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Research on the legal and practical issues with respect of Port State Control regiem

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RESEARCH ON THE LEGAL AND PRACTICAL ISSUES WITH RESPECT OF PORT STATE CONTROL REGIME

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Declaration

I certify that all the material in this research paper that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this research paper reflect my own personal views, and are not necessarily endorsed by the University.

Signature:

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Abstract

Title of Research paper: **Research on the Legal and Practical Issues With respect of Port State Control Regime**

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While the international regime of Port State Control is relatively developed, this paper does the analysis on the standpoint of current international legislation, including United Nations Convention on the Law of the Sea and the generally accepted international regulations established and developed through the International Maritime Organization (IMO Treaties) as well as relevant IMO instruments such as Assembly Resolutions, so as to explore the legal basis of PSC regime in international law sphere. Whilst the legal certainty is established, several practical issues relating to the operation of PSC are discussed. Major focuses are made on regional PSC cooperation, academic categorization of PSC deficiencies, the effect of participation of Classification Societies, remedy for undue delay of ships derived from PSC decisions, the effect and the future tendency. Suggestions on the development of PSC-related legislation and enforcement in China are made in accordance with domestic circumstances.

KEYWORDS: UNCLOS, jurisdiction, IMO Treaties, PSC, the flag State, the coastal State, the port State

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LIST OF ABBREVIATIONS

AFS	International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001
CCS	China Classification Society
China MSA	China Maritime Administration
CS	Classification Society
EU	European Union
IMO	International Maritime Organization
Implementation Code	Code for the Implementation of Mandatory IMO Instruments, 2011 (IMO's Resolution A. 1054 (27))
LL	International Convention on Load Lines, 1966
MARPOL	Protocol of 1978 relating to the International Convention for the Prevention of Pollution from ships, 1973, as amended (MARPOL 73/78); Annex Ⅲ to MARPOL 73/78; Annex Ⅳ to MARPOL 73/78; and Annex Ⅴ to MARPOL 73/78
MoU	Memorandum of Understanding
Paris MoU	Paris Memorandum of Understanding on Port State Control
Procedure 2011	Procedures for Port State Control,2011 (IMO's Resolution A. 1052 (27))
PSC	Port State Control
PSCO	Port State Control Officer
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, 1978, as amended
Tokyo MoU	Memorandum of Understanding on Port State Control in the Asia-Pacific Region
TONNAGE	International Convention on Tonnage Measurement of Ships, 1969
UNCLOS	United Nations Convention on the Law of the Sea

1. Introduction

The shipping industry constitutes the cornerstone of international maritime transportation in the age of globalization. Meanwhile, the sea on which the shipping industry exclusively relies has been too vulnerable to undergo any further challenges such as marine pollution. In other words, the sea is the paramount resource for our living, thus shipping utilizing the sea should ensure safety, security and anti-pollution at the urgent request of international community.

The International Maritime Organization, as a specialized agency of the United Nations has engaged in establishing and developing international regulations on safety, security and anti-pollution at sea for several decades. While IMO's work of international legislation made some achievements by the late 1970s, represented by the establishment of international Treaties of the "International Convention for the Safety of Life at Sea, 1974, as amended", the "Protocol of 1978 relating to the International Convention for the Prevention of Pollution from ships, 1973, as amended", and the "International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended", fatalities and marine pollution as a result of marine casualties result in severe damage to the water areas of coastal States and pose huge public pressure upon political leaders. In this sense, endeavor to effective solutions at international level through law-making Treaties has never been ceased. UNCLOS provides for general legal framework for States Parties in respect of safety navigation and anti-pollution, while IMO Treaties being compatible with UNCLOS set out specific requirements for the enforcement of stakeholders involved, including the States and individuals such as ship-owners. Nevertheless, certain states and individuals fail to discharge their duties derived from those international Treaties primarily because of the fiscal consideration and limit of available resources. That is, ship-owners have to take into account the financial

advantages before any decision relating to their business, and national laws and policies of States concerning such maritime affairs as ship registry and safe manning level of ships flying their flag would be adopted and enforced on the basis of those States' practical situation. Consequently, inconsistency of implementation and enforcement of relevant international treaties at international level exists. In response, an international regime concentrating on the control of port States over foreign ships in their ports comes into play.

Port State jurisdiction or PSC is the power of the port State derived from UNCLOS and relevant IMO Treaties, as well as certain ILO Conventions, focusing particularly on examining the compliance of foreign-flagged ships calling the local ports with applicable laws, including international standards and domestic rules. Once defects are established as a result of physical inspections by officials of the port State, intervention actions, inter alia, rectification with deadline, suspension of cargo operation and detention may be imposed by PSC authority of the port State so as to ensure that they are fit to proceed to sea without threat to safety and security of ships and people onboard, and marine environment. In this sense, PSC is of a corrective approach in accordance with applicable international regulations and, of a preventive regime against risks from foreign ships in order to protect the interests of the port State.

Since almost all maritime nations play the role of the port State, the flag State and the coastal State within the shipping community, PSC regime refers primarily to, at the national level, three major concerns:

- In the capacity of the port State, the State takes charge of control over foreign ships as a major implementation and enforcement of relevant international regulations;

- In the capacity of the flag State, the State takes effective jurisdiction over its ships to ensure their compliance with applicable international standards, thereby to avoid intervention by foreign PSC authorities; and
- In the capacity of the coastal State, the State is entitled to make use of PSC regime in order to prevent pollution damage and risks thereof within its water areas from foreign ships.

2. Legal Basis of PSC Regime

This section endeavors to explore the legal basis of PSC regime under international law, particularly relevant provisions in UNCLOS, IMO Treaties and interrelation thereof, thereby makes analysis on the essence and legitimacy of PSC regime.

2.1 United Nations Convention on the Law of the Sea

As a result of the negotiation at an international level – the third United Nations Conference on the law of the sea – from 1973 to 1982, United Nations Convention on the Law of the Sea was adopted and came into effect in 1994. UNCLOS establishes the general framework of international law, which was signed and ratified by 165 sovereign nations as at 23 January 2013 (UN, 2013). In general UNCLOS confers rights to coastal and landlocked States in respect of utilizing resources of the sea in order to establish "*a just and equitable international economic order*" on the basis of "*mutual understanding and cooperation*" (United Nations Convention on the Law of the Sea (1982)).

UNCLOS elaborates three types of States which are central and active in the legal framework of law of the sea: the Flag State, the Coastal State and the Port State. While concentration of Flag State is made primarily on its responsibilities, duties and enforcement, UNCLOS mainly stipulates powers of Coastal State and Port State in tackling both general and particular affairs concerned. The concept of Flag State is

deeply associated with commercial ships and ship registry institution, i.e. the Flag State of a commercial ship is the State the ship gets registry under its laws. Therefore, the ship is subject to domestic laws of the State whose flag it is entitled to fly, and obligations of enforcement fall under Flag State jurisdiction. The concept of "Coastal State" primarily refers to the delimitation of various "zones" such as coast, territorial sea, contiguous zone and exclusive economic zone derived from provisions of UNCLOS, and in turn relevant rights and obligations attached are clarified. Port State is the State whose ports are open to call of foreign-flagged ships. It is notable that reference of delimiting the territorial sea/coast is also made to the concept of the port. In accordance with UNCLOS, "*the outermost permanent harbor works which form an integral part of the harbor system are regarded as forming part of the coast*" of the Port State (United Nations Convention on the Law of the Sea (1982)). In this sense, particular ports for ships' cargo operation within the harbor area which forms part of the coast is absolutely deemed part of Port State territory. Furthermore, despite the different characteristics, foregoing three types of States are closely interconnected in shipping practice. In other words, UNCLOS establishes three kinds of interrelated jurisdictions. Differing from the authorities of official organizations such as Courts to make legal decisions on matters submitted, jurisdictions in UNCLOS specifically refer to those of States, i.e. State jurisdictions in which a particular system of laws take major effect. Since almost all shipping nations maintain those three capacities, prevailing international seaborne trade gives rise to the intersection among those three jurisdictions especially within local ports and maritime zones of one State. For instance, whilst the ship flying the flag of State A calls one port of State B, the ship is at present subject to the control of both the flag State A and the port State B, owning to jurisdictions respectively. Whilst the ship proceeds to sea after cargo operation through territorial sea of State B, State B now in the capacity of the Coastal State is empowered to enforce its laws upon the

ship, when appropriate.

2.2 Interrelation between UNCLOS and IMO Treaties

The interrelation between UNCLOS and IMO Treaties plays an essential role in ascertaining the legal basis of PSC in international law sphere. It has been clarified that the rights and obligations derived from other international agreements shall not be altered by respects of UNCLOS unless those agreements are not compatible with UNCLOS. In this condition, States Parties to UNCLOS are entitled to conclude other agreements which are applicable solely to the relation among them regulating operative particulars in specific fields, without prejudice to the application of principles and effective execution of purpose under UNCLOS. Therefore, the compatibility of IMO Treaties with UNCLOS should be taken into account seriously. In general, goals of UNCLOS lie in "*strengthening of peace, security, cooperation and friendly relations among all nations*", based on clear consciousness that "*problems of ocean space are closely interrelated and need to be considered as a whole*" (United Nations Convention on the Law of the Sea (1982)). Motto of IMO "*safe, secure and efficient shipping on clean oceans*" (IMO, 2013a) definitely demonstrates its mission and vision – taking all necessary steps towards ship safety navigation, security of both ship and people involved and prevention of marine pollution, in order to achieve efficient international shipping. Obviously, abovementioned maritime affairs embodied in IMO Treaties accurately respect the ultimate goals of UNCLOS. In other words, marine casualties involving foreign ships or seafarers would by no means prompt friendly international relations. As for cooperation, not only IMO itself originally focuses on providing "*machinery for cooperation among governments*" (Convention on the International Maritime Organization (1948)), but its extensive technical cooperation program at present which engages in development of human resources particularly in developing nations

by means of maritime training also makes contribution, and PSC regime elaborated in most important IMO Treaties is initially with nature of inter-governmental cooperation. Furthermore, active participation of IMO Secretariat in the third UN conference on law of the sea evidences the substantial compatibility between UNCLOS and IMO's work after 1973, and the potential conflicts between IMO instruments and UNCLOS have been effectively avoided by virtue of explicit expression in several IMO Treaties such as SOLAS, MARPOL and AFS on no derogation from, or prejudice to, the codification and development of UNCLOS. For instance, apart from general requirements for that nothing in Treaties or relevant instruments should prejudice the rights, jurisdiction or obligations of States under international law,

- Ships' routeing and reporting systems and actions taken by Governments to implement and enforce SOLAS regulations "*shall be consistent with relevant provisions*" of UNCLOS (International Convention for the Safety of Life at Sea, 1974, as amended (1980)); and

- Nothing in MARPOL and STCW shall make infringement on the "*codification and development*" of UNCLOS; the application of MARPOL shall not "*derogate from or extending*" the sovereignty of Parties under UNCLOS (Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended (1978)).

2.3 Effects of IMO Treaties under UNCLOS

While the wording "International Maritime Organization" is merely mentioned in Annex Ⅷ, Article 2 (2) of UNCLOS referring arbitration, the expression "*the competent international organization*" should be applied "*exclusively to IMO*" (IMO, 2008). It indicates that international effects or global mandate of IMO Treaties

have been recognized under UNCLOS. This assertion is acceptable mainly as firstly, the consistency between the goals of IMO and UNCLOS discussed above; secondly, the expression under UNCLOS is primarily used in respect of establishing international rules and standards, including safety navigation schemes such as routeing systems, against pollution from ships. Those rules and standards shall be established through "the competent international organization" and adopted by States involved such that rules and standards could be generally accepted at international level. In other words, the "the competent international organization" plays the role of establishing machinery, providing States an appropriate platform for direct negotiations, encouraging and facilitating the eventual adoption of proposals which would be applicable to all individual States involved and be reviewed continuously. That role under UNCLOS falls exactly under the purpose of IMO provided for in the IMO Convention. Thirdly and most importantly, the generally accepted international standards through the competent international organization which shall be complied with by States in exercising of powers and discharging of obligations have been definitely related to particular IMO Treaties. Article 39 of UNCLOS regulates ships in transit passage conforming to the generally accepted international regulations on safety at sea, including IMO's International Regulations for Preventing Collisions at sea. Table 1 clearly illustrates the nature of general acceptance of key IMO Treaties as at 3 June 2013.

Table 1 – Status of IMO Treaties

Instrument	Date of entry into force	No. of Contracting States / Parties	% world tonnage*
IMO Convention	17-Mar-1958	170	97.16
SOLAS 1974	25-May-1980	162	99.20
SOLAS Protocol 1978	1-May-1981	117	96.86
SOLAS Protocol 1988	3-Feb-2000	104	95.70
LL 1966	21-Jul-1968	161	99.19
LL Protocol 1988	3-Feb-2000	98	95.96
TONNAGE 1969	18-Jul-1982	152	99.06
COLREG 1972	15-Jul-1977	155	98.71
STCW 1978	28-Apr-1984	157	99.23
MARPOL 73/78 (Annex I/II)	2-Oct-1983	152	99.20
MARPOL 73/78 (Annex III)	1-Jul-1992	138	97.59
MARPOL 73/78 (Annex IV)	27-Sep-2003	131	89.65
MARPOL 73/78 (Annex V)	31-Dec-1988	144	98.47
MARPOL Protocol 1997 (Annex VI)	19-May-2005	72	94.30
AFS Convention 2001	17-Sep-2008	65	82.25

Source: International Maritime Organization. (2013). *Summary of Status of Conventions*. Retrieved 4 May, 2013 from World Wide Web: http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Summary%20of%20Status%20of%20Conventions.xls

It is evident from the table that the most important IMO Treaties, i.e. SOLAS, MARPOL and STCW which cover essential domains of safety of navigation, anti-pollution and qualification of seafarers respectively, have been in the situation of universal mandate, as manifested by the absolute majority of contracting Parties which represent "*all but a fraction of world merchant fleet*" (IMO, 2013).

Furthermore, provisions of UNCLOS have made obligations upon States Parties to be in conformity with the generally accepted international regulations, major sources

of which absolutely fall under IMO Treaties on account of their universal mandate mentioned above. Typically in accordance with Article 94 of UNCLOS, each flag State is required to conform to the generally accepted international regulations such that ships flying its flag could be effectively placed under its control. In this sense, Parties to UNCLOS have to comply with requirements of IMO Treaties in spite of the circumstance that they have not ratified particular IMO Treaties.

In addition to encouraging of formulation and elaboration of new and compatible international regulations for anti-pollution, UNCLOS endeavors to put up as few as possible barriers upon the maintenance or validity of other special conventions and agreements with the spirit of protection and preservation of the marine environment which were established prior to UNCLOS. As premise, specific obligations on States derived from those regulations and conventions should be discharged in a consistent manner in the light of general principles set forth in UNCLOS (United Nations Convention on the Law of the Sea (1982)).

2.4 The Necessity of IMO Treaties

Since legal certainty has been established through foregoing discussion as to the compatibility of IMO Treaties with UNCLOS, it is essential to ascertain the practical necessity of IMO Treaties. UNCLOS is generally acknowledged as an "umbrella convention" mainly because its provisions are lack of operability. That is, those as general principles, e.g. "cooperate on a global basis", "take measures necessary", "establish particular requirements", "institute proceedings", etc. should be equipped with criteria for individual States and shipping community to exercise and evaluate. Given the fact that IMO Treaties concentrate on "*governmental regulation and practices relating to technical matters of all kinds affecting shipping* (Convention on the International Maritime Organization (1948))", i.e. regulate specific operative features in the context of shipping, effective enforcement of UNCLOS could be

attained through that of IMO Treaties. In practice, if all individual shipping nations develop their own legislation as to safety and anti-pollution at sea, conflicts among jurisdictions or national laws would inevitably lead to the situation of disorder in the whole shipping community as no single party or entity is able to justify certain behaviors without consistent legal basis. In turn, the industry as a whole would be destroyed since such international actors as owners/operators are very much likely to be in trouble in almost each port of call. In this sense, IMO Treaties of "*highest practicable standards*" (Convention on the International Maritime Organization (1948)) play vital role in directing the behaviors of shipping actors, including the Governments who possess powers and assume duties, and owners/operators who actually control the operable level of individual ships.

While IMO Treaties of SOLAS, MARPOL, STCW, LL, TONNAGE, and AFS accurately respect the aforesaid direction set out in UNCLOS, they make reasonable modifications in accordance with specialty in the fields they covered respectively. For instance, the detection of violations with respect to anti-pollution is expressly strengthened by MARPOL to the extent that "*all appropriate and practicable measures*" (Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, as amended (1978)) shall be taken on the basis of cooperation among Parties, and the port State is entitled to impose detection of discharge violation in any place on ships of call either at the request of any other Parties or on its own initiative. The scope of detection or inspection shall be subject to operational requirements detailed in 6 annexes which constitute legitimate reason for detention. While the PSC inspection under TONNAGE shall on no condition delay the ship, STCW reasonably constrains the conditions for detention in detail.

2.5 PSC Regime under UNCLOS

Briefly, PSC is of the control by individual States over foreign ships in local ports.

Therefore, it is necessary for seeking whether UNCLOS reveals relevant principles or elaborates powers/duties for States Parties to exercise PSC.

Anti-pollution and safety navigation which constitute major aspects within PSC regime, maintain considerable weight under UNCLOS. Particularly, the innocent passage of foreign ships could be constrained by the coastal State according to its domestic laws for the purpose of safety navigation and pollution prevention. The "*design, construction, manning or equipment of foreign ships*" (United Nations Convention on the Law of the Sea (1982)) could be regulated by the coastal State as long as the duly publicized national laws give effect to those generally accepted international regulations, inter alia, IMO Treaties. While assuming the coastal State jurisdiction over foreign ships in territorial sea is distinct from that in local ports, it implies the significance of domesticating Treaties. That is, the powers derived from particular Treaties could make legitimate restriction upon certain aspects of international law, e.g. foreign ships' right of innocent passage. Moreover, the coastal State is of course entitled to set forth PSC requirements within its "*laws relating to innocent passage*" (United Nations Convention on the Law of the Sea (1982)), serving as complementary measures to schemes such as sea lane and traffic separation, so as to minimize the risks during the passage. In this sense, Article 21 itself is eligible for the international legal basis of PSC regime that legitimizes the imposition by the coastal State of its national laws which give effect to generally accepted international regulations in respect of the design, construction, manning or equipment upon foreign ships visiting territorial sea as well as ports under its jurisdiction.

More explicitly, the coastal State is entitled to set out particular conditions for the admission of foreign ships going to its internal water or calling at a port; and is empowered to "*take the necessary steps*" (United Nations Convention on the Law of

the Sea (1982)) against any violation by ships of those conditions according to Article 25 of UNCLOS. In this respect, the conditions for entry into ports could be related by the coastal State to foreign ships' PSC inspection records within a period of time, e.g. last one calendar year. Once unqualified performance of a ship is determined by the coastal State as the first step, refusal of access would be the following necessary step when the ship involved makes another call. Whilst the coastal State is satisfied as a result of certain commitment from, e.g. the flag State or CSs, the next step would be lifting of the ban and in turn the new PSC inspection step commences. Meanwhile, the coastal State may "*suspend temporarily"* the ongoing innocent passage, as long as it "*is essential for*" (United Nations Convention on the Law of the Sea (1982)) security on the viewpoint of the coastal State, irrespective of whether actual threat emerges. This provision has been accurately and thoroughly executed by IMO's ISPS Code as to the requirements for foreign ships providing the coastal State relevant information before entry. In fact, just like criteria of "essential" are based on the assessment of the coastal State, the degree to which temporary suspension could be applied is determined by the coastal State as well. In this regard, security has been recognized universally as a fully subjective assessment by individual sovereign States and could not be interfered with by any others in international law sphere.

The fundamental obligations for the flag State are elaborated in Article 94 of UNCLOS. A series of requirements are stipulated for the purpose of effective control over administrative, technical and social affairs relating to ships concerned. In particular, aspects listed in Article 94 (3) and (4) overlap with major concerns of IMO Treaties, and the principle of conforming to the generally accepted international regulations is reaffirmed for the implementation and enforcement of the flag State. Noteworthy is (6) which requires the flag State effectively responding to the report

from another State on its nonfeasance of duties for properly assuming jurisdiction over particular ships flying its flag. That is, a State in the capacity of the coastal State or port State is entitled to detect the defects of foreign ships which could be attributed, as per generally accepted international regulations, to the faults of the flag State. It is exactly the standpoint on which current PSC regime takes effect – PSC regime came into play as a result of failure of flag States to discharge their duties under international law, even though the detection is not expressly an obligation under UNCLOS.

Most explicitly, Part 12 of UNCLOS makes comprehensive arrangements for the operation of PSC relating to anti-pollution. The establishment of international regulations and adoption of corresponding national laws on prevention of pollution from ships and by dumping are of legal obligations of States Parties to UNCLOS, which definitely recognizes at the same time that coastal States have "*the right to permit, regulate and control*" (United Nations Convention on the Law of the Sea (1982)) such pollution. In addition, the prevention of pollution from ships could be the legitimate premise for coastal States imposing particular entry restrictions/conditions upon foreign ships which intend to call local ports, as long as that imposition has been duly published and been communicated to IMO. In this sense, coastal States could cooperate on a regional basis under an identical legal framework so as to prompt further harmonization of anti-pollution policies and enforcement thereof by individual States involved. This part of UNCLOS has made several vital implications. Firstly, protecting the interests of the coastal State's water areas, from internal waters, territorial sea to continental shelf and exclusive economic zone, is of an important issue which shall be taken into account and resolved at international level. In other words, apart from individual measures via national legislation, establishment of generally accepted international regulations, i.e.

international cooperation, is absolutely necessary. Framework by UNCLOS for anti-pollution is based on the joint efforts from flag States, coastal States, port States and international community. Secondly, the effect of measures taken by individual States under national legislation shall not be lower, and is encouraged tacitly to be higher, than that under international regulations. It indicates the compulsory requirements under UNCLOS for national legislation in respect of pollution prevention to be subject to the generally accepted international regulations, e.g. the structure of ships. Thirdly, almost all particular measures in the light of international regulations and national laws could be taken against violation by national-flagged and foreign-flagged ships. Those against foreign ships, e.g. PSC regime, could be made as stringent as possible on the basis of anti-pollution. Fourthly, the most reasonable approach under UNCLOS to protecting the interests of the coastal State so as to facilitate the exercise of sovereignty, lies in giving effect to the generally accepted international regulations through the competent international organization, i.e. IMO Treaties, within national law system. It is apparent that apart from response to contingency such as marine casualties, the normal and feasible regime to prevent pollution from foreign ships is of the direct control by the coastal State over those ships whilst they are in local ports. Requirements could be imposed and particular steps could be taken in accordance with international regulations and national laws to ensure that pollution threat to water areas has been minimized before entry and thereafter. Fifthly, one of the goals under UNCLOS anti-pollution framework is to promote notification to coastal States. Coastal States should be well informed through international cooperation as to occurrence of marine casualties which give rise to pollution on their water areas, and emerged risks. In this regard, in addition to report and investigation arrangements for marine casualties under IMO Treaties, prevailing regional PSC agreement is of a significant form of the notification, which particularly takes effect in the field of risk prevention and

control. Given geographical proximity and timely data update, more efficient and effective information exchange could be achieved. Meanwhile, ships concerned would be relieved from unnecessary or duplicated inspections in ports of the same region.

The enforcement plays an essential role in safeguarding compliance. UNCLOS sets out detailed distribution of enforcement obligations among three types of States. The ultimate jurisdiction of the flag State over ships flying its flag is reaffirmed through establishing an integrated set of explicit obligations. The port State is empowered not only to take actions, including inspections and subsequent institution of proceedings, against violation within its water areas by foreign ships, but also to investigate the pre-existing violation occurred outside its water areas by those ships of call. At the request of any other State involved, that investigation is transformed into a legal commitment. Notably, instituting proceedings towards pre-existing violation could not be taken unless that violation "*has caused or is likely to cause pollution*" (United Nations Convention on the Law of the Sea (1982)) within the port State's water areas. In this case, it is acceptable to argue that the port State has grasped the power to the same extent as the flag State does under UNCLOS. This is because while the flag State is obliged to effective enforcement over a ship flying its flag which has committed or is likely to commit a violation of its national laws in respect of anti-pollution, the port State is entitled to investigate that violation by the same ship once it is voluntarily within a port of that State in the light of international regulations to which the flag State's national laws give effect. In particular, periodic surveys/inspections of the compliance of ships' actual situation with applicable regulations are conducted by both the flag State and the port State. Moreover, any port State is entitled to determine, thereby prevent the ship from sailing on its own initiative via administrative measures given the violation of the

requirements for seaworthiness in respect of design, construction, equipment and manning of ships according to Article 219 of UNCLOS, all of which fall exclusively under particular domains covered by IMO Treaties. The port State in practice examines the situation of the ships in local ports so as to detect pollution risks. "Risk" is of a delicate concept which is incompatible with negligence, thus evaluation of risks is inevitably affected by subjectivity and inclusion of uncertainties. From the perspective of the port State, a ship with records of violation usually warrants tendency of re-committal, whereas this opinion could be precluded by the ship's qualified performance in PSC during a period of time. Meanwhile, it is hard to clearly distinguish anti-pollution investigation from other forms of physical inspections because a piece of tiny defect in any field might lead to catastrophic consequences according to the theory of chaos, and seaworthiness is deemed a standard concerning technical, operational and subjectively estimated respects on the common viewpoint of the port State. In this sense, specific PSC operation features under IMO instruments are absolutely compatible with the requirements for port State enforcement under UNCLOS.

Significant respects are stipulated in several provisions of UNCLOS that make general direction towards specific PSC operation.

- Enforcement over foreign ships, including inspections, investigations, and institution of proceedings could solely be executed by officials serving the Governments – Article 224;
- Foreign ships shall be treated without discrimination whatsoever during enforcement – Article 227;
- Verification of certificates carried onboard a foreign ship is the start point and basic standpoint of any physical inspection. Those valid certificates shall be

recognized being the same effect as those issued by the State exercising enforcement, and be deemed the sufficient evidence for the compliance of the ship's actual situation with items on those certificates – Article 217&226.

- That verification could not be broken through or expanded until warranted by "*clear grounds*" listed – Article 217&226;
- Unseaworthy ships could be administratively detained and be directed to appropriate shipyard for the purpose of anti-pollution. The release shall be conditional, i.e. committed violation has been corrected and threat of damage to marine environment has been precluded from those ships – Article 219, 220& 226;
- The flag State shall be promptly informed the circumstances as to institution of proceedings, inter alia, detentions against its ships – Article 231;
- Foreign ships targeted shall not entail extra risks in respect of navigation safety and anti-pollution as a result of the enforcement – Article 225;
- Unnecessary physical inspections shall be largely avoided through cooperation among States of enforcement – Article 226; and
- Remedies, e.g. actions in Courts, shall be available on the occasion that damage or loss has been suffered as a result of unlawful measures taken by the State of enforcement. In this case, that State is liable for those damages or losses – Article 232;

All in all, principles of PSC run through the framework of UNCLOS in respect of the enforcement by the flag State, the coastal State and the port State. Therefore, it is reasonable to summarize that under UNCLOS, PSC regime should be deemed the power of enforcement by both the coastal State and the port State which are closely

interrelated. In other words, PSC is initially of an approach as the coastal State enforcement to preventing pollution damage within its water areas, and the violation to which the damage or potential damage is totally attributable could be investigated by the port State as port State enforcement in accordance with the generally accepted international regulations.

2.6 No More Favorable Treatment

It is notable that the principle of "no more favorable treatment" is clarified within IMO Treaties of SOLAS, MARPOL, STCW and AFS. It indicates that ships of States non-Parties to those Treaties when in ports of States Parties would undergo the inspections in accordance with higher treaty standards compared with present rules applied to those ships. It appears not impartial at the first sight. Principle of "*Pacta sunt servanda*" makes States Parties be bound by a particular treaty in force, whereas "*a treaty does not create either obligations or rights for a third State without its consent*" (Vienna Convention on the Law of Treaties (1969)). Relevant precedents could be found under case law – the North Sea Continental Shelf Cases between Federal Republic of Germany and Denmark, and between Federal Republic of Germany and Netherlands respectively by International Court of Justice (ICJ, 1969). In this case, claims of Denmark and Netherlands as to application of equidistance principle regulated in Article 6 of Geneva Convention on the Continental Shelf were dismissed by the Court since Federal Republic of Germany who had not ratified that Convention should not be bound by it. However, whilst a treaty reflects customary international law, i.e. it reiterates or codifies peremptory international norms, non-Parties should be bound. Treaty Convention accepts this idea through applying the principle of "*jus cogens*" and deemed peremptory international norms "*accepted and recognized by the international community of States as a whole as a norm*" (Vienna Convention on the Law of Treaties (1969))

which could by no means be derogated. International norms are in fact a critical source of international law. Undoubtedly, behavioral pattern becomes a norm as a result of general practice among States for a relatively long period of time, and those peremptory norms exactly hit the bottom line of overall international community. In this sense, consideration should be made on whether principles and particulars in IMO Treaties constitute peremptory international norms. Proponents might base their arguments on the overwhelming significance of human life and the sea as lose of life at any corner of the world, including at sea shall be prevented whatsoever; and the sea which constitutes paramount resource for the survival and living of mankind has been too vulnerable to undergo any further damage, e.g. pollution from ships. Meanwhile, key IMO Treaties have been practiced by States parities for several decades and experienced continuous revise in order to meet practical needs, and have been generally accepted by the international shipping community as a whole. Nonetheless, imposing of intervention or sanction as per particular Treaties owning to the violation of peremptory international norms, e.g. detaining ships of States non-Parties to SOLAS in accordance with relevant provisions of SOLAS, seems questionable. In other words, violation of peremptory international norms by individual States would lead to universal blame, rather than inevitable sanctions derived from particular treaty regulations. Furthermore, major problems haunt international shipping community yet, inter alia, non-fulfillment of treaty duties by signatories of flag States, and pursuance by individual owners/operators of operating ships below the minimum conventional standards. In fact, the implementation and enforcement of IMO Treaties at international level is quite far away from general and uniform practice among States since various features including economy and politics are affecting the performance of those actors. IMO is still on its way for effective solution. In this regard, this paper concludes that requirements under IMO Treaties do not constitute peremptory international norms in international law sphere. The

enforcement, nevertheless, of "no favorable treatment" seems feasible. The reason lies not only in inviting a fraction of States Parties to UNCLOS but have not ratified relevant IMO Treaties to actively participate the international work of preserving marine environment and protecting safety of life at sea, but also implying that given no privilege for non-Parties, requirements for Parties would be inevitably and progressively strengthened. Furthermore, the enforcement of "no favorable treatment" makes another significant implication as to the tendency of international legislation. Traditionally, the process on transforming a set of behavioral patterns into international or multilateral Treaties is subject to the sequence that following the practice of certain States for a period of time, the pattern is accepted as law by those States. When being developed and generally practiced within international community, international norms or customary laws are established; Treaties then are established to reiterate those norms. However, a contemporary treaty refers to "*an international agreement concluded between States in written form and governed by international law*" (Vienna Convention on the Law of Treaties (1969)), which indicates that rather than codification of international norms, a treaty nowadays is of the compromise or agreement recognized among negotiating or contesting States. According to the Statute of the International Court of Justice, the international laws could be stemmed from international Treaties, international custom, general principle of laws and judicial decisions (UN, 1945). Therefore, the international Treaties and general international law make mutual promotion. Despite the difficulty of setting up definite constitutional hierarchy within international law system vis-à-vis domestic laws, international Treaties constitute the prime source of international law. In this sense, the international order in modern world is inclined to be maintained and developed by treaty laws under globalization. This consideration has been taken by IMO in IMO Convention which recognizes that certain areas are "*incapable of settlement through the normal processes of international shipping business*" so that

they shall be given priority as "*the subject of direct negotiations between the Members concerned*" (Convention on the International Maritime Organization (1948)). Not only IMO Treaties, but UNCLOS itself is also with the nature of treaty law in spite of codification of certain international norms. The port State jurisdiction under UNCLOS mentioned above is of extra-ordinary and far-reaching power which could be exercised without consideration of the actual needs or requests of the flag State or coastal State concerned, even though preliminary and generalized PSC regime had emerged within certain IMO Treaties, e.g. SOLAS 1927, prior to UNCLOS (Özçayır, 2001). Noteworthy is the fact that establishment and development of treaty laws take response to the urgent needs within certain domains, inter alia, protection of marine environment and safety of life at sea since they reflect, or take into account, the common needs and values of the international community which could not be satisfied so far through the practice of individual States. In this sense, IMO law-making Treaties would significantly take effect.

Other two aspects as to no discrimination and compensation of undue delay which are highlighted in this paper will be discussed in the following section.

3. Port State Control in Practice

Generally, PSC is derived from the practical needs of port State Governments for the authority powerful enough to control foreign ships so as to prevent ships with major defects from actual operation, thereby safeguard safety at sea.

In May 1993, A Panamax dry bulk carrier "*San Marco*" was detained by the Canadian Coast Guard as a result of physical inspection which identified severe defects of the ship in respect of its structure, fire-fighting and life-saving. Approximately one month later, the ship was released at the request of its owner, and went to sea for trade with valid Class certificates justified its good situation as a

result of new Class inspection but without any repair or relevant recommendation for rectification. Consequently, the ship en route involved in a severe structural damage on shell plating leading to total incapability of navigation. Despite another detention, the ship subsequently was sold for scrapping since no owner would like to cover the huge expense for repairing (Özçayır, 2001). In this case, although owners and Classification Societies concerned failed to ensure safety, major drawbacks within international ship control system lie with that legal power is not available for Canadian Coast Guard to constrain follow-up movement of that ship after identification of deficiencies. In other words, follow-up measures Canadian Coast Guard desired the vessel to take, e.g. local repairing, were not codified by any international regulation.

3.1 The Regime

Nowadays, States Parties to IMO Treaties have grasped strong power for control over foreign ships voluntarily in their ports so that fewer ships like *San Marco* could operate without satisfying rectification. It is absolutely of an improvement within international ship control system. Notably, the purpose of PSC regime lies not only in the creation of a complementary measure against failure of the flag State, but also in establishing enforcement of IMO itself. As a special agency of UN, IMO is unable to exercise the enforcement by itself over flag States and individual ships. This is because the establishment of IMO enforcement force is not feasible due to fiscal consideration, and IMO staff would be under no condition permitted to board any commercial ship for physical inspection. However, the general practice of PSC from the perspective of a flag State seems equivalent to the enforcement of IMO who initiated the regime, even though the enforcement is specifically executed by its members. In this regard, all States members to IMO exercising PSC constitute IMO's enforcement force since they ratified IMO Treaties – this is a

typical case revealing the successful utilization of treaty law to establish international order.

Stephen D. Krasner in 1982 defined an international regime as "*implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations*" (Krasner, 1982). This is accurate enough to describe the situation of contemporary PSC regime. The area of international relations concerned in a broad sense is the shipping community in which States participate; and particularly, it lies with specific relations derived from ship-related incidents such as marine casualties among individual States. In this case, willingness of different States is intersected, i.e. preventing the reoccurrence whatsoever. Achievement of that prevention primarily depends on the application of substantive and procedural regulations of States involved so as to support decision-making. Once consistency among national laws has been established, the general willingness could be achieved. In this regard, international laws come into play. Current PSC regime derived from treaty laws constitutes an influential international actor who is able to exert virtual impacts towards individual States and owners/operators. In this regard, while the PSC is exercised on the basis of territorial jurisdiction, the PSC regime in international law sphere is independent of State sovereign.

3.2 Substandard Ships

The notion of "substandard ships" has been utilized in PSC-related legislation as the object of elimination by IMO instruments and laws of European Union (EU laws). The definition of "substandard ships" has been clarified in IMO Resolution of Procedures for Port State Control, 2011 (Procedure 2011) that refers to ships not complying with relevant IMO Treaties in respect of both such hardware as construction and software of shipboard operation by crewmembers. However,

given IMO law-making Treaties discussed above, the notion of "substandard ships" could solely be used among international rule-makers who determine the quality of "standard". In other words, ratification of law-making treaties do not constitute absolute compliance, thus the notion of "substandard ships" could not be imposed upon fleet of flag States unless those States give full effect to, or perfectly implement, relevant treaties. The notion of "eradicating all substandard ships", likewise, appears not practicable and could be retained only as a slogan. While it is undoubted that certain businessmen within the shipping community still make their ships of non-compliance at minimum operable level by virtue of ignoring or neglecting safety of life at sea and risks of pollution, the fact that ships are subject to administration of their flag States would not change whatsoever as long as the existence of ship registry mechanism, combined with the tendency that major flag States are endeavoring to, where appropriate, recover the control of ships owned by their nationals which currently get registry in other States by means of modifying national registry laws. In this regard, control on ships by flag States would be further strengthened and the degree to which those ships meet the generally accepted standards primarily depends on the extent to which flag States give effect to those standards, including both implementation and enforcement. Given the variance on available resources of economy, technology and human, States Parties to IMO Treaties would discharge the treaty duties in different ways in accordance with the optimal strategic planning. For instance, State A would focus mainly on local security in the capacity of the port State given its paramount status within international economy, while State B assesses its major role as the flag State such that relatively weakens PSC in order for economic development. Eradicating of all substandard vessels therefore is impossible under the jurisdiction of both flag State and port State as long as the circumstance of disparate development exists. While PSC is of course a strong medicine as it focuses directly on realistic operators and

actual performance of ships in ports, the individual compliance or non-compliance could not be deemed the unique criterion for flag States' performance. In response, IMO launched the Voluntary IMO Member State Audit Scheme concentrating directly on almost all respects of its member States' performance in accordance with relevant IMO Treaties. In the foreseeable future, therefore, substandard States would emerge in addition to substandard ships/owners.

3.3 PSC Cooperation

PSC regime under international law is initially of a type of international cooperation. That is, the port State examining compliance of foreign ships with international standards in order to maintain the order of international shipping exactly constitutes cooperation with flag States whose flag ships in port is entitled to fly.

Another prevailing scheme under the auspices of IMO is of the inter-governmental agreements on PSC, i.e. Memorandum of Understandings, represented by Paris MoU developing through European Union legislations. European Union (EU) is of an economic and political union that operates via a series of independent and supranational institutions, and makes decisions by means of intergovernmental negotiation. Among those institutions, European Parliament (EP) exercises legislative function together with Council of European Union (the Council) and European Commission (EC). While EC as executive body is especially responsible for proposal of legislation, EP, as well as the Council, takes charge of deliberation and subsequent issuance of relevant Directives. In this sense, an effective and efficient legislative system for investigation, proposal, consideration and decision-making has been established, and in turn policy taking into account of interests of member States as a whole could be implemented and enforced at EU level.

Basic principles within the Paris MoUs could be concluded as:

- All Governments of member States give effect to the agreement;
- All foreign ships are targeted and inspected without discrimination as to flag;
- Physical inspections are accurately based on the scope laid down in applicable Treaties;
- Purpose of enforcement is to ensure compliance of all ships of call;
- Flag States are obliged to ensure compliance of their ships by periodic survey while port States are entitled to continuous monitoring of compliance;
- The Companies/owners/operators assume prime obligations of maintenance for compliance; and
- Timely information exchange and maintenance makes benefit for all Parties within the region (Paris Memorandum of Understanding on Port State Control (2013)).

In this sense, success of MoUs depends on firstly, proportionate degree of economic development or the consistent economic interests or political strategy among Parties; secondly general uniformity in respect of implementation, interpretation and enforcement of relevant treaties.

It is notable that the scope of inspection within regional agreements, especially Paris MoU should be construed in a broader sense. That is, more stringent requirements for ship particulars based on treaties "minimum standards" are likely to be adopted by EU within the Paris MoU region and be enforced upon foreign ships since the ultimate goal of IMO Treaties is to guarantee "safety navigation and clean oceans". Meanwhile, the port State shall take measures necessary to prevent marine pollution as per UNCLOS. In this regard, any step towards this purpose would be approved

and legitimate in international law sphere. In fact, requirements of "clear grounds" stipulated in UNCLOS and IMO Treaties for further inspections after verification of certificates carried on board by the port State give rise to the enforcement of foregoing more stringent requirements or higher standards. It is evident from the Directive 2009_16_EC which reads PSC inspection "*is not a survey and relevant inspections forms are not seaworthiness certificates*" (Directive (2009)). This statement makes two strong assertions. Firstly, it partially denies the completeness of the Flag State Control through survey, and the corresponding faults should be corrected by port States. Secondly, verification of certificates is broken through at the outset of a physical inspection. That is, while UNCLOS and relevant IMO Treaties regulate that forms of PSC inspection should be limited to documentation unless there are clear grounds warranting further detection, PSC inspection of EU members initially lies on detecting of those clear grounds. In other words, mere validity of certificates which should be accepted as evidence for compliance could not satisfy an effective PSC inspection within EU region. Notably, whilst a PSC inspection questions the conformity of one foreign ship's actual situation with those attested by relevant certificates, the effectiveness of certification by the port State is queried as well, at least the possibility of similar failure or negligence might exist in the port State's administration. Therefore, ships flying the flag of State A which apply more stringent standards to ships of State B in PSC inspection would undergo examinations with similar forms in ports of State B. This reveals the general principle of reciprocity concerning international relations which also takes effect in the remedy for undue delay of ships as a result of PSC inspection. In this sense, an argument could be made that the general establishment of regional PSC agreements following Paris MoU is of a necessary response to rigorous PSC system of Paris MoU.

Moreover, "no discrimination as to flag" makes no sense on the viewpoint of EU legislation. Directive 2009_16_EC explicitly illustrates the failure of flag States and ROs thereof as "*there has been a serious failure on the part of a number of flag States*" (EU, 2009) to properly fulfill commitment of international law. In addition, EU legislation definitely relates those ships posing extra danger to safety and environment to the performance of their flag States. In this case, "white, grey and black list" scheme of flag States derived from Paris MoU practice for the purpose of "name and shame" gains legitimate status. This is the case of deviation of PSC practice from "no discrimination" which indicates fair treatment. From the perspective of international rule-makers such as UN and IMO, clarification of "no discrimination" principle is absolutely necessary since they are shaping an industry that constitutes the cornerstone of international transportation which refers to political, commercial and financial interests of actors within the community. However, the fact of long-lasting unqualified performance of those actors indicates that effective implementation and enforcement of international regulations at the global scale is hard to achieve – various aspects are making barriers, including strategies of individual States, profit consideration, resource limit, etc. In this sense, Paris MoU supplies a relatively effective solution which covers flag States, port States and owners/operators. That is,

- Applying more stringent standards to all ships of call in order to minimize the gap between treaty standards and the minimum operable level of particular ships;
- Relating performance of individual ships to trade opportunity of their owners/operators, i.e. consequence of non-compliance may be of detention, refusal of access or expulsion from port;
- Relating performance of individual ships to international reputation of their flag States, i.e. "name and shame"; and

- Establishing and developing an uniform legal framework to ensure consistency of implementation and enforcement among member States.

In this sense, the general establishment of regional PSC agreements all over the world is supported by IMO without hesitation. It was confirmed by IMO Resolution in 1991 that the Paris MoU made "*important contribution to maritime safety, and prevention of pollution and the operation of substandard ships*" (IMO, 1991). Therefore, the Paris MoU was deemed a model and other States Parties were invited to establish regional agreements under the auspices of the Paris MoU members. The regional PSC agreement is consistent with the principle of cooperation laid down in UNCLOS, IMO Convention and other particular IMO Treaties; meanwhile, it encourages those States which reveal ineffective implementation or enforcement of international regulations to make progress in a more acceptable regional sphere.

Nonetheless, the Paris MoU could be definitely distinguished from other existing MoUs. Tokyo MoU reads "*each Authority will apply those relevant instruments which are in force and are binding upon it*" (Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013)). That is, States non-parities to a particular IMO Treaty would not examine the compliance of ships with that treaty which is likely to be relevant for other members. Meanwhile, the cost of rectification of defects identified in PSC inspection and FSC survey, has to be covered by ship-owners' cost. Whilst their ships are delayed, huge financial loss and subsequent contractual disputes would arise. Therefore, owners have to take into account the fiscal advantages before determining the flag of registry, the Company of management and ports of call. In this case, flag and port of convenience emerge in response of practical needs of owners. Owing to the lack of uniform legislation, inconsistency of implementation and enforcement emerges

inevitably and thereby the circumstance of "port of convenience" would be more or less retained. In contrast, member States of Paris MoU who are EU members are subject to EU legislation which could give effect to international regulations and EU requirements so that the implementation and enforcement of both pre-existing and created higher standards could be exercised in a consistent manner to ensure effective and efficient administration of foreign ships. Consequently, ships of non-compliance would be no place to hide.

The "*Volgoneft-248*" (the ship) case specifically emphasizes the significance of utilization of PSC regime and of PSC cooperation at regional basis. The ship is an oil tanker built in 1975, flying the flag of Russia and owned by a Russian domestic entity. On December 29th, 1999, the ship loaded at Bulgaria a few days earlier involved in severe structural damage and broke into two pieces off a Turkish port in the Marmara Sea whilst anchoring and waiting for unloading (Otay, 2000). Despite the severe storm at that time, pre-existing defects of the ship, particularly those relating to hull strength were uncovered, thereby faults of ship control authorities, including the flag State and the two port States should be seriously taken into consideration. The overall situation of a ship should be under the control of its flag State through surveys, so that relevant professional advice or compulsory orders in respect of safety navigation could be in place. Since defects concerning hull strength which is too severe to maintain ship's integrity could not be attributed to faults of onboard crewmembers in respect of their daily routine of maintenance, it is reasonable to argue that the flag State of Russia failed to properly exercise jurisdiction or enforce its laws over the ship, or the owner/operator disregarded relevant directions from the flag State. While the law enforcement of the flag State could not be intervened by any other State, Bulgaria and Turkey who became IMO member State in 1960 and 1958 respectively (IMO, 2013b) could make use of PSC

regime elaborated in IMO Treaties so as to prevent the ship from damage. In this sense, it is apparent that PSC authority of Bulgaria exhibited totally ineffective PSC mechanism, failing to implement IMO Treaties or to enforce national laws, even though its water areas were not contaminated as a result of the casualty, compared with pollution damage on coastline of Turkey. Status of Turkey in this case, meanwhile, is quite distinctive as the ship was not in its port but in anchorage when accident occurred, and Turkey has not ratified UNCLOS up to now (UN, 2013). The Bosphorus Strait Turkey borders is of the sole water connection between the Black Sea and the Marmara Sea, thus seaborne trade of States surrounding the Black Sea is absolutely based on the Strait. UNCLOS confers States bordering straits used for international navigation, e.g. the Bosphorus Strait, power to adopt and enforce national legislation over foreign ships conducting transit passage in accordance with UNCLOS and other applicable international regulations so as to ensure safety navigation and combat marine pollution. Combined with the far-reaching power of port State jurisdiction discussed above, therefore, such States as Turkey could utilize several approaches under UNCLOS to tackling with the ship before casualty took place. Regretfully, Turkey is not yet the signatory of UNCLOS, thus aforesaid approaches by Turkey in the Bosphorus Strait could be refused by foreign ships. Nonetheless, PSC regime laid down in SOLAS 74, STCW 78, Annex Ⅰ/Ⅱ of MARPOL 73/78 respectively which Turkey has ratified could be properly utilized by Turkey, especially through regional cooperation, in order to prevent casualty. It is easy to envisage that once Turkey and Bulgaria had been in close PSC cooperation under regional agreement, even bilateral contract which ensures that all ships calling ports of contracting Parties should undergo PSC in accordance with specific requirements of the generally applicable international regulations or of the agreement, it was far likely that the ship was detained with conditional release at the loading port of Bulgaria. Whilst the ship was en route to

Turkey, information on the poor situation of the ship was circulated from PSC authority of Bulgaria. Turkey authority was in turn able to take measures necessary in a timely manner, at least notifying the ship on the circumstances of severe storm and rough sea, or suggesting the ship through competent authority of Bulgaria to take temporary stand-by at loading port for weather improvement. This reaffirms the importance of information exchange at inter-jurisdictional level in respect of all relevant particulars of certain ships. In other words, information should be exchanged irrespective of ships trading in or out of any jurisdiction within the region. Comfortingly, the framework of this cooperation has been established through the Memorandum of Understanding on Port State Control in the Black Sea signed in Istanbul, Turkey, in 2000, which covers all the three States involved in this case.

3.4 Classification of Deficiencies

Establishment of deficiencies justifies the necessity of PSC regime; and deficiencies of substantial non-compliance give rise to intervention. While the general classification of deficiencies of ships in PSC is primarily pertaining to technical categorization, e.g. list of deficiency codes, this paper divides deficiencies into two major types – Class-related and Safe Manning from the perspective of a PSC authority.

PSC inspections examines overall situation of foreign-flagged ships in respect of safety navigation, pollution prevention, and welfare of crew covered by generally accepted international regulations. Notably, one domain that shall be seriously taken into account by both the flag and the port State is ship's manning which essentially influences the effective enforcement in foregoing three general fields. SOLAS has encompassed "ships' manning" requiring generally that all ships shall "*be sufficiently and efficiently manned*" and carry onboard "*a minimum safety*

manning document" (SOLAS, 1980). Since this document is issued by the flag State, the evaluation of "sufficient and efficient manning" shall be duly exercised by the flag State. In particular, abovementioned SOLAS provision relates principles of safe manning to relevant IMO Assembly Resolution A.1047 (27) adopted in 2011. Safety manning is a very much broad issue involving a variety of respects onboard a ship. This paper argues that, rather than construction, structure and equipment consisting of ships' hardware that certified by the flag State, which comprise the object of onboard operation, all others respects could be classified within scope of "safe manning" emphasizing the seafarers. This is because, as A.1047 (27) reads, safe manning is "*a function of the number of qualified and experienced seafarers necessary for the safety and security of the ship, crew, passengers, cargo and property and for the protection of marine environment*" (IMO, 2011a). While sentence above is definitely enough to mirror reality, Table 2 is for detailed analysis.

Table 2 – Safe manning related aspects

Regarding seafarers	**Quality**	**Proof/Effect**
Number	Sufficient	Minimum Safety Manning document
Qualification	Competent	STCW Certificates
Operation	Proficient	Safety Management System regarding training & instructions
Practice	Experienced	Safety Management System regarding training & instructions
Performance	Qualified	Safety and security of ship, crew, cargo; and pollution prevention

Source: Compiled by the author.

Apart from those attested by relevant certificates or documents, all other outcomes listed above should be achieved by seafarers through operation. It is notable that

firstly, maintenance of a sufficient number of seafarers and competency/proficiency thereof need both survey by the flag State and auditing/monitoring by the owners/managers. While the former may be conducted alternatively by CSs as Recognized Organizations, the latter could be attained by virtue of effective enforcement of onboard Safety Management System. Secondly, seafarers' welfare is of an influential factor as the ship is of both workplace and living room for seamen. This is the reason for inclusion of relevant ILO Conventions in addition to STCW Code. Increasing attention has been paid upon living and working conditions for seafarers. In this respect, mandate of ISM Code and operation inspections prevailing in current PSC regime is very much reasonable from the perspective of integral safety. Moreover, a system ship in general comprises parts of machinery and human, as well as those of management institutions going across for coordination or integration. Since the manning level is determined exclusively by flag States perhaps pursuant to relevant IMO Resolutions, defects relating to safe manning are usually made eventual attribution to, rather than "unsafe manning", non-proficiency or non-competence of crewmembers as a result of operation examination. The reason lies in the fact that it makes no sense for a PSC authority, once deficiencies being identified, alleging directly failure of the State whose flag the ship inspected is flying. Therefore, owners/the Companies defined in ISM Code of the ship have to taken prime responsibility for safe manning in practice.

It is vital for a PSC authority to accurately and timely ascertain Parties, rather than crewmembers on board, which take responsibility to, and are able to rectify or make contribution to rectify defects of inspected ship. In fact, in addition to the punishment directly upon the Master as per port State domestic law, intervention actions such as suspension of cargo operation and detention by PSC authority have

no influence on crewmembers. In other words, since ships are injected huge financial value derived from the seaborne trade, those interventions are actually of great influence over owners/charterers. Meanwhile, problems such as port congestion probably arise in local areas as a result of intervention. In this sense, since the normal is of "berthing – operation – departure", "invasion" of intervention has to be removed as far as practicable without prejudice to the achievement of purpose set forth in applicable international and domestic laws. Once deficiencies giving rise to intervention, they normally could not be properly corrected solely through the efforts of crew, i.e. the ability or commitment of crewmembers has been deeply questioned or negatively assessed by PSC authority which could not be satisfied unless the participation of other relevant interested Parties. The significance of CSs in safeguarding safety and anti-pollution at sea has been recognized by current PSC authorities around the world. Procedure 2011 clarifies the duty of PSC authority as to informing relevant Parties such as flag States and CSs immediately after detention being imposed (IMO, 2011b). CSs, given their technical competence, and more importantly, RO status for certification of certain shipboard respects are capable of making feasible proposal or commitment, from the view point of "manager", on the basis of mutual consultation so as to lift the ban. Likewise, once deficiencies concerning safe manning such as operational defects are identified, correction in site by committed individuals is insufficient for future compliance, e.g. proficiency/competence cannot be promoted in such a short period of time. At this point, active participation of CSs/the Companies who actually take charge of safe manning of individual ships is reasonable, e.g. revising of running shipboard SMS may satisfy PSC authority and may thereby transform the detention to rectification within a period of time. After all, solutions by flag States are quite far away from reality.

Procedure 2011 lists 72 certificates and documents covering various respects of a ship which would be checked during PSC inspection. Residues beyond foregoing two categories inevitably emerge since distinct situations of individual ships. For instance, such circumstances as no-class ships, the flag State without ROs, ships below convention size and ships flying the flag of non-Parties may lead to difficulties in satisfying the PSC authority or correcting defects warranting severe interventions. In response, establishing explicit substantive and procedural rules through national legislation is tightly interrelated with effectiveness and efficiency of PSC inspections.

3.5 Classification Societies

As mentioned in the Introduction, the essence of PSC regime refers to the enforcement of both the port State and the flag State. While the focus of the former should be generally on ship safety and anti-pollution, concerns of the latter could be reasonably expanded to safeguarding of interests of all national stakeholders. Apart from ship-owners/operators, one of the stakeholders is national maritime equipment manufacturers who are active in shipping industry and play a fundamental role on safety and anti-pollution at sea. Those entities in fact take full charge of furnishing a ship with their products, from various equipments to huge blocks which should be certified by competent authority of the flag State; and equally importantly, with technical services regarding installation, commissioning, debugging, maintenance and repairing. Those products and services account for an absolute majority of the value of a made-up ship, and those entities as a whole in Europe is evaluated as "*the most important employer in the maritime industry*" since they provide large amount of occupations and turnover (European, 2005).

However, it is not hard to envisage the consequences of an initially non-effective Oil/Water Separator provided by those manufacturers. This is the reason for the

statutory certification of those products and qualification of those services by the States whose ships are equipped. Therefore, great attention has been paid on the performance of CSs, which constitutes one significant ship targeting factor prior to field inspection. Almost all Governments of flag States nominate certain CSs – given their technical competence – to conduct certification of onboard equipments and services in accordance with its own Class Rules for ships engaged in both international and domestic voyages. However, once several CSs concurrently certify within the same field, e.g. one piece of equipment, a manufacturer desiring to place its products onto market is likely to undergo several certification processes so as to meet individual Class Rules. From the perspective of a manufacturer, it is of course a typical waste of resources which ought to be utilized for further innovation. Undoubtedly, CSs have achieved great development in respect of both technology and internal quality management; and IACS is endeavoring to upgrade Class Rules to a higher and more harmonized level. Nonetheless, foregoing development and efforts appear not adequate to satisfy the urgent need of certain interested bodies within maritime sector, e.g. EU member States. In this case EU enacted Regulations accompanied by Maritime Equipment Directives providing for detailed standards for ship inspection and survey organizations, and regulating relevant activities of maritime administrations. Therefore, two major solutions have been established at EU level. Firstly, technical development of different CSs concerned according to IMO Treaties should be driven by legal power by virtue of harmonization of technical rules applicable to marine equipment industry. Secondly, CSs shall set out conditions for mutual recognition of certificates issued respectively on the basis of periodic consultation in pursuit of consistent interpretation of applicable treaties and maintenance of rules-related equivalence. Given the serious consideration upon Class performance, categorization of “Class-related deficiencies” could not be neglected. In response,

this type of "two-pronged" mechanism for the enhancement of Class performance is hopeful to take effect, i.e. harmonized national legislation and Class Rules could be established and continuously reviewed through continual and interactive cooperation pattern of "CS ↔ CS ↔ Government", so as to meet the up-to-date and higher safety standards. As a result, application of more stringent standards at regional level could be achieved through the active participation of CSs. Notably, there have been far more casualties in maritime context than that in aviation sector. The reasons lie with

- Airplanes are merely of workshop for flight crew whereas a vessel is both workplace and home for seamen;
- Formal cooperation between national Authorities in the topic of harmonization of technical standards has been conducted for more than two decades.

In this regard, the compatibility of technical rules derived from different CSs on the basis of uniform IMO Treaties makes prime contribution to good enforcement at the international level.

Up to now, China PSC has been at a relatively high level in terms of professionalism and technicality embodied in PSCOs. Meanwhile, ships flying flag of China reveal progressively improving PSC records during the last decade, as illustrated in Table 3.

Table 3 – PSC inspection data for China flag under Tokyo MoU

Year	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002
No. of inspections	685	673	694	690	798	804	851	899	904	811
No. of deficiencies	1750	2013	1933	2354	2337	2048	2235	2513	2960	2919
No. of detentions	1	8	7	11	7	6	7	15	15	14
No. of deficiencies	2.55	2.99	2.79	3.39	2.93	2.55	2.63	2.80	3.27	3.60
% of Detention	0.15	1.19	1.01	1.59	0.88	0.75	0.82	1.67	1.66	1.73%

Source: China Maritime Administration. (2011, January). 2011 Annual PSC Report. Dalian, Author.

It is primarily due to the good enforcement of current national laws, combined with great efforts by individual ship-owners and managers. However, there is still room for improvement. China Maritime Administration has effectively cooperated with China Classification Society (CCS) in technical legislation, outcome of which falls within Regulations of Construction for Ships that drafted by CCS, deliberated and promulgated by China MSA. Acting on behalf of Chinese Government, CCS holds the leading position amongst ROs, and plays an essential role in statutory certification for China-registered ships. In addition, CCS has established a series of rules concerning the classification survey, and has taken up surveys for many ships exclusively engaged in domestic voyages under the auspices of China MSA. This is a significant step towards promoting the safety level of all ships under jurisdiction that indicates proper interpretation and enforcement of applicable laws. Nevertheless, given the overriding position held by CCS, few opportunities for further improvement are available, i.e. lack of formal consultation with other CSs. Assessing implementation and enforcement of IMO Treaties by China in the capacity of flag State might be left to IMO, while PSC-related issues are the case. In this regard, suggestions below are listed in accordance with EU experiences.

- Statutory audit scheme with explicit criteria as to the functioning of internal quality system of CCS could be established to ensure that missions are accomplished and the active status is properly maintained for technical research;

- As per periodic PSC statistics, CSs and deficiencies thereof identified in physical inspections are available. Therefore, CSs with qualified performance in respect of ship structure such as strength and stability; machinery such as engines and steering gear; and shipboard equipments including life-saving and those for such special cargo as oil and chemicals could be deemed "preliminarily acceptable organizations" with which CCS could consult;

- The outcome of the consultation should be submitted to China MSA periodically, in order to ascertain "acceptable organizations";

- As per the outcome, ships carried onboard certificates issued by acceptable organizations could be rewarded with less frequent detailed inspections in relevant fields. This is a scheme that conducting by CS surveyor team inspections towards class-related items prior to ships entering into ports, or inspections without specific ships in the broader sense;

Therefore, both CCS and MSA could review and improve their regulations and rules through consultation in order to facilitate application; resources in PSC could be saved; and the competitiveness of national marine equipment manufacturers in international market could be enhanced owing to accurate application of international standards. Notably, while various IMO Treaties provide for minimum standards for safety and anti-pollution, CSs concentrate on, within the scope of those treaties, establishing higher applicable rules via technical research and field survey. Therefore, endeavor to improve national legislations and Class Rules, both of which are interconnected in maritime sector, in respect of

substantive and procedural provisions is of urgent mission for China MSA. Meanwhile, enforcement of foregoing scheme shall be without prejudice to any professional judgments in site by PSCOs because of the uncertainties stemmed from Human Factors. And, general principle for identifying Class-related deficiencies lies in "being responsible for areas covered within certificates issued by them".

3.6 Port State Control Officers

PSC inspections are conducted by PSCOs employed by competent authority of the port State, and the boarding of PSCOs gives rise to the establishment of administrative relationship. According to the general principles of administrative law, while the flag State takes the ultimate responsibilities for the compliance of their ships in foreign ports, it is not deemed the eligible subject under administrative law of the port State. Therefore, within administrative relationship through PSC inspections, the subjects are the port State Government and the owner/operator by whom the right of control and obligation of compliance are undertaken respectively.

PSCOs play a significant role in achieving the consistency of PSC inspections at international level. In this regard, it is necessary to introduce a set of criteria or lessons as to the generally good practice of PSCOs and to invite port States to use for reference in their training programs. Following a joint Paris MoU & Tokyo MoU Ministerial meeting in Canada, this approach was introduced by Port State Control Committee of PMoU and has been annexed to Procedure 2011. It is an important step by IMO towards regional PSC cooperation. Just like the importance of the constant consciousness of the Master, who generally represents the ship-owner, on his/her overriding power and responsibilities within the shipboard SMS, PSCOs being in daily contact with shipping community should bear in mind that carrying out inspections is to discharge the statutory duty, and his/her judgment might greatly

influence the business of the owner/charterer. In other words, PSC is of a power for port State but duty for PSCOs employed by State government; power of PSCOs, i.e. discretion based on expertise, is relative and shall be subject to domestic law. In this sense, regulating basic respects of integrity, professionalism and transparency, as well as the way of conducting inspections and handling disagreements is beneficial for all governments which make administrative supervision on their officials as PSCOs.

3.7 Remedy for Undue Delay

As discussed above, administrative relationship is established as a result of field PSC inspection between the Government of the port State and owner/operator of the inspected ship under administrative law of the port State. In this sense, whilst the owner/operator alleges that the decision of a PSC inspection, especially detention, makes an infringement on its rights in respect of navigation liberty of his/her ship of compliance, procedures for challenging the decision or appeal should be available. UNCLOS stipulates the right for appeal from the perspective of State liability that States shall take legal responsibility for the damage or loss suffered from their measures for enforcing regulations on pollution prevention, and recourse of actions shall be in place under national laws. Since PSC regime is of the power of the port State which launches the field inspection, two major requirements for the appeal under UNCLOS are clarified.

- Suffered damage from PSC decision could be submitted to Courts of the port State as causes of action for judgment; and

- The Government is liable for the damage which has been judged unlawful under national law of the port State (United Nations Convention on the Law of the Sea (1982)).

Key IMO Treaties of SOLAS, MARPOL, STCW and AFS concentrate specifically on the operability that exercising of PSC shall make the best endeavors to avoid undue delay of targeted ships, and any loss or damage suffered from the undue delay shall be covered by compensation. In this sense, it seems fair and favorable for ship-owners/operators that PSC inspections in fact are conducted with due diligence so as to circumvent the dilemma of undue delay. Even if there have been certain faults that lead to damage or loss, legal compensation would guarantee the remedy. Is it the case?

The cruise ship "*Van Gogh*" flying the flag of St Vincent & Grenadines was detained in May 2006 after arrival of Harwich, UK by Maritime and Coastguard Agency (MCA) as a result of inspection alleging the ship's failure to fully comply with statutory requirements under Merchant Shipping Act 1995. In fact, 93 of 744 people onboard were suffering from gastroenteritis due to spread of Norovirus at that moment. A few days after detention notice, the previous inspector delivered a further notice to the Master, emphasizing that the ship was unfit to go on a voyage without serious danger to human life. In exercise of powers elaborated in Section 95 of the Act, the ship was prohibited from sailing until the release by a MCA officer. Meanwhile, leaflets as to making references of detention notice to arbitration were attached to that notice. A few hours later, the ship was released as a result of re-inspection. Rather than submitting for arbitration within statutory 21 days, charterer of the ship litigated in Commercial Court against Department of Transport who governed MCA, claiming invalidity of detention and notices concerned, statutory compensation, together with damages derived from tort of conversion. In response, the defendant asserted that the ship was dangerously unsafe given the high risk of Norovirus which would greatly impair the ability of crew in safety navigation, and sought to justify the detention via invoking relevant

provisions of Merchant Shipping and Fishing Vessels Regulations 1997 as to the power of detaining ships of non-conformity. While that invoking was not approved by the Court since the detention decision was made exclusively on the basis of provisions of the Act, the Court held that if the detention was valid under either the Act or the Regulation, formation of notices concerned made no sense in its validity, i.e. "*there should not be a triumph of form over substance*". The cause of action as to conversion was rejected by the Court as the intervention of detention did not fall totally and accurately under the scope of torts regulated in Torts Act 1997 (International, 2009).

At that moment, the charterer could merely pin its hope upon the assessment of the validity of the detention. While this paper does not intend to make a satisfying judgment, it is notable that

- The latter notice from the MCA was to considerably complement the former, i.e. correcting the procedural defects as per the Act. However, it appears not the achievement since the detention notice "*shall specify the matters which make the ship a dangerously unsafe ship*" (Merchant Shipping Act (1995));
- "Dangerously" adds great weight upon "unsafe". It is the paramount criterion for detention. A few infections of crewmembers or passengers do not absolutely constitute "*serious danger to human life*" and being "*unfit to go to sea*" according to the Act (Merchant Shipping Act (1995)).
- As for tort, it is still a major dispute as to whether it shall be embodied in the administrative remedy. The litigation seems to commence a judicial review against the detention decision. Irrespective of the eligible jurisdiction of the Commercial Court, damages claim based on committing of tort by Department of Transport would not certainly be sustained; and
- Consequently, available remedy is solely of the statutory compensation. Even

though the charterer – UK-based *Travelscope* (Wikipedia, 2013) who acquainted itself with UK laws – made a series of "professional claims", it was in great trouble since the awarding of statutory compensation is exclusively empowered by the Act on the arbitrator who thinks fit whereas the arbitration did not commence the arbitration within restriction of 21 days.

Procedural legitimacy is one key principle in modern administrative law. As for PSC activities which constitute administrative actions, however, the Courts or Authorities for review of many States indicate a definite tendency for large respecting of professional judgment of inspectors or PSCOs. In other words, interventions such as detention are far likely to be justified as long as they were determined by a qualified PSCO who is able to supply adequate evidence supporting his/her decision. Moreover, any challenging processes such as arbitration, review and litigation shall not suspend the detention. In this sense, challenging the intervention decisions through local proceedings should be at least very much familiar with local laws, thus seems not feasible in reality.

3.8 The Effect and the Future

The deficiencies and detentions of ships do not be eliminated through general exercise of PSC at international level. Annual report of Paris MoU 2011 indicates most deficiencies were identified in the field of fire safety, with the rate progressively increasing from 11.55% in 2009 to 12.89% in 2011, and 56% of bulk carriers were inspected with deficiencies (Paris, 2011). Likewise, the deficiencies associated with fire fighting appliance accounted for 19% as per USCG Annual PSC Report 2010 (USCG, 2010), and bulk carrier obtained 67 detentions in the total of 156. It is reasonable to argue that PSC with deficiencies, even with intervention, is still preferable or acceptable for certain owners/operators since cost of voluntary compliance is far higher than that of current operable level and of PSC. In this

sense, PSC regime is merely able to compensate partial of non-fulfillment. Nevertheless, instruments are adopted and the enforcement is enhanced. This indicates that the general tendency on the global scale of safety and anti-pollution at sea is moving towards upgrading of ship-related restrictions primarily because of the growing awareness of vulnerability of marine environment and human life, or decreasing tolerance on casualties with pollution damages or fatalities. In other words, effective solution of problems in the context of shipping would persistently rely on establishment, development, implementation and enforcement of treaty laws in the foreseeable future.

Given the aforesaid "name and shame" scheme, the exposure of those States and individuals without sufficient resources in tackling substandard ships would be made more frequent. Moreover, the publicity could be deliberately utilized and related to particular States who fail to discharge treaty duties which they ought to be. In this sense, an obvious social consequence of PSC regime lies in the impact on the reputation of the actors.

Due to the clear legal framework of PSC regime established under UNCLOS and IMO Treaties, States Parties have acquired explicit direction in general. For the purpose of preserving marine environment and protecting individual interests, the enforcement of a State is pertaining to its interpretation of applicable international regulations and its strategic planning so as to reduce the impact of enforcement on national economy. The consistency of interpretation would be attributable to further efforts by IMO and CSs in technical fields, while consistent enforcement would be achieved under the auspices of successful inter-jurisdictional PSC cooperation. If PSC regime is living with "diseases", the cure method would fall under international coordination amongst those political and business leaders.

The strong power of PSC regime under international laws gives rise to the heavy

burden upon individual ship-owners/operators as well as certain flag States and port States which have not properly discharged their treaty duties. In the foreseeable future, PSC would of course be further strengthened and utilized through the efforts of IMO and individual States. However, operative features guiding the exercise of PSC are primarily embodied in relevant IMO resolutions serving as recommendations. In other words, inconsistency in respect of the effects of PSC among States would inevitably persist in the future since the available international treaties do not elaborate the specific requirements for the performance and criteria thereof. Even though relevant inspection regime within the regional PSC cooperation has been established and developed, uniformity at international level has not been attained. This is mainly because the performance level of individual States concerning the exercise of PSC power could be assessed but on no condition be directly associated with criteria for their compliance of international regulations. While the assessment has been conducted via the Voluntary IMO Member State Audit Scheme which covers the performance of PSC (IMO, 2005), it could not make essential influence upon the specific approach during PSC inspections, even though the Audit Scheme refers to the interpretation and implementation of applicable international regulations. In this sense, IMO plans to achieve the mandatory Audit Scheme at about 2015 (IMO, 2013a). While this paper is unable to make any prediction on the essence of the upcoming scheme, it is arguable that on one hand, it makes no change but setting out the mandatory conditions for commencement of the audit; on the other hand, Code for the Implementation of Mandatory IMO Instruments, 2011 serving as standard of the Audit would be made mandatory together with the scheme. It is apparent that in the latter case, the performance of PSC would be examined in addition to assessment by IMO as per Procedure 2011 to which the Code definitely refers. Rather than establishing of its own enforcement force which is not feasible in respect of internal finance and

external acceptability, IMO concentrates directly on the performance of member States via audit scheme which, combined with PSC regime, constitute the practical compulsion of IMO. Enhancing of PSC regime by virtue of mandatory audit over States appears the major tendency.

3.9 PSC-related Legislation in China

As discussed above, one of major purposes of PSC regime is to prevent the pollution damage within water areas of the port State. Chinese legislation in this respect is relatively matured. Regulations on Prevention Pollution from Ships was promulgated by China State Council and came into effect in March 1st, 2010, which constitutes both a good implementation of applicable international regulations and a practicable regime for protecting the interests of China, thereby paves the way for effective enforcement in respect of anti-pollution in the capacity of the port State and the coastal State. In particular, all ships acting within the water areas, inter alia, the harbor waters of China have to comply with relevant Chinese laws and international regulations in respect of

- Structure, equipments and appliances of ships;
- Activities of discharging hazardous waters, oily waters, sewage, waste gases and ballast waters, and dumping;
- Operations of stripping, washing, bunkering, cargo, repairing, scrapping, etc.; and
- Handling contingency of marine pollution, including investigation, salvage, and clean-up (Regulations on Prevention Pollution from Ships (2010)).

While it is quite comprehensive legislation which covers almost all respects relating to anti-pollution, reliance is primarily made on the hindsight. In other

words, given the limit that those deemed very much undoubted in hindsight were not so obvious at that moment, more attention should be paid on the proactive actions. In fact, the principle of "prevention first" is stipulated in the Regulation, thus given the close interconnection between PSC regime and anti-pollution approach under international laws such as UNCLOS and MARPOL China has ratified, utilizing PSC regime to minimize pollution risks from foreign ships constitutes the optimal strategy or precaution that should be incorporated into the enforcement features of this Regulation. This is why many scholars strongly suggest the incorporation of "Shipping Act" into the China law system.

As for legislation on specific operation of PSC inspections, Ships Inspection Rules 2009 enacted by China Department of Transport which governs Maritime Administration is so far the essential PSC legislation of China which makes great progress compared with its predecessor. It clarifies the concept, application, scope of PSC inspection, and recognizes the effects of Tokyo MoU in PSC system of China (Ships Inspection Rules (2009)). Notably, introduction of the principles of transparency and public monitoring is exactly compatible with spirits of relevant international laws, and recognizing that ship-owners and crewmembers shall take prime responsibility for the shipboard maintenance indicates the facilitation of PSC operation through domestic legislation. However, China PSC legislation which gives effect to applicable international regulations should at least cover major respects as follows.

- Making legal permission for inspections of foreign-flagged ships under jurisdiction;
- Clarifying PSC authority and PSC inspectors;
- Clarifying the extent to which international and domestic laws shall be applied

during particular inspections;

- Legitimizing the enforcement or intervention actions against ships of substantial non-compliance; and
- Appeal procedure for challenging the decision during enforcement.

Therefore, a list of applicable international treaties and national laws during PSC inspections should be attached or annexed to the Rules 2009, not only for the integrity of legislation, but also for the consistency of operation. In other words, the expression "conform to relevant international treaties China has ratified" that widely used within relevant domestic laws is too ambiguous to facilitate the enforcement. Meanwhile, the appeal procedures for challenging the PSC decisions should be available in the Rules 2009 not only because of the requirements under UNCLOS China ratified in 1996, but also of the consideration of responsibility distribution. While PSCOs practically conduct physical inspections, they merely take charge of evidence collection. Therefore, the PSCOs should responsible for the breaches of national laws during physical inspections in respect of requirements for China officials. The decision according to evidence is made by the PSC authority employing those PSCOs, thus the local PSC authority, i.e. legal department of local branches of China MSA, should be responsible for reconsideration so as to determine the legitimacy and appropriateness of alleged PSC inspection/decision as per China administrative law (Administrative Reconsideration Act (1999)). Once actions in Courts commence thereby, the aforesaid local PSC authority should respond as the defendant in the course of judicial review which is entitled to make final decision on the legitimacy of PSC inspection/decision (Administrative Litigation Act (1990)).

4. Conclusion

By way of conclusion, PSC in accordance with UNCOLS is a power of the coastal State to protect its interests in respect of safety navigation, security and anti-pollution. Meanwhile, the port State is entitled to investigate any violation of anti-pollution regulations under UNCLOS so as to ensure effective enforcement at international level, irrespective of where the violation occurs and the consequences. Since UNCLOS expressly requires States Parties during enforcement being subject to the generally accepted international regulations through the competent international organization which refers exclusively to IMO, the legal certainty under UNCLOS of the status of relevant IMO Treaties is in place. While UNCLOS stipulates general requirements, effective enforcement should rely on the implementation and enforcement of relevant IMO Treaties which regulates specific operative features. Given the circumstances that imbalance among States in respect of implementation and enforcement of IMO Treaties exists, PSC regime as a major measure against non-compliance of individual ships is strongly advocated by IMO, and has been developed through the regional PSC cooperation, serving as a mechanism of constant monitoring under which performance of flag States of inspected ships has been placed. Therefore, PSC regime could be deemed successful in practice especially in respect of the restrictions over ship-owners/operators who assume the prime obligations of maintenance. It reveals the definite tendency of contemporary international legislation on the common and urgent needs within international community which could not be resolved through the practice of individual States. In this sense, effective solution makes reliance on treaty laws which set out international regime in respect of cooperation and monitoring. However, the general exercise of PSC regime could not preclude the unqualified performance of flag States and individual actors, the

"name and shame" scheme appears not beneficial on all occasions because of the large subjective elements involved, and legal proceedings for the remedy of undue delay under port States' national law seems not feasible from the perspective of ship-owners/operators. In this sense, it is necessary to establish effective cooperation of individual States with Classification Societies in order to achieve the accuracy and harmonization in respect of interpretation of international regulations and the national legislation which gives effect to those international regulations. The effective enforcement of MARPOL regulations in respect of controlling the emission of sulphur oxides from ships on the viewpoint of IMO's Secretary-General Mr. Koji Sekimizu relies primarily on the contribution of oil industry which makes low-sulphur fuel suitable and available for the shipping industry (IMO, 2013c). Likewise, if political and business leaders at national and international level endeavor seriously to pave the way for effective PSC through due planning, coordination and cooperation, more restrictions would be imposed upon the operation of ships of non-compliance. In the future, PSC regime would be further strengthened through the efforts of IMO, individual States and regional PSC cooperation, inter alia, IMO's mandatory audit scheme.

While China has made considerable progress on PSC, future consideration should be made on enhancing the national legislation in respect of integrity, accuracy, and operability. Since national legislation should duly give effect to applicable international regulations in accordance with international law, it plays a significant role in exhibiting the basic attitude of a State towards international relations. In this sense, a set of integral PSC legislation of China concerning both substantive and procedural rules would not only facilitate the enforcement of national players, but also indicate the certainty of enforcement by Chinese Government on safeguarding safety navigation, anti-pollution, maritime security and welfare of seafarers at both

national level and international level. The vision might fall under the situation that no prudent ship-owner/operator would deliver their ships of substantial non-compliance into water areas of China given the rigorous legislation and enforcement thereof.

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