existence of the fact or legal right arising out of the condition of the vessel and interference with operation of the vessel was reasonable.¹²⁰ A port authority may detain a vessel on the grounds, which are later not substantiated, but, however, the action taken by the port authorities may have been reasonable. Therefore, such case still falls within off-hire clause. Nevertheless, in the absence of reasonable belief where the conduct of port authorities may be unlawful, unjustified or unreasonable, the vessel shall stay on hire. The most vivid example is *The Laconian Confidence* case, where the judge criticised that the refusal by Bangladesh port authorities to allow the vessel to leave the port due to the presence of

¹¹⁴ Terence Coghlin, Andrew W. Baker, Julian Kenny and John D. Kimball, *Time Charters* (6th edition Informa Publishing, London 2008) 25.34

¹¹⁵ Rhidian Thomas, *supra* note 110, p. 141

¹¹⁶ *The Laconian Confidence* [1997] 1 Lloyd’s Rep 139

¹¹⁷ Rhidian Thomas, *supra* note 104, p. 147

¹¹⁸ *The Mastro Giorgis* [1983] 2 Lloyd’s Rep 69

¹¹⁹ *The Laconian Confidence*, *supra* note 116, p. 151

¹²⁰ *Ibid.*

approximately 15 tonnes of residue sweeping onboard was highly bureaucratic attitude.¹²¹ Therefore, it was ruled that the vessel was not off hire.

Finally, in order to draw a solid line between external and internal causes, some cases of pure external causes shall be reviewed. In *The Auqacharm* case, Panama Canal authorities refused the vessel to pass through the canal because of excessive draft. The vessel was overloaded by mistake of the master. Therefore, it was required to discharge a part of her cargo, which was carried together with the vessel by a smaller vessel and then reloaded onboard *Auqacharm*. The vessel was not held off-hire during the period of delay as:

“*Aquacharm* could not pass through the canal because the canal authorities decided she was carrying too much cargo, but that decision did not in any way reflect upon *Aquacharm*'s efficiency as a ship and *Aquacharm* remained at all times an efficient ship; she was capable of “full working” within the meaning of the off hire clause and the charterers could not succeed under this head.¹²²”

The judge applied the reasoning from the earlier leading *Court Line Ltd. v. Dant & Russell Inc.* case, where the chartered vessel was blocked by a boom placed in the Yangtse river by Chinese forces during the war between China and Japan in 1937.¹²³

According to the clause 15 of NYPE 1946, there must be a loss of time resulted from the prevention of the full working of the vessel, which caused by the off-event irrespective of being named or within the phrase “any other cause”. Therefore, the very next question to be answered while trying to invoke such off-hire clause is whether the full working of the ship is prevented. In one of the recent cases, *The Berge Sund*¹²⁴ it was reaffirmed the principle from *Hogarth v. Miller* case¹²⁵ stated by the judge, namely “I should read the contract as meaning this... that she should be efficient to do what she was required to do when she was called upon to do it.” Hence, if the next operation that charter service requires from the ship is to sail to the discharge port, but she is unable to do so, then the ship is being prevented from working. On the other hand, if the situation is that the ship unable to sail, but the next operation required of her is to remain at berth and discharge, the full working of the ship has not been prevented.¹²⁶ Therefore, the critical question to determine whether the full working of the ship is prevented is whether she is able to perform next operation required by the charterer.

Hence, it is possible to assert that PSC detention is within one of standard off-hire events.

¹²¹ *Ibid.*, p. 144

¹²² *The Auqacharm* [1982] 1 Lloyd's Rep 7

¹²³ *Court Line v. Dant & Russell* (1939) 64 Lloyd's Rep 212

¹²⁴ *The Berge Sund* [1993] 2 Lloyd's Rep 459

¹²⁵ *Hogarth v. Miller* [1891] A.C. 56

¹²⁶ Terence Coghlin, Andrew W. Baker, Julian Kenny and John D. Kimball, *supra* note 114, 25.9

5 Development of PSC and other ways for ascertaining observance of IMO instruments

5.1 Intensifying interrelation between PSC and FSI

Flag states as the most important “principal actors in international shipping”¹²⁷ are primarily responsible for the realisation of the provisions of the international maritime conventions. As it was shown in the subchapter 1.2, the failure of flag states to fulfil their duties under the international maritime conventions entailing the escalation of the number of substandard ships has become a catalyst for turning port states to use their right to enforce port state jurisdiction in order to protect their waters from substandard ships. Initially, PSC, exercised by traditional maritime powers, concerned about maritime safety and protection of marine environment as well as distorted competition, was viewed as the contrasting mechanism to FSC to force reluctant and negligent maritime administrations of some flag states to discharge properly their international obligations. Subsequent serious maritime disasters, involving loss of human lives and pollution of marine environment, urged regional port states to establish effective means of cooperation in conducting PSC. With that emergence of the regional PSC regimes through the establishment of the regional MoUs agreements, first time ability to interrelate PSC and FSC had appeared through the PSC statistics revealing the data on detention of the vessels of particular flag states as an indicator of flag state performance.

Another milestone of development of this process was establishment of IMO FSI subcommittee in early nineteen nineties, which fostered IMO work on last unmanaged area with respect to implementation and enforcement of IMO mandatory instruments by flag states. New IMO instruments on FSI employ the data from PSC regional MoUs to assess flag states. In its turn, PSC uses devised mechanisms of FSI instruments for more effective targeting system. Therefore, the interaction between PSC and FSI must be thoroughly explored. The greater focus should be devoted to contemporary development of FSI, which will have a significant impact on PSC.

As PSC basis was analysed in subchapter 1.2, first, it is important to skim through FSC basis in order to observe international legal framework thereof and compare with PSC. According paragraph one of the article 94 of

¹²⁷ Expression used is adopted from the article by Lawrence D. Barchue, ‘The Voluntary IMO Member State Audit Scheme: An Accountability Regime for States on Maritime Affairs’ (2009) 8 WMU Journal of Maritime Affairs 62

UNCLOS “every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”

The article singles out further one of fundamental duties of flag state that is to take measures for ships flying its flag as are necessary to ensure safety at sea which should include, *inter alia*, with respect to the construction, equipment and seaworthiness of ship; the manning of ships, labour conditions and the training of crews; and the use of signals, the maintenance of communications and the prevention of collisions. This provision sets fundamental universal duties of every flag state and simultaneously it is a blueprint of such conventions as SOLAS, STCW, COLREG, and ILO147 and MLC. Paragraph four of this article provides for one of the most important methods of FSC that is survey by a qualified surveyor of ships.

The flag states duty to protect marine environment is stipulated by the article 217 of UNCLOS. It provides for flag state responsibility to ensure compliance by vessels flying their flag with applicable international rules and standards with respect to prevention, reduction and control of pollution of the marine environment from vessels and therefore, flag states shall adopt laws and regulations and take other measures necessary for their implementation. Furthermore, flag states shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs. Paragraph three imposes duty on flag states to ascertain that ships under their flag carry on board certificates required by and issued pursuant to international rules and standards, and they are periodically inspected in order to verify that such certificates are in conformity with the actual condition of the vessels.

It is necessary here to find distinguishing points between PSC and FSC in order to highlight their roles and targeting goals. First, it must be underlined that FSC is a duty of every state, which entitles ships to fly its flag. In other words, it means the right of a state to entitle ships to fly its flag entails obligation to assure that those ships under its flag are technically sound, do not possess danger to marine environment and respective labour standards onboard of a ship are observed. According to customary international law and the article 218 of UNCLOS, PSC is a right of a port state in order to protect their waters from marine pollution or other threats.

It must be emphasised that PSC is a complimentary regime to FSC. However, PSC becomes a duty when a state is a party to regulatory maritime conventions such as SOLAS and MARPOL employing PSC to ascertain that the ships calling its port will not proceed to sea until it presents danger to the ship, persons onboard or marine environment. In other words, PSC starts playing its role when FSC fails to assure the ships are in conformity with respective international rules and standards. PSC has become the next control layer after FSC. Therefore, PSC is a complementary mechanism to FSC and it cannot substitute FSC. There is very well made point showing that PSC cannot substitute FSI as it is not able to solve the problem of domestic shipping especially relevant for archipelago states.¹²⁸ There is also a good explanation of correlation of PSC

¹²⁸ Iqbal Fikri, ‘Flag State Control: an Overview and its Relationship with Port State Control’ (Master thesis, World Maritime University 2007) 53

and FSC: “[t]he better flag state control is in exercising the duties, the lighter the tasks of port states are.”¹²⁹

The first consistent IMO instruments aimed to facilitate FSI was elaborated in 1997.¹³⁰ The preamble of the resolution A.847(20) notes that the ultimate effectiveness of any convention depends upon all states through becoming party to the instruments, implementing them widely and effectively, enforcing them rigorously and reporting to IMO. As a starting point, the resolution sets when a convention enters into force for a state, the government of that state must be in a position to implement its provisions through appropriate national legislation and to provide the necessary infrastructure. In order to effectively discharge its responsibilities, flag state should implement policies through the issuance of national legislation and guidance which will assist in the implementation and enforcement of the convention requirements; assign responsibilities within the maritime administration to update and revise the policies; and embed these functions in long-term strategic planning document.¹³¹ As a core part of implementation, section four focuses on delegation of authority to RO that should be in conformity with respective IMO resolution. The next subchapter will examine it in detail. Section six complements those provisions with provisions for qualification of flag state surveyors which is supposed to be applicable vis-à-vis RO surveyors acting on behalf of a state. Section five provides guidelines for implementation of the article 94 of UNCLOS. Section seven contains guidelines for flag state investigation. It provides basic principles of casualty investigation and further refers to IMO Code for the Investigation of Marine Casualties and Incidents. The appendix of the resolution suggests a possible framework for national legislation implementing the SOLAS, MARPOL, LOADLINE and STCW. The next logical step was preparation of the guidelines to assist flag states in the self-assessment of their performance in 1999¹³² with changes in 2001.¹³³ The self-assessment guidelines employ the recommendatory framework for flag state implementation in the resolution A.847. The resolution A.912 provides criteria how to assess flag state performance and there is a detailed form with questions on each element of performance in the annex thereto. These two resolutions had been further step towards elaboration of proper IMO FSI framework but it was obvious that it was not enough to achieve that purpose. The further work had been continuing.

In 2002 IMO Council approved the initiative of 19 Member States to develop IMO model Audit Scheme. ICAO Universal Safety Oversight Programme was taken as a base.

The work was split into two routes: development of the code for the implementation of mandatory IMO instruments, which would serve as audit standard and development of framework and procedure for Audit Scheme

¹²⁹ *Ibid*, 50

¹³⁰ IMO Resolution A.847(20) Guidelines to Assist Flag States in the Implementation of IMO Instruments (adopted 27 November 1997)

¹³¹ *Ibid*, sec. 3.1

¹³² IMO Resolution A.881(21) Self-Assessment of Flag State Performance (adopted 25 November 1999)

¹³³ IMO Resolution A.912(22) Self-Assessment of Flag State Performance (adopted 29 November 2001)

by joint working group established within MSC, MPEC and TCC.¹³⁴ In 2003 the IMO resolution, which approved the establishment and further development of the VIMSAS, was adopted.¹³⁵ The next step was taken in 2005, which resulted in adoption of the Code for the implementation of mandatory IMO instruments¹³⁶ and framework and procedure for VIMSAS.¹³⁷

The current version of the code¹³⁸ is comprised of four areas. The common areas include provisions on objective, strategy, scope, initial actions, and communication of information, records and improvements.

Setting the objective to enhance global maritime safety and protection of the marine environment, the strategy provides with main approaches to be used for that, namely to implement and enforce relevant international mandatory instruments; adhere to international recommendations, review and verify continuously the effectiveness of the state in respect of meeting its international obligations; achieve, maintain and improve overall organizational performance and capability. The states should communicate its strategy including information on its national legislation to all concerned. The scope of the code covers main IMO regulatory conventions as SOLAS, MARPOL, SCTW, LOADLINE, TONNAGE and COLREG. States should continually improve the adequacy of the measures, which are taken to give effect to those conventions, and protocols, which they have accepted. Improvement should be made through rigorous and effective application and enforcement of national legislation and monitoring of compliance. Initial actions are in consistency with resolution A.847(20), being more elaborated. Three other areas are devoted on three different embodiments of states such as flag, coastal and port and states.

The flag state part traditionally focuses on implementation, delegation of authority, enforcement, flag state surveyors, casualty investigation and evaluation. In accordance with section 15, implementation is comprised of two elements, namely to give effect to the provisions of IMO applicable conventions through enactment of national legislation where necessary and organisational element which is, in large, based on assignment of responsibilities within maritime administration to update and revise any relevant policies adopted and establishment of resources and processes capable of administering a safety and environmental protection programme. Very important element of FSI is delegation of authority, which will be examined, in great detail in next subchapter. However, it is appropriate and even necessary for consistency of the text to introduce the topic in this subchapter. Mr. Barchue has described partially the scourge of ROs as the intensification of commercial pressure on the ROs due to fact that many

¹³⁴ Barchue, *supra* note 127, 64

¹³⁵ IMO Resolution A.946(23) Voluntary IMO Member State Audit Scheme (adopted 27 November 2003)

¹³⁶ IMO Resolution A.973(24) Code for the Implementation of Mandatory IMO Instruments (adopted 1 December 2005)

¹³⁷ IMO Resolution A.974(24) Framework and Procedures for the Voluntary IMO Member State Audit Scheme (adopted 1 December 2005)

¹³⁸ Resolution A.1054(27) Code for the Implementation of Mandatory IMO Instruments (adopted 30 November 2011)

ROs have other business interests with ships flying the flag of the state delegating authority to such ROs. He indicates that it may cause the conflict between ROs role acting as certifier and inspector on behalf of the flag state and their commercial relationship as a classification society.¹³⁹ Another major quandary created by some ROs with very low performance, which is shown in subchapter 5.2.4. It is important to contemplate that delegation of statutory duties to ROs creates the new duty for maritime administration – effectively and continually monitoring and supervision of the work of ROs. Section 18 of the code provides for the flag states authorizing ROs to act on their behalf must regulate such authorization in accordance with SOLAS regulation XI-1/1. Furthermore, the flag state should establish or participate in an oversight programme with adequate resources for monitoring of, and communication with, its ROs in order to ensure that its international obligations are fully met.

Enforcement provisions direct to the flag state to provide for sanctions for that ship flying under its flag, which are failed to comply with requirement of relevant conventions. The rest of provisions on flag states are in consistency with resolution A.847(20), being also more detailed.

Part three and four of the code specify that coastal and port states have certain obligations under various mandatory IMO instruments which must be given due implementation and provided with appropriate enforcement mechanism. Section 51 indicates that port states can play an integral role in the achievement of maritime safety and environmental protection, including pollution prevention. This section recognises the importance of port state to achieve set goals mainly through application of PSC mechanism.

The current resolution A.974(24) provides with VIMSAS engine to be worked together with the code which is a audit standard for VIMSAS. Such important principals were embedded in VIMSAS as sovereignty and universality, transparency and disclosure, consistency, fairness, objectivity, and timeliness, cooperation and continual improvement.

In accordance with section 8 of the resolution, the Secretary-General of IMO is responsible, with respect to VIMSAS, for, *inter alia*, the implementation of the audit scheme, formal appointment and maintenance of an appropriate list of audit team leaders and auditors as well as establishing an audit team for each member state audit and concluding a Memorandum of Cooperation with the member state to be audited.

Annex one of the resolution provides for the procedure for VIMSAS. VIMSAS consists of several phases as planning, preparation for the audit, conduction the audit, reporting, member state correction plan, and records and follow-up. Planning phase consists of appointment of an audit team leader by the Secretary-General, determination of the scope of audit by audit team leader, signing of Memorandum of Cooperation, nominations and selection of auditors and audit team.

Groundwork for audit requires the preparation of pre-audit questionnaire answered by member state to be audited prior to the audit. The questionnaire consists of main areas of audit and supplementary information including general information of a state and its maritime authority, areas of

¹³⁹ Barchue, *supra* note 127, 63

responsibility, information on international instruments, enforcement, investigation and analysis of marine casualties and pollution incidents, PSC activities, coastal state activities, reporting requirements, management systems, evaluation and review.

The conduct of the audit consists of setting its timeline, opening meeting when the auditors and the representatives of the member state to be audited should be held in order to confirm the arrangements prior to commencing the on-site audit, the actual audit and closing meeting where the opportunity for the audit team to brief all relevant personnel from the audited member state on findings relating to the audit is provided.

VIMSAS contemplates several audit reports. The audit interim report is a formal report of the audit findings submitted to the member state. The member state's corrective action plan should be based on the audit interim report. The member state corrective action plan responds to the audit findings by proposing action to bring the member state in conformity or adherence with the code. The audit final report represents the official and actual report of the audit, which shall include an analysis of the member state corrective action plan submitted by the audited state. An audit follow-up should, if applicable, be conducted between one and two years following a member state audit, in order to determine the status of implementation of the corrective action plan. An audit summary report, which will as far as practicable not identify the audited member state and will provide an overview of that audited member state's adherence to the code and applicable IMO instruments. The audit team leader should prepare a separate report describing the conduct of the audit, positive elements and difficulties encountered and proposals to improve the planning and conduct of audits facilitating sustainability of VIMSAS. The resolution also contains the Memorandum of Cooperation and the pre-audit questionnaire.

According to IMO time frame and schedule of activities to institutionalize VIMSAS, it shall become MIMSAS on 1 January 2015.¹⁴⁰ It was well explained why some member states have been reluctant to participate in VIMSAS, namely, *inter alia*, insufficiency and inexperience of maritime administration personnel, additional expenses, inability to change national law.¹⁴¹ However, with introduction of MISAS, the situation is supposed to change. There is even a suggestion that the ships flying under the flag of those states, which have not been undergone through MISAS may be permanently banned by PSC MoU following ICAO experience.¹⁴² Perhaps, it is a too far suggestion for now taking into consideration that shipping is quite conservative in its nature but it, definitely, is an option that may happen in unforeseeable future.

There is a devised mechanism to introduce MIMSAS, which was presented on 20th session of FCI.¹⁴³ It is prepared that the draft of new IMO

¹⁴⁰ IMO Resolution A.1018(26) Further Development of the Voluntary IMO Member State Audit Scheme (adopted 25 November 2009)

¹⁴¹ Afriyie Kwaku Anthony, 'An Analysis of the Voluntary IMO Member State Audit Scheme' (Master thesis, WMU 2007) 66

¹⁴² Qiu Jianwei, 'Voluntary IMO Member State Audit Scheme: its status, trend and challenges' (Master thesis, WMU 2006) 44

¹⁴³ FSI 20/12 of 21 December 2011 Review of the IMO Instruments Implementation Code: adoption of, and amendment to, the III Code noted by the Secretariat

Instruments Implementation Code which will be made mandatory through inclusion of respective provisions in SOLAS (chapter XIII), LOADLINE (regulation 3 of Annex I of Annex B), MARPOL (regulation 1 of Annexes I, II, III, IV, V and regulation 2 of Annex VI), COLREG (Part F of Annex), TONNAGE (regulation 2 of Annex I, regulation 8 of Annex 3). Provisions incorporating the code stipulate that member states shall apply the provisions of the code in the execution of their obligations and responsibilities contained in the conventions. For the purpose of that regulation, the requirements of the code shall be treated as mandatory and its recommendations shall be treated as non-mandatory. Every member state shall have responsibility for facilitating the conduct of the audit and implementation of a programme of actions to address the findings, based on the framework and procedures for the audit scheme.

It can be concluded that with development of IMO FSI VIMSAS (and consequently MIMSAS) mechanism, it is possible to find interdependence between FSI and PSC. VIMSAS uses PSC data to measure flag state performance and Paris MoU takes into consideration VIMSAS audited states for assignment to ships of low priority for inspections. It is believed that it is a matter of time when other PSC MoUs will develop similar selection scheme to Paris MoU as it is more effective and allow to lessen number of inspection focusing only on more probable substandard ships relieving the overload of PSCO.

5.2 Consideration for possible strengthening of IMO regulation on ROs

The role of ROs in contemporary shipping industry extremely significant as majority of flag states entrust them to carry out, to some extent, duties under IMO conventions. Thus, there is direct dependence between performance of ROs and discharge of technical duties of flag states. PSC statistics reveal that there are a number of classification societies, which do not perform their duties in proper manner. The ships, which were surveyed with so-called convenient ROs, have been found with detainable deficiencies. This subchapter will focus on this problem and will endeavour to contemplate possibility to strengthen the control over ROs.

5.2.1 International legal framework on delegation of flag state duties to ROs

IMO conventions, which require a ship to be surveyed and then subject to it to be certified in order to ascertain that she is in compliance with the provisions of a convention, give the option to the maritime administrations to delegate this function to the nominated surveyors or ROs. The closer look must be given to the provisions of those conventions. In general, it can be characterised that ROs are associated rather with technical conventions as their significant experience in providing technical expertise for shipping

industry doubled with broad geographical coverage of representatives is fully appreciated by the maritime administrations.

The common pattern provision used in all conventions is that officers of the maritime administration shall carry out certain functions as inspections and/or surveys (in case of TONNAGE, determination of gross and net tonnage) for implementation or enforcement of the convention. However, these functions may be entrusted to nominated surveyors or ROs by maritime administration.¹⁴⁴ Every convention also emphasises on very important aspect that in every case maritime administration should be fully responsible for the certificates issued under its authority either by the officers of the administration or recognised organisation.

The provisions on ROs of SOLAS, MARPOL and AFL are much more elaborated in comparison with rest conventions. These conventions further require when maritime administration, nominating RO to conduct inspections and/or surveys, shall as minimum empower them to require repairs to a ship and to carry out inspections and surveys if requested by the appropriate authority of a port state. Hence, important conclusion follows that this provision constitutes not only nexus of RO with port authority but shows significance of RO for port state control as it may be requested to conduct more detailed inspection. When PSC officer notifies RO that some deficiencies of the vessel under inspection are found then very important obligation for RO under these convention will start playing its role. When RO determines that condition of the ship or its equipment does not correspond substantially with the particulars of the certificate or the ship is not fit to proceed to sea without danger to the ship or crew onboard, such RO shall ensure that corrective action is taken and shall notify maritime administration. If appropriate corrective measures are not taken the relevant certificate should be cancelled and maritime administration should be immediately notified about that, and if the ship is in the port of another state, the PSC authority should be notified as well. In its turn, port state has obligation before RO to give any necessary assistance to carry out their obligations under those conventions. The same provisions contain the requirement for port state to ascertain that the ships shall not sail until it can proceed to sea without danger to the ship or persons onboard. It must be concluded that these provisions establish triple relationship among RO, maritime administration and port state authority. Therefore, while considering PSC inspection this triple relationship should be taken into account.

¹⁴⁴ International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) Chapter I Reg. 6;
International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) Annex I Reg. 6, Annex II Reg. 8, Annex IV Reg. 4, Annex VI Reg. 5;
International Convention on Load Lines (adopted 5 April 1966, entered into force 21 July 1968) Art. 13;
International Convention on Tonnage Measurement of Ships (adopted 23 June 1969, entered into force 18 July 1982) Art. 6;
International Convention on the Control of Harmful Anti-fouling Systems on Ships (adopted 05 October 2001, entered into force 17 September 2008) Annex IV Reg. 1;
Maritime Labour Convention, 2006 (adopted 7 February 2006) Reg. 5.1.1

Regulation 1 of Chapter XI-1 of SOLAS, and regulation 6 of Annex I and regulation 8 of Annex II of MARPOL explicitly provide that ROs shall comply with two IMO resolutions: A.739(18) and A.798(19). There is one more convention mentioning these resolutions – AFL. However, regulation 1 of Annex IV thereof has only footnote reference to them that does create some uncertainty especially in contrast to SOLAS and MAROL provisions. Resolutions A.739(18) adopts guidelines for the authorisation of organisations acting on behalf of the maritime administration. The guidelines underline necessity for the control in the assignment of authority under international conventions to ROs.¹⁴⁵ There are certain conditions for such assignment of authority. Those conditions set certain standard of RO resources, require formal written agreement between the maritime administration and RO to be concluded, specify actions to be followed in case of a ship to be found substandard, oblige a maritime administration to provide RO with all appropriate instruments of national law in relation to all conventions concerned, and put the duty on RO to maintain records and to provide the maritime administration with data to assist in interpretation of convention regulations

Latter resolution adopts the specifications on the survey and certification functions of RO. Specifications are divided into four elementary modules: management, technical appraisal, surveys, qualifications and training, and there are separate specifications pertaining to various certificates in the end as well.¹⁴⁶

In considering provisions on ROs of maritime regulatory conventions, MLC stands alone. The wording of provisions on ROs of MLC has considerable difference with rest conventions. Paragraph 3 of regulation 5.1.1 and paragraph 1 regulation 5.1.2 of MLC makes emphasis on competency and independency of RO unlike to the rest of conventions. Regulation 5.1.2 also stipulates that inspection or certification functions, which ROs may be authorized to carry out, shall come within the scope of the activities that are expressly mentioned in the MLC. Mandatory standard A5.1.2 explains what conditions should be fulfilled to consider ROs as competent and independent, namely they are: necessary expertise; ability to maintain and update the expertise of its personnel; necessary knowledge of the convention and applicable national laws and regulations; appropriate size, structure, experience and capability commensurate with type and degree of authorization.

The standard stipulates as well that ROs shall be, as minimum, empowered to require the rectification of deficiencies in seafarers' working and living conditions and to carry out inspections at the request of the port state similar provision with other conventions. This provision is quite similar to those contained in SOLAS and MAROL. However, it is modified to serve goals of MLC.

¹⁴⁵ IMO Resolution A.739(18) Guidelines for the Authorisation of Organisations acting on behalf of the Administration (adopted 4 November 1993) 2

¹⁴⁶ IMO Resolution A.789(19) Specifications on the Survey and Certification Functions of Recognized Organizations acting on Behalf of the Administration (adopted 23 November 1995) 3

Unlike IMO conventions, this standard requires from participating state to establish a system to ensure the adequacy of work performed by ROs. However, the standard mentions only information on all applicable national laws and regulations and procedures for communication with RO and in case of oversight.

Recommendatory guideline B5.1.2 complements aforementioned standard with qualitative conditions, which RO seeking recognition shall comply with. The conditions are of the similar nature as required by IMO resolution A.739(18). Similarly, the guideline states that competent authority should conclude written agreement with RO, which should include specified elements. However, the content of the agreement is much less elaborated in the guideline.

STCW is not within the scope of the work of ROs but it also contains provisions in case if a state, which is party the convention, renders duties under the convention to the non-governmental organisations like ROs. According to the convention, each party shall ensure that all training assessment of competence, certification carried out by non-governmental organisations are continuously monitored through a quality standards system.¹⁴⁷

As it was shown, enforcement of the technical provision of IMO conventions as SOLAS and MAROPOL is done through surveys and certification, which are usually carried by ROs. As it is the most critical part in the implementation of the conventions, IMO has elaborated the harmonised system of surveys and certifications applicable both for maritime administrations and ROs.¹⁴⁸ The system contains specific rules for each type of survey to each convention (SOALS, MARPOL and LOADLINE) and mandatory code.

IMO has elaborated the model agreement between flag state and ROs governing the delegation of statutory certification in support of provisions of annex two of the resolution A.739(18).¹⁴⁹

It may be concluded that there is already extensive international legal framework, which regulates the activity of ROs. However, it still leaves many issues to discretion of flag states. Besides international legal regulation of ROs, there is also EU model, which is more stringent.

5.2.2 EU standards for ship inspection and survey organisations

The current EU legislation on ROs was enacted in 2009, which is comprised of the respective directive¹⁵⁰ and regulation.¹⁵¹ The directive (EC) 2009/15

¹⁴⁷ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1978, entered into force 28 April 1984) Chapter I Reg. I/8

¹⁴⁸ IMO Resolution A.1053(27) Survey Guidelines under the Harmonized System of Survey and Certification (HSSC), 2011(adopted 30 November 2011)

¹⁴⁹ MSC/Circ.710, MEPC/Circ.307

¹⁵⁰ European Parliament and the Council Directive (EC) 2009/15 on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations [2009] OJ L131/47

in general aims to ensure that the maritime administrations of the member states can assure an appropriate enforcement of the provisions of the international conventions, in particular with regard to the inspection and survey of ships and the issue of certificates and exemption certificates.¹⁵² It establishes measures to be followed by the member states and organizations concerned with the inspection, survey and certification of ships for compliance with the international conventions on safety at sea and prevention of marine pollution.¹⁵³ The wording of general provisions reflects EU policy for effective implementation of international maritime regulatory convention in the region.

The member states are obliged to authorize only those organisations, which are recognised by EU. Accordingly, the member states, which wish to grant an authorisation to any organisation, which is not yet recognised, shall submit a request for recognition to the Commission together with complete information on, and evidence of, compliance with the minimum criteria for ROs.¹⁵⁴ The Commission jointly with member state requesting such RO recognition shall carry out assessment of RO with respect to compliance with set minimum criteria. Finally, recognition is granted by the EU Commission, which is assisted by the Committee on Safe Seas and the Prevention of Pollution from Ships created according to article 3 of Regulation No 2099/2002 of the European Parliament and of the Council of 5 November 2002. All the organisations, which are granted recognition shall be closely monitored by the Committee. The list of the organisations recognised is published in the Official Journal of the European Communities.

With a view to ensure the freedom to provide services it is provided for that member states shall in principle not refuse to authorise any of RO. However, they may restrict the number of organisations they authorise in accordance with their needs provided there are transparent and objective grounds for so doing.¹⁵⁵ The principle of reciprocity is embedded in the paragraph 2 of the article 4. Hence, in order for a member state to accept RO located in the state outside EU, the member state or the Community may request the third state in question to grant reciprocal treatment for those RO, which are located in the EU.

The directive (EC) 2009/15 sets that there must be the legal agreement between RO and maritime administration of a member state. Its provisions should be based on IMO recommendatory framework. Furthermore, the directive stipulates the provisions on financial liability. In a view of that if liability arising out of any incident is finally and definitely imposed on the maritime administration by the court or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss or damage to property or personal injury or death,

¹⁵¹ European Parliament and the Council Regulation (EC) 391/2009 on common rules and standards for ship inspection and survey organisations

¹⁵² European Parliament and the Council Directive (EC) 2009/15, *supra* note 150, art. 3

¹⁵³ *Ibid*, art. 1

¹⁵⁴ European Parliament and the Council Regulation (EC) 391/2009, *supra* note 151, art. 3(1)

¹⁵⁵ European Parliament and the Council Directive (EC) 2009/15, *supra* note 150, art. 4

which is proved in that court to have been caused by a wilful act or omission or gross negligence of the RO, its bodies, employees, agents or others who act on behalf of the RO, the maritime administration shall be entitled to financial compensation from RO to the extent that the said loss decided by the court.¹⁵⁶ According to subparagraphs two and three of the article, the member state may limit the maximum amount payable by the RO, which must, however, be at least equal to EUR 4 million for personal injury or death and EUR 2 million for loss or damage to property. The directive established quite high threshold of financial liability of RO in comparison to the maritime conventions on limitation of liability.¹⁵⁷

The regulation (EC) 391/2009 imposes range of duties on ROs. One of the most topical requirements that RO shall demonstrate willingness to cooperate with PSC administrations when a ship of their class is concerned, in particular, in order to facilitate the rectification of reported deficiencies or other discrepancies.¹⁵⁸ This legal norm facilitates necessary legal nexus between PSC and ROs, which is missed in the IMO regulations.

Another important duty is that ROs have to consult with each other periodically with a view to maintaining equivalence and aiming for harmonisation of their rules and procedures and the implementation thereof. They shall cooperate with each other with a view to achieving consistent interpretation of the international conventions, without prejudice to the powers of the flag states. Recognised organisations shall, in appropriate cases, agree on the technical and procedural conditions under which they will mutually recognise the class certificates for materials, equipment and components based on equivalent standards, taking the most demanding and rigorous standards as the reference.¹⁵⁹

All the ROs shall be assessed by the Commission together with the member state, which submitted the relevant request for recognition. The assessment may include a visit to regional branches of the organisation as well as random inspection of ships for auditing the RO performance. The Commission shall provide the member states with a report of the results of the assessment.¹⁶⁰ Hence, the regulation has elaborated collective measures for assurance of quality of performance of RO operating on the territory of EU.

In general, it may be concluded that EU legislation on RO incorporates IMO regulations on RO and further develops them envisaging more stringent

¹⁵⁶ *Ibid*, art. 5(2)

¹⁵⁷ Convention on Limitation of Liability for Maritime Claims, 1976 (adopted 19 November 1976, entered into force 1 December 1986) articles 6,7,8;

Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976 (adopted 3 May 1996, entered into force 13 May 2004) articles 3,4,5;

IMO Resolution LEG.5(99) Adoption of Amendments of the Limitation Amounts in the Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims, 1976 (adopted 19 April 2012, entry of amendments into force 8 June 2015);

International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships, and Protocol of Signature (adopted 10 October 1957, entered into force 31 May 1968) art. 3

¹⁵⁸ European Parliament and the Council Regulation (EC) 391/2009, *supra* note 151, art. 10(3)

¹⁵⁹ *Ibid*, art. 10(1)

¹⁶⁰ European Parliament and the Council Directive (EC) 2009/15, *supra* note 150, art. 11

regime for RO operating in EU. However, EU is comprised of just 27 states currently. Therefore, the key question is whether international regulation is sufficient for achievement of principal task – elimination of substandard shipping. Before investigation whether ROs properly perform their duties under the international conventions, it must be briefly said about those organisations, which stand actually behind this generic term “recognised organisations.”

5.2.3 Examination of classification societies acting as ROs

It is classification societies, which are assigned by flag states administrations to carry out their functions under international conventions. In some cases, they are, to significant extent, responsible for flag state control functions and even their performance is much more effective than some other maritime administrations due to lack of financial means or qualified personnel. With available IMO, consolidated data on 2001 there are 59 non-governmental organizations authorized almost by every flag state to carry out surveys and issue certificates on behalf of maritime administration.¹⁶¹ The reasons, why classification societies have competitive advantages (expressing it with the term of economics) over maritime administration, are much more sophisticated rather than simple explanation through prism of financing or matter of personnel competence. The essence of shipping business is to move cargo from country A to country B. Therefore, it often happens that due to market demand a vessel may not call the port of registration if ever after registration and in many case physical presence of the vessel is not even the requirement for ship registration. According to public international law, a state cannot exercise its power on the territory of another state without the consent of latter state.¹⁶² Classification societies facilitate international shipping and make it possible for a ship to be surveyed in the majority of ports in the world instead of sailing back to the port of registry.

Another side of classification societies business is classification service, which has been initial function of classification society emerged from demand of marine insurance industry. Marine underwrites have been keen to make sure that the vessel, which is going to be insured, is technically sound and will not sink in the next voyage. The history of this business traces back to the eighteen century with its very bright content. However, it is not the purpose of this thesis to mention it.

It is also important to mention IACS, which can trace its origins back to the 1930 LOADLINE. The convention recommended collaboration between classification societies to secure as much uniformity as possible in the application of the standards of strength upon which freeboard is based. A second major class society conference, held in 1955, led to the creation of working parties on specific topics and, in 1968, to the formation of IACS by

¹⁶¹ IMO Circular FSI/Circ.10 of 4 June 2001 <<http://docs.imo.org/>> accessed 10 November 2012

¹⁶² Shaw, *supra* note 2, 489

seven leading societies. The value of their combined level of technical knowledge and experience was quickly recognised. In 1969, IACS was given consultative status with IMO. IACS developed Quality System Certification Scheme, which assures high standards and quality of performance of its members.¹⁶³

Nowadays, class certificate is important not only for marine insurance. Many others participating in shipping business as charterers, ship buyers rely on the class of a ship.¹⁶⁴ Furthermore, class certificate has relevance for statutory certification. One of the most important maritime regulatory conventions, namely SOLAS refers to the standards of classification societies. For instance, regulation 3-1 of chapter II-1 stipulates that ships shall be designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a classification society, which is recognized by the maritime administration in accordance with relevant provisions of the convention.

Therefore, it is of essential importance to make sure that those classifications societies acting in both private and public capacities perform their functions and duties properly and in accordance with international agreed rules and standards.

5.2.4 Analysis of PSC statistics on performance of ROs

Performance of ROs can be assessed by means of PSC statistics, which is available in the annual reports of majority of regional MoUs and FSI PSC reports. It is fairly stated that detainable deficiencies, discovered during PSC inspections, can be directly attributed to a failure of RO to properly survey or/and inspect the particular ships.¹⁶⁵

In order to see the scale of regional PSC MoUs activities, Annex 2 presents general PSC data for 2011 that is last available data. Seven regional MoUs, which have available date on their websites for the last year, are compared. The total number of inspections of these MoUs is sixty eight thousand five hundred eighty one wherein the biggest share of forty two percents belongs to Tokyo MoU and second biggest share of 28 percents belongs to Paris MoU. The smallest shares of one and two percents belong to Caribbean and Abuja MoUs respectively. Based on total number of inspections and detentions pie charts and bar chart on detention percentage in Annex 2, illustrating graphically as well as with help of the table comparing the detention percentage among MoUs in Annex 3 to get more comprehensive picture, it is possible to show that Indian MoU detains ships the most frequently that may signify that there is a greater concentration of substandard ships in this region. The general trend in the dynamics of PSC detentions for all MoUs except Indian MoU has tendency for decreasing ratio of detention relative to overall number of inspection in the region,

¹⁶³ Classification Societies - What, Why and How?

<http://www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF>
accessed 05.12.2012

¹⁶⁴ Nicolai Lagoni, *The Liability of Classification Societies* (Springer, Berlin 2007) 11

¹⁶⁵ John N.K. Mansell, *Flag State Responsibility* (Springer, Dordrecht 2009) 191

which may indicate that during last year number of substandard ships became less. The detention percentage in Indian MoU is growing constantly on the scale of four years periods wherein there is a fluctuation of detention percentage. The reason for that may be explained that partially some substandard ships shifted to trade in Indian MoU region. However, it is rather a suggestion.

Only Paris MoU contains statistics on RO related detentions, which is available for quite short period from 2005 to 2009 presented in Annex 3. It shows that percentage is quite stable with minor fluctuations. The share of RO related detentions out of overall number of detention for this period lies in the range from 12,18 to 15,9 percents. Taking into consideration that RO extensively involved for the verification that ships surveyed by them are in compliance with respective international maritime regulatory conventions, it may be concluded the performance of RO is rather satisfactory although this rate is still quite significant. According to IACS statistics, more than 90% of the world's cargo-carrying tonnage is covered by the classification design, construction, and through-life compliance rules and standards set by the 11 member societies of IACS, which also shows their significance as ROs. Overwhelming majority of IACS classification societies are found in the section of high performing RO in the Paris MoU list of annual report 2011 and only Indian Register of Shipping indicated as medium performing. Therefore, it is possible to say that majority of ROs that contribute to RO related detention percentage are non IACS members although some of non IACS members also perform quite well as Hellenic Register of Shipping, Polski Rejestr Statkow, etc. Some ROs appear to be for several years as very low performing. For example, International Register of Shipping (USA) has been for last five years and Register of Shipping (Albania) has been for last four years. In general, it can be seen that those RO performing poorly are rather small and pertaining to be rather national or operating very limitedly internationally. However, it should not be forgotten that *Prestige* and *Erika*¹⁶⁶ were classed with IACS members. Therefore, it is important to have such regime governing RO, which allows to exist only for well performing RO and assure sustainable quality of their performance. Currently there is a continuous work in IMO for development of the instrument aimed to provide comprehensive regime for RO that must be further examined in detail.

5.2.5 Development of IMO Code on ROs

At 84th session of MSC it was agreed to include in the work programme of the FSI Sub-Committee a high-priority item on “Development of a Code for Recognized Organizations,”¹⁶⁷ which was initiated by the group of 27 states together with the European Commission.¹⁶⁸ To demonstrate necessity of the code, it was stated that in order to meet their responsibilities in recognizing,

¹⁶⁶ Özçayir, *supra* note 1, 287

¹⁶⁷ MSC 84/24 of 23 May 2008 Report of the Maritime Safety Committee on its Eighty-Fourth Session, par. 22.27

¹⁶⁸ MSC 84/22/13 of 6 February 2008 Work Programme: Development of a Code for Recognized Organizations (RO Code)

authorizing and monitoring their ROs, the maritime administrations apply the existing IMO requirements for ROs. However, these requirements are presently scattered in different IMO instruments, some of which are mandatory under SOLAS regulation XI-1/11, whereas others remain recommendatory, and at present no audit scheme aimed at ROs exists to verify that these requirements are effectively and uniformly implemented. The objectives of the code were decided as to assist maritime administrations in meeting their responsibilities in recognizing, authorizing and monitoring their ROs; to gather all the applicable RO requirements in a single IMO mandatory instrument; to amend the existing and applicable legal framework to ensure that the ROs are correctly audited by qualified and independent auditors with respect to the code.¹⁶⁹

During 18th session of FSI Sub-Committee prepared a document, which consolidated the requirements and recommendations of the IMO conventions, codes and resolutions regarding ROs, and lists the relevant IMO circulars.¹⁷⁰ Next step was elaboration of the draft of RO code on 19th session of FSI Sub-Committee.¹⁷¹

The intent of the code was defined as to provide flag states with a tool that will assist in achieving harmonized and consistent global implementation of requirements established by IMO instruments for the assessment, and authorization ROs, and guidelines for the monitoring them as well as to provide flag states with harmonized, transparent, and independent mechanisms which can assist in the assessment and monitoring of ROs in an efficient and effective manner.¹⁷²

The code contains normative references to mandatory IMO instruments not to reiterate theme, ISO standards on quality management systems, general criteria for the operation of various types of bodies performing inspection and guidelines for quality and environmental management systems auditing.¹⁷³ Within general requirements for ROs, principles of independence, impartiality, integrity, competence, transparency, confidentiality, liability insurance and responsibility are established. There are also requirements for management and organisation of ROs as quality policy, documentation requirements (including quality manual, control of documents, control of records), planning, organization, communication (including with flag states and other RO), management review. Another set of requirements with respect to the resources of ROs, which include such areas as personnel, infrastructure, work environment.

It is important to indicate that certification processes is quite comprehensively regulated. The ROs shall determine requirements specified by the flag state, specifically for survey and certification activities; requirements not stated by the flag state but necessary for specified or intended use, as determined by the ROs; statutory and regulatory

¹⁶⁹ *Ibid*, par. 4

¹⁷⁰ FSI 18/15 of 17 September 2009 Development of a Code for Recognized Organizations: requirements and recommendations contained in IMO instruments regarding recognized organizations

¹⁷¹ FSI 19/14 of 17 November 2010 Development of a Code for Recognized Organizations: report of the Correspondence Group – Part 1 submitted by the United States

¹⁷² *Ibid*, annex, preamble

¹⁷³ *Ibid*, annex, part I sec. 3.1

requirements applicable to survey and certification activities; and any additional requirements considered necessary by the ROs.¹⁷⁴ The process of service design and development and control of production is covered there as well.

The machinery for performance measurement, analysis and subsequently generation of improvements is installed in the code. The ROs shall plan and implement the monitoring, measurement, analysis and improvement processes needing to demonstrate conformity to service requirements, to ensure conformity of the quality management system, and continually to improve the effectiveness of the quality management system. This shall include the determination of applicable methods, including statistical techniques, and the extent of their use.¹⁷⁵ The ROs shall conduct internal audits at planned intervals to determine whether the authorized activity conforms to the planned arrangements and that the quality management system is effectively implemented and maintained, and that a supervisory system is in place, which monitors the actions and work, carried out by the organization.¹⁷⁶ The monitoring and controlling subassembly require application of suitable methods for monitoring and measurement of the quality management system processes. The ROs shall monitor and measure the vessel's compliance with statutory requirements and the RO's rules to verify that all requirements have been met. In case of discovery of non-conformities, they must be identified and controlled. As element of sustainability, ROs are required continually to improve the effectiveness of the quality management system through the use of the quality policy, quality objectives, audit results, analysis of data, corrective and preventive actions and management review. Corrective actions shall be taken to eliminate the causes of non-conformities in order to prevent recurrence. Moreover, ROs shall determine action to eliminate the causes of potential non-conformities in order to prevent their occurrence.

The part two of the code is designed for flag state monitoring of ROs, which is assigned as a recommendation for flag states in contrast to first mandatory part. The flag state should establish or participate in an oversight programme with adequate resources for monitoring of, and communication with, its ROs in order to ensure that its international obligations are fully met largely by means of supplementary surveys.¹⁷⁷ An oversight programme may include various monitoring activities, which may, *inter alia*, consist of audits, inspections and audit observations. The implementation of the oversight programme should include, among other, coordinating and scheduling monitoring activities relevant to the oversight programme; establishing and maintaining a process for the evaluation of the auditors and their continual professional development; ensuring the control of records of the monitoring activities; ensuring review and approval of monitoring activity reports, and ensuring their distribution to interested parties.¹⁷⁸

¹⁷⁴ *Ibid*, annex, part I sec. 8.2.3

¹⁷⁵ *Ibid*, annex, part I sec. 9.1.1

¹⁷⁶ *Ibid*, annex, part I sec. 9.4.1

¹⁷⁷ *Ibid*, annex, part II sec. 7.1

¹⁷⁸ *Ibid*, annex, part II sec. 8.3.4

The code provides also with requirements for training and qualification of ROs' technical staff defined, specifications on the survey and certification functions of ROs acting on behalf of the administration in the first and second appendices to the part one respectively. Appendix three contains the minimum list of elements to be included in the written agreement between the maritime administration and the RO.

On 20th session of FSI Sub-Committee the vehicle to adopt or amend the RO code has been designed.¹⁷⁹ Three different possible options to adopt the RO code have been prepared taking into account the procedural guidance to give full effect to the provisions of certain instruments developed by IMO under specific IMO conventions. These options are joint MSC and MPEC resolution, separate MSC and MPEC resolutions and Assembly resolution. In order to make RO code mandatory, the draft of amendments to relevant conventions was prepared. Regulation 1 of Chapter XI-1 of SOLAS, regulation 6, of Annex I, regulation 8 of Annex II, regulation 4 of Annex IV, regulation 5 of Annex VI of MARPOL, regulation 2-1 of chapter I of Annex I of Annex B of LOADLINE. Standard provision stipulated to refer to RO code in the conventions reads as following:

“organizations [*including classification societies – for LOADLINE*] referred to in [...] of the convention shall be authorized by the Administration in accordance with the provisions of the present Convention, as supplemented by the provisions of the Code for recognized organizations (RO Code) adopted by the Organization by resolution [...]”

- (a) the provisions of part I of the RO Code shall be fully complied with;
- (b) the related guidance contained in part II of the RO Code should be taken into account to the greatest possible extent in order to achieve a more uniform implementation of the RO Code;
- (c) amendments to part I of the RO Code shall be adopted, brought into force and take effect in accordance with the provisions of [...]; and
- (d) part II of the RO Code shall be amended by the Maritime Safety Committee and the Marine Environment Protection Committee in accordance with their rules of procedure.”¹⁸⁰

The proposed regulation of ROs in the code reflects current position of flag states according to which flag states have wide discretion to choose ROs. Of course, the code regulates extensively the activity of ROs and its relationship with a flag state but main responsibility for ROs compliance with contemplated regime is entrusted to a flag state. It is not different from current regime in place, which is proved to be ineffective. Analysis of PSC statistics clearly show that there is number of ROs with low performance, which, in fact, are major contributors of RO related detentions. Indeed, it is why new endeavour is launched to assure that ROs properly discharge their duties. Considering current two component system (flag state and RO) for realisation of provisions of international regulatory maritime convention, it is deemed that there must be a third independent element to be introduced in order to ensure effectiveness of those two elements. The idea of third

¹⁷⁹ FSI 20/13/1 of 23 December 2011 Development of a Code for Recognized Organizations: instrument to adopt or amend the RO Code and amendments to relevant IMO instruments to make the RO Code mandatory Note by the Secretariat

¹⁸⁰ *Ibid*, Annex 4, p. 1

component is not new. EU model has already employed this principle of trinity by means of integral cooperation of EU Commission and member states doing neighbours watch. However, the most challenging question is how to introduce this third element. It is already partially in place. The introduction of VIMSAS being an international arrangement in nature orchestrated by IMO and being contemplated to be mandatory in 2015 will facilitate the effective discharge of flag state duties. IMO should be that third element which will harmonically complement the current system. The proposition of this thesis is to elaborate mechanism of IMO audit according to which international community through IMO will verify ability to comply with RO code. Organisations, meeting requirements of RO code, being verified by IMO audit will be recognised by IMO members. Therefore, flag states must be confined to choose ROs only from available list of IMO recognised organisations. The listing approach is not new for IMO. Under STCW regulation I/7 there exists so-called “white list” of countries assessed to be properly implementing the convention signifying that those states appeared on white list, in principal, enjoy the right of recognition by other parties to the convention of the certificates issued by or on behalf of them. Subsequently, IMO will monitor performance of ROs through MIMSAS as minimum. Additional monitoring tools may be devised. Those organisation which is proved to be substandard must be withdrawn from the list of IMO ROs. It is entirely believed that this trinity based system involving IMO will guarantee effectiveness of international maritime regulatory conventions. However, whether it is possible to implement this idea depends on malleability of the code as well as current international legal regime in general that is again dependent on willingness and position of member states of IMO. Nevertheless, as a matter of bringing a piece of innovate substance to the research it deserves its place in this thesis.

5.3 Consideration of universal PSC regime

Since emergence of first PSC MoU in 1978 there have been developed ten regional PSC regimes including USCG in the world now. Due to these significant efforts of PSC authorities, we have been witnessing the trend of decreasing substandard shipping.¹⁸¹ However, one, who is truly concerned with the issue of shipping safety and protection of marine environment, should pose the question whether current 10 regimes are effective enough to eliminate substandard shipping, of course, with efforts of flag states and other principal actors in tandem. Eradication of substandard shipping as goal has not been a possibility of observable future so far. Furthermore, there are some serious deficiencies of current regimes. It is enough to recall the failure of PSC to identify *Erika* as a substandard ship to acknowledge that some further developments must be triggered. There are some academic considerations that it is a time to construct one global PSC regime covering

¹⁸¹ See p. 90

the whole globe.¹⁸² Therefore, this subchapter is devoted to examine this challenging issue. It will be analysed the need for and possibility of establishment of universal PSC regime.

In order to understand why global PSC regime is necessary, the cotemporary problems of the current regional PSC regimes must be explored in detail. The one and probably the most important downside of multitude of PSC regimes is an overlap of inspections. Vessels trading on the tramp market usually ply from one region to another driven by charterers' demand. If a ship is inspected in one MoU region then sailing to another MoU region means the ship may be targeted for another inspection in that region. It was validly posed the question whether too many inspections contribute to the seafarers fatigue.¹⁸³ In interview with the seafarers, it was revealed that they are overloaded with PSC inspections of different regions. Of course, it has also a commercial aspect – delay of a ship, which causes additional expenses in transportation of goods. Another very important downside is that PSC regimes are not synchronised with each other. There is no one comprehensive database, which would facilitate the most correct targeting system. If PSC regimes are not in position of firm cooperation then it may happen that the shipoperator of a ship with some deficiencies to be corrected in the next port of call, which is in another region, may not rectify them. Different standards are applicable in different regions and it creates serious problem for shipowner to be in compliance with all of them doubled with different levels of qualification of PSCO in different regions. All of these reasons dictate for consideration of more harmonised system of PSC regimes, which may even be one universal PSC regime.

It is appropriate here to mention the words of Mr. Efthimios E. Mitropoulos, former IMO Secretary-General said during Second Joint Ministerial Conference of Paris and Tokyo MoUs:

“A huge opportunity now exists to build upon the good foundations that have already been laid. I believe that a consistent, uniformly applied PSC regime with global outreach, embracing all the regional schemes and others such as the United States Coast Guard, should be a common objective. To achieve this, existing PSC activities need to be harmonized and co-ordinated.”¹⁸⁴

To achieve this, for the moment, utopian purpose, obstacles on the way of its accomplishment must be analysed. The question is whether it is possible to establish one global PSC regime now. Analysis of regional PSC regimes in second chapter revealed that there are fundamental differences of regional MoUs. Mainly, they are scope of applicable instruments, use and approach of targeting system, and level of stringency of consequences for non-

¹⁸² Özçayir, *supra* note 50, 239; Dilip Mehrotra, ‘Memorandums of Understanding on Port State Control: The Need for a Global MOU?’ (Master thesis, WMU 2000) 94; Li Jin, ‘A Study on Development and Perspective of Port State Control’ (Master thesis, WMU 2008) 42; Lin Jianxiang, ‘One Global PSC regime, to be or not to be’ (2007) 5 WMUSC Publication 12

¹⁸³ *Ibid.*, Mehrotra, 70

¹⁸⁴ Speech by Mr Efthimios E. Mitropoulos on Second Joint Ministerial Conference of the Paris and Tokyo Memoranda of Understanding on Port State Control, Vancouver, 2 November <2004 http://www.imo.org/blast/mainframe.asp?topic_id=847&doc_id=4418> accessed 20.11.2012

conforming vessels. However, besides formal attributes there are other differences as qualification of PSCO, financing, regional policies, etc. Furthermore, non-integration of USCG into system of regional MoUs, as it was shown in subchapter 3.2.3, has own contribution to overall challenges of establishment of universal PSC regime since USA alone has very long coastline and significant importance for shipping as one of the centres of world economy facilitated, mainly, by means of sea transport.

So now, it is possible to answer on the posed question in this subchapter. Abovementioned differences without making compromises do not allow establishing one global PSC regime at present time. Therefore, with this purpose in mind, the further cooperation on harmonisation of PSC regimes should be fostered. There are number of initiative towards the harmonisation of regional PSC MoUs.

One of successful form of cooperation is CIC, which was initially introduced by Paris MOU in 1995. These campaigns normally last a period of 3 months and focus on a specific area of the ship.¹⁸⁵ There are two types of CIC. One is conducted by regional MoU alone. For example, Black Sea MoU carried out CIC on harmful substances in 2011.¹⁸⁶ Another type is joint CIC when two or more regional MoUs participate in. For instance, in the period from 1 September to 30 November 2011 CIC on structural safety and LOADLINE was carried out jointly by Paris and Tokyo MoUs with participation of Viña del Mar MoU, Indian MOU, Mediterranean MOU and Black Sea MOU.¹⁸⁷ On more joint CIC of Paris and Tokyo MoUs on fire safety systems is conducted in 2012. From the press release it was explained that in practice, the CIC would mean that during a regular PSC inspection conducted under the regional ship selection criteria within the Paris and Tokyo MoU regions, the fire safety arrangements, maintenance records and other applicable documentation would be verified in more detail for compliance with SOLAS Chapter II-2.¹⁸⁸

Another form of cooperation is PSCO training programs. It is accurately asserted that the success of any PSC regime depends on the officer who is carrying out the inspection.¹⁸⁹ Therefore, to achieve homogeneous standards of PSC regimes, first, it is essential to strive for uniform standards of training and qualification of PSCO. There are number of PSCO training initiatives such as Tokyo MoU basic training course for PSCOs and Paris MoU Expert Training on Safety and Environment, which provide training

¹⁸⁵ Jin, *supra* note 182, 36

¹⁸⁶ Black Sea MoU 2011 Annual Report, p. 3 <<http://www.bsmou.org/files.php?file=PDF/2011ANNUALREPORT.pdf>> accessed 01 November 2012

¹⁸⁷ Tokyo MoU 2011 Annual Report, p. 3 <<http://www.tokyo-mou.org/ANN11.pdf>> accessed 01 November 2012

¹⁸⁸ Joint Paris and Tokyo MoU Press Release on PSC of 1 June 2012 <<http://www.tokyo-mou.org/Joint%20press%20release%20CIC%20on%20FSS.pdf>> accessed 21 November 2012

¹⁸⁹ Mehrotra, *supra* note 182, 93

for other MoUs PSCO as well.¹⁹⁰ PSCO are also trained with help of IMO integrated technical cooperation programme.¹⁹¹

FSI Subcommittee facilitates the harmonisation of PSC MoUs. It collects and summarises PSC data from regional MoUs through its annual progress reports on PSC. It is a common platform for all MoUs used for cooperation with each other. Majority of PSC MoUs established direct connection with each other by means of observer status.

Annual IMO Workshops for PSC MoU Secretaries and Database Managers contributes to PSC MoUs harmonisation. For example, during last 5th workshops, which took place from 14 to 16 June 2011 at IMO Headquarters, several data exchange agreements were signed with IMO, Paris and Tokyo MoUs had jointly developed, in cooperation with the IMO, a common system for PSC coding which is in the process of being used by the Paris and Tokyo MoUs as the basis for collecting and recording PSC data.¹⁹²

Exchange of PSC related information plays very important role in the harmonisation process. Equasis, international database, which was established after *Erika* incident for the purpose of greater transparency and timeliness of shipping safety data in the maritime industry, can be characterised as a key there, integrating IMO, ILO, regional MoUs, public authorities, non-governmental international shipping organisations, organisations involved in shipping safety, marine insurance industry and others.

There was Quality Shipping Campaign, launched by the European Commission and the UK Government in November 1997. The Campaign endeavoured to bring together all players involved in the various fields of shipping business in an effort to advance marine safety. It was based upon dialogue between all the marine industry and public authorities and its tools are, primarily, voluntary measures. As the Quality Shipping Campaign revealed, one of the greatest shortcomings towards the shipping quality culture is the lack of transparency in the information relating to the quality of ships and their operators.¹⁹³

While much relevant information had been collected and available, it was scattered and often difficult to access. It was unanimously decided by all participants representing the whole range of industry professionals (including ship-owners, cargo owners, insurers, brokers, classification societies, agents, ports and terminals), to make such information more accessible.¹⁹⁴

The European Commission and the French Maritime Administration decided to collaborate for development of the information system collating

¹⁹⁰ FSI 20/6/2 of 17 November 2011 Harmonization of Port State Control Activities: Progress report on PSC regimes

¹⁹¹ TC 62/3 of 2 April 2012 Integrated Technical Co-Operation Programme: biennial report on 2010-2011 note by the Secretariat

¹⁹² FSI 20/6 of 18 August 2011 Harmonization of Port State Control Activities: outcome of the Fifth IMO Workshop for PSC MoU/Agreement Secretaries and Database Managers note by the Secretariat

¹⁹³ Information available on the Equasis website

<<http://www.equasis.org/EquasisWeb/restricted/About?fs=HomePage>> accessed 07.12.12

¹⁹⁴ *Ibid*

existing safety-related information on ships from both public and private sources and making it available on the Internet. The main underpinning principles of Equasis are as follows:

- to be a device aimed at reducing substandard shipping limited to safety-related information on ships;
- to be for no commercial purpose;
- coverage of the whole world fleet;
- dynamic collaboration with all players involved in the maritime industry;
- To be used on a voluntary basis.¹⁹⁵

Equasis was established through conclusion of MoU between seven maritime authorities and EMSA at the IMO in 2000.¹⁹⁶

According to the section 2 of the Equasis MoU, there are two types of participatory involvement in the work of Equasis MoU. Major participants who have the voting right are represented by three groups: maximum three maritime authorities from Paris and Tokyo MoU, USCG, EMSA. The others may participate as observers that is available for IMO and maritime authorities that have made the commitment to join the Supervisory Committee as full members but are still investigating the procedures to so. Supervisory Committee is established, composed of one representative of each participant, to carry out the specific tasks assigned to it under the MoU. The committee may invite organisations involved in maritime safety to participate in its meetings, as non-voting observers. The committee is responsible for guidance and operation of the Management Unit and the Technical Unit and approving their annual reports.¹⁹⁷

Management Unit is established to be in charge of the daily operation of Equasis which is intended to operate on a non-profit basis. EMSA hosts the Management Unit and locate it in its premises at its own cost. The Management Unit, acting under the guidance of the Supervisory Committee and within the limits of the resources made available for Equasis. It is responsible for management of agreements with the providers of information to Equasis, organizational and logistics support to the Supervisory Committee and the Editorial; facilitation of the exchange of information, preparation of summaries and statistics of the information provided through Equasis and preparation of reports and other functions. The technical Unit is responsible for develop the information system and management the Equasis database.¹⁹⁸

The Editorial Board is composed of representatives of the participants, and public and private organizations that provide information to Equasis on a regular basis. It is responsible for monitoring and ensuring the quality and accuracy of the information released through Equasis and advising the

¹⁹⁵ *Ibid*

¹⁹⁶ Memorandum of Understanding on the establishment of the Equasis information system (signed 17 May 2000)

<http://www.equasis.org/EquasisWeb/Static/MOA/About/MOU_EN.pdf> accessed 07.12.12

¹⁹⁷ *Ibid.*, sec. 5.1

¹⁹⁸ *Ibid.*, sec. 5.2

Management Unit and the Technical Unit on any aspect relating to the provision of information and data in Equasis.¹⁹⁹

Section 7 of the MoU contains a legal disclaimer providing for participants, and organisations invited as observers to the Supervisory Committee meetings, accept no liability for the accuracy or reliability of the data displayed on Equasis, nor any liability in connection with the management, operation or use of Equasis.

The core section of Equasis MoU is the section four that stipulates that Equasis to be designed for collection, processing and disseminating quality and safety-related information on the world merchant ships provided to it with the approval of the holders of such information.

The information disseminated by Equasis is to be accessible through the Internet, subject to the conditions laid down by the Supervisory Committee. There are 45 providers of information to Equasis currently They are 5 PSC regions (Paris, Tokyo, Viña del Mar, Indian MoUs and USCG), private inspection organisations (CDI and OCIMF), IACS and other (Türk Loydu) classification societies, international group of P&I clubs, other providers, including, *inter alia*, EMSA, ITF, IHS Fairplay, INTERTANKO, INTERCARGO.

In the speech of the former IMO Secretary-General, Mr. Mitropoulos made during Equasis 10th Anniversary Celebration it was said that there was considerable scope to find synergies between Equasis and GISIS, information database launched by IMO. For example, the collaboration between the IMO Secretariat and Equasis in developing the PSC module of GISIS is typical of the sort of opportunities that can be explored.²⁰⁰

It can be concluded that for the moment it is not possible to think of universal PSC regime due to number of fundamental impediments among regional MoU regimes. However, we are, definitely on the way to global harmonised system of regional PSC regimes, which may provide the basis for construction of universal PSC regime in future.

¹⁹⁹ *Ibid*, sec. 5.4

²⁰⁰ Speech on Equasis 10th Anniversary Celebration at IMO Headquarters on 29 November 2010 Address by E.E. Mitropoulos, former IMO Secretary-General
<<http://www.imo.org/MediaCentre/SecretaryGeneral/SpeechesByTheSecretaryGeneral/Pages/Equasis-10th-Anniversary.aspx>> accessed 07.12.12

6 Conclusions

International foundation of PSC lies within PSJ, which is, in its turn, based on international customary law and the fundamental principles of international law. There are elaborated provisions on PSJ in UNCLOS, which concern PSEJ and PSC. However, the more comprehensive provisions, instituting the international legal regime on PSC, are found in the international maritime conventions such as SOLAS, LOADLINE, MARPOL, STCW, TONNAGE, AFS and MLC. Although CLC and BUNKER do not contemplate PSC, they are within the applicable instruments of several MoUs. Hence, it indicates that PSJ is rather an evolving concept. It shall be concluded that there is no a general right of access to foreign ports. Nevertheless, there are certain limitations of port state jurisdiction to deny access to foreign ships imposed by international trade law and UNCLOS.

The PSC framework and mechanism consist of several levels of norms of different nature including the international legal regime as a first level. The next level lies within the IMO guidelines, which provide the internationally recommendatory framework on which, further, the regional MoUs are based. The last level in this chain is particular state's arrangements on PSC. Each level has own peculiarities: a scope, legal nature, application, etc.

It must be underlined that the IMO resolutions, providing for the guidelines on PSC, have an non-obligatory nature. Nevertheless, the significant volume of provisions of the IMO guidelines on PSC are incorporated into the regional MoUs that indicates a considerable success of IMO to bring the global consistent regime of PSC. However, the regional MoUs as well as the IMO guidelines fall within a category of soft law. In fact, the regional MoUs are administrative agreements, which do not create internationally binding obligations for state parties. They are aimed to build a framework of cooperation among the maritime authorities of a region or the group of states with a similar position on PSC. The regional MoUs provide uniformity and harmonization for application, among participating states, of the right of a port state to ascertain that calling ships are in compliance with internationally agreed rules and standards mainly on maritime safety and protection of marine environment within their PSJ.

It is possible to distinguish ten regional PSC regimes, which cover almost the whole globe, namely nine regional MoUs and USCG PSC programme, which stands alone as the national arrangement on PSC of USA. Several conclusions may be deduced from the comparison of the regional MoUs. First, the MoUs have a common structural architecture. It is comprised of a preamble, sections on general commitments, relevant instruments, inspection procedures, rectification and detention, provision of information, operational violations, training programmes and seminars, organization, financial mechanism, amendments, administrative provisions and annexes where relevant. Second, the majority of MoUs uses the typical wording of provisions. Paris MoU is almost completely distinguished from the rest of the MoUs as it uses own wording and some conceptually different

provisions which, in general, can be characterised as much more stringent and effective. It is possible to find some provisions of Tokyo MoU, which were adopted from Paris MoU. However, in general, Tokyo MoU is different from other regional PSC MoUs. It is also possible to find some common provisions just between Tokyo and Indian MoU. There is a group of the MoUs, which are quite similar with each other, namely Black Sea, Abuja, Mediterranean, Riyadh, Indian MoUs within which Abuja and Mediterranean MoUs are almost identical. Caribbean MoU is quite similar with this group. However, it employs own wording in many cases and uses not all typical provisions. Based on wording of provisions, Viña del Mar MoU can be almost completely distinguished from the rest of MoUs, although same typical provisions are used. The distinctive characteristics for all MoUs are applicable instruments and the selection scheme for ships to be inspected. Another major difference of Paris and Tokyo MoU from the rest is use of multi-faceted listing system showing performance of flag states and ROs, which is utilised in the selection scheme. Paris MoU inspection and selection scheme, as the most sophisticated in contrast to Tokyo MoU, is based on the ship risk profile scheme with range of different factors. Among other factors of the scheme, there are the black, grey and white list for flag state and ROs performance, which are used for the assessment of ships' priority of an inspection. Another peculiarity of Paris MoU, which, in fact, distinguishes it from the rest of MoUs, is banning those ships, which are systematically found substandard. Finally, uniqueness of Paris MoU also consists in that it is a regime with the regime inside. EU states, which are party to Paris MoU, shall comply with the EU legislation on PSC, which incorporates Paris MoU and makes it obligatory within EU. Due to its peculiarities, Paris MoU can be characterised as most rigorous as well as the most effective in achieving aimed goal to eliminate substandard ships from its waters. The PSC detention dynamics shows that Paris MoU has the lowest detention rate. Since 1995, the Paris MoU detention rate dropped in three times, which clearly indicates its effectiveness.

USCG PSC programme is quite different from the regional MoUs. The main body of norms on PSC is found in USCG directives, which as well as the regional MoUs have no status of law. Nevertheless, USCG PSC programme has a legal foundation in the federal primary and secondary legislation but it can be characterised as lacking consistency with the international maritime conventions to which USA is a state party. Those provisions are too selective and concern only few conventions.

The comparison of PSC in UK and Ukraine clearly shows that there are different standards and approaches in the implementation of PSC on the national level. Where UK legislation on PSC is quite comprehensive, Ukrainian legislation is not only outdated and scattered but it does not address the specifically sensitive issue of undue detention or delay.

PSC detention has several legal implications. The international maritime conventions, employing PSC, envisage that if a ship is unduly detained or delayed, it shall be entitled to compensation for any loss or damage suffered. However, this provision does not solve a potential problem as it must be properly implemented into the national legislation. Furthermore, the *Lantau Peak* case has shown that even the national legislation on PSC may

be misinterpreted by a judge. Therefore, it must be clearly drafted in line with the international maritime conventions and even with the participating regional MoU(s) if necessary. Nevertheless, the importance of international law shall not be underestimated as a flag state may bring the case against the port state before ICJ on behalf of its shipowner, which suffered a loss from undue detention, subject to the possibility to establish the jurisdiction of ICJ. In such case, the PSC provisions of the international maritime conventions become directly applicable before ICJ. Moreover, there is, even, strong probability that the PSC provisions of the maritime regulatory conventions may be treated by ICJ as international customary law. Hence, it simplifies the situation when one party to the international dispute is not a party to the respective maritime convention. Another important conclusion, which may be drawn from *Lantau Peak* case, is when there is some degree of uncertainty with respect to standards to be applicable to the being inspected ship, the authority and responsibility for the taking of such a decision rest with PSC authority of the port state.

PSC detention may have a drastic effect on the contracts of affreightment and marine insurance. In the case of a marine insurance contract, PSC detention may signify the breach of implied warranty of seaworthiness by the shipowner. The breach of implied warranty of seaworthiness entails that the insurer is discharged from the liability as from the date of the breach of warranty. However, it is not so easy to give the straight answer with respect to the contract of affreightment, since in the contract of affreightment, the implied warranty of seaworthiness is categorised as an innominate term. It implies that there are two possible scenarios depending on severity of the breach of the contract. One gives mere entitlement for seeking damages caused by the breach and another is more severe, that is to say, the right to repudiate the contract. The right test to determine how to qualify the innominate term is whether the charterer had been deprived of substantially the whole benefit of the contract.

There is also another legal implication of PSC detention in relation to time charterparties. It was found that the risk of PSC detention is usually allocated within an off-hire clause of time charterparties. Two categories of time charterparties may be singled out with respect to how the risk of PSC detention is contemplated within the wording of an off-hire clause. First category represents off-hire clauses with explicit inclusion of PSC detention as an off-hire event. Second category embodies the rest of off-hire clauses where PSC detention as an off-hire event may be construed impliedly. The sweeping-up phrase or proviso on arrest of the vessel at the suit of a claimant as an equivalent *vis-a-vis* the detention by port authorities may be used to bring PSC detention within the meaning of an off-hire clause as one of off-hire events.

With that emergence of the regional PSC regimes, first time ability to interrelate PSC and FSC has appeared through the PSC statistics revealing data on the detention of the vessels of the particular flag states as an indicator of flag state performance. Another milestone of the development of this process was establishment of IMO FSI subcommittee in early nineteen nineties, which fostered the IMO work on last unmanaged area with respect to the implementation and enforcement of the IMO mandatory

instruments by flag states. The IMO instruments on FSI employ the data from the regional MoUs to assess flag states. In its turn, PSC uses the devised mechanisms of FSI instruments for a more effective targeting system. It must be emphasised that PSC is a complimentary regime to FSC. However, PSC becomes a duty when a state is a party to the regulatory maritime conventions such as SOLAS and MARPOL, which employ PSC to ascertain that the ships calling its port will not proceed to sea until it presents a danger to the ship, persons onboard or marine environment. In other words, PSC starts playing its role when FSC fails to assure ships are in conformity with the respective international rules and standards. PSC has become the next control layer after FSC. Therefore, PSC is a complementary mechanism to FSC and it cannot substitute FSC.

There is direct dependence between the performance of ROs and discharge of technical duties of flag states. The PSC statistics reveal that there are a number of classification societies, which do not perform their duties in proper manner. Many ships, which were surveyed with so-called convenient ROs, have been found with detainable deficiencies.

There is already an extensive international legal framework, which regulates the activity of ROs. It is based on such regulatory conventions as SOLAS, MARPOL, LOADLONE, AFS, TONNAGE, MLC as well as the IMO resolutions A.739(18) and A.789(19) which are made mandatory through the respective provisions of SOLAS and MARPOL. Moreover, IMO has also elaborated the model agreement between a flag state and ROs governing the delegation of statutory certification and harmonised system of surveys and certifications applicable both for maritime administrations and ROs. However, it still leaves many issues to discretion of flag states. Besides the international legal regulation of ROs, there is also the EU model, which is more stringent.

It is classification societies, which are assigned by flag states administrations to carry out their functions under the international conventions. In some cases, they are, to significant extent, responsible for flag state control functions and even their performance is much more effective than some other maritime administrations.

The performance of ROs can be assessed by means of the PSC statistics, which is available in the annual reports of the majority of the regional MoUs and FSI PSC reports. The general trend in the dynamics of PSC detentions for all MoUs except Indian MoU has a tendency for decreasing ratio of detention relative to overall number of inspection in the region, which may indicate that during the last year the number of substandard ships became less. The detention percentage in Indian MoU is growing constantly on the scale of four years periods wherein there is a fluctuation of detention percentage. The reason for that may be explained that partially some substandard ships shifted to trade in the Indian MoU region. However, it is rather suggestion.

Based on the Paris MoU statistics, the majority of ROs, which contribute to the RO related detention percentage, is non IACS members. Although some of non IACS members also perform quite well as Hellenic Register of Shipping, Polski Rejestr Statkow, etc., some ROs appear to be for several years as very low performing. For example, International Register of

Shipping (USA) has been for the last five years and Register of Shipping (Albania) has been for the last four years. In general, it can be seen that those ROs performing poorly are rather small and pertaining to be rather national or operating very limitedly internationally.

In order to strengthen the international regime on ROs, IMO code on ROs was developed. The intent of the code was defined as to provide flag states with a tool that will assist in achieving harmonized and consistent global implementation of requirements established by IMO instruments for the assessment, and authorization ROs, and guidelines for the monitoring them as well as to provide flag states with harmonized, transparent, and independent mechanisms which can assist in the assessment and monitoring of ROs in an efficient and effective manner. Recently, the vehicle to adopt or amend the RO code has been designed, which contemplates to make it mandatory through the inclusion of the respective provisions into SOLAS, MARPOL and LOADLINE. The thesis further proposes to reinforce the effectiveness of the code through the introduction of the IMO listing mechanism to approve ROs internationally. The proposal is based on the EU groundwork and the IMO experience in other affiliated spheres.

There are some academic considerations that it is a time to construct one global PSC regime covering the whole globe. Such cotemporary problems of the current regional PSC regimes as the overlap and lack of synchronisation of inspections among the MoUs create holes in the PSC net for unscrupulous shipowners on one side and contribute to the seafarers fatigue on the other side. Furthermore, the different standards are applicable in different regions and, therefore, it creates a serious problem for shipowner to be in compliance with all of them, doubled with the different levels of the qualification of PSCO in the different regions. All of these reasons dictate for consideration of the more harmonised system of PSC regimes, which may even be one universal PSC regime.

For the moment, it is not possible to establish the universal PSC regime due to a number of obstacles pertaining to the current PSC regimes. The analysis of the regional PSC regimes reveals that there are fundamental differences among the regional MoUs. Mainly, they are a scope of applicable instruments, the employment and approach of targeting system, and the level of stringency of consequences for non-conforming vessels. However, besides formal attributes there are other differences as the qualification of PSCO, financing, regional policies, etc. Furthermore, non-integration of USCG into the system of the regional MoUs has own contribution to overall challenges of the establishment of the universal PSC regime since USA alone has a very long coastline and significant importance for shipping as one of the centres of the world economy facilitated, mainly, by means of sea transport. Nevertheless, the further cooperation on harmonisation of PSC regimes through the conduction of CIC among the MoUs, organisation of PSCO training programs and the work of FSI Subcommittee is aimed. With this purpose in view, Equasis plays a significant role as it is based upon a dialogue between all members of the marine industry and public authorities and its tools are, primarily, voluntary measures. In future, Equasis may become that bridge, which will integrate the private and public sectors for the elimination of substandard shipping that is a primary target of PSC.

Annex 1 Comparison of main PSC MoUs provisions

Description of the provisions	1	2	3	4	5	6	7	8	9
To give effect to the provisions of the Memorandum	Green	Green	Green	Green	Green	Green	Green	Green	Green
To establish and maintain an effective system of PSC	Green	Green	Green	Green	Green	Green	Green	Green	Green
To consult, co-operate and exchange information with the other authorities	Green	Green	Green	Green	Green	Green	Green	Green	Green
Application of ILO 147 Convention	Green	Green	Green	Green	Green	Green	White	Green	White
Application of ILO Conventions	White	White	White	White	White	White	Green	White	White
Application of the relevant instruments subject to entry into force and participation	Green	Green	Green	Green	Green	Green	Green	Green	Green
No more favourable treatment principle	Green	Green	Green	Green	Green	Green	Green	Green	Green
Application of requirements to non-convention sized ships	White	White	White	Green	Green	White	Green	White	Green
Application of requirements to ships below 500 gross tonnage	Green	Green	Green	White	White	White	White	Green	White
Definition of inspection	Green	Green	Green	Dark Green	Dark Green	Dark Green	White	Yellow	Red
Minimum standards of inspection	Green	Green	Green	White	White	White	White	White	White
More detailed inspection subject to clear grounds	Green	Green	Green	Green	Green	Brown	Pink	Yellow	Red
Reference of listing of clear grounds cases	Green	Green	Green	Green	Green	Brown	Pink	Yellow	Red
Rule of constrictions that nothing in the text restricts the powers of the authorities to take measures within their jurisdiction	Green	Green	Green	Green	Green	Green	Green	Green	Red
Reference to relevant procedures and guidelines for control of ships	Green	Green	Green	Green	Green	White	White	White	White
Special attention (priority) in selecting ships for inspection	Dark Blue	Green	Green	Green	Green	White	White	Yellow	Red
ISM Code inspection procedure reference	White	White	White	White	White	White	White	White	Red
Application of ship risk profile	White	White	White	White	White	White	Pink	White	Red
Application of targeting factor in selection of ships	White	White	White	White	White	Brown	Pink	White	White
Arrival in advance reporting obligations for ships	White	White	White	White	White	White	Pink	White	White
Banning	White	White	White	White	White	White	Pink	White	White
To avoid inspecting ships, which have been inspected by any of the other authorities within specified period	Dark Blue	Cyan	Brown	Purple	Orange	Brown	White	Yellow	Red
Pilots' duty to inform on apparent anomalies	White	Green	White	White	White	White	Green	White	White
Inspections to be carried out only by duly authorized persons with specified qualification	Green	Green	Green	Green	Green	Brown	Pink	Yellow	Red
Right to use assistance by a person with the required expertise	Green	Green	Green	Purple	Green	White	Green	White	Red
Principle of impartiality and independence	Green	Green	Green	Green	Green	White	Green	White	Red
Issuance and use of PSCO identity card	Dark Blue	Green	Green	Green	Green	White	Pink	White	Red
To provide the master with results of the inspection	Green	Green	Green	Green	Green	Brown	Pink	Yellow	Red
Suspension of an inspection	White	White	White	White	Green	Green	Pink	White	White
Rectification of deficiencies	Green	Green	Green	Green	Dark Green	Dark Green	Pink	Yellow	Red
Detention in the case of clearly hazardous deficiencies	Green	Green	Green	Green	Green	Dark Green	Dark Green	Yellow	Red
Notification of flag state administration in the case of detention	Dark Blue	Green	Green	Green	Green	Dark Green	Pink	Dark Green	Red
Notification of RO in the case of detention	Dark Blue	Green	Green	Green	Green	Dark Green	Pink	Dark Green	Red

Allowance for the ship to proceed to another port if rectification of deficiencies is not possible									
Allowance for the ship to proceed to another port in the case of detention due to absence of VDR									
Refusal of access to the ship not complying with instructions for rectification of deficiencies when sailing to another non-agreed port									
Alerting and detention in the case where the ship not complying with instructions for rectification of deficiencies when sailing to another non-agreed port									
Access to a specific port in the case of force majeure									
Detention and refusal of access provisions are without prejudice to the requirements of relevant instruments or IMO procedure on notification and reporting procedures related to PSC									
To avoid unduly detaining or delaying a ship									
Burden of proof for alleged undue detention lies with the owner or operator of the ship									
Exemption from detention due to reporting prior to, upon arrival or whilst the vessel is in the port, of any damage, breakdown or deficiency to the ship, its machinery and equipment subject to rectification									
Exemption from detention due to reported accidental damage where appropriate remedial actions are taken									
Allowance, in exceptional circumstances, to call at a port for temporary repairs for safety reasons to a ship on its way to a specified repair yard									
Source of the information must not be disclosed where an inspection is initiated based on a report or complaint									
Right of appeal against a detention decision									
Costs relating to follow up inspections									
Provision of information									
Operational Violations									
Training Programmes and Seminars									

Colour explanation

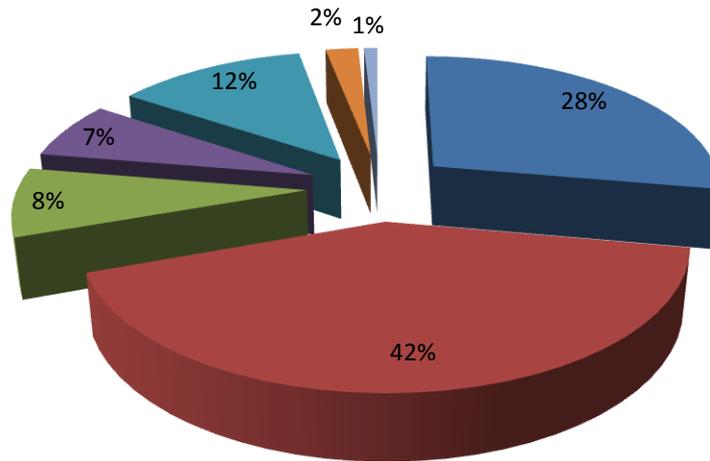
Majority	Minor majority	Not applicable	Black Sea MoU	Mediterranean MoU	Abuja MoU
Riyadh MoU	Indian MoU	Tokyo MoU	Paris MoU	Caribbean MoU	Viña del Mar MoU

1 - Black Sea MoU; 2 - Mediterranean MoU; 3- Abuja MoU;; 4 - Riyadh MoU; 5 - Indian MoU; 6 – Tokyo MoU; 7 - Paris MoU; 8 - Caribbean MoU; 9 - Viña del Mar MoU

Annex 2 General PSC data 2011

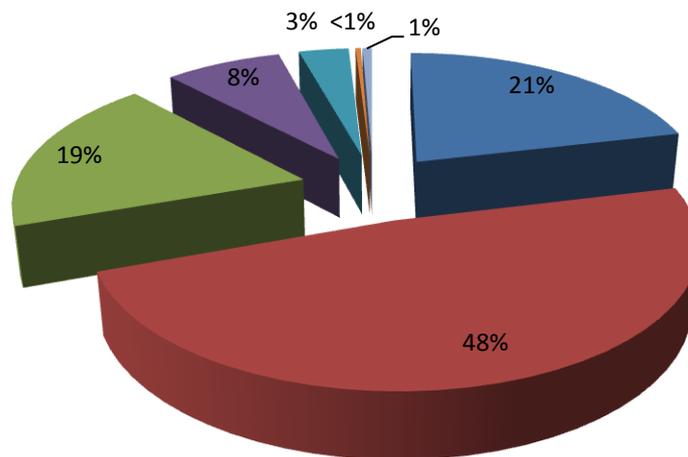
Total number of inspections

- Paris MoU 19058
- Tokyo MoU 28627
- Indian MoU 5550
- Black Sea MoU 4657
- Vina del Mar MoU 8584
- Abuja MoU 1483
- Caribbean MoU 605

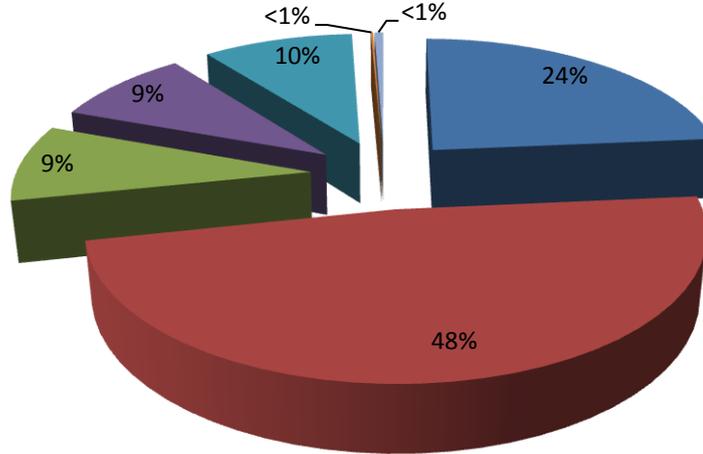
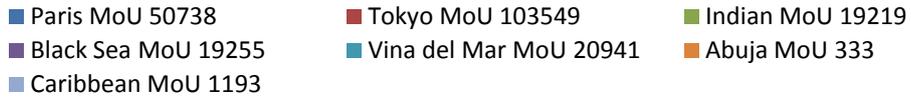


Total number of detentions

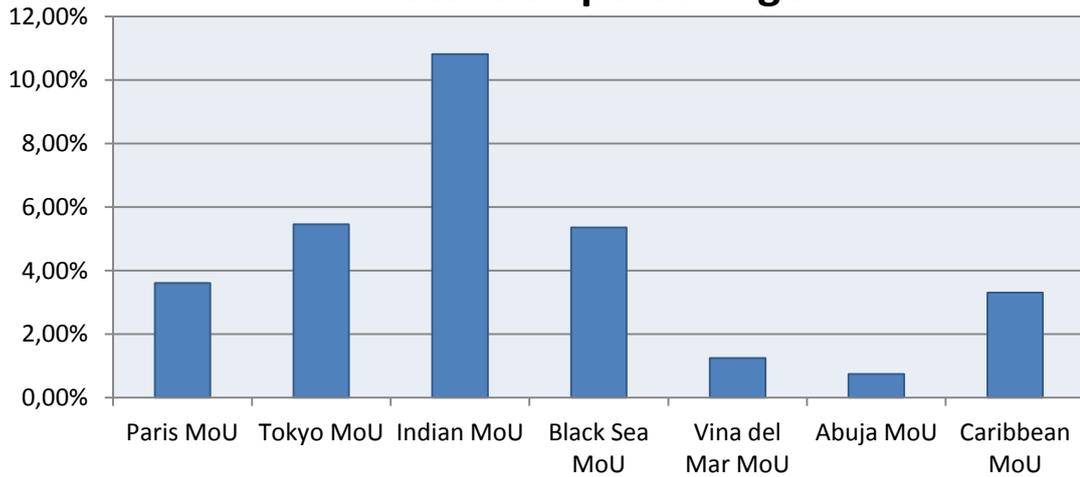
- Paris MoU 688
- Tokyo MoU 1562
- Indian MoU 600
- Black Sea MoU 249
- Vina del Mar MoU 107
- Abuja MoU 11
- Caribbean MoU 20



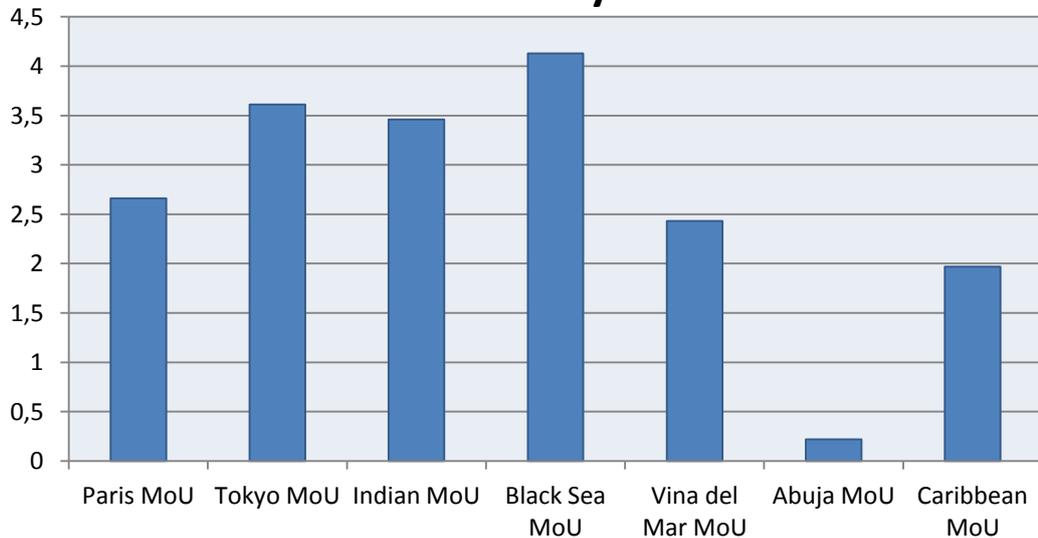
Total number of deficiencies



Detention percentage

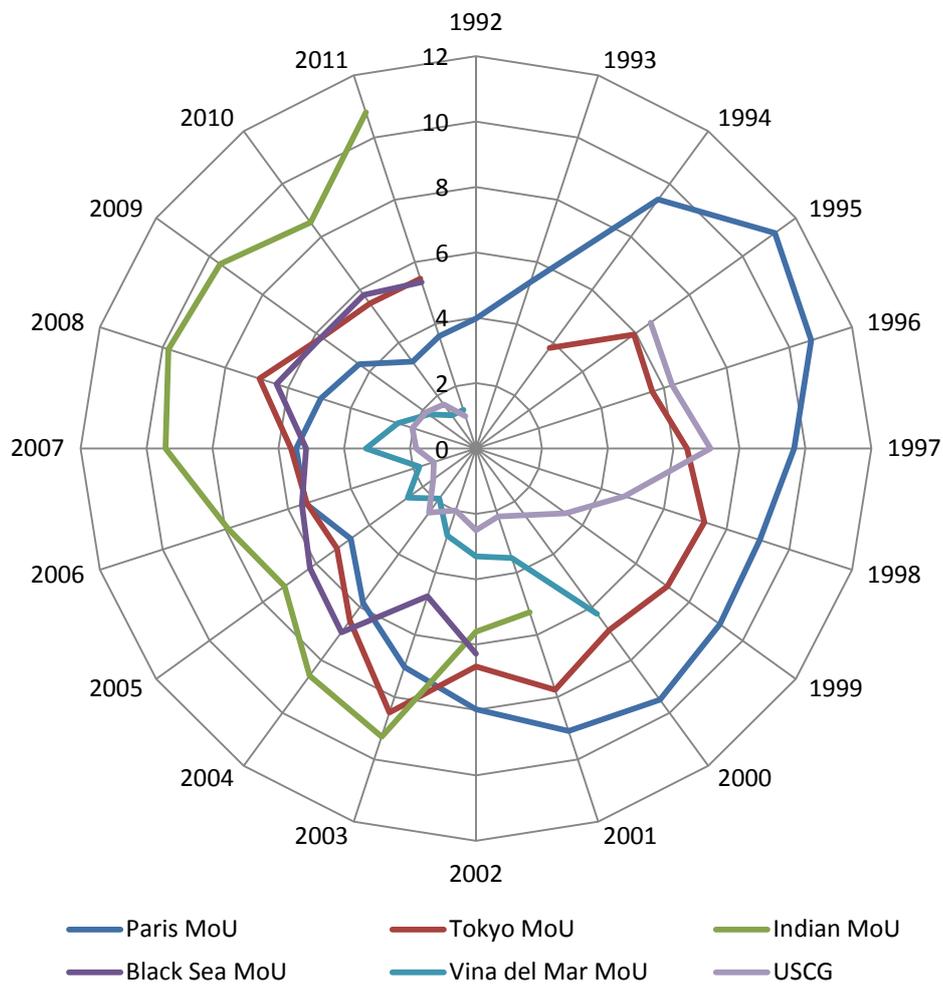


Deficiency rate



Annex 3 Dynamics of PSC detentions

The dynamics of PSC detention is measured by detention percentage relative to all inspections for the particular year. The data gathered from annual FSI PSC (progress and MoUs annual submission) reports and PSC MoUs annual report available on their websites. The radar chart illustrates the dynamics for those MoUs with consistent data for all available years whereas the table presents the data for all MoUs.

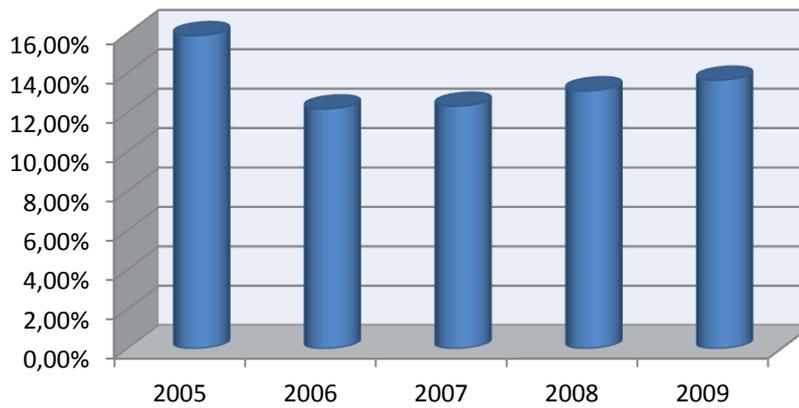


Year	1	2	3	4	5	6	7	8	9	10
2011	3,61	5,46	10,81	5,35	1,24	0,74	3,30			1,04
2010	3,28	5,48	8,54	5,80	1,25	0,76	1,47	7,77	3,62	1,67
2009	4,38	5,78	9,60	5,79	1,78		3,72	10,15	5,11	1,88
2008	4,95	6,91	9,82	6,37	2,50	1,04	1,33	9,96	7,69	2,03
2007	5,46	5,62	9,42	5,161	3,34	0,71	3,97	15,70	7,69	1,82
2006	5,44	5,40	7,92	5,56	1,81		2,05	17,27	9,38	1,35
2005	4,7	5,21	7,18	6,23	2,56			22,69		1,61
2004	5,84	6,51	8,59	6,95	1,9	1,54	9,48	14,54		2,43

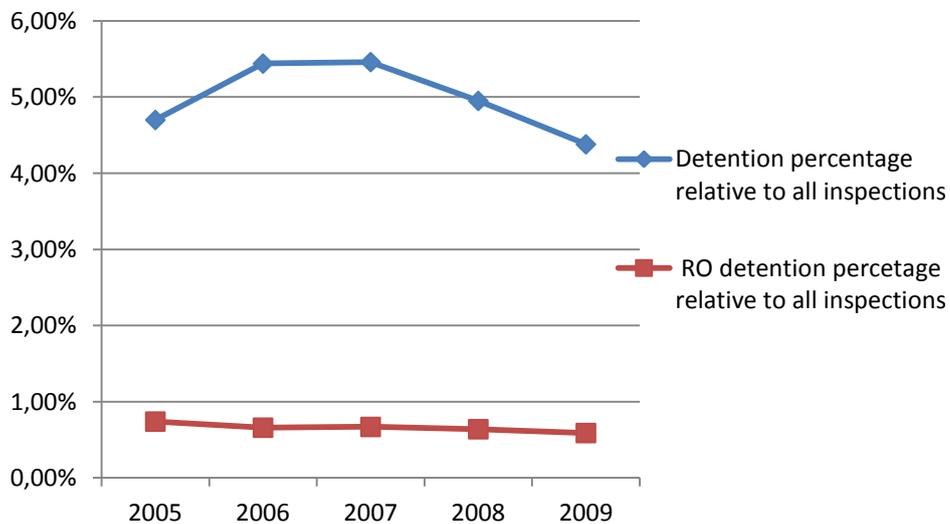
2003	7,03	8,49	9,27	4,76	2,8	1,9	10			1,99
2002	7,98	6,67	5,61	6,28	3,3					2,50
2001	9,09	7,76	5,27		3,52					2,19
2000	9,50	6,87			6,25					2,52
1999	9,15	7,18								3,37
1998	9,06	7,29								4,73
1997	9,66	6,41								7,12
1996	10,70	5,63								6,26
1995	11,21	5,93								6,55
1994	9,41	3,80								
1993	5,35									
1992	3,97									
1991	3,65									

1- Paris MoU; 2 - Tokyo MoU; 3 - Indian MoU; 4 - Black Sea MoU;
5 - Vina del Mar MoU; 6 - Abuja MoU; 7 - Caribbean MoU;
8 - Mediterranean MoU; 9 - Riyadh MoU; 10 - USCG

RO detention percentage relative to overall detentions



Overall detentions and RO detentions dynamics



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