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## Study on the undue detention of foreign ships by Port State Control

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**WORLD MARITIME UNIVERSITY**

Dalian, China

**STUDY ON THE UNDUE DETENTION OF  
FOREIGN SHIPS BY PORT STATE CONTROL**

By

**XIONG HAITAO**

**The People's Republic of China**

A research paper submitted to the World Maritime University in partial  
fulfillment of the requirements for the award of the degree of

**MASTER OF SCIENCE**

**(MARITIME SAFETY AND ENVIRONMENTAL MANAGEMENT)**

2015

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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):           Xiong Haitao

(Date):                June 18, 2015

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Jiang Yuechuan

Professor of Dalian Maritime University

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because they provide the spiritual power and logistics in my 18-month studies.

## ABSTRACT

**Title of Research Paper: Study on the Undue Detention of Foreign Ships**

**By Port State Control**

**Degree: Msc**

With the rapid development of shipping industry and the improvement of the human awareness on safety and environment protection, the requirement of ships' seaworthiness has become higher and higher. Port state control (PSC) provides effective protection for sailing safety and environment in the sea in many countries. Although the system of PSC was set up to control the sub-standard ship sailing in the sea at the beginning, in the process of concrete implementation, it appears to have harmed the interests of common ship in some aspects, such as undue detention by PSC (Luo&Li, 2005). This is caused by many factors, such as the judgment or technical errors by PSCO, and errors in the application of international conventions, etc.

Every year, more than 2000 ships are detained by the PSC all over the world, including undue detention of ships held on 2% to 4% (Benedicte, 2005). This article aims to analyze the harm, causes and legal responsibility of undue detention of ships, and discusses how ships can take appropriate remedy when suffering undue detention, and puts forward management measures to reduce undue detention of ships. The ultimate aim is to minimize losses in saving ships, at the same time to raise the level of PSCO inspection in the later work to play the effective roles in maritime safety supervision.

**KEYWORDS: Maritime Management, Port State Control, Undue Detention**

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## **LIST OF ABBREVIATIONS**

**AFS- Anti Fouling Systems**

**COLREGS- Convention on the International Regulations for Preventing Collisions at Sea**

**FSC-Flag State Control**

**ILO-International Labour Organization**

**IMO-International Maritime Organization**

**ISM- International Safety Management**

**MARPOL-International Convention for the Prevention of Pollution from Ships,1973(and its protocols)**

**MEPC- Marine Environment Protection Committee**

**MLC-Maritime Labour Convention 2006**

**MOU- Memorandum of Understanding**

**MSC-Maritime Safety Committee**

**PSC-Port State Control**

**PSCO-Port State Control Officer**

**SMS-Safety Management System**

**SOLAS-International Convention for the Safety at Sea,1974**

**STCW-International Convention on Standards of Training,Certification and Watchkeeping for Seafarers,1978(amended 1995,2010)**

**UNCLOS-United Nations Conference on the Law of Sea**

## **Chapter 1: Overview of PSC**

*PSC regimes were created on the ground that maritime safety should not be used by ship owners as a competitive tool. In that sense, unique standards and procedures must apply worldwide in order to verify that when a foreign vessel calls in a national port, the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules.* (Knapp, 2007) The main purpose of PSC is to eliminate the low standard of the ship sailing in the sea, ensure safety of ship navigation and prevention of damage to the marine environment. It is also a complement for flag state to perform the international conventions. (Pierre& Maximo& Francois, 2009)

### **1.1 The Development of PSC**

#### **1.1.1 The Purpose of Setting up PSC system**

On March 17, 1978, oil tanker Amococadiz of Liberian flag run ground on the coast Brittany of France, and 230,000 tons of oil spilled in the sea. As the oil spill accident caused huge economic loss and serious social impact, in December 1980 the French Marine minister invited 13 countries have a meeting on how to strengthen the supervision of foreign ships in the port state region. It formed a consensus to decide to inspect actual condition of the ship with technology. After the meeting, working group began to draft Paris Memorandum of Understanding (MoU) on PSC. In January 1982, the ministers of the 13 countries gathered in Paris again to sign the Paris MoU which took effect on July 1, 1982.

The purpose of MoU is to (Paris MoU Organizations, 1982):

*Recognizing the importance of the safety of life at sea and in ports and the growing urgency of protecting the marine environment and its resources;*

*Recalling the importance of the requirements set out in the relevant maritime conventions for ensuring maritime safety and marine environment protection;*

*Recalling also the importance of the requirements for improving the living and working conditions at sea;*

*Noting the resolutions adopted by the International Maritime Organization, and especially Resolution A682(17) adopted at its 17th Assembly, concerning regional co-operation in the control of ships and discharges;*

*Noting also that the Memorandum is not a legally binding document and is not intended to impose any legal obligation on any of the Authorities;*

*Mindful that the principal responsibility for the effective application of standards laid down in international instruments rests upon the administrations whose flag a ship is entitled to fly;*

*Recognizing nevertheless that effective action by port States is required to prevent the operation of substandard ships;*

*Recognizing also the need to avoid distorting competition between ports;*

*Convinced of the necessity, for these purposes, of an improved and harmonized system of port State control and of strengthening cooperation and the exchange of information.*

### **1.1.2 Implementation of Supportive Document**

In 1983, IMO passed Resolution No.466 to adopt the Paris MoU, on the basis of the principle of which PSC procedures and guidelines were carried out immediately. It stipulated from a simple certificate inspection to comprehensive safety inspection by the resolution of international conference. Then a series of resolutions such as IMO Resolution No.642 and Marine Environment Protection Committee Resolution No.

26 and No. 481, No. 597, No. 681, No. 742 were brought in to force, forming a set of files on PSC checking procedure. Meanwhile, IMO also revised the relevant international conventions to supplement and perfect PSC regime. In 1995, the 19th congress passed the IMO Resolution No.787, a series of resolutions in relation to PSC merged into a decision, so that the content is more orderly and easy to operate. (Allen, 2009)

### **1.1.3 Establishment of PSC System all over the World**

After Paris MoU was established, the region of Latin America and the Asia-Pacific respectively established the PSC regional cooperation organization in 1992 and 1993. Since then, the region of Caribbean, the Mediterranean, the Indian Ocean, West and Central Africa, the black sea and the Arab also began to sign MoU on PSC. After development of 20 years, nine regional PSC organizations have been established, forming a ship inspection network basiced on Paris and Tokyo MoU in the world. The institution of PSC has attracted widespread attention as an effective mechanism for implementing international maritime conventions. As a result, it is difficult for the shipping companies to find escape port to berth the substandard ships. (Allen, 2009)

### **1.1.4 Further Development of PSC System**

After the ISM Code went into force On July 1, 2002, the PSC program was no longer just related to ship structure and equipment, but started to cover the ship operation and company management. The problem that many marine accidents reflected was that the crew was weak in the ship's emergency response. It not only required the ships to be equipped with safety equipment in accordance with the international conventions, but also that the crew should be able to know the regulations and skillfully operate the ship equipment. (Chang&Bao, 2007)

## **1.2 Legal Basis of PSC**

PSC is based on the implementation of the provisions of international conventions, in which port states are parties. Port state can send inspector to the foreign ships that arrived in the port for inspection. Legal basis is as follow:

--The Protocol of 1988 Relating to the International Convention on Load Lines,1966 and International Convention on Load lines,1966 Revised by the Protocol of 1988;

--International Convention for Safety of Life at Sea(SOLAS) ,1974 and The Protocol of 1978 Relating to International Convention for Safety of Life at Sea(SOLAS) ,1974 and The Protocol of 1988 Relating to International Convention for Safety of Life at Sea(SOLAS), 1974;

--The International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78);

--International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 78/95 (STCW78/95) and The Manila Amendments to the Annex to STCW78/95;

--International Convention on Tonnage Measurement of Ships;

--Convention on the International Regulations for Preventing Collisions at Sea (COLREGS) and the Amendments to the Annex to COLREGS;

--Maritime Labour Convention, 2006.

## **1.3 The Procedure for PSC**

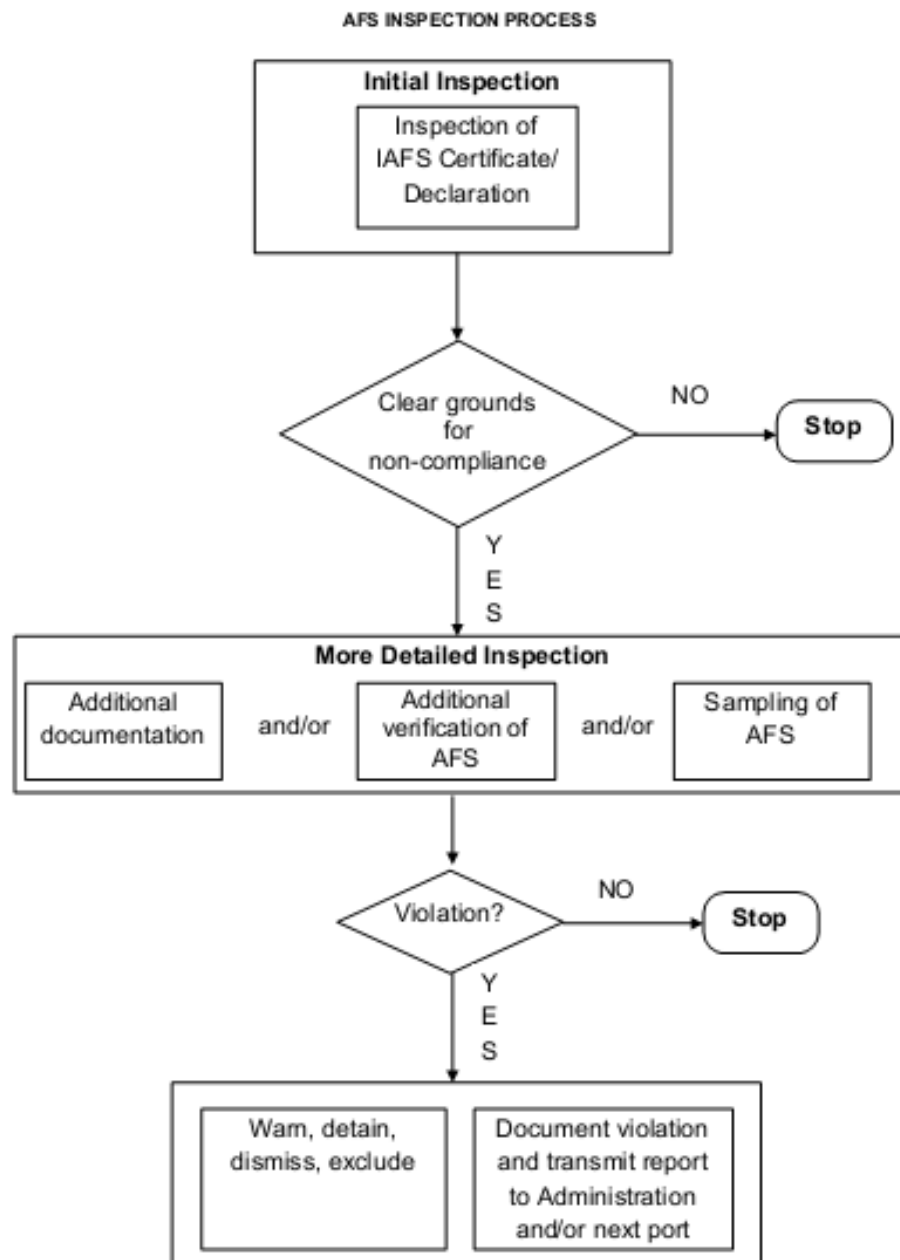
In November 1995, the 19th assembly passed IMO resolution a. 787 (19), and Procedure for PSC began to carry on. In November 1999, the 21st assembly passed

IMO resolution a. 882 (21), and Procedure for PSC was revised and the content of the ISM code was added into it.

According to the provisions of the convention, the implementation of PSC is mainly divided into two processes:

- a. The initial inspection. At first the PSCO should check the appearance of ship, to see if it exist obvious defects and damage. It then checks of all sorts of relevant qualification certificates, documents and manuals.
- b. The detailed inspection. If PSCO found defects of the ship or it did not have effective certificate in initial inspection, it should have detailed inspections. Detailed inspection mainly includes the ship structure and equipment, ship emissions requirements and operation of the crew. (IMO, 1999)

The basic flow chart shows as follow.



**Resource:** IMO, Procedure for Port State Control (MSC.882 (21))

## **Chapter 2: Brief Introduction to Undue Detention**

PSC is means that the port state carries on the national duty of supervision and administration of foreign vessels. The purpose is to ensure that foreign nationality vessels can meet with applicable standards and regulations of international conventions. When finding the substandard vessels in PSC, port state should take punitive action, one of the most severe of which is ship detention.

### **2.1 Ship Detention**

According to Procedure for PSC, *ship detention is intervention action taken by the port state when the condition of the ship or its crew does not correspond substantially with the applicable conventions to ensure that the ship will not sail until it can proceed to sea without presenting a danger to the ship or persons on board , or without presenting an unreasonable threat of harm to the marine environment* (IMO,1999) . Ship detention is one of the characteristics of specialized terminology, not the legal terminology (Wang, 2003). Actually, the meaning of ship detention is forbidding ship to leave the port.

Generally, PSC inspection has three kinds of results: first, if the ship does not have deficiencies, it can leave the port. Second, the ship has certain deficiencies that haven't reached the extent of detention; in this case, the ship also can leave the port. The third is the deficiencies are severe enough to lead to the ship detention, so it cannot leave. In the third situation, the PSCO not just detains the ship; it still asks the captain to eliminate the deficiencies on-site or within a limited time (Ding, 2009). Because when the ship seriously endangers the maritime safety and marine environment, port state has the right to put the ship, the ship's company and the flag state onto “gray list” or “blacklist” which is published on the Internet. So, after the ship is detained, in addition to the economic losses, the reputation of company and flag state would also be hugely damaged. (Cai& Tang, 2006)



## **2.2 Undue Detention**

Undue detention has no clear definition in the international conventions at present, so we can generally understand it as when a PSCO detain the ship without obvious or reasonable evidence to explain that the ship does not comply with the convention, but essentially carries on the ship detention any way. It can be understood from two aspects: one is that the port state's illegal detention of the ship is in violation of the provisions of the convention, or lacks regulations support; second, the port state authorities behavior is to abuse discretion, deliberately extend or shorten the detention time, or aggravate punishment to the ship (Hu & Hong, 2003).

## **2.3 Categories/Types of Undue Detention**

Practically, undue detention of ship embodied in:

- a. On the basis of incorrect regulations, such as using the domestic regulations to replace international conventions, or use an old convention instead of new one, or deeming the standard for large tonnage ship applicable to small tonnage ship;
- b. The fact of the ship substandard is not clear or in lack of evidence, such as: the inadequate inspection of crew operational skill; PSCO makes the detention conclusions in the situation of that they incompletely know about the SMS system;
- c. The program of detention is illegal, for example, the process of inspection and detention is out of convention provisions;
- d. Law enforcement body is illegal, for example, the implementation institutions of PSC is not accredited by the flag state, or the PSCO has no qualification certificate to inspect ship;
- e. The administrative behavior is unfair, for example, different ship have different conclusions for the same deficiencies. (Luo & Wang, 2002)

## **2.4 The Harm of Undue Detention**

After the ship was detained by PSCO, a series of harmful impacts could follow. The ship will pay cargo owner a high amount of liquidated damages. The detention information will be shared with other maritime administrative institutions of other port states. As a result, in the next port of destination, the ship is bound to get more attention than other ships, and will be treated as low standard ship for stricter inspections of safety and pollution prevention. The information of detention of ship will further influence the ship credibility on leasing market and shipping market, so its commercial value will jump to fall. (Cai& Tang, 2006)It also indirectly creates great pressure on the crew, ship owner and the company of ship. Further more, to improve the management level will inevitably increase the running cost of the company. In addition, it does the harm to the fairness of the law. Finally, when the detention involves the responsibility of dereliction of duty, some people need to assume corresponding responsibility.

### **Chapter 3: The Reasons for Undue Detention**

The reasons for undue detention are various. Some of them are the intentional behaviors of port state, and some of them are caused by conflict of specified standards in different regions, and the others are caused by the faults of PSCO. In face of PSC, in order to avoid undue detention, ship need to understand the reasons and make a preparation in advance. Port state also needs to find out the causes, as far as possible to prevent it from happening through development of PSC regime and PSCO training.

#### **3.1 Differences in the Standard of PSC in Different Countries**

Although many countries formulate PSC standard, each region has different requirements for ship and crew. Usually the requirements in developed countries are on the high side, and in developing countries are low, so there are different standards of ship detention when establishing domestic regulations of PSC for port state. (Peter, 1994)

In addition, although IMO resolution A. 1052 (27) aims to identify and explain the substandard ship and the standard to detain the ship, but the inspection results mainly rely on the judgment of PSCO, because these procedures are not specific quantitative, only qualitative description for the concepts, such as what are serious deficiencies, the degree of serious deficiencies having no classification in regulations. (Zeng, 2014)So in the actual execution, different PSCO will have different understanding of these concepts, which leads to different results.

And the limited communication between PSCO from different countries also leads to the different inspection standards. Sometimes, if the regulations are not clear, PSCO have to detain the ships judging by personal experience. In this situation, PSCO are easily biased in understanding the relevant provisions, so it is hard to avoid undue

detention.

### **3.2 Improper Interests to Port State in Detaining Ships**

As the political system and opinions are not consistent in many countries, the political or economic conflicts actually happen all the time. So, it is a fact that sometimes the port state detains the ships not for the substandard of ship, but for the reasons of political factors which cause the ships from specific country to be detained unreasonably. These intentional action may be caused by diplomatic tensions between the two governments, or it is a kind of revenge.

For example, a ship from State A is detained by PSCO in the port of State B. If State A thinks that the detention was unreasonable, it maybe happen that a ship from State B would be detained in the port of State A. This situation is completely caused by the subjective perspective and abuse of power (Luo &Wang, 2002). And, some port states consider the profits of their own repairing enterprise to detain the ships for high cost on equipment purchase and ship repairing in the port. They always tell the ship to go to a designated anchorage and shipyard to repair or buy ship equipment.

### **3.3 The Omission or Error by PSCO**

PSCO are the people who implement PSC regulations. The ability requirement of PSCO is very high, which not only requires PSCO to have enough knowledge of ship sailing and structure, are also familiar with international conventions even for update. The inspection content of PSC is very large, and the ability of each PSCO is different or they are good at different field, so they may make the wrong judgment because of their subjective consciousness in ship inspection. Sometimes the vessel will be detained by the omission or error of PSCO. Of course, the communication between PSCO and captain, and sending the wrong message by crew also may make the wrong results of inspection. However, it is very difficult to avoid the omission and error, just possible to reduce it.

## **Chapter 4: Introduction to the Cases of Undue Detention**

The cases of Undue detention of ships have happened in many countries, but it is very difficult to assert the right for the ships. Grievance procedures are complex and time-consuming, and the court usually maintains cautious attitude to overturn the decisions of detention, and the collection of supportive legal provisions and evidence is also difficult. Two cases are below:

### **4.1 Case 1: Detention of the Ship “Noble Dragon” in Australia (Administrative Appeals Tribunal of Australia, 2007)**

#### **4.1.1 Introduction to the Case**

On August 18, 2005, “Noble Dragon” arrived in Australia port Dampier. At 10:00 in the morning, Australia PSCO boarded on ship and took PSC inspection. The PSCO found the radio communication system of ship was unable to successfully send a signal, and this problem has not been recorded in the seaworthiness certificate. After finishing the PSC, PSCO issued "repair before sailing" in PSC report.

In the afternoon, the PSCO were told the wrong information that ship's radio wouldn't be repaired in a short time. They boarded on ship again and issued detainable deficiency instead. But a few minutes ago, the shipping company in Hong Kong had redistributed a new radio system to replace of the old one. After PSCO issued the report, the master received the new radio system, and as soon as possible submitted relevant documents to PSCO who then issued an order to release the ship.

#### **4.1.2 Sue to the Court**

After the case happened, the ship thought it was an action of undue detention and litigated to maritime court. It mainly has three reasons:

- a. When PSCO issued the order to detain ship, they actually were told that the company was redistributing the new radio systems to the ship;
- b. This case belonged to the provisions of IMO Resolution A. 787 (19) Chapter 2 (5.6) : It should be recognized that all equipment is subject to failure and spares or replacement parts may not be readily available. In such cases, undue delay should not be caused if, in the opinion of the PSCO, safe alternative arrangements have been made.
- c. At first the decision in PSC report was repair before sailing, it show that PSCO didn't think the deficiencies of radio communication system serious enough to detain the ship. PSCO had no reason to change the decision. The deficiency report from rectify deficiency before departure upgraded to detainable deficiency does not conform to the procedure for PSC.

#### **4.1.3 Trial Results**

The judge did not support the plaintiff because he thought the decision of PSCO to detain ship was not in violation of regulations for the following reasons.

- a. For the ship said PSCO had known the fact that new radio system had been redistributed on the way before they issued the order to detain ship, the judge' opinion was that due to the ship did not provide any evidence to PSCO, they could consider the deficiency couldn't be rectified at the short time.
- b. The judge admitted that the provisions in IMO Resolution A. 787 (19) emphasized to avoid undue detention, but there were enough reasonable reasons to detain the ship in this case. According to IMO Resolution A. 787 (19) and SOLAS convention, the deficiency of radio system is one of the reasons for the detention of ship. At the same time, the judge accepted the witness testimony of a maritime expert who emphasized the importance of radio system for ship navigation safety.

c. For the prosecution said it was improper decision from rectify deficiency before departure upgraded to detainable deficiency, the judge thought that it couldn't see PSCO have an intentional action to upgrade the deficiency level, because two decisions were both based on one reason of "radio communication system deficiency". And, according to "1912 Australian navigation law" the 210th, when PSCO think the ship is unseaworthiness, they can give provisional detention. After further check, they can give final decision to detain ships. The judge thought that PSCO have complied with this procedure in the case.

## **4.2 Case 2: Detention of the Ship "Lantau Peak" in Canada (Zhang &Wei, 2012)**

The ship "Lantau Peak" belongs to shipping company Budisukma Puncak Sendirian Berhad which is in Malaysia. The ship's classification society is NK in Japan. PSCO detained the ship in Canada for more than four months.

### **4.2.1 Introduction to the Case**

On April 5, 1997, "Lantau Peak" arrived in Vancouver. After inspection, PSCO thought that there were some serious deficiencies of hull structure corrosion and part of life-saving equipment damage, and decided to detain the ship for repair. It made the ship have to be off hire. After that, the Malaysian government and NK Classification Society quickly negotiated with Canadian Maritime Authorities, saying that for consideration of the maintenance costs, they hoped Canada could allow the ship to sail to Shanghai for the rest of the maintenance in the condition of preliminary repair and ship seaworthiness.

On April 15 and May 5, NK Classification Society submitted Seaworthiness Certificate of ship to the Canadian Maritime Authorities twice. On April 25, the Canadian government told the captain that, the regulations allowed the ship to sail to Shanghai for further repair in the condition of updating the brackets that corrosion

degree more than 25% and rectification all other deficiencies. But at last the ship was still not allowed to leave.

On April 23, ship owner applied to the Canadian Board of Steam Ship Inspection for administrative reconsideration. Until July 17, the administrative reconsideration decided to reduce the condition of release of ship, and allowed the ship to sail to Shanghai if updating the brackets of corrosion degree more than 33%. On August 12, the ship completed the required repair and was released from Vancouver.

#### **4.2.2 Unsatisfactory Trial Results**

In 1999, the ship owner lodged a complaint against Canadian government and asked for compensation on grounds of infringement in Canada's federal court. The first-instance judgment, the court ruled the Canadian government to pay the ship owner the compensation of \$6 million and the interest. The Canadian government immediately appealed and the second-instance judgment overturned the initial judgment. The court rejected the compensation request of the ship owner.

#### **4.2.3 The reasons given by the judge**

The reasons said by the judge conclude:

a. The court considered PSC inspection was very professional. The judge noted that the inspection involved the professional knowledge of understanding on ship construction and maintenance, and the judge's understanding of this aspect was very limited. By contrast, the Board of Steam ship Inspection and the PSCO had a certain degree of professionalism for the relevant education, training, work experience and front-line perspective. In the aspect of safety and maintenance of the ship, the judge was obvious disadvantages. So respecting the decisions of PSCO may be a better way.

b. The purpose of PSC was to ensure the ships safety and environmental protection in



the sea. The factors which lead to ship detention were very complex. Its core was ship safety and environmental protection, but also involved the economic and diplomatic factors, at the same time involved the legal relationship relating to flag state, port state, ship owner and Classification Society. The judge thought the decision of detention by PSCO that had comprehensive consideration by a multicenter decision system should be respected by the court.

c. It was a matter of fact that the ship was safe or airworthiness. The decision of PSCO was mainly based on the fact cognizance, so they had discretionary power in fact finding. Discretionary power of the PSCO also was supported by the substantive law. According to article 310 of the Canada Shipping Act, the PSCO had the right to detain the ships when they thought the ships could endanger the safety of life and environment of sea.

## **Chapter 5: The Liability Subject of Undue Detention in the Law**

Although right protection is very difficult after ship being detained for the ship owner, due to the widespread existence of undue detention, especially in the areas where the law system is not perfect, it is necessary for the ship to understand the relevant regulations and provisions in international convention to avoid losses in property and reputation.

### **5.1 The Provisions in International Convention**

For marine environment protection and navigation safety, IMO has formulated the SOLAS, STCW, MARPOL and a series of international conventions. They give port state the power to inspect foreign nationality ship. However, in order to avoid abuse of power to violate the legitimate interests of the ship and stakeholder, namely balance of rights and responsibilities, there are the restrictive provisions in each convention to ensure the compensation right of ship when suffering undue detention. The provisions are mainly in the following:

--The annex of "Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974", Regulation 19(f): *When exercising control under this regulation all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is thereby unduly detained or delayed it shall be entitled to compensation for any loss or damage suffered.*

-- IMO Res. A.1052 (27) "Port State Control Procedures 2011", Article 2.1.4: *All possible efforts should be made to avoid a ship being unduly detained or delayed. If a ship is unduly detained or delayed, it should be entitled to compensation for any loss or damage suffered.*

--MARPOL Convention 73/78, Article 7: *All possible efforts shall be made to avoid a ship being unduly detained or delayed under articles 4, 5 or 6 of the present*

*Convention. When a ship is unduly detained or delayed under articles 4, 5 or 6 of the present Convention, it shall be entitled to compensation for any loss or damage suffered.*

*--STCW 1978 Convention, Article 10 (4): When exercising control under this article, all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is so detained or delayed it shall be entitled to compensation for any loss or damage resulting therefrom.*

## **5.2 The Legal Nature of PSC**

The provisions of the PSC system are regulated by the international conventions and then the parties implement the convention by domestic law. PSC, in essence, is a country administrative institution and their staff carry on implementation of administrative behavior according to the international convention or domestic administrative laws and regulations. Administrative action is a special power that is undertaken to administrative relative person by organization and individual who are authorized by the law or regulations. Administrative legislation is an activity which state administrative bodies to enact administrative rules and regulations according to the statutory authority and legal procedure. (Mustill&Boyd, 1989)

On the basis of the facts, we can reach the conclusion that the legislation of PSC in nature belongs to administrative legislation. In addition, according to the laws and regulations, PSCO are representatives standing for the states to inspect the foreign ships that arrived at the port from the aspects of quality, operation and technology, so as to ensure the safety of the ship and preventing pollution at sea. PSC authorities as an administrative body and the ships in the process of ship inspection form corresponding administrative legal relationship. (Luo&Li, 2005)

### **5.3 Responsibility of the Port State Should for Undue Detention**

PSCO, in the implementation of the ship inspection, for a variety of reasons may carry on undue detention of the ship. When it happens, the port state should be the liability body for the accident. In accordance with the relevant principles of international law, if the harm to foreign national is caused by the administrative behavior of another state, the state should bear corresponding responsibility (Liu&Zhou, 2008, p.183). According to the analysis of the nature of PSC, we know that it belongs to national administrative behavior. From the relevant theories of administrative law, because the wrong administrative behavior lead to the loss of the administrative relative person, the state should take on the liability for compensation.

Administrative compensation refers to the activities of administrative organizations and officers that infringe upon the legitimate rights and interests of citizens or legal persons, and also cause damages which should be compensated by state. In addition, the international court of justice in a recent ruling also concluded that: “behavior in organizations of any country must be seen as the country's behavior”, which is “an established rule of international law”. (Liu, 2009)

It is a kind of illegal behavior of violating international conventions and administrative law for the PSC organization, as an administrative body of state to inspect foreign ship, on behalf of the state, which leads to undue detention. This behavior not only leads to the economic losses of foreign ship, but also the influence of their reputation. Legitimate rights and interests of the ship will suffer greatly. Therefore, it should be compensated by port state.

## **Chapter 6: Remedy of Undue Detention of Ship**

After a ship suffered unfair treatment of undue detention, it is usually that it even doesn't want to fight for its own rights and interests by legal way. On one hand it is afraid of revenge by port state authorities; on the other hand they are not familiar with remedy procedure. It is a fact that there will be no retaliation in most ports; on the contrary, it can help to improve the legal system of port state. So, when undue detention happened in PSC, the ship should take the effective way to argue and obtain the compensation, so as to reduce their losses. The introduction to remedy procedure is as follow.

### **6.1 The Concepts Related to Remedy**

#### **6.1.1 The Parties of Compensation**

Since someone wants to apply for compensation, it is important to find the legal subject in accordance with the law of compensation. The legal subject is the parties of compensation, including the claimant (ship owner), obligor (the state) or its agency for compensatory obligations. Compared with the other complex civil and criminal compensations, the legal subject in state compensation which caused by undue detention is clear.

#### **6.1.2 The Claimant for Compensation**

According to the theory of administrative law, the claimant for compensation is someone who suffers illegal administrative violations and has the right to request the compensation (Liu, 2009). Therefore, in the case of undue detention, the claimant for compensation generally is the ship company that has the right to claim. But actually it depends on the domestic regulations of flag state. Prevailing on the international law, state compensation generally adopts the principle of "reciprocity", namely if there is a equivalent treaty of state compensation, or a precedent case of state

compensation between the flag state of the detained ship and the port state, the ship company has the right to request for the state compensation from port state. (Zhou &Liu, 2008)

Otherwise, according to the general principles of international law, the ship of undue detention cannot have right to request for state compensation from port state; or even lodging a claim for compensation from the port state, the ship is difficult to get compensation. So, the ship has the qualification of claimant for compensation that is based on whether the flag state has built the equal protection treaty of ship with port state.

### **6.1.3 Agency of Obligor**

Generally, in administrative law, administrative compensation is part of the state compensation, together with the judicial compensation to form the national compensation system. The subject of compensation liability is the state. In general, agency for compensatory obligations is the institution which is to accept and deal with the request of administrative compensation on behalf of state, and participate in the administrative litigation. According to the relevant theories of administrative law, agency for compensatory obligations is usually the institution, in which the staff causes damage to claimant for compensation (Liu, 2009). In the case of undue detention, it is the PSC organization that should take the obligation of compensation, because the PSCO are employed by it and it to carry on the action of PSC on behalf of.

Of course, because of the different political system, in some countries the state compensation liability is separated from the public institution liability of compensation. Considering the convenience to operate, some of them set up a specialized authority for compensation, such as in Swiss, the country's financial sector is the agency for compensatory obligations. In this case, according to domestic regulations of port state, the ship directly request this department for administrative

compensation, so PSC organization has no need to bear the financial liability of compensation. (Shi, 2012)

## **6.2 Implementation of the Remedy**

When the inappropriate behavior of PSCO caused undue detention of foreign ship, implementation of compensation should have a compensation procedure, which also should have the support by laws and regulations. Although at present, the international convention said that the ship of undue detention has the right to claim, there are no detailed instructions as to how to get it.

The reason is that the fundamental law systems are different between countries. Different state has a different compensation procedure, so there is no way on the consistency of the rules. Because the compensation procedure is not clear, a lot of ships give up the right to request remedy. (Wang, 2003) Actually, the implementation of the ship's remedy mainly has four ways as follow.

### **6.2.1 Right to Petition PSC Authorities to Change the Decision**

In administrative law, when the state authority illegally or improperly exercises administrative power, the victim has the right to state the facts and reasons to require state authority to change the administrative action. When undue detention happened, if the ship thinks the action of PSCO made a mistake in the condition that it doesn't want to get the remedy by judicial way, it can provide the reasons and evidence to petition the PSC authorities to change the decision of ship detention. After receiving petition from the ship, PSC authorities should investigate it in a certain period of time, and then take the new measures according to the investigation result. If the ship is still not satisfied with the results, it can also request designated department to review it. (Lin, 2013)

### **6.2.2 Remedy by Administrative Reconsideration**

Administrative reconsideration is an important legal system for administrative counterpart to exercise the right of administrative compensation. At present, most countries in the world is regulated the system of administrative reconsideration, which creates the condition for ship to get the compensation when suffering undue detention. However, the regulations of administrative reconsideration system in each country have some differences in concept and content. Although these differences are also an obstacle for ship to obtain remedy, it is notable that the main process of administrative reconsideration is the same in each country. (Si, 2002, p.211)

First, the ship thinks PSCO took inappropriate behavior which violated its legal rights and interests, it can apply to administration reconsideration organization of port state to carry on administrative reconsideration in accordance with domestic administrative law.

Second, after receiving the application, administration reconsideration organization should examine the legality and appropriateness of the application in accordance with the statutory procedures in the prescribed period of time.

Third, administration reconsideration organization makes the decision to investigate and announce the investigation result in the prescribed period of time.

Compared with the petition, administrative reconsideration has strict application condition and time limit for hearing, and it is more complex but effective. In general, when the ship applies for remedy in the process of administrative reconsideration, it also can request for compensation from the relative department.

### **6.2.3 Obtain Remedy by Judicial Litigation**

Because PSCO inspection is the administrative behavior, after suffering undue detention, besides applying for administrative reconsideration, the ship can also



apply maritime court of port state for administrative litigation. The same as the system of administrative reconsideration, administrative litigation system is also different in different country. Generally speaking, the main process has four stages: (Luo & Wang, 2002)

First, if the ship thinks the behavior of the PSCO is improper or illegal, it can propose judicial litigation to maritime court of port state;

Second, the maritime court reviews the legality of administrative act by PSCO in accordance with the legal program;

Third, the court judges whether the claims of the ship are reasonable;

Fourth, the court makes a decision according to the investigation results.

It is worth mentioning that the ship can apply for administrative reconsideration first, if not satisfied with the results, it can then put forward the administrative litigation. It also can directly submit administrative litigation to the maritime court.

#### **6.2.4 Apply Remedy by MoU**

The remedy by MoU is that, in the case that a dispute cannot be resolved between the ship and port state, ship's flag state or classification society can apply the secretariat of MoU to solve the problem. The secretariat of MoU will form a group of Detention Review Panel to review the case. (Zhang&Wei, 2012) However, this way has certain limitation because the secretariat of MoU is just a coordination department who cannot interfere in administrative power of member states.

### **6.3. The Scope of Compensation**

#### **6.3.1 The condition of compensation**

In addition, there should have three preconditions for compensation,

- There is concrete evidence to prove the loss of ship exists;
- It must confirm PSCO has improper behavior;
- There is causal relationship between the loss of ship and undue detention, namely the loss of ship is caused by undue detention.

### **6.3.2 The Content of Compensation**

By the analysis of above, if the PSCO behavior caused the loss of ship, the port state shall bear the liability for compensation. However, the specific scope of compensation should be in accordance with the provisions of national compensation law, generally in the limitation of the maximum loss of ship. Although the provisions of compensation law are not the same, according to the principle of fair, the compensation scope includes the following aspects:

- a. The daily cost of the ship during period of undue detention, mainly including the crew wages, board expenses, harborage dues.
- b. Overdue fine by undue detention. If the undue detention causes ship overdue, the ship owner may pay penalty to the cargo owner due to breach of contract.
- c. The profit loss of ship during period of undue detention. It means that if the ship is not detained, under normal conditions, it can obtain the profits.
- d. The cargo loss caused by undue detention. Whether the period of detention results in the cargo loss, such as cargo decay or expiration, it also needs to compensate.

Of course, it is sure that how to compensate is finally according to provisions of domestic compensation law of port state.

#### **6.4 The Controversies on Limitation of Compensation Liability**

Limitation of compensation liability is that the compensation subject does not bear all the liability for the loss of ship, and it only needs to bear part of compensation. When PSCO causes undue detention, if the limitation of liability may be applied in compensation system is a topic in controversy at present. International conventions and regional MoU did not make specific provisions. Just domestic laws have a small amount of rules in several countries. Israel "Port State Authorities Act" said, port state authorities do not have any limitation of liability for compensation. This rule has been clear that the Israeli port state control authorities need to take full liability to pay compensation for the ship of undue detention. ( Luo &Wang, 2002)

However, the rules in the other countries said, in certain situations the port state authorities can apply for the limitation of liability. As Britain's "Merchang Shipping Act 1900", Article 2 said: Without intentional misconduct or gross negligence causes losses of ships and cargo, the port state authorities can enjoy limitation of liability. (Luo &Wang, 2002)

It is the most controversial if international convention should refer to limitation of liability according to "Maritime Law". It said when there are no significant errors in the subjective, port state authority can apply for limitation of liability. However, from legal principle analysis, it is the nature of state compensation, so the applicable law is public law and the compensation subject is the state. It is different that, when ship in violation of the provisions of "maritime law", the applicable law is private law and the compensation subject is private body. It is necessary to set up compensation limitation for the protection of private body. And for the state that has enough ability of compensation, setting compensation limitation is not suitable obviously.

## **Chapter7: The Measures to Reduce Undue Detention**

MoU system and port state authorities play the key role in PSC that is making an important contribution to navigation safety, marine environment protection and the development of the international shipping industry. However, because the development of PSC system does not have a long time, there are many deficiencies, especially in aspect of ship detention. Therefore, to solve the problem of undue detention is of great significance. It should set up the advanced system to ensure healthy development of PSC and take effective intervention measures to ship. There some pieces of advice to reduce undue detention.

### **7.1 Detailing the PSC System and Unified Standards of Ship Detention**

#### **7.1.1 The Major Problem at Present**

Lack of unified standard of ship detention is an important cause of undue detention for PSC. For example, both in international conventions and domestic laws of port state the definition of “substandard ship” is quantitative, which leads to different standards on “substandard ship” in different regions and different PSCO. It is also a controversial issue whether qualified crew should be judged by a qualified certificate or actual ship operation ability and technology. In addition, ship deficiency also lacks quantitative standard. For example, what is the “obvious deficiency” is hard to evaluate. The “obvious deficiency” just relies on the subjective understanding and judgments of PSCO. (Zhang, 2000)

#### **7.1.2 The Effective Measures**

Therefore, at first IMO should develop a unified standard of quantitative. And according to domestic situation, port state can choose to adopt the standard into the

domestic laws and regulations. Second, at present the qualitative standard should be quantitatively detailed, so as to minimize discretion in PSC inspection. In addition, for some standards difficult to quantitative, it can establish index system of detention decisions to solve the problem. It is that the port state invites maritime experts to carry on the comprehensive analysis for the detention intention. According to index system of detention decisions, the expert evaluates and gives the comprehensive points to the object. (Cai&Tang, 2006)The points determine whether the ship will be detained. This system can objectively reflect the actual condition of the vessel, and the final conclusion of detention is more reasonable and persuasive.

So, only by establishing unified standard of inspection and detention can PSCO accurately make the decision of ship detention and reduce the errors or mistakes in the process of PSC. In this way, PSC can become more and more transparent and fair that can effectively reduce the probability of undue detention of the ship.

## **7.2 Training of PSCO to Improve Comprehensive Ability**

In a sense, to improve the quality of the PSCO is a fundamental and effective measure to reduce undue detention of ship. Port state authorities should strengthen the training of the PSCO to comprehensively improve moral quality and professional skill of them.

### **7.2.1 Improving the Moral Quality of PSCO**

At present, the MoU organizations are taking active measures to regularize the moral quality of PSCO. For example, in September 2006 the committee of Tokyo MoU for PSC passed the "Code of Conduct for PSCO ", clearly pointing out that "integrity, professional and transparent" is the code of conduct for PSCO. When taking the inspection, PSCO is easy to be influenced by personal bias or commercial temptation, which makes the wrong decisions. Therefore, the moral quality education is very necessary for PSCO to realize the seriousness and significance of PSC, and force

them to consciously strengthen self-discipline. A good PSCO, when facing the commercial temptation, are able to resist the lure of economic benefits and control them not to make illegal choices; and have objective and fair political stance, and treat each ship fairly regardless of which flag state the ship belongs to.

### **7.2.2 Improving the Profession Skill of PSCO**

PSC is a job that has a high demand for professional maritime knowledge. In practice, because there are so many convention provisions to implement, even some PSCO who have very rich experience, also often need to consult convention provisions while checking the ship. If the professional skill of PSCO is not enough, it will inevitably affect the quality of ship inspection, at this time undue detention is high possible to happen. Therefore, port state authorities should choose the people who have professional maritime background and rich maritime knowledge do the job of PSC. The professional skills also include language level.

### **7.2.3 Updating Professional Knowledge**

As the international conventions and domestic laws and regulations are often revised, PSCO should actively pay attention to the newest action of IMO and domestic maritime organizations. Once finding new provisions appeared in convention or domestic regulations, PSCO should immediately learn them so as to update knowledge.

### **7.2.4 Developing the Ability to Deal with the Unexpected Incidents**

PSCO should have good psychological quality, and familiar with the port and ship environment, and fully control the contents and procedures of emergence. When emergent events happen, they can solve it quickly and effectively.

### **7.3 Strengthen the Administrative Supervision**

Without effective supervision measures, the PSC system is difficult to implement in order. Administrative supervision can improve the level of ship inspection. The specific measures of strengthening the administrative supervision are in followings.

#### **7.3.1 Setting up Supervision Institution**

Except for a PSCO team, port state authorities should also set up supervision institution of PSC. The duty of supervision institution is to regularly supervise PSCO in accordance with the law. If finding out the problems existing in inspection, it must timely take measures to correct their behavior, and avoid undue detention of ship.

#### **7.3.2 Establishing Supervision Rules**

PSC mechanism should include "PSC supervision rules". It should make specific provisions in detail of the supervision subject and supervision procedure.

#### **7.3.3 Setting up Responsibility System**

It is necessary to establish accountability system, reward and punishment system. Illegal behavior in PSC should be investigated for responsibility. The good PSCO should be reasonably reward.

So, establishing a perfect supervision system can effectively guarantee the PSCO who carry on the task in accordance with the law. And the rewards and punishment system can stimulate the vigor of PSCO.

## **Chapter 8: Conclusion**

At present, the development of PSC system is not balanced in the world. There is a big gap between developed countries and developing countries actually. However, it cannot be denied that, since PSC system was set up 30 years ago, it has played a huge role to maintain safety of ship and protect the marine environment. At the same time, the international shipping business has got rapid development.

PSC system brings us great positive significance, also creates many problems. The problem of undue detention is one of them. With the development of ship industry and market demanding and ship's tonnage increase rapidly, the ship's loss has become very big most of time for undue detention. Due to lack of unified quantitative standard and the professional level of PSCO is uneven, so infringement behaviors of PSCO exist in many countries.

Where there is infringement behavior there is remedy. After undue detention happened, the ship should take the right remedy measures to get the corresponding compensation. Although the ship can take a variety of ways to achieve their goals, but in all of the remedy way, port state compensation is the best way. Because PSC behavior in essence is a national administrative act, administrative act causes infringement behaviors, and then the compensation liability ought to be assumed by port state. In addition, as the object of PSC is a foreign ship, if port state does not assume liability to pay compensation, it may cause the international dispute between flag state and port state.

Undue detention has posed great threat to the development of PSC system, so it is an urgent to take effective measures to improve it. At present, a unified inspection



standard, setting up the supervision system and improving the inspection quality can effectively reduce the undue detention of the ship.

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