

UNILATERAL PORT STATE JURISDICTION

**THE QUEST FOR UNIVERSALITY IN THE PREVENTION,
REDUCTION AND CONTROL OF SHIP-SOURCE POLLUTION**

Nelson F. Coelho

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THE QUEST FOR UNIVERSALITY IN THE PREVENTION, REDUCTION AND CONTROL OF
SHIP-SOURCE POLLUTION

UNILATERALE RECHTSMACHT VAN HAVENSTATEN

VERKENNING VAN UNIVERSALITEIT IN DE PREVENTIE REDUCTIE EN CONTROLE VAN ZEEVERONTREINIGING
DOOR SCHEPEN

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ABBREVIATIONS

AB	Appellate Body of the World Trade Organization
AFS	International Convention on the Control of Harmful Anti-fouling Systems in Ships
AMSA	Australian Maritime Safety Authority
APPS	Act to Prevent Pollution from Ships (33 U.S.C. §§1905-1915)
Art.	Article
BPR	Biocidal Product Regulation
BPR	EU Biocidal Product Regulation
BWM	Ballast Water Management
CARB	California Air Resources Board
CCR	California Code of Regulations
DWT	Deadweight ton (ship's weight carrying capacity, excluding ship's weight)
EC	European Communities (1993-2009)
EEC	European Economic Community (1958-1993)
EEZ	Exclusive Economic Zone
EMSA	European Maritime Safety Authority
ESI	Environmental Ship Index
EU	European Union (2009 - ...)
FAO	Food and Agriculture Organization
FSA	Fish Stocks Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GHG	Greenhouse Gases
GRT	Gross register tonnage (total internal volume of a ship)
HELCOM	Baltic Marine Environment Protection Commission
HFO	Heavy Fuel Oil
HKC	Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009
IAS	Invasive Aquatic Species
ICJ	International Court of Justice
ILA	International Law Association
ILC	United Nations International Law Commission

ISPS	International Ship and Port Facility Security Code
MARPOL	International Convention for the Prevention of Pollution from Ships
MEPC	Marine Environment Protection Committee
MoU	Memorandum(/a) of Understanding
MRV	<i>Monitoring, reporting and verification</i>
NO _x	Nitrogen Oxides
OGV	Ocean-Going Vessel
OILPOL	International Convention for the Prevention of Pollution of the Sea by Oil
OJ	Official Journal of the European Union
ORB	Oil Record Book
PCA	Permanent Court of Arbitration
PRC	People's Republic of China
PSMA	Port State Measures Agreement
PSSA	Particularly Sensitive Sea Area
RFMO	Regional Fisheries Management Organization
ROC	Republic of China (Taiwan)
SCOTUS	Supreme Court of the United States
SCR	Selective Catalytic Reduction
SOLAS	International Convention for the Safety of Life at Sea
SO _x	Sulphur Oxides
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS III	Third United Nations Conference on the Law of the Sea, 1973-82
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty System
USC	Code of Laws of the United States of America
USCG	United States Coast Guard
VCLT	Vienna Convention on the Law of Treaties
VOC	Volatile Organic Compounds

Abbreviations

WCNH	Convention Concerning the Protection of the World Cultural and Natural Heritage
WPSP	World Port Sustainability Program
WTO	World Trade Organization
OPA90	USA Ocean Pollution Act 1990

INTERNATIONAL INSTRUMENTS

Treaties

1648

Osnabrücker Friedensvertrag (Instrumentum Pacis Osnabrugensis)

Münsterscher Friedensvertrag (Instrumentum Pacis Monasteriensis).

1713

Treaty of Peace between France and Prussia, concluded at Utrecht the
11th of April 1713

1899

Hague II

Convention with Respect To The Laws And Customs Of War On Land

1921

Convention and Statute on the Regime of Navigable Waterways of
International Concern, Barcelona

1923

Convention and Statute on the International Régime of Maritime Ports.
League of Nations

1945

United Nations Charter

1952

International Convention for the Unification of Certain Rules Relating
to the Arrest of Sea-going Ships

1954

OILPOL

International Convention for the Prevention of Pollution of the Sea by
Oil

1958

CHS

Convention in the High Seas

1959

The Antarctic Treaty

1963

Convention on offences and certain other acts committed on board aircraft. Signed at Tokyo on 14 September 1963

1969

International Convention on Civil Liability for Oil Pollution Damage

1971

NUCLEAR

Convention relating to civil liability in the field of maritime carriage of nuclear material

FUND 71

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

1972

UNESCO

Convention for the Protection of the World Cultural and Natural Heritage

London

International Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter

Convention (LC)

1973

MARPOL 73

International Convention for the Prevention of Pollution from Ships

1974

SOLAS

International Convention for the Safety of Life at Sea

1976

Protocol to the International Convention on Civil Liability for Oil Pollution Damage

Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

1978

STCW

International Convention on Standards of Training, Certification and Watchkeeping for Seafarers

International Instruments

MARPOL 73/78	Protocol of 1978 to the International Convention for the Prevention of Pollution from Ships
1979	
	Agreement Governing the Activities of States on the Moon and Other Celestial Bodies
1981	Treaty between the Government of Canada and the Government of the United States of America on Pacific Coast Albacore Tuna Vessels and Port Privileges
1982	
UNCLOS	United Nations Convention on the Law of the Sea
Paris MoU	Paris Memorandum of Understanding on Port State Control
1983	
Bonn Convention	Convention on the Conservation of Migratory Species of Wild Animals
1986	
VCLT	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations
	United Nations Convention on Conditions for Registration of Ships
1990	
OPRC	International Convention on Oil Pollution Preparedness, Response and Cooperation
1991	
	Protocol On Environmental Protection to The Antarctic Treaty
1992	
CBD	Convention on Biological Diversity
UNFCCC	United Nations Framework Convention on Climate Change
Viña del Mar MoU	Acuerdo Latinoamericano de Viña del Mar
1993	
Tokyo MoU	Tokyo Memorandum of Understanding on Port State Control
1994	

United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa

1995

FSA United Nations Fish Stocks Agreement

1996

Caribbean MoU Caribbean Memorandum of Understanding on Port State Control
International Convention on Liability And Compensation for Damage
in Connection with the Carriage of Hazardous And Noxious
Substances

Protocol to the Convention on the Prevention of Marine Pollution by
Dumping of Wastes and Other Matter

DARIWA Draft articles on responsibility for internationally wrongful acts

1997

Mediterranean MoU Memorandum of Understanding on Port State Control in the
Mediterranean Region

1999

OPRC-HNS Protocol on Preparedness, Response and Co-operation to pollution
Incidents by Hazardous and Noxious Substances
International Convention on Arrest of Ships

2000

Black Sea MoU Black Sea Memorandum of Understanding on Port State Control

2001

International Convention on Civil Liability for Bunker Oil Pollution
Damage.

AFS International Convention on the Control of Harmful Anti-fouling
Systems on Ships

2004

BWM International Convention for the Control and Management of Ship's
Ballast Water and Sediments

Riyadh MoU The Riyadh Memorandum of Understanding on Port State Control in
the Gulf Region

2007

International Instruments

Nairobi International Convention on the Removal of Wrecks

2009

SR/HKC Hong Kong International Convention for the Safe and Environmentally Sound recycling of Ships

PSMA Agreement on Port State Measures to Prevent, deter and Eliminate Illegal, Unreported and Unregulated Fishing

2010

Protocolo Complementario y Ampliatorio a los Convenios de Ilo suscritos entre Bolivia y Perú

2015

Paris Agreement Paris Agreement under the United Nations Framework Convention on Climate Change

United Nations

A/31/10 Report of the International Law Commission on the work of its twenty-eighth session, 3 May - 23 July 1976, Official Records of the General Assembly, Thirty-first session, Supplement No. 10

A/52/491 Oceans and The Law Of The Sea: Law Of The Sea. Impact of the entry into force of the 1982 United Nations Convention on the Law of the Sea on related existing and proposed instruments and programmes. Report of the Secretary-General. 20 October 1997.

A/54/429. Oceans and the law of the sea Report of the Secretary-General. 30 September 1999

A/61/10, Report of the International Law Commission Fifty-eighth session (1 May-9 June and 3 July-11 August 2006) General Assembly Official Records Sixty-first session Supplement No. 10

A/63/63, Report on Oceans and the Law of the Sea. 10 March 2008

A/AC.138/SC.III/L.40 (1973 proposal by the USA delegation in the Seabed Committee)

A/CN.4/148 Report of the International Law Commission covering the work of its Fourteenth Session, 24 April–29 June 1962, Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209)

A/CN.4/190 Draft articles on the law of treaties: text as finally adopted by the Commission on 18 July 1966 (reproduced at para. 38 of document A/6309/Rev.1).

A/CN.4/L.703, International Law Commission, Fifty-eighth session Geneva, 1 May-9 June and 3 July-11 August 2006, Unilateral acts of States: Report of the Working Group — conclusions of the International Law Commission relating to Unilateral acts of States, 20 July 2006

A/CN.4/SER.A/1976/Add.1 (Part 2) Report of the International Law Commission on its twenty-eighth session, Yearbook of the International Law Commission, 1976, Volume II, Part Two

A/CN.4/SER.A/1980/Add.1 (Part 1) Yearbook Of The International Law Commission 1980, Volume II, Part One, Documents of the thirty-second session (excluding the report of the Commission to the General Assembly)

A/CONF.32/41, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968,

A/CONF.62/C.3/L.24. Belgium, Bulgaria, Denmark, German Democratic Republic, Germany, Federal Republic of, Greece, Netherlands, Poland and United Kingdom of Great Britain and Northern Ireland: draft articles on the prevention, reduction and control of marine pollution, 21 March 1975

A/CONF.62/C.3/SR.14, UNCLOS III, 14th meeting Friday, 9 August 1974, at 3.35 p.m. Chairman: Mr. A. YANKOV (Bulgaria).

A/CONF.62/C.3/SR.19. 19th meeting of the Third Committee, para. 10: “Although such changes in jurisdiction would not be a panacea, he was confident that the system of port State jurisdiction would be of value in the war against pollution by complementing better control by the flag State”.

International Instruments

A/CONF.62/WP.10 Informal Composite Negotiating Text, Doc. (15 July 1977).

A/CONF.62/WP.8/PART III Third United Nations Conference on the Law of the Sea, 1973-82, volume IV, Documents of the Conference, Third Session: Informal single negotiating text, part III.

A/RES/58/240. Resolution adopted by the General Assembly on 23 December 2003. *Oceans and the law of the sea.*

A/RES/68/70 (2013) *Oceans and the law of the sea*

S/PV.5663, 5663rd Meeting (AM & PM) SC/9000, 17 April 2007 Security Council Holds First-Ever Debate On Impact Of Climate Change On Peace, Security, Hearing Over 50 Speakers

United Nations Economic and Social Council (UNESCO)

39 C/40, 24 August 2017, Proclamation of an International Day Of Light

CC-81/CONF/003/6, 5 January 1982, Convention Concerning The Protection Of The World Cultural And Natural Heritage

CONF 003 VIII.15, 5th session of the Committee (CONF 003), 1981, Nominations to the World Heritage List (inscribed sites)

United Nations Framework Convention on Climate Change (UNFCCC)

Submission by the International Maritime Organization (IMO) United Nations Climate Change Conference – Eighth Session Of The Ad Hoc Working Group On Long-Term Cooperative Action, Fifteenth Conference Of The Parties – Cop 15 7 to 18 December 2009 - Copenhagen, Denmark. Control Of Greenhouse Gas Emissions From Ships Engaged In International Trade, 29.

International Maritime Organization (IMO)

A 20/Res.868 - Resolution A.868(20) Adopted On 27 November 1997 Guidelines For The Control And Management Of Ships' Ballast Water To Minimize The Transfer Of Harmful Aquatic Organisms And Pathogens. 1 December 1997.

A 21/Res.895 - Resolution A.895(21) Adopted On 25 November 1999 Anti-Fouling Systems Used On Ships. 4 February 2000.

A 23/Res.949 - Resolution A.949(23) Adopted On 5 December 2003 (Agenda Item 17) Guidelines On Places Of Refuge For Ships In Need Of Assistance. 5 March 2004.

A 25/5(B)/2/Corr.1

A 27/Res.1052 - Resolution A.1052(27) Adopted On 30 November 2011 (Agenda Item 9) Procedures For Port State Control, 2011. 20 December 2011.

A 28/Res.1060 - Resolution A.1060(28) Adopted On 29 November 2013 (Agenda Item 8) Strategic Plan For The Organization (For The Six-Year Period 2014 To 2019). 27 January 2014.

A 774(18) - Resolution A.774(18). Adopted On 4 November 1993 (Agenda Item 13). Guidelines For Preventing The Introduction Of Unwanted Aquatic Organisms And Pathogens From Ships' Ballast Water And Sediment Discharges.

A 868(20) Resolution A.868(20) Adopted On 27 November 1997. Guidelines For The Control And Management Of Ships' Ballast Water To Minimize The Transfer Of Harmful Aquatic Organisms And Pathogens,

A.572(14), Of 20 November 1985

A.682 (17) *Regional Co-Operation In The Control Of Ships And Discharges* (1991)

A.682(17) Regional Cooperation In The Control Of Ships And Discharges.

A.710(17)

C/Xxxiii/14/1 "Proposal On An International Convention On The Regime Of Vessels In Foreign Ports" Note By The Government Of The Union Of Soviet Socialist Republics

International Instruments

LC 37/16, Annex 9. 2015 Guidelines For The Application Of The De Minimis Concept Under The London Convention And Protocol

LEG Xxvi/2 Imo, Draft Ussr Convention

LEG/Misc.7 19 January 2012 Implications Of Unclos For The Imo

LEG/Misc.8. 30 January 2014. Implications Of The United Nations Convention On The Law Of The Sea For The International Maritime Organization. Study By The Secretariat Of The International Maritime Organization (Imo)MEPC 26/4. The Presence And Implication Of Foreign Organisms In Ship Ballast Water Discharged In The Great Lakes. 4 July 1988.

MEPC 49/22/Add.1 - Report Of The Marine Environment Protection Committee On Its Forty-Ninth Session Attached Are Annexes 1 To 12 To The Report. Annex 9. **Resolution MEPC.104(49)** Adopted On 18 July 2003 Guidelines For Brief Sampling Of Anti-Fouling Systems On Ships

MEPC 58/23/Add.1 Report Of The Marine Environment Protection Committee On Its Fifty-Eighth Session. 17 October 2008. Annex 13 **Resolution MEPC.176(58)** Adopted On 10 October 2008 Amendments To The Annex Of The Protocol Of 1997 To Amend The International Convention For The Prevention Of Pollution From Ships, 1973, As Modified By The Protocol Of 1978 Relating Thereto (Revised Marpol Annex Vi)

MEPC 60/4/37 - Prevention Of Air Pollution From Ships. Consideration Of A Market-Based Mechanism: Leveraged Incentive Scheme To Improve The Energy Efficiency Of Ships Based On The International Ghg Fund. 15 January 2010

MEPC 60/4/37/Corr.1 - Prevention Of Air Pollution Prevention From Ships. Consideration Of A Market-Based Mechanism: Leveraged Incentive Scheme To Improve The Energy Efficiency Of Ships Based On The International Ghg Fund. Corrigendum. 16 March 2010.

MEPC 61/Inf.2. Reduction Of Ghg Emissions From Ships Full Report Of The Work Undertaken By The Expert Group On Feasibility Study And Impact Assessment Of Possible Market-Based Measures. Note By The Secretariat. 13 August 2010.

MEPC 62/24 - Report Of The Marine Environment Protection Committee On Its Sixty-Second Session. 26 July 2011. Annex 2 **Resolution MEPC.196(62)** Adopted On 15 July 2011. 2011 Guidelines For The Development Of The Ship Recycling Plan. Annex 3. **Resolution MEPC.197(62)** Adopted On 15 July 2011. 2011 Guidelines For The Development Of The Inventory Of Hazardous Materials. Annex 6. **Resolution MEPC.198(62)**. Adopted On 15 July 2011 2011 Guidelines Addressing Additional Aspects To The Nox Technical Code 2008 With Regard To Particular Requirements Related To Marine Diesel Engines Fitted With Selective Catalytic Reduction (Scr) Systems

MEPC 62/24/Add.1 - Report Of The Marine Environment Protection Committee On Its Sixty-Second Session. 26 July 2011. **Resolution MEPC.203(62)** Adopted On 15 July 2011 Amendments To The Annex Of The Protocol Of 1997 To Amend The International Convention For The Prevention Of Pollution From Ships, 1973, As Modified By The Protocol Of 1978 Relating Thereto (Inclusion Of Regulations On Energy Efficiency For Ships In Marpol Annex Vi). Annex 26 **Resolution MEPC.207(62)** Adopted On 15 July 2011. 2011 Guidelines For The Control And Management Of Ships' Biofouling To Minimize The Transfer Of Invasive Aquatic Species

MEPC 63/23 - Report Of The Marine Environment Protection Committee On Its Sixty-Third Session. 14 March 2012. Annex 4 **Resolution MEPC.210(63)** Adopted On 2 March 2012 2012 Guidelines For Safe And Environmentally Sound Ship Recycling. Annex 5. **Resolution MEPC.211(63)** Adopted On 2 March 2012 2012 Guidelines For The Authorization Of Ship Recycling Facilities

MEPC 65/22 - Report Of The Marine Environment Protection Committee On Its Sixty-Fifth Session. 24 May 2013.

MEPC 70/18/Add/1. - Report Of The Marine Environment Protection Committee On Its Seventieth Session. 11 November 2016. **Res MEPC.278(70)** (Adopted On 28 October 2016) Amendments To The Annex Of The Protocol Of 1997 To Amend The International Convention For The Prevention Of Pollution From Ships, 1973, As Modified By The Protocol Of 1978 Relating Thereto Amendments To Marpol Annex Vi (Data Collection System For Fuel Oil Consumption Of Ships). **Res. MEPC.282(70)**

(Adopted On 28 October 2016) 2016 Guidelines For The Development Of A Ship Energy Efficiency Management Plan (Seemp).

MEPC.1/Circ.723. Information On North American Emission Control Area (Eca) Under Marpol Annex Vi. 13 May 2010.

MEPC.1/Circ.792. Guidance For Minimizing The Transfer Of Invasive Aquatic Species As Biofouling (Hull Fouling) For Recreational Craft. 12 November 2012.

MEPC.1/Circ.811. Guidance For Evaluating The 2011 Guidelines For The Control And Management Of Ships' Biofouling To Minimize The Transfer Of Invasive Aquatic Species. 13 June 2013.

MEPC.1/Circ.833 Guidelines For The Reduction Of Underwater Noise From Commercial Shipping To Address Adverse Impacts On Marine Life. 7 April 2014.

MEPC.31/21. - Report Of The Marine Environment Protection Committee On Its Thirty-First Session. 29 July 1991. Annex 16. **Resolution MEPC.50(31)**. Adopted On 4 July 1991. International Guidelines For Preventing The Introduction Of Unwanted Aquatic Organisms And Pathogens From Ships' Ballast Water And Sediment Discharges

MEPC.49/8 - Identification And Protection Of Special Areas And Particularly Sensitive Sea Areas. Extension Of Existing Great Barrier Reef PSSA To Include The Torres Strait Region. 10 April 2003

MEPC.53/24/Add.1 - Report Of The Marine Environment Protection Committee On Its Fifty-Third Session - Annexes 1 To 14. 1 August 2005.

MEPC.53/24/Add.2 - Report Of The Marine Environment Protection Committee On Its Fifty-Third Session - Annexes 15 To 38. 22 July 2005. **Resolution MEPC.133(53)** - Designation Of The Torres Strait As An Extension Of The Great Barrier Reef Particularly Sensitive Sea Area. Revokes MEPC.45(30). 22 July 2005

MEPC.53/Inf.12 - Recycling Of Ships. Report On The Current Status Of Ship Recycling At Alang In India. 13 May 2005.

MEPC.55/23 - Report Of The Marine Environment Protection Committee On Its Fifty-Fifth Session. 16 October 2006

MEPC.55/23 - Report Of The Marine Environment Protection Committee On Its Fifty-Fifth Session. 16 October 2006.

MEPC.55/8/2/Add.1 - Identification And Protection Of Special Areas And Particularly Sensitive Sea Areas Outcome Of Nav 52 Related To Pssas. Note By The Secretariat. 7 September 2006.

MEPC.55/8/3. - Identification And Protection Of Special Areas And Particularly Sensitive Sea Areas. Torres Strait. Submitted By International Chamber Of Shipping (Ics), Bimco, Intercargo And Intertanko. 10 August 2006.

MEPC.60/22 – Report Of The Marine Environment Protection Committee On Its Sixtieth Session. 12 April 2010. Annex 10 **Resolution MEPC.189(60)** – Amendments To The Annex Of The Protocol Of 1978 Relating To The International Convention For The Prevention Of Pollution From Ships, 1973 (Addition Of A New Chapter 9 To Marpol Annex I)

MEPC.60/4/40 - Prevention Of Air Pollution From Ships. Achieving Reduction In Greenhouse Gas Emissions From Ships Through Port State Arrangements Utilizing The Ship Traffic, Energy And Environment Model, Steem. 15 January 2010.

MEPC.64/5/4 - Reduction Of Ghg Emissions From Ships. Elaboration On The Port State Levy Proposal. 10 July 2012.

MEPC.67/20 - Report Of The Marine Environment Protection Committee On Its Sixty-Seventh Session. 31 October 2014. **Resolution MEPC.252(67)** Adopted On 17 October 2014 Guidelines For Port State Control Under The Bwm Convention. **Resolution MEPC.256(67)** Adopted On 17 October 2014 Amendment To The Annex Of The Protocol Of 1978 Relating To The International Convention For The Prevention Of Pollution From Ships, 1973 Amendment To Marpol Annex I (Amendment To Regulation 43)

International Instruments

MSC.76/4/15 - Measures To Enhance Maritime Security. Draft Regulation Xi-2/9 – Control. 1 November 2002

MSC.94/3/1 - Consideration And Adoption Of Amendments To Mandatory Instruments. Adoption Of The International Code For Ships Operating In Polar Waters (Polar Code). 30 July 2014.

MSC/Circ. 1067 - Early Implementation Of The Special Measures To Enhance Maritime Security. 28 February 2003.

MSC/Circ.1111 - Guidance Relating To The Implementation Of Solas Chapter Xi-2 And The Isps Code. 7 June 2004

Nav.52/18 - Report To The Maritime Safety Committee. 24 August 2006.

Nav.59/20 - Report To The Maritime Safety Committee. 1 October 2013.

United Nations Environmental Programme (UNEP)

UNEP/CHW/LWG/4/, Provisional list of meeting documents organized by provisional agenda item, 7 March 2017.

Antarctic Treaty Consultative Meeting (ATCM)

Resolution 7(2010) “Enhancement of Port State Control for Passenger Vessels Bound for the Antarctic Treaty Area”

Final Report of the Twenty First Antarctic Treaty Consultative Meeting , (15) The United Kingdom introduced Working Paper (XXI ATCM/WP 22)

Council of Europe

Recommendation, No. R (97)11/E of the Committee of Ministers to Member States on the Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law (June 12, 1997)

National Instruments

NATIONAL INSTRUMENTS

Australia

Great Barrier Reef Marine Park Act 1975; No. 85, 1975

Environment Protection and Biodiversity Conservation Act 1999. No. 91, 1999.

Navigation Act 1912; Act No. 4 of 1913 as amended

AMSA Marine Notice 16/2006

AMSA Marine Notice 8/2006

AMSA Marine Notice 7/2009 (April 2009)

State of Victoria, Australia - Environmental protection (ships' ballast water) regulations 2006
[S.R. No. 59-2006]

Navigation Act 2012 No. 128, 2012 An Act relating to maritime safety and the prevention of
pollution of the marine environment, and for related purposes

House of Representatives Committees, 10 May 2013 Imposition of conditions on port access
for cruise ships: requirements regarding crimes at sea.

Argentina

Prefectura Naval Argentina - Ordenanza No. 7-98 (DPMA) - Prevencion de la contaminacion
con organismos acuaticos en el lastre de los buques destinados a puertos Argentinos
de la cuenca de plata

Belize

Maritime Areas Act Chapter 11 Revised Edition 2000 Showing The Law As At 31st December,
2000 This is a revised edition of the law, prepared by the Law Revision Commissioner
under the authority of the Law Revision Act, Chapter 3 of the Laws of Belize, Revised
Edition 1980 - 1990

Bolivia

Constitución Política del Estado

Brazil

Brazilian Navy Ports & Coastal Directorate 2005 Regulations on Ballast Water [NORMAM 20/DPC/Rev.1]

California (USA)

Biofouling Management Regulations to Minimize the Transport of Nonindigenous Species from Vessels Arriving at Californian Ports

California Air Resources Board, Marine Notice 2016-1, April 2016. California Ocean-Going Vessel Fuel Regulation1 to Remain in Effect Subject to Reevaluation in Two Years.

California Code of Regulations - Article 4.6 Ballast Water Regulations for Vessels Operating within the Pacific Coast Region

California Code of Regulations - Article 4.7 Performance Standards and Assessment Protocols for the discharge of ballast water for vessels operating in California waters

California Code of Regulations, Title 13 § 2299.2(a). USA California Code of Regulations, Title 17, § 93118.2(a).

California Environmental Protection Agency, Air Resources Board, Public Hearing To Consider Adopting Regulations On Fuel Sulfur And Other Operational Requirements For Ocean-Going Vessels Within California Waters And 24 Nautical Miles Of The California Baseline.

California State Lands Commission, File Ref: W9777.234 Marine Invasive Species Program Annual Vessel Reporting Form

Legislative Council of the State of California, Assembly Bill No. 32, [Approved by Governor September 27, 2006. Filed with Secretary of State September 27, 2006.]

National Instruments

State of California, 2017. Re: Biofouling Management Regulations to Minimize the Transport of Nonindigenous Species from Vessels Arriving at California Ports, Effective October 1, 2017.

State of California, Assembly Bill No. 1312, Approved by Governor October 8, 2015

Canada

Bill C-48. Oil Tanker Moratorium Act. An Act respecting the regulation of vessels that transport crude oil or persistent oil to or from ports or marine installations located along British Columbia's north coast

Bill C-606, An Act to amend the Canada Shipping Act, 2001 (prohibition against the transportation of oil by oil tankers on Canada's Pacific North Coast)

Notices to Mariners 1 to 46, ”

Guidelines For The Control Of Ballast Water Discharge From Ships In Waters Under Canadian Jurisdiction, TP 13617E (04/2018)

Chile

DGTM. and MM. Ord. No. 12600-228 VRS. Order for preventive measures to avoid transmission of harmful organisms and epidemics by ballast water (1995)

Ecuador

Constitución de la República del Ecuador

France (EU)

LOI constitutionnelle n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement

Code des Transports, créé par l'ordonnance no 2010-1307 du 28 octobre 2010.

Avis du conseil d'état du 28 oct. 1806 (approuvé le 20 novembre), sur la compétence en matière de délits commis à bord des vaisseaux neutres, dans les ports et rades de France.

European Economic Community / European Community / European Union

Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, European Parliament and the Council of the European Union, Official Journal, L208, 5 August 2002

Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security

Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 amending Directive 1999/32/EC

Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94

Regulation (EC) No 782/2003 of the European Parliament and of the Council of 14 April 2003 on the prohibition of organotin compounds on ships

Regulation (EC) No 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers

Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 amending Directive 1999/32/EC

Regulation (EC) No 1005/2008 of the European Parliament and of the Council of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing

Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (Text with EEA relevance)

Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (Text with EEA relevance)

National Instruments

Directive 2012/33/EU of the European Parliament and of the Council of 21 November 2012 amending Council Directive 1999/32/EC as regards the sulphur content of marine fuels

Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision No 280/2004/EC (Text with EEA relevance)

Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC

Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC (Text with EEA relevance)

Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels

Directive 2009/16/EC of the European Parliament And Of The Council Of 23 April 2009 On Port State Control (Recast).

COM(2012) 660 final Report assessing the implementation and the impact of the measures taken according to the Directive 2009/16/EC on port State control

European Commission (EC), Directorate General Maritime Affairs & Fisheries “Legal aspects of Arctic shipping – Final Report” (23 February 2010)

European Parliament resolution on the EU strategy for the Arctic (2013/2595(RSP))

P7_TA (2014)0236 EU strategy for the Arctic European Parliament resolution of 12 March 2014 on the EU strategy for the Arctic (2013/2595(RSP))

EC COM(2017) 420 final on Hong Kong Convention) Report From The Commission To The European Parliament And The Council on the feasibility of a financial instrument that would facilitate safe and sound ship recycling

Proposal for a regulation of the European Parliament and of the Council on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers (2000/C 212 E/08) (Text with EEA relevance)

COM(2000) 142 final 2000/0067(COD)(Submitted by the Commission on 22 March 2000)

COM(2013) 479 final (Integrating maritime transport emissions in the EU's greenhouse gas reduction policies)

COM(2013) 479 final (Integrating maritime transport emissions in the EU's greenhouse gas reduction policies) 28.6.2013.

EU, European Commission MEMO/07/50

Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community

Council Regulation (EC) No 2978/94 of 21 November 1994 on the implementation of IMO Resolution A.747(18) on the application of tonnage measurement of ballast spaces in segregated ballast oil tankers

Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control)

Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC

COM(2000) 142 final, Commission communication of 21 March 2000 to Parliament and the Council on the safety of the seaborne oil trade

2016/2228(INI), European Parliament resolution of 16 March 2017 on an integrated European Union policy for the Arctic

Fiji

National Instruments

Constitution of the Republic of Fiji

Hong Kong (PRC)

L.N. 51 of 2015: *Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation*

India

Gujarat Maritime Board Ship Recycling Regulations 2003 (No. GMB/ALANG/73/110/2003/42 Gujarat, India) (published in Vol. XLIV The Gujarat Government Gaz. Extra Ordinary, 7 July 2003, 281-1)

Mexico

Reglamento de Inspección de Seguridad Marítima, Reglamento publicado en el Diario Oficial de la Federación el 12 de mayo de 2004.

Netherlands (EU)

Besluit voorkoming verontreiniging door schepen, Artikel 7 (Tekst geldend op: 01-03-2013), Artikel 7. Eisen aan schepen op grond van het AFS-verdrag

Besluit voorkoming verontreiniging door schepen, Artikel 7a (Tekst geldend op: 01-03-2013), Artikel 7a. Eisen aan schepen op grond van het Ballastwaterverdrag [Treedt in werking op een nader te bepalen tijdstip]

New Zealand

Biosecurity Act 1993

New Zealand “A Proposal to Enhance Port State Control for Tourist Vessels Departing to Antarctica” Working Paper 7 (2009) submitted to ATME 2009

Guidance Document for the Craft Risk Management Standard - Biofouling on Vessels Arriving to New Zealand Accompanying Information for the Craft Risk Management Standard for Biofouling on Vessels Arriving to New Zealand.

New Zealand House of Representatives, 2008. International treaty examination of the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004

Te Urewera Act 2014. Public Act 2014 No 51. Date of assent 27 July 2014.

Report of the NZ House of Representatives: *International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 National Interest Analysis*:

Nicaragua

Ley General De Puertos De Nicaragua; Ley No. 838, Aprobada el 14 de Mayo del 2013 Publicada en La Gaceta No. 92 del 21 de Mayo del 2013

Nigeria

Nigerian National Petroleum Corporation. Letter Ref. GGM/ST/EX/01: List of Prohibited Crude Oil Vessels. 15 July 2015.

Nigerian National Petroleum Corporation. Letter Ref. GGM/COMD/008: Implementation of Presidential Directive on Ban of 113 vessels, 8th september 2015

Pakistan

Pakistan Maritime Security Agency Act, 1994. Registered No. M-302/L-7646, June 29 1994.

People's Republic of China

Ministry of Transportation of the PRC [中华人民共和国交通运输部], Notification on the Implementation Plan on the Emissions Control Area of Pearl River Delta, Yangtze River Delta and Bohai Bay Area [《交通运输部印发珠三角·长三角·环渤海(京津冀)水域船舶排放控制区实施方案》], Date of issue: 2 Dec 2015, Date of entry into force: 2 Dec 2015, http://www.gov.cn/xinwen/2015-12/04/content_5019932.htm (accessed: 26 Oct 2017)

National Instruments

The People's Government of Shenzhen Municipality [深圳市人民政府], Notification on the Action Plan (2016-2020) on the Construction of Green and Low-Carbon Harbor of Shenzhen Municipality [《深圳市人民政府关于印发深圳市绿色低碳港口建设五年行动方案 (2016-2020年) 》], Date of issue: 6 May 2016, Date of entry into force: 6 May 2016, Available at: http://www.sz.gov.cn/zfgb/2016/gb959/201606/t20160601_3676681.htm (accessed: 26 Oct 2017)

Atmospheric Pollution Prevention and Control Law of the People's Republic of China (2015 Revision) [中华人民共和国大气污染防治法 (2015修订)]; [CLI Code] CLI.1.256292(EN). Available at: http://www.pkulaw.com/en_law/6f36f444160e4c76.html (accessed: 26 Oct 2017).

Document of Hainan MSA of the People's Republic of China QHWF [2017] No.10 Notice of Hainan MSA on Circulating the Ship Pollution Control Implementation Plan http://www.american-club.com/files/files/MA_112917_PRC_Hainan_Notice_Ship_Pollution_Control_Plan_p2.pdf

Peru

Resolucion Directoral N° 072-2006-DCG. *Dictan disposiciones sobre control de la descarga del agua de lastre y sedimentos de buques de navegacion maritima internacional que tengan como destino o escala a los puertos peruanos* (Norma actualizada a setiembre del 2010)

Taiwan (PRC)

Commercial Port Law, 2011-12-28. Amendment to whole articles promulgated on December 28, 2011

Ministry of Transportation and Communications ROC (Port State Control System (PSCS) > Inspection Procedures) at http://eng.mtnet.gov.tw/psc_eng/03-05.html

Saudi Arabia

Saudi Global Ports Co. Circular. “Subject: Saudi Ports Announces Restrictions to not receiving any ships & cargo from the State of Qatar”

Spain (EU)

Real Decreto-Ley 9/2002, de 13 de diciembre, por el que se adoptan medidas para buques tanque que transporten mercancías peligrosas o contaminantes; publicado en: «BOE» núm. 299, de 14 de diciembre de 2002, páginas 43555 a 43556 (2 págs.); BOE-A-2002-24343

Ley 14/2014, de 24 de julio, de Navegación Marítima.

Sweden (EU)

Sveriges grundlagar (The Constitution of Sweden: The Fundamental Laws and the Riksdag Act)

Turkey

“Regulation on Reduction of Sulphur Rate in Some Types of Fuel Oils” [Bazi Akaryakit Türlerindeki Kükürt Oraninin Azaltılmasına İlişkin Yönetmelik], which has entered into force by being published in 6 October 2009 dated and 27368 numbered Official Gazette.

“Regulation about Making Amendment in the Regulation on Reduction of Sulphur Rate in Some Types of Fuel Oils” [“Bazı Akaryakit Türlerindeki Kükürt Oranının Azaltılmasına İlişkin Yönetmelikte Değişiklik Yapılmasına Dair Yönetmelik”], which has entered into force by being published in 31 December 2009 dated and 27449 numbered Official Gazette

United Arab Emirates

Port of Fujairah, Notice to Mariners No. 224. Subject: Entry Restrictions to Vessels Flying Qatar Flag, Vessels Destined to or Arrival from Qatar Ports. 5 June 2017.

United Kingdom of Great Britain and Northern Ireland (EU)

National Instruments

Hovering Act (1736) 9 Geo II ch 35

United Kingdom, Merchant Shipping (Prevention of Oil Pollution) Regulations 1996, (No 2154 of 1996), regulations 34 to 39.

Customs Consolidation Act 1876. 1876 c. 36 (Regnal. 39_and_40_Vict)

European Scrutiny Committee - Eleventh Report/ Eleventh Report of Session 2012-13 - European Scrutiny Committee Contents. 1 Sulphur content of marine fuels.

United States of America

High Seas Driftnet Fisheries Enforcement Act (Public Law 97–389). SEC. 102. [16 U.S.C. 1826b] Duration Of Denial Of Port Privileges And Sanctions

Ballast Water Management for Vessels Entering the Great Lakes That Declare No Ballast Onboard Federal Register / Vol. 70, No. 168 / Wednesday, August 31, 2005 / Notices 5 [USCG–2004–19842]

Federal Register / Vol. 70, No. 168. [USCG–2004–19842] Ballast Water Management for Vessels Entering the Great Lakes That Declare No Ballast Onboard.

State of Michigan, Permit Application for Port Operations and Ballast Water Discharge. EQP 5932 (Rev. 3/2015) NP1

Senate hearing “Examine Port Pollution And The Need For Additional Controls On Large Ships”

DOJ, March 30, 2017, *Fishing Vessel Owner Convicted of Discharging Oily Waste Into the Coastal Waters of the United States Off Washington State.*

DOJ, September 2, 2016, *Two Greek Shipping Companies and Engineers Convicted of Pollution Crimes and Obstruction of Justice.*

INTERNATIONAL JURISPRUDENCE

Arbitrations

Costa Rica Packet Arbitration (Great Britain v. Netherlands) (1897) 184 C.T.S. 240. By the Convention of 16 May 1895 (181 C.T.S. 253)

US-French Air Services Arbitration (U.S. / France, 1978) Case Concerning the Air Service Agreement Of 27 March 1946 between the United States of America and France, Decision Of 9 December 1978, R.I.A.A. Volume XVIII pp. 417-493

Lake Lanoux Arbitration (France V. Spain), (1957) 12 R.I.A.A. 281; 24 I.L.R. 101, Arbitral Tribunal, November 16, 1957.

Trail Smelter Arbitration (United States v. Canada) Arbitral Tribunal, Washington, D.C., 15 April 1938, 11 March 1941

Chile-Peru Alliance Arbitration (Chile v Peru) H La Fontaine (ed) *Pasicrisie internationale* (1902) 157 (1875) 7 April 1875.

S. S. "I'm Alone" Arbitration (Canada, United States) 30 June 1933 and 5 January 1935. R.I.A.A. Volume III pp. 1609-161(1935).

Claim of Charles Adrian van Bokkelen v. Government of Haiti, Award of 24 May 1888, *Moore International Arbitrations* 2 (1898): 1807 135n537

Aramco Arbitration, Saudi Arabia v Arabian American Oil Company (Aramco) (Arbitration Tribunal) (1958)

The Government of the State of Kuwait v The American Independent Oil Company ('Kuwait v Aminoil')

European Court of Human Rights

Al-Skeini and ors, Bar Human Rights Committee (intervening) and ors (intervening) v United Kingdom, Merits and just satisfaction, App No 55721/07, [2011] ECHR 1093, (2011)

53 EHRR 18, 30 BHRC 561, IHRL 207 (ECHR 2011), 7th July 2011, European Court of Human Rights [ECHR]; Grand Chamber [ECHR]

Inter-American Court of Human Rights

Case of the Serrano Cruz Sisters v. El Salvador. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118.

The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23.

International Court of Justice

Arrest Warrant of 11 April 2000, Congo, The Democratic Republic of the v Belgium, Judgment, Merits, Preliminary Objections, ICJ GL No 121, [2002] ICJ Rep 3, [2002] ICJ Rep 75, ICGJ 22 (ICJ 2002), 14th February 2002, International Court of Justice [ICJ]

North Sea Continental Shelf, Germany v Denmark, Merits, Judgment, (1969) ICJ Rep 3, ICGJ 150 (ICJ 1969), 20th February 1969, International Court of Justice [ICJ]

Fisheries, United Kingdom v Norway, Merits, Judgment, [1951] ICJ Rep 116, ICGJ 196 (ICJ 1951), 18th December 1951, International Court of Justice [ICJ]

Temple of Preah Vihear, Cambodia v Thailand, Merits, Judgment, [1962] ICJ Rep 6, ICGJ 160 (ICJ 1962), 15th June 1962, International Court of Justice [ICJ] Gabčíkovo-Nagymaros Project, Hungary v Slovakia, Judgment, Merits, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, (1998) 37 ILM 162, ICGJ 66 (ICJ 1997), 25th September 1997, International Court of Justice [ICJ]

Case Concerning Pulp Mills on the River Uruguay, Argentina v Uruguay, Judgment on the merits, ICGJ 425 (ICJ 2010), 20th April 2010, International Court of Justice [ICJ]

Whaling in the Antarctic, Australia and New Zealand (intervening) v Japan, Judgment, ICJ GL No 148, ICGJ 471 (ICJ 2014), 31st March 2014, International Court of Justice [ICJ]

United States Diplomatic and Consular Staff in Tehran, United States v Iran, Judgment, ICJ GL No 64, [1980] ICJ Rep 3, ICGJ 124 (ICJ 1980), 24th May 1980, International Court of Justice [ICJ]

Barcelona Traction, Light and Power Company, Limited, Belgium v Spain (New Application, 1962), Belgium v Spain, Preliminary Objections, Judgment, [1964] ICJ Rep 6, ICGJ 151 (ICJ 1964), 24th July 1964, International Court of Justice [ICJ]

Barcelona Traction, Light and Power Company Limited (New Application, 1962), Belgium v Spain, Judgment, Merits, Second Phase, ICJ GL No 50, [1970] ICJ Rep 3, (1970) 9 ILM 227, ICGJ 152 (ICJ 1970), 5th February 1970, International Court of Justice [ICJ]

Reparation for injuries suffered in the service of the Nations, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11th April 1949, International Court of Justice [ICJ]

Corfu Channel, United Kingdom v Albania, Judgment, Compensation, (1949) ICJ Rep 244, ICGJ 201 (ICJ 1949), 15th December 1949, International Court of Justice [ICJ]

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, [1951] ICJ Rep 15, ICGJ 227 (ICJ 1951), 28th May 1951, International Court of Justice [ICJ]

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ GL No 53, [1971] ICJ Rep 16, ICGJ 220 (ICJ 1971), 21st June 1971, International Court of Justice [ICJ]

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, International Court of Justice [ICJ]

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v United Kingdom, Judgment, Preliminary Objections, ICJ GL No 88, [1998] ICJ Rep 9, ICGJ 76 (ICJ 1998), 27th February 1998, International Court of Justice [ICJ]

Dispute Regarding Navigational and Related Rights, Costa Rica v Nicaragua, Judgment on the merits, ICGJ 421 (ICJ 2009), 13th July 2009, International Court of Justice [ICJ]

Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Qatar v Bahrain, Judgment, Merits, [2001] ICJ Rep 40, ICGJ 83 (ICJ 2001), 16th March 2001, International Court of Justice [ICJ]

International Tribunal for the Law of the Sea

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, ITLOS Case No 17, [2011] ITLOS Rep 10, ICGJ 449 (ITLOS 2011), 1st February 2011, International Tribunal for the Law of the Sea [ITLOS]

The M/V 'SAIGA' (No 2), Saint Vincent and the Grenadines v Guinea, Merits, Judgment, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1st July 1999, International Tribunal for the Law of the Sea [ITLOS]

The Arctic Sunrise Case, Netherlands v Russian Federation, Provisional Measures, ITLOS Case No 22, ICGJ 455 (ITLOS 2013), 22nd November 2013, International Tribunal for the Law of the Sea [ITLOS]

The M/V 'Norstar' Case, Panama v Italy, Preliminary Objections, ITLOS Case No 25, ICGJ 512 (ITLOS 2016), 4th November 2016, International Tribunal for the Law of the Sea [ITLOS]

Permanent Court of Arbitration

Chagos Marine Protected Area Arbitration, Mauritius v United Kingdom, Final Award, ICGJ 486 (PCA 2015), 18th March 2015, Permanent Court of Arbitration [PCA]

The Arctic Sunrise Arbitration, Netherlands v Russia, Award on the Merits, PCA Case No 2014-02, ICGJ 511 (PCA 2015), 14th August 2015, Permanent Court of Arbitration [PCA]

Island of Palmas Case (or Miangas), United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration [PCA]

The North Atlantic Coast Fisheries Case, Great Britain v United States, Award, (1961) XI RIAA 167, (1910) 4 AJIL 948, ICGJ 403 (PCA 1910), 7th September 1910, Permanent Court of Arbitration [PCA]; Ad Hoc - Geneva

Permanent Court of International Justice

S.S. "Lotus", France v Turkey, Judgment, (1927) PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), 7th September 1927, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ]

Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921, Great Britain v France, Advisory Opinion, (1923) PCIJ Series B no 4, ICGJ 271 (PCIJ 1923), 7th February 1923, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ]

Jurisdiction of the European Commission of the Danube Between Galatz and Braila, France and ors v Romania, Advisory Opinion, (1927) PCIJ Series B no 14, ICGJ 281 (PCIJ 1927), 8th December 1927, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ]

Certain German interests in Polish Upper Silesia, Germany v Poland, Merits, Judgment, (1926) PCIJ Series A no 7, ICGJ 241 (PCIJ 1926), 25th May 1926, League of Nations (historical) [LoN]; Permanent Court of International Justice (historical) [PCIJ]

Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27

NATIONAL JURISPRUDENCE

European Union (European Court of Justice)

C-177/95 Judgment of the Court of 27 February 1997. *Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and others.*

C-286/90. *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.*, Judgment of the Court of 24 November 1992.

C-286/90. Judgment of the Court of 24 November 1992. *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* Reference for a preliminary ruling: *Kriminal- og Skifteretten i Hjørring - Denmark.*

C-308/06. *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport.* Judgment of the Court (Grand Chamber) of 3 June 2008.

C-366/10. Judgment of the Court (Grand Chamber) of 21 December 2011. *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change.* Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) - United Kingdom. Reference for a preliminary ruling

C-537/11: Judgment of the Court (Fourth Chamber) of 23 January 2014 (request for a preliminary ruling from the Tribunale di Genova (Italy)) — *Mattia Manzi, Compagnia Naviera Orchestra v Capitaneria di Porto di Genova*

C-9, 104, 114, 116, 117 and 125 to 129/85 (Joined cases) Opinion of Mr Advocate General Darmon delivered on 25 May 1988. *A. Ahlström Osakeyhtiö and others v Commission of the European Communities.* Concerted practices between undertakings established in non-member countries affecting selling prices to purchasers established in the Community.

C-9/89. Judgment of the Court of 27 March 1990. - *Kingdom of Spain v Council of the European Communities.*

National Jurisprudence

Germany

Lliuya v RWE AG [2018] Essen Regional Court, 2 O 285/15 (Essen Regional Court)

India

Lalit Miglani vs State Of Uttarakhand And Others on 30 March, 2017

Ireland

ACT Shipping (PTE) Ltd v The Minister for the Marine, Ireland and the Attorney General
[1995] 3 Irish Rep. 426.

Israel

Attorney General of the Government of Israel v. Adolf Eichmann, Supreme Court of Israel,
Judgment of May 29, 1962, 36 ILR, 1968, p. 277 at p.304

Netherlands

*Guangzhou Ocean Shipping Company v. Minister of Transport, Public Works and Water
Management, Council of State, Administrative Justice Division.* (1996) 27
Netherlands YB Int'l L 354, 357

Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry
of Infrastructure and the Environment) [2015] The Hague; District Court,
C/09/456689 / HA ZA 13-1396 (The Hague; District Court)

New Zealand

William Rodman Sellers v Maritime Safety Inspector. Court of Appeal of New Zealand CA
104/98, 5 November 1998.

Thomson v The Minister for Climate Change Issues (New Zealand)

Spain

Sentencia de 13/11/2013, Audiencia Provincial Municipio: Coruña (A) N° Recurso: 38/2011
[ROJ: SAP C 2641/2013 - ECLI:ES:APC:2013:2641] <URL>

Sweden

Environmental Board of the Municipality of Helsingborg v HH-Ferries AB and Sundbusserne
A/S, Appeal judgment, Case No M 8471-03, ILDC 634 (SE 2006), 24th May 2006,
Sweden; Stockholm; Svea Court of Appeal.

United Kingdom of Great Britain and Northern Ireland

Edwards v Quickenden and Forester. Probate Divorce and Admiralty Division 17 March
1939 [1939] P. 261 Henn Collins J.1939 March 16, 17 .

“British Prize Court Decisions: The Möwe” (1915)

United States of America

Cunard SS Co. v. Mellon, 262 U.S. 100, 43 S. Ct. 504, 67 L. Ed. 894 (1923).

Fednav, Ltd. v. Chester, 547 F.3d 607 (6th Cir. 2008).

Ford v. United States, 273 U.S. 593, 47 S. Ct. 531, 71 L. Ed. 793 (1927).

Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895).

IN RE OCEANIC ILLSABE LTD., No. 7: 15-MC-5-JG (D.N.C. Nov. 23, 2015).

Khedivial Line, SAE v. Seafarers' International Union, 278 F.2d 49 (2d Cir. 1960).

Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953).

McCulloch v. Sociedad Nacional, 372 U.S. 10, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963).

Murray v. Schooner Charming Betsy, 6 U.S. 64, 2 L. Ed. 208, 2 L. Ed. 2d 208 (1804).

Pacific Merchant Shipping Ass'n v. Cackette, 2007 W.L. 2492681 (2007).

Pacific Merchant Shipping Ass'n v. Goldstene, 133 S. Ct. 22 (U.S. 2012).

National Jurisprudence

Schooner Exchange v. McFaddon, 11 U.S. 116, 3 L. Ed. 287, 3 S. Ct. 287 (1812).

Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).

Smith v. United States, 507 U.S. 197, 122 L. Ed. 2d 548, 113 S. Ct. 1178 (1993).

Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).

Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 125 S. Ct. 2169, 162 L. Ed. 2d 97 (2005).

The Apollon, 22 U.S. 362, 6 L. Ed. 111, 6 S. Ct. 851 (1824).

United States v. Diekelman, 92 U.S. 520, 23 L. Ed. 742 (1876).

United States v. Locke, 529 U.S. 89, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000).

United States v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960).

US v. Abrogar, 459 F.3d 430 (3d Cir. 2006).

US v. Ionia Management SA, 526 F. Supp. 2d 319 (D. Conn. 2007).

US v. Ionia Management SA, 555 F.3d 303 (2d Cir. 2009).

US v. Jho, 534 F.3d 398 (5th Cir. 2008).

US v. Jho, Crim. No. 12-453-13 (FSH) (D.N.Y. Mar. 17, 2014).

US v. MST Mineralien Schiffahrt Spedition Und Transport GmbH, Criminal No. 16-134 (JNE/LIB) (D. Minn. Aug. 12, 2016).

US v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358 (S.D. Fla. 1998).

US v. Vilches-Navarrete, 523 F.3d 1 (1st Cir. 2008).

Wildenhus's Case, 120 U.S. 1, 7 S. Ct. 385, 30 L. Ed. 565 (1887).

Wilmina Shipping AS v. United States Department of Homeland Security, 75 F. Supp. 3d 163
(D.C. 2014).

Wilmina Shipping AS v. United States Department of Homeland Security, 934 F. Supp. 2d 1
(D.C. 2013).

Wilmina Shipping AS v. US, 824 F. Supp. 2d 749 (S.D. Tex. 2010).

Wilson v. Girard, 354 U.S. 524, 77 S. Ct. 1409, 1 L. Ed. 2d 1544 (1957).

INTRODUCTION

History mentions an episode where the Roman general Pompey ordered the captains of his army to face a storm by means of a terse but impressive command: “sailing is necessary, living is not”.¹ This old Roman aphorism could well be the daily motto for the more than 1.8 million ships that every day and night cross the world’s oceans, often facing dangerous meteorological conditions, to ensure the transportation of people and goods.² Shipping and its related practices have become an increasingly profitable venture, growing in importance as the world economy has become liberalized. Ships went from being made of wood to being made of metal, from being powered by wind to relying on coal, oil derivatives and nuclear energy, from carrying people, grains, spices and gold to carrying dangerous goods, chemical substances and oil, and from carrying goods in bags and barrels to encapsulating them in uniform containers and colossal reservoirs. As humankind relies less and less on manpower on land, so does it at sea, where there are fewer seafarers on board than in previous times and where automated ships, controlled remotely via satellites, are already being developed. Sailing became less of a necessity and more of a leisure activity, with cruise ships becoming like floating cities, consuming energy and generating waste in just the same way. And, perhaps because of this technological development and the prosperity it brought to people, the quality of human life became more than ever a concern. The impact of shipping on seafarers, coastal populations and the world at large is today at the top of the political agenda of many nations. Living well also became necessary.

It comes as little surprise to learn that international law is today equipped to address the negative consequence of shipping. And that consequence has one name: pollution. Much like any term used in law, it has been living two separate but connected existences. It is a term of use in environmental science, which is distinct from the actual substance or energy introduced, called a contaminant,³ and it is a normative term, receiving legal recognition in national legal systems and in international instruments. In both cases, pollution refers totally or partially to

¹ (Plutarch & Perrin, 1917)“navigare necesse est vivere non est necesse”, translated from the Greek "πλεῖν ἀνάγκη, ζῆν οὐκ ἀνάγκη".

² (UNCTAD, 2017, p. 24)

³ (Weis, 2015, pp. 4-5)

human action. Yet whilst in science the threshold for the existence of pollution is determined by evidence of an impact on the environment – pollution by consequence – in law pollution also exists as pre-determined and standardized conduct – pollution by action. This results in some scientifically proven pollution not being considered unlawful, for legislators have not yet recognized that consequence as punishable, and – at least in theory – in some acts deemed by legislators as “pollution” as causing no environmental impact at all.

Pollution types may be distinguished by reference to their source, and one such source is shipping: it is then called ‘ship-source pollution’. Pollution from ships comes in different types. First, there is the need to consider the risk of accidents, be it due to poor maintenance or even the design of the ship, such as a tanker’s hull. Then there is the need to consider operational pollution, i.e., pollution caused by the normal activity of the ship.⁴ Ships may, as a result of their normal operations, discharge substances such as oil, wastewater, antifouling biocides, ballast water, or marine litter; ships may also emit substances into the air: greenhouse gases (GHG), sulphur oxides (SOx), nitrogen oxides (NOx), volatile organic components (VOC) and ozone depleting substances (ODS); ships make noise, both underwater and on the surface; some shipwrecks may liberate substances as well, for example due to corrosion; and ships being scrapped also liberate toxic compounds into surrounding waters. All this affects not only human beings but also other animals that coexist on the planet, as well as the surrounding flora. Finally, there is one other possible circumstance where pollution may occur in the eyes of the law: an intention to pollute which will later materialize, such as for example the dumping at sea of land-generated toxic materials. This last-named type of pollution is of such dangerousness that, in 2008, the Secretary-General of the UN included an item on “intentional and unlawful damage to the marine environment” in the UN’s assessment on threats to security in the oceans.⁵ The dumping of all sorts of substances into the ocean or the illegal discharge of the substances referred to above are a concern, especially because of their unforeseeable consequences. In some cases, for example the ocean disposal of radioactive waste, the impact of the human action on the environment may occur centuries later.

⁴ (Kachel, 2008, p. 31)

⁵ UN A/63/63. par.39.

The preferred method of dealing with the risks involved in maritime transportation has been the multilateral recognition of the environment as an interest of the international community. Multilateralism has many virtues. An agreed goal generates an expectation that all parties are working together and going in the same direction. These processes also put nations under some pressure from their peers, as no state wishes to be pointed at by all others as the underachiever. The results of international legal multilateralism are widely publicized by the media and are often considered as the sole possible road for the development of international environmental law. However, the good news of an agreement on the text rapidly gives way to the frustration of subsequent formalities. States take time to sign the treaty to which they adhered at the negotiating table. And even when they do, it may take years, if not decades, until the treaty is ratified and enters into force in that state's legal order.

The road to a treaty's implementation is also paved with good intentions but too often states are simply incapable of delivering on their commitments. Implementation depends on budgetary capabilities and controlling pollution seldom comes cheap nor is it at the top of a state's priority list. This has been the tragic history of many environmental treaties. Although states have the right – if not the obligation – to act, their effective implementation of a treaty is often below what is necessary to achieve the stated objectives of the instrument. Private actors who are aware of capability limitations in certain latitudes can identify opportunities to evade the law. It is this problem of capability limitation in shipping regulations that gave rise to the idea that certain states provide an 'open registry' or a 'flag of convenience', meaning that states provide a ship with the necessary permit for navigation with not too many questions asked about the specifics of that activity. This may be considered as one systemic root cause of ship-source pollution and a failure of the multilateral approach.

The years in which this study took place (2014-2018) saw many examples of another looming threat to the multilateral approach: withdrawal. The United States of America has withdrawn from the Paris Agreement on climate change, from the UNESCO, and from the UN HRC. The International Criminal Court saw many members leave its jurisdiction: Burundi, Gambia, South Africa, the Russian Federation, and the Philippines. Following a referendum, the Parliament of the United Kingdom has voted to leave the European Union. A trend in this direction may have already started at the beginning of the century, with the USA withdrawing from the bilateral Anti-Ballistic Missile Treaty. Another example is the withdrawal of Canada from the Kyoto Protocol in 2011. These cases illustrate how multilateral seldom means global

and how even within regions there is no unanimity in multilateralism. This also does not mean that multilateralism is dead: it is sufficient to mention the ongoing negotiations at the UN towards an agreement on biodiversity beyond national jurisdiction that aims at a new high seas treaty to underline the persistence of this approach in international law.⁶ Yet a generalist international lawyer would not lack evidence to suggest that, after a century of hegemony as the paradigm of international legal relations, multilateralism is fading.

If not multilateralism, then what alternative is there for states to address the concern of pollution from ships? The answer to this question is the starting point of this research. Aside from bilateral agreements, unilateral action has never ceased to be a lawful option for states. Withdrawal from multilateral agreements is a form of unilateralism, and states may use that as part of a diplomatic strategy to assert pressure over other states. Other unilateral actions are also easily associated with the defence of a state's interests, but they do not exhaust the possibilities offered by unilateralism.

Understanding the opportunities for states to act unilaterally under international law is the core goal of this research. As such, it should be underlined that there is no claim by the author as to the preferability of unilateralism. Indeed, the unilateral actions are mere normative options of a legislature and should not be judged at face value. More unilaterally designed regulation is neither a threat to the international rule of law, nor does it necessarily represent a "development" in any sense (economic, political or social). It simply means that a state is providing legal coverage to human actions which were taking place in a normative vacuum.

Accordingly, the purpose of this study is to provide clarity to a phenomenon which has been occurring for some years now and which has been treated under the usual parochial interpretation of state sovereignty which posits that state action is self-centred. Instead, this study will argue that state actions are today more complex, bringing about a distinct legal role for the state. It is through the study of unilateral actions undertaken by states, namely the unilateral prescription of environmental standards and their enforcement on foreign ships in port, that this study will provide the literature of public international law with a take on how unilateral jurisdiction is a fundamental part of how states act today.

⁶ UN A/RES/69/292.

Structure

This study aims to showcase the practice of port states under the dichotomy unilateral/multilateral and it also aims to interpret that practice under the dichotomy territorial/extraterritorial. Both objectives will be pursued under a parallel debate focused on a third dichotomy: parochial/cosmopolitan. This parallel debate aims to illustrate how the development of international law is leading to different perspectives regarding those first two dichotomies. Ultimately, this dialogue between different dichotomies will help understand the existent – or non-existent – legal basis for port states to act unilaterally under international law. For this reason, the study is divided in two parts.

Part I is descriptive, as it presents the powers of the port state and how those powers have been attributed multilaterally and resorted to unilaterally. The objective is to provide an overview of the law as it stands today, both international customary law (namely with a discussion of port powers), treaty law (on ship-source pollution) and national laws which use port powers, but which diverge from the multilaterally agreed standard of application of such powers. It will be submitted that sovereignty is not at odds with the idea that states may act not in exclusive furtherance of their self-interest but, instead – or in parallel – that states may provide legal protection to unprotected common concerns and/or interests.

Part II is hermeneutic, as it discusses the unilateral actions of port states in light of the principles of state jurisdiction. This part reinterprets the practice to find alternative opportunities for and necessary limitations to a state's jurisdiction. Scholars have used different terminology to describe the legal nature of state jurisdiction under international law: basis, nexus, link, or, as used here, principle.⁷ This study will use the term “principles” in this study, for principles are rules deduced from legal systems which have emerged in different periods of the history of international law.⁸ The scope of principles such as territoriality or functionality is ill-defined and in constant mutation, not only because they are subject to interpretation but also because they may evolve as state practice evolves.⁹ The interpretation of the right of port states to act

⁷ (Shaw, 2017, p. 488)

⁸ (Crawford, 2008, p. 37)

⁹ (Crawford, 2008, pp. 34-35)

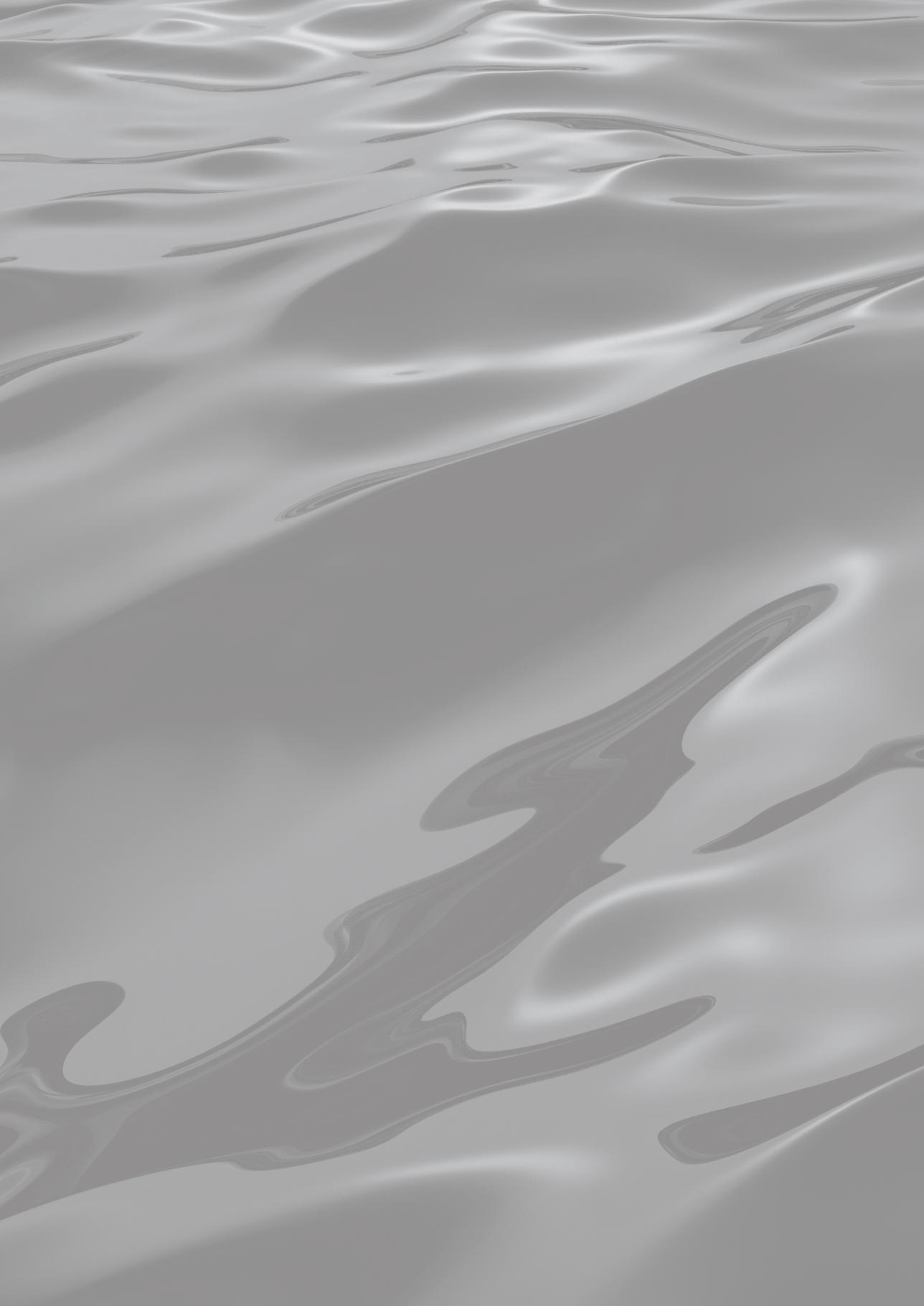
unilaterally is therefore the product of its time as it ultimately leads to a re-interpretation of the principles of jurisdiction. Hence, the objective of Part II is to illustrate how principles of state jurisdiction have been or could be argued to justify unilateral jurisdiction.

Methodology

Despite the many dogmatic iterations that the findings of this study may offer, the main argument being developed throughout the pages will nonetheless revolve around a central research question: *what opportunities does international law provide for port states to exercise jurisdiction on ship-source pollution?* To answer that question, this study follows traditional legal methodology, relying on the sources of international law, as they appear in Article 38 of the ICJ statute, especially the principles of jurisdiction.¹⁰ The research will explore existing state practice, both multilateral and unilateral, and reinterpret it to explain the relevance of cosmopolitanism in the international law of jurisdiction. The selection of the relevant state practice is made based on evidence found in Marine Notices of maritime authorities and information sent by maritime insurers, known within the industry as P&I clubs (protection and indemnity insurers), and marine consultancy firms to shipping companies worldwide. This information is sometimes available on the Internet without restriction, but it is not organized coherently. This means that the cases analysed in this study, despite covering different regions and different sorts of standards, are not exhaustive nor do they aim to be. Most of the practice analysed took place during the time this study was being undertaken and some further developments on such cases are bound to occur soon.

Although unilateral port state jurisdiction occurs for different reasons and in different circumstances, the cases analysed in this study merely relate to ship-source pollution. References to other instances of port state unilateralism, such as safety of navigation, tackling IUU fisheries, or protecting labour rights, are not the object of analysis and the sporadic reference to them relies mostly on secondary sources. Furthermore, some scientific studies related to pollution will be used to explain technical issues and so will reports from the relevant international bodies and from non-governmental organizations.

¹⁰ Statute of the International Court of Justice, Article 38(1).



PART I

1. THE CAPACITY TO ACT AS A PORT STATE IN INTERNATIONAL LAW

“A port State is also a coastal State, but it would assume a specific identity with specific powers when a vessel is voluntarily visiting its port at a given moment.”¹¹

1.1. Introduction to Chapter 1

§ 1. The capacity to act as a port state emerged in international law as a complement to the insufficient capabilities of flag states to fulfil all their duties. This capacity rapidly evolved into a mechanism to achieve not only the fulfilment of those duties but also to protect the interests and concerns of the international community. The existence, in international law, of a ‘community’ of states is therefore a necessary starting point for a correct understanding of port state jurisdiction. Not so much because the conceptual debut of this distinct capacity to act resulted from the largest multilateral effort international law had known at the time, the UNCLOS III, but mainly because the motivations which led to its emergence illustrate a fundamental change in the interpretation of the role which states play in maritime affairs. This distinctive nature opens new vistas for interpreting the practices undertaken by port states with respect to the environment. Indeed, there are over 200 sovereign states in the world, and the idea of a ‘community’ highlights that states may not only act in self-interest but also on behalf of other states or even on behalf of humankind, as cosmopolitan entities. Section 1.2. makes the point that statehood has been a parochial device for nations to protect themselves from other nations in a violent world. In contrast to parochialism, cosmopolitanism brings about the international law of cooperation, which is richer in terms of jurisdictional possibilities than the international law of coexistence. Only once this dichotomy has been put into perspective will it be time to explain what a “port state” is and how an excessive focus on parochial rights is insufficient to understand this acting capacity.

1.2. The parochial approach to acting as a state

§ 2. Statehood as a form of public authority is a relatively recent invention in the history of nations. Legal historians establish that milestone at around 1648, with the Peace of Westphalia

¹¹ (DOALOS, 2002, p. 2).

and the adoption of treaties which put an end to 30 years of war in Europe.¹² The creation of a ‘nation state’ was then a deliberate effort to put an end to imperialism, restraining the temptation for expansion.¹³ This development was also tied to the emergence of legal positivism, which aimed at putting an end to a theocentric interpretation of the rule of law in international law.¹⁴ One distinctive mark of the existence of ‘statehood’ as a form of authority under international law, but also for international law, is national law.¹⁵ From a municipal perspective, the law of the state is the symbol of the existence of a national authority bound by the rule of law. And from an international perspective, it provides evidence of its external sovereignty.¹⁶ The principle of sovereignty is what grants sovereign rights to states, which today translate as plenary territorial and personal jurisdiction within certain political boundaries, recognized or disputed, the presumption of legality of one’s sovereign acts, constitutional and organizational autonomy including self-determination as well as the protection of one’s *domaine réservé*, which has been enshrined in the UN Charter as “domestic jurisdiction”.¹⁷ These elements will be invoked again in Part II.

§ 3. The ability for a sovereign state to proclaim the law is called ‘jurisdiction’ (from the Latin *iuris dicere*). It encompasses three dimensions: the ability to ‘create’ the law, the ability to ‘verify’ the law and the ability to ‘apply’ the law. It is common to call the first ‘legislative’ or ‘prescriptive’ jurisdiction, the second ‘judicial’ or ‘adjudicative’ jurisdiction and the last ‘executive’ or ‘enforcement’ jurisdiction. Some literature has mentioned the existence of a separate category for ‘investigative jurisdiction’, but, like adjudicative jurisdiction, this category will not receive much attention here.¹⁸ These dimensions of a state’s jurisdiction can be ‘original’, in the sense that they are an attribute of the state’s sovereignty; or they can be

¹² (Eyffinger, 2012, p. 822)

¹³ (Suter, 2003, p. 20)

¹⁴ (Suter, 2003, p. 22)

¹⁵ (Conforti, 1993, p. 8)

¹⁶ (Bull, 2012, pp. 16-17)

¹⁷ UN Charter, Article 2(7)

¹⁸ (Svantesson, 2016, p. 199)

‘derived’, either from treaty law, in which case they also result from the original prerogative to consent to treaties, or from another state’s voluntary (tacit or explicit) attribution. Yet despite this distinction, some would say that they both derive from the international legal order, which is, ultimately, the sole source of jurisdiction.¹⁹

§ 4. Other descriptive terms have been employed to describe situations occurring in international law. A claim of jurisdiction can be ‘concurrent’, when it conflicts with a claim of jurisdiction of another state; it may be ‘residual’, when it results from a treaty which explicitly allows states to develop their own rules and standards on a particular subject matter (although some would say that a treaty’s standards may imply a preclusion of this),²⁰ or it may be ‘vicarious’, often termed ‘subsidiary’, when it occurs following an explicit request by another state which thus transmits its original right. One could also argue that it can additionally stem from an implicit need to achieve justice in cases where the state which holds the original right is unwilling or unable to provide an adequate remedy.²¹

§ 5. It is traditional to consider the *SS Lotus* dictum as setting the contemporary terminological markers of the discussion on what states may or may not do regarding events occurring beyond their political boundaries.²² Akin to a categorical imperative, the territorial nature of sovereignty has been put forward as an essential rule of international coexistence, proposing that the powers of one state end where the powers of another state begin.²³ This early twentieth century tenet, the so-called ‘Lotus principle’, has however proved to be insufficient in dealing with two situations which often occur in combination: when events take place beyond any state’s territory, such as on the high seas, and when events are of concern to the state despite their relative extraterritorial nature (relative in the sense that they might be ‘territorial’ for another state), such as international crimes in areas outside any territory, for example maritime

¹⁹ (Zoller, 1984, p. 79)

²⁰ (Molenaar, 1998, p. 111)

²¹ (Ryngaert, 2014, p. 2)

²² PCIJ, *SS Lotus*, p.18-19.

²³ PCA, *Island of Palmas*, p.829.

piracy.²⁴ Furthermore, there is no agreement on what counts as a territorial connection, giving rise to broad interpretations of that concept in practice.²⁵ A deeper discussion on this matter will be provided later in the study.²⁶

§ 6. Overall, qualifying nation-state actions as ‘parochial’ is here proposed as a critique to the way that states tend to construct their jurisdiction rights.²⁷ This does not mean that parochial actions are less lawful or legitimate from an international law perspective – on the contrary, they are the default setting that states follow today. This descriptor serves to distinguish those actions which are lawfully undertaken in pursuance of self-interest, from those actions which go beyond that, regardless of an actual intention to do so. It thus only makes sense to use this term when considering that states have the ability to act in a ‘cosmopolitan’ manner, detaching the sphere of concerns that motivate their claims and assertions of jurisdiction from the ‘nation’ and moving it into something broader than this imagined community.²⁸ The presence of certain ‘cosmopolitan formulae’ in the international practice of states is already evidence of the existence of such an alternative trend in international law. The question is then whether these formulae have a legal nature.

1.3. The cosmopolitan approach to act as a state

§ 7. Cosmopolitanism is, by definition, a philosophical quest for universality. In 1795, Immanuel Kant defended the ideal of *ius cosmopolitanicum*, inspired by an optimistic reading of international relations. It posited that, as nations grow more and more connected, injustices in one part of the world would matter to all.²⁹ This optimistic trend could already be identified in the writings of Vattel, who referred in 1758 to a “universal society of the human race”.³⁰ These

²⁴ (Hertogen, 2015, p. 925)

²⁵ (Scott, 2014, p. 89)

²⁶ *Infra*, Chapter 4, The territoriality of unilateral port state jurisdiction.

²⁷ (Sellers, 2012, p. 254)

²⁸ (Anderson, 2006, p. 6)

²⁹ (Kant, 1917, p. 142)

³⁰ (de Vattel, 1758, p. 6) Par 11.

perspectives are quite at odds with the rather more pessimistic approaches which inspired and subsequently interpreted and gave meaning to the Peace of Westphalia: Bodin had in mind the “shipwreck” of the republic following the 1572 massacre of the Huguenots;³¹ Hobbes was afraid of “the invasion of foreigners” that had happened during the English Civil War;³² and Grotius sought to express the “common law among nations” that would prevent a constant “rush to arms” as had occurred during the Dutch War of Independence.³³ The modern state was a product not of optimism but rather of the fear of hegemonic authority.³⁴

§ 8. The international peace treaties of 1648 have embedded this parochial bent into modern international law.³⁵ The preponderance then given to the principles of state sovereignty, legal equality of states and non-intervention illustrate the priority of European nations at the time: to ensure a “negative peace”, i.e. the mere absence of “personal violence”.³⁶ The aim was to create what has been called a ‘billiard ball model’ of mutual deterrence.³⁷ Kant’s cosmopolitan ideal has had to find its way in between these principles, inaugurating a tradition of counterhegemonic political philosophy.³⁸

§ 9. Contemporary approaches to cosmopolitanism continue to focus on the idea of a “universal and egalitarian law”.³⁹ Today their focus is increasingly put on the development of “real existing institutions” that effectively help in achieving that ideal.⁴⁰ Those institutions have had to evolve to accommodate “globalizing processes” best characterized by not being “hindered

³¹ (Bodin, 1993, pp. 45-46)

³² (Hobbes, 1965, pp. 131-132)

³³ (Grotius, 1925, p. 20)

³⁴ (Glenn, 2013, pp. 11-12)

³⁵ The *Osnabrücker Friedensvertrag (Instrumentum Pacis Osnabrugensis)* and the *Münsterscher Friedensvertrag (Instrumentum Pacis Monasteriensis)*.

³⁶ (Galtung, 1969, p. 183)

³⁷ (Wolfers, 1962, pp. 19-20)

³⁸ (Sousa Santos, 2006, p. 398)

³⁹ (Pierik & Werner, 2010, p. 1)

⁴⁰ (Pierik & Werner, 2010, p. 3)

or prevented by territorial or jurisdictional barriers”.⁴¹ This encounter between a cosmopolitan aspiration and globalization has transformed the essentially state-centred structure of international law, giving birth to a “universal world community” of states.⁴² It also gave rise to diverse legal “formulae” of cosmopolitanism, something that “compels a multilateral approach to international law”.⁴³ Yet these formulae also reveal how international law has been “very conservative of its traditional institutions”, not providing for institutions adapted to the pursuit of cosmopolitan ideals.⁴⁴

§ 10. The cosmopolitan formulae are comprised of three sorts of elements. One element is the *subjective* element, which personifies the cosmopolitan ideal. This can be as narrow as the ‘community’⁴⁵ of states or as broad as ‘all peoples’,⁴⁶ ‘humankind’⁴⁷ or ‘mankind’⁴⁸ (or ‘humanity’, although this term may also be considered an objective element), or even ‘world’,⁴⁹ and it is possibly accompanied by the phrase ‘as a whole’.⁵⁰ Another element of such formulae is the *objective* element, which refers to the object of legal protection, or the legal definition given to it. It can be a depiction of space, such as ‘area’;⁵¹ it can be a materialization of some sort, such as ‘good’;⁵² it can be a patrimonial relationship, such as ‘heritage’;⁵³ and it can be

⁴¹ (Rosenau, 2006, p. 84)

⁴² (Jenks, 1958, p. 62)

⁴³ (Carrillo Salcedo, 1997, p. 589)

⁴⁴ (Villalpando, 2010, p. 410)

⁴⁵ ICJ, Barcelona Traction.

⁴⁶ UNGA, Res. 63/122

⁴⁷ UNFCCC Paris Agreement, 25a. Introductory text.

⁴⁸ UNCLOS, Article 136

⁴⁹ Convention for the Protection of the World Cultural and Natural Heritage (UNESCO 1972), preamble.

⁵⁰ Rome Statute of the International Criminal Court, preamble.

⁵¹ UNCLOS, Art. 136.

⁵² Convention on the Conservation of Migratory Species of Wild Animals, preamble.

⁵³ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Art.11, (1).

many other variants: ‘concern’,⁵⁴ ‘standard’,⁵⁵ ‘interest’,⁵⁶ ‘needs’,⁵⁷ ‘province’,⁵⁸ ‘requirement’,⁵⁹ or even ‘right’.⁶⁰ The third element which may be part of these formulae is here named the *adjective* element, in the sense that it provides a description to the objective element. This third type of element enhances the cosmopolitan trend brought about by the formulae: ‘collective’, ‘common’,⁶¹ ‘elementary’,⁶² ‘fundamental’,⁶³ ‘global’, ‘greater’,⁶⁴ ‘international’,⁶⁵ ‘public’,⁶⁶ ‘special’, ‘universal’,⁶⁷ ‘urgent’,⁶⁸ etc. These descriptors enhance the difference of these objects between what is ‘individual’ to states, or ‘of their own’,⁶⁹ ‘local/regional’, ‘national’ or ‘private’, i.e. what is parochial, and what is cosmopolitan.

§ 11. Through these formulae used in their international relations, states have recognized the existence of a sphere of interests beyond their immediate remit. For early international law

⁵⁴ Convention on Biological Diversity, preamble.

⁵⁵ The Universal Declaration of Human Rights, preamble.

⁵⁶ The Antarctic Treaty, preamble.

⁵⁷ UNESCO, Document 39 C/40

⁵⁸ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Article 1.

⁵⁹ ICJ, Reparation for Injuries Suffered in the Service of the United Nations, p. 178

⁶⁰ PCIJ Territorial Jurisdiction of the International Commission of the River Oder, p. 27

⁶¹ United Nations Framework Convention on Climate Change preamble.

⁶² ICJ, Corfu Channel, p 22.

⁶³ IACHR, Serrano Cruz Sisters v. El Salvador, Dissenting Opinion by Judge AA Cançado Trindade, para. 7.

⁶⁴ ICJ, Gabcikovo-Nagymaros Project, Dissenting Opinion by Judge Weeramantry.

⁶⁵ VCLT, Article 53

⁶⁶ Convention With Respect To The Laws And Customs Of War On Land (Hague, II).

⁶⁷ Convention for the Protection of the World Cultural and Natural Heritage (UNESCO 1972), preamble.

⁶⁸ United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, preamble.

⁶⁹ ICJ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, p. 12.

scholars, this sphere was a rather a philosophical proposition.⁷⁰ Contemporary practice forces us to reconsider whether those formulae actually have a practical application. One discussion that cosmopolitan formulae raise regards ‘consent’, for they may be at odds with the contractual nature of international legal relations.⁷¹ Some scholars have already touched upon the issue, illustrating how the emergence of cosmopolitan normativity relativizes the role which consent plays in international law, namely due to the possibility that unilateral action is posited not on sovereignty but rather on that cosmopolitan normative sphere itself.⁷² It is true that there are other exceptions to the rule of consent which have been incorporated in multilateral agreements, such as United Nations Security Council (UNSC) resolutions, and that may be used strategically.⁷³ Such a concern is also often voiced with respect to the emergence of novel *ius cogens* norms or of *erga omnes* obligations in treaties.⁷⁴

§ 12. Cosmopolitanism may either signify ‘what all states determine to be pursued’, or it may be broader, signifying ‘what all humans believe should be pursued’. In the first case, states may refer to the ‘international community’ to justify their actions. When states act in pursuance of the interests of the international community, regardless of an obligation to do so, that is already a realization of cosmopolitanism, a sort of guardianship of international law.⁷⁵ States may also pursue cosmopolitanism unbound by those collective determinations, namely by looking at the values that underlie previously held statements or adopted instruments. That sort of creative cosmopolitanism is rarer and more controversial, as states are not explicitly given the right to act as agents of a global collective axiology but merely, and with certain limits, to act as agents of the collective interest of all nations considered as a subject. It is this possibility for the state to act not parochially but as a representative of the interests of this entity that justifies looking at instances where that may occur. And the capacity to act as a port state is arguably one of those cases.

⁷⁰ (Abi-Saab, 1998, p. 250)

⁷¹ (Guzman, 2011, p. 749)

⁷² (Krisch, 2014, p. 36)

⁷³ (Guzman, 2011, p. 775)

⁷⁴ (Bassiouni, 1989, p. 780)

⁷⁵ Israel, Attorney General of the Government of Israel v. Adolf Eichmann, at p.304.

1.4. The port state as an international actor

§ 13. It has been submitted that states may act parochially, i.e. in the fulfilment of national interests, and that they may act inspired by a cosmopolitan intent, for example as reflected in formulae employed in international instruments, such as those on environmental protection. Parochialism or cosmopolitanism are not legal categories, but rather academic interpretations of broader legal trends. This section now turns to another different distinction grounded on the law, but which arguably relates to that dichotomy: that between the capacity to act as a port state in international law, as opposed to the capacity of acting as a coastal state or as a flag state. It will be submitted that a port state is an international actor, an idea which is best understood by returning to a cosmopolitan approach to international law.

§ 14. This study focuses exclusively on private ships, regardless of the subcategories into which they fit. As far as polluting potential is concerned, there is a substantial difference between a pleasure yacht and an oil tanker for example, and it would be unreasonable to treat them alike. One benchmark devised under international law to distinguish the applicability of a certain law to private ships is their deadweight tonnage. An international treaty establishes some uniformity with this regard.⁷⁶ It also defines what international voyage consists of.⁷⁷ This information is relevant because some treaties only enter into force following the signature of a minimum tonnage of the world fleet.

§ 15. When any ship – national or foreign-flagged – calls into a port, the responding maritime authority is equipped with a set of powers. These powers, as well as the fact that they apply to a determined location – the port – are what determines the capacity, i.e. the right, to act as a port state as a distinct one from others that exist, such as coastal state or flag state.

1.4.1. *The port and the powers of the port state*

§ 16. A legal definition of port is not essential to this study and it has rarely been the object of contention in the practice of states. In the *Möwe* case, decided in 1914, the legal definition of port was construed in quite broad terms as “a place where ships are in the habit of coming to

⁷⁶ International Convention on Tonnage Measurement of Ships, Preamble

⁷⁷ International Convention On Tonnage Measurement Of Ships, Article 2(3)

load or unload, embark or disembark”.⁷⁸ In a 1921 treaty, reference was made to the fact that ports could be under the sovereignty or authority of a “riparian” state.⁷⁹ Today, the UNCLOS does not provide any definition, despite the references to ports in the treaty, especially with regard to delimitation issues.⁸⁰ A non-binding definition provided by private actors explains that ports are “an area within which ships are loaded with and or discharged of cargo and includes the usual places where ships wait for their turn or are ordered or obliged to wait for their turn no matter the distance from that area”.⁸¹ This is a particularly useful definition to understand that ports are not necessarily harbours, in the sense of a natural feature of the coast which protects ships from stormy weather, but also includes roadsteads and mooring buoys, as well as facilities which are located inland in a river or lake but which are frequented by seagoing ships.⁸²

§ 17. Some treaties reveal that for matters of international law, states distinguish their ports according to their usage. Two categories exist: those which “are normally frequented by sea-going vessels and used for foreign trade”, deemed to be maritime ports, and those which do not fall under this category.⁸³ The literature distinguishes these maritime ports as ‘closed ports’ and ‘open commercial ports’.⁸⁴ This distinction also emerges in the practice of states: for example, the law of Nicaragua explicitly states that its ports will be open to navigation, but that access could be denied for lack of reciprocity by the flag state.⁸⁵ Then there is also a distinction between the ports which are part of the coastline, which are in internal waters, from those which are outside. There are cases where a maritime port can exist on a river (e.g. Basel, Switzerland).

⁷⁸ (British Prize Court Decisions, 1915, p. 552)

⁷⁹ Convention and Statute on the Regime of Navigable Waterways of International Concern, Article 5.

⁸⁰ UNCLOS, Article 12, Article 18(1)(a), Article 192’ Article 11

⁸¹ (Baltic and International Maritime Conference, 1981)

⁸² (Marten, 2014, p. 21)

⁸³ Statute on the International Regime of Maritime Ports, Article 1.

⁸⁴ (Degan, 1986, p. 13)

⁸⁵ Nicaragua, Lei General Puertos Nicaragua, p 4244.

There are also cases where a port can be installed on the coast of another state (e.g. Bolivian port of Ilo, in Peru).⁸⁶

§ 18. A specific type of port exists in navigable waterways. The international regulation of navigable waterways has existed since the early twentieth century, emerging in a treaty which determined that some waterways are of “international concern”.⁸⁷ In ports located in these waterways, equal treatment ought to be given to foreign ships. They have indeed a status of public use that restricts the rights of the port state so that freedom of navigation is not impaired. The benefits attributed under such status may be revoked if reciprocity is not practised.⁸⁸

§ 19. Maritime ports are often used by ships as places of refuge. Places of refuge have been defined by the IMO as “a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation and to protect human life and environment”.⁸⁹ This definition may include ports, as the EU shows in its own definition which says that it is “a port, the part of a port or another protective berth or anchorage or any other sheltered area identified by a Member State for accommodating ships in distress”.⁹⁰ The distress of the ship using the port as a place of refuge constitutes a customary limit to the state’s sovereignty in such a way that, despite the port state having a role as a provider of the place of refuge, “port state jurisdiction” may not exist in that circumstance as the entry was not voluntary.⁹¹ However, the port state retains a discretion on balancing the interests at stake when deliberating on granting access to a ship which may pose a risk to the port’s environment and safety, in particular when safety of life is no longer part of the equation.⁹² This may also include considering issues of coordination with other port states, for example, as occurred with the

⁸⁶ Protocolo Complementario y Ampliatorio a los Convenios de Ilo suscritos entre Bolivia y Perú.

⁸⁷ Convention and Statute on the Regime of Navigable Waterways of International Concern, and Additional Protocol to the Convention on the Regime of Navigable Waterways of International Concern..

⁸⁸ Convention and Statute on the Regime of Navigable Waterways of International Concern, Article 9

⁸⁹ IMO, Resolution A.949(23).

⁹⁰ EU, Directive 2002/59/EC, Article 20.

⁹¹ (Institut de Droit International, 1957)

⁹² Ireland, ACT Shipping (PTE) Ltd v The Minister for the Marine, Ireland and the Attorney General.

MSC Flaminia in Portugal, which made the decision to grant entry on grounds of distress to be dependent on whether other port states had denied refuge.⁹³

§ 20. Access to port has been an object of reference at least since the time of the Roman Empire.⁹⁴ In medieval Europe, it was mentioned as part of the discussion on customs duties and taxes, for example in Venice.⁹⁵ From the perspective of the flag state, access to foreign ports is important and restrictions to it affect the exercise of freedom of navigation of its ships. The right to close the port to foreign ships has an impact on navigation, and that has international legal relevance.⁹⁶ In *Khedivial*, the US judiciary (which is not bound by the UNCLOS as treaty law but to the international customary law contained within it) found that there was no evidence for an unrestricted right of access to port.⁹⁷ In the *Danube* case, the PCIJ had concluded that “the freedom of movement for vessels going to and from the sea also extends to ships coming into or leaving a port”.⁹⁸ Yet it must be noted that access to port under freedom of movement does not preclude the right to close a port to navigation.

§ 21. It is today widely accepted that states may close their ports to all navigation.⁹⁹ This right of port states has certain legal limits. From the works of the IDI, we learn that the general rule in the early twentieth century was that access to port is “presumed open”.¹⁰⁰ This is a rather more nuanced, and hence restrictive, formula than “is open”, which was also argued in the course of the discussions;¹⁰¹ and that ended up being used a few years later.¹⁰² Ports may, under

⁹³ (BSU, 2014, p. 139)

⁹⁴ (Liu, 2009, p. 107)

⁹⁵ (Liu, 2009, p. 108)

⁹⁶ (Hakapää, 1981, p. 163)

⁹⁷ USA, *Khedivial Line, S. A. E. v. Seafarers' Intern. Union*.

⁹⁸ PCIJ, *Jurisdiction of the European Commission of the Danube*.

⁹⁹ (de La Fayette, 1996, p. 22)

¹⁰⁰ (Institut de Droit International, 1898) Article 3.

¹⁰¹ (Stuyt, 2013, p. 156)

¹⁰² (Institut de Droit International, 1928) Article 3.

this approach, be closed “when the vital interests of a State so require”, as an arbitral tribunal stated in 1958.¹⁰³ The same tribunal went further than the IDI formulae and stated that ports “must be open”, but in light of subsequent literature, this study interprets this decision rather restrictively.¹⁰⁴ This presumption, i.e. that access to port is presumed open, does not mean that there is an obligation to provide access.¹⁰⁵ It also does not mean that flag states have a right of access to foreign ports. Yet there is no consensus on how that subtle legal distinction works in practice. On the one side, there are those who see that access to port is a right, a kind of “maritime hospitality” without which freedom of navigation would be “no more than a disappointing illusion”.¹⁰⁶ One might consider the rights and interests of land-locked states and the practical impossibility of accessing the sea without access to at least one port, an issue which has been addressed in treaties under the rule of ‘equal treatment’.¹⁰⁷ Yet treaty rules fail in considering the natural rights of non-participating states. On the other side, there are those who see freedom of navigation not as a principle but rather as the consequence of a principle, that of the absence of sovereignty on the high seas, which by itself creates no right of entry into port.¹⁰⁸ The right to close a port would then be nothing more than an attribute of state sovereignty and a port’s openness would be a matter of courtesy.¹⁰⁹ Services provided within ports also fall into this category; some states use the term ‘port privileges’ to refer to those services.¹¹⁰ Whichever side one may pick, this debate illustrates that ports are under a special international legal regime, which is more regulated than the regime which grants states domestic jurisdiction to regulate entry into their territory of foreign individuals. The 1923

¹⁰³ Arbitration, Saudi Arabia v Arabian American Oil Company (Aramco).

¹⁰⁴ (Lowe, 1976, p. 621)

¹⁰⁵ (Stuyt, 2013, p. 157)

¹⁰⁶ (Institut de Droit International, 1910, p. 111)

¹⁰⁷ Convention on the High Seas, Article 3. Convention on Transit Trade of Land-locked States.

¹⁰⁸ (Institut de Droit International, 1910, p. 406)

¹⁰⁹ (Institut de Droit International, 1957) Preamble. (Stuyt, 2013, p. 157) (Mellor, 2002, p. 393) (de La Fayette, 1996, p. 1).

¹¹⁰ Treaty between the Government of Canada and the Government of the United States of America on Pacific Coast Albacore Tuna Vessels and Port Privileges

Geneva Convention and Statute on the International Regime of Maritime Ports would then be one of such agreed exceptions to that customary right, applicable only to the contracting states.¹¹¹ Despite rarely being mentioned in the literature, a 1974 USSR proposal to the IMO also referred to that right.¹¹² This particular issue was one of the few related to port state jurisdiction which raised no opposition at the time.¹¹³ Port states thus have a right to close access to their ports to navigation, a right which has certain limits which have in the past been mistaken for a right of access that was provided as a matter of courtesy and economic and social self-interest.

§ 22. As the closure of ports affects the interests of other nations, justification may be provided to illustrate the proportionality and adequacy of the measure. One way of justifying the exercise of the right to close ports is to argue for the right to undertake certain countermeasures to an unlawful action by the flag state. Port states may lawfully close their ports as part of a set of countermeasures (or, following an older terminology, ‘reprisals’) towards one nation or one flag in particular.¹¹⁴ Countermeasures have been framed in international law as a sort of retributive tool for states to exercise pressure for compliance.¹¹⁵ This is a sort of unilateral measure which works as a response to a wrong, and therefore a wrong must be proven to exist.¹¹⁶ The right to countermeasures has been enshrined into the ARSIWA, which details limits to its exercise that are relevant for states acting in their capacity as port states.¹¹⁷ One of them is proportionality, which means that port states should not restrict access to port arbitrarily.¹¹⁸ Recent state practice illustrates this sort of approach to port state jurisdiction in action: in 2017, following the severance of diplomatic ties with Qatar, several neighbouring

¹¹¹ Convention and Statute on the International Regime of Maritime Ports.

¹¹² IMO, LEG XXVI/2, Article 3 (Admittance to Ports)

¹¹³ (Liu, 2009, pp. 136-137)

¹¹⁴ (Institut de Droit International, 1898) Article 3.

¹¹⁵ US-French Air Services Arbitration

¹¹⁶ (Zoller, 1984, p. xvi)

¹¹⁷ ARSIWA, Articles 49-54.

¹¹⁸ (Franck, 2008, p. 763)

states (e.g. the UAE¹¹⁹ and Saudi Arabia¹²⁰) closed access to port to all Qatari ships as well as to all ships coming from or going to Qatar. In this case, the closure of ports as a countermeasure was not directed at one ‘flag’, to use IDI’s 1928 formula, but rather to one ‘nation’, to use IDI’s 1898 formula, hence being applicable to foreign ships with non-Qatari flags but that had some previous connection with Qatar.

§ 23. There is a difference between closure of ports and denial of entry, also known as ‘refusal of access’. Denial of entry is a power ad hoc, exercised towards one ship and not in the abstract, as in the case of port closure, towards all ships or one nation or flag. A port state may deny entry to a ship for multiple reasons, including as a result of a multilateral agreement such as a MoU on port state control.¹²¹ Denial of entry to one ship has also been argued on the grounds of sovereignty.¹²² For example it could have policy goals, such as has been argued by Canada in the past with respect to fisheries.¹²³ This denial can be merely temporary or it can be permanent; in the latter case, it may more properly be called a ‘ban’.

§ 24. A decision to deny entry into port to a ship may be temporary, i.e. subject to the fulfilment of a condition of time. The port state may impose such a denial because of a violation of an entry condition. This means that, for a certain amount of time, the ship is prevented from calling at any port of the port state. Such a ban may also be envisaged against a flag state in abstract, preventing all ships from ever entering the ports of that port state until a certain condition has been fulfilled.¹²⁴

§ 25. The decision to ban – i.e. to permanently deny access to – particular ships is rather rare in practice, but it has become more frequent in recent years as a result of the development of

¹¹⁹ UAE, Port of Fujairah, Notice to Mariners No. 224, “Subject: Entry Restrictions To Vessels Flying Qatar Flag, Vessels Destined To or Arrival From Qatar Ports”

¹²⁰ Saudi Arabia, Global Ports Co. Circular. “Subject: Saudi Ports Announces Restrictions to not receiving any ships & cargo from the State of Qatar”

¹²¹ *Infra* 2.4, The memoranda of understanding on port state control.

¹²² Netherlands, Guangzhou Ocean Shipping Company v. Minister of Transport, Public Works and Water Management, Council of State, Administrative Justice Division.

¹²³ (Kwiatowska, 1991, p. 184)

¹²⁴ PSMA, Article 9(1)

regional agreements on port state control. It consists of preventing one ship from ever returning to the ports of one state or of multiple states, normally following persistent serious wrongful conduct either towards that one port state or towards multiple port states sharing information about the ship's compliance with certain rules of standards.¹²⁵ At any time, this ban can be lifted (cancelled) either as the result of the fulfilment of a certain condition, such as the passage of time or a change in the ship's design, or simply as the result of a discretionary decision of the port state administration.¹²⁶

§ 26. The port state may also refuse a ship access to certain services provided at the port although entry has been granted. This has been called 'denial of port privileges'.¹²⁷ Such services are for example maintenance, dry-docking or refuelling. The denial of such services has, in one instrument related to fisheries, been said to be subject to international law.¹²⁸

§ 27. Then there is the denial of exit. Port states may refuse to grant exit to foreign ships present in the port. The assertion of this power may result from the assertion of another power (e.g. fulfilment of exit conditions or arrest) or in isolation (e.g. for traffic control). This may also result from countermeasures or from the intention to regulate conduct that the ship is likely to perform once it has left the port. The proposal of a 'departure state jurisdiction' has indeed been discussed under the Antarctic Treaty.¹²⁹

§ 28. One specific situation where denial of exit may occur is when the ship is unseaworthy. Unseaworthiness is an issue which, despite not causing immediate pollution, presents a risk to the environment. It used to be the case that the payment of port fees was sufficient for the maritime authorities to turn a blind eye to this matter, namely when the usage of port powers was not a priority.¹³⁰ Nowadays, international law explicitly allows port states to deny ships

¹²⁵ (Hare, 1997, p. 580)

¹²⁶ E.g. notification by the Paris MoU Secretariat that the refusal of access of M/V 'Blacksmith' to Paris MoU ports has been cancelled on 19 July 2017.

¹²⁷ USA, High Seas Driftnet Fisheries Enforcement Act, SEC. 102. [16 U.S.C. 1826b] (Duration Of Denial Of Port Privileges And Sanctions).

¹²⁸ PSMA, Article 9(6)

¹²⁹ ATCM, Final Report of the Twenty First Antarctic Treaty Consultative Meeting, (15).

¹³⁰ (Hare, 1997, p. 573)

permission to leave the port until internationally applicable seaworthiness conditions have been fulfilled. The ship must in that case be granted permission to proceed to the nearest appropriate repair yard and, upon removal of the causes of the violation, to continue its journey.¹³¹ This issue was raised in the case of the *Mostoles*, which was detained in the Netherlands on the grounds of previous illegal discharges and an unwillingness to provide information about the next port of call, raising the suspicion that discharges could happen once the ship had left the port.¹³² The ship in question was only authorized to leave the port once its slop tanks had been discharged.¹³³ A more controversial case occurred in New Zealand, where the decision to deny exit to a yachtsman on the basis of a lack of appropriate radio equipment was quashed on the ground that such a requirement did not exist in international law.¹³⁴ The case ended up being subject to criticism, revealing that such powers are also a unilateral prerogative of the state.¹³⁵ This power is more of a preventive nature, but as ships now have standards of seaworthiness with which to comply, it may also be interpreted as punitive, for delays in the journey are a very convincing economic deterrent.

§ 29. Port states may impose other conditions for ships to enter port, as well as to leave it. These conditions are discretionary and international law does not limit their content, except, as will be soon be explained, in situations of prompt release.¹³⁶ They impose the fulfilment of certain criteria, both prior to entry, during the stay in the port or after leaving the port. Failure to comply may then lead to denial of entry or of exit. This right to impose conditions for access to port or to leave the port has been well illustrated in the position of the USA (which, as a non-party to the UNCLOS, illustrates the customary nature of this right) in the case of the dumping of incinerator ash by the *Khian Sea* (which occurred prior to the Basel Convention), where the USA defended the position that the port state can require reporting of the position, cargo and

¹³¹ UNCLOS Article 219.

¹³² (Molenaar & Dottinga, 2001, pp. 316-317)

¹³³ (Pozdnakova, 2012, p. 168)

¹³⁴ New Zealand, *Sellers v. Maritime Safety Inspector*.

¹³⁵ (Marten, 2013, p. 569)

¹³⁶ (Sohn, et al., 2014, p. 357)

destination as a condition of entry into the port state.¹³⁷ But as a recent legal opinion pointed out, “there is little guidance, either in treaties or in the academic literature, about the sorts of conditions of access which would be permitted”.¹³⁸

§ 30. The port state has the power to conduct inspections of the ship once it has entered port and is at berth, namely to verify whether entry or exit conditions are being fulfilled. The inspectors will verify compliance with the applicable laws. There are many strategies to optimize the resources necessary to conduct inspections, such as concentrated campaigns or the creation of lists setting priorities for certain ships depending on their flag, age or type.

§ 31. The port state may decide to arrest the ship in port, which carries the same consequences as preventing its exit, although not based on unfulfilled exit conditions or on denial of exit. The arrest of seagoing ships has been the object of a treaty, defining arrest as “the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment”.¹³⁹ This power may also apply to previous offences and not just as a result of the last journey, as with Australia’s three-year arrest rule on violation of compulsory pilotage, a case which will be studied in more detail later.¹⁴⁰ Historically, the right to arrest a ship was one power put forward in the proposal that led to UNCLOS Article 218, but this proposal did not make it as explicitly as that into that Article which, as will be shown in Chapter 2, became central in defining the terms in which port state enforcement may occur with respect to discharges.¹⁴¹

§ 32. Detention is distinct from arrest in the sense that arrest is a provisional measure aimed at investigating whilst detention follows the investigation and may constitute part of proceedings instituted by the port state against a ship.¹⁴² This right to detain comes from the power to

¹³⁷ (Weinstein, 1994, pp. 164-165)

¹³⁸ Australia, House of Representatives Committees, 10 May 2013 Imposition of conditions on port access for cruise ships: requirements regarding crimes at sea.

¹³⁹ International Convention on The Arrest Of Seagoing Ships. Brussels, On 10 May 1952, Article 1(2).

¹⁴⁰ (Beckman, 2007, p. 326)

¹⁴¹ UN, A/CONF.62/C.3/L.24, Article 3(11)

¹⁴² UN, A/CONF.62/C.3/L.24, Article 3(19)

“institute proceedings”.¹⁴³ The detention of the ship is hence also subject to the rules on prompt release.¹⁴⁴ One legal definition developed at EU level states that detention means “the formal prohibition for a ship to proceed to sea due to established deficiencies which, individually or together, make the ship unseaworthy”.¹⁴⁵

§ 33. The port state has the power to expel a ship from the port. Expulsion is not the same as setting an exit condition, for it is not dependent on the fulfilment of a precondition but is rather the result of a command by the state. This is a control measure, referred to in SOLAS.¹⁴⁶ The USA has commented on the setting of this power, illustrating the complexities raised by the right to a claim for compensation which would be tantamount to setting a limitation to what it considers to be a sovereign right under customary international law.¹⁴⁷

§ 34. Despite its primacy, the jurisdiction of the flag state always competes with the jurisdiction of the port state. The exceptions that would allow the port state to interfere with that primacy used to be limited to cases where the peace and good order of the port was compromised.¹⁴⁸ Practice analysed in this study confirms that this is now, to a certain degree, an outdated statement, as increasingly the port state initiates proceedings and uses its port powers motivated by conduct which, at least directly, has no impact on the port itself.¹⁴⁹ That holds true both when port states consider a certain event to be criminal, and also when exerting compliance with certain rules which are not fundamental to the public order.¹⁵⁰

¹⁴³ (Lagoni, 1996, p. 154)

¹⁴⁴ (Tanaka, 2004, p. 246)

¹⁴⁵ EU, Directive 2009/16/EC, Art 2(15).

¹⁴⁶ IMO, MSC/Circ.1111, p.3.

¹⁴⁷ IMO, MSC 76/4/15, p. 3.

¹⁴⁸ (Charteris, 1920, p. 46)

¹⁴⁹ (Marten, 2014, p. 25)

¹⁵⁰ USA, Wildenhus.

§ 35. Criminal jurisdiction is in this case quite distinct from exercises of control by the port state. Control powers refer to administrative measures imposed whilst the ship is in port.¹⁵¹ Contrary to what occurs in the case of criminal jurisdiction, when the port state exercises control, it does not prosecute.¹⁵² Control by the port state has been encouraged at the UN to improve safety of navigation.¹⁵³ Whilst criminal jurisdiction is for the most part to be found in national law, which may or may not be in pursuance of cosmopolitan formulae, the administrative measures taken following port state control are based on international rules and standards and are hence arguably cosmopolitan in nature. Port state control is therefore a subcategory of port state jurisdiction, which qualifies it but encompasses more practices.

§ 36. All these powers illustrate that the port state is equipped not only to implement international rules and standards but also to exercise jurisdiction unilaterally. Although the range of port powers at the disposal of the port state appears to fit with exercises of unilateral jurisdiction, the reach of port state jurisdiction is not unlimited.¹⁵⁴ The capacity to act as a port state may collide with exercises of rights under other capacities which will limit the way in which those powers may in practice be exercised. The following subsection discusses the reach (and the potential over-reach) of port state jurisdiction.

1.4.2. *The reach of port state jurisdiction*

§ 37. The use of port state powers affects the existing legal regimes for certain maritime zones. The first maritime zone affected by the exercise of port powers is the “internal waters”, as ports are generally, but not always, situated inland. Sovereignty is once again an important principle to be mentioned, for it is often pointed to as the definitive legal basis for the usage of port powers.¹⁵⁵ In those cases, ships are subject to the “full scope” of the port state’s territorial

¹⁵¹ (Bang & Jang, 2012, pp. 170-171)

¹⁵² (Bang, 2009, p. 292)

¹⁵³ UN, A/RES/68/70.

¹⁵⁴ (Staker, 2014, p. 310)

¹⁵⁵ *Supra* 1.2, The parochial approach to acting as a state.

sovereignty.¹⁵⁶ Some authors consider that when a ship enters an inland maritime port, it puts itself within the territorial jurisdiction of the coastal state.¹⁵⁷ Yet reality is more complex, as certain places where port state jurisdiction extends lie outside the coastline. It is then a matter of legal fiction to say that those are internal waters. According to the UNCLOS, states may impose conditions for the admission of ships to internal waters.¹⁵⁸ The territorial sovereignty of the coastal state would hence override the primacy of flag state jurisdiction in cases of conflicting entitlements of jurisdiction.¹⁵⁹

§ 38. The second maritime zone affected by the exercise of port powers is the territorial sea, over which ships enjoy a right of innocent passage. The right of innocent passage through the territorial sea has been portrayed as the “chief limitation of a sovereign’s jurisdiction over its own territory”.¹⁶⁰ As enshrined in the UNCLOS, it asserts that ships of all states enjoy, in the territorial sea, the right to proceed to or from internal waters or call at a roadstead or port facility as long as such passage remains “continuous and expeditious”.¹⁶¹ This passage remains innocent as long as it does not bear prejudice to the “peace, good order or security”, and the UNCLOS provides an open listing of what such conduct may be.¹⁶² This does not mean, however, that such right exists when the ship has entered the internal waters of the state, or the port itself – that right ceases to be claimable as soon as the ship enters internal waters.

§ 39. The third maritime zone affected by port state actions, namely the effect and influence of a legal prescription, is the high seas. Port states ought not to interfere with the right of a flag state to exercise its freedom of navigation on the high seas. The geographical scope of this principle has already been curtailed through the creation of maritime zones where coastal states may exercise a functional jurisdiction over certain issues, both at the prescriptive level and

¹⁵⁶ (de La Fayette, 1996, p. 3)

¹⁵⁷ (Churchill & Lowe, 1999, p. 65)

¹⁵⁸ UNCLOS, Article 25(2)

¹⁵⁹ (Fonseca de Souza Rolim, 2008, p. 66)

¹⁶⁰ (Beale, 1923, p. 259)

¹⁶¹ UNCLOS, Article 17 and Article 18.

¹⁶² UNCLOS, Article 19.

through enforcement actions. Any claim to prescriptive extra-territorial jurisdiction by the port state to ship-source pollution occurring outside its coastal maritime zones could arguably be considered to be an infringement on freedom of navigation as specified by UNCLOS Article 87.¹⁶³ Freedom of navigation benefits the flag state and not private individuals, and this means that such freedom merely relates to the exclusivity of flag state enforcement jurisdiction on the high seas (UNCLOS Article 92(1)), i.e., not to have active interference by the executive branch of a (coastal) state in an otherwise uninterrupted journey. This means that prescriptive jurisdiction under the capacity to act as a port state, i.e., to be enforced when the ship is voluntarily at port, cannot represent, under the UNCLOS, an infringement to freedom of navigation even for facts occurring on the high seas. Opposing arguments could be raised about whether the existence of legal norms to be applied once the ship enters the port restricts that freedom by fragmenting the wished-for uniformity.¹⁶⁴ This argument, however, is based on no tangible rule of law but rather on a policy preference.

§ 40. Port states must also consider actors in other capacities. Although they are not central to understanding the role of port states, it is important to briefly explain what those are as their jurisdiction will be often referred to as conflicting with that of the port state.

§ 41. Flag states are those states which have rights and duties towards ships flying their flag, and they may be states without ports or a maritime coast (e.g. Mongolia or Moldova).¹⁶⁵ The conditions for the registration of ships in the territory of the flag state are a matter of domestic jurisdiction, a “well-defended preserve” of sovereignty.¹⁶⁶ Evidence of this is the very low number of signatures to a treaty on the conditions for the granting of nationality to ships;¹⁶⁷ yet, as of today, international law only demands that “a genuine link” must exist.¹⁶⁸ The flag

¹⁶³ ITLOS, *Norstar*, par 122

¹⁶⁴ (Tan, 2005, p. 13)

¹⁶⁵ (Walker, 2011, pp. 193-194)

¹⁶⁶ (Treves, 2004, p. 189)

¹⁶⁷ United Nations Convention on Conditions for Registration of Ships, Article 1.

¹⁶⁸ UNCLOS, Article 91(1).

state enjoys “exclusive jurisdiction on the high seas” over its ships.¹⁶⁹ The UNCLOS may, however, have torn down this exclusivity to some extent, for example with Article 218, which introduced port state enforcement regarding high seas discharges in violation of applicable international standards.¹⁷⁰ The exclusivity has been read as considering only enforcement actions, allowing port states to prescribe rules of conduct for foreign ships while they are on the high seas.¹⁷¹ The flag state must also fulfil its duties regarding conformity of the ship with international standards, wherever the ship is located, as well as investigating when it receives reports by other states.¹⁷² For that reason, and for the practical reason that it would be too complicated for ships to be exposed to so many laws, it is widely agreed that flag states retain primacy in cases where jurisdiction is concurrent.¹⁷³ Nonetheless, this study submits that when the ship is at port, this primacy is a rule of jurisdictional comity practised on a case-by-case balancing of interests and it does not hinder the jurisdictional rights of the port state.¹⁷⁴ Comity interacts with flag state jurisdiction, in that a port state “may, but need not, refrain from exercising its rightful jurisdiction over actions taken in port or territorial waters, yielding instead to adjudication by the flag state”.¹⁷⁵ It has already been pointed out that, due to the expectations of access to port, flag states could argue a breach of international comity when such ships were forbidden access to port.¹⁷⁶ The practice analysed in this study does not seem to contradict this position, although it does not confirm it either.¹⁷⁷

¹⁶⁹ UNCLOS, Article 92(1).

¹⁷⁰ (Boyle, 1985, p. 365)

¹⁷¹ (Honniball, 2016, p. 528)

¹⁷² UNCLOS, Article 94.

¹⁷³ (Pozdnakova, 2012, p. 89)

¹⁷⁴ USA, *Hilton v. Guyot*.

¹⁷⁵ (Statman, 2013, p. 274)

¹⁷⁶ (Lowe, 1976, p. 622)

¹⁷⁷ *Infra*, 3, The unilateral actions of port states over ship-source pollution.

§ 42. Then there are coastal states, which may also act as port states but which, in this study, will mostly be referred to as states with rights over maritime zones where port state jurisdiction is also intended to apply. Coastal states have historically had sovereignty over a visible belt of sea adjacent to their coast, to which the dominion of the mainland would extend.¹⁷⁸ The distance was first determined by the range of the cannons of the state;¹⁷⁹ it was subsequently fixed at three nautical miles (which some states retain, such as Gibraltar, Jordan, Palau and Singapore);¹⁸⁰ under the UNCLOS, the sovereignty of the state today extends up to 12 nautical miles.¹⁸¹ The breadth of this belt has been growing every century and the UNCLOS regime has set a system of maritime zones where coastal states may exercise a ‘functional jurisdiction’ to protect national interests, going up to 200 nautical miles.¹⁸² In those maritime zones, the jurisdiction of the coastal state overlaps with that of the flag state, not only at the prescriptive level but also with regard to the right to enforce.¹⁸³ It would be advisable, as the literature has already suggested in general terms, that states should consult each other to avoid conflicting laws.¹⁸⁴ To some extent, that is already performed at the IMO.

§ 43. From the perspective of the enforcement agent, it is simply more practical for a coastal state to exercise jurisdiction when the ship is present in the port.¹⁸⁵ This allows the state to enforce the law which had been violated while the foreign ship was in the maritime zones of the state, or to enforce all sorts of rules and standards over its own ships. These powers are what gives port state jurisdiction a distinct capacity to act under international law. This study, however, is not about enforcement at port of prescriptions based on coastal state or flag state

¹⁷⁸ (Bijnkershoek & Frank, 1964)

¹⁷⁹ (Swartztrauber, 1972, pp. 49-50)

¹⁸⁰ (Kent, 1954, p. 553)

¹⁸¹ UNCLOS, Article 3.

¹⁸² (Gavouneli, 2007, pp. 104-105)

¹⁸³ (Gavouneli, 2007, p. 34)

¹⁸⁴ (Ryngaert, 2015, p. 189)

¹⁸⁵ (Ringbom, 2008, p. 202)

rights and duties; it is about the right of the port state to use its powers to regulate conduct independently from such capacities, and which may have an impact beyond such zones.

§ 44. Port states are not generally barred by international law from using their powers to set out rules regarding conduct occurring beyond their internal waters. First, they have extended sovereignty over the territorial sea, which grants prescriptive jurisdiction over conduct occurring in those waters, whilst also subject to the UNCLOS and other rules of international law.¹⁸⁶ Second, they also have entitlements of port state prescriptive jurisdiction which are ‘extraterritorial’, but which have been enshrined in the UNCLOS following the creation of maritime zones of functional jurisdiction, which constitute areas of coastal state enforcement jurisdiction.¹⁸⁷ And third, recent practice shows that port states have been using their powers to regulate conduct which occurs beyond such maritime zones,¹⁸⁸ this encompasses both the high seas and also, to some extent, conduct occurring in other states’ maritime zones or even within their ports. This last-mentioned dimension, which is the object of some criticism in the literature, constitutes the focus of this thesis.¹⁸⁹

1.4.3. *The limits to port state jurisdiction*

§ 45. Port states must consider the existence of certain legal limits to the exercise of their powers.¹⁹⁰ Limits to that reach may come from custom or be treaty based, but there are generally few of them according to some authors.¹⁹¹ These are substantively distinct from the limits to the exercise of jurisdiction under the principles of unilateral jurisdiction, which will be individually addressed in Part II.

§ 46. One of the oldest doctrines in the law of the sea is that what happens inside the ship (also known as ‘internal economy’) remains a matter for the ship, where the master of the ship is the

¹⁸⁶ UNCLOS, Article 2(1); Article 2(3)

¹⁸⁷ *Infra* 2.3.2, The UNCLOS Part XII as a jurisdictional framework.

¹⁸⁸ *Infra* 3, The unilateral actions of port states over ship-source pollution.

¹⁸⁹ (Tan, 2005, p. 219)

¹⁹⁰ (Ringbom, 2008, p. 204)

¹⁹¹ (Hakapää, 2005, p. 265)

sole representative of the sovereign of the flag state. In 1806, the French Conseil d'État confirmed that, despite the existence of a link under the principle of territoriality, the port state ought to respect the internal economy of the ship and hence could not interfere whenever "its support is not requested or [...] the tranquillity of the port is not compromised" unless it were to threaten public order.¹⁹² The literature considers that today it is only a practice of some states and that there is little evidence of the existence of an international custom.¹⁹³

§ 47. The port state is also prevented from exercising its jurisdiction over certain ships, namely warships and "government ships operated for non-commercial purposes".¹⁹⁴ The UNCLOS provides a legal definition of the former;¹⁹⁵ but it does not provide any definition of the latter. It may be argued that visiting naval ships enjoy diplomatic immunity and cannot be subject to inspection.¹⁹⁶ One case where this limit was discussed was when New Zealand banned warships carrying nuclear weapons from entering its ports, which resulted in a dispute with the USA.¹⁹⁷ This study focuses on private ships and so sovereign immunity will not receive any more attention.

§ 48. Distress is another such limit. As early as Vattel, the literature recognized that access to the territory could not be blocked to those seeking shelter from a storm.¹⁹⁸ It is irrelevant whose 'fault' the *force majeure* is: distress forms an objective criterion of assessment.¹⁹⁹ Access of ships to port in case of distress was a non-issue until very recently, due to lack of proper communication.²⁰⁰ Today the situation has changed, and ships may easily request entry into

¹⁹² France, Avis du conseil d'état du 28 oct. 1806.

¹⁹³ (Marten, 2014, p. 31)

¹⁹⁴ UNCLOS, Part II, Section 3, Subsection C and Articles 95 and 96.

¹⁹⁵ UNCLOS, Article 29.

¹⁹⁶ (McMillan, 1987, p. 64)

¹⁹⁷ (McMillan, 1987, pp. 94-95)

¹⁹⁸ (de Vattel, 1758, p. 324)

¹⁹⁹ (Degan, 1986, pp. 10-11)

²⁰⁰ (Morrison, 2012, p. 76)

port to find refuge. Yet access may still be refused, as port states may consider the ship to represent a danger.²⁰¹ It is also accepted that port states may not exercise port state jurisdiction unless the presence of the ship in port is voluntary, and distress precludes voluntariness.²⁰² This is confirmed in specific norms of Part XII of the UNCLOS.²⁰³ It is also confirmed by state practice.²⁰⁴ However, this principle has, to a limited extent, been challenged by the EU regarding IUU fishing.²⁰⁵

§ 49. The UNCLOS includes norms on non-discrimination towards flag states, namely regarding environmental regulations.²⁰⁶ These do not directly apply to the exercise of port powers. Some treaties have explicitly added a reference to an obligation of non-discrimination, which raises the question of whether a general obligation does exist outside such treaties.²⁰⁷ In addition, certain legal regimes, such as international trade law, impose non-discrimination rules. Another example of different treatment for ships is the UNCCC which distinguishes between states based on the CBDR principle, whilst the IMO treats all ships equally.²⁰⁸

§ 50. The UNCLOS establishes strict limits to the amount of time for port state investigation.²⁰⁹ This limit applies to the enforcement of pollution rules and standards by a port state.²¹⁰ In a case of detention, a ship should be allowed to leave port – i.e. be promptly released – following the posting of a bond. Prompt release must not, however, lead to pollution; the claim by the port state that releasing the vessel promptly does pose such a risk of pollution should be

²⁰¹ (Molenaar, 1998, p. 101)

²⁰² (Marten, 2014, p. 27)

²⁰³ UNCLOS Articles 218 and 220(1)

²⁰⁴ (Chircop, 2006, p. 189)

²⁰⁵ EU, Regulation (EC) No 1005/2008, Article 37(5)

²⁰⁶ UNCLOS Article 227.

²⁰⁷ FSA, Article 23

²⁰⁸ UNFCCC, Submission by the International Maritime Organization (IMO)

²⁰⁹ UNCLOS, Article 226

²¹⁰ (Lindpere, 2005, p. 253)

substantiated with evidence, such as unseaworthiness.²¹¹ Despite preventing abuse, Article 292 also raises issues of coordination with the national justice systems.²¹² The literature has highlighted how developments having to do with the environment will force a rethink of the role which prompt release plays.²¹³

§ 51. The limits mentioned above link to other more general limits that derive from international law but that are not freestanding. One of them is good faith. It is a common trope to remember that good faith in international law is always presumed.²¹⁴ In legal terms, bad faith has been said not to be presumable.²¹⁵ This is because it is so hard to prove.²¹⁶ The UNCLOS has enshrined an obligation to act in good faith when states are fulfilling their obligations under the treaty.²¹⁷ This acts as a limit for port states which should not exercise their powers in bad faith, for example as a means of harming another state, or, as it is put forward by this study, to advance parochial interest under the guise of cosmopolitanism. Another such limit is the principle of due regard. The UNCLOS states that freedom of navigation is to be exercised by all states “with due regard for the interests of other States in their exercise of the freedom of the high seas”.²¹⁸ This limit to jurisdiction also shows up in regard to the creation of laws and regulations regarding ice-covered areas.²¹⁹ Before the UNCLOS, this limit was termed “reasonable regard”.²²⁰ In sum, this signifies that when exercising jurisdiction through port powers, port states ought to consider the rights of flag states. The possibility of an abuse of

²¹¹ (Anderson, 2008, pp. 297-298)

²¹² (Anderson, 2008, p. 298)

²¹³ (Trevisanut, 2017, p. 307)

²¹⁴ ICJ, Navigational and Related Rights, par. 150.

²¹⁵ Lake Lanoux Arbitration.

²¹⁶ Barcelona Traction Case, Separate Opinion of Judge Tanaka, p. 333.

²¹⁷ UNCLOS, Article 300.

²¹⁸ UNCLOS, Article 87(2).

²¹⁹ UNCLOS: Article 234.

²²⁰ CHS, Article 2.

rights also needs to be mentioned. The UNCLOS lays down that state parties (and not all states) are to exercise the “rights, jurisdiction and freedoms” recognized in the UNCLOS “in a manner which would not constitute an abuse of right”.²²¹ The principle of ‘abuse of rights’ has been recognized in state practice.²²² It is submitted that this limits prescriptive jurisdiction rights if states fail to prove a jurisdictional link. The principle of proportionality also deserves a mention, as it is often mentioned in literature on port state jurisdiction.²²³ The proportionality of port state jurisdiction has been highlighted by some literature as a potential limit by international law on its exercise.²²⁴ This principle does not of itself bar port states from interfering with foreign ships, but it establishes a requirement of non-excessiveness.²²⁵ All in all, these four general limitations to jurisdiction help to explain how the capacity to act as a port state is a matter of international law.

§ 52. One specific limit – or requirement – to port state jurisdiction is that laws affecting ships ought to have been made public. At the very least, environmental laws to be applied at port must be made known to ships, according to the UNCLOS.²²⁶ This also implies that the flag state and the IMO should be informed.²²⁷ Publicity of port state requirements is often undertaken in the shape of a ‘Marine Notice’, distributed by the maritime authority of the port state. However, this does not go as far as providing for the existence of a general limit for port states to enforce jurisdiction when this procedure has not been followed. The UNCLOS mentions that port states must communicate their entry requirements to the IMO.²²⁸ In practice, states rarely meet this requirement and no consequences seem to follow. Port states may consider the requirement of publicity to be fulfilled regardless of appropriate and timely

²²¹ UNCLOS, Article 300.

²²² PCIJ, *Certain German Interests in Polish Upper Silesia*, p. 30. PCIJ, *Free Zones*, p 167.

²²³ (Marten, 2015, pp. 132-133)

²²⁴ (Ringbom, 2017, pp. 270-271)

²²⁵ (Ryngaert, 2015, pp. 158-159)

²²⁶ UNCLOS, Article 211(3).

²²⁷ (McDorman, 2000, p. 218)

²²⁸ UNCLOS, Art. 211(3)

communication to the IMO of the measures. This may have to do with the fact that port states do not see certain requirements as an action undertaken in the capacity as a port state in international law but rather as an exercise of domestic jurisdiction. That assessment is disputed in this study in regard to ship-source pollution for reasons to be discussed when analysing the legal basis for unilateral port state jurisdiction.²²⁹

§ 53. Under the UNCLOS regime, states – arguably in any capacity, as that is not provided for in the treaty – may only impose monetary penalties with respect to violations of national laws and regulations, or applicable international rules and standards, for the prevention, reduction and control of pollution of the marine environment, committed by foreign ships beyond the territorial sea.²³⁰ When such acts have occurred in the territorial sea, an exception exists for cases where pollution is “wilful and serious”.²³¹ The port state may then impose penal sanctions, such as imprisonment and confiscation of the ship.²³²

§ 54. The proposal brought about during UNCLOS III concerning port state inspection referred to discharges which had occurred “within the preceding six months” of the visit.²³³ A proposal of the ILA was more restrictive, referring to a period of six weeks.²³⁴ These proposals have cited no customary law in regard to the prescription of a state’s criminal law. This study found no evidence of its application, but it could be questioned whether an unlimited right would pass the proportionality test. Also related to this issue of time is the requirement that port states must avoid “undue delay”.²³⁵ This has more to do with a question of capability than of the existence of inspections on board ship by reason of law. In that sense, what is ‘undue’ is the inability of the port state to enforce the law in a reasonable time, e.g. due to lack of personnel.

²²⁹ *Infra* 4.3.1, The ‘domaine réservé’ as an exception to the principle of territoriality.

²³⁰ UNCLOS, Article 230(1).

²³¹ UNCLOS Article 230(2).

²³² (Kasoulides, 1993, p. 31)

²³³ UN, A/CONF.62/C.3/L.24, Article 3(9).

²³⁴ (British Branch Committee on the Law of the Sea, 1974, p. 406)

²³⁵ MARPOL, Article 7

§ 55. According to some literature, port states would have a limited enforcement capacity under international law, something that would eventually limit their willingness to prescribe more stringent rules and standards.²³⁶ This interpretation is based on a narrow reading of UNCLOS, namely Articles 25 and 218, which allegedly suggest that port states may “only exercise enforcement powers relating to the conditioning of entry or access to services”.²³⁷

§ 56. Although this study will not investigate WTO law in detail, some of its fundamental tenets should be mentioned as they might pose a limit to the exercise of port powers. The GATT provides for a significant impediment to the establishment of port entry conditions. In order to ensure “freedom of transit”, port states must ensure equal treatment to all flag states and may not impose conditions relating to the ownership of goods and ships.²³⁸ Denying access to ships because of the flag under which they operate would be tantamount to a trade barrier under the GATT’s “most favoured nation” principle.²³⁹ The EU’s internal market rules are also a limit to discrimination by port states’ jurisdiction on such a ground.²⁴⁰

§ 57. Now that the powers of the port state have been made explicit, as well as their reference in international law which provides both a framework for their reach and, at the same time, limits to that reach, a point will now be made on how the port state, as well as being an international actor, is also a cosmopolitan actor.

1.5. The port state as a cosmopolitan actor

§ 58. The opening quote to this chapter pointed to the subsidiarity of port state jurisdiction in the UNCLOS regime, and, more arguably, in the law of the sea in general. It referred to flag state failure as a reason “to take action”; but what that action consists of may be broader than simply the fulfilment of the UNCLOS duties. What is more, the phrase “within a reasonable time” may be interpreted not only as what the flag state is expected to do towards individual

²³⁶ (Molenaar, 2007, p. 235)

²³⁷ (Marten, 2015, p. 132)

²³⁸ GATT, Article 5(2)

²³⁹ (McDorman, 1997, pp. 310-311)

²⁴⁰ TFEU, Article 26(2).

ships to ensure compliance, but also as a regulating entity under which every ship may register. Finally, it pointed out that it “should come into play only” in such cases, without permanently limiting the port state’s right to act outside those boundaries. There is for these reasons more than enough room to speculate whether port states are acting in a parochial manner, protecting their national interests as well as those of others which so request, or whether they are resorting to a cosmopolitan approach to international law both through their enforcement of international rules and standards and through the laws which they pass. Unfortunately, most of the world’s states are not well equipped to perform this task, as the priority for public spending is sometimes focused on more urgent matters.²⁴¹

§ 59. The debates in UNCLOS III show that the capacity to act as a port state was, at the time, not one of cosmopolitanism but rather of strict collaboration between states in pursuance of national interests.²⁴² The creation of this capacity has, however, been seen from the perspective of the expansion of the geographical reach of coastal state jurisdiction.²⁴³ Apart from serving the national interest, port state jurisdiction also furthers the interests of the international community.²⁴⁴ Although the norms in treaties such as the UNCLOS or MARPOL definitively reflect the interests of the state and form a balance between interests of different states, those norms also create benefits for humans in general, not only the populations of the individual states but, for example, for people who are not directly represented, either because their sovereign state is not party to the rule-making process or because they do not recognize the sovereign state’s legitimacy. When the port state enforces a treaty, it is therefore not only furthering its own interest, but also that of the international community in preventing impunity and unfair competition by non-enforcement. More broadly, the port state may also impact those humans who benefit from that treaty’s rules and standards despite their formal exclusion from the process. In this sense, port states embody the role of “guardians of the maritime order”.²⁴⁵

§ 60. Port states may contribute to the development of rules and standards in two separate ways. One is to use the margins of residual jurisdiction granted by multilateral instruments. The rules

²⁴¹ UN, A/RES/68/70 (2013), 146.

²⁴² UN, A/CONF.62/C.3/L

²⁴³ (Gavouneli, 2007, p. 44)

²⁴⁴ (Molenaar, 2007, pp. 225-226)

²⁴⁵ (Geiss & Tams, 2015, p. 19)

and standards developed by port states under such entitlement are still, to some extent, treaty based, and must not contravene the object and purpose of the treaty. Yet they are not fully multilateral as they require in each case an intention, an effort, and the respective public investment in its realization. The treaties just work as a measuring rod for ensuring that states do not use their margins of discretion to undermine the treaty's object and purpose. The other way to develop rules and standards is to create other rules and standards which go beyond those that are accepted in the treaty but that act in furtherance of the same values that inspired the cooperation. This second way is part of a different trend, which is the development of cosmopolitan international law. Nonetheless, this study argues that they are both cases of unilateral jurisdiction.

§ 61. The explicit or implicit reliance on cosmopolitan formulae to justify exercises of jurisdiction raises the question of whether the state is finding an appropriate legal ground. This study will propose a new means of interpreting the basis of port state jurisdiction when performed unilaterally. Instead of focusing on the territoriality or extraterritoriality of the concrete norm, i.e. its geographical scope of application, this study proposes that, not only at the moment of enforcement (as has already been hinted at by some literature) but more specifically for prescriptive jurisdiction, port states are enhancing the functionality of the law. It is submitted that this is a more accurate interpretation for exercises of unilateral jurisdiction that regulate ship-source pollution, as it is understood that the port state is providing legal protection to a cosmopolitan 'object': the environment.

1.6. Interim conclusion (I)

§ 62. This first chapter was designed as an overview of some of the most crucial elements of discussion that will follow. At first, the modern state was conceived as a parochial entity, entitled to exercise certain powers aiming at preserving the existence of the nation. International law was originally a tool for ensuring coexistence, and sovereignty was then devised as a principle of coexistence between equals. To a certain extent, this still holds true. Yet recent developments have shown how international law has enriched its purpose, providing states with more grounds for exercising powers. In particular, international law has seen the emergence of certain expressions (here called *formulae*) in the last century which reveal the emergence of a cosmopolitan approach to statehood, detached from the nation. This rather more communitarian trend has also revealed itself in the recognition of new entities with vested interests in state actions, such as the international community, as well as new objects of legal

protection which do not emerge immediately from state laws, but which rather serve as its source. One of these objects is the environment. Although some states have developed their own environmental laws internally, there is today a framework for the common legal protection of the environment. This has developed throughout the twentieth century and has given rise to rules and standards which develop according to a multilateral process. The existence of a common legal framework for the environment, characterized by multilateralism, has certain advantages, such as uniformity and predictability, but also certain limitations. These limitations have the consequence of preventing an optimal level of protection for the environment, and possibly other global values too, and reveal the parochial nature of international law. The capacity to act as a port state under international law has emerged to ensure that multilateral rules and standards were implemented regardless of the incapacity or unwillingness of flag states to comply with their duties. This is already rather cosmopolitan, as a state is taking into its own hands the burden of ensuring that the rule of law is applied regardless of its immediate interests being affected. But it is also serving the national interest, as the state is invested in ensuring that the level playing field established globally for its own ships is respected. Port states may therefore be cosmopolitan actors in the sense that they contribute to the enforcement of international rules and standards as well as in the sense that they may legislate unilaterally in pursuance of a higher threshold of legal protection for the environment. To better understand how that plays out in practice, one specific set of measures will be analysed in this study: ship-source pollution rules and standards. The next chapter sets out to present how states have established a multilateral framework for port states to act under international law to tackle that issue. Only after completing that overview of what is generally accepted will this study be able to look, by comparison, at what port states have been doing unilaterally.

2. THE MULTILATERAL FRAMEWORK FOR PORT STATE JURISDICTION

“Port State jurisdiction should come into play only in cases when the flag State failed to take action within a reasonable time.”²⁴⁶

2.1. Introduction to Chapter 2

§ 63. The jurisdiction of states over maritime transport has been for the most part the object of treaty law. The multiplicity of treaties on this issue creates a framework, where each treaty interacts with and, in some cases, cross-fertilizes the others.²⁴⁷ As a result, these treaties often grant overlapping entitlements to states acting in different capacities. The jurisdiction to regulate ship-source pollution has partly resulted from multilateralism. International legally binding instruments have been discussed and approved at diplomatic conferences, and today they provide a comprehensive set of rules for ships. These instruments also provide rights for states, more specifically jurisdictional rights. And some of these rights rely on port state powers or attribute a right to make use of them. The reliance on port state jurisdiction to ensure compliance with ship-source pollution rules and standards approved multilaterally has increased in past years because of both treaties and enforcement agreements.²⁴⁸ Multilateralism enhances jurisdiction, namely by explicitly mentioning the role of port states as complementary to the fulfilment of flag state duties. Such enhancement also occurs when states multilaterally recognize new concerns, sometimes having recourse to cosmopolitan formulae that aim at removing the focus from sovereignty and placing it on achieved results.²⁴⁹ That notwithstanding, the multilateral framework often also limits port states in using their powers in a way that could further develop the level of legal protection afforded to those concerns.²⁵⁰ Hence multilateralism is both a source of and a limit for cosmopolitan state action.

§ 64. This chapter will study the existing multilateral framework of port state jurisdiction by analysing norms which attribute port states with rights over ship-source pollution conduct. The idea of multilateralism as a path towards cosmopolitan international law is first dissected to

²⁴⁶ UN, A/CONF.62/C.3/SR.14

²⁴⁷ (Redgwell, 2006, p. 184)

²⁴⁸ IMO, LEG/MISC.8, 30 January 2014.

²⁴⁹ *Supra* 1.3, The cosmopolitan .

²⁵⁰ *Infra* 2.5, The limitations of this multilateral framework.

better understand the structural limits it imposes. Then the substance of norms on ship-source pollution is presented, illustrating from an evolutionary perspective the growing scope of multilateral instruments in the law of the sea. This will show how the UNCLOS has created a balance of jurisdiction, where port states have a role to play, but that does not exhaust all possibilities. The focus subsequently shifts towards regional agreements on the enforcement of those norms, for example the MoU on port state control, which are early evidence of how international law allows port states to act. A short reference is made to non-binding guidelines as they also contribute to enhancing the role of port states and are developed multilaterally, often serving as a model for subsequent binding instruments. The interim conclusions will then establish a connection between the limitations of multilateralism and the promise of unilateralism.

2.2. The multilateral approach to international law

§ 65. The idea that cooperation with many other states is the best way to develop international law has not always been in fashion in international relations. In earlier times, international law used to be characterized by instruments resulting from bilateral relationships and by customary practices rather than by multilateral assemblies and organizations. The increased growth in cosmopolitan formulae in the twentieth century came along with the development of multilateral institutions, such as the United Nations, which pushed for the development of treaties with a global scope of application and which aimed at being universal in terms of membership. In a sense, the treaties that correspond to this multilateral approach also correspond to a cosmopolitan shift in international relations, for states started to put aside some of their parochial concerns in order to achieve common goals. This has indeed become the most efficient way to ensure consensus and uniformity.²⁵¹

§ 66. Treaties are legally binding agreements governed by international law which are concluded between two or more subjects of international law and that aim to produce legal effects.²⁵² Treaties can be bilateral, but when they comprise more than two parties, they are multilateral. Some multilateral treaties have a limited number of possible participants due, for

²⁵¹ (Blum, 2008, pp. 348-349)

²⁵² UN, A/CN.4/SER.A/1962/Add.1, p. 161.

example, to their regional scope. Some have the ambition of having a wide participation. The multilateral approach to the regulation of maritime transport fits this latter objective, as most instruments are open to all states.

§ 67. It is a well-established rule in international law that *pacta sunt servanda* (i.e. contracts are to be kept).²⁵³ This rule serves to prevent a treaty from being unilaterally set aside on grounds of non-compliance.²⁵⁴ The existence of this rule is not only in the interests of the states involved but ultimately of the international community.²⁵⁵ This principle ensures the stability of a multilateral framework, beyond eventual disagreements which almost always occur.

§ 68. One possible legal effect of a treaty is the attribution, or recognition in the case of the codification of customary norms, of rights to assert jurisdiction. Treaty law is therefore one possible source of international jurisdiction rights, determining their scope and setting the limits for the exercise of such rights. Attributions of jurisdiction by treaty are substantially distinct from legal obligations that may exist in the treaty. Special attention must hence be drawn to the language used, namely to more stringent formulae such as ‘shall’ and more open ones such as ‘may’.

§ 69. Another relevant point regards the applicable location of treaty law. Treaties are to be applied territorially.²⁵⁶ To define what territory is at sea, the VCLT refers to “appurtenant territorial waters”, which is a term that is not used in the UNCLOS but that is widely interpreted as encompassing the territorial sea.²⁵⁷ The added formula ‘otherwise established’ illustrates

²⁵³ Chile-Peru Alliance Arbitration, “It is a principle well established in international law that a treaty containing all elements of validity cannot be modified except by the same authority and according to the same procedure as those which have given birth to it.” Claim of Charles Adrian van Bokkelen v. Government of Haiti: “Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals (...) and to be kept with the most scrupulous good faith.” The North Atlantic Coast Fisheries Case: “Every State has to execute the obligations incurred by treaty bona fide, and is urged thereto by the ordinary sanctions of international law in regard to observance of treaty obligations.”

²⁵⁴ ICJ, Gabcikovo-Nagymaros Project, par. 114.

²⁵⁵ (Wehberg, 1959)

²⁵⁶ VCLT, Article 25. This represents a difference from the draft: “Unless a different intention appears from the treaty or is otherwise established, *the application of a treaty extends to the entire territory of each party*” (emphasis added) in UN Doc.: General Assembly, Official Records, Twenty-first session, supplement No. 9 (A/6309/Rev. 1), pp. 44/45. It has been noted that this change served to “make it deal also with the extra-territorial application of treaties” Draft Articles on the Law of Treaties with commentaries, 1966, p. 213.

²⁵⁷ (Odendahl, 2012, p. 497)

that other elements may be relevant to assess the geographical scope of a jurisdictional right, for example, other treaties or court assessments.²⁵⁸ This is particularly important when states use their port powers within prescriptions that consider conduct which took place outside the state's territory, as will be discussed in Part II.

§ 70. This study proposes that multilateral instruments, not only treaties but also memoranda of understanding and guidelines, provide states with a measuring rod to ascertain whether their exercises of jurisdiction are based on a multilateral entitlement or whether they are unilateral. Those multilateral entitlements do not encompass the full range of actions which a port state can take with regards to the protection of the environment from ship-source pollution. To better discern when unilateral jurisdiction is taking place, it is necessary to understand the scope of treaty-based jurisdiction.

§ 71. So far as the specific topic of this research is concerned, one must also refer to the role of the IMO. Indeed, in the international law of maritime transport regulation, it is generally accepted that a certain level of centralization in the rule-making process is necessary and beneficial to ensure predictability and legal security. Nonetheless, there is no evidence to argue that there exists a monopoly of maritime regulation that mandates a state to rely exclusively on the rules and standards of that organization. Nowhere in the statutes of the IMO is it established that states consent to not making full use of their port state rights under other applicable treaties such as the UNCLOS.

§ 72. Multilateralism does not, however, mean globalism. It signifies “many sides”, not “all sides”. States often seek multilateralism at the regional level, with neighbouring states. Globally applicable treaties such as the UNCLOS include references to regional co-operation.²⁵⁹ Because some ecosystems have their own specificities, some states have adopted treaties on ship-source pollution with a regional scope.²⁶⁰ That possibility is part of the existing

²⁵⁸ (Odendahl, 2012, pp. 491-492)

²⁵⁹ UNCLOS, Art. 197.

²⁶⁰ Some examples: Convention For The Protection Of The Mediterranean Sea Against Pollution (1976 Barcelona Convention), Kuwait Regional Convention For Co-Operation On The Protection Of The Marine Environment From Pollution (1978 Kuwait Convention), Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region (1981 Abidjan Convention), Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (1981 Lima Convention), Regional Convention For The Conservation Of The Red Sea And Gulf Of Aden Environment And Protocol (1982 Jeddah Convention), Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (1983 Cartagena Convention),

framework on port state jurisdiction. For example, reference to port state jurisdiction appears in the 2002 Protocol Concerning Cooperation in Preventing Pollution from Ships, and in Cases of Emergency, Combating Pollution of the Mediterranean Sea. The openness of this document to the exploration of avenues of residual jurisdiction by Mediterranean port states reveals itself when it refers to ‘their applicable legislation’, although reference to ‘measures in conformity with international law’ and to the ‘relevant international conventions’ appears to restrict it somewhat.²⁶¹ Some multilateral treaties focus exclusively on cooperation between just a few states, establishing a more particular regime.²⁶² Multilateralism embodies actions taken between many states, some of which have at their core a treaty. However, much exists outside this symbol of legal positivism. Shared values manifest themselves in the many fora where states interact, namely in their declarations, in the resolutions they pass, in the agendas they set. Jurisdiction is rarely defined, however, in that rather soft set of multilateral achievements. Instead, it is the object of treaties.

2.3. Treaty-based port state jurisdiction over ship-source pollution

§ 73. The evolution of the international law on ship-source pollution which entitles port states to exercise prescriptive and enforcement powers is a long story. Throughout the last fifty years there has been considerable evolution in this regard. Notwithstanding this evolution, it is noticeable that states have at times agreed on the substance whilst for many years delaying the entry into force of binding obligations. It is within this setting that port states have emerged as environmental actors. To provide a structure to this evolution, the existence of port state jurisdiction in the treaties is presented in three stages: before the UNCLOS entered into force

Convention of the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (1985 Nairobi Convention), Convention For The Protection Of The Natural Resources And Environment Of The South Pacific Region (1986 Nouméa Convention), Convention On The Protection Of The Black Sea Against Pollution (1992 Bucharest Convention) and the Convention On The Protection Of The Marine Environment Of The Baltic Sea Area (1992 Helsinki Convention).

²⁶¹ 2002 Protocol Concerning Cooperation in Preventing Pollution from Ships, and in Cases of Emergency, Combating Pollution of the Mediterranean Sea, Article 4(2).

²⁶² Denmark, Finland, Norway and Sweden signed: Agreement Concerning Cooperation To Ensure Compliance With The Regulations For Preventing The Pollution Of The Sea By Oil (1967 Copenhagen Agreement); Agreement Concerning Cooperation in Taking Measures Against Pollution of the Sea by Oil (1971 Nordic Agreement);

(i.e. before 1994); in the UNCLOS treaty itself; and after the UNCLOS entered into force up to the present day (i.e. 1994-2018).

2.3.1. Norms from pre-UNCLOS multilateral treaties

§ 74. The environmental protection provisions of the 1958 Geneva Convention on the High Seas still remain relevant for states which have not ratified UNCLOS, such as the United States of America, Venezuela and Turkey, especially if one views port state jurisdiction in UNCLOS Article 218 as not being rooted in custom but merely in treaty law. The 1958 treaty already included norms on discharge of oil by ships,²⁶³ and also on the dumping of radioactive waste.²⁶⁴ Reference to port state jurisdiction appears in the reference made to equal access to seaports²⁶⁵ and equal treatment in the ports.²⁶⁶

§ 75. The period between the entry into force of that treaty (1962) and the moment the UNCLOS entered into force (1994) is best depicted by the catastrophic maritime environmental incidents involving oil pollution. Although some effort was undertaken prior to such major incidents, they were the cause of the acceleration of the multilateral efforts in the decades prior to the UNCLOS entering into force. Three such incidents should be mentioned. In 1967 the *SS Torrey Canyon*, an oil tanker registered in Liberia, was wrecked off the western coast of England.²⁶⁷ Less than a decade after, in 1978, the *Amoco Cadiz*, also flagged in Liberia, caused a major oil spill off the coast of France.²⁶⁸ Finally, in 1989, after the UNCLOS had already been signed, it was the turn of the USA flagged *Exxon Valdez* to cause an oil spill off the Alaskan coastline.²⁶⁹ The literature often refers to these incidents as determining points around

²⁶³ CHS, Article 24.

²⁶⁴ CHS, Article 25(1).

²⁶⁵ CHS, Article 3(1)(b).

²⁶⁶ CHS, Article 3(2).

²⁶⁷ (BBC, 1967)

²⁶⁸ (BBC, 1978)

²⁶⁹ (BBC, 1989)

which international law on ship-source pollution developed.²⁷⁰ Yet it should be said that other incidents of equally relevant proportions occurred worldwide around that period.²⁷¹ Public opinion realized that ships, in particular oil tankers, could pose a threat both to the economic activity of the coastal zones where the incidents occurred, which was suspended for some time in the aftermath, and also to the marine environment and, indirectly, to human health. The coverage, however, often failed to grasp the exceptional nature of these disasters.²⁷²

§ 76. Nevertheless, prior to that peak in public awareness, efforts had been undertaken to prevent those same sorts of incidents from happening. The international treaty law on ship-source pollution started by addressing the concern of oil leaks from tankers.²⁷³ A first international multilateral effort to counter ship-source marine pollution had already been made in 1954. The International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), which was signed in that year, entered into force in 1958 and was subsequently amended in 1962, 1969 and 1971. This was the first international treaty attempting to protect the sea from pollution by oil tankers, prohibiting them from discharging oil, or any oily mixture, within specified prohibited zones.²⁷⁴ In regard to particular entitlements to port state jurisdiction, OILPOL only allowed inspections of the ship's documents to determine if there had been a violation of such norm.²⁷⁵ One particular exception to the powers of the port state with respect to the prohibited discharge of oil or any oily mixture was based on the availability at port of a reception facility.²⁷⁶ Under this treaty, the port state would need to have such a facility so as to enforce an international ban on the discharge of oil. This requirement would continue to be a distinguishing mark of all subsequent developments.

²⁷⁰ (Sands & Peel, 2012, p. 348)

²⁷¹ (Carpenter, 2016, pp. 6-7)

²⁷² (Tan, 2005, p. 69)

²⁷³ (Churchill & Lowe, 1999, p. 333)

²⁷⁴ OILPOL Article III and Annex A.

²⁷⁵ OILPOL Article IX(2)

²⁷⁶ OILPOL, Article III(2)(b).

2.3.1.1. *Port states in the London Convention (I)*

§ 77. Concerns raised by the dumping of pollutants into the ocean also led to a treaty. In 1972, the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter was opened for signature. In the preamble to this treaty states recognized that “the capacity of the sea to assimilate wastes and render them harmless, and its ability to regenerate natural resources, is not unlimited”.²⁷⁷ This treaty, albeit not referring to ports as such, does make reference to the conduct of the ship within the territory of a state, likely to be the port state, namely the loading of ‘the wastes or other matter’. Also, it was specified that states must designate an authority to have the power to control the permits required to dump matter and the records of such activities, something that may eventually rely on port state powers.²⁷⁸ Such control and monitoring relates to the port state when the matter for dumping is loaded in the territory of the state party (i.e. at port),²⁷⁹ and the consequent measures are to be applied in the territory, which also means the port.²⁸⁰ The treaty also recognizes that each state party may adopt other measures “in accordance with the principles of international law”, arguably leaving room for port states to regulate this matter unilaterally.²⁸¹

2.3.1.2. *Port states in the MARPOL 73/78 (I)*

§ 78. Soon after the London Convention, the International Convention for the Prevention of Pollution from Ships (MARPOL) was opened for signature, in 1973. Despite the sensitivity of states to environmental issues at the time, this treaty did not find sufficient support to come into effect. It only entered into force after the adoption, in 1978, of a protocol. The Protocol of 1978 was adopted in response to the tanker accidents of 1976-1977. MARPOL 73/78 (i.e. convention plus protocol) stipulated that it superseded the OILPOL treaty.²⁸² It entered into

²⁷⁷ LC, Preamble.

²⁷⁸ LC, Article VI(1).

²⁷⁹ LC, Article VI(2).

²⁸⁰ LC, Article VII(1)

²⁸¹ LC, Article VII. 5

²⁸² MARPOL, Article 9(1).

force only in October 1983, a decade after the time of signature. The treaty is composed of a core instrument and of annexes which incorporate rules and standards on several types of ship-source pollution. Each annex is composed of regulations that set the applicable rules, and by appendixes which are composed of technical standards. The original treaty included five annexes, which are still subject to frequent revisions at the IMO. Annex I (oil) and Annex II (chemicals) are compulsory, which means that states adopting the treaty are necessarily adopting those rules and standards. Annex III (packaged materials), Annex IV (sewage) and Annex V (garbage) are optional. More recently, Annex VI (air pollution), also optional for MARPOL state parties, was approved.

§ 79. Similar to other instruments developed at the IMO, all the MARPOL annexes are amended through a tacit acceptance procedure.²⁸³ This process is aimed at avoiding the delay caused by explicit acceptance.²⁸⁴ Under that procedure, the amendments approved at the IMO enter into force on a predetermined date, unless a predetermined number of state-parties object by an agreed date.²⁸⁵ Consent is hence presumed unless states indicate otherwise, a practice which aims to ensure that consensus achieved at the negotiating table has immediate applicability. A recent example of this method has been an amendment to MARPOL Annex 1 (Chapter 9, Regulation 43) which prohibits the use of heavy grade oil as ballast in the Antarctic area.²⁸⁶

§ 80. MARPOL recognizes primary prescriptive and enforcement jurisdiction for flag states but it does not prevent the coastal state from applying its laws to violations within its jurisdiction.²⁸⁷ The treaty explains that the term 'jurisdiction' is to be construed in the light of international law in force at the time of its application or interpretation.²⁸⁸ This was meant to

²⁸³ (Shi, 1999, p. 306)

²⁸⁴ (Shi, 1999, p. 307)

²⁸⁵ MARPOL 73/78 Article 16.

²⁸⁶ IMO MEPC Resolution 256(67).

²⁸⁷ MARPOL 73/78 Article 4.

²⁸⁸ MARPOL 73/78 Article 9(3).

prevent compromising developments at UNCLOS III,²⁸⁹ but it ended up having wider effects, as the jurisdiction of states continues to evolve. This is particularly evident when it comes to analyse the development of a capacity to act as a port state which relies heavily, as will be demonstrated, on interpretations given to territoriality.

§ 81. Another example of the reliance on port state mechanisms introduced by MARPOL is the issuance of certificates that all parties to the treaty ought to recognize as their own. Ships are required to have various certificates when entering a port and inspections can be limited to verifying such certificates.²⁹⁰ The MARPOL treaty introduced a system of certification as evidence of compliance with its standards. This system relies on control at port by providing that the port state can detain the ship if “there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of the certificate”.²⁹¹

§ 82. Inspection rights at port are attributed to any state party “for the purpose of verifying whether the ship has discharged any harmful substances in violation of the provisions of the regulations”.²⁹² The same rights exist upon request by a third state party.²⁹³

§ 83. MARPOL limits the power to deny entry or to control foreign ships at port with an obligation to communicate to the flag state any denial of entry or other action taken against the ship.²⁹⁴

§ 84. MARPOL exhorts states to provide “reception facilities” at port for the disposal of oily wastes, sewage, garbage, and other hazardous materials.²⁹⁵ Parties to the Convention are under an obligation to provide adequate facilities for reception of residues and oily mixtures at

²⁸⁹ (Karim, 2015, p. 7)

²⁹⁰ MARPOL, Article 5(2).

²⁹¹ MARPOL 73/78 Article 5.

²⁹² MARPOL, Article 6(2).

²⁹³ MARPOL, Article 6(5).

²⁹⁴ MARPOL, Article 5(3).

²⁹⁵ Oily residues (from ER or from cargo): Annex I, regulation 38; NLS residues: Annex II, regulation 18; Sewage: Annex IV, regulation 12; Garbage: Annex V, regulation 7; and Annex VI wastes & residues: regulation 17.

loading terminals, repair ports, and other ports frequented by ships which have oily residues to discharge. This bears some relevance for port state jurisdiction as it may serve as a limit to what port states can require ships to perform at port, as well as what they should have performed prior to the call.

§ 85. The Annexes of MARPOL also provide evidence to the relevance of port state jurisdiction in tackling ship-source pollution.

§ 86. Annex I of MARPOL includes the Regulations for the Prevention of Pollution by Oil.²⁹⁶ Under Annex I, tankers and other ships are obligated to use the ‘LOT (Load on Top) system’ to extract oily residues from operational waters. These oily wastes must be retained on board in slop tanks for later transfer into shore reception facilities. Furthermore, tankers and other ships must carry and maintain an Oil Record Book in which all operations involving oil are to be recorded. Every movement of oil from loading to discharge, on a tank to tank basis, must be logged in the book. This book can be inspected by the authorities of any state which is a party to MARPOL.²⁹⁷ This illustrates how Annex I relies on port state powers to inspect the Oil Record Book, granting port states jurisdiction for this matter.²⁹⁸ Moreover, the treaty also attributes jurisdiction to conduct other surveys and inspections on the condition of the ship and its seaworthiness.²⁹⁹

§ 87. Annex II of MARPOL includes the Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk.³⁰⁰ It attributes jurisdiction to the port state to inspect the Cargo Record Book that such ships must carry.³⁰¹ It also attributes jurisdiction to conduct other surveys and inspections on the duration of certificates issued for carrying noxious liquid substances in bulk.³⁰²

²⁹⁶ MARPOL Annex I, Regulations for the Prevention of Pollution by Oil.

²⁹⁷ MARPOL, Annex I, Regulation 20.

²⁹⁸ MARPOL, Annex I, Regulation 20 (6).

²⁹⁹ MARPOL, Annex I, Regulation 4(3)(d).

³⁰⁰ MARPOL Annex II, Regulations for the Control of Pollution By Noxious Liquid Substances in Bulk.

³⁰¹ MARPOL, Annex II, Regulation 9(7).

³⁰² MARPOL, Annex II, Regulation 12(3).

§ 88. Annex III of MARPOL includes the Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form.³⁰³ It provides a (port) state with jurisdiction to determine whether all ‘operational requirements’ are being followed.³⁰⁴

§ 89. Annex IV of MARPOL includes the Regulations for the Prevention of Pollution by Sewage from Ships.³⁰⁵ It refers to the verification by port state authorities of an International Sewage Pollution Prevention Certificate, which contains information on the voyage between port states.³⁰⁶

§ 90. Annex V of MARPOL includes the Regulations for the Prevention of Pollution by Garbage from Ships.³⁰⁷ This applies in principle to all ships.³⁰⁸ It deals with several types of garbage and specifies the distances from land and the way the different types of garbage may be disposed of. The requirements are much stricter in a number of ‘special areas’.³⁰⁹ The Annex also imposes a complete ban on the dumping into the sea of all forms of plastic. One of the relevant provisions of this Annex to port states is the Garbage Record Book, which may also be controlled by port states.

2.3.1.3. *Port states in the Convention on Oil Pollution Preparedness, Response and Cooperation*

§ 91. In 1990, another treaty on oil pollution was opened for signature: the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC). This time the focus was on preparedness, response and cooperation. This treaty required ships to have on

³⁰³ MARPOL, Annex III.

³⁰⁴ MARPOL, Annex III, Regulation 8(1).

³⁰⁵ MARPOL Annex IV.

³⁰⁶ MARPOL, Annex IV, Regulation 4(1).

³⁰⁷ MARPOL Annex V.

³⁰⁸ MARPOL Annex V, Regulation 2: “Unless expressly provided otherwise, the provisions of this Annex shall apply to all ships”.

³⁰⁹ MEPC 62/24, Annex 13, page 2

board an ‘oil pollution emergency plan’, which was subject to inspection by officers at port.³¹⁰ Apart from the reference to the international agreements, it is worth noting that this treaty suggests that state laws are applicable, in a possible reference to unilateral port state prescriptive jurisdiction.

2.3.1.4. *Port states in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers*

§ 92. The 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) has, as one of its objectives, the protection of the marine environment. The revised Chapter I of STCW includes enhanced procedures concerning the exercise of port state jurisdiction to allow intervention in the case of deficiencies deemed to pose a danger to persons, property or the environment.³¹¹ This intervention can take place when the certificates are not in order or when the ship is involved in a collision or grounding, if there is an illegal discharge of substances (causing pollution) or if the ship is manoeuvred in an erratic or unsafe manner.³¹²

2.3.1.5. *Port states in the International Convention for the Safety of Life at Sea*

§ 93. The International Convention for the Safety of Life at Sea (SOLAS) is not a treaty on the protection of the marine environment. Nonetheless, it does contain norms that are relevant for countering ship-source pollution.³¹³ Some of SOLAS Regulations are relevant for this study. This is so because SOLAS compliance can be the object of a port state control MoU. One example is regulation V/10 that acknowledges that “ships' routing systems contribute to safety of life at sea, safety and efficiency of navigation and/or protection of the marine environment”.³¹⁴ Another example is regulation V/11 which refers to ‘precautionary areas’ or

³¹⁰ OPRC, Article 3(1)(b).

³¹¹ STCW, Regulation I/4(1) [Control procedures].

³¹² STCW, Regulation I/4(2) [Control procedures]: “4”.

³¹³ (Anderson, 2008, p. 257).

³¹⁴ IMO, NAV 59/20. IMO, MEPC.1/Circ.833, at para. 10.5.

‘areas to be avoided’.³¹⁵ The carriage of chemicals in bulk, apart from being covered in MARPOL Annex II, is also subject to regulation in the SOLAS treaty.³¹⁶ Both treaties require chemical tankers built after 1 July 1986 to comply with the International Bulk Chemical Code (IBC Code), which sets out the international standards for the safe carriage, in bulk by sea, of dangerous chemicals and noxious liquid substances.

§ 94. Overall, this analysis of the treaty law signed prior to the UNCLOS reveals that port state jurisdiction based on treaty entitlements is not an innovation of the UNCLOS III. Rather, as some have pointed out, it evolved, to a limited extent, as a customary practice.³¹⁷ Nonetheless, it is noticeable that the negotiations for the UNCLOS had a profound impact on the development of treaty law at the time (1973-1982), leaving jurisdictional issues open.

2.3.2. *The UNCLOS Part XII as a jurisdictional framework*

§ 95. Between 1973 and 1982, the United Nations convened the Third Conference on the Law of the Sea. This conference was concluded at Montego Bay, Jamaica, on 10 December 1982, with the signature of the United Nations Convention on the Law of the Sea (UNCLOS). This treaty only entered into force in 16 November 1994, together with an implementation Agreement for Part XI. The treaty was then called ‘the constitution for the oceans’, giving substance to customary practices and introducing new law.³¹⁸ This treaty allowed no reservations because the whole treaty was negotiated as a package deal to prevent the existence of diverging laws in the ocean.³¹⁹

§ 96. The UNCLOS sought to cast a new balance of jurisdiction between coastal states and flag states, introducing for the first time a reference to port state enforcement to remedy flag state failure. This development has been concomitant with the development of the international law

³¹⁵ IMO, Resolution A.572(14), of 20 November 1985

³¹⁶ SOLAS, Chapter VII (Carriage of dangerous goods).

³¹⁷ (Boyle, 1985, p. 363)

³¹⁸ T. T. B. KOH (Singapore), 185th meeting of UNCLOS III, Monday, 6 December 1982, at 10.30 a.m.

³¹⁹ UNCLOS, Article 309. For a legal definition on ‘reservation’ see VCLT, Art. 1(d).

of ship-source pollution and cannot be understood in isolation from it.³²⁰ This subsection explores the substantive norms attributing port state jurisdiction over that matter and the safeguards that may or may not limit its application.

§ 97. The treaty elaborated the rights and duties of states with respect to all major sources of marine pollution. It calls upon ‘all states’, irrespective of the capacity in which they may act, to address pollution of the marine environment, both individually or jointly.³²¹ This action by states should follow necessity and apply to ‘activities under their jurisdiction or control’.³²² What is more, the same Article which provides for this possibility also refers to ‘their environment’, raising the issue of the link between the state and the damage caused by pollution. In regard to ‘pollution from vessels’, states must focus on ‘prevention, reduction and control’ and regulate specific types standards.³²³ These standards on “construction, design, equipment and manning” are significant for they are often the object of unilateral port state prescription. They will receive separate attention in this section.³²⁴

§ 98. A distinction ought to be made at the beginning between entitlements in UNCLOS to legislative (or prescriptive) jurisdiction and entitlements to executive (or enforcement) jurisdiction. This distinction reveals itself, in Part XII of the treaty, through a specific section on “enforcement” and, before that, in a section on prescriptive jurisdiction entitled ‘International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment’. Norms from Part XII which concern ship-source pollution are open to subsequent development through a “rule of reference”.

2.3.2.1. *Overview of rights over ship-source pollution*

³²⁰ (Bernhardt, 1980, pp. 269-270)

³²¹ UNCLOS, Article 194(1)

³²² UNCLOS, Article 194(2).

³²³ UNCLOS, Article 194(3)(b).

³²⁴ *Infra* 2.3.2.3, The exceptional regime for ‘CDEM’ standards.

§ 99. There are two Articles that regulate the prescriptive rights of states over ship-source pollution. Article 210, which develops the pre-existing legal regime of dumping,³²⁵ of relevance for port states through enforcement rights provided under Article 216,³²⁶ and Article 211, which addresses all other instances of pollution caused by ships, and of relevance for port states through enforcement rights provided under Article 218.

§ 100. In respect to dumping, port state powers are relevant when the state will “adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping”,³²⁷ or when it considers “other measures [as may be] necessary to prevent, reduce and control such pollution”.³²⁸ The UNCLOS also refers to the need for states to ensure that national legislation requires ships to have a ‘permission’ for carrying out dumping.³²⁹ The only limit imposed by UNCLOS is that “[n]ational laws, regulations and measures shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards”.³³⁰

§ 101. Apart from dumping, the UNCLOS provides states with the right to establish particular requirements “as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals”, explaining that states can make use of their special powers as port states to prevent, reduce and control pollution of the marine environment.³³¹ It imposes a duty to give due publicity when a state establishes those requirements.³³² The possibility for cooperation is also acknowledged.³³³

³²⁵ *Supra* 2.3.1, Norms from pre-UNCLOS multilateral treaties.

³²⁶ (Yang, 2006, p. 241)

³²⁷ UNCLOS, Article 210(1)

³²⁸ UNCLOS, Article 210(2)

³²⁹ UNCLOS, Article 210(3).

³³⁰ UNCLOS, Article 210(6)

³³¹ UNCLOS, Article 211(3)

³³² UNCLOS, Article 211(3)

³³³ UNCLOS, Article 211(3)

§ 102. The UNCLOS also provides discretion for states to prescribe and enforce national legislation on air emission.³³⁴ The prescription, however, would be limited to ships flying their flag and to foreign ships within the air space under their sovereignty, i.e., limited to the territorial sea. For these reasons, this treaty provides little guidance on the regulation of fuel requirements such as those to be discussed in Chapter 3. The UNCLOS is not decisive in this respect.³³⁵ This shows how this treaty is not always strong, for in this respect states are only supposed to “take account of” international rules and standards.³³⁶

§ 103. Overall, the UNCLOS is not very detailed about the type of pollution-related issues which a state may regulate. This has led to post-UNCLOS normative developments which rely, to some extent, on a reference system in this treaty. This system, which is quite unique to environmental rules and standards, needs detailed clarification.

2.3.2.2. *The rule of reference in the UNCLOS*

§ 104. The UNCLOS Part XII features a system of open clauses known as a ‘rule of reference’. This system bears some significance for port states as it helps to determine the scope of their jurisdiction under that treaty. The rule of reference only applies, as a matter of principle, between state parties to the UNCLOS, either acting as port states or as flag states.³³⁷ In a way, and as the IMO itself has acknowledged, this system governs the interrelation between the jurisdictions of these actors.³³⁸ Notwithstanding the existence of such principle, practices that enlarge the scope of application of those rules, for example to encompass ships from flag states which have not consented to the rules and standards being referred to, are not prohibited as long as the flag state is party to the UNCLOS.³³⁹ Many authors have had the opportunity to

³³⁴ UNCLOS Article 212 and 222.

³³⁵ (Ringbom, *The International Legal Framework for Monitoring and Enforcing Compliance with the Sulphur in Fuel Requirements of MARPOL Annex VI*, 2017)

³³⁶ (Boyle, 1985, p. 354)

³³⁷ (Oxman, 1991, p. 121)

³³⁸ IMO Doc LEG/MISC.7.

³³⁹ (Molenaar, 1998, p. 179)

weigh in on this matter, with various interpretations.³⁴⁰ That is why this study also weighs in on the matter, from the perspective of the port state.

§ 105. Some norms are characterized by their flexibility and are unfettered by formal limitations such as ratification procedures.³⁴¹ These “standards” as they are called in the UNCLOS, have predominantly technical objectives and they are very frequently the object of unilateral prescriptive jurisdiction, namely through early implementation of negotiated developments. They are not, by definition, of a “fundamentally norm-creating character”.³⁴² Due to their frequently highly technical nature, sometimes setting quantitative thresholds which evolve over time, they could hardly have originated from customary international law and hence some authors have pointed out that rules and standards, as defined in the UNCLOS, should not be considered to be customary international law.³⁴³ The norm through which they become applicable is the treaty norm of the UNCLOS which refers to them, and hence consent cannot be said to be totally absent.³⁴⁴ The rule of reference merely serves to give substance to the duties of states, yet it also means limiting their sovereignty as they may have not consented to that specific content.³⁴⁵ And that is why the term ‘framework’ has been used to characterize the jurisdiction of a port state, as it encompasses multilateral agreements on both the rule of reference – via the UNCLOS – and the standards themselves, via the IMO for example.³⁴⁶

§ 106. The UNCLOS III has resorted to a considerable number of terms to refer to such norms which, although located outside the treaty, gain applicability through it.³⁴⁷ The original list

³⁴⁰ (Franckx, 2001, pp. 23-24)

³⁴¹ (Henry, 1985, p. 49)

³⁴² UN, A/70/10.

³⁴³ (Bang, 2009, pp. 299-300)

³⁴⁴ (Sohn, 1986, p. 1075)

³⁴⁵ (Boyle, 1985, p. 356).

³⁴⁶ (Redgwell, 2006, pp. 181-182)

³⁴⁷ (Vukas, 2004, pp. 26-27)

emerged in the first drafting sessions of the UNCLOS.³⁴⁸ Despite calls for simplification, its contents were not simplified, and the treaty now includes all of the terms, and more.³⁴⁹ The formula which is most often used in the context of ship-source pollution is ‘generally accepted international rules and/or standards’, and it serves as a basis for the analysis of its constituent elements.³⁵⁰

§ 107. The UNCLOS also includes references to the ‘competent international organization’ through which such rules and standards are created. International organizations are subjects of international law which have a relevant role in the development of multilateral legal frameworks, and some of them assume a treaty-making power.³⁵¹ The sole participation of state representatives in these organizations can already provide evidence of state practice.³⁵² The IMO is widely recognized as the organization being referred to in Articles on ship-source pollution in Part XII of the UNCLOS.³⁵³ Other organizations include the FAO, the IAEA, the ICAO, the IHO, the IOC, and the WHO.³⁵⁴

§ 108. The IMO is a specialized agency of the United Nations with its own legal personality and it is widely accepted to be the competent international organization that the UNCLOS refers to on matters of ship-source pollution.³⁵⁵ The treaty that establishes the IMO refers explicitly to problems related to ship-source pollution as forming part of the mandate of the organization.³⁵⁶ For this purpose, the IMO set up the Marine Environmental Protection Committee (MEPC) which considers “any matter within the scope of the Organization

³⁴⁸ UN A/CONF.62/WP.10.

³⁴⁹ (Vukas, 2004, p. 28)

³⁵⁰ (Vukas, 2004, p. 29)”

³⁵¹ (Crawford, 2012, p. 180)

³⁵² (Crawford, 2012, p. 193)

³⁵³ (Vukas, 2004, p. 30)

³⁵⁴ (DOALOS, 1996, p. 79)

³⁵⁵ UN Doc. A/52/491, section J, paras 8 and 9.

³⁵⁶ IMO Convention. Article 1.

concerned with the prevention and control of marine pollution from ships”.³⁵⁷ Recently, the IMO reiterated that one of its main challenges is to stave off regional and unilateral practice, and it has been doing so by developing the multilateral framework precisely by creating new rules and standards.³⁵⁸

§ 109. At times the UNCLOS also clarifies that rules and standards are “established through the competent international organization or general diplomatic conference”.³⁵⁹ This is an alternative source for the rules and standards on ship-source pollution, rather than treaty law. The phrase may open the possibility for states to regulate maritime matters outside the scope of the IMO, if these other settings are open to universal participation.³⁶⁰ It may also mean that port states can consider commitments taking place at the negotiating table. Acceptance of norms at this stage of the law-making process may indeed lead to the emergence of a customary rule, requiring no need to wait for the signatures of states.³⁶¹ This may be a method of law creation, an application of the old principle *ex concordia jus oritur* (the law arises out of agreement).³⁶²

§ 110. But what exactly does the phrase “rules and standards” – to which this rule of reference so often alludes – mean in international law? To start with, the phrase must be interpreted as meaning norms in positive public international law, i.e. written law and not custom for example.³⁶³ In that sense, the phrase requires an evolutionary interpretation of the treaty where it stands.³⁶⁴ Other alternative phrases are also to be found in the treaty, such as ‘global’ instead

³⁵⁷ IMO Convention, Article 38.

³⁵⁸ IMO Assembly Resolution A.1060(28), at para 2.2.

³⁵⁹ UNCLOS, Articles 211(2) and 211(5), 213, 214, 216(1), 218 and 222.

³⁶⁰ (Bodansky, 1991, p. 743)

³⁶¹ (Sohn, 1986, p. 1077)

³⁶² (Sohn, 1986, p. 1080)

³⁶³ (van Reenen, 1981, p. 8)

³⁶⁴ (Redgwell, 2014, p. 605)

of ‘international’.³⁶⁵ No immediate legal consequences appear to be attached to this difference but both concepts include not only binding law but also non-binding law.³⁶⁶ So, for example, recommendations made by the IMO could be considered binding for the purpose of this rule of reference.³⁶⁷ Yet the phrase could be interpreted more narrowly, requiring formal acceptance of the norms and hence excluding resolutions, guidelines and codes of conduct.³⁶⁸ To answer this, a distinction must be made between the ‘applicability’ of the rules and standards from IMO treaties on ship-source pollution and their ‘general acceptance’.³⁶⁹

§ 111. When referring to prescriptive jurisdiction, the UNCLOS makes use of the concept of “generally accepted” international rules and standards.³⁷⁰ There is no definition of this term, although UNCLOS provides that they include inter alia those relating to notification of accidents likely to cause marine pollution.³⁷¹ The lack of clarity of the phrase may give rise to disputes about compliance of obligations.³⁷² Hence, the scope of this norm is questionable: does it include, for example, Annexes I and II of MARPOL, widely ratified already? And what about the norms of other Annexes? One early proposal is that only applicable instruments fall under this definition, and not merely those instruments that have been accepted by many states but that have not yet attained the threshold necessary to their entry into force.³⁷³ Another interpretation is that this rule requires widespread ratification or incorporation in national law. The required ratification rate would hence be lower than that which is required for a norm to

³⁶⁵ UNCLOS, Article 210(6)

³⁶⁶ (van Reenen, 1981, p. 5)

³⁶⁷ (van Reenen, 1981, p. 9)

³⁶⁸ (Bang, 2009, p. 399)

³⁶⁹ (Oxman, 1991, p. 96)

³⁷⁰ UNCLOS, Articles 211(2), 211(5), 211(5)(c) and 226(1)(a)

³⁷¹ UNCLOS, Article 211(7).

³⁷² (Churchill & Lowe, 1999, p. 347)

³⁷³ (Valenzuela, 1984, p. 151)

become customary, for this is a different threshold of validity.³⁷⁴ Still, practice shows that port states go beyond that as they use port state control to apply treaties to all ships whether there is consent given by the flag states or not.³⁷⁵ So another possibility is to consider acceptance at the IMO conferences where they are approved. Yet there is always a risk that a minority of states imposes its will on the majority when the entry into force of an instrument does not require a majority of states.³⁷⁶

§ 112. Another quite distinct term relates to the moment of enforcement and this is the ‘applicability’ of the said rules and standards by the port state.³⁷⁷ The ILA has suggested that this expression was left purposefully vague.³⁷⁸ It was actually the result of a compromise between states with different environmental priorities.³⁷⁹ The reference to the ‘applicability’ covers a broader set of norms than the concept “generally applicable”.³⁸⁰ The difference here is that there is a more stringent threshold. What is generally accepted may not be generally applicable in a specific circumstance. The port state may prescribe rules based on what is accepted but it will arguably not be allowed, at least under the UNCLOS, to enforce such rules if the flag state did not participate or ratify, or if it actively rejected such rules.

§ 113. This is relevant for assessing the scope of the enforcement powers granted under UNCLOS Article 218, which will receive separate attention later in this chapter.³⁸¹ Which law should be applied in respect to discharges?³⁸² State parties to the UNCLOS may only enforce discharge rules and standards against ships which have accepted them, i.e., to which they are

³⁷⁴ (Kasoulides, 1993, p. 37) (Kasoulides, 1993, pp. 37, n. 15)

³⁷⁵ *Infra* 3.3.1.2, Port state practice under the MoU on PSC.

³⁷⁶ (Timagenis, 1977, p. 27)

³⁷⁷ UNCLOS, Section 4, Part XII: Enforcement

³⁷⁸ (Franckx, 2001, p. 112)”

³⁷⁹ (Timagenis, 1980, p. 606)

³⁸⁰ (Franckx, 2001, p. 116)

³⁸¹ *Infra* 2.3.2.4, Port state enforcement in the UNCLOS.

³⁸² (Bodansky, 1991, pp. 760-761)

applicable. Even though the flag state is not party to the UNCLOS, it may have accepted such rules and standards.³⁸³ There is, however, a point to be made as to whether having a right to prescribe but not to enforce would render the right to prescribe redundant.³⁸⁴

§ 114. An interesting critique of this rule of reference is that it may have the negative effect of discouraging states from ratifying both the UNCLOS, to prevent this rule from being applied, or the treaties which feature such rules and standards, as they would thus be applicable to third parties anyway.³⁸⁵ This weakness of the rule of reference only highlights the relevance of discussing the issue from a ‘parochial versus cosmopolitan’ perspective and to integrate a less formalistic benchmark to assess the rights which port states have outside the treaties. If the system itself is discouraging for states to participate in multilateralism, this may signify that unilateral jurisdiction is a stronger possibility for protecting the global legal commons. However, that unilateralism will still pay much attention to a specific type of standards: the CDEM standards.

§ 115. Finally, it is important to note that the rule of reference of Part XII is different from the ‘compatibility clause’ that has been included in the UNCLOS Article 237.³⁸⁶ This clause is designed to determine the relationship of the UNCLOS Part XII with other treaties on the protection and preservation of the marine environment.³⁸⁷ This clause is rather more specific than the general clause set out in Article 311, as it focuses on ensuring that obligations which emerge from those other treaties are fully respected.³⁸⁸ Indeed, that general clause on how the UNCLOS supersedes other instruments features an exception aimed at situations such as that of Article 237.³⁸⁹ Article 237 also requires that specific obligations assumed under those other treaties “should be carried out in a manner consistent with the general principles and

³⁸³ (McDorman, 1997, p. 319)

³⁸⁴ (Bodansky, 1991, p. 762)

³⁸⁵ (Churchill & Lowe, 1999, p. 347)

³⁸⁶ (Librando, 2014, pp. 595-596)

³⁸⁷ UNCLOS, Article 311

³⁸⁸ (Trevisanut, 2009, p. 415)

³⁸⁹ UNCLOS, Article 311(5)

objectives” of the UNCLOS.³⁹⁰ As a consequence, a level of consistency between these treaties and the principles and objectives of UNCLOS is required.³⁹¹ This turns the UNCLOS, namely its Part XII, into an ‘umbrella’ for subsequent developments in respect of ship-source pollution.³⁹²

2.3.2.3. *The exceptional regime for ‘CDEM’ standards*

§ 116. Not all rules and standards have the same value in the UNCLOS. A special reference is often given in the treaty to norms concerning construction, design, equipment and manning of ships.³⁹³ These are commonly referred to as ‘CDEM standards’.³⁹⁴ A special reference to construction, equipment, manning and “seaworthiness” already existed in the Geneva Convention on the High Seas.³⁹⁵ Under this treaty, flag states had exclusive jurisdiction over these matters.³⁹⁶ Under the UNCLOS, coastal states may not adopt laws or regulations on “the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof”, which restrict the right of innocent passage, “unless they are giving effect to generally accepted international rules and standards”.³⁹⁷ What is more, beyond that context, coastal states are not allowed to adopt more stringent CDEM standards than the ones which have been “generally accepted”.³⁹⁸ The reason for this distinction is to avoid interference by coastal states in operational issues of navigation, fragmenting the consistency of the regime.³⁹⁹

³⁹⁰ (Nordquist, 1991, p. 425)

³⁹¹ UNCLOS, Article 237(2)

³⁹² (Nordquist, 1991, p. 425)

³⁹³ UNCLOS, Article 21(2), Article 94 (3), Article 194(3), Article 211(6)(c), Article 217(2).

³⁹⁴ (Molenaar, 1998, p. 3)

³⁹⁵ Convention on the High Seas, Art. 10.

³⁹⁶ (Dzidzornu & Tsamenyi, 1990, p. 272)

³⁹⁷ UNCLOS, Art. 21(2)

³⁹⁸ UNCLOS, Art. 211(6)(c)

³⁹⁹ (Marten, 2014, p. 17)

Despite the importance of the distinction, the UNCLOS does not provide a definition of the phrase “design, construction, manning or equipment” or of its constituent terms.

§ 117. This category of norms bears some relevance for port states. Accordingly, a port state can address ship-source pollution in two fundamentally distinct ways. Either it tackles an incident of navigation, such as deliberate, operational or accidental discharge, dumping or emissions of substances into the atmosphere, or it addresses the ‘condition’ of ships and the risk or damage it causes to the marine environment.⁴⁰⁰ Whilst the former situation is dynamic, in the sense that an act can occur for just a moment during the ship’s route, i.e. on the high seas only, the latter is ‘static’ in the sense that it remains virtually unchanged, and unchangeable, throughout a ship’s journey.⁴⁰¹ Port states may use their inspection powers to ensure compliance of ships with CDEM standards.⁴⁰² Port states may also use their powers to impose more stringent standards than the generally accepted ones, despite the criticism.⁴⁰³

§ 118. The issue with the ‘extraterritorial effect’ of CDEM standards set by the port states is treated in this study to a different approach.⁴⁰⁴ The literature tends to consider the incidental nature of that effect as a sufficient reason to not discuss further the legal basis required to establish these standards, focusing only on the argument of consent to the port state’s sovereignty.⁴⁰⁵ This study will take a different route and put that effect back into the equation and make the point that it must also be justified under international law, more precisely by one or more principles of state jurisdiction. Because port states are not as constrained as coastal states in the regulation of CDEM, they may enact unilateral standards – i.e. different from the generally accepted ones. In other words, UNCLOS Article 21 does not appear to preclude the setting of entry conditions based on CDEM standards because those measures will not be harming innocent passage rights in the territorial sea. This is confirmed by UNCLOS Article

⁴⁰⁰ (Tan, 2005, p. 22)

⁴⁰¹ (Ringbom, 2008, p. 214)

⁴⁰² (Molenaar, 1998, p. 469)

⁴⁰³ (Tan, 2005, p. 205)

⁴⁰⁴ *Infra* 4.3.4, The ‘extraterritorial effects’ of port state territoriality.

⁴⁰⁵ (Frank, 2007, pp. 203-204)

25(2), when it mentions conditions for calling at a port facility. Yet to justify the partial extraterritoriality of that measure, port states will have to engage with the principles of jurisdiction, as there is no multilateral basis for that power to be resorted to. The lack of any reference to prescription or enforcement of CDEM at port in the UNCLOS is the reason why the legal basis for port states to regulate CDEM is discussed more thoroughly in Part II.

2.3.2.4. *Port state enforcement in the UNCLOS*

§ 119. Port state enforcement has been debated since the very beginning of UNCLOS III.⁴⁰⁶ Following an initiative taken by the USA, a detailed proposal was presented by some European states in 1975.⁴⁰⁷ The strategy of the USA aimed at preventing the establishment of special regimes that would inhibit freedom of navigation.⁴⁰⁸ When presenting this proposal, the proponents explained the major reasons for port state jurisdiction as an alternative means to effectively enforce international rules.⁴⁰⁹ The reasoning behind this proposal was backed up by a study on the legal basis of port state jurisdiction.⁴¹⁰ In this study it was clear that a different capacity to act was being proposed, “a specific identity” as it was phrased.⁴¹¹ The study pointed out that, under this capacity, there would be no need to prove that a discharge had taken place at sea.⁴¹² One of the main concerns of the drafters of that proposal was the geographical scope of a port state’s right to institute proceedings.⁴¹³ The concerns were aimed at protecting flag states’ interests. Three approaches competed: the universal approach, proposing jurisdiction, autonomously or by request, in respect of violations committed in *any* area of the sea; the zonal

⁴⁰⁶ UN, Doc. A/AC.138/SC.III/L.40

⁴⁰⁷ UN, Doc. A/CONF.62/C.3/L.24.

⁴⁰⁸ (Galdorisi & Vienna, 1997, p. 128)

⁴⁰⁹ UN, Doc. A/CONF.62/C.3/SR.19, para. 10:

⁴¹⁰ (British Branch Committee on the Law of the Sea, 1974, p. 400)

⁴¹¹ (DOALOS, 2002, p. 2)

⁴¹² (Anderson, 2008, p. 259)

⁴¹³ (Hakapää, 1981, p. 174)

position, taking into account a specific distance from the port state or the requesting state; the interest approach, proposing jurisdiction over what was resulting or likely to result in damage to the coastal areas of the port state or the requesting state.⁴¹⁴ It has been affirmed that this proposal “constituted a bold departure” from the provisions of the 1958 Geneva Conventions and from the international instruments on ship-source pollution concluded prior to the drafting of the UNCLOS.⁴¹⁵ The resulting Article 218 was widely regarded as an innovation in international law.⁴¹⁶

§ 120. Article 218 refers to the exercise of jurisdiction as a right of the port states and not to an obligation: the word “may” instead of “shall”, which is used in other Articles of UNCLOS, is evidence of that. These enforcement rights are only applicable to ships which have entered into the port by their own free will.⁴¹⁷ This prevents port states, for example, from enforcing international discharge standards on detained ships, i.e., ships that have entered the port following an arrest by the coastal state authorities, or ships that have entered the port due to *force majeure*.⁴¹⁸ Furthermore, some commentators have pointed to the fact that this Article does not cover detentions occurring due to discharges in internal waters, where the port state would retain exclusive jurisdiction.⁴¹⁹

§ 121. The enforcement rights of port states under the UNCLOS only apply to discharge. Unlike dumping, ‘discharge’ is not defined in UNCLOS. A definition may be found in another instrument: “‘discharge’ means any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying”.⁴²⁰ The port state can claim jurisdiction even when such discharges have occurred outside of the exclusive economic

⁴¹⁴ (Hakapää, 1981, p. 174)

⁴¹⁵ (Keselj, 1999, p. 129)

⁴¹⁶ (Hakapää, 1981, p. 178)

⁴¹⁷ UNCLOS, Article 218(1)

⁴¹⁸ (DOALOS, 2002, p. 2)

⁴¹⁹ (Lagoni, 1996, p. 154)

⁴²⁰ Annex IV To The Protocol On Environmental Protection To The Antarctic Treaty.

zone.⁴²¹ This implies that the port state has, under this treaty, a right to regulate this sort of conduct on the high seas and also beyond it. The phrasing of the article implies that the port state can consider conduct in any maritime zone of a third state, but only to the extent where such discharge “is likely to cause pollution” in its own maritime zones.⁴²²

§ 122. The port state may also, under Article 218, institute proceedings with regard to discharge occurring in maritime zones of a third state when that state so requires.⁴²³ Substitutive assertions of jurisdiction by port states, either of the flag state, irrespective of where the discharge occurred, or of other coastal states, become an obligation under the third paragraph, following a request by the flag state, with the sole exception of impracticable assertions.⁴²⁴ When referring to “any” discharge, the treaty is referring to the circumstances where that discharge occurred and not to the content of the materials discharged. This means that port states can take into consideration *deliberate* discharges, *operational* discharges or *accidental* discharges.⁴²⁵ The relevance of these circumstances to the penalties to be instituted following criminal or administrative proceedings is a matter of national law. Finally, the Article adds that there is a duty to communicate the records of any investigation, also upon request. This communication may lead to the suspension of the initiated proceedings.⁴²⁶ Only a failure of the flag state to conclude proceedings would allow the port state to pursue such proceedings.⁴²⁷

⁴²¹ UNCLOS, Article 218(1)

⁴²² UNCLOS, Article 218(2)

⁴²³ UNCLOS, Article 218(2)

⁴²⁴ UNCLOS, Article 218(3)

⁴²⁵ UNCLOS, Article 42(1); UNCLOS, Article 194(3); UNCLOS, Article 211(6)(c); UNCLOS, Article 211(7).

⁴²⁶ UNCLOS, Article 218(4).

⁴²⁷ (McDorman, 1997, p. 318)

§ 123. Very few states have reportedly implemented Article 218(1) into their domestic laws; Belize,⁴²⁸ the United Kingdom,⁴²⁹ and also the European Union have done so.⁴³⁰ Despite the rarity of the cases available, some would already claim that this norm is part of customary international law, or at least that no state would oppose such a claim.⁴³¹ Another author would go so far as to say that Article 218 “does represent a notable example of standing to uphold the collective interest”.⁴³² This study will later explore the hypothesis that the custom in place is not so much the recourse to port powers to enforce international rules and standards but precisely the ability to do so with a view to fulfilling functions of sovereignty which are in the collective interest.⁴³³

§ 124. It has been put forward in some literature that UNCLOS Article 218 enshrines an entitlement to jurisdiction under the principle of universality.⁴³⁴ Arguably, the protection of the marine environment is one of those cosmopolitan objectives which deserve universal legal protection, as its content may be considered a norm of *ius cogens* from which no derogation is allowed.⁴³⁵ It is doubtful whether there is an actual obligation to exercise jurisdiction in this respect and hence the argument preferred here is that port states have a right that may be argued in the same way as a *ius cogens* obligation but that does not oblige the state in any way to exercise such powers. This approach already considers the extraterritoriality which is at stake in these cases and will be examined in Chapter 5 within the discussion of whether the principle of universality may accurately be invoked here by the port state.⁴³⁶

⁴²⁸ Belize Maritime Areas Act 1992, s 24(4).

⁴²⁹ United Kingdom, Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 (No 2154 of 1996), regulations 34 to 39.

⁴³⁰ EC Directive 95/21, Article 3(1)(e).

⁴³¹ (Birmie, et al., 2009, p. 422)

⁴³² (Brunée, 2008, p. 558)

⁴³³ *Infra* 6.2.3, Unilaterally set functional port state jurisdiction.

⁴³⁴ (Meese, 1982, p. 92)

⁴³⁵ (van Reenen, 1981)

⁴³⁶ *Infra* 5.5.2, The principle of universality in cases of ship-source pollution.

§ 125. Although having a misleading general title (*port state enforcement*), Article 218 relates only to discharge, which does not exhaust all the types of ship-source pollution nor all issues of the concern of the port state that require enforcement at port. The treaty does not clarify whether assertions of port state jurisdiction over other acts of pollution, or over other issues, would be subject to these procedures. It is also not agreed whether its content has already gained a customary nature, as other norms of this treaty have done. The lack of state practice in respect to this Article suggests that the rights derived from this Article are still confined to the treaty and hence only binding on the UNCLOS state parties.⁴³⁷

§ 126. One may still find further grounds for states to exercise enforcement jurisdiction at port in the UNCLOS although the legal basis could hardly be the capacity to act as a port state. That possibility is framed under the capacity to act as a coastal state, and the fact that part of the enforcement under that capacity may eventually occur at port allows this study to consider the powers employed as port powers.

§ 127. Indeed, the UNCLOS also confers, at least implicitly, port state jurisdiction in respect of measures relating to the seaworthiness of ships to avoid pollution.⁴³⁸ In Article 219, the UNCLOS demonstrates that states can either by request or “on their own initiative”, prevent a ship from sailing out of their ports (exit conditions).⁴³⁹ This can occur when two requirements are met: the violation of the international standards applicable and the consequent threat of damage to the marine environment.⁴⁴⁰ The absence of reference to the voluntary presence of the ship in port suggests that this Article also applies to situations where the ship has entered port against its will, either by *force majeure* or following an arrest.⁴⁴¹ This obligation (‘shall’) is both “subject to section 7” of Part XII and related to the application of international rules and standards.⁴⁴² It is also limited to ‘practicability’, much like Article 218(3). Because not

⁴³⁷ UNCLOS has, to date, 157 signatory states, but 166 state parties.

⁴³⁸ (Nordquist, 1991, p. 277)

⁴³⁹ UNCLOS, Article 219.

⁴⁴⁰ (Nordquist, 1991, p. 278)

⁴⁴¹ (Nordquist, 1991, p. 277)

⁴⁴² (Nordquist, 1991, p. 277)

every port is equipped with repair yards, the port state ‘may’ allow the ship to set sail towards the nearest one.⁴⁴³ This enforcement of international rules and standards is limited to “administrative measures”, which appears to exclude criminalization for unseaworthiness of ships.⁴⁴⁴ This right was also incorporated in the European submission during the UNCLOS III negotiations.⁴⁴⁵

§ 128. Under the title ‘Enforcement by coastal States’, however, the UNCLOS still partially refers, in Article 220, to enforcement at port. This Article gives a legal basis for states to give application to their laws which have been adopted in accordance with UNCLOS or generally accepted international rules and standards on ship-source pollution when violations have occurred outside the port, but within the maritime zones of the coastal state.⁴⁴⁶ It is noticeable that Article 220(1) does not explicitly mention the right to conduct investigations, but all evidence points to it.⁴⁴⁷ The criterion of voluntariness of presence in port is again present.⁴⁴⁸ The main difference between this attribution of jurisdiction and that of Article 218(1) is that it relates to national laws and not to the direct application of the GAIRAS.⁴⁴⁹ The discretion left to coastal states by the phrase ‘in accordance’ allows them some degree of material innovation that does not seem to go against existing treaties. Also, the fact that this Article merely applies to the territorial sea and exclusive economic zones and not the high seas illustrates how the capacity to act as a port state is easily associated with cosmopolitan actions.⁴⁵⁰

§ 129. Finally, although Article 222, entitled “Enforcement with respect to pollution from or through the atmosphere”, does not give a ground for exercises of port state jurisdiction over foreign ships, it appears to pose a limit to port state jurisdiction (over foreign ships). When read

⁴⁴³ UNCLOS, Article 219.

⁴⁴⁴ (Nordquist, 1991, p. 277)

⁴⁴⁵ UN, A/CONF.62/C.3/L.24, at p. 211, par. 18.

⁴⁴⁶ UNCLOS, Article 220(1)

⁴⁴⁷ (Molenaar, 1998, p. 187)

⁴⁴⁸ (Nordquist, 1991, p. 299)

⁴⁴⁹ (Nordquist, 1991, pp. 298-299)

⁴⁵⁰ *Supra* 1.5, The port state as a cosmopolitan actor.

together with Article 212, on pollution from or through the atmosphere, namely its second paragraph, there appears to be a residual obligation ('shall') for states to enforce national law applicable rules and standards at port.⁴⁵¹ The same happens with dumping. Article 216 refers to the obligation to enforce applicable rules and standards on dumping where the port is used in the process of loading.⁴⁵² The proposals for this Article referred explicitly to port states but this reference was later discarded.⁴⁵³

§ 130. All in all, the UNCLOS has introduced port state enforcement rights with respect to discharge, but these rights do not cover the whole range of existing prescriptive opportunities offered by the UNCLOS itself. Should one state use its port powers to impose certain entry conditions, and enforce such entry conditions through, for example, a temporary ban, that enforcement is still an exercise of port state jurisdiction but without a clear UNCLOS backing. This illustrates how it is incorrect to understand the capacity to act as a port state merely by reading UNCLOS Article 218, as this only seems to provide procedural hurdles to the enforcement and not limit the jurisdiction of states under international law. The treaty has also established a series of safeguards to port state enforcement. Although already mentioned at times, for example the publicity requirement, they deserve separate attention in this study.

2.3.2.5. *Safeguards to port state jurisdiction in the UNCLOS*

§ 131. One fundamental principle of the jurisdiction balance in the UNCLOS is that states 'shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights'.⁴⁵⁴ To give substance to this general norm, safeguards have been put in place in the UNCLOS as a limit to the prescription and enforcement of national legislation over foreign ships.⁴⁵⁵ Some of these safeguards relate to safety of navigation,⁴⁵⁶ but most relate to

⁴⁵¹ UNCLOS, Article 212(2).

⁴⁵² UNCLOS, Article 216(1).

⁴⁵³ UN, A/CONF.62/WP.8/PART III, (Article 25). UN, A/CONF.62/C.3/L.27. UN, A/CONF.62/C.3/L.4.

⁴⁵⁴ UNCLOS, Article 194(4).

⁴⁵⁵ UNCLOS, Articles 223-233.

⁴⁵⁶ UNCLOS, Article 225.

the content of port state actions so as to prevent inessential delays. Assertions of port state jurisdiction are for example limited to an examination of certificates, records or other documents.⁴⁵⁷ There is an obligation that the records of these investigations carried out at port are to be transmitted to the flag state or the coastal state ‘upon request’,⁴⁵⁸ but the coastal state affected by an incident of marine pollution can also request that any proceedings instituted following the investigations be suspended.⁴⁵⁹ When this suspension occurs, evidence, records and any bond are transmitted to the coastal state, precluding the proceedings.⁴⁶⁰ The proceedings set out how the investigations undertaken by port states have to be carried out.⁴⁶¹ Apart from these procedural issues, the treaty calls for cooperation in order to avoid inspection of vessels at sea.⁴⁶² It could be argued that this principle has opened up the way for the existing MOU on port state control.⁴⁶³ Another important issue that was raised during UNCLOS III in this regard is the question of time during which the offence can still be the object of proceedings by the port state. Drafters had in mind a limit of six weeks for the enforceability of discharge standards.⁴⁶⁴ This safeguard was however not drafted into the final text of the treaty. Finally, another safeguard with consequences for the jurisdiction of the port state over ship-source pollution is the non-discrimination principle.⁴⁶⁵

2.3.3. *Post-UNCLOS normative developments*

⁴⁵⁷ UNCLOS, Article 226(1)(a)

⁴⁵⁸ UNCLOS, Article 218(4).

⁴⁵⁹ UNCLOS, Article 218(4).

⁴⁶⁰ UNCLOS, Article 218(4).

⁴⁶¹ UNCLOS, Article 223.

⁴⁶² UNCLOS, Article 226(2).

⁴⁶³ (Nordquist, 1991, p. 344)

⁴⁶⁴ (British Branch Committee on the Law of the Sea, 1974, p. 406)

⁴⁶⁵ UNCLOS, Article 227:

§ 132. Ever since the UNCLOS entered into force in 1994, states have continued to develop the international law on ship source pollution. One reason is that maritime catastrophes have continued to occur. In 1996 the *MV Sea Empress*, a bulk carrier registered in Liberia, was wrecked off the coast of Wales. In 1999 the *MV Erika*, an oil tanker registered in Malta, was wrecked off the coast of France.⁴⁶⁶ And in 2002 the *MV Prestige*, an oil tanker registered in the Bahamas, was wrecked off the coast of Spain after being refused entry into several ports.⁴⁶⁷ These events, together with the changing perceptions of old threats brought about by emerging scientific awareness and technological developments, led to the adoption of new treaties and to amendments to pre-UNCLOS treaties. These new treaties and amendments have confirmed and reinforced the role of port states.

2.3.3.1. *Port states in the Antarctic Treaty*

§ 133. The Protocol on Environmental Protection to The Antarctic Treaty provides some ground for port state jurisdiction. In its Annex IV on Prevention of Marine Pollution, states agree on some obligations and rights regarding the ships that can engage in or support Antarctic operations.⁴⁶⁸ Controlling compliance with these requirements on ship retention capacity is the responsibility of the port state.⁴⁶⁹ These kinds of requirements arguably fall under the category of CDEM.⁴⁷⁰ Again, availability of port reception facilities emerges as a possible limitation on port states.⁴⁷¹ The relevance of port state control in this treaty has already led to proposals on a memorandum of understanding on port state control for this region.⁴⁷²

⁴⁶⁶ (BBC, 1999)

⁴⁶⁷ (BBC, 2002)

⁴⁶⁸ Protocol AT, Article 9(1).

⁴⁶⁹ Protocol AT, Article 9(2):

⁴⁷⁰ *Supra* 2.3.2.3, The exceptional regime for 'CDEM' standards.

⁴⁷¹ Protocol AT, Article 9(3).

⁴⁷² XXVI ATCM Information Paper IP-044-ASOC 'Port State Control: An Update On International Law Approaches To Regulate Vessels Engaged In Antarctic Non-Governmental Activities' which includes Draft Antarctic Memorandum of Understanding on Port State Control Measures.

2.3.3.2. *Port states in the London Convention (II)*

§ 134. In 1996, a Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, known as the London Protocol, was adopted.⁴⁷³ The potential need for more stringent measures to be adopted at the national level is acknowledged in the Preamble which mentions that it may be desirable to adopt more stringent measures at a national or regional level.⁴⁷⁴ This protocol brought a major change of approach to the question of how to regulate dumping. Dumping would now be generally prohibited except for those materials which were part of an approved list. This is a complete reversion of the rule created in 1972 which permitted dumping of waste at sea, except for those materials on a banned list.⁴⁷⁵ As regards jurisdiction, this instrument confirmed the role of the port state, again without referring to it, but rather reiterating the relevance of the loading of waste and other matters occurring at port.⁴⁷⁶

2.3.3.3. *Port states in the MARPOL 73/78 (II)*

§ 135. Post-UNCLOS times have also seen developments in the MARPOL treaty. Only after the UNCLOS was signed in 1982 did the first five MARPOL annexes finally enter into force.⁴⁷⁷ Then in 1997 came the regulation of air pollution from ships, which once again amended MARPOL 73/78. This amendment served to introduce Annex VI entitled 'Regulations for the Prevention of Air Pollution from Ships'.⁴⁷⁸ These regulations seek to minimize airborne emissions from ships and their contribution to local and global air pollution and environmental problems. This Annex limits the main air pollutants contained in ships' exhaust gas, including

⁴⁷³ 1996 Protocol.

⁴⁷⁴ 1996 Protocol, preamble.

⁴⁷⁵ *Supra* 2.3.1.1, Port states in the London Convention (I).

⁴⁷⁶ 1996 Protocol, Article 4(1)(1)

⁴⁷⁷ Annex I entered into force on 2 October 1983. Annex II entered into force on 6 April 1987. Annex III entered into force on 1 July 1992. Annex IV entered into force in 27 September 2003. Annex V entered into force on 21 December 1988.

⁴⁷⁸ IMO, MEPC.176(58)

sulphur oxides (SO_x) and nitrous oxides (NO_x), and prohibits deliberate emissions of ozone depleting substances (ODS). MARPOL Annex VI also regulates shipboard incineration, and the emissions of volatile organic compounds (VOC) from tankers. This Annex only entered into force in 2005 and a revised version, with significantly tightened emissions limits, was later adopted in 2008, entering into force in 2010.⁴⁷⁹ This development is tied to the concern of combating climate change.⁴⁸⁰

§ 136. MARPOL Annex VI is composed of 19 regulations on air pollution from ships. Just like other MARPOL annexes, control at port is mentioned on various occasions. The first reference to port state jurisdiction in Annex VI is about the means to control certificates. It arises from an obligation to support surveyors when the ship in port has conditions that do not correspond with the certificate held.⁴⁸¹ Such certificates on air pollution are issued to ships which engage in voyages to state parties' ports.⁴⁸² Port states have further competences when these certificates expire, in particular preventing the ship from leaving the port until a new certificate has been obtained.⁴⁸³ This annex also deals with port state control on operational requirements. Port states, according to Regulation 10, are competent to perform inspections "where there are clear grounds for believing that the master or crew are not familiar with essential shipboard procedures relating to the prevention of air pollution from ships".⁴⁸⁴ This inspection might eventually lead port states to impose exit conditions.⁴⁸⁵ However, this regulation not only conforms to a more general procedure explained in the MARPOL treaty,⁴⁸⁶

⁴⁷⁹ MARPOL Annex VI amendments according with MEPC 176(58) came into force 1 July 2010. This amended Regulation 12 which concerns control and record keeping of Ozone Depleting Substances and also amended Regulation 14 which concerns mandatory fuel oil change over procedures for vessels entering or leaving SECA areas and FO sulphur limits.

⁴⁸⁰ UN Sustainable Development Goal 13: Take urgent action to combat climate change and its impacts.

⁴⁸¹ MARPOL, Annex VI, Regulation 5(6).

⁴⁸² MARPOL, Annex VI, Regulation 6(1).

⁴⁸³ MARPOL, Annex VI, Regulation 9(3).

⁴⁸⁴ MARPOL, Annex VI, Regulation 10(1).

⁴⁸⁵ MARPOL, Annex VI, Regulation 10(2).

⁴⁸⁶ MARPOL, Annex VI, Regulation 10(3).

but also states that no interpretation of it can limit rights or obligations emerging from that treaty.⁴⁸⁷ As regards detection of violations and enforcement, it is established that any ship may be subject to port state control for the purpose of verifying whether the ship has emitted any substance in violation of the Annex.⁴⁸⁸ This can also occur in cases where authorization has been requested by another party.⁴⁸⁹ What is more, there is a norm which, according to the literature, “unambiguously demonstrates that a state party is agreeing to a limit on its prescriptive jurisdiction”.⁴⁹⁰ Indeed, Regulation 15(1) of Annex VI of MARPOL sets a maximum standard for emissions of volatile organic compounds (VOCs) when it states that if such emissions from a tanker are to be controlled through the use of port powers, “they shall be regulated in accordance with the provisions of this regulation”.⁴⁹¹ This is a language which is not often found in the treaties analysed so far. VOCs from tankers do not necessarily have to be regulated by the parties, but if they do designate ports or terminals under their jurisdiction in which the emissions of VOCs are to be regulated, they must submit a notification to the IMO and abide by MARPOL provisions.⁴⁹² Another quite distinct competence of the port state under this Annex relates to fuel oil quality. Accordingly, state parties have the right to inspect the bunker delivery notes while the ship is in port.⁴⁹³ Some literature has suggested the possibility of an analogy between Article 218 and Annex VI, namely with a view to ensuring the applicability of MARPOL’s standards on the high seas. This analogical application of UNCLOS Article 218 would allow the port state to enforce Annex VI with respect to emissions, but it would require a broad interpretation of ‘discharge’.⁴⁹⁴

⁴⁸⁷ MARPOL, Annex VI, Regulation 10(4).

⁴⁸⁸ MARPOL, Annex VI, Regulation 11(2).

⁴⁸⁹ MARPOL, Annex VI, Regulation 11(5).

⁴⁹⁰ (Marten, 2015, p. 120)

⁴⁹¹ MARPOL, Annex VI, Regulation 15(1).

⁴⁹² MARPOL, Annex VI, Regulation 15(2).

⁴⁹³ MARPOL, Annex VI, Regulation 18(5)(a)

⁴⁹⁴ (Kopela, 2016, p. 235)

§ 137. The 70th session of the MEPC adopted amendments to MARPOL Annex VI to establish a system for the collection of data on fuel consumption from ships. As from 1 January 2019 ships of 5,000 gross tonnage and above engaged on international voyages will be required to collect data on fuel consumption, distance travelled and hours the ship is underway and report the aggregated data at the end of each calendar year. Within the first three months of the following year the aggregated data must be reported to the vessel's flag state for submission to the IMO fuel consumption database.⁴⁹⁵

§ 138. The MARPOL also continued to develop in connection with the changing environment in the Arctic Ocean. The International Code for Ships Operating in Polar Waters (Polar Code) has recently been adopted.⁴⁹⁶ It covers the full range of design, construction, equipment, operational, training, search and rescue and environmental protection matters relevant to ships operating in waters surrounding the two Poles.⁴⁹⁷ Its norms on pollution prevention measures deserve some attention as they present a more stringent threshold of protection for the marine environment through the application of existing treaties.⁴⁹⁸ The Polar Code has become mandatory via amendments to the SOLAS and MARPOL Conventions. Arctic port states may use this as a ground for prescriptive jurisdiction, in conjunction with UNCLOS Article 234 on jurisdiction over ice-covered areas.

2.3.3.4. *Port states in the Anti-Fouling Systems Convention*

§ 139. Before the UNCLOS had entered into force, the problem of antifouling paints had already been brought to the attention of the MEPC of the IMO by some concerned states.⁴⁹⁹ As

⁴⁹⁵ MEPC.278(70)

⁴⁹⁶ IMO, MSC 94/3/1. IMO, MSC 385(94).

⁴⁹⁷ IMO Briefing 38, November 21, 2014.

⁴⁹⁸ Part II-A is composed of five chapters: Chapter 1 - Prevention of Pollution by Oil, Chapter 2 – Control of Pollution by Noxious Liquid Substances in Bulk, Chapter 3 – Prevention of Pollution By Harmful Substances Carried by Sea in Packaged Form, Chapter 4 – Prevention of Pollution by Sewage from Ships, Chapter 5 – Prevention of Pollution by Garbage from Ships.

⁴⁹⁹ The pollution problems caused by TBT in anti-fouling paints were first raised at the IMO's Marine Environment Protection Committee (MEPC) in 1988, when the Paris Commission requested the IMO to consider the need for measures under relevant legal instruments to restrict the use of TBT compounds on seagoing vessels. The Paris

a result, the IMO, in 1990, had adopted a non-binding resolution recommending governments to adopt measures to eliminate anti-fouling paints containing TBT.⁵⁰⁰ In the 1990s, the MEPC continued to review the environmental issues surrounding anti-fouling systems, and in November 1999, the IMO adopted an Assembly resolution that called on the MEPC to develop an instrument, legally binding throughout the world, to address the harmful effects of anti-fouling systems used on ships.⁵⁰¹ The resolution called for a global prohibition on the application of organotin compounds which act as biocides in anti-fouling systems on ships by 1 January 2003, and a complete prohibition by 1 January 2008.⁵⁰² In October 2001, states convened at the IMO adopted the International Convention on the Control of Harmful Anti-fouling Systems on Ships, which prohibits the use of harmful organotins in anti-fouling paints used on ships and establishes a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems. The convention entered into force in 2008, 12 months after 25 states representing 25 per cent of the world's merchant shipping tonnage had ratified it. This means that, after 20 years since the first report, a binding treaty has finally entitled port states to actually enforce anti-fouling system standards on foreign vessels.⁵⁰³ Under the terms of this treaty, states recognize that certain anti-fouling systems used on ships pose a substantial risk of toxicity and other chronic impacts to ecologically and economically important marine

Commission (PARCOM) is an international organisation established by Treaty and concerned with the prevention of pollution of the North East Atlantic. It is now part of the Oslo and Paris (OSPAR) Commission.

⁵⁰⁰ France prohibited the use of TBT-based paints on vessels less than 25 metres in length in 1982 and other countries followed suit, including Japan, which imposed strict regulations on the use of TBT in anti-fouling paints in 1990 and prohibited the production of such paints in 1997. Similar bans on use of TBT paints were imposed in the United Kingdom (1987), United States (1988), New Zealand (1988), Australia (1989) and Norway (1989), as well as other countries.

⁵⁰¹ In 1990, at its 30th session, the MEPC adopted Resolution MEPC 46(30) on Measures to Control Potential Adverse Impacts Associated with Use of Tributyl Tin Compounds in Anti-Fouling Paints. This resolution recommends that Governments adopt measures to eliminate the use of antifouling paint containing TBT on non-aluminium hulled vessels of less than 25 metres in length and eliminate the use of anti-fouling paints with an average leaching rate of more than 4 microgrammes of TBT per cm² per day. These recommendations were intended to be interim measures until the IMO could consider a possible total prohibition of TBT compounds in anti-fouling paints for ships.

⁵⁰² IMO Resolution A.895.

⁵⁰³ (IMO, 2002)

organisms.⁵⁰⁴ Port states are required to prohibit and/or restrict the use of harmful anti-fouling systems on ships that enter their ports, shipyards or offshore terminals.⁵⁰⁵ The control on anti-fouling systems is thus to be done at port.⁵⁰⁶ Each state party commits to prohibit or restrict the “application, re-application, installation or use of such system” whilst the ship is in its ports.⁵⁰⁷ The same reliance on port state jurisdiction is attributed to the inspections and detection of violations.⁵⁰⁸ However, and unless there are clear grounds for believing the ship is in violation of the treaty, the inspection should be limited so as not to cause further delays.⁵⁰⁹ The guidelines on brief sampling explicitly provide that port state control officers are to proceed with such an operation.⁵¹⁰ An entitlement of port state jurisdiction is given in case a violation is detected: steps *can* be taken by the state party to this treaty to exclude the ship from its ports.⁵¹¹ Another entitlement can be found there for vicarious port state jurisdiction, i.e., upon request by another party, although this still relies on the pre-existing investigatory powers of the port state.⁵¹² Further references to ‘port states’ (e.g. ‘the appropriate authorities of a port state that is party to this convention’)⁵¹³ are given in the Annexes to this treaty which confirm that the intention of the parties was to ensure that the whole system relied on the capacity of the parties to make

⁵⁰⁴ AFS, Preamble.

⁵⁰⁵ Under this treaty, “Anti-fouling system” means a coating, paint, surface treatment, surface, or device that is used on a ship to control or prevent attachment of unwanted organisms. AFS, Article 2(2).

⁵⁰⁶ AFS, Article 3(1)(c)

⁵⁰⁷ AFS, Article 4(1).

⁵⁰⁸ AFS, Article 11(1).

⁵⁰⁹ AFS, Article 11(1). The guidelines on brief sampling were adopted in 2003. The more general “Guidelines For Survey And Certification Of Anti-Fouling Systems On Ships” were developed only in 2010.

⁵¹⁰ AFS, Guideline 1.2.2.

⁵¹¹ AFS, Article 11(3).

⁵¹² AFS, Article 11(4).

⁵¹³ AFS, Annex 4, Regulation 1(4)(b)(ii)

use of this territorial feature. One of the shortcomings of this treaty is that it does not regulate the alternatives.⁵¹⁴

2.3.3.5. *Port states in the Ballast Water Management Convention*

§ 140. Another case of pollution which has received attention after the UNCLOS entered into force is biological pollution caused by ballast water. Biological pollution consists of harmful aquatic organisms and pathogens that affect the biodiversity of the marine ecosystem and it can result from the exchange (uptake and discharge) of ships' ballast water.⁵¹⁵ In 1991 the MEPC adopted guidelines for preventing the introduction of unwanted aquatic organisms and pathogens from ships' ballast water and sediment discharges.⁵¹⁶ In November 1993, the IMO adopted a resolution calling for the development of a binding instrument.⁵¹⁷ In 1997 the IMO adopted new guidelines⁵¹⁸ inviting its member states to use these new guidelines when addressing the issue of invasive aquatic species. After more than 14 years of complex negotiations between IMO member states, the International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM Convention) was adopted by consensus at a diplomatic conference held at IMO Headquarters in London on 13 February 2004. This treaty has up to recently (8 September 2017) failed to enter into force for over a decade since its adoption.⁵¹⁹ That is why the MEPC adopted two guidelines on this matter.⁵²⁰ The treaty includes several dispositions on port state control over biological pollution.⁵²¹ It

⁵¹⁴ (Gipperth, 2009, p. S88)

⁵¹⁵ (Rolim, 2008, p. 1)

⁵¹⁶ IMO, MEPC.50(31).

⁵¹⁷ IMO A.774(18)

⁵¹⁸ IMO, A.868(20)

⁵¹⁹ (Molenaar, 2015, p. 182)

⁵²⁰ IMO, MEPC.252(67). IMO, MEPC 253(67), IMO MEPC 67(20).

⁵²¹ IMO, BWM/CONF/36.

recognized that states had already started some initiatives on this matter,⁵²² making use of their port state jurisdiction.⁵²³ The treaty provides a legal basis for port state powers to be used to attain the objectives of the treaty.⁵²⁴ The treaty also provides that a ship may be inspected in any port of a party. This inspection is limited to certain actions, namely the verification of (a) valid certificates, (b) record books and/or (c) a sample of the ship's ballast water.⁵²⁵ However, in some circumstances a 'detailed inspection' may be carried out whilst the ship is in port.⁵²⁶ Further steps can be taken regarding the right to leave port for the purpose of discharging the ballast water.⁵²⁷ Under the same goal of detecting violations to this treaty, parties can act upon request provided that evidence is given that a ship is infringing the treaty.⁵²⁸ The Regulations that form part of the treaty confirm the relevance of port state jurisdiction in ensuring compliance with the ballast water management rules. Port states have jurisdiction under this treaty to grant exemptions,⁵²⁹ to designate areas where ballast water exchanges may occur,⁵³⁰ or even provide an 'endorsement' to extend the validity of the required certificate of compliance with the applicable standard.⁵³¹ The UNCLOS had already indicated that states could even go further than IMO standards, arguably "without IMO approval".⁵³² And here, the

⁵²² *Infra* 3.4.3, The transfer of invasive aquatic species .

⁵²³ BWM Preamble.

⁵²⁴ BWM, Article 4(2)

⁵²⁵ BWM, Article 9(1).

⁵²⁶ BWM, Article 9(2).

⁵²⁷ BWM, Article10(2).

⁵²⁸ BWM, Article10(4).

⁵²⁹ BWM, Annex, Regulation A-4.

⁵³⁰ BWM, Annex, Regulation B-4(2).

⁵³¹ IMO, MSC/91/22/Add.1.

⁵³² (Molenaar, 2015, pp. 177-178)

requirement to notify the IMO still remains.⁵³³ The Preamble to the convention recognizes that “several States have taken individual action with a view to prevent, minimize and ultimately eliminate the risks of introduction of Harmful Aquatic Organisms and Pathogens through ships entering their ports, and also that this issue, being of worldwide concern, demands action based on globally applicable regulations together with guidelines for their effective implementation and uniform interpretation”.⁵³⁴ Unilateral action does bear some significance in the fight against invasive species,⁵³⁵ but it is rarely enough.⁵³⁶

2.3.3.6. *Port states in the Basel Convention on Waste Disposal*

§ 141. Reference should be made to the Basel Convention. Despite not being specifically aimed at ship-source waste disposal, there has been some multilateral debate about the transboundary movement of waste and the powers of the port state in this regard. However, it would be erroneous to consider this as a case of ship-source pollution because the waste is not generated by the ship itself but rather carried by it from one port to another or to transshipment at sea. Still, because accidents may occur at sea, the de facto source of the interference with the marine environment would indeed be the ship itself. Therefore, some port states have been acting under this treaty.⁵³⁷ This hypothesis may also apply to the dismantling of ships, for when they are scrapped at port they become waste. However, this has been dealt with under a specific treaty on ship recycling.

2.3.3.7. *Port states in the Hong Kong Convention on Ship Recycling*

§ 142. Apart from occupational health issues, ship recycling can also cause adverse effects on the environment. In 2009, some states recognized that “recycling of ships contributes to

⁵³³ IMO, A.868(20), para 11.2 “Member States have the right to manage ballast water by national legislation. However, any ballast discharge restrictions should be notified to the Organization”.

⁵³⁴ BWM, Preamble.

⁵³⁵ (Rolim, 2008, p. 147)

⁵³⁶ (Schine, Nattley, & Gundling, 2000, p. 12)

⁵³⁷ UNEP, UNEP/CHW/LWG/4.

sustainable development and, as such, is the best option for ships that have reached the end of their operating life”,⁵³⁸ and they signed a new treaty on this matter.⁵³⁹ The treaty attributes some powers to port states, at the same time not preventing them from taking more stringent measures consistent with international law.⁵⁴⁰ The first case of port state jurisdiction in this treaty is related to the right to inspect ships.⁵⁴¹ This inspection is limited to verifying the existence of the relevant certificate, but in special circumstances a more detailed inspection may be carried out.⁵⁴² It is explicitly stated that, in respect of the recycling of ships, the port state functions as a supplement to flag state control, when it executes port state control.⁵⁴³ Also, it is provided that ships destined for recycling are “subject to current port state control procedures as any other ship, in accordance with applicable international regulations”.⁵⁴⁴ Co-ordination between the port state and the flag state is encouraged to ensure that the ship meets all relevant IMO requirements. The consequence of the detection of violations is the exclusion from the port, a right explicitly attributed to the state parties to this treaty.⁵⁴⁵ The Hong Kong Convention was adopted in 2009 but its entry into force will only take place 24 months after ratification by 15 states, representing 40 per cent of world merchant shipping by gross tonnage, combined with a maximum annual ship recycling volume not less than 3 per cent of their combined tonnage.

2.3.3.8. *Port states in the Wrecks Convention*

⁵³⁸ Hong-Kong Convention (SR), Preamble.

⁵³⁹ IMO, SR/CONF/45

⁵⁴⁰ SR, Article 1(2).

⁵⁴¹ SR, Article 8(1).

⁵⁴² SR, Article 8(1).

⁵⁴³ IMO Guidelines on Ship-Recycling, 9.3.

⁵⁴⁴ IMO Guidelines on Ship Recycling. 9.3.1.1.

⁵⁴⁵ SR, Article 9(3).

§ 143. Another treaty that refers to the jurisdiction of the port state over environmental matters is the 2007 Wrecks Convention (CRW). Wrecks, if not removed, may pose a hazard to the marine environment and could thus be a form of pollution. This treaty expects port states to verify whether the ship entering or leaving a port “in its territory” is properly insured or secured.⁵⁴⁶ This will have the consequence of preventing abandoned shipwrecks – which contain dangerous chemicals– from contaminating the ocean.

§ 144. Overall, the post-UNCLOS developments on ship source pollution have undeniably reinforced the powers of the port state on a broad number of issues. Under such treaties, port states are expected to ensure the compliance with the rules and standards applicable but are also granted a margin for prescribing legislation which furthers the objectives of the treaties. Yet there are also other instruments which may also contribute to this framework despite not having environmental protection within their object and purpose.

2.3.4. *Relevant instruments for port states*

§ 145. Other instruments which do not provide rights to port states are also important for they have a beneficial effect on environmental protection despite not having that as their main object and purpose.⁵⁴⁷ Environmental accidents also prompted the drafting of treaties relating to civil liability and monetary compensation for oil pollution damage. The most important of such international treaties are the 1969 International Convention on Civil Liability for Oil Pollution Damage,⁵⁴⁸ and the 1971 International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage.⁵⁴⁹ This was seen as a way of preventing states from having a competitive advantage by not being insured for pollution.⁵⁵⁰ Both these

⁵⁴⁶ CRW, Article 12(12), further elaborated in CRW, Article 12(15).

⁵⁴⁷ (Roberts, 2005, p. 136)

⁵⁴⁸ International Convention on Civil Liability for Oil Pollution Damage, Art. VIII(11).

⁵⁴⁹ International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

⁵⁵⁰ (Kasoulides, 1993, p. 60)

treaties were then superseded in 1992.⁵⁵¹ In 2001 a new treaty was signed on this same matter, the International Convention on Civil Liability for Bunker Oil Pollution Damage.⁵⁵² More specific agreements on liability have been concluded, namely in 1971 with the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material,⁵⁵³ and in 1996 with the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances.⁵⁵⁴ These international treaties may be used by port states to unilaterally implement environmental standards, i.e., use unilateral enforcement powers not given by these treaties to ensure that their norms are fulfilled.

§ 146. Salvage rules may also benefit the environment. The 1989 International Convention on Salvage (SALVAGE) corresponds to a major development to an older instrument. In 1910 states had signed the Brussels Salvage Convention.⁵⁵⁵ Then, states had had no concern for pollution or for the environment, nor were port states referred to. In 1989 states recognized some jurisdiction for port states, using the power to regulate admittance to port.⁵⁵⁶ More references to port state jurisdiction appear when referring to cooperation and to the duty to provide security.⁵⁵⁷ What is more, the new treaty provided its own definition of ‘damage to the environment’ as meaning “(...) substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents”.⁵⁵⁸ Although not aimed specifically at countering ship-source pollution at port, this treaty illustrates a new sensibility to

⁵⁵¹ International Convention on Civil Liability for Oil Pollution Damage (CLC). International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND).

⁵⁵² International Convention on Civil Liability for Bunker Oil Pollution Damage

⁵⁵³ Convention relating to civil liability in the field of maritime carriage of nuclear material

⁵⁵⁴ International Convention on Liability And Compensation for Damage in Connection with the Carriage of Hazardous And Noxious Substances

⁵⁵⁵ Assistance and Salvage at Sea, 37 Stat. 1658; Treaty Series 576.

⁵⁵⁶ SALVAGE, Article 11.

⁵⁵⁷ SALVAGE, Article 21(3).

⁵⁵⁸ SALVAGE, Article 1(d).

environmental concerns and also to the role of port states as actors whose rights over foreign ships complement the duties of the flag states.

§ 147. The 1999 International Convention on Arrest of Ships is also relevant for limiting expansive claims of port state jurisdiction. Whilst the 1952 Arrest Convention did not include any environmental consideration, this more recent treaty does so.⁵⁵⁹ The treaty recognizes that a maritime claim can arise out of “damage or threat of damage caused by the ship to the environment, coastline or related interests”.⁵⁶⁰ Furthermore, a special reference to claims related to the presence of ships in ports also appeared in this treaty.⁵⁶¹ It is also particularly relevant to notice that a claimant went from being someone “who alleges that a maritime claim exists in his favour” to “a person asserting a maritime claim”.

§ 148. These are just but a few examples of how the multilateral framework which provides states with jurisdiction over ships at port on matters of pollution is not limited to instruments which have that in their objectives. It is also important to realize that this framework is not only composed of treaties and international organization guidelines but also of softer agreements which are designed to assist maritime authorities in the implementation of the rules and standards discussed so far. These are known as memoranda of understanding (MoU) and their focus is on the control of compliance, whilst still relying on a jurisdictional right. They deserve separate attention.

2.4. The memoranda of understanding on port state control

§ 149. Port states may implement treaties on ship-source pollution in isolation or collectively. The collective approach has been used in certain regions of the world in the form of MoU on port state control. As it is submitted that, despite the multilateral nature of these MoU, the actual enforcement powers are sometimes used by port states unilaterally, the analysis of cases of port state control will only take place in Chapter 3.

⁵⁵⁹ International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships.

⁵⁶⁰ Arrest Convention, Article 1(d).

⁵⁶¹ Arrest Convention, Article 1(n).

2.4.1. *The legal nature of the MoU on port state control*

§ 150. Treaties can have multiple designations.⁵⁶² Any agreement which has not been named as a ‘treaty’ may still be subject to the international law of treaties and generate legal effects to the parties involved. To know whether an agreement between states is a treaty, the VCLT points to the verification of four conditions.⁵⁶³ Arguably, the MoU on port state control do not fulfil one of them: they are concluded not between states but rather between maritime authorities which are not organs of the state.⁵⁶⁴ Because of that, they could well be described as being an instrument of soft law.⁵⁶⁵ As such, MoU on port state control would not generate, at least immediately, rights and obligations to their parties.⁵⁶⁶ Yet because of that potential normative effect, the negotiations leading to them are approached with extreme care. Aside from that potential effect, states do have political ambitions and these instruments may serve to achieve certain pressure as well as to consolidate a collective approach. The lack of legal obligations should thus not be read as meaning a lack of legal relevance, for under these MoU a multilateral consensus is established. Furthermore, despite not being a binding treaty, nothing prevents such a memorandum from having within its wording some binding content obligations, and in this way having, at least partially, a treaty value. The ILC termed such situations ‘treaties in simplified form’.⁵⁶⁷

§ 151. The MoU are therefore widely seen to be less formal instruments than treaties.⁵⁶⁸ The option of signing such a memorandum instead of an international treaty already reveals a different intention by the entities involved.⁵⁶⁹ For example, MoU are signed as a means to avoid

⁵⁶² ICJ, Qatar vs. Bahrein, par. 23.

⁵⁶³ VCLT, Article 2(1)(1):

⁵⁶⁴ (Molenaar, 1996, p. 246)

⁵⁶⁵ (Dupuy, 1991, p. 435)

⁵⁶⁶ (Dupuy, 1991, p. 429)

⁵⁶⁷ UN, A/CN.4/148

⁵⁶⁸ (Kasoulides, 1993, p. 143)

⁵⁶⁹ (Aust, 1986, p. 800)

lengthy treaty-making procedures.⁵⁷⁰ Although such a memorandum is, in most cases, not legally binding, it may operate as an argument for *estoppel* or preclusion. This principle has often been used in international courts.⁵⁷¹ In the case of port state control, the principle could be interpreted as meaning that there is a clear signal given about what sorts of powers a port state may exercise with respect to foreign ships, and lead to the impossibility for the parties involved to later affirm that port state jurisdiction does not encompass them after all.

§ 152. Although collective, MoU could well be described as ‘regional unilateralism’.⁵⁷² MoU on Port State Control (PSC) arguably constitute one of the ‘regional or unilateral’ initiatives the IMO refers to in one of its reports.⁵⁷³ This is so because they were initially developed outside the IMO framework. It is also so because these instruments seek to impose agreed requirements on all ships, irrespective of their nationality. Only recently has their positive contribution to tackling shipping compliance issues been recognized.⁵⁷⁴ And, after some hesitation, the IMO showed some support for this regional approach to the implementation of international instruments.⁵⁷⁵ These MOU are not regional multilateralism in one sense: they do not create new standards for ships.⁵⁷⁶ Yet they are a reflection of a regional approach in the sense that they may create special enforcement powers and also share information that justifies the exercise of certain enforcement powers.⁵⁷⁷ Whilst flag states retain primary jurisdiction

⁵⁷⁰ (Özcayir, 2009, p. 210)

⁵⁷¹ *Case concerning the Temple of Preah Vihear* [Cambodia v Thailand] [Merits] [Dissenting Opinion of Sir Percy Spender] 143–44. *North Sea Continental Shelf Cases*, ICJ, para. 30; *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria* [Cameroon v Nigeria: Equatorial Guinea Intervening] [Preliminary Objections] para. 57

⁵⁷² (Ringbom, 2008, p. 235)

⁵⁷³ IMO, A.1060(28)

⁵⁷⁴ UN, A/RES/58/240, par 33-35.

⁵⁷⁵ IMO, A.682(17).

⁵⁷⁶ Some examples of those efforts are the 1976 Barcelona Convention for Protection against Pollution in the Mediterranean Sea, the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), the 2003 Framework Convention for the Protection of the Marine Environment of the Caspian Sea, or the 1994 Partnerships in Environmental Management for the Seas of East Asia (PEMSEA).

⁵⁷⁷ (Molenaar, 2014, p. 285)

over the compliance by their ships with international treaties, the MoU represent today an alternative means to the enforcement of such treaties. As such, they are not compliance mechanisms devised by the treaties themselves. They were not created to replace the flag state in its exercise of jurisdiction but rather to complement it.

§ 153. Collective reliance on port state powers was already a trend in the practice of states before the UNCLOS entered into force.⁵⁷⁸ As a reaction to the *Amoco Cadiz* incident, nine North Sea states concluded in 1978 a memorandum of understanding to ensure compliance at port with international treaties, the Hague Memorandum of Understanding.⁵⁷⁹ The European Community, noting the failure of this memorandum to have any effect on pollution, launched a proposal directed against substandard ships.⁵⁸⁰ Its aim was both to create an obligation for the usage of state powers as attributed under the international treaties and also to accelerate the ratification of such treaties.⁵⁸¹ This initiative led to the creation of a new memorandum of understanding which came into force in July 1982, the Paris Memorandum of Understanding. This document was first signed by maritime authorities of the then European Community's member states and then opened to other adherents, with the consent of the Community. It aims at ensuring compliance with most of the treaties on ship-source pollution, as well as other treaties on safety of navigation and labour standards. For those states which are members of the European Union, the EC Directive on Port State Control has made the Paris Memorandum's commitments binding.⁵⁸² Changes to this directive have been proposed as new treaties emerge.⁵⁸³

§ 154. All this having been considered, the international legal basis for the implementation of a memorandum of understanding on port state control is the jurisdiction of the port state as attributed by the treaties to which the memorandum aims to give application. Notwithstanding

⁵⁷⁸ (Valenzuela, 1984, p. 145)

⁵⁷⁹ (UK Royal Commission on Environmental Pollution, 1981)

⁵⁸⁰ (Kasoulides, 1993, p. 145)

⁵⁸¹ (Kasoulides, 1993, p. 146)

⁵⁸² Directive 2009/16/EC.

⁵⁸³ EU, COM(2012).

that default basis, one must consider the possibility that port states may agree to use these MoU to apply treaty rules and to states which have not consented to being bound. Another possibility is that such rules and standards are applied by resorting to powers not provided by the treaty. This is problematic for it means that there must be a legal basis that justifies the port state's use of such powers unilaterally, i.e., outside the applicable multilateral framework. This will be discussed in the following chapter, as it is an example of how MoU are also potentially a case of unilateral jurisdiction.⁵⁸⁴ Before delving into that question, it is important to know the typical content of MoU on port state control.

2.4.2. *The content of MoU on port state control*

§ 155. The MoU on port state control (PSC) integrate a state's commitments concerning the application of relevant international conventions: the inspection procedures and the investigation of operational procedures, the exchange of information, the structure of the organization and amendment procedures. Each of the MoU aims at giving application to a different set of international treaties. Following the practice initiated in 1982, several other MoU have been signed. They cover today most of the world's oceans: the 1992 Acuerdo Latino or Acuerdo de Viña del Mar (South and Central America),⁵⁸⁵ the 1993 Tokyo Memorandum of Understanding (Pacific Ocean),⁵⁸⁶ the 1996 Caribbean Memorandum of Understanding,⁵⁸⁷ the 1997 Mediterranean Memorandum of Understanding,⁵⁸⁸ the 1999 Indian Ocean Memorandum of Understanding,⁵⁸⁹ the Abuja Memorandum of Understanding (West and Central Atlantic

⁵⁸⁴ *Infra* 3.3.1, Enforcement under the MoU on port state control.

⁵⁸⁵ Acuerdo Latinoamericano sobre Control de Buques por el Estado Rector del Puerto

⁵⁸⁶ Memorandum of Understanding on Port State Control in the Asia-Pacific Region

⁵⁸⁷ Memorandum of Understanding on Port State Control in the Caribbean Region

⁵⁸⁸ Mediterranean Memorandum of Understanding On Port State Control

⁵⁸⁹ Memorandum of Understanding On Port State Control For The Indian Ocean Region

Africa),⁵⁹⁰ the Black Sea Memorandum of Understanding,⁵⁹¹ and the Riyadh Memorandum of Understanding (Persian Gulf).⁵⁹² All of them follow a very similar model, whereby port states share information on their implementation of international treaties. The United States of America is currently outside any of these regional agreements.

§ 156. As all the existing MoU on PSC follow a very similar structure and this analysis relies on the text of the 1982 Paris Memorandum of Understanding, this methodological option will work merely as a point of departure, considering that all the others tend to stem from that inception.⁵⁹³ Where other MoU depart from this standard, the differences are flagged up accordingly.

§ 157. A Memorandum of Understanding on PSC starts with a section on ‘commitments’ (Section I), whereby the maritime authorities commit to maintaining an effective system of port state control. Then, a commitment on the inspection targets is set out. MoU may also entail commitments of consultation, cooperation and exchange of information between maritime authorities to further the objectives laid down in the memorandum. Further commitments can be assumed, depending on the ambitions of the members.

§ 158. The MoU on PSC then integrate a list of relevant instruments (Section II). These are the international treaties to be given application through port state control. The list varies from memorandum to memorandum and can be subject to amendments. It is important to notice that not all these instruments relate to pollution: some relate to safety (e.g. the SOLAS) and/or to labour conditions (e.g. the MLC). The MoU also clarify that each maritime authority will apply those relevant instruments which are in force and to which its state is a party. The same goes for amendments to the instruments.

§ 159. The procedures taken by port state control agents are normally the section that follows (Section III). This refers to inspection, detention, rectification and to reporting, setting the ship risk profile and selection criteria. The Paris Memorandum of Understanding also includes here the procedure of ‘inspection and detention’. This section explains more concretely the action

⁵⁹⁰ Memorandum of Understanding on Port State Control for West and Central African Region

⁵⁹¹ Memorandum of Understanding on Port State Control in the Black Sea Region

⁵⁹² Riyadh Memorandum of Understanding on Port State Control

⁵⁹³ (McDorman, 2000, p. 209)

which port state control agents will undertake; for example “check the validity of the certificates and documents and furthermore satisfy themselves that the crew and the overall condition of the ship, its equipment, machinery spaces and accommodation and hygienic conditions on board, meet the provisions of the relevant instruments”.⁵⁹⁴ Sections IV and V are more prone to differ from memorandum to memorandum. Some integrate banning procedures whilst others do not. Some states also decided to integrate here their provisions on information disclosure to the secretariat. Only the Paris and the Abuja MoU explicitly refer to banning procedures. These norms imply the refusal of access of ships following multiple instances of detention. This is particularly important if one considers that it is a prerogative of the port state to prevent access to its territory.

§ 160. Then follow rules on operational violations in contravention of discharge provisions, and then an explanation on the institutional organization of the memorandum (committee and secretariat), a section on amendments to the memorandum, a section on financial mechanisms, a section on the administrative provisions and eventual annexes that include all the forms that clarify technical aspects of the standards to be applied, for example the ship risk profiling methods (High, Low or Standard).

§ 161. All in all, the contents of these MoU do not have many variations, except in the powers used and the instruments to be applied. However, the investment necessary to make full use of port state jurisdiction to control compliance of vessels with the relevant international treaties varies from region to region. As some port states do not have the means to perform frequent inspections, MOU on PSC may have some difficulty in effectively influencing navigation.

2.4.3. The limitations of MoU on port state control

§ 162. The MoU on PSC have by now been generally recognized, both by the IMO and by the UNGA, as an implementation mechanism for IMO anti-pollution standards.⁵⁹⁵ The Paris Memorandum of Understanding, for example, went from first focusing on CDEM standards to

⁵⁹⁴ Memorandum of Understanding On Port State Control for The Indian Ocean Region, Section 3, Article 3.1.

⁵⁹⁵ UN, A/54/429, par 91.

gradually expanding the inspections to discharge, navigational and operational standards.⁵⁹⁶ The extended coverage aimed at is a confirmation that international law relies on state jurisdiction to be implemented, especially on executive/enforcement actions of the state. Indeed, only after the explicit call of a 1991 IMO Resolution did other states feel comfortable in developing regional agreements of the same kind.⁵⁹⁷ Still, the hesitancy in recognizing unilateral actions illustrates the IMO's "apprehension" with respect to port state control.⁵⁹⁸ Today, this apprehension is less pronounced, as evidenced by a recent UNGA resolution that stresses the expectation towards flag states that they will undergo satisfactory port state control examinations.⁵⁹⁹

§ 163. The collective approach to port state control aims at creating an exception to the competition between ports, at least for environmental aspects.⁶⁰⁰ As such, maritime authorities have succeeded in creating a level playing field, preventing the emergence of what have already been termed 'ports of convenience'.⁶⁰¹ Yet this does not provide for a global panacea. Although these MoU aim at giving application of global standards, the fact is that their methods are only applicable regionally and hence are not uniform worldwide. In this sense, multilateralism does not mean universality, for these agreements do not expand beyond a given area. And, consequently, substandard ships will "region shop".⁶⁰²

§ 164. Even within MoU the practices are not uniform. There is a degree of variation in the actual exercise of powers under these agreements by different port states.⁶⁰³ By having a centralized secretariat to manage the information and compare results, there is something akin to a peer pressure effect that may push port states to invest in giving the necessary provision to

⁵⁹⁶ (Molenaar, 1996, p. 247)

⁵⁹⁷ IMO, A.682(17), Agenda item 10.

⁵⁹⁸ (Molenaar, 1998, p. 123)

⁵⁹⁹ UN, A/RES/68/70 (2013), par 125 and par 150.

⁶⁰⁰ (McDorman, 2000, p. 209)

⁶⁰¹ (Swan, 2006, p. 38)

⁶⁰² (Bang & Jang, 2012, p. 184)

⁶⁰³ (Keselj, 1999, p. 148)

their maritime authorities for fulfilling their duties. But MoU on PSC go further than this. They ensure a universal applicability of international treaties that port states have ratified and that are part of the list of treaties to be given application through the MoU. The fact that port states inspect and punish all ships, regardless of nationality, means that for the states of registry of those ships, the treaties are applicable irrespective of consent. This collective effort has therefore undeclared cosmopolitan purposes: it aims at ensuring that international law applies to all ships that visit a port state's ports, putting the objectives of the port state ahead of the right of the flag state to have its ships exempted from certain international rules and standards. However, the MoU also admit that port states are not limited by the MoU in the exercise of their jurisdiction.⁶⁰⁴

§ 165. This collective attempt to ensure universal application of a treaty is different from the *quests for universality* that this study aims at analysing. Some states indeed aim at making their own laws universally applicable by using their port state jurisdiction and pushing for more stringent environmental regulations worldwide. Evaluating the lawfulness of that attempt is a fundamentally more complex subject.

§ 166. To sum up, the MoU on PSC reveal that port states can act as enforcers of international treaties, acting on behalf of all the signatories of those treaties and, arguably, on behalf of the international community whenever such treaties are approaching universal acceptance. Yet aside from being part of a multilateral framework on port state jurisdiction, the MoU are also an example of how port states may act unilaterally. The existence of these MoU already reveals a tendency towards relying on the unilateral exercise of port state powers. The actual discussion from the perspective of unilateralism is, however, subject to a different sort of limitation, as will be analysed in Chapter 3.⁶⁰⁵

2.5. The limitations of this multilateral framework

§ 167. The laxity of flag state control has been compensated for by the additional mechanism of port state compliance control of ship-source pollution.⁶⁰⁶ The existence of a multilateral framework for port state jurisdiction is partially the result of a cosmopolitan effort by port states

⁶⁰⁴ Paris Memorandum of Understanding, 1.7.

⁶⁰⁵ *Infra* 3.3.1, Enforcement under the MoU on port state control.

⁶⁰⁶ (Warner, 2009, p. 137)

to ground their actions in a consensus-based structure so as to ensure more harmonious relationships with states acting under other capacities, in particular flag states. Yet multilateralism has its own limitations, some of them revealing the parochial tendency of contemporary international law.

§ 168. One first issue has to do with the coordination between states. As the number of states peaked in the last decades of the twentieth century, any multilateral process with global ambitions has become more complex due to the quantity of national interests and agendas to consider. This has an impact on the pace of decisions and, more importantly, in the actual transition between ambitions to actions, i.e., the implementation. This problem may be addressed for example by the creation of an international organization, equipped with a secretariat for administrative tasks which ensures that multilateral commitments are respected and that the level playing field is also respected. This is one of the reasons for the existence of the IMO. All treaties developed within the remit of the IMO are taken into consideration so as not to create contradicting entitlements which would be detrimental to the clarity and certainty of the legal regime of maritime transport. This coordination role also takes place within each Memorandum of Understanding with the secretariats which centralize information and create some sort of peer pressure by releasing the results of the performance of each member state.

§ 169. The UNCLOS does not provide clear rules about the scope of port state jurisdiction.⁶⁰⁷ This is particularly evident as regards the right of port states to exceed the existing rules and standards.⁶⁰⁸ The treaty makes no relevant reference to the legislative competence of port states, except to what is needed to accommodate their enlarged enforcement jurisdiction.⁶⁰⁹ What is more notorious is its silence concerning the treatment of ships in port in general

§ 170. One of the most commonly argued limitations for treaty-based jurisdiction continues to be that treaty-making takes time, which delays the impact of substantive norms upon ships. This is so especially in environmental matters where the cost of reverting pollution impacts grows higher as the polluting substances accumulate and the level of depletion increases. What is more, even after a treaty is agreed upon and open for signature there is still a variable period

⁶⁰⁷ (Marten, 2015, p. 109)

⁶⁰⁸ (Ringbom, 2008, p. 212)

⁶⁰⁹ (Churchill & Lowe, 1999, p. 348)

where the treaty is waiting for major flag states to ratify, arguably allowing certain ships to be exempted from new standards by hiding behind the curtain of their flag. Despite not being legally binding while not having entered into force, it is commonly acknowledged that a treaty already casts legal effects upon those states which signed it.⁶¹⁰ Treaties indeed constitute “an accurate expression of the understanding of the parties at the time of signature”.⁶¹¹

§ 171. Third states might argue that while not signing the treaty, they are not bound by it and therefore that the ships flying their flag are exempted. This possibility appears less evident when considering amendments to annexes of existing treaties, such as is the case with MARPOL where consent to the amendments is presumed by the treaty itself; in that case, states will have to explicitly manifest their objection, something that rarely occurs. This strategy aims at accelerating the entry into force of the amendments and hence achieving universal coverage more rapidly.

§ 172. The applicability of treaties to third parties is a subject of discussion with great impact on the analysis of unilateral port state practice. This study submits that the lawfulness of such an exercise of jurisdiction will depend on the legal basis argued by the port state, as it would not be the treaty itself. For example, according to Article 5(4) of the MARPOL, the parties are to apply their rules and standards on the ships of non-parties “as may be necessary to ensure that no more favourable treatment is given to such ship”. The literature recognizes that MARPOL standards apply to non-state parties which visit ports of UNCLOS state parties which are also signatories to such treaties.⁶¹² One possible explanation is that the flag state is voluntarily accepting to be bound by a treaty which it has not ratified.⁶¹³ Another explanation is that there is an obligation of the flag state to comply with these standards, but the question then emerges about what source creates this obligation. The source could possibly be an agreement between the flag state and the port state, but there is no evidence of this. Another

⁶¹⁰ VCLT Article 18.

⁶¹¹ ICJ, Qatar vs. Bahrein, par. 89

⁶¹² (Fitzmaurice, 2002, pp. 119-120)

⁶¹³ (Fitzmaurice, 2002, p. 120)

source could just be a customary practice of the application of treaty law, a possibility to which the literature has already called attention.⁶¹⁴

§ 173. Be that as it may, it results in an imposition of standards, and questions arise as to whether compliance by flag states is purely voluntary or the result of an obligation. Regarding port state jurisdiction, if the presumption that the right to port state enforcement as set out in Article 218 is not part of customary international law, some have said that it appears that this jurisdiction can only be exercised towards vessels of a state which is itself party to UNCLOS, being thus a substantively different situation from that of MARPOL.⁶¹⁵ However, if that is rebutted by practice – as has been argued – then the situation of port state jurisdiction over ships of third states is the same as under MARPOL.⁶¹⁶

§ 174. The guidelines developed by the IMO are non-binding and therefore provide no rights or obligations. Their effective application is based on other incentives, for example through publication of good practices regarding acts of pollution that have not yet become illegal under international law. The turn to non-binding initiatives reveals the fragility of the treaty-based international law and the barrier which consent sometimes represents to ensure the protection of the environment beyond the territorial boundaries of states. Furthermore, the emergence of self-regulation by privatized port authorities, such as the Clean Shipping Index, within the industry is symptomatic of the current limitations of international law in dealing with a global industry that sees in jurisdiction a hurdle with potential impact for business operations.⁶¹⁷

§ 175. It has been pointed out that there are four ways for a common framework of legal protection to emerge at the multilateral level: a) adoption by international conference; b) entry into force in an international convention; c) extensive ratification of an international convention in excess of the minimum required; or d) binding acceptance by a particular state by means of ratification of a convention.⁶¹⁸ Although varied, this approach to law-making is prone to some

⁶¹⁴ (Fitzmaurice, 2002, p. 121)

⁶¹⁵ (Fitzmaurice, 2002, p. 121)

⁶¹⁶ (Fitzmaurice, 2002, p. 121)

⁶¹⁷ (Clean Shipping Index, 2017)

⁶¹⁸ (Kasoulides, 1993, p. 37) (Timagenis, 1977, pp. 605-606)

delay. One example of this phenomenon is the MARPOL, which is said to be “the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes”.⁶¹⁹ The treaty was adopted in 1973, but since by 1978 it had still not entered into force, a new protocol absorbed it and finally led to its entry into force in 1983. Its annexes also suffered from the same problem of delayed entry into force: Annex I and Annex II took 10 years, Annex III took 19 years, Annex IV took 30 years and Annex V took 15 years; the more recent Annex VI took ‘only’ 8 years to enter into force. By comparison, the UNCLOS took 12 years to enter into force, and only did so after the adoption of an implementation agreement which substantially reviewed Part XI of the treaty.⁶²⁰

§ 176. The multiplicity of international binding and non-binding documents creates the impression that the insufficiency of multilateralism is strictly connected with time, not content. In other words, the limitation of a common legal protection may have to do with the procedural hurdles involved in the process rather than the substantive result eventually achieved after those hurdles have been overcome. Another limitation is that this tends to result from major incidents, having a reactive nature instead of a pre-emptive one.⁶²¹ Also, the classic procedures for the legal recognition of rights and obligations at the international level hardly fit with the sense of urgency that common concerns are vested in.⁶²² This is especially true regarding environmental issues: as years pass, the overall quality of the oceans’ ecosystems depletes, biodiversity diminishes drastically, resources become scarce and renovation less likely.⁶²³ Still, whenever there is the information, the capacity and the political will from some states, the multilateral procedure necessary to amend the former documents is painfully slow.⁶²⁴ This slow pace, or more precisely the factual consequences of the lack of a timely legal response to a certain issue, could be argued as a ground for unilateral action (*ex factis ius oritur*). This argument would,

⁶¹⁹ (International Maritime Organisation, 2018)

⁶²⁰ (Oxman, 1994, p. 696)

⁶²¹ (Sands & Peel, 2012, p. 348)

⁶²² (Krisch, 2014, p. 38)

⁶²³ (Harnik, et al., 2012, p. 614) (Harnik, et al., 2012, p. 610)

⁶²⁴ (WWF, 2018)

however, need to be articulated with a sound legal basis as it could not stand on its own in the case of a conflict of jurisdiction, namely the jurisdiction of the flag state that always applies.

§ 177. All in all, despite the attribution of certain agenda-setting powers to the secretariats of international organizations, thereby influencing what gets discussed and what does not, the fact is that states retain to a large extent the power to decide what binds them and what does not. This means that parochial interests are at the forefront of any diplomatic conference.

2.6. Interim conclusion (II)

§ 178. In Chapter 2, the multilateral framework for port state jurisdiction was explained having as a reference the instruments on ship-source pollution that rely on that capacity. This framework serves as a minimum and it often provides the maximum that most port states are willing or able to perform. In a sense this framework is positive from a cosmopolitan perspective, as it ensures a level playing field and a certain predictability for ship-owners. However, this framework has structural flaws, as it relies on procedures that are not fully fit for the global challenges they seek to address. Not only are the formalities not adapted to the urgency of certain situations, but also the possibility for objecting to or withdrawing from binding agreements remains a possibility for all states. Nevertheless, the framework remains as the reference point for assessing the existence of unilateralism. As it will be submitted in Chapter 3, this framework provides evidence of legally relevant values on which port states rely when acting unilaterally. Cases where that happens are hence discussed in Chapter 3 by having as a measuring rod the instruments discussed in this chapter.

3. THE UNILATERAL ACTIONS OF PORT STATES OVER SHIP-SOURCE POLLUTION

“States may find themselves bound by their unilateral behaviour on the international plane.”⁶²⁵

3.1. Introduction to Chapter 3

§ 179. The jurisdiction of states under international law is not only the product of a multilateral framework. Practice which does not stem from the multilateral framework reveals the broader extent of a state’s jurisdiction. This non-multilateral jurisdiction is best defined as unilateral. Unilateral actions are part of what constitutes the international law of jurisdiction. These actions, if widely repeated and generally accepted, may eventually constitute a source for emerging international customary rights which shape the role of the state in international law. Their unilateral nature says little about the legal basis upon which the state is claiming to have jurisdiction, only that it falls outside the existing multilateral framework. The legal basis for unilateral jurisdiction is not the focus of this chapter. Rather, this chapter explores the practices of states which use their port state powers to enforce international rules and standards outside the permissible scope granted by treaties, or when they use those powers to prescribe novel rules and standards. These are the practices that will be interpreted under the light of the customary principles of state jurisdiction in Part II of this study.

§ 180. This chapter starts by discussing unilateralism under international law. Then the focus is turned on actual port state practice, starting with enforcement action, including a detailed analysis of MoU on port state control which deviate from treaties, and then shifting to prescriptive actions which make use of port state powers. Finally, a critical assessment of unilateralism in international law is presented. This explains how unilateral port state jurisdiction is not a panacea, despite its apparent promise when considering the limitations of the multilateral framework. One of these limitations, namely the lack of an adequate international legal ground, is what will motivate the inquiry, in Part II, about the possible legal sources which a port state may be relying on or may eventually rely on. As the introductory quote to this chapter aims to illustrate, these unilateral actions may have the impact of binding the state in its international relations and hence it must be submitted from the outset that

⁶²⁵ UN, A/CN.4/L.703

unilateralism is here studied from the perspective of international law and not from a foreign relations policy standpoint.

3.2. The unilateral approach to international law

§ 181. States may perform certain actions under international law which are termed ‘unilateral’: recognition, protest, and waiver are some examples of unilateral actions. Even delimitation has been categorized in jurisprudence as a unilateral action, making its validity dependent upon international law.⁶²⁶ However, the concept is not uniform, and certain of these actions may be formulated by various states under a multilateral framework whilst others are just “an exercise of their freedom to act on the international plane”.⁶²⁷ The strengthening of a multilateral approach to international law in the last century, which has by now a truly global impact, has not totally halted unilateral actions with an international legal consequence. In fact, despite being rare when compared with the number of joint communications, resolutions and treaties signed in any given year, unilateral actions gain a more important role when they occur within the margins of well-developed, multilateral frameworks. This also means that they are the object of much protest when they occur outside these margins, namely because they disrupt a balance of interests which has been very carefully established by all signatory states.

§ 182. The concept of ‘unilateral jurisdiction’ can be summed up as meaning any act of prescription, enforcement, adjudication or investigation carried out by the state’s authorities which has some international component, and which takes place outside the existing multilateral framework for that subject matter. Unilateral jurisdiction requires a principle of international law to serve as a legal basis. Those principles emerge from unilateral action itself which, in a self-replicating way, confirms the existing principles whilst developing their legal scope. This has been the case in the principle of territoriality, the principle of nationality, the principle of security, the principle of universality and, this study argues, the principle of functionality.⁶²⁸ These are the five principles of jurisdiction in international law. On the bases of these principles, states can have recourse to unilateral jurisdiction to enforce international standards through means not devised by the instruments containing them, either to apply these

⁶²⁶ ICJ, *Anglo Norwegian Fisheries Case*, p 20

⁶²⁷ UN, A/61/10, p. 367.

⁶²⁸ *Infra* 6, The functionality of unilateral port state jurisdiction.

standards before their entry into force through early implementation schemes with direct reference to the instrument adopted, or to create their own new rules and standards over unregulated conduct. This latter type of unilateralism, namely legislative or prescriptive, would then in itself contain a claim of unilateral enforcement which is also not based on an international instrument but on the international lawfulness of the unilateral prescription itself.⁶²⁹ The unilateral prescription without actual enforcement would normally not raise issues, but the doctrine has raised the point that this may not always be the case.⁶³⁰

§ 183. Unilateral jurisdiction has a norm-setting or norm-catalytic potential. It instils the principles of jurisdiction, creating specific doctrines which clarify the jurisdiction rights which states have in international law. It also steers states towards the setting of positive legal norms on jurisdiction into treaties, following multilateral processes. Because of this potential, states may intentionally have recourse to unilateral jurisdiction as a means of putting pressure on those processes, influencing, through their own state practice, the development of international law.⁶³¹ It is undeniable, however, that being a “normative power” (as the norm-setting potential of unilateral jurisdiction has been referred to in the literature concerning the EU) is for the most part reserved for those states that have a strong bargaining position in international affairs, either militarily or economically.⁶³²

§ 184. The organization and legal structure of the EU is an example of how that unilateral jurisdiction does not always mean jurisdiction exercised in isolation and by a single state. One state can act with others, at a regional or sub-regional level, using its sovereign powers as part of a collective strategy to achieve a certain policy goal.⁶³³ Unilateral jurisdiction can be exercised by states under the aegis of an international organization such as the EU, or within the framework of a collective agreement, such as the MoU on port state control.⁶³⁴ This latter

⁶²⁹ (Brownlie, 2003, p. 308)

⁶³⁰ (Mann, 1964, pp. 14, n. 194)

⁶³¹ (Scott, 2014, p. 107)

⁶³² (Manners, 2006, p. 184)

⁶³³ (Christodoulou-Varotsi, 2008, p. 30)

⁶³⁴ *Supra* 2.4.1, The legal nature of the MoU on port state control.

possibility is unilateral in the moment of its application over third states, which, by not having consented to the exercise of that particular power, will see their jurisdiction being unexpectedly overlapped by a novel claim; and in the law of the sea regime, which today is framed by a very detailed jurisdictional regime in treaty law, this is quite problematic.⁶³⁵ Yet the sort of unilateralism in these memoranda is not as norm setting as it is norm confirming, for memoranda only serve to implement existing treaty standards.

§ 185. Another question that unilateral jurisdiction raises with respect to the law of the sea regime, is whether it falls within the category of ‘residual jurisdiction’. This category is used in some of the literature to refer to jurisdiction exercised as part of an open treaty-based mandate, perhaps better phrased as ‘based on consent’. It has also been used at the EU level to refer to “jurisdiction that is left to be determined by national law”.⁶³⁶ It is a matter of debate whether treaties may actually provide for direct openings for states to have recourse to principles of jurisdiction, acting unrestrained by treaty rules, or whether, because of procedural rules in the treaty providing for residual jurisdiction, states are not acting unilaterally but rather fulfilling the treaty’s mandate, which is often kept purposefully vague. This study takes the position that residual jurisdiction is unilateral and, when states exercise this right, their freedom is somewhat limited.⁶³⁷ This perspective is justified by the fact that jurisdiction rights in treaties often are, prior to the treaty or following subsequent repeated practice, part of customary international law. As such, when states are given, within a treaty, the right to exercise a jurisdiction right, the procedural constraints which are still restricting the exercise of that right do not affect the legal basis of that right but rather delimit it as the result of the treaty itself. It is as if states leave an opening in the treaty for an original condition of freedom, constrained at the source merely by the principles of jurisdiction. Residual jurisdiction, in that sense, is merely a formalistic description of a situation, which comes from the narrow and superficial perspective of a treaty; it is an approach which fails to contemplate the original source of the jurisdiction exercised, perhaps because of an overwhelming importance attached to its secondary legal manifestation, and it is hence wrongly qualifying a consequence as a cause.

⁶³⁵ *Supra* 2.4.3, The limitations of MoU on port state control.

⁶³⁶ (Nuyts, 2007, p. 12)

⁶³⁷ *Infra* 6.2.3.2, The functionality of unilateral port state prescription.

§ 186. The jurisdictional rights of a sovereign state in a position of freedom may clash with other states' rights which are either based on other applicable principles of jurisdiction or are treaty-based rights. The objections raised against exercises of unilateral jurisdiction demonstrate that states and international organizations do pay attention to unilateral conduct and do not underestimate its long-term norm-setting potential with respect to both treaty interpretation and the interpretation of the principles themselves. Any action, if generalized and repeated (*usus*) with the conviction that it corresponds to a right of the acting state (*animus*), may have an impact on the scope of powers which another state may later claim if no persistent objection to such practice is raised (*opinio iuris*).⁶³⁸ Unilateral actions, for fear that they would be indicating the emergence of a customary norm, may indeed be objected to, in particular those actions purporting to exercise some sort of jurisdiction rights at sea.

§ 187. The state practice presented in the following sections of this chapter is exclusively related to rights of states at sea, more particularly with port state rights over ship-source pollution. Most of the examples are from a post-UNCLOS time, for this treaty has set out a comprehensive framework for the exercise of rights at sea. However, unilateral jurisdiction over maritime conduct is by no means a recent phenomenon in international law; rather, it is the watermark of the whole law of the sea regime. Unilateral claims are at the base of existing maritime zones where coastal state jurisdiction can be exercised. An example of this is the 1878 British Territorial Waters Jurisdiction Act,⁶³⁹ by which the British purported to assert criminal jurisdiction over incidents occurring in territorial waters, contributing to the consolidation of the territorial nature of these waters.⁶⁴⁰ The same had already happened regarding the exercise of jurisdiction over a contiguous zone for fiscal purposes, again with the UK taking the lead with the 1736 Hovering Act.⁶⁴¹ This Act, eventually repealed,⁶⁴² later led to the development

⁶³⁸ (Lepard, 2010, p. 117) (Lesaffér, 2009, p. 159)

⁶³⁹ UK, The Territorial Waters Jurisdiction Act 1878.

⁶⁴⁰ (Bederman, 2012, p. 375)

⁶⁴¹ UK, Hovering Act.

⁶⁴² UK, Customs Consolidation Act 1876, s 179.

of the right to exercise jurisdiction in a 'contiguous zone'.⁶⁴³ The other two maritime zones that exist today in the UNCLOS, namely the continental shelf and the exclusive economic zones, are also the result of claims of unilateral jurisdiction: the 1945 Truman proclamation by the USA in regard to the former;⁶⁴⁴ and the practice of Chile, Ecuador and Peru, which resulted in the 1952 Declaration of Santiago, in regard to the latter.⁶⁴⁵

§ 188. Another situation which may be considered to be unilateral jurisdiction is early implementation. It is quite common for states to decide to have recourse to early implementation by relying on port powers that are attributed by a treaty. In practice, early implementation is rarely an object of dissent. However, this is not the same as substitutive/vicarious enforcement jurisdiction, for no state is entitled to act on the basis of the treaty until the treaty is in force; early implementation of the treaty is not a prerogative of the treaty itself, but rather a pre-existing right to prescribe and enforce the treaty's norms unilaterally.⁶⁴⁶ The right to prescribe any rules or standards does not exist by virtue of the treaty that ultimately contains them, and thus the enforcement that may follow that prescription is necessarily unilateral as well, and partially dependent on the lawfulness of the prescription itself. The precise basis of unilateral jurisdiction to prescribe will thus depend on the way in which the port state frames the conduct over which any rules or standards should apply. In this way, states may give application to treaty rules and standards before the treaty is binding, i.e. before they are *stricto sensu* treaty law. This 'early implementation', which is referred to by the IMO itself,⁶⁴⁷ is, for this study, a case of unilateral jurisdiction and it is so for two main reasons. The first reason is because the lack of initiative of the state would, in principle, i.e. unless expressly provided, not be interpreted as going against the object and purpose of the treaty. The second reason is because the unilateral action is not posited on a right that has been attributed by treaty law (*scilicet* treaty law in force), and so it is not based on a multilateral

⁶⁴³ (Frommer, 1981, p. 457)

⁶⁴⁴ USA, Proclamation 2667.

⁶⁴⁵ USA, Declaration of Santiago.

⁶⁴⁶ *Supra* 1.2, The parochial approach to acting as a state.

⁶⁴⁷ IMO, MSC/Circ. 1067.

framework. Because of this non-existent multilateral backing, the state's early implementing of rules and standards relies on a principle of jurisdiction. A different position could be argued when looking at the VCLT, in particular the effects which the signing of a treaty already has on the state.⁶⁴⁸ One could argue that a state not using its unilateral jurisdiction to give the future treaty rules and standards early application in a specific circumstance could be defeating the object and purpose of a treaty it has already signed, but this would mean that in practice there would be obligations prior to the entry into force of the instrument. Nevertheless, if that were to be the case, then it would be the result of a multilaterally set obligation and so the jurisdiction would not be unilaterally but multilaterally set. Applying a treaty's standards before it entered into force could therefore be part of a state's jurisdiction, although the entitlement would result from an interpretation of this VCLT imposed obligation and not from the specific instrument. Some literature addresses this issue with a more nuanced tone, showing that there is still a degree of unilateralism even when the standard being enforced is multilaterally agreed.⁶⁴⁹

§ 189. All in all, unilateral jurisdiction remains, despite the existence of a dense web of multilaterally set jurisdiction rights, a lawful avenue for port states to use. It is true that some unilateral actions will not fit into any principle of jurisdiction and will therefore not be lawful from an international law standpoint. However, the discussion on the legality of the actions is a matter to be analysed under the principles that provide them with a legal basis, something which will be addressed later in this study. For now, it will be shown how states have been using their port state powers both to enforce applicable rules and standards with powers not attributed multilaterally or applied to states which have decided not to be subject to those generally agreed international rules and standards, and also to prescribe new rules and standards on ship-source pollution with no multilateral source.

3.3. The unilateral port state enforcement actions

§ 190. Enforcement actions aimed at giving application to multilaterally set rules and standards may already be interpreted as cosmopolitan action, since the state is using its own capabilities to realize the objectives of multilateral instruments to which it has committed. Nonetheless, whilst international instruments provide a recognizable entitlement for port states to act

⁶⁴⁸ VCLT: Article 18.

⁶⁴⁹ (Bodansky, 2000, p. 343)

regarding foreign flagged ships, port states have in some circumstances not hesitated to make an extensive recourse to their port state powers, going beyond what those entitlements explicitly provide. This section looks at cases of port state unilateral enforcement, i.e., enforcement which is not dependent on an exercise of unilateral legislative jurisdiction. This means that the rule or standard to be applied, and which is part of the multilateral framework, is left unchanged by the assertion. The unilateral factor occurs either due to early implementation of the treaty, i.e., without waiting for its entry into force, or to the recourse to powers not provided by the instrument itself. It is fair to assume that many more such initiatives may exist throughout the world, illustrating how unilateral port state enforcement actions are part of the regulatory landscape.

3.3.1. *Enforcement under the MoU on port state control*

§ 191. Port states may end up applying certain treaty rules and standards to ships whose flag state did not consent to being bound.⁶⁵⁰ The memoranda on port state control were initially not well received precisely because of this “discriminatory enforcement of the treaties”.⁶⁵¹ To analyse this, this subsection will be divided into two separate parts. The first part will cover the port state enforcement powers which are mentioned in the MoU on port state control. The objective is to illustrate how port states have recourse to enforcement actions which are not coincident with those provided in the ‘relevant instruments’. The second part will cover the practice of port states taking place under the effect of these MoU, with attention to the Paris Memorandum of Understanding as the best example of unilateral enforcement jurisdiction.

3.3.1.1. *Port state enforcement powers under the MoU on PSC*

§ 192. When enforcing under a framework of port state control, the port state resorts to unilateral powers, namely powers explicitly attributed under international treaties. One example of this is the consideration of the BWM treaty as an applicable instrument by the Paris Memorandum of Understanding member states. These states have been enforcing compliance

⁶⁵⁰ (McDorman, 2000, p. 212)

⁶⁵¹ (Brugmann, 2003, pp. 281-282)

with the standards of a legal instrument before it is applicable, in what constitutes a case of port state enforcement unilateralism, i.e. the ballast water management convention is not applicable and yet the port state applies it under the Paris Memorandum of Understanding. Nevertheless, it should be highlighted that the signatories to the memorandum are usually discouraged from giving effect to treaties which are not in force.⁶⁵² What follows is an explanation of the nature of these enforcement powers with a focus on the Paris Memorandum of Understanding. This focus is justified by the fact that this is the oldest memorandum, the most ambitious in terms of new powers, and the one encompassing the most relevant instruments. These powers will be discussed in abstract terms first, for in the following subsection (3.3.1.2) there will be an analysis of their application over ships with regards to pollution.

§ 193. Ships may have to comply with reporting obligations and, correspondingly, the port state can require ships to produce such reports. These reports include information that the ship must send to the port authority. The information requested under the Paris Memorandum of Understanding, and that port states may require, are messages to be sent before the ship arrives at the port, when the ship arrives at port and when the ship departs from the port.⁶⁵³

§ 194. Port states can attribute ships with a ‘ship risk profile’ according to certain parameters, such as the type and age of the ship or performance records from previous port state control actions. This will determine the priority for inspection, the interval between the inspections and the scope of the inspections. The power is a licence to discriminate between ships, acting in opposition to the general principle of equal treatment.⁶⁵⁴

§ 195. The “selection” is the application of the previously mentioned ship risk profile at port. In selecting ships for inspection, the port authority will rely on a selection scheme. This serves to make the most efficient use of limited human and infrastructural resources. In the Paris Memorandum of Understanding, there is a system of targeted inspections (the BGW lists). The “Black”, “Grey” and “White” (BGW) lists present the full spectrum, from quality flags (“White” list) to flags with a poor performance (“Black” list) that are considered under the

⁶⁵² (Kasoulides, 1993, p. 181)

⁶⁵³ Paris Memorandum of Understanding, Annex 12.

⁶⁵⁴ (Molenaar, 1996, p. 248)

categories of medium risk, medium to high risk, high risk and very high risk. This system of targeted inspections is based on the total number of inspections and detentions over a 3-year rolling period for flags with at least 30 inspections in the period. Flags with an average performance are shown on the “Grey” list.⁶⁵⁵

§ 196. The “inspection” is the action through which compliance with international instruments is verified by port state control officers. Inspection is often limited to a certificate check, the exception to this general rule being where the existence of “clear grounds” so justifies. Under the MoU, this exception has been considerably extended. This broader approach has already been embraced by the IMO’s Procedures for Port State Control and is by now more generally considered to be consistent with international law.⁶⁵⁶ Furthermore, there is, in some MoU, a percentage of ships which each port authority commits to inspect. The Paris Memorandum of Understanding authorizes inspection of ships regardless of their flag states being a party to a relevant instrument, which results in a “no more favourable treatment” (NMFT) type of clause.⁶⁵⁷ Since only some of the treaties of the inspection list contain such a clause, it has been argued that they should not be imposed on non-consenting flag states.⁶⁵⁸ As a result, ships of flag states which are not party to certain treaties do not have the appropriate certificates and hence are subject to more stringent inspections. The MoU may also change their inspection regimes over time. In 2011, the Paris Memorandum of Understanding adopted a new inspection regime (NIR) which sets different inspection targets for its parties, followed by the Tokyo Memorandum of Understanding in 2014. Concentrated inspection campaigns have also been created to target specific ships, for example those coming from or heading towards Arctic waters.⁶⁵⁹

§ 197. The Paris Memorandum of Understanding has also created a new power, unparalleled in the regulatory conventions or the UNCLOS: the suspension of the inspection in exceptional

⁶⁵⁵ (European Maritime Safety Agency, 2018)

⁶⁵⁶ UN, A 27/Res.1052.

⁶⁵⁷ Paris Memorandum of Understanding Section 2.4.

⁶⁵⁸ (Kasoulides, 1993, p. 181)

⁶⁵⁹ (Ringbom, 2017, p. 267)

circumstances. In a case where statutory certificates are missing, expired or invalid the inspection may be suspended after the check of the certificates and documents. The suspension of the inspection may continue until the responsible parties have taken the steps necessary to ensure that the ship complies with the requirements of the relevant instruments.⁶⁶⁰

§ 198. A similar safeguard applies to detention under the MoU. Unlike the case of arrest under national law, “detention under an MoU can be issued at the sole discretion of a port state control officer, without prior consideration of the merits by a judge”.⁶⁶¹ This means that an unduly detained ship will be entitled to compensation and can appeal against a detention order, but that does not stop the process of detention.⁶⁶²

§ 199. The Paris Memorandum of Understanding also introduced the most radical consequence to non-compliance with treaties: a complete denial of entry after multiple detentions. Banning of ships is also present in other MoU.⁶⁶³ Although port states are not preventing a ship from navigating in the MoU region, this measure already serves as a way of inducing compliance in the region.⁶⁶⁴

3.3.1.2. *Port state practice under the MoU on PSC*

§ 200. The enforcement powers that port states agree to use under the MoU on PSC could easily be considered as mere paper tiger ambitions. Despite figuring in the memoranda, the stated intention to counter pollution through port powers still requires states to use those powers. This section analyses the evidence of that use. The analysis that follows is based on 2014 data alone, both for simplicity and also due to the available data at the time of writing. The focus is on the control of compliance with ship-source pollution standards in some of the MoU available. It should be noted that not all of the ship-source pollution standards applied under the MoU relate to the high seas. The objective of this section is to illustrate whether and to what level port

⁶⁶⁰ Paris Memorandum of Understanding, Section 3.6.

⁶⁶¹ (Gard, 1999)

⁶⁶² UNCLOS, Art. 220(2) and Art. 220(6).

⁶⁶³ Abuja Memorandum of Understanding, Section 4.

⁶⁶⁴ (Sage-Fuller, 2013, p. 31)

states have been using these powers, highlighting the cases where they have done so unilaterally.

§ 201. The available numbers demonstrate that these regional agreements have some impact on the enforcement of international agreements.⁶⁶⁵ However, the data can be misleading when one looks at the individual performance of each authority within these regional organizations. Indeed, when one looks at the detention rates, some states appear much more lenient in their enforcement than others.⁶⁶⁶ These numbers do not differentiate the nature of the deficiency that led to the inspection or the detention, so they apply generally to the global performance of port states to ensure compliance with all instruments. The same occurs with refusals of access.⁶⁶⁷

§ 202. Within the MoU there are also differences regarding the applicability of instruments by the port state. In the Viña del Mar Memorandum of Understanding, Mexico and Cuba have not signed MARPOL Annexes III and IV; it is also noticeable that only six (Brazil, Chile, Guatemala, Panama, Peru and Uruguay) out of the fifteen member states have signed Annex

⁶⁶⁵ In the Paris Memorandum of Understanding there were 2,320 pollution-related deficiencies detected, which corresponds to *circa* 22.71% of the total number of deficiencies detected at port that year. In the Viña del Mar Memorandum of Understanding there were 566, corresponding to 8.54% of the overall total. In the Tokyo Memorandum of Understanding there were 5,276, which corresponds to *circa* 5.79% of the total. In the Caribbean Memorandum of Understanding there were 74, which correspond to *circa* 4.66% of the total. In the Mediterranean Memorandum of Understanding, 3% of the 15,092 deficiencies detected had to do with pollution prevention. In the Indian Ocean Memorandum of Understanding, there were 900, corresponding to 5.34% of the total. In the Abuja Memorandum of Understanding (excl. MARPOL II and IV and AFS), there were 44 deficiencies detected, which corresponds to a total of 7.22% of all deficiencies detected. In the Black Sea Memorandum of Understanding there were 610, corresponding to *circa* 3.32% of the overall insufficiencies detected. In the Riyadh Memorandum of Understanding there were 58 out of 132 major deficiencies related to MARPOL.

⁶⁶⁶ For example, in the Paris Memorandum of Understanding, Cyprus had a 14.29% rate of detentions whilst the three Baltic states had 0% detentions; in the Tokyo Memorandum of Understanding, the Philippines have 0.10% of detentions whilst China has 6.47%; in the Acuerdo de Viña del Mar, Ecuador detained 11% of the ships with deficiencies whilst Panama for example detained none. What is more, also in the number of *inspections* there are great differences. In the Indian Ocean Memorandum of Understanding, Iran undertook 470 inspections, detaining 7.66% of ships, whilst Kenya detained only 2.36% of the 466 ships inspected in its ports. In the Black Sea Memorandum of Understanding, whilst Russia has a 5.75% detention rate, Ukraine has a mere 0.73%. In the Abuja Memorandum of Understanding, Nigeria and South Africa alone represent 81% of the number of inspections with deficiencies detected out of the 14 member states; and in the Caribbean Memorandum of Understanding, Aruba, Grenada, Guyana, Barbados and Curaçao had recorded no inspections in this period.

⁶⁶⁷ As regards refusal of access, the Paris Memorandum of Understanding Annual Report of 2014 states that “[i]n a total of 20 cases ships were refused access (banned) from the Paris MoU region in 2014 for reasons of multiple detentions (17), failure to call at an indicated repair yard (2) and jumping detention (1)” and that “[a] number of ships remain banned from previous years”, also adding that “[s]everal ships have been banned a second time after multiple detentions, resulting in a minimum banning period of 12 months”. Although this same possibility is contemplated under the Abuja Memorandum of Understanding, there is no statistic in the Annual report that indicates a ship has actually been banned by any of the port authorities that are a part of it.

VI. This means that there is not a uniform regime, for port states are only required, in general, to apply those instruments from the list to which they themselves have signed up.⁶⁶⁸ In the Paris Memorandum of Understanding only Iceland has not signed one of the MARPOL Annexes (namely Annex V); in this regime however, the EU pushes for stricter coordination between its member states.⁶⁶⁹ A striking example of imbalance in pollution control compromises occurs in the Indian Ocean Memorandum of Understanding where Yemen has not signed any of the MARPOL Annexes and therefore does not apply them at its ports.⁶⁷⁰

§ 203. It is undeniable that the MoU on PSC help to ensure that international standards on pollution have a virtually global coverage, namely by making standards applicable over flag states despite their non-participation in the applicable instrument. Nonetheless, the data available demonstrates how, despite regional efforts to create some “peer pressure”, there are inevitably ports that are more lenient than others in using these enforcement powers.

§ 204. The data also points at enforcement which is unilateral. The following examples have been collected from the Paris Memorandum of Understanding inspection database by looking for inspections of ships whose flag state is not party to a specific instrument adhered to by the states whose maritime authorities have signed the memorandum. The examples highlight the enforcement of standards on ships whose flag states have not ratified the respective treaty. Information about ports and dates has not been included in this study, as it is not relevant for the analysis. The cases all occurred between 2014 and 2017 in ports of the Paris Memorandum of Understanding region.

§ 205. In regard to MARPOL Annex V, two cases have been found: the *Urgence*, flagged in the Cook Islands, failed to comply with garbage shipboard handling; the *Sormovskiy-118*, also flagged in the Cook Islands, failed to comply with the garbage management plan. In both these cases, port state control officers considered that there had been violations of treaty law even though the flag state had not signed that Annex.

⁶⁶⁸ Latin American Memorandum Of Understanding On Port State, 2.2 “Cada Autoridad Marítima aplicará aquellos instrumentos pertinentes que estén en vigor y de los cuales su Estado sea parte. En caso de enmiendas a un instrumento pertinente, cada Autoridad Marítima aplicará aquellas enmiendas que estén en vigor y que su Estado haya aceptado. Un instrumento así enmendado será considerado como instrumento pertinente por dicha Autoridad Marítima.”

⁶⁶⁹ *Infra* 3.3.3, The EU directive(s) on port state control powers.

⁶⁷⁰ (World Bank, 2000, p. 17) “Yemen has not ratified the MARPOL agreement due to a lack of funds to purchase the necessary port waste reception facilities. Ratification of other international environmental conventions has been slow for similar reasons.”

§ 206. In regard to MARPOL Annex VI, which has been adopted more recently, there are a greater number of cases. The *Tin Ziren*, flagged in Algeria, showed that its sulphur oxide levels were not as required under the treaty standards (something which also constitutes an International Safety Management Code (ISM) related deficiency). The Lebanese flagged *Fidelity*'s MARPOL Annex VI bunker delivery notes were not as required. These two ships were not detained, as these and other defects did not provide ground for detention. However, detentions have occurred. The Moldovan flagged *Ilya Muromets* was detained in an inspection where the bunker delivery notes required under MARPOL Annex VI have been considered, as was the Tanzanian flagged *Abdullah*. In both these cases, however, compliance with this standard was not the ground for detention. Ships have also been banned as the result of an inspection which considered MARPOL Annex VI: the Moldovan flagged Ro-Ro cargo ship *Jigawa*, with bunker delivery notes not as required, and the Comoro flagged *Lady Boss*, that showed ozone depleting substances not as required. In at least one case, the ban was partially based on MARPOL Annex VI: the Togo flagged *Rubin S* had an inoperative incinerator and was subsequently refused access due to multiple detentions.

§ 207. Similar situations have occurred with regards to the Anti-fouling Systems Convention (AFS). The Moldovan flagged *River Pride* was banned when a deficiency was indicated regarding a lack of AFS supporting documentation when that flag state had not signed the treaty (although this was not a ground for detention). The paint condition of the Moldovan flagged *Catrin-1* was not as required under the AFS, but that did not serve as a ground for detention. The Moldovan flagged *Lime* was detained because of missing AFS supporting documentation, i.e., the lack of these documents was a ground for detention.

§ 208. Despite their initial similarity, the constant flux of amendments makes the memoranda very different in substance from each other today.⁶⁷¹ This progressive differentiation between the substantive norms to be controlled under the existing memoranda is mostly due to the fact there is no structure created to manage coordination between them all. The only coordination instrument is called “procedures for port state control”, a document created by the IMO.⁶⁷²

⁶⁷¹ (Molenaar, 1998, p. 126)

⁶⁷² IMO Secretariat, III 2/7/6.

There is also a compromise on the exchange of information⁶⁷³ and one may also find some guidelines set out by the IMO on port control of specific treaties.⁶⁷⁴

3.3.2. *The United States Coast Guard port state control programme*

§ 209. In the United States of America, enforcement of ship-source pollution control standards is carried out by the United States Coast Guard (USCG) under the Act to Prevent Pollution from Ships (APPS).⁶⁷⁵ The enforcement at port is subject to the Ports and Waterways Safety Act.⁶⁷⁶ Both are part of a more extensive set of norms compiled in the US Code Title 33.⁶⁷⁷ When compared with the collective approach of the MoU, the approach of the USA is a purely individual (unilateral) approach, acting “on the basis of a rigorous policy of port state control inspections”.⁶⁷⁸

§ 210. As well as being a major port state not party to the UNCLOS, the USA is also not party to any MoU on port state control. Nonetheless, it has a programme on port state control, enacted by the USCG, which began in 1994.⁶⁷⁹ The banning of foreign vessels is presented by the USCG as the result of a procedure applied “when a vessel has been repeatedly detained by the U.S. Coast Guard (three detentions w/in twelve months) and it is determined that failure to effectively implement the SMS [Safety Management System] may be a contributing factor for the substandard condition(s) that led to the detentions”.⁶⁸⁰ The application of that ban may also depend on “the opinion” of the USCG as to whether the condition of the vessel may pose a

⁶⁷³ As of 3 March 2013, all nine regional PSC regimes, i.e. the Abuja, Black Sea, Caribbean, Indian Ocean, Mediterranean, Paris, Riyadh and Tokyo MoU and the Viña del Mar Agreement, have all signed data exchange agreements with the Organization in order to submit PSC reports electronically to GISIS on behalf of their member Authorities.

⁶⁷⁴ IMO, MEPC 252(67).

⁶⁷⁵ USA, APPS, §§1905-1915

⁶⁷⁶ USA, PWSA, §1221 et seq.

⁶⁷⁷ USA, USC: Title 33 - Navigation and Navigable Waters.

⁶⁷⁸ (Christodoulou-Varotsi, 2008, p. 27)

⁶⁷⁹ USCG, CG-543 Policy Letter

⁶⁸⁰ USCG, Port State Control – Information Notice No.6 of 2010

“significant risk” to the marine environment. It may also be applied if the ship “has a history of accidents, pollution incidents, or serious repair problems which creates reason to believe that such a vessel may be unsafe or create a threat to the marine environment”,⁶⁸¹ or when the ship “has discharged oil or hazardous material in violation of any law of the United States or in a manner or quantities inconsistent with the provisions of any treaty to which the United States is a party”,⁶⁸² even, this study notes, if this specific type of enforcement power has not been attributed in those treaties.

§ 211. Boarding and inspection procedures are laid down in the USCG Port State Control Initiative which aims to ban substandard ships from USA waters and to punish illegal discharges. This has been particularly aimed at controlling MARPOL’s oil record book at port.⁶⁸³ MARPOL allows for concurrent jurisdiction between a flag state and a non-flag state when MARPOL violations occur within the jurisdiction of the non-flag state.⁶⁸⁴ This has been the understanding of the US judiciary.⁶⁸⁵ Critics of these enforcement activities have also noted that “[o]ver the years, the scope of the United States’ MARPOL enforcement program expanded to the point where it is now irrelevant where the illegal discharges occurred”.⁶⁸⁶

§ 212. In conducting inspections, the USCG typically relies on a ship's oil record book (ORB) and statements of the crew to determine whether the crew is properly handling oil-contaminated water and its disposal. An ORB includes, among other things, a log of the ship's discharge and disposal of oil and certain oily water mixtures. To help monitor and prevent pollution from oil discharges, the APPS regulations include the requirement that ships over a certain tonnage are

⁶⁸¹ USA, 33 U.S.C. § 1228 (1).

⁶⁸² USA, 33 U.S.C. § 1228 (3).

⁶⁸³ USA, 33 U.S.C. § 1904(c); 33 C.F.R. § 151.23(a)(3) and (c). “The Coast Guard has the authority to board and examine the oil record book of any vessel while that vessel is in U.S. waters or at a U.S. port.”

⁶⁸⁴ MARPOL art. 4(2)

⁶⁸⁵ USA, *US v. Pena*, “Article 4 of the MARPOL Convention makes clear that, for violations that occur within the jurisdiction of the Port State, the Port State and the Flag State have concurrent jurisdiction.”

⁶⁸⁶ (Lexology, 2011)

to “maintain” an ORB.⁶⁸⁷ The ORB must be kept on board the ship and “be readily available for inspection at all reasonable times”. APPS regulations give the USCG authority to board the ship and inspect the ship for compliance with MARPOL, the APPS, and APPS regulations.⁶⁸⁸ In conducting inspections to identify vessels that have polluted or are likely to pollute in violation of the APPS, USCG personnel rely on statements of the vessel's crew as well as the vessel's registration and compliance documentation. The USCG's inspection authority includes the ability to examine the ORB kept by a ship.⁶⁸⁹ Failure of a ship to comply with MARPOL requirements can form the basis for: refusal of entry of that ship into the port; prohibiting the ship from leaving port without remedial action; referring the matter to the flag state of the vessel; or, where appropriate, prosecuting the violation in the US courts.⁶⁹⁰

§ 213. One frequent offence under the APPS is the bypassing of the vessel's oily water separator and the consequent discharge of oily waste water through a so-called “magic hose”.⁶⁹¹ As already explained, under MARPOL Annex I vessels record all oil transfer operations, including overboard discharge of bilge water, in an ORB that is retained on board and available for inspection by the competent authority of any state which is party to MARPOL. The practice of bypassing oily water would also have to be reported in the ORB. The first cases of the kind were the *US v. Royal Caribbean Cruises, Ltd* cases. This company was subject to multiple charges, totalling US\$27 million in criminal penalties. In one of the cases, the court had to consider the applicability of UNCLOS Article 218, concluding that the offence had taken place

⁶⁸⁷ USA, 33 C.F.R. § 151.25(a). The regulation states that the “master or other person having charge of [the] ship” is responsible for “maintenance of such record”.

⁶⁸⁸ USA, 14 U.S.C. § 89(a)

⁶⁸⁹ USA, 33 C.F.R. § 151.23(c).

⁶⁹⁰ USA, 33 U.S.C. § 1908. *US v. Abrogar*, 459 F. 3d 430 - Court of Appeals, 3rd Circuit 2006

⁶⁹¹ *US v. Ionia Management SA*, 555 F.3d 303 (2d Cir. 2009).

The unilateral actions of port states over ship-source pollution within the port and hence not in the maritime zones of the port state.⁶⁹² In the other case, the court concluded that MARPOL allows for ‘limited jurisdiction’ to port states.⁶⁹³

§ 214. Some years later, in *US v. Abrogar* (2006), the Court of Appeals discussed the relevance of extraterritorial conduct in the framing of an ORB violation. The US Government was allegedly reading the APPS in very broad terms and trying to determine the offence as starting when the first false entry was added to the ORB even if that was outside US waters.⁶⁹⁴ The court found that “the terms of the Act and its regulations exclude from criminal liability the ‘failure to maintain an accurate oil record book’ by foreign vessels outside U.S. waters”.⁶⁹⁵ Because the offence actually occurred in the course of attempting to avoid detection of the illegal discharges, this does not fit the definition of “relevant conduct” and hence cannot be considered part of the offence of illegal discharge. Furthermore, the court went on to affirm that criminal liability for MARPOL violations by a foreign vessel does not arise until that vessel enters US waters, and hence that the improper discharges at issue here – all of which occurred outside US waters in this case – “do not constitute ‘substantive environmental offense[s]’ under

⁶⁹² USDC Florida: *US v Royal Caribbean Cruises Ltd.* “It is uncontested that there has been no request by Liberia, the flag state, or the Bahamas, the coastal state. By its own language, Article 218 limits itself to proceedings ‘in respect of any discharge from a vessel outside the internal waters, territorial sea, or exclusive economic zone.’ While the interpretation of the term ‘in respect of’ is admittedly imprecise, Article 218.1 plainly directs its prohibitions to discharge violations and not domestic port violations. As a result, we do not find that the provisions of Article 218.1 are violated by this action.”

⁶⁹³ USA, USDC Puerto Rico: *US v Royal Caribbean Cruises, Ltd.* “RCCL further contends that treaties to which the United States is a party limit the United States’ jurisdiction over non-serious marine pollution committed within the territorial seas of the United States. The defendant contends that MARPOL requires the United States to report any violation of the treaty by a foreign ship plying United States waters to the ship’s flag state and that upon receipt of this report, Article 6.4 requires the flag state to take appropriate action. However, MARPOL provides for the exercise of limited jurisdiction by port and coastal states over treaty violations within territorial waters, pursuant to UNCLOS.”

⁶⁹⁴ *US v. Abrogar*, 459 F. 3d 430 - Court of Appeals, 3rd Circuit 2006: “By contrast, the Government’s argument in favor of the enhancement assumes that the ‘offense of conviction’ of which Abrogar is guilty—failure to maintain an accurate oil record book—occurred for ‘offense-defining’ purposes not only within U.S. waters, but during the whole of Abrogar’s tenure on the Magellan—or at least from the moment at which he entered the first false entry in the oil record book.”

⁶⁹⁵ *US v. Abrogar*, 459 F. 3d 430 - Court of Appeals, 3rd Circuit 2006: “As discussed above, the United States has no jurisdiction to prosecute a foreign vessel or its personnel for ‘failure to maintain an accurate oil record book’ outside of U.S. waters. Furthermore, no provision of the APPS or its accompanying regulations indicates that ‘failure to maintain an accurate oil record book’ by a foreign ship outside U.S. waters is a crime.[3] Stated differently, the terms of the Act and its regulations exclude from criminal liability the ‘failure to maintain an accurate oil record book’ by foreign vessels outside U.S. waters.”

U.S. law any more than the failure to maintain an accurate oil record book outside U.S. waters constitutes a recordkeeping offense under U.S. law”.⁶⁹⁶ This demonstrates how the court sees the prescriptive jurisdiction of the state and how the government intended to expand its regulatory power through an extensive interpretation of the APPS.⁶⁹⁷ The court rejected the position of the government that seemingly aimed to extend the scope of the APPS to conduct taking place outside the territory.⁶⁹⁸

§ 215. After this case, in *US v. Jho* (2008) the Court of Appeals reviewed a District Court decision that held that “prosecution of the oil record book offenses would violate principles of international law”.⁶⁹⁹ In this case the court followed a different path from *US v. Abrogar*. The court read the requirement of maintaining an ORB as imposing a duty upon the entry into port.⁷⁰⁰ Indeed, while in the former case the precise nature of *Abrogar's* offence was described as failure to maintain an accurate ORB while the ship was in the navigable waters of the United States, thus excluding from criminal liability the failure to maintain it accurately outside US waters, in this case the court followed the reasoning of another landmark case, *US v. Ionia Management* (2007), where the court recognized that the gravamen of the action was “not the

⁶⁹⁶ *US v. Abrogar*, 459 F. 3d 430 - Court of Appeals, 3rd Circuit 2006

⁶⁹⁷ *US v. Abrogar*, 459 F. 3d 430 - Court of Appeals, 3rd Circuit 2006: “We conclude, therefore, that under the APPS and accompanying regulations, Congress and the Coast Guard created criminal liability for foreign vessels and personnel only for those substantive violations of MARPOL that occur in U.S. ports or waters. Stated differently, a MARPOL violation by such a vessel or its personnel is only an ‘offense’ under U.S. law if that violation occurs within the boundaries of U.S. waters or within a U.S. port. As such, the precise nature of *Abrogar's* ‘offense of conviction’ under the Guidelines is most accurately described as ‘failure to maintain an accurate oil record book while in the navigable waters of the United States’.”

⁶⁹⁸ *US v. Abrogar*, 459 F. 3d 430 - Court of Appeals, 3rd Circuit 2006: “Indeed, we believe that the reading of the relevant provisions urged by the Government is so broad as to contravene the very meaning of those provisions. As discussed above, the United States has no jurisdiction to prosecute a foreign vessel or its personnel for ‘failure to maintain an accurate oil record book’ outside of U.S. waters. Furthermore, no provision outside of the APPS or its accompanying regulations indicates that ‘failure to maintain an accurate oil record book’ by a foreign ship outside U.S. waters is a crime. Stated differently, the terms of the Act and its regulations *exclude* from criminal liability the ‘failure to maintain an accurate oil record book’ by foreign vessels outside U.S. waters.”

⁶⁹⁹ *US v. Jho*,

⁷⁰⁰ *US v. Jho*, “We refuse to conclude that by imposing limitations on the APPS's application to foreign-flagged vessels Congress intended so obviously to frustrate the government's ability to enforce MARPOL's requirements. Instead, we read the requirement that an oil record book be ‘maintained’ as imposing a duty upon a foreign-flagged vessel to ensure that its oil record book is accurate (or at least not knowingly inaccurate) upon entering the ports of navigable waters of the United States.”

pollution itself, or even the Oil Record Book violation occurring at that time, but the misrepresentation in port”.⁷⁰¹ The Appeals Court in *Jho* engaged in an international law discussion after explaining the port-based nature of the conduct in the offence. It noted that although “a state's exercise of jurisdiction over foreign-flagged ships in its ports is permissive, and that a port state may, based on comity concerns, decide not to exercise its jurisdiction”, the US did indeed decide, in this case, to exercise its criminal jurisdiction.⁷⁰² It also recalled that in *Lauritzen v. Larsen* it was already recognized that “jurisdiction may be exercised concurrently by a flag state and a territorial state”.⁷⁰³ This case also highlighted how neither the UNCLOS nor MARPOL supersedes the jurisdiction of the US regarding extraterritorial pollution events.⁷⁰⁴

§ 216. It is important to look more carefully at the reasoning of the court here. First, the court noted that “UNCLOS's labelling of coastal states and port states is not static” and as such the power to act as a port state depended “upon a foreign-flagged vessel's proximity to a state, and whether that vessel has voluntarily entered the state's port”.⁷⁰⁵ Then the court declared that the “UNCLOS actually broadens the traditional authority given to a port state” and that nothing in

⁷⁰¹ 498 F.Supp.2d at 487 “The Royal Caribbean court reached a similar conclusion for a criminal charge brought under 18 U.S.C. § 1001: holding that presentation of an inaccurate oil record book in a U.S. port establishes a domestic violation of the False Statement Act. See *Royal Caribbean*, 11 F.Supp.2d at 1371. The district courts in *Ionia Management* and *Petraia Maritime* both relied on the *Royal Caribbean* case in reaching their holdings under § 1908. In *Ionia Management*, the court considered a charge brought under § 1908 based on the defendant's actions during a U.S. Coast Guard inspection. 498 F.Supp.2d at 480 (“Count two charges that defendant ... knowingly failed and caused the failure to maintain an Oil Record Book ... during a U.S. Coast Guard inspection.”). While the facts underlying the charge in *Petraia Maritime* are unclear, the court's heavy reliance on *Royal Caribbean* suggests that the court only considered the ‘presentation’ of a false or inaccurate record book. See *Petraia Maritime*, 483 F.Supp.2d at 39 (“The case at hand presents no distinguishing facts or circumstances [from *Royal Caribbean*].”).”

⁷⁰² *US v. Jho*, 534 F. 3d 398, quoting *Wildenhus*

⁷⁰³ *Lauritzen v. Larsen*

⁷⁰⁴ (*Lindin & Warde*, 2008)

⁷⁰⁵ *US v. Jho*, 534 F. 3d 398 - Court of Appeals, 5th Circuit 2008: “UNCLOS's labeling of coastal states and port states is not static. The categorization depends upon a foreign-flagged vessel's proximity to a state, and whether that vessel has voluntarily entered the state's port. For example, while the *M/T PACIFIC RUBY* was in the coastal zones of the United States, the United States operated as a coastal state under UNCLOS. During the times that the *M/T PACIFIC RUBY* was voluntarily in a U.S. port, the United States was authorized to act as a port state under UNCLOS.”

the treaty prevents a state from enforcing ORB offences.⁷⁰⁶ This broadening of traditional authority is considered especially in comparison with coastal state powers,⁷⁰⁷ and this is so even concerning extraterritorial conduct.⁷⁰⁸ All in all, precisely because the UNCLOS does not limit the powers of the port state but actually expands them, something that was even recognized by the US Senate,⁷⁰⁹ the court rejected the idea that prosecution of the ORB offences at port was precluded because neither the UNCLOS nor the law of the flag doctrine “encroaches on the well-settled rule that a sovereign may exercise jurisdiction to prosecute violations of its criminal laws committed in its ports”.⁷¹⁰ The court thus looked at the territorial conduct of the ship only to confirm that there was no violation of international law principles. § 217. This reasoning was confirmed in the Appeals Court case of *US v. Ionia Management* (2009), where the court looked at discharge on the high seas carried out by the crew of the oil tanker *Kriton*.⁷¹¹ Here, one of the reasons for the appeal was that the district court had erred by “considering extraterritorial information”.⁷¹² The court confirmed *US v. Jho* in that the requirement to ‘maintain’ an ORB “impos[es] a duty upon a foreign-flagged vessel to ensure

⁷⁰⁶ *US v. Jho*, 534 F. 3d 398 - Court of Appeals, 5th Circuit 2008: “Neither these provisions nor any other provisions of the UNCLOS enforcement scheme suggest that the limitations imposed by articles 216 and 230 apply to the in-port, oil record book offenses charged in this case.”

⁷⁰⁷ *US v. Jho*, 534 F. 3d 398 - Court of Appeals, 5th Circuit 2008: “While article 27 speaks specifically to coastal states, this proximity principle is consistent with the greater power given to port states as compared to coastal states regarding enforcement of marine pollution laws under Part XII of UNCLOS”.

⁷⁰⁸ *US v. Jho*, 534 F. 3d 398 - Court of Appeals, 5th Circuit 2008: “The enforcement scheme created by UNCLOS provides port states the power to pursue violations beyond those that occur in its ports. UNCLOS allows port states to pursue violations of marine pollution laws that occur within the port state’s territorial sea or exclusive economic zone”.

⁷⁰⁹ *US v. Jho*, 534 F. 3d 398 - Court of Appeals, 5th Circuit 2008: N. 11 “In urging ratification of UNCLOS, the Senate Committee on Foreign Relations submitted an Executive Report to the Senate. S. Exec. Rep. No. 108-10 (2004). In the report, the Committee stated the following in explaining its interpretation of UNCLOS’s enforcement scheme: The United States understands that sections 6 and 7 of Part XII [*i.e.*, UNCLOS’s enforcement sections] do not limit the authority of a State to impose penalties, monetary or nonmonetary, for ... any violation of national laws and regulations ... [concerning] the prevention, reduction and control of pollution of the maritime environment that occurs *while a foreign vessel is in any of its ports, rivers, harbors, or offshore terminals.*”

⁷¹⁰ *US v. Jho*, 534 F. 3d 398 - Court of Appeals, 5th Circuit 2008

⁷¹¹ *US v. Ionia Management SA*, 555 F. 3d 303 - Court of Appeals, 2nd Circuit 2009.

⁷¹² *USA, US v. Ionia Management SA*, 555 F.3d 303 (2d Cir. 2009)

that its oil record book is accurate (or at least not knowingly inaccurate) upon entering the ports of navigable waters of the United States”.⁷¹³

§ 218. Another case concerns the banning of a ship from US ports, namely the *Wilmina* case.⁷¹⁴

A case of banning occurred in the US for the first time following an alleged MARPOL violation in May 2010.⁷¹⁵ The appeal against this decision was decided in May 2010, with little bearing on the ban itself.⁷¹⁶ Following the litigation, in March 2013 the Appeals Court dealt with a discussion on whether the USCG could depart from its previous policy.⁷¹⁷ It eventually found that “the three year ban was, in effect, a penalty and nothing more, and the PWSA did not grant the agency the power to craft new sanctions for environmental violations”.⁷¹⁸ In other words, the Appeals Court found that although the USCG had statutory authority to revoke a ship's certificate, it did not have authority to ban the ship from US waters for three years. In 2014 the Appeals Court discussed the reasonableness of that change of policy.⁷¹⁹ There was never an issue with the limits posed by international law.

§ 219. Situations such as these are likely to be repeated. In 2016, another case with a similar factual background emerged.⁷²⁰ The international legal grounds for this kind of jurisdictional

⁷¹³ USA, *US v. Ionia Management SA*, 555 F. 3d 303 - Court of Appeals, 2nd Circuit 2009.

⁷¹⁴ (Coast Guard News, 2010)

⁷¹⁵ USA, *Wilmina Shipping AS v. US DEPT. OF HOMELAND SEC.*, 934 F. Supp. 2d 1 (D.C. 2013)

⁷¹⁶ USA, *Wilmina Shipping AS v. US*, 824 F. Supp. 2d 749 (S.D. Tex. 2010).

⁷¹⁷ USA, *Wilmina Shipping AS v. US DEPT. OF HOMELAND SEC.*, 934 F. Supp. 2d 1 (D.C. 2013) “This case concerns the scope of the U.S. Coast Guard's authority to ban a foreign ship from U.S. waters when it finds that the ship has violated provisions of federal environmental laws and international environmental treaties.”

⁷¹⁸ USA, *Wilmina Shipping AS v. US DEPT. OF HOMELAND SEC.*, 934 F. Supp. 2d 1 (D.C. 2013) “If a ship is operating in a manner detrimental to the marine environment and poses a risk to that environment and public safety, the government has a strong interest in immediately addressing this problem. Indeed, the statute requires that it must”

⁷¹⁹ USA, *Wilmina Shipping AS v. US DEPT. OF HOMELAND SEC.*, 75 F. Supp. 3d 163 (D.C. 2014): “Thus, the order against the *Wilmina* is not arbitrary and capricious merely because the agency has not issued one like it before. The question is whether the order is permissible under the statute, whether there are good reasons for it, and whether the agency reasonably finds the new approach to be superior.”

⁷²⁰ *US v. MST MINERALIEN SCHIFFFAHRT SPEDITION UND TRANSPORT GmbH*, Criminal No. 16-134 (JNE/LIB) (D. Minn. Aug. 12, 2016). (U.S. Attorney's Office, 2016) “United States Attorney Andrew M. Luger today announced an indictment charging MST MINERALIEN SCHIFFFAHRT SPEDITION UND TRANSPORT GMBH (‘MST’), a German company and operator of the M/V *Cornelia*, with violating the Act to Prevent Pollution from Ships (APPS) by failing to maintain an accurate ship record about the disposal of oil-contaminated waste.

assertion need to be discussed but their legality has not been questioned by the flag states, leading to the impression that they accept the framing of the offence as legitimate despite the unilateral component involved.

3.3.3. *The EU directive(s) on port state control powers*

§ 220. The emergence of ‘ports of convenience’, so called due to their lenient enforcement capabilities, has led the member states of the European Union to collectively adopt their own approach to port state control.⁷²¹ This section looks at the norms adopted by these states, an example of collective enforcement unilateralism, as through these directives new international rules were almost automatically incorporated into EU law.⁷²²

§ 221. The European Community (EC) member states adopted, in 1995, a directive which had the practical effect of making the Paris Memorandum of Understanding system binding on all EC member states.⁷²³ This directive imposed a 25 per cent inspection commitment (“shall carry out...”) which had to be complied with as an international obligation.⁷²⁴ This directive also introduced regional bans from ports, a practice which was by then well established and increasingly resorted to in the practice of most member states as a result of the Paris

The defendant is also charged with presenting falsified records to the U.S. Coast Guard (...)” (U.S. Attorney’s Office, 2016) “According to the Information to which Doorae pled guilty, the operation of a marine vessel, such as the B. Sky, an oil tanker ship flagged out of Vanuatu and operated by Doorae, generates large quantities of waste oil and oil-contaminated waste water. International and U.S. law requires that these vessels use pollution prevention equipment to preclude the discharge of these materials (...)” (U.S. Attorney’s Office, 2016) “Information produced to the court established that from between July 8, 2016 through July 14, 2016, during a Port State Control examination conducted by the United States Coast Guard, employees of Doorae Shipping presented the B. Pacific’s Oil Record Book to representatives of the United States Coast Guard knowing that it failed to document or acknowledge that approximately 5,400 gallons of oil contaminated bilge water had been placed into and stored in an unapproved void space neither designated nor appropriate for the storage of oil and other ship generated liquids (...)”

⁷²¹ For EU member states, the following Directives make usage of such MOU agreed powers mandatory: 95/21/CE ; 96/40/CE ; 98/25/CE ; 98/42/CE ; 1999/97/CE ; 2001/106/CE ; 2002/84/CE ; 2009/16/CE. According to this last Directive, “The refusal of access should be proportionate and could result in a permanent refusal of access, if the operator of the ship persistently fails to take corrective action in spite of several refusals of access and detentions in ports and anchorages within the Community.”

⁷²² (Ringbom, 2008, p. 240)

⁷²³ EU, Directive 95/21/EC

⁷²⁴ EU, Directive 95/21, Article 5(1).

Memorandum of Understanding.⁷²⁵ That directive, having been amended several times, was eventually replaced in 2009, mentioning the experience gained by member states from the Paris Memorandum of Understanding.⁷²⁶ The necessity for an international legal entitlement for states is clearly stated.⁷²⁷ When EU member states adopted Directive 2009/16, the refusal of access measure was kept.⁷²⁸ It should be noted that this directive also led to a harmonised approach; the enforcement stopped being exclusively a function of the international instrument to which the relevant member state had signed up. Not only were the relevant applicable ‘Conventions’ explicitly mentioned in the directive (such as the MARPOL, STCW, and SOLAS etc.), but it was also laid down that the port state must, when inspecting a ship whose flag state is not a party to those treaties, ensure that “the treatment given to such ship and its crew is no more favourable than that given to a ship flying the flag of a State which is a party”.⁷²⁹ Under this directive, multiple bans can be imposed: the ban due to multiple detentions (Article 16); the ban for jumped detention (Article 21.4); and the ban for not calling into the indicated repair yard (Article 21.4). This applies to all ship types. The directive also reformed the inspection scheme: all ships calling on EU ports must be inspected, even if they only rarely visit the EU. A risk profile is established for each ship, based on its type, age, flag, company history and detention history. Depending on the risk profile, ships may be inspected as often as every six months, or as infrequently as every three years. Substandard ships are subject to a mandatory minimum ban period and repeat offenders may be permanently banned. Finally, this directive also introduced the New Inspection Regime in the EU and established a blacklist of companies operating substandard ships.

§ 222. A complementary piece of EU legislation that also requires a mention in this section is Directive 2005/35 on ship-source pollution and on the introduction of penalties for

⁷²⁵ (Salvarani, 1996, p. 230)

⁷²⁶ EU, Directive 2009/16/EC of 23 April 2009.

⁷²⁷ EU, Directive 2009/16/EC, Article 4 (Inspection Powers)

⁷²⁸ EU, Directive 2009/16/EC, Art. 16.

⁷²⁹ EU, Directive 2009/16/EC, Art. 3(3).

infringements.⁷³⁰ As well as introducing a standard stricter than MARRPOL, by criminalizing accidental pollution on the territorial sea as serious negligence, this document also addresses the enforcement measures with respect to ships within a port of member states.⁷³¹ It would be difficult to argue the existence of any sort of unilateral component as there is explicit reference to IMO guidelines.⁷³² Nonetheless, and because such guidelines are not binding, the decision to enforce international pollution standards in a way that does not contradict but rather confirms such guidelines could still be described as unilateral.

3.3.4. *The Taiwanese port state control system*

§ 223. Taiwan, or the Republic of China (ROC), has been selected as an example because it provides a rare case of a non-IMO member which acts both as a flag state and as a port state despite not being party to a memorandum of understanding. This thesis does not discuss whether the territory of the ROC is part of the People's Republic of China (PRC), but the fact is that the ROC has its own port state control system in place.⁷³³ This provides an interesting case where unilateral enforcement of international rules and standards has been taking place through port state control but outside any MoU as well. In practice, the list adopted by the Tokyo Memorandum of Understanding would be applied in the ROC's ports as "inspection procedures shall adhere to instructions provided in Chapter I, Section 3 of the Tokyo MOU".⁷³⁴ The ROC began implementing its port state control system from the beginning of 2003 with the assistance of the Canadian Trade Office in Taipei.⁷³⁵ The literature has indicated that the legal basis for the enforcement of the "applicable conventions" is ROC's domestic laws, see

⁷³⁰ ECJ, Case C-308/06 Intertanko and Others

⁷³¹ (Tuerk, 2012, pp. 165-166)

⁷³² EU, Directive 2005/35, Article 6

⁷³³ (Liou, et al., 2011, p. 36)

⁷³⁴ (ROC Ministry of Transportation and Communications, 2008)

⁷³⁵ (Chiu, et al., 2008, p. 208)

The unilateral actions of port states over ship-source pollution especially “The Commercial Port Law”.⁷³⁶ Some literature has pointed to other domestic instruments that provide for the enforcement of MARPOL VI emissions standards.⁷³⁷ The website of the ROC’s port state control system shows that there has been, at least between 2003 and 2011, a number of inspections, detected deficiencies and consequent detentions; but this website does not have information as to whether any of the anti-pollution instruments have actually been enforced in those controls.⁷³⁸

3.4. The unilateral port state prescriptive actions

§ 224. States may also resort to port powers when they lay down new or more stringent rules and standards than the ones set at the multilateral level. Practice shows that port states are not only enforcing international standards in the way set out by treaties, but also that they take legislative initiatives that regulate ships’ conduct that is either not regulated in any way or that is argued to be insufficiently regulated by the treaties. These legislative initiatives constitute what this study calls exercises of ‘unilateral prescriptive port state jurisdiction’. The existence of a prescriptive jurisdiction as part of the capacity to act as a port state under international law is not consensual, as many still consider port state jurisdiction to be a mere enforcement mechanism for international standards. Nonetheless, this study proposes a more expansive view of this capacity, at least regarding the regulation of ship-source pollution. In this section, some cases are presented where states have unilaterally prescribed rules and standards to be enforced with their port powers. It is submitted that unilateral regulatory developments illustrate the international norm-setting potential of unilateral jurisdiction.

3.4.1. *The phasing-in of double hull tankers*

§ 225. The construction of tankers is of special concern as accidents may lead to oil spills which are a serious environmental nuisance. The construction of ships used to consist of only one hull but, in view of this special concern, engineers envisaged that a second hull, isolating the tankers from the main hull, would provide an additional layer of security against eventual collisions.

⁷³⁶ (Chiu, et al., 2008, p. 208)

⁷³⁷ (Lin & Lin, 2006, pp. 222-223)

⁷³⁸ (ROC Ministry of Transportation and Communications, 2011)

Nevertheless, this technological development was not made mandatory, as tankers with a single hull had been an investment of the industry and it was intended that they should remain in use for as long as they were seaworthy. The solution adopted by certain regulators has been a phasing-in, i.e., a timeframe within which that requirement would be mandatory at port. Indeed, some port states found that it was an urgent need to prevent the risks caused by single-hulled ships to coastal waters and, arguably, to discourage their passage without contravening the rights of innocent passage and the rule that no coastal state is to regulate CDEM unilaterally. Port state jurisdiction was the solution found to accommodate change without breaking that rule. The USA took the lead, followed by the member states of the EU collectively but, in the case of Spain, also individually. In the cases that will be analysed, the speeding up of the applicable timeframe was taken outside the existing multilateral framework and the IMO was merely responsive, first creating a timeframe to fit with what the USA was doing, and then adapting its own norms after the pressure caused by the early implementation of that timeframe by EC member states.

3.4.1.1. *The USA's approach: standard creation*

§ 226. After the *Exxon Valdez* accident, the USA adopted, in 1990, the Oil Pollution Act (OPA 90). This Act imposed double hull requirements on both new and existing oil tankers in waters out to the 200-mile economic zone limit.⁷³⁹ This norm was supposed to be read in conjunction with §3703 of the USC stating that more stringent regulations than those which are internationally applicable may be prescribed.⁷⁴⁰ It also clarifies that regulations prescribed must include requirements about hulls.⁷⁴¹ OPA 90 required that all tankers constructed under contracts awarded after 1990 must be fitted with double hulls and that all existing single hull tankers engaged in the marine transport of oil and petroleum products must either be rebuilt with double hulls or be retired between the years 1995 and 2015, depending on the size and age of the tanker. The port state dimension is not explicitly declared but is self-evident, for

⁷³⁹ USA, Oil Pollution Act of 1990, SEC. 4115. Establishment Of Double Hull Requirement For Tank Vessels.

⁷⁴⁰ USA, 46 U.S. Code § 3703.

⁷⁴¹ USA, 46 U.S. Code § 3703

only a control at port can verify whether a ship complies with this construction standard. Some literature described this as a case of residual jurisdiction, arguing that this was confirmed by the absence of international protest.⁷⁴² Some literature also concluded that despite being unilateral, this did not constitute an abuse of rights.⁷⁴³ In regard to the subsequent rejection of MARPOL amendments by the USA, some literature has already commented upon the meaning of this opt-out under MARPOL.⁷⁴⁴

§ 227. Faced with this measure, the IMO established double hull standards in 1992. It became a requirement that all oil tankers with a DWT of 600 tonnes or more, delivered from July 1996, were to be constructed with a double hull or an equivalent design. For single hull tankers with a deadweight tonnage of 20,000 tonnes or more, delivered before 6 July 1996, MARPOL required that they were to comply with the double-hull standards at the latest by the time they were 25 or 30 years old, depending on whether they have segregated ballast tanks. The passing of the OPA 90 by the USA Congress, and subsequent modifications of international maritime regulations, resulted in a far-reaching change in the design of tank vessels. Double-hull rather than single-hull tankers are now the industry standard, and nearly all ships in the world maritime oil transportation fleet are already expected to have double hulls by about 2020.⁷⁴⁵ The standard created in the USA prompted further regulation both at the IMO and in other jurisdictions, particularly in Europe.

3.4.1.2. *The European approach: accelerated implementation*

§ 228. Faced with incidents with oil tankers that caused pollution off the coast of its member states, the European Commission presented proposals to modify the standards in force relating to tankers and ships transporting dangerous or polluting material.⁷⁴⁶ In a communication, the phrase “immediate action” was used to refer to unilateral prescriptions which relied on port

⁷⁴² (Molenaar, 1998, p. 115)

⁷⁴³ (Molenaar, 1998, p. 117)

⁷⁴⁴ (Molenaar, 1998, p. 115)

⁷⁴⁵ (National Research Counsel, 1998)

⁷⁴⁶ EU, 2000/C 212 E/08

state powers.⁷⁴⁷ The first proposal amended Directive 95/21/EC to control the entry of ships into EU ports.⁷⁴⁸ Ships older than 15 years that have been detained more than twice in the previous two years are added to a "blacklist" and denied entry to any EU port. This move was depicted in the literature as an 'environmentalist card' aimed at correcting substandard shipping.⁷⁴⁹

3.4.1.2.1. EC Regulation 2978/94 and EC Regulation 417/2002

§ 229. In pursuance of the 1992 amendments to the MARPOL treaty, the EC adopted Regulation 2978/94 on the implementation of IMO Resolution A.747(18).⁷⁵⁰ At this time there was arguably still no unilateral claim of any sort. The EC member states were instead arguing that "there should be unified implementation in the Community of internationally agreed rules concerning the charging of levies on oil tankers by port and harbour authorities and pilotage authorities".⁷⁵¹ One of the norms set out in this Regulation regarded fees levied at port.⁷⁵² Here the port states were claiming a right to impose a fee upon an IMO-designed CDEM requirement. It is arguable that there is some level of unilateralism in this action since the technical requirement came directly from a multilateral instrument.

§ 230. Following the *Erika* incident in 1999, the European Commission decided to exercise some pressure over the IMO to push for a more stringent timeframe.⁷⁵³ In 2000, a first proposal was presented that did not, at that time, establish any new criteria or standards in relation to oil tankers' technical construction.⁷⁵⁴ The EU was here admittedly taking inspiration from the

⁷⁴⁷ EU, COM(2000) 142 final

⁷⁴⁸ Subsection 3.3.3, The EU directive(s) on port state control powers.

⁷⁴⁹ (Blanco-Bazán, 2004, p. 282)

⁷⁵⁰ EU, Regulation 2978/94

⁷⁵¹ EU, Regulation 2978/94, preamble.

⁷⁵² EU, Regulation 2978/94, Article 5.

⁷⁵³ (Tan, 2005, p. 147)

⁷⁵⁴ EU, COM(2000) 142 final 2000/0067(COD)

criteria of the OPA 90, confirming the international norm-setting quality of the USA's unilateral exercise of jurisdiction over the phasing-in timeframe.⁷⁵⁵ In parallel to this discussion, the member states agreed that the final adoption of an EU Regulation should await the conclusion of discussions at the IMO.⁷⁵⁶ The aim of the Commission was to accelerate the dates of the IMO timeframe to fit those adopted by the USA.⁷⁵⁷ In the end, this pressure was successful: the IMO reviewed its timeframe and the EU adopted a Regulation which integrated the multilaterally agreed timeframe.⁷⁵⁸ However, apart from the effect of the threat of unilateral jurisdiction, there were also some innovations here. The difference between the revised MARPOL regulation 13G (on prevention of accidental pollution – measures for existing oil tankers) and Regulation 417/2002 was that Article 7 of the latter does not allow the continued operation of certain foreign oil tankers.⁷⁵⁹

§ 231. The port state power involved in this measure appears more clearly in Article 2 of the EU Regulation. There it is stated that the Regulation applies to oil tankers “entering into a port or offshore terminal under the jurisdiction of a Member State, irrespective of their flag”.⁷⁶⁰ Article 4 establishes a prohibition of entry into port of single hull tankers delivered before a certain date which corresponds to the approved IMO timeframe.⁷⁶¹ In the case of certain specified categories, a Condition Assessment Scheme would still allow single hull tankers to enter the port until a certain date.⁷⁶² But after that period, and in a challenge to MARPOL's timeframe, the entry into port would not be allowed.⁷⁶³ Nevertheless, according to this

⁷⁵⁵ EU, Council Doc. 11711/00 (Presse 347)

⁷⁵⁶ EU, Council Doc. 14004/00 (Presse 470)

⁷⁵⁷ (Ringbom, 2008, p. 267)

⁷⁵⁸ IMO, Resolution MEPC.111(50)

⁷⁵⁹ EU, Regulation 417/2002, Art. 7

⁷⁶⁰ EU, Regulation 417/2002, Article 2.

⁷⁶¹ EU, Regulation 417/2002, Article 4

⁷⁶² EU, Regulation 417/2002, Article 5(1)

⁷⁶³ EU, Regulation 417/2002, Article 7

Regulation, notification to the IMO must still be done under Article 211(3) of the UNCLOS.⁷⁶⁴ It is up to each individual state to inform the IMO of its decision to deny entry into port of oil tankers in pursuance of this Regulation.⁷⁶⁵

§ 232. It is the setting of this timeframe, and the reliance on the port state's right to impose conditions of access to port to enforce it, that constitute a case of unilateral jurisdiction. This has been considered unlawful by some commentators because it would allegedly violate "basic UNCLOS provisions on innocent passage and freedom of navigation".⁷⁶⁶ This EU Regulation, however, proved ineffective as the *Prestige* tanker sunk at the end of the same year (19 November 2002), leading to one EU member state's unilateral exercise of jurisdiction in similar terms.

3.4.1.2.2. Spain's Real Decreto-Ley 9/2002 and EC Regulation 1726/2003

§ 233. Following the *Prestige* incident off the coast of Spain in November 2002, the Spanish government decided, on 13 December of that year, to enact a law excluding all single hull tankers from entering Spanish ports.⁷⁶⁷ The legality of this unilateral action is arguable because the action consisted of a restriction based on a CDEM standard.⁷⁶⁸

§ 234. After this Spanish initiative, the EU institutions soon followed suit to create a collective approach, but which was still unilateral in relation to the existing multilateral framework. It is important to note that the incident occurred in the gap created by EC Regulation 417/2002, i.e., this tanker would have been banned from EU ports had the original proposal been adopted.⁷⁶⁹ This led the Council to invite the Commission "as a matter of urgency, to present a proposal concerning an accelerated phasing out of single hull tankers and incorporating the Condition Assessment Scheme in the general survey regime for tankers regardless of design from the age

⁷⁶⁴ EU, Regulation 417/2002, Article 9(1)

⁷⁶⁵ EU, Regulation 417/2002, Article 9(2)

⁷⁶⁶ (Blanco-Bazán, 2004, p. 283)

⁷⁶⁷ Spain, Real Decreto-Ley 9/2002, Artículo 1

⁷⁶⁸ *Supra* 2.3.2.3, The exceptional regime for 'CDEM' standards.

⁷⁶⁹ (Ringbom, 2008, p. 269)

of 15 years; the proposal must be approved no later than by 1 July 2003”.⁷⁷⁰ However, this time there was not such a manifest intention to wait for the outcome of international negotiations.⁷⁷¹

§ 235. This urge to accelerate the implementation of the IMO timeframe led to Regulation 1726/2003 which amended Regulation 417/2002 to accelerate even more the phasing out of single hull tankers. The timeframe ended up matching and in some respects even exceeding the 2000 *Erika* proposal.⁷⁷² Additionally, the requirement to make older tankers undergo a condition assessment had been extended to include certain specified categories.⁷⁷³ The Regulation also introduced a new requirement: to “ban the transport to or from ports of the Member States of heavy grades of oil in single-hull oil tankers”, and this would mean that only double hull tankers would be allowed to enter the port in the future.⁷⁷⁴

§ 236. The EU was hence ready to challenge the multilateral framework, showing that its leaders were ready to challenge MARPOL when deciding on access to port for oil tankers.⁷⁷⁵ The reaction at the IMO was not positive, for the EU unilateral action occurred without waiting for the outcome of the amendment process of the MARPOL.⁷⁷⁶ In the end, however, the period during which the most manifest inconsistencies showed up between the EU rules and MARPOL lasted only 18 months. The IMO approved revisions to the treaty that “correspond to, or at least do not prohibit, the kind of rules which had already been adopted by the EU”.⁷⁷⁷

§ 237. This did not go uncontested. One of the main arguments against this case of unilateral jurisdiction was the “uncertainty” it created.⁷⁷⁸ Intertanko brought a lawsuit against the EU at

⁷⁷⁰ EU, Council Doc. 15121/02 (Presse 380).

⁷⁷¹ EU, Council Doc. 7685/03 (Presse 90).

⁷⁷² EU, Regulation 1726/2003, Article 1(4)

⁷⁷³ EU, Regulation 1726/2003, Article 1(5)

⁷⁷⁴ EU, Regulation 1726/2003, Article 1(1).

⁷⁷⁵ (Ringbom, 2008, p. 270)

⁷⁷⁶ (Frank, 2005, p. 22)

⁷⁷⁷ (Ringbom, 2008, p. 271)

⁷⁷⁸ ECJ, Case C-308/06. (Roach & Smith, 2012, p. 530)

the ECJ, but this court's decision did not contribute much to the discussion of port state powers.⁷⁷⁹

3.4.2. *The sulphur content of marine fuels*

§ 238. Certain compounds of fuels are especially polluting and are used away from the coast to cut costs. To comply with the coastal requirements and still have the possibility to enjoy freedom on the high seas, ships can carry different types of fuels and switch between them during their journey. Port states have sought to regulate the usage of marine fuels by ships, namely to regulate the SO_x and NO_x contents of such fuels. The legal nature of marine fuels is disputed. Because of their 'static' nature (i.e., the fact that the ship could not, in principle, change the fuel it carries whilst en route to a port) marine fuels could be considered as 'equipment' of the ship, i.e. part of the CDEM category.⁷⁸⁰ This understanding would apply even if a ship can carry multiple fuels and switch them throughout the journey to comply with the various regulatory requirements eventually found. Nonetheless, this study submits that there is a distinction between fuel in use and oil carried as bunker fuel. In the former case, it is a necessary component to the functioning of the ship and hence would fit the concept of 'equipment'; in the latter, it is a commodity being carried by the ship that is not essential to its operation. This distinction is of relevance when discussing the compatibility of unilateral state practice and the UNCLOS rule on CDEM standards.

3.4.2.1. *The EU Sulphur Content of Marine Fuels Directive*

§ 239. The requirements concerning the sulphur content of gas oils were the object of Directive 1999/32/EC following the incorporation into EU law of MARPOL Annex VI rules. The most significant revision of the Directive arose from the Commission's strategy to reduce atmospheric emissions from seagoing ships. The pressure for stronger measures, which resulted in that amendment, started in 2002.⁷⁸¹ The result of that pressure was Directive

⁷⁷⁹ (Ringbom, 2011, p. 363)

⁷⁸⁰ (CE Delft; Germanischer Lloyd; MARINTEK; Det Norske Veritas, 2006, p. 71)

⁷⁸¹ (UK Parliament, 2012)

2005/33/EC, which is here presented as a case of unilateral port state jurisdiction. The literature commenting on Directive 2005/33 has often identified the disparity between the EU requirements and those of MARPOL Annex VI.⁷⁸² Some of those EU requirements were without actual counterparts either in MARPOL or anywhere else.⁷⁸³

§ 240. Directive 2005/33/EC was devised as an instrument to exert pressure over the IMO.⁷⁸⁴ It introduced into EU law the IMO concept of Sulphur Emissions Control Areas (SECAs) and the associated stricter fuel standards.⁷⁸⁵ The maximum sulphur content of marine fuels was there limited to a maximum of 1.5 per cent for ships operating in the Baltic Sea as from 2006 and in the North Sea and the English Channel as from 2007. In addition, and in recognition of the need to further improve air quality for the protection of human health beyond the SECAs, some requirements that went beyond the IMO rules were introduced. This introduction had an impact on later IMO rules, for the IMO timeframes that followed have adapted to those standards. Two of these requirements rely on the controlling powers of the port state under international law: the obligation for ships at berth or anchorage in EU ports to use fuels containing a maximum of 0.1 per cent sulphur, and the obligation for passenger ships on regular service to EU ports to use fuels containing a maximum sulphur content of 1.5 per cent.⁷⁸⁶ In this way, the EU unilaterally decided that the reductions in emissions of sulphur dioxide resulting from the combustion of certain petroleum-derived liquid fuels should be achieved by imposing limits on the sulphur content of such fuels as a condition for their use within member states' territory, territorial seas and exclusive economic zones or pollution control zones.⁷⁸⁷ This illustrates that there is an intent to regulate emissions in a MARPOL's SECA and that the EU will look at the part of the conduct that occurred outside the waters of its member states despite not having, at that moment in time, a clear multilateral entitlement to do so. Despite

⁷⁸² (Ringbom, 2008, p. 265)''

⁷⁸³ (Ringbom, 2008, pp. 265-266).

⁷⁸⁴ (Linné, 2017, p. 162)

⁷⁸⁵ EU, Directive 2005/33/EC

⁷⁸⁶ (Ringbom, 2011, p. 362)

⁷⁸⁷ EU, Directive 2005/33, Article 4a(1)

this lack of international legal endorsement, the EU called upon its member states to use their powers to enforce that norm at port.⁷⁸⁸ The control of compliance occurs at port, where information about the fuel used is given to the port authority.⁷⁸⁹

§ 241. A case from the Italian courts on this matter has been brought to the ECJ. The appeal against the order was based on the fact that “there is a discrepancy between Directive 1999/32 and Annex VI as regards the maximum amount of sulphur contained in marine fuels”.⁷⁹⁰ Although the decision does not respond to the international clash between EU law and MARPOL, it does say that “although the European Union is not bound by an international agreement, the fact that all its Member States are contracting parties to it is liable to have consequences for the interpretation of European Union law, in particular the provisions of secondary law which fall within the field of application of such an agreement”.⁷⁹¹ This has been interpreted in the literature as a contribution of EU law to the law of the sea regime.⁷⁹²

§ 242. In 2012, Directive 1999/32 was amended once again. This time the amendment brought four major developments. It (1) aligned the Directive with the latest IMO provisions on the sulphur content of marine fuels; (2) adapted the Directive to the IMO provisions on alternative compliance methods; (3) maintained the link between the stricter fuel standards in SECAs and the fuel requirements for passenger ships on regular service; and (4) improved implementation of the Directive by harmonising and strengthening provisions for monitoring of compliance and reporting.⁷⁹³ The latest development by the EU regarding the sulphur content of certain liquid fuels has been Directive 2016/802.⁷⁹⁴ This is simply a codification of Directive 1999/32EC and all its amendments.⁷⁹⁵ EU and MARPOL standards on SO_x emissions are now

⁷⁸⁸ EU, Directive 2005/33, Article 4b(4)

⁷⁸⁹ EU, Directive 2005/33, par. 12.

⁷⁹⁰ ECJ, C-537/11

⁷⁹¹ ECJ, C-537/11, par 45.

⁷⁹² (Paasivirta, 2017, p. 244)

⁷⁹³ EU, Directive 2012/33

⁷⁹⁴ EU, Directive 2016/802

⁷⁹⁵ (Ringbom, 2016, pp. 54-55)

The unilateral actions of port states over ship-source pollution aligned and the Commission laid down certain implementation rules which support the intensification of fuel inspections, especially as regards their sulphur content, in EU ports.⁷⁹⁶

3.4.2.2. *The California Ocean-Going Vessel Fuel Regulation*

§ 243. Although not applicable throughout the whole of the USA, there has been some unilateral action about the sulphur content of marine fuels taken by California. At the end of 2005, the California Air Resources Board (CARB) adopted some measures, arguing that they “will reduce the exposure of coastal and port community residents to harmful air pollutants”.⁷⁹⁷ Those measures establish limitations for emissions of diesel particulate matter, sulphur oxides, and nitrogen oxides from the use of auxiliary diesel engines and diesel-electric engines on ocean-going vessels. On 1 January 2007, these so-called ‘Marine Vessel Rules’, limiting emissions from the auxiliary diesel engines of ocean-going vessels within 24 miles of California's coast, began being enforced, namely through the inspecting of ships upon arrival at California ports.⁷⁹⁸ On 8 May 2008, the CARB suspended the enforcement of the specific rule that required ships to use low sulphur fuels in on-board auxiliary diesel engines. This was due to a decision of a US federal court, which ruled that such a measure was an “emissions standard” which was pre-empted by federal law.⁷⁹⁹

§ 244. The Marine Vessel Rules provide for different emissions limits from the ones imposed by the IMO.⁸⁰⁰ The California auxiliary engine programme required the use of 0.5 per cent sulphur fuel in the state's coastal waters and at port by 2007. The allowed sulphur level was lowered to 0.1 per cent by 2010. Since 1 January 2014, ships operating within 24 nautical miles

⁷⁹⁶ EU, Commission Implementing Decision 2015/253

⁷⁹⁷ (California Environmental Protection Agency, 2005) “[a]imed specifically at curbing emissions from port-based cargo-handling equipment and diesel engines used to produce electric power on ocean-going vessels”.

⁷⁹⁸ USA, California, Fuel Sulfur and Other Operational Requirements for Ocean-Going Vessels within California Waters and 24 Nautical Miles of the California Baseline. Title 13, California Code of Regulations (CCR) §2299.2 and title 17, CCR §93118.2.

⁷⁹⁹ Pacific Merchant Shipping Ass'n v. Goldstene.

⁸⁰⁰ “Except as provided in subsections (c), (g) and (h), no person subject to this section shall operate any auxiliary diesel engine, while the vessel is operating in any of the Regulated California Waters, which emits levels of diesel PM, NOx, or SOx in exceedance of the emission rates of those pollutants that would result had the engine used the following fuels: [specified fuels omitted]”

of California's coastline have therefore been required to use distillate fuel with a sulphur content not exceeding 0.10 per cent by mass. The IMO standard dropped to this level meanwhile, turning this unilateral prescription into the same internationally applicable standard. However, in April 2016, the CARB affirmed that, although the USA ratified the IMO standards, their application as such would not be likely to provide the same level of protection as the Ocean-Going Vessel Fuel Regulation. The sunset provision, whereby this Regulation would cease to be applied when equivalent requirements on emissions reductions would be enforced, was thus not implemented. This was due, among other reasons, to "the exemptions granted under International Maritime Organization Regulation 3 [of MARPOL Annex VI] which provides temporary exemptions from the fuel sulphur requirements".⁸⁰¹

§ 245. The port powers of the state are mentioned when the regulation declares that the rules "exempt, among others, vessels traversing the regulated waters but not entering or stopping at a port in California and vessels owned or operated by a local, state, federal or foreign government".⁸⁰² The legislation admittedly intends to go beyond MARPOL VI requirements and to push the IMO for further steps on this matter.⁸⁰³ The literature has confirmed that unilateralism in this case is, in itself, not a problem.⁸⁰⁴ Some have, however, claimed that the CARB rules violate the UNCLOS, arguably because "other nations presumably consider any law enforced by a US government a United States law",⁸⁰⁵ and also that they overlap with the APPS and MARPOL.⁸⁰⁶ In the same line of reasoning, these regulations have been said to "construct a jurisdictional framework that arguably exceeds even the powers of the Federal

⁸⁰¹ California Air Resources Board, Marine Notice 2016-1, *California Ocean-Going Vessel Fuel Regulation 1 to Remain in Effect Subject to Reevaluation in Two Years*.

⁸⁰² *Id.* §§ 2299.1(c)(1), 2299.1(c)(3):

⁸⁰³ (United States Senate, 2007) "The Marine Vessel Emissions Reduction Act goes beyond MARPOL Annex VI and puts the U.S. in the lead on establishing vessel emission reductions standards, sending a very important statement to the International Maritime Organization (IMO) that the U.S. is squarely on board with regard to managing the emissions affecting our ports and the region. It also would give the IMO more support as it works to bring all nations on board in strengthening the treaty, and it gives the U.S. EPA the backing it needs as our Nation's representative to IMO."

⁸⁰⁴ (Allen, 2012, p. 26)

⁸⁰⁵ (Murray, 2014, p. 16)

⁸⁰⁶ (Murray, 2014, p. 30)

Government to regulate air emissions from non-U.S.-flag ships”.⁸⁰⁷ However, it was not being contended that it was international law that prevented US unilateralism but rather specific national legal circumstances.⁸⁰⁸

3.4.2.3. *The PRC ECA low sulphur content fuel requirement*

§ 246. The People’s Republic of China has also acted with a view to setting a requirement on the sulphur content of marine fuels.⁸⁰⁹ This local regulation was not established in pursuance of any multilateral framework but was unilateral.⁸¹⁰ One place where this plan is implemented is the harbour of the Shenzhen Municipality.⁸¹¹ The plan is in line with the norms on ocean-going vessels contained in the Atmospheric Pollution Prevention and Control Law of the People’s Republic of China (2015 Revision).⁸¹² In 2016, the PRC set emission control areas around parts of its coast, namely in the Yangtze River Delta, the Pearl River Delta and the Bohai Bay,⁸¹³ this list was enlarged in 2017 to include the Zhejiang and Jiangsu coastal areas.⁸¹⁴ In 2015, the Government of Hong Kong (an Associate Member of the IMO) had already acted unilaterally.⁸¹⁵ The Hong Kong legislation required vessels when at berth to use fuel oil with a sulphur content not exceeding 0.5 per cent by weight or Liquefied Natural Gas (LNG) or any other fuel approved by the Director of Environmental Protection. Dates and times of arrival,

⁸⁰⁷ (Benner, 2006, p. 28)

⁸⁰⁸ (Murray, 2014, p. 5)

⁸⁰⁹ Ministry of Transportation of the PRC [中华人民共和国交通运输部], *Notification on the Implementation Plan on the Emissions Control Area of Pearl River Delta, Yangtze River Delta and Bohai Bay Area*

⁸¹⁰ (Gritsenko, 2017, p. 131)

⁸¹¹ The People’s Government of Shenzhen Municipality [深圳市人民政府], *Notification on the Action Plan (2016-2020) on the Construction of Green and Low-Carbon Harbor of Shenzhen Municipality* [《深圳市人民政府关于印发深圳市绿色低碳港口建设五年行动方案（2016-2020年）》]

⁸¹² Atmospheric Pollution Prevention and Control Law of the People’s Republic of China (2015 Revision), Article 63 and Article 64.

⁸¹³ (Huatai, 2016)

⁸¹⁴ (Huatai, 2017)

⁸¹⁵ L.N. 51 of 2015: Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulation.

switching to/and from compliant fuel, and departure are to be recorded in a vessel's log book, and the relevant records retained on board for a period of not less than three years.⁸¹⁶ The inspection would thus occur in port and the punishment of infringements would thus be an exercise of port state jurisdiction.

§ 247. Jurisdiction under Emission Control Areas is granted under a multilateral framework, but the unilateral measure by the PRC was set without any information being sent to the IMO as required by the existing MARPOL procedures of Annex VI, to which China is a party. Chinese authorities decided, in 2016, to implement a higher requirement on using low sulphur content fuel (not exceeding 0.5 per cent) in key ports within the Yangtze ECA including Shanghai, Ningbo-Zhoushan, Suzhou and Nantong. Recently, local authorities in Shenzhen made a similar decision and intend to adopt a higher requirement on using low sulphur content fuel (not exceeding 0.5 per cent) during ships' berthing at Shenzhen port. In the Pearl River Delta ECA, it is only at Shenzhen port that such a requirement will be implemented in advance whilst, at other key ports within that ECA, such requirement will be implemented in accordance with the original schedule of China Maritime Safety Administration.⁸¹⁷ This follows a decision to create an Implementation Plan for Emission Control Zones (ECZs) that lays out a roadmap to require ships calling at major mainland Chinese ports to switch to lower sulphur fuels.⁸¹⁸ In September 2017, the timeline for implementation was accelerated.⁸¹⁹

3.4.2.4. *Turkey's reduction of sulphur rate in some types of fuel oils*

§ 248. In Turkey, the Regulation on Reduction of Sulphur Rate in Some Types of Fuel Oils published and amended in 2009 was aimed at accelerating the application of a multilaterally set timeframe.⁸²⁰ Articles 6 and 7 of the regulation address limits of sulphur content in marine

⁸¹⁶ (West of England, 2015)

⁸¹⁷ (Huatai, 2016)

⁸¹⁸ (Finamore, 2015)

⁸¹⁹ (Gard, 2017)

⁸²⁰ *Regulation on Reduction of Sulphur Rate in Some Types of Fuel Oils*, which has entered into force by being published in 6 October 2009 dated and 27368 numbered Official Gazette. Put into effect by the Decree of the

fuels, while Article 10 sets the standards for sampling and testing/analysis of fuels on board ships.⁸²¹ It set the 0.1 per cent limit to be applicable to inland waterway ships and berthed ships. What is more, the regulation applied on the territorial seas and in the ECA.⁸²² The regulations apply to all vessels safely at berth or at anchor within the boundaries of any port. According to a 2011 Circular, “vessels coming to ports of our country [Turkey] cannot use marine diesel whose Sulphur content exceeds 0.1% by mass as at 01.01.2012”.⁸²³ As of 1 January 2012, Turkey has enforced new regulations covering the limits of the sulphur content of marine fuels used by vessels within its domestic territorial waters. The new Turkish rules applied not only to Turkish vessels but, more importantly, to all vessels in Turkish waters. This case shows how the EU’s unilateral jurisdiction was emulated by Turkey. Port state powers were, again, necessary to verify compliance.

§ 249. It is not the first time that Turkey has had to discuss whether its jurisdictional claims were unilateral or not.⁸²⁴ Turkey is still not a state party to the UNCLOS and, at the time of this case, Turkey was not a party to MARPOL Annex VI either. None of the sea areas around Turkey are declared Sulphur Emission Control Areas (SECAs) under the MARPOL Annex VI, nor were there any national Turkish regulations defining any sea area as a SECA. Turkey is also not a member state of the EU although it admits that the measures adopted were in

Council of Ministers dated 29 September 2009 and numbered 2009/15478. Amended on 31 December 2009 by 27449 numbered Official Gazette.

⁸²¹ Ships transiting SECAs “located in marine jurisdiction and pollution control areas of the Republic of Turkey” should use marine fuels with a maximum sulphur content of 1.5%.

⁸²² “vessels coming to ports of our country can not use marine diesel whose Sulphur content exceeds ,1% by mass as of 01.01.2012 (...) Likewise Passenger Vessels sailing in our country’s marine jurisdictions can not use marine fuels whose Sulphur content exceeds 1,5% by mass”

⁸²³ Circular No: 517/2011 of Istanbul & Marmara, Aegean, Mediterranean, Black Sea Regions Chamber of Shipping.

⁸²⁴ (Molenaar, 2000, pp. 38-43)

pursuance of its accession to the EU.⁸²⁵ The standards adopted by the EU on this matter served as a model.⁸²⁶

3.4.2.5. *Sweden's order of the Environmental Board of Helsingborg Municipality*

§ 250. A case from Sweden illustrates how unilateral jurisdiction can occur at the local level.⁸²⁷ In 2000, two ferry companies were ordered by the Environmental Board of Helsingborg Municipality to equip the engines of their ships with a Selective Catalytic Reduction (SCR) system if they were used within Helsingborg's harbour area. Briefly, an SCR converts NOx into harmless nitrogen and water vapour with the aid of a catalyst, and it is the subject of IMO regulation.⁸²⁸ The imposition of such a system is part of IMO NOx Tier III controls, which apply only to the specified ships while operating in ECAs established to limit NOx emissions; outside such areas the Tier II controls apply. That imposition was created long before the Baltic Marine Environment Protection Commission (HELCOM) had agreed to submit to the IMO a proposal for a Baltic Sea NOx ECA (Nitrogen Emission Control Area, or NECA) according to the IMO MARPOL Annex VI.⁸²⁹ Meanwhile the IMO had designated the North Sea and the Baltic Sea as a NECA. MARPOL Annex VI, which deals with air pollution from ships, had only entered into force in May 2005 and hence there was no general multilateral backing for this order. This unilateral action was taken to court, prompting a legal debate focused on the powers of the port state under the UNCLOS.⁸³⁰

⁸²⁵ Republic of Turkey, Prime Ministry, Undersecretariat of Maritime Affairs (07/09/2011)

⁸²⁶ *Supra* 3.4.2.1, The EU Sulphur Content of Marine Fuels Directive, on page 203.

⁸²⁷ (Ryngaert & Ringbom, 2016, p. 389)

⁸²⁸ MEPC. 198(62)

⁸²⁹ HELCOM 37-2016 "Draft roadmap for the Baltic Sea and the North Sea NECAs"

⁸³⁰ Sweden, Environmental Board of the Municipality of Helsingborg v HH-Ferries AB and Sundbusserne A/S, paragraph 95.

§ 251. The court based its understanding of international law on a legal opinion which concluded that more far-reaching requirements were compatible with UNCLOS.⁸³¹ Furthermore, the order also included conditional fines for non-compliance. Port state powers were involved because the control of the compliance with such standards was performed at port. More specifically, this was drafted as an entry condition which was concerned only with emissions happening in territorial waters and not beyond that space.⁸³² The port would thus be preventing the entry of a foreign ship based on a standard of its own making.

3.4.3. *The transfer of invasive aquatic species in ballast water*

§ 252. One other type of pollution caused by ships is the discharge of water which they carry for ballast; it is the living microorganisms which can be found therein which are the cause of such pollution. These microorganisms may be deleterious to foreign ecosystems and, for that reason, they are called “invasive aquatic species” (IAS). The risk posed by IAS in vessels’ ballast water is now regulated internationally by treaty.⁸³³ This treaty followed some unilateral actions taken in the past.

§ 253. In 1989 the “Voluntary Guidelines for the Control of Ballast Water Discharges from Ships Proceeding to the St. Lawrence River and Great Lakes” were put in place by Canada.⁸³⁴ These Guidelines required the ship’s master to file a Ballast Water Exchange Report on entering the St Lawrence. The Guidelines also provided for a designated alternative discharge zone where deep-water exchange was not possible for reasons of safety or the voyage route. The main concern was to ensure that the ballast water had high salinity – a fact that made it unlikely that species could survive in the freshwater of the Great Lakes.⁸³⁵ Considering that

⁸³¹ Environmental Board of the Municipality of Helsingborg v HH-Ferries AB and Sundbusserne A/S, .A legal opinion of Professor Jonas Ebbesson.”

⁸³² “Environmental Board of the Municipality of Helsingborg v HH-Ferries AB and Sundbusserne A/S, Appeal judgment, Case No M 8471-03, ILDC 634 (SE 2006), 24th May 2006, Svea Court of Appeal” para 98

⁸³³ *Supra* 2.3.3.5, Port states in the Ballast Water Management Convention.

⁸³⁴ IMO, MEPC 26/4.

⁸³⁵ (McConnell, 2002)

such control is performed as a condition of entry, or when already within the port, this can be seen as an example of the use of unilateral port state control power.

§ 254. The port of Vancouver was one of the ports which issued supplemental requirements. The Port Authority Harbour Master issued a standing order requiring vessels discharging ballast water into the port to complete a mid-ocean ballast exchange prior to arrival in Canadian waters. The Vancouver Port Authority Harbour Operations Manual states that exchanges are mandatory prior to the entry into the port.⁸³⁶ Inspection occurs in port to verify compliance with this requirement, namely by checking the relevant forms.⁸³⁷ There is no international treaty that gives jurisdiction to the port state to inspect these elements, apart from IMO non-binding guidelines. Another case of IMO ballast water management guidelines implementation is that of Brazil, where a first attempt was unsuccessful.⁸³⁸ Only a broad interpretation of the law would, in that case, have allowed for the consideration of ballast water.⁸³⁹ To clarify the scope of the jurisdiction of the port state in that regard, a new law from 2001 included reference to entry into the port.⁸⁴⁰ Peru provides another interesting case where measures have been taken.⁸⁴¹ As Peru is not part of the UNCLOS, references in its practice are made to the actual distance from the coast and not to the zone. In its 2006 amendment to a 1996 resolution, updated in 2010, Peru provided that all ships calling at Peruvian ports must renew their ballast

⁸³⁶ “All vessels destined to arrive at the Port of Vancouver in ballast condition, will be required on and from March 1, 1997 to carry out a Mid Ocean Ballast Water Exchange prior to arriving in Canadian Waters. The purpose of this exchange is to limit the possibility of transferring non indigenous species into Canadian waters”

⁸³⁷ “to see one of the following: 1) Log book entry (in English); 2) Abstract of log book entry 3) Company or other administration form; 4) Ballast Water Reporting form as per Appendix 1 giving details of the ballast water management procedure carried out”

⁸³⁸ “NORMAM-08 was the first national measure adopted in 2000 to obtain information on ballast water discharged in Brazilian ports. This legislation codifies the compulsory use of BWRF (Annex 03), which corresponds to Recommendation 8.1.3 of IMO Resolution A.868(20). Through the BWRF, the Brazilian Maritime Authority requested information on quality, amount, origin and places of discharge of ballast water in Brazil. However, as will be outlined in the following pages, it seems that at that time this first BWRF requirement did not receive proper consideration by the actors involved and did not work as an effective measure of control.”

⁸³⁹ (Cavalcante Oliveira, 2008, p. 122)

⁸⁴⁰ (Cavalcante Oliveira, 2008, pp. 122-123)

⁸⁴¹ Peru, Directorial Resolution No. 072-2006-DCG

The unilateral actions of port states over ship-source pollution water once “at least further than 12 nautical miles off the coast”.⁸⁴² This is pointed to as an implementation of IMO Resolution A.868(20).⁸⁴³

§ 255. Since then, there have been many special requirements with respect to the management of ballast water according to specific national standards, such as in the USA, which is not party to the BWM Convention.⁸⁴⁴ Yet despite those developments in the control of IAS in ballast, the control of vessel biofouling – i.e., concerning the IAS that are attached to the hull of the ship – remains largely voluntary. Lack of an international regulatory framework addressing the prevention of the transfer of IAS through biofouling has recently prompted several governments to act and develop unilateral regulations. The state of California and New Zealand have more recently announced the implementation of more stringent biofouling regulations within their jurisdictions.

3.4.3.1. *The California Biofouling Management Regulations*

§ 256. The state of California has enacted the Biofouling Management Regulations to Minimize the Transport of Nonindigenous Species from Vessels Arriving at Californian Ports.⁸⁴⁵ They contain norms which unilaterally have recourse to port state powers. One of the new obligations for ships is that a Marine Invasive Species Programme Annual Vessel Reporting Form must be filed at least 24 hours prior to a vessel’s first arrival at a Californian port.⁸⁴⁶ Another obligation is that ships must carry on board a Biofouling Management Plan,⁸⁴⁷

⁸⁴² Peru, Resolucion Directoral N° 072-2006-DCG, Articulo 1

⁸⁴³ Peru, Resolucion Directoral N° 072-2006-DCG, Articulo 12

⁸⁴⁴ USCG, (2017) *Guidelines for voluntary compliance with the international convention for the control and management of ships’ ballast water and sediments, 2004*, p.2

⁸⁴⁵ (State of California, 2017)

⁸⁴⁶ Biofouling Management Regulations to Minimize the Transport of Nonindigenous Species from Vessels Arriving at Californian Ports, Section 2298.5 “The master, owner, operator, agent or person in charge of a vessel carrying, or capable of carrying, ballast water that arrives at a California port shall submit the [form] to the Commission in written or electronic form at least twenty-four hours in advance of the first arrival of each calendar year at a California port of call.”

⁸⁴⁷ Biofouling Management Regulations to Minimize the Transport of Nonindigenous Species from Vessels Arriving at Californian Ports, Section 2298.3. “The master, owner, operator, or person in charge of a vessel

as well as a Biofouling Record Book,⁸⁴⁸ which contain information regarding a ship's conduct prior to the entry into the port. The information required is consistent with the requirements of the IMO Biofouling Guidelines.⁸⁴⁹ These measures apply to ships of 300 gross registered tons (GRT) or more that arrive at a Californian port and which carry, or are capable of carrying, ballast water.⁸⁵⁰ It should be noted that biofouling management is also regulated under USA federal law, although in less detail than the regulations of California.⁸⁵¹ Californian regulations include unique reporting requirements.

3.4.3.2. *The New Zealand Craft Risk Management Standard*

§ 257. One other example of unilateral jurisdiction comes from New Zealand.⁸⁵² In 1993, New Zealand unilaterally introduced mandatory controls on ballast water discharges.⁸⁵³ This occurred ahead of any multilaterally binding endeavour (such as the 1997 IMO A.868(20) Guidelines).⁸⁵⁴ Permission was required before ballast loaded “in another country” could be discharged to ensure that ballast has been exchanged in an area “free from coastal

carrying, or capable of carrying, ballast water that arrives at a California port shall maintain a Biofouling Management Plan to be retained onboard and prepared specifically for that vessel.”

⁸⁴⁸ Biofouling Management Regulations to Minimize the Transport of Nonindigenous Species from Vessels Arriving at Californian Ports, Section 2298.4. “The master, owner, operator, or person in charge of a vessel carrying, or capable of carrying, ballast water that arrives at a California port shall maintain a Biofouling Record Book to be retained onboard the vessel. The Biofouling Record Book must contain details of all inspections and biofouling management measures undertaken on the vessel since the beginning of the most recent scheduled out-of-water maintenance or since delivery into service as a newly constructed vessel if no out-of-water maintenance has yet occurred. (...)”

⁸⁴⁹ IMO, MEPC 62/24/Add.1.

⁸⁵⁰ 2298.2. “(x) “Vessel” means a vessel of 300 gross registered tons (GRT) or more.”

⁸⁵¹ USA, 33 CFR 151.2050 “Additional requirements — nonindigenous species reduction practices.”

⁸⁵² (Firestone & Corbett, 2005, p. 291)

⁸⁵³ New Zealand, Import Health Standard for Ballast Water from all Countries 1998 under The Biosecurity Act 1993.

⁸⁵⁴ (New Zealand House of Representatives, 2008, p. 5) “In 1998, mandatory controls on ballast water discharges were unilaterally introduced by New Zealand, under the Biosecurity Act 1993 (...). Also, as existing controls do not have any international backing, enforcement action is limited once a ship has left New Zealand.”

The unilateral actions of port states over ship-source pollution influences”.⁸⁵⁵ New Zealand has more recently acted unilaterally to counter IAS with the Craft Risk Management Standard for Biofouling.⁸⁵⁶ This standard applies to ships which anchor, berth or are brought ashore in New Zealand after a voyage originating outside New Zealand’s territorial waters. To demonstrate compliance, ships arriving at New Zealand ports will be required to submit information about their biofouling management practices; if they follow the “continual maintenance” option, this includes submitting a biofouling management plan and a record book consistent with the IMO Biofouling Guidelines. Ships must plan well ahead for arrival in New Zealand, namely by exchanging ballast water mid ocean and by allowing some offshore inspection to ascertain that the vessel complies with those requirements.⁸⁵⁷ There has been at least one case where New Zealand’s unilateral port state action was taken under Section 33(1)(b) of the Biosecurity Act 1993.⁸⁵⁸ The ship in question completed the required notice of arrival at Auckland Port and was directed to move outside New Zealand territory and remain there until a ‘clean hull’ could be evidenced. The ship was eventually allowed to re-enter New Zealand territorial waters and no penalties were imposed.⁸⁵⁹

3.4.4. *The control of CO₂ emissions from shipping: the EU MRV Regulation*

§ 258. In 2011, the European Commission drafted a White Paper on transport which suggested that the EU’s CO₂ emissions from maritime transport should be cut by at least 40 per cent from 2005 levels by 2050 and, if feasible, by 50 per cent.⁸⁶⁰ In 2013, it had already set out a strategy for progressively integrating maritime emissions into the EU’s policy for reducing its domestic greenhouse gas emissions, a strategy composed of three consecutive steps: (1) monitoring,

⁸⁵⁵ New Zealand, Marine Notice 07/1999

⁸⁵⁶ New Zealand, CRMS – BIOFOUL 15 May 2014 – Craft Risk Management Standard: Biofouling on Vessels Arriving to New Zealand.

⁸⁵⁷ (Gard, 2018)

⁸⁵⁸ New Zealand, Biosecurity Act 1993, Section 33(1)(b): “Where there are any risk goods on board or attached to the outside of a craft that has entered New Zealand territory from outside New Zealand territory, an inspector may direct the master or the other person in charge of the craft to (...) (b) move the craft outside New Zealand territory (immediately, or within a period specified by the inspector).”

⁸⁵⁹ (Gard, 2016)

⁸⁶⁰ EU, COM(2011) 144 final.

reporting and verification (MRV) of CO₂ emissions from large ships using EU ports; (2) GHG reduction targets for the maritime transport sector; and (3) further measures, including market-based measures, in the medium to long term.⁸⁶¹

§ 259. Regulation 525/2013 had explicitly left the door open for the regulation of shipping emissions. Nevertheless, in 2013 the Commission drafted a proposal for the regulation of carbon dioxide emissions from maritime transport.⁸⁶² This proposal resulted in Regulation 2015/757.⁸⁶³ The use of port powers is present in the first Article, which states that the scope of application falls upon “ships arriving at, within or departing from ports under the jurisdiction of a Member State”.⁸⁶⁴ This Regulation does not apply to all ships, only to those above 5,000 gross tonnage; and it is to be applied in all of the ports of the EU member states.⁸⁶⁵

§ 260. The EU expects to collect and transmit data on “CO₂ emissions from the combustion of fuels, while the ships are at sea as well as at berth”,⁸⁶⁶ carrying out that monitoring and reporting “within all ports under the jurisdiction of a Member State and for any voyages to or from a port under the jurisdiction of a Member State”.⁸⁶⁷ The preamble of the Regulation makes it clear that “[a]ll intra-Union voyages, all incoming voyages from the last non-Union port to the first Union port of call and all outgoing voyages from a Union port to the next non-Union port of call, including ballast voyages, should be considered relevant for the purposes of monitoring”.⁸⁶⁸ The Regulation establishes that ships arriving at, within or departing from a port under the jurisdiction of a EU member state, and which have carried out voyages during

⁸⁶¹ EU, COM(2013) 479 final.

⁸⁶² Proposal for a Regulation of the European Parliament And Of The Council on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport and amending Regulation (EU) No 525/2013.

⁸⁶³ EU, Regulation 2015/757.

⁸⁶⁴ EU, Regulation 2015/757, Article 1.

⁸⁶⁵ EU, Regulation 2015/757, Article 2(1)

⁸⁶⁶ EU, Regulation 2015/757, Article 4(2).

⁸⁶⁷ EU, Regulation 2015/757, Article 4(1).

⁸⁶⁸ EU, Regulation 2015/757, at (14)

that reporting period, must carry on board “a valid document of compliance”.⁸⁶⁹ The Regulation requires that member states ensure that any inspection of a ship in a port under its jurisdiction “includes checking that a valid document of compliance is carried on board”.⁸⁷⁰

§ 261. An expulsion order may be issued by the competent authority of the state of the port of entry, namely in the case where ships have failed to comply with the requirements. Non-compliance must have taken place for two or more consecutive reporting periods and it is also required that, prior to the expulsion, other enforcement measures have failed. Because of the issuing of such an expulsion order, all other member states of the EU must refuse entry to the ship concerned into any of their ports.⁸⁷¹ The literature pointed out that this expulsion, and the subsequent ban it entails, should still allow for rectification within a reasonable period.⁸⁷²

§ 262. The unilateral nature of this norm has been admitted by the legislators themselves. The Commission stated that “[t]he proposed gradual approach to address GHG emissions from ships with a robust MRV system as the first step is aligned with other measures proposed in the IMO context and take action to practical rather than theoretical level” (sic); the Commission also admitted that “[t]his proposal will feed into the discussions at the IMO and can serve as a sample for a global scheme”.⁸⁷³ The EU Parliament explicitly referred to this legislation as “an opportunity to influence negotiations within the International Maritime Organisation” in the same vein as it had proceeded with the *Erika* packages previously.⁸⁷⁴

§ 263. It should be noted that the IMO has been discussing the matter.⁸⁷⁵ In 2003, IMO Resolution A. 963(23) urged the MEPC to “identify and develop the mechanism or

⁸⁶⁹ EU, Regulation 2015/757, Article 18.

⁸⁷⁰ EU, Regulation 2015/757, Article 19(2).

⁸⁷¹ EU, Regulation 2015/757, Article 20(3)

⁸⁷² (Jessen, 2016, p. 1094)

⁸⁷³ EU, COM/2013/0479 final.

⁸⁷⁴ (European Parliament, 2015)

⁸⁷⁵ UNCLOS, Article 212(3) (*Pollution from or through the atmosphere*). Under this framework, a new annex (VI) to the International Convention for the Prevention of Pollution from Ships (MARPOL) was added in 1997 with regulations which seek to minimize airborne emissions from ships (SO_x, NO_x, ODS, VOC shipboard incineration). This annex entered into force on 19 May 2005 and was subsequently upgraded.

mechanisms needed to achieve the limitation or reduction of GHG emissions from international shipping”.⁸⁷⁶ A set of MEPC circulars on efficiency standards followed, culminating, in 2011, in a Resolution which introduced amendments to MARPOL Annex VI with the inclusion of binding regulations on energy efficiency for ships.⁸⁷⁷ Regulation 10 added a new paragraph on port state control of operational requirements, explaining that in relation to chapter 4 (Regulations On Energy Efficiency For Ships), any inspection “shall be limited to verifying, when appropriate, that there is a valid International Energy Efficiency Certificate on board”.⁸⁷⁸ The IMO was careful to note that the “adoption of the amendments to Annex VI in no way prejudices the negotiations held in other international fora, such as the United Nations Framework Convention on Climate Change (UNFCCC), nor affects the positions of the countries that participate in such negotiations”.⁸⁷⁹ This illustrates how the IMO does not see itself as having a regulatory monopoly in regard to this issue. The EU itself took note, in 2013, that the IMO had already developed these international regulations regarding greenhouse gas emissions.⁸⁸⁰ The EU also noted that “Regulation 18 of MARPOL Annex V already makes compulsory the availability of bunker delivery notes for ships engaged in international transport over 400 GT”, recognizing that “the global fuel consumption of a ship is already monitored”.⁸⁸¹ However, the reason why the EU decided to act unilaterally was that the reporting and verification process in this regard still needed to be established.⁸⁸² Without such transmission of information to port authorities, little could be done by EU port states to accomplish their more general environmental objectives related to GHG emissions. The unilateral nature of this measure exists therefore in relation to Annex VI of MARPOL.⁸⁸³ When

⁸⁷⁶ IMO, Resolution A. 963(23)

⁸⁷⁷ IMO, Resolution MEPC.203(62)

⁸⁷⁸ IMO, Resolution MEPC.203(62).

⁸⁷⁹ IMO, Resolution MEPC.203(62).

⁸⁸⁰ EU, COM(2013) 479 final.

⁸⁸¹ EU, COM(2013) 479 final.

⁸⁸² EU, COM(2013) 479 final.

⁸⁸³ *Supra* 2.3.3, Post-UNCLOS normative developments.

the EU adopted the Regulation, there were no commitments on reporting and verifying emissions of ships at port. Indeed, despite the IMO repeating that it provides “the correct and only forum to identify solutions and an appropriate pathway for international shipping to decarbonize with the rest of the globe”,⁸⁸⁴ the existing norms of international law set by the IMO could not be interpreted as preventing states from unilaterally requesting such data from visiting ships, using their port powers.⁸⁸⁵ The UNCLOS explicitly allows for unilateral assertions of jurisdiction on this matter, the unilateral factor being, in this case, the enforcement at port of a lawful prescription.⁸⁸⁶

3.4.5. *The usage of biocidal products and anti-fouling paints*

§ 264. Anti-fouling systems are biocidal, i.e. they are composed of chemicals (biocides) which kill biological elements that attach themselves to the external layer of the ship, compromising its efficiency as well as damaging the hull itself. These chemicals are applied as paints and over time they liberate certain particles into the ocean which are potentially toxic, such as Tributyltin (TBT). Concerns with pollution caused by biocidal products have predated the current multilateral instrument that regulates them, already introduced in Chapter 2. France was perhaps the forerunner, setting standards on this matter as early as 1981, when measures were adopted with regard to the usage of TBT at the port of Arcachon.⁸⁸⁷ Japan was also a pioneer in regulating the use of TBT anti-fouling paints.⁸⁸⁸ In 1990, the Japanese Shipowners' Association introduced a self-imposed restraint on their usage; the total quantity of TBT substances was restricted by law. The use of TBT anti-fouling paints for domestic vessels and vessels involving port transport industry was prohibited by the Ministry of Transport in Japan and the Japanese Shipowners' Association and the Shipbuilders' Association of Japan further introduced a self-imposed restraint to prohibit TBT anti-fouling paints being used on newly-

⁸⁸⁴ (International Maritime Organization, 2016, p. 13)

⁸⁸⁵ IMO, MEPC.1/Circ.795/Rev.2.

⁸⁸⁶ UNCLOS, Article 212(2); UNCLOS Article 222. (Nordquist, 1991, p. 319)

⁸⁸⁷ (INERIS, 2005)

⁸⁸⁸ (Schinas, 2016, p. 650)

built charter vessels and ship repairs in Japan. Nonetheless, TBT was still used in other countries. Thus, Japan claimed the need for regulating TBT anti-fouling paints at the MEPC, eventually leading to the AFS Convention.

§ 265. Ahead of the entry into force of the AFS Convention, the EU enacted a Regulation on the Prohibition of Organotin Compounds on Ships.⁸⁸⁹ This may be a case of early implementation through unilateral enforcement powers.⁸⁹⁰ The Regulation applied to foreign-flagged ships “that enter a port or offshore terminal of a Member State”.⁸⁹¹ It confirms the idea that the port states of the EU were acting unilaterally when enforcing this Regulation prior to the entry into force of the AFS Convention.⁸⁹² With regard to the inspections and detection of breaches through port state control, the Regulation merely provides that the AFS Convention will “guide” the member states.⁸⁹³ This rather softer expression, ‘guidance’, also confirms the idea that the AFS Convention had not entered into force, the state’s prescription was unilateral in nature, for the substantive standard applied is, under international law, not binding.

§ 266. Reference should be made to another case. The EU enacted the Biocidal Products Regulation (BPR) which concerns the placing on the market and use of biocidal products.⁸⁹⁴ This Regulation aims to “protect human health, animal health and the environment, and to avoid discrimination between treated articles originating in the Union and treated articles imported from third countries”.⁸⁹⁵ Under the original version (later altered by the Council of Ministers), the definition of “treated articles” would also be applied to ships.⁸⁹⁶ Because ships were at the time already regulated under the AFS Convention, it was a case of ‘inadvertent’ unilateral jurisdiction; indeed, as the BPR’s standards were more restrictive than those of the

⁸⁸⁹ EU, Regulation EC/782/2003

⁸⁹⁰ (Schinas, 2016, p. 650)

⁸⁹¹ EU, Regulation 782/2003, Art 3(1)(c).

⁸⁹² EU, Regulation 782/2003, Recital 24.

⁸⁹³ EU, Regulation 782/2003, Article 7

⁸⁹⁴ EU, Regulation (EU) 528/2012

⁸⁹⁵ EU, Regulation (EU) 528/2012, Preamble (52)

⁸⁹⁶ EU, Regulation (EU) 528/2012, Article 3(1)(l)

AFS Convention, they would prevail at the EU ports.⁸⁹⁷ The situation caused by the BPR was apparently not foreseen and, during its short period of being in force, it was not enforced by member states.

§ 267. Unilateral action on the matter of anti-fouling systems by the EU has been seen as a positive.⁸⁹⁸ Yet the same analysis has raised an alert about the consequences of this initiative, namely increased fuel consumption and the risk of introducing alien species.⁸⁹⁹ Whilst the IMO struggles to keep a balance between all aspects, it is unlikely that states will have the same care with less immediate threats to their own interests when other threats of a similar nature are a priority.

3.4.6. The protection of Particularly Sensitive Sea Areas: Australia's compulsory pilotage rule

§ 268. Certain areas of the sea are particularly sensitive to pollution and international law provides a legal regime to ensure their protection. One way is to impose compulsory pilotage, ensuring that the ship follows a specified route. Compliance with such requirement may be checked at port, and this has occurred in Australia regarding the navigation in the Torres Strait.⁹⁰⁰ The Torres Strait is a nautical passage between the Cape York Peninsula in Australia and the Western Province of Papua New Guinea. This passage is a strait used for international navigation to which the regime of transit passage applies.⁹⁰¹ The option of compulsory pilotage in this strait was taken as early as 1997 by Papua New Guinea, which required all tankers visiting its Kutubu oil facility to use a pilot through the Torres Strait.⁹⁰² The US has created a

⁸⁹⁷ (Union of Greek Shipowners, 2016, p. 3)

⁸⁹⁸ (Gipperth, 2009, pp. S93-S94)

⁸⁹⁹ (Gipperth, 2009, p. S94)

⁹⁰⁰ (López Martín, 2010, p. 84)

⁹⁰¹ UNCLOS, Part III, Article 34 to 45.

⁹⁰² (Kaye, 1997, p. 125)

similar measure in the Florida Keys, but without the port component being of relevance there.⁹⁰³

§ 269. Compulsory pilotage in the Australian Particularly Sensitive Sea Area (PSSA) had already been introduced in the past by Australia.⁹⁰⁴ Australia's Great Barrier Reef Marine Park Act 1975 includes provisions requiring compulsory pilotage for certain ships in prescribed areas of the Great Barrier Reef Region.⁹⁰⁵ Similar to what was later provided under the Environment Protection and Biodiversity Conservation Act 1999, the 1975 Act provides for an investigation regime.⁹⁰⁶ This regime includes the appointment of inspectors and powers of investigation for those inspectors and also enforcement mechanisms.⁹⁰⁷ The 1975 Act then creates another separate offence based on the entry into port after the voyage through the compulsory pilotage area without a pilot.⁹⁰⁸ It adds that the navigation without a pilot may have occurred on that same voyage where the offence is detected or have occurred prior to that voyage.⁹⁰⁹ The same applies when the ship enters an Australian port after having navigated without a pilot in the compulsory pilotage area and it enters the port under the command of a master other than the master who was in command of the ship during the navigation in that area.⁹¹⁰ Australia set an entry condition regarding compulsory pilotage rules and allowed enforcement of this measure to happen at port at any moment subsequent to the offence. This raised no major debate until this regime extended to the Torres strait.

⁹⁰³ (Boyle, 2006, p. 27)

⁹⁰⁴ (Ottesen, et al., 1994, p. 514)

⁹⁰⁵ Australia, Great Barrier Reef Marine Park Act 1975.

⁹⁰⁶ Australia, Environment Protection and Biodiversity Conservation Act 1999.

⁹⁰⁷ Australia, Great Barrier Marine Park Act 1975, 59B (Offence to navigate without a pilot), (1)

⁹⁰⁸ Australia, Great Barrier Marine Park Act 1975, 59C (Offence to enter an Australian port after navigating without a pilot: master and owner liable), (1)

⁹⁰⁹ Australia, Great Barrier Marine Park Act 1975, 59C (Offence to enter an Australian port after navigating without a pilot: master and owner liable), (2).

⁹¹⁰ Australia, Great Barrier Marine Park Act 1975, 59D (Offence to enter an Australian port after navigating without a pilot: owner liable), (1) and (2).

§ 270. In 2003, Australia and Papua New Guinea submitted a proposal to the IMO to extend the Great Barrier Reef PSSA to the Torres Strait and to extend the Great Barrier Reef compulsory pilotage system to the Torres Strait. The proposal sought to extend the regime existing in effect since 1991.⁹¹¹ The associated protective measure was deemed necessary to improve safety of navigation.⁹¹² The existing regime was considered by both states to be less than satisfactory, as compliance with the existing recommended pilotage regime was declining and Resolution A.710(17) no longer provided an acceptable level of protection for the Torres Strait.⁹¹³ Less than two years later, in 2005, the MEPC adopted a resolution which approved that proposal.⁹¹⁴ This resolution also recommended that governments inform ships flying their flags that they should act in accordance with Australia's system of pilotage when navigating the Torres Strait. However, official protests were raised. The delegation of the USA stated that "(...) this resolution was recommendatory and provided no international legal basis for mandatory pilotage for ships in transit in this or any other strait used for international navigation" and "[t]he United States could not support this resolution".⁹¹⁵ Several delegations supported the statement of the United States and the delegation of Australia indicated that it did not object to the statement by the United States.⁹¹⁶

§ 271. Shortly after the approval of that Resolution, and despite those statements, the Australian Government issued Marine Notice 8/2006 entitled 'Revised Pilotage Requirements for Torres Strait'.⁹¹⁷ This notice advised shipowners and operators of a new compulsory pilotage area for the Torres Strait (according to which the "Amendments to the Commonwealth Navigation Act 1912 (the Act) make it an offence under new section 186I to navigate in a

⁹¹¹ IMO, A.710(17). IMO, A 17/Res. 710.

⁹¹² IMO Doc. A.710(17), para. 1.3

⁹¹³ IMO, MEPC 49/8, para. 5.9

⁹¹⁴ IMO, Resolution MEPC.133(53). IMO, MEPC.53/24, Annex 21.

⁹¹⁵ IMO, Res. 133(53) para. 8.5.

⁹¹⁶ IMO, Res. 133(53), para. 8.6.

⁹¹⁷ Australia, AMSA Marine Notice 8/2006

compulsory pilotage area without a pilot”).⁹¹⁸ It advised that significant penalties would apply to a master or owner who failed to comply with the compulsory pilotage requirements. The notice highlighted that “[u]nder the new requirements, section 186J of the Act will require the pilot to provide a *certificate* to the master in the approved form specifying details about the completed piloted voyage before disembarking the ship” (emphasis added) as evidence of compliance with rules of pilotage. A revised Navigation Act 1912 would henceforth include a rule stating that “if: (a) a ship is a regulated ship; and (b) the ship navigates in a compulsory pilotage area; and (c) the ship navigates in that area without a licensed pilot; the master and the owner of the ship each commit an offence”.⁹¹⁹ This Act would still allow the defendant to prove “that the ship was exempted (...) from the requirement to navigate with a licensed pilot in the area” and that “the navigation complied with the terms of the exemption”.⁹²⁰

§ 272. As a consequence of this notice, more protests followed,⁹²¹ not only raised by states, but also by industry representatives.⁹²² Australia reacted to this protest by issuing another Marine Notice entitled ‘Further Information on Revised Pilotage Requirements for the Torres Strait’.⁹²³ This notice preserves the compulsory pilotage requirements but affirms that Australia will not “suspend, deny, hamper or impair transit passage and will not stop, arrest or board ships that do not take on a pilot”. The notice warns, however, that “the owner, master and/or operator of the ship may be prosecuted on the next/entry into an Australian port, for both ships on voyages to Australian ports and ships transiting the Torres Strait en route to other destinations”.⁹²⁴

⁹¹⁸ Australia, Act No. 109 of 2006, amending Navigation Act 1912.

⁹¹⁹ Australia, Navigation Act 1912, 186I (Offence to navigate without a licensed pilot), (1).

⁹²⁰ Australia, Navigation Act 1912, 186I (Offence to navigate without a licensed pilot), (3).

⁹²¹ IMO Doc. NAV 52/18 (2006), par 17.74 and 17.75

⁹²² IMO Doc MEPC 55/8/3.

⁹²³ Australia, AMSA Marine Notice 16/2006.

⁹²⁴ Australia, AMSA, Marine Notice 16/2006.

§ 273. A lively debate ensued during the MEPC 55 meeting.⁹²⁵ The last chapter of this legislative history happened in 2009. Following several consultations with the USA, Australia accepted a compromise position. Despite environmental concerns, the threat of a legal challenge by the USA and Singapore led the Australians to abandon the initially compulsory legal pilotage framework and to revert, in practice, to a voluntary scheme for many vessels without enforcing penalties against ships that transited the strait but did not call at an Australian port. Australia then issued Marine Notice 7/2009,⁹²⁶ which still sought to justify the compulsory pilotage system on the basis of both the IMO Resolution MEPC.133(53) and as a port entry requirement.⁹²⁷ Again, this was met with protest, this time from Singapore which insisted, in its third diplomatic note, that the IMO Resolution did not authorize the Australian system of compulsory pilotage.⁹²⁸ Australia has since changed its Torres Strait pilotage laws to apply only to foreign vessels in its territorial sea or internal waters. The Navigation Act 2012 updated those rules on compulsory pilotage.⁹²⁹ Under these new rules “[t]he master of a foreign vessel does not commit an offence against section 166 [*navigating without a licensed pilot*] unless, at the time of the act or omission constituting the alleged offence, the vessel is: (a) in an Australian port; or (b) entering or leaving an Australian port; or (c) in the internal waters of Australia; or (d) in the territorial sea of Australia” (emphasis added).⁹³⁰ The Australian compulsory pilotage requirements in the Great Barrier Reef area are now deemed to have been breached when the ship in question arrives in port.

3.4.7. *The carriage and use of heavy fuel oils in the polar regions*

⁹²⁵ IMO, MEPC.55/8/3. IMO, MEPC 55/8/2/Add.1, para. 3. IMO, A 25/5(b)/2/Corr.1, para. 5. IMO, MEPC 55/23, para. 8.14 and Annex 24. IMO, A 25/5(b)/2/Corr. para. 56 and “Statement by the Delegation of Australia concerning Pilotage in the Torres Strait PSSA”, Annex 23.

⁹²⁶ Australia, AMSA Marine Notice 7/2009.

⁹²⁷ Australia, AMSA Marine Notice 7/2009.

⁹²⁸ (Koh, 2012, p. 24)

⁹²⁹ Australia, Navigation Act 2012, 166 (Navigating without a licensed pilot).

⁹³⁰ Australia, Navigation Act 2012, 167 (Offences against section 166 by masters of foreign vessels).

§ 274. Ice covered sea areas are particularly sensitive because the mitigation of a pollution event in those extreme areas is more difficult to achieve, leading to some potential irreversible damage in the case of an accident. These areas have a special legal regime within the UNCLOS, which explicitly provides for opportunities for state action, especially for departure state ports.⁹³¹ This applies to both the Arctic and Antarctic regions and there has been some state practice on the matter. With respect to the Southern Ocean, the option of a new memorandum of understanding on port state control was suggested as a possible solution for pollution control in the area, with a draft being proposed.⁹³² Yet despite that discussion, a proposal has already been discarded by some states.⁹³³ This confirms pre-existing concerns with a lack of political will to establish such a system in the region.⁹³⁴ The proponent, New Zealand, did however recall that MoU progressed from unilateral reactive measures to become multilateral proactive mechanisms.⁹³⁵ The possibility of exercising a ‘departure state jurisdiction’ had already been considered some time ago as a means to close loopholes in the Antarctic Treaty System.⁹³⁶ Commentators have more recently pointed to the exercise of port state control by the ‘gateway states’ as the only solution for this particular area considering the unresolved sovereignty

⁹³¹ (Boone, 2013, p. 206)

⁹³² ATCM, XXVI ATCM, Information Paper IP-044-ASOC, *Port State Control: An Update on International Law Approaches to Regulate Vessels Engaged in Antarctic Non-Governmental Activities*. Draft Antarctic Memorandum of Understanding on Port State Control Measures

⁹³³ ATCM XXV, Antarctic and Southern Ocean Coalition (ASOC) “Port State jurisdiction: An Appropriate International Law Mechanism To Regulate Vessels Engaged in Antarctic Tourism” Information Paper 63 (2002), submitted to ATCM XXV (10-20 September 2002) “the countries with ‘gateway ports’ for Antarctic Waters are themselves members of the three PSC regimes that work in harmony”

⁹³⁴ (Bastmeijer, 2003, p. 374)

⁹³⁵ New Zealand, “A Proposal to Enhance Port State Control for Tourist Vessels Departing to Antarctica” Working Paper 7 (2009) submitted to ATME 2009 (9-11 December 2009) 4-6 “to enhance port state control for tourist vessels departing to Antarctica” (...) “from a unilateral reactive measure by coastal States to a multilateral proactive control mechanism supported by international law”

⁹³⁶ (Orrego Vicuña, 2000, p. 68)

situation.⁹³⁷ With regard to the Arctic, the EU conducted a study on this matter in 2010 which referred to opportunities for “optimized port state jurisdiction” there.⁹³⁸

§ 275. Recently the EU approved a proposal which makes use of the lessons of that report. The aim is to restrict navigation of ships carrying in bulk as cargo or carrying and using as fuel heavy fuel oils in the Arctic. The carriage in bulk as cargo or carriage and use as fuel of heavy grade oils by ships in the Antarctic area (sea area south of latitude 60°S) has been prohibited since 2011 under Regulation 43 of MARPOL Annex I,⁹³⁹ later amended to include use of such fuels as ballast.⁹⁴⁰ Partly inspired by this measure, in 2017 the European Parliament (EP) adopted a resolution on an integrated EU policy for the Arctic.⁹⁴¹ This resolution looks at many issues related to that region, one of them being the use of heavy fuel oil (HFO) in maritime transport. This expression of concern by the EP is not unprecedented. In 2014 a motion for a resolution submitted by some Members of the EP was already calling on the Commission “to promote strict limits on the use and carriage of HFO in the Arctic”.⁹⁴² At the time, the motion affirmed that there was an “absence of adequate international measures” and that the EC should consider adopting rules to be applied to “vessels calling at EU ports”. This motion was rejected, and this proposal did not make its way into the resolution on the EU strategy for the Arctic which was adopted by the EP that year. The EP resolution approved in 2017 contains elements of that motion. This time the EP went so far as to “call on the Commission and the Member States to take all necessary measures to facilitate actively the ban on the use and carriage of HFO as ship fuel in vessels navigating the Arctic seas”.⁹⁴³ What is more, the resolution makes it clear that this ban would be achieved “through the International Convention for the Prevention of Pollution from Ships (MARPOL Convention), and/or through port state control”

⁹³⁷ (Swanson, et al., 2015, pp. 377-378)

⁹³⁸ (European Commission, 2010)

⁹³⁹ IMO, MEPC.189(60)

⁹⁴⁰ IMO, MEPC.256(67)

⁹⁴¹ EU, 2016/2228(INI)

⁹⁴² EU, 2013/2595(RSP)

⁹⁴³ EU, 2016/2228(INI)

and “as regulated in the waters surrounding Antarctica”.⁹⁴⁴ Keeping in mind that there is yet no final and binding document and that this EP resolution is merely a first stage in a long regulatory process, three remarks can already be made, which then lead to a question. First, the EP resolution does not consider the moment when the conduct occurs, but it targets ships when “calling at EU ports subsequent to, or prior to, journeys through Arctic waters”. Thus, member states will consider past or future conduct of the ship to frame the illicit conduct that leads to the consequent ban. Secondly, the right to deny entry into the port based on past or future conduct in the Arctic does not stem from any multilateral entitlement. The IMO has not yet regulated this matter in the Polar Code (which merely says that “[s]hips are encouraged to apply regulation 43 of MARPOL Annex I when operating in Arctic waters”), and it has also not been dealt with elsewhere. Thirdly, the fact that the standards to be set by the EU would arguably be those already in place in the Antarctic, as the 28th paragraph of the Preamble to the EP resolution hints at, might well increase the likelihood of their acceptance in upcoming international negotiations. Yet, from a purely legal perspective, the existing standards do not provide any entitlement for port state jurisdiction with regards to HFO in the Arctic. This means that any EU legislation on this matter would be a case of unilateral jurisdiction.

3.4.8. *The recycling of ships: the option for a financial levy in EU ports*

§ 276. Even after the end of their operational lives, ships may be a source of pollution. Unsound ship recycling practices are another sector where states may act. Attempts to act unilaterally to regulate this sector have existed in the past in places like India and the literature has noted the failure of one particular attempt.⁹⁴⁵ One of the reasons for that failure was the costs imposed on ship owners, making such activity uneconomical for India.⁹⁴⁶ This was confirmed by India itself at the IMO, which pointed out the shortcomings of its unilateral approach, especially

⁹⁴⁴ EU, 2016/2228(INI)

⁹⁴⁵ India, Gujarat Maritime Board Ship Recycling Regulations 2003. (Puthucherril, 2010, p. 192)

⁹⁴⁶ (Nagarsheth, 2001, pp. 1-2)

from an economic perspective.⁹⁴⁷ This section focuses on another case which involved port powers as a means of countering bad ship recycling practices.

§ 277. The EC enacted in 2013 a Regulation on ship recycling. It sought to address environmentally unsound and unsafe practices for dismantling ships at the end of their operational lives, by bringing into force an early implementation of the requirements of the Hong Kong Convention (HKC). This Regulation would only apply to private ships of more than 500GT, excluding ships operating only in waters subject to the sovereignty or jurisdiction of flag state.⁹⁴⁸ Thus it applies to ships of third states and takes account of voyages outside waters under the jurisdiction of EU member states. Port state powers are provided to enforce this Regulation: namely warnings, detention, dismissal or exclusion from the port in the case where no appropriate ‘statement of compliance’ is submitted.⁹⁴⁹ The proposal also aimed at imposing a levy at port aimed at financing sound environmental ship recycling plans. Indeed, the Regulation left open the possibility of the creation of a financial instrument that would be applicable upon the entry of ships into port prior to their recycling.⁹⁵⁰ It is this financial instrument which raised questions concerning the prescriptive and enforcement powers of the port state and that is the object of discussion here. Yet non-EU flag states “could seek to challenge the levy or fee on ships visiting EU ports in international courts as overstepping on their port state rights under UNCLOS”.⁹⁵¹ Other issues have been raised about another multilateral framework, WTO law, but this study does not delve into them.⁹⁵²

§ 278. Following this criticism, the EP has agreed to proposals for new ship recycling rules but has stopped short of controversial proposals for a recycling fund. In the end, the Regulation enacted did not include such a fee, mainly because the EU would not have such powers under the treaties its member states have signed. A decision on that matter was therefore postponed.

⁹⁴⁷ IMO/MEPC 53/INF.12

⁹⁴⁸ EU, Regulation 1257/2013, Article 3

⁹⁴⁹ EU, Regulation 1257/2013, Article 12(5)

⁹⁵⁰ EU, Regulation 1257/2013, Article 29

⁹⁵¹ (Hernandez, McGuinn, & Zamparutti, 2013, p. 60)

⁹⁵² (Hernandez, McGuinn, & Zamparutti, 2013, p. 61)

A report has more recently pointed to the issuance of time-based ship recycling licences to vessels calling at EU ports as a feasible financial incentive. Owners would essentially pay to obtain a licence, with the money going into an EU fund. This would allow port states to police the enforcement. However, this proposal has been rejected by the industry as complex, impractical, burdensome, unrealistic and unworkable.⁹⁵³

§ 279. In 2017 the Commission published a new report on this issue which highlights the existing limitations of the current international approach and the opportunities for unilateral regulation offered by the multilateral framework itself.⁹⁵⁴ It is arguable whether this measure would have an impact on recycling practices worldwide. The creation of a levy would have to comply with EU standards of recycling that cannot be attained in many shipyards outside the EU where ‘beaching’, i.e. the disposal of ships on beaches, is a recurrent practice.⁹⁵⁵ The European Commission acknowledged the merits of a potential ship recycling licence but also reaffirmed the issues regarding compatibility with international law.⁹⁵⁶ There has been some pressure on the part of certain NGOs towards considering that the EU Regulation constitutes a form of complementary action to the HKC, that it is actually authorized by the HKC and moreover encouraged by the UNCLOS.⁹⁵⁷ They also argue that the CBDR principle and the polluter-pays principle support this interpretation.⁹⁵⁸ Notwithstanding the existence of such arguments, the EU argues that the issues are not sufficiently clear and it has decided to postpone this matter once again.

3.4.9. *The ban on oil tankers into ports of Canada’s British Columbia*

§ 280. The exclusion of ships from entering port is an extreme measure taken to prevent specified ships from accessing the port indefinitely. An old case often referred to in the

⁹⁵³ (Lloyd’s List, 2017)

⁹⁵⁴ EU, COM(2017) 420 final.

⁹⁵⁵ (Puthucherril, 2010, p. 184)

⁹⁵⁶ EU, COM/2017/0420 final, Conclusion.

⁹⁵⁷ (Shipbreaking Platform, 2016)

⁹⁵⁸ (Shipbreaking Platform, 2016)

literature recalls the moment when nuclear fuel rods were banned de facto from the port of Rotterdam precisely through port state powers.⁹⁵⁹ Sometimes the banning measure is taken as a reaction to an incident. This was the case, for example, with the decision of the Indian state of Gujarat, which in 2011 banned all ships older than 25 years from entering port. This was a reaction to an incident where a 27-year-old ship, the MV RAK, heading for Dahej port, sank 20 nautical miles off neighbouring Mumbai.⁹⁶⁰ The attempt was not novel, and it faced an internal backlash due to the possible consequences for Indian ships abroad.⁹⁶¹ This case has not received much attention in the literature outside India.⁹⁶² Nigeria also went down that route in 2015, but its ban was made without regard to any prior visit of the ship and based on a list of ship names.⁹⁶³ This resulted in protests by shipping companies' representatives and was eventually lifted.⁹⁶⁴

§ 281. A more recent case from Canada provides some more details of how the banning of ships may be used to discourage certain ships from navigating along the coast, i.e. as a matter of prevention and not of reaction. In 2017, the government of Canada introduced Bill C-48, the Oil Tanker Moratorium Act.⁹⁶⁵ The Act applies to ships transporting crude oil or persistent oil to or from ports or marine installations located along British Columbia's north coast. Three port powers are resorted to. First, a prohibition on mooring or anchoring at ports on part of the coast of British Columbia on all oil tankers carrying crude oil, or persistent oil or any combination of the two in a specific amount.⁹⁶⁶ This means that the ban is not on the tanker itself but on the

⁹⁵⁹ (Weinstein, 1994, p. 158)

⁹⁶⁰ (Tradewinds, 2011)

⁹⁶¹ (Insurance Technology Industry News, 2011)

⁹⁶² (Vijayan, 2014, p. 223)

⁹⁶³ Nigeria, GGM/ST/EX/01. Nigeria, GGM/COMD/008.

⁹⁶⁴ (Financial Times, 2015) "Nigeria has lifted a ban prohibiting 113 tankers from operating in its territorial waters, according to a letter from the state oil company that has circulated among traders and shipbrokers."

⁹⁶⁵ Canada, Bill C-48 "An Act respecting the regulation of vessels that transport crude oil or persistent oil to or from ports or marine installations located along British Columbia's north coast"

⁹⁶⁶ Canada, Bill C-48 "It is prohibited for an oil tanker that is carrying crude oil or persistent oil, or any combination of the two, in an amount greater than 12 500 metric tons, in bulk in its hold, to moor or anchor at a

tanker when it carries a specific cargo. Second, a denial of port services/privileges: a prohibition on unloading that oil at port,⁹⁶⁷ and also a prohibition on loading that oil.⁹⁶⁸ Third, the setting of an entry/exit condition, namely the transport of oil to/from a tanker with the purpose of aiding it to circumvent the prohibition.⁹⁶⁹ Bill C-48 requires the master of an oil tanker, which is constructed or adapted for these purposes, to report pre-arrival and send information on the type and amount of any oil carried and to be loaded or unloaded at port. This must be done at least 24 hours in advance of arrival.⁹⁷⁰ Denial of entry may be imposed if the Minister has reasonable grounds to believe that the master of an oil tanker has failed to comply with this requirement.⁹⁷¹ This Canadian Bill may be qualified as unilateral in the sense that Canada is acting as a port state without multilateral backing to deny the entry of specific vessels to its ports due to their fuel content.

port or marine installation that is in Canada, on the coast of British Columbia, north of 50°53'00" north latitude and west of 126°38'36" west longitude.”

⁹⁶⁷ Canada, Bill C-48 “Unloading (2) It is prohibited for an oil tanker that is carrying crude oil or persistent oil, or any combination of the two, in an amount greater than 12 500 metric tons, in bulk in its hold, to unload any of that oil at a port that is within the area described in subsection (1) or to a marine installation that is within that area.”

⁹⁶⁸ Canada, Bill C-48 “Loading (3) It is prohibited for an oil tanker to load into its hold any crude oil or persistent oil that is at a port or marine installation that is within the area described in subsection (1) if, when the loading is about to begin, the oil tanker is carrying crude oil or persistent oil, or any combination of the two, in an amount greater than 12 500 metric tons, in bulk in its hold, or if loading it would result in the oil tanker carrying, at any time, crude oil or persistent oil, or any combination of the two, in bulk in its hold, in an amount greater than 12 500 metric tons.”

⁹⁶⁹ Canada, Bill C-48 “Transport to port, etc. (4) It is prohibited for any person or any vessel to transport, by water, any crude oil or persistent oil — that an oil tanker is carrying in its hold — from the oil tanker to a port or marine installation that is within the area described in subsection (1) for the purpose of aiding the oil tanker to circumvent the prohibition in subsection (2).”; “Transport from port, etc. (5) It is prohibited for any person or any vessel to transport, by water, any crude oil or persistent oil from a port or marine installation that is within the area described in subsection (1) to an oil tanker for the purpose of aiding the oil tanker to circumvent the prohibition in subsection (3).”

⁹⁷⁰ Canada, Bill C-48 “7 (1) The master of an oil tanker that is constructed or adapted to carry more than 12 500 metric tons of oil in bulk in liquid form in its hold must report pre-arrival information to the Minister, in accordance with subsections (2) and (3), before the oil tanker moors or anchors at a port or marine installation that is within the area described in subsection 4(1).”

⁹⁷¹ Canada, Bill C-48 “8 If the Minister has reasonable grounds to believe that the master of an oil tanker has failed to comply with subsection 7(1) or (4), the Minister may direct the oil tanker not to moor or anchor at a port or marine installation that is within the area described in subsection 4(1).”

3.5. The limitations of unilateral port state actions

§ 282. The cases presented in this chapter show that port states are often willing to apply their regulatory powers outside existing international jurisdictional frameworks, exploring opportunities offered by treaties (i.e. residual jurisdiction) or even creating some which were not offered by them. Their actions have an impact on states which expect the existing framework to be altered only by consensus at the multilateral level. This dynamic relationship has acted as a “pacemaker” for the IMO’s work, challenging at moments the uniformity of that framework.⁹⁷² Unilateral jurisdiction has deserved its bad reputation precisely because it overlaps with existing rights and expectations of other states; these expectations are, in the cases this study looks at, generated by the perception that the IMO is the sole forum for the regulation of maritime affairs and that rules and standards developed there are universal in scope. However, there is no evidence that states precluded their state powers when creating the organization. Practice confirms that this has been a long-standing illusion, rarely broken. Yet, despite the increasing frequency of unilateral jurisdiction, breaking that illusion does not come as an easy option for port states.

§ 283. An example of that limitation is the regulation of tanker VOC emissions under MARPOL Annex VI, whereby the signatory port state explicitly limits its jurisdiction to the applicable standard.⁹⁷³ The opposite actually happens far more often, as the signatory state explicitly affirms that the treaty will not pre-empt its customary rights.⁹⁷⁴ This means that a right to exercise jurisdiction granted by a treaty does not by itself limit a state’s jurisdiction. It is merely a right which interplays both with other existing rights and obligations within the treaty and also with rights and obligations outside that treaty. The apposition of a clause whereby the state explicitly claims not to be foregoing its rights under international law does not appear to be necessary, but the fact that states still do that reveals the intent to object to any

⁹⁷² (Christodoulou-Varotsi, 2008, p. 27)

⁹⁷³ (Marten, 2015, p. 110)

⁹⁷⁴ AFS, Article 1(3). BWM, Article 2(3). Hong Kong, Article 1(2).

international custom to be formed on the basis of the practice carried out under that treaty that may eventually, in the future, limit that option.⁹⁷⁵

§ 284. Unilateral port state actions may also have the effect of jeopardizing the role of the IMO negotiating table. Although there is no legal limit set by the IMO as to what states may do unilaterally, unilateral jurisdiction with respect to the maritime transport sector has its own legal limits. There exists a general duty of good faith, which is always presumed, and that applies during ongoing negotiations. This duty requires the state to suspend the (full) exercise of its rights, which may include jurisdiction rights.⁹⁷⁶ It requires the state to take reasonable account of the laws of and interests of other states.⁹⁷⁷ It prescribes that negotiations are meaningful and it could be argued as a consequence that actions taking place outside that negotiating framework, such as exercises of unilateral jurisdiction, should not be equivalent to an insistence on a predetermined position.⁹⁷⁸ This duty has, however, its own margins, for negotiations are expected by some states to take place over an appropriate period.⁹⁷⁹ Some literature discusses the legal scope of obligations during and after negotiations which is relevant to understanding the scope of unilateral jurisdiction during that time.⁹⁸⁰ There is indeed, after the expression of consent to be bound but prior to the entry into force of the treaty, an international legal obligation to abstain from acting against the object and purpose of the commitment signed by the state, regardless of the entry into force of that instrument.⁹⁸¹

§ 285. It is, for example, possible to discuss it from the viewpoint of finance. The option for unilateral action is costly in terms of capabilities. Port states must invest their budgetary resources in ensuring that control officers are in sufficient numbers to tackle a high number of ships, especially when aiming at fulfilling objectives set under ambitious MoU. The more a

⁹⁷⁵ (Marten, 2015, p. 118)

⁹⁷⁶ RSA vol. XII, p311 Lanoux

⁹⁷⁷ ICJ, North Sea Fisheries Cases, par 65, p. 201

⁹⁷⁸ ICJ, North Sea Continental Shelf case, ICJ Reports, 1969, p. 47

⁹⁷⁹ Kuwait v. AMINOIL (1982)

⁹⁸⁰ (Rogoff, 1994, p. 148)

⁹⁸¹ VCLT: Article 18.

port is visited, the more inspectors it will need, but personnel numbers are not the only issue. Certain objectives may only be achieved through investment in the port itself. For example, port states which aim at enforcing applicable rules and standards on ballast water management must equip their ports with a reception facility where the ballast water may be safely discharged, the reason why some states do not ratify the MARPOL.⁹⁸² Indeed, only if ballast water reception facilities provided by a port state are utilized does Regulation B-3.6 of the BWM apply.⁹⁸³ And although there is now an international instrument in force, port states have had difficulties in keeping up with this requirement. This has been one of the reasons why this treaty took so long to be ratified and why the unilateral actions described in this chapter do not mention that possibility: it would simply be too costly for the finances of the state to incorporate that feature. In other cases, the port state has created levies to finance unilateral regulatory efforts.⁹⁸⁴

§ 286. Still on the financial side of the debate, one must consider the burden for ships; more precisely, the burdens for the private actors behind the shipping ventures that bring the ship to that port. The industry is quite vocal about its desire for uniformity and predictability. New rules and standards impose new bureaucratic burdens on managers, who must incorporate the cost of compliance in their balance sheets so that financial ends meet at the end of the journey. The customary requirement of publicity is not sufficient for that predictability to be achieved, namely because of the investment necessary to carry out changes. For those private actors, shipping would preferably be regulated by the IMO, as some sort of global maritime government responsible for levelling the playing field for all states. However, that is not how jurisdiction works and states may, despite their participation in negotiations, choose not to be bound, or to implement early, or even to prescribe different norms. A more stringent regulation makes the port less welcoming, and alternatives are immediately sought to prevent costs from rising. It is why enforcement is performed collectively through MoU: solitary unilateralism would mean losing customers for the port state, which would see the neighbouring states' ports becoming more convenient competitors. It is also why unilateral prescription happens in strong states (national or federal), or as a collective regulatory effort within an international

⁹⁸² (European Bank for Reconstruction and Development, 2013, p. 9)

⁹⁸³ IMO, MEPC 53/24/Add.1, ANNEX 5, 1.2.3.1.

⁹⁸⁴ (Ottesen, et al., 1994, p. 516)

organization, such as the EU. Were there no such consequences for the port state's national budget, unilateral action would possibly be more frequent.

§ 287. There is, in addition, the diplomatic cost of unilateralism. The impact of challenging a collective decision on a state's reputation may be quite high, and this may have an impact on whether unilateral action is an option for the port state. Unilateralism is perceived negatively mainly because of a twentieth century dogma which persists: that multilateral processes are best qualified to reach the best possible regulatory outcome. Acting unilaterally has hence always had a tainted connotation in the literature. Unilateral port state actions have been deemed unreasonable simply because of their unilateral character. One author has even argued, in relation to the legality of USA's OPA90,⁹⁸⁵ that the extent to which a regulation is consistent with the traditions of the international system is one of the factors to be considered in determining whether the exercise of jurisdiction is unreasonable and that the double hull requirement has "disregarded the justified expectations of the international community".⁹⁸⁶ Apart from the industry and some scholars, states have also opposed unilateral action. When Australia extended its PSSA to include the Torres Strait and hence required compulsory pilotage in its port entry requirements, other states, such as Singapore and the USA, were quite vocal in denouncing it as unlawful unilateral jurisdiction.⁹⁸⁷

§ 288. Some ink has been spilled on discussing the possible impact of unilateral jurisdiction on the existing 'balance of jurisdiction' and how that may represent a limitation on unilateralism.⁹⁸⁸ It is true that flag states have for long held the primacy of jurisdiction over their ships. To some extent, there is still a monopoly, at least as regards enforcement on the high seas, except under a few situations. Yet as regards the prescription of standards which make use of port powers, and the subsequent enforcement at port, the flag state has for some time been recognizing the complementary role of port states. The existence of a balance, for example as crystallized by a multilateral framework of jurisdiction, does not by itself prevent any assertion of unilateral jurisdiction. Rather, the purposes to be achieved with that balance are more relevant in a jurisdictional debate, for the balance is constantly recast by state practice.

⁹⁸⁵ *Supra* 3.4.1.1, The USA's approach: standard creation.

⁹⁸⁶ (Ayorinde, 1994, p. 94)

⁹⁸⁷ *Supra* 3.4.6, The protection of Particularly Sensitive Sea Areas: Australia's compulsory pilotage rule.

⁹⁸⁸ (Molenaar, 1998, pp. 530-532)

The balance of jurisdiction serves a purpose which is to distribute roles with an agreed objective; the attribution of roles is not of itself the end purpose of the framework. In other words, because jurisdiction will often overlap, the object and purpose of the jurisdictional entitlement provides a more useful benchmark for determining the legality of an assertion of jurisdiction, be it unilaterally or multilaterally framed. In the face of this teleological reading of the law, the assumption that an exercise of unilateral jurisdiction should be halted because of its effect on a 'jurisdictional balance' may end up unbalancing the scales of global justice.

§ 289. One frequent criticism of unilateralism in general is its imperialist taint.⁹⁸⁹ This study sought to illustrate that many states have engaged in unilateral jurisdiction to protect the environment, confirming that protecting the global environment is a mission recognized by all nations. Rather than being a cultural export, this study assumes instead that environmental concerns result from a certain level of prosperity achieved in certain societies. When the constituency has passed a level of mere survivalist concerns, more altruistic attitudes emerge which translate, at the policy level, into a more cosmopolitan state. The issue with imperialism by unilateral action is hence not so much a clash of values but rather a clash of development. It is based on this different development that states assume different obligations under the concept of common but differentiated responsibilities, which then may push states to claim unilateral jurisdiction instead of, or aside from only, striving for a multilateral redistribution of jurisdiction with regards to environmental issues. Another important consequence of unilateral jurisdiction takes place when operators under flags of developing states are impacted by the actions of developed states. This study argues that the fact that these operators are only affected by such unilateralism when its ships enter a port and benefit from the services provided therein, means that there should not be room for an argument of differentiated responsibilities.

§ 290. Another criticism is the fragmentation this causes to uniformity and predictability, especially in maritime affairs, leading to what has been called a "patchwork quilt international regime".⁹⁹⁰ With the existence of a detailed jurisdictional framework, and with the opportunities for development of the UNCLOS through the rules of reference, unilateral jurisdiction in maritime affairs is regarded as illegitimate. From an international law perspective, that is a very narrow interpretation of reality. The value attributed to uniformity is

⁹⁸⁹ (Bodansky, 2000, p. 341)

⁹⁹⁰ (Mukherjee, 2001, p. 113)

merely economical, as stakeholders prefer to know the rules of the game ahead of their investment decisions. Predictability, at least as regards port state unilateral actions, is ensured through publicity and communication to the competent international organization. A shift to unilateralism may signify that port states are finding that uniformity is less important in the face of environmental urgency. Another possible argument is that with the advent of digital communications, rules of port states are easily made available to the whole world, removing the difficulty that once existed of managing that ‘patchwork quilt’.

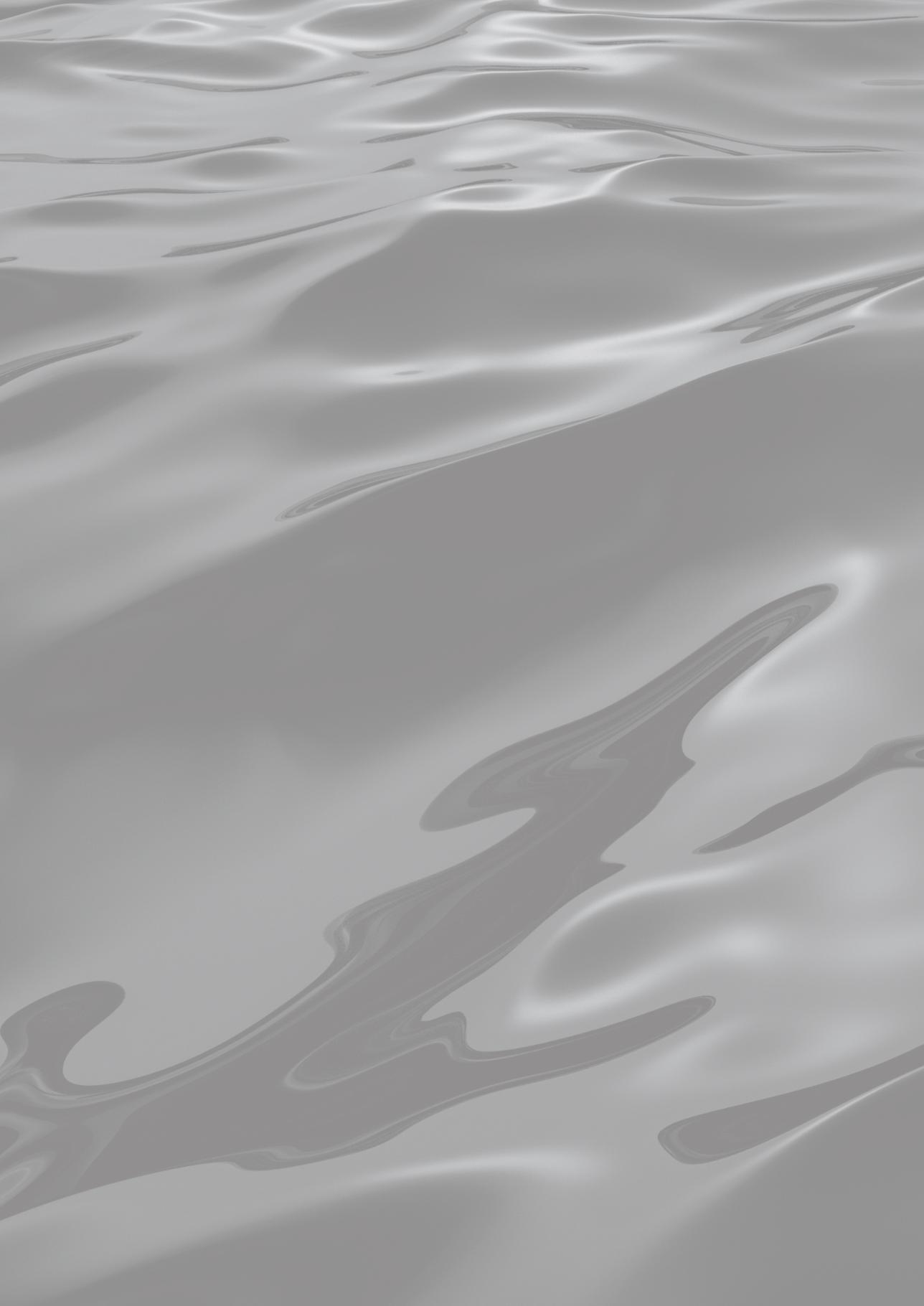
§ 291. Unilateralism also has limitations whilst all the while it offers some promises. Criticism about its shortcomings – its impact on the balance of jurisdiction with other states, normative colonialism, financial or diplomatic costs – should not be considered as a legal limit but rather as part of the reason why unilateral jurisdiction has been the exception rather than the rule in maritime affairs. The limitations of this trend should not be ignored, but the discussion should move on beyond the assumption that unilateral jurisdiction is illegal to verifying which unilateral jurisdiction is unlawful. For that matter, the international principles of jurisdiction should be analysed from the perspective of port states, for they contain the legal limits to their unilateral jurisdiction.

3.6. Interim conclusion (III)

§ 292. The practice presented in this chapter is not exhaustive concerning what states may do or have done to tackle ship-source pollution. Yet all the evidence gathered points to the fact that states have been regulating ship-source pollution through the exercise of port powers. The port state has claimed jurisdiction over a multitude of environmental issues related to shipping activities, but this does not automatically mean that it has jurisdiction over all issues that may arise. One may already conclude that the reach of port state jurisdiction is dynamic in the sense that it has expanded due to the unilateral actions which have been set out in this chapter. Those unilateral actions come in different types. Some of them are national, meaning one state applying its laws in all its ports. Some of them are a collective effort, applicable in a region of the world, such as the MoU on port state control. Some of them stem from an international organization, such as the EU. Some of them are carried out at the federal level, meaning only one part of the national territory is subject to it, such as California in the USA. Some of them are local, such as the initiative taken at the municipality of Helsingborg in Sweden. Yet all these cases reveal the capacity of using port powers to influence the behaviour of ships and shipowners before they enter the port. The unilateral nature of jurisdiction should not per se be

determining its unlawfulness because there is a space for residual jurisdiction allocated by instruments, both expressly, as the UNCLOS does on some occasions, and tacitly, as can be understood from the lack of a general prohibition on exercises of strictly unilateral jurisdiction.⁹⁹¹ The legal basis for unilateral actions that take place outside the multilateral framework but that explore that general lack of prohibition is not a given and often is a composite of multiple rights. Part II explores all the rights which a state may argue to justify its unilateral port state actions.

⁹⁹¹ PCIJ, *SS. Lotus Case*, at 19.



PART II

4. THE TERRITORIALITY OF UNILATERAL PORT STATE JURISDICTION

“Qui in territorio meo est, etiam meus subditus est”⁹⁹²

4.1. Introduction to Chapter 4

§ 293. International law has, over the last four centuries, been almost exclusively concerned with delimiting the exercise of sovereign power on a territorial basis.⁹⁹³ Indeed, the territory of the state provides a blueprint for the geographical scope of a state’s jurisdiction, as well as a limit to the exercise of its sovereign powers.⁹⁹⁴ Territory has been an essential element of the definition and delimitation of state sovereignty partly due to the stability that it represents, when compared with the relative volatility of nationality links and with the frequent change in national governments.⁹⁹⁵ Yet, territory and sovereignty, despite having been intertwined for so long, remain independent normative concepts. Whilst sovereignty is the source of the authority of the state, as recognized externally by other sovereigns and internally by the people, a state’s territory is the space where the power of the sovereign is deployed. The territory constitutes nothing more than a geographically well-defined area which, under international law, is protected from almost all interference by other sovereigns. In other words, it is appropriate to say that sovereignty excludes, in that space, other sovereignties. This exclusivity is limited by what has been consented to by the sovereign.⁹⁹⁶

§ 294. The sovereignty of the state over a ‘terra’ where it exercises its powers (‘terror’) has hence been working in international law as a sort of legal presumption, providing the state with exclusive jurisdiction over its territory.⁹⁹⁷ The respect attributed to this presumption has been

⁹⁹² (Fellmeth & Horowitz, 2009) “Whoever is in my territory is indeed my subject.”

⁹⁹³ (Jennings, 1963, p. 2)

⁹⁹⁴ (Gottmann, 1973, p. 2)

⁹⁹⁵ (de Visscher, 1957, p. 197)

⁹⁹⁶ (Sassen, 2013, p. 24)

⁹⁹⁷ Lac Lanoux Arbitration (France v Spain).

considered “an essential foundation of international relations”⁹⁹⁸ and it has been confirmed by international jurisprudence.⁹⁹⁹ The respect for the territorial integrity of states is thus a fundamental pillar of the current international legal order.¹⁰⁰⁰ The principle of “territorial integrity” has even been included in the Charter of the United Nations and represents a fundamental limit to the exercise of sovereign powers.¹⁰⁰¹ Notwithstanding that fundamental nature, and perhaps because it has always been a living concept, the legal scope of ‘territory’ is not defined by international law. This concept has been failing to provide ready-made solutions for contemporary jurisdictional conflicts.¹⁰⁰² If it is already quite a complex legal construct to claim a territorial link with what takes place within another state’s territory where exclusivity applies, then it is practically impossible – if not illogical – to consider the establishment of such a link with conduct occurring at sea, especially on the high seas. And yet, port states are often tempted to do so, employing for that purpose some sophisticated legal techniques.

§ 295. This chapter will focus on the legal relevance of links to the state’s territory to determine, justify and limit the unilateral application of port state powers over ship-source pollution. The goal of this chapter is to explain how ‘territory’ has been used, and eventually misused, by port states to justify unilateral jurisdiction over ship-source pollution which takes place, at least partially, prior to the entry of the ship into the territory of the state.

4.2. The territorial link in port state jurisdiction

§ 296. When submitting that port state jurisdiction has reached the status of an autonomous capacity to act under the international law of the sea regime, one cannot deny its strong territorial component. The port is very often part of the territory of the port state, and the port state applies its laws there without any need for a legal ‘extension’ of its sovereignty, as is the

⁹⁹⁸ ICJ *The Corfu Channel Case*, p 35:

⁹⁹⁹ PCA, *Island of Palmas Case* p. 838

¹⁰⁰⁰ UN, UNGA Resolution 2625(XXV).

¹⁰⁰¹ UN Charter, Articles 2(4) and 2(7).

¹⁰⁰² (Crawford, 2012, p. 456) (Brownlie, 2003, p. 297)

case in the territorial sea or in its airspace.¹⁰⁰³ Yet, port state jurisdiction relies on territory for far more than just regulating what ships do within its confines. Because foreign-flagged ships calling to port often cross parts of the ocean which are beyond the territory of the port state and beyond its coastal state jurisdiction, such as the high seas, and because that journey may have an impact on the territory of the port state, the exercise of port state jurisdiction represents an example of how territory is essential to understand unilateral actions. This section aims to explain how the territory of the port state is a relevant element in the legal nexus established between the port state and the foreign-flagged ship, which is under the jurisdiction of the flag state. To do that, it is necessary to divide the discussion into two separate parts: first, one must establish the existence of a normative link between the state and its own national territory; only once that link has been explained is it possible, second, to discuss the link established between a ship and the territory of the state both prior to, during and after its presence in the port.

4.2.1. The link between the port state and its national territory

§ 297. The port state has a legal relationship with the space where the port is located. This space – the ‘territory’ – is defined only by its external boundaries, as there are no requirements as to what a territory should encompass internally. It provides, in other words, a spatial framework for the state to exist with the nation.¹⁰⁰⁴

§ 298. The territory of the state does not have to conform to a requirement like the UNCLOS definition for islands, for example, which must “sustain human habitation or economic life of their own”.¹⁰⁰⁵ Hypothetically, a sovereign in a not so remote future would be able to define its – or, more accurately, ‘a’ – territory without encompassing any land: territory could come to have legally recognized existence in an artificial island or platform, a space station, cyberspace, an area of outer space, or even on the surface of another celestial body. The power exercised

¹⁰⁰³ UNCLOS, Article 2.

¹⁰⁰⁴ (Elden, 2013, p. 323)

¹⁰⁰⁵ UNCLOS, Article 21(3).

by a sovereign over “a space” is hence a more accurate description of what territory encompasses than the phrase “territorial sovereignty”.¹⁰⁰⁶

§ 299. The port is equivalent to a gateway of connection between sovereigns; the port state has the power over the gateway, but the scope of that power depends on the development of international law. This, in turn, depends on the development of practices by sovereigns which can alter the meaning attributed to territory and the expectations they have towards one another. For example, some scholars assert that sovereignty comes from the idea that territories are the property of the sovereign.¹⁰⁰⁷ These doctrines tend to focus on the nature of the power exercised over the territory by the state and not on the legal relationship established between the sovereign and that space.¹⁰⁰⁸ Under a more subject-oriented approach, the state cannot be formed without territory, and is hence unable to exercise the political power which is its essential attribute, as well as its purpose.¹⁰⁰⁹ This perspective fails to explain the case of territorial cessions or of shared territorial competences.¹⁰¹⁰ Under a patrimonial approach, the state ‘has’ a territory rather than ‘is’ the territory. That territory is the public *dominium* of the sovereign, “the object of its power and exercise of sovereignty”.¹⁰¹¹ These approaches are static in nature and insufficient to account for the complex jurisdictional realities that exist today. Some more recent approaches take into account the jurisdiction to be exercised in the territory, delimiting it through that concept.¹⁰¹² Others see the territory as the area over which the state has jurisdiction, i.e., the space within which the jurisdiction of the state is exercised.¹⁰¹³ In yet another approach, territory is neither an object nor constitutive element of the state but rather

¹⁰⁰⁶ (Milano, 2006, pp. 66-67)

¹⁰⁰⁷ (Bull, 2012, pp. 18-19)

¹⁰⁰⁸ (Strauss, 2015, p. 30)

¹⁰⁰⁹ (Rousseau, 1974, pp. 46-47)

¹⁰¹⁰ (van Kleffens, 1954, p. 96)

¹⁰¹¹ (Strauss, 2015, p. 31)

¹⁰¹² (Rousseau, 1974, p. 50)

¹⁰¹³ (Lauterpacht, 1970, p. 93)

a ‘framework’ within which the national legal order is valid and where it is exercised.¹⁰¹⁴ Another way of framing territory under this theory is to depict it as “the sphere of validity of a norm”.¹⁰¹⁵ This view emerged in international jurisprudence, where territory was defined as an external mark of a state’s sovereignty.¹⁰¹⁶ That theory fails to answer the question of where the norm is being applied: at port or whenever a qualified conduct takes place?¹⁰¹⁷ The limitations of this theory to explain the relationship of the state with areas beyond the territory, such as the high seas, led some authors to build on a novel theory.¹⁰¹⁸ It is this novel theory of territory that will be useful in arguing the legal basis for cosmopolitan unilateral port state jurisdiction. **§ 300.** This novel theory, developed in the late 20th century and strongly influenced by the efforts put forward in the UNCLOS III, is the functional theory. Territory is here linked to the independent title to exercise coercive powers recognized by international law.¹⁰¹⁹ In this sense, sovereignty is quite variable, for it depends on the purpose of that title.¹⁰²⁰ This means that, for this theory, the territory of the sovereign is simply the starting point for a power assertion, but it does not set a limit; rather, territory has a function. One of the acknowledged merits of this approach is the permissible scope it grants for new grounds of jurisdiction which go beyond a territorial/personal divide.¹⁰²¹

§ 301. The varied nature of these accounts illustrates how a theory of the state entails an account of the legal significance of territory. Sovereignty and territory are two separate concepts which interplay in various circumstances, hence giving rise to different interpretations. Even though the port state often carries out its internationally sanctioned function simply by applying international law that the flag state has consented to previously,

¹⁰¹⁴ (Lauterpacht, 1970, p. 93)

¹⁰¹⁵ (Kelsen, 1945, p. 42)

¹⁰¹⁶ PCIJ, Nationality Decrees in Tunis and Morocco, p. 106

¹⁰¹⁷ (Kelsen, 1932, p. 200)

¹⁰¹⁸ (Conforti, 1994, p. 75)

¹⁰¹⁹ (Conforti, 1994, pp. 76-77)

¹⁰²⁰ (Fowler & Bunck, 2010, p. 133)

¹⁰²¹ (Milano, 2006, p. 70)

the port state may and sometimes does go beyond that. Consequently, the relevance of the territorial link in port state jurisdiction becomes less latent and more noticeable. Indeed, it is often by setting up a territorial connection to the ship (namely its conduct) that the sovereign justifies the application of its own laws and regulations. In the case of ship-source pollution, that territorial link must be proven to exist between the ship and the port which will assert jurisdiction. The establishment of that link is hence a second, and autonomous, step in defining the applicability of a principle of territoriality.

4.2.2. *The link between the ship and the territory of the port state*

§ 302. Under international law, a sea-going ship is no longer considered a ‘floating territory’ but rather a vehicle subject to registration.¹⁰²² Before calling into the port, the ship is not, in principle, linked to the port state’s territory. However, it may eventually be linked to that territory due to prior calls, i.e., previous “territorial contacts” which are relevant for a jurisdictional analysis.¹⁰²³ The awareness of compliance with CDEM standards or of certain conduct prior to the entry into the port will depend on an exchange of information between the ship and the port state. In this way the moment of existence of that link with the port state’s territory may be understood just as being an *ex post facto* construct of the port state. This is so due to the inability of the port state to interfere, in any way, with the jurisdiction of the flag state on the high seas, at least prior to the call. The same rule would apply regarding conduct on the high seas following the call at the port, as this inability to interfere is not removed by the decision to grant entry.

§ 303. A first moment of connection exists when the ship *calls* to the port. This call can be performed from any maritime zone, even from another port. The ship contacts the port authority in question requesting permission to enter the port, as there is no right to enter the port, at least no automatically exercisable one as already discussed in Chapter 1. The rules regarding this procedure vary between port authorities, but they involve similar categories of required information: namely the name and type of ship, its IMO number, its flag of registry, its gross tonnage and other more technical details. It is also possible to find states agreeing to more

¹⁰²² Costa Rica Packet Arbitration.

¹⁰²³ (Buxbaum, 2009, p. 631)

stringent information requirements for security purposes.¹⁰²⁴ By providing this information, which consists of a pre-arrival notification form, the ship is showing a wish to enter the port. It is setting up a link with the port state's authorities found on the state's territory, aiming to enter the internal waters of the port state.

§ 304. The port state receives the information sent by the ship and decides whether to concede or to deny entry into port. Information is hence crucial at this moment.¹⁰²⁵ At this stage, there is already a legal link established between the ship and the port authority. However, is it a link with the territory itself? On the one hand, the ship is not yet within the territory. The communication is established from outside the territory and only a message with information crosses the territorial boundary. On the other hand, the information sent by the ship is processed in the territory, by the maritime administration of the port state. The fact that the maritime authority processes this information in the territory already creates a connection with international legal relevance, for there is an international legal relationship being established between a state and a ship which is under the jurisdiction of a flag state. Hence, requesting entry has a component which occurs in the territory of the port state. Although it did not start in the territory, it unquestionably produced results there. Regardless of being in breach of existing domestic or international rules, a false declaration, for example, produces a legally relevant consequence in the territory of the state from the moment when the authority processing that information is affected by it, namely by being deceived and having a false expectation about the identity or nature of that ship. The matter here is not the substance of the declaration itself (e.g. the tonnage being communicated) but rather its inaccuracy (e.g. the fact that the reported tonnage does not correspond to the actual tonnage of the ship). The moment when the declaration is eventually deemed false, i.e. the confirmation or establishment of the illegal statement, normally requires a more immediate contact with the ship which can occur at berth or shortly before the entry into port.

§ 305. A situation may arise where entry is denied either due to the information submitted or due to reasons which apply to all ships indiscriminately, such as a closure of the port or a general ban not based on individual conduct or ship features. In the first case, the information has been assessed in the territory before the request has been denied. In the second case, the

¹⁰²⁴ EU, Regulation 725/2004, preamble (7)

¹⁰²⁵ (Marten, 2016, p. 474)

communication has been received in the territory, the information was not processed, for all ships are denied entry, yet the request has been denied based on that communication.

§ 306. When entry into port has been granted following the call, the ship will, at some point on its subsequent journey, set course to the port. Despite the link established with the port state authority, the ship's entry and presence in the territorial sea still falls under the legal regime of innocent passage.¹⁰²⁶ Indeed, 'passage' encompasses "proceeding to or from internal waters or a call at such roadstead or port facility". Only when it enters the port itself – or the roadstead – is the ship fully under the port state's territorial jurisdiction.

§ 307. As soon as the ship enters the port, a new link with the territory of the state is established.¹⁰²⁷ This link provides an international legal basis for the state to use its port powers. This may go as far as preventing the ship from leaving the port. The scope of this link is debatable and the subcategories of the principle of territoriality, which will be described in Section 4.3., tend to reflect the various approaches to territory discussed previously.

§ 308. Then there is the moment when the ship leaves the port. Leaving the port usually follows a request sent by the ship to the port state authority and has normally been scheduled prior to the entry into the port or immediately after it. Because the ship is still within the territory, the request is linked to the territory of the port state and any information provided will have a territorial link. Hence, departure conditions may be imposed.¹⁰²⁸ These may relate to future conduct outside the port state's maritime zones, such as the Antarctic.¹⁰²⁹ The proposal of a "departure state jurisdiction" has for example been discussed under the Antarctic Treaty.¹⁰³⁰ Contrary to the situation of the request to enter the port, where the conditions of entry must be fulfilled prior to the entry into the port, the lack of compliance with the conditions for leaving port will occur, at least partially, within the territory. For example, if the ship leaves the port without proper authorization, the port state may establish a link with the conduct and its

¹⁰²⁶ UNCLOS, Article 17

¹⁰²⁷ (Yang, 2006, p. 83)

¹⁰²⁸ (Molenaar, 2007, p. 241)

¹⁰²⁹ (Orrego Vicuña, 2000, p. 65)

¹⁰³⁰ ATCM, Final Report of the Twenty First Antarctic Treaty Consultative Meeting, 15.

territory, even if the ship manages to leave the port and gives rise to the right to hot pursuit.¹⁰³¹ Some of this conduct may be partially non-territorial: if the ship has an intention of not complying with exit conditions but only after it has left the port, there is still a territorial component to it as the ship left the port under that condition. Although this latter example may be enforced on a future re-entry, and hence be based on the new territorial connection established at that moment, it is also correct to consider that the territorial link that existed when the ship left the port never ceased to exist.

§ 309. There are two situations that may exist after the moment of the exit of the port. In the first situation, the exit was voluntary, a part of the journey and the link which subsists corresponds to the one which was established prior to the entry but which was reconfirmed upon the moment of departure. The second situation is where the port state has banned the ship. In this case, the port state will have a link to that ship based on its prior presence in the port, denying its re-entry for a certain period. Because the ship has been banned following its presence in port, there is a territorial link in that decision and hence a link between the ship's conduct and its previous presence in the territory of the port state. This link may, however, not be direct. For example, under the MoU on port state control, the port state may ban a ship due to a link established with another signatory state. In other words, the decision would rely on previous assessments based on other territorial links. The same would occur when the port state is merely implementing a ban decided previously either in that state or in another jurisdiction. The justification for the usage of the ban is not territorial because, in the case of all those other states, there has been no presence of that ship.

§ 310. Overall, once a factual link between the sovereign, its territory and the ship has been identified by the legislator, there needs to be a jurisdictional link to justify the application of the national law to conduct which partially occurred beyond that territory. The practice that exists based on this link, both in maritime and non-maritime affairs, has given way to a principle of territoriality. That principle is a possible legal basis for unilateral jurisdiction and may be argued when port state powers are used.¹⁰³²

¹⁰³¹ IMCO, C XXXIII/14/1. Annex, Article 16.

¹⁰³² 1958 Geneva Convention on the TS and CZ, Articles 16(2), 19(2), 19(5) and 20(3).

4.3. The principle of territoriality as a basis for port state jurisdiction

§ 311. In general terms, the principle of territoriality is a preferred basis for a state to justify its jurisdiction under international law. This reflects the system of sovereignty inherited from the Treaty of Westphalia and which permeates actions in any capacity.¹⁰³³ This section aims to explain that port states may rely on a principle which entitles them to enact and enforce laws on ship-source pollution when there is a territorial link between the ship and the state. It will do so based on the actual practice, i.e., either by relying on actual justifications provided by states or by reconstructing that justification on the basis of the reasoning that underlies the assertion itself. Subsection 4.3.1 discusses the possibility of port state jurisdiction being a matter of domestic jurisdiction. Subsection 4.3.2 explains what the principle of territoriality encompasses when the focus of the legislator is upon the location where the conduct is completed and the location where the consequences of the conduct are felt. Then a discussion is held, in subsection 4.3.3 on the ‘effects doctrine’, which is often portrayed as a separate ground of jurisdiction, but which relates to both the territory and the port state’s environment. Subsection 4.3.4 introduces the concept of “extraterritorial effect”, a distinct concept from ‘extraterritorial jurisdiction’. Brief reference will be made to the presumption against extraterritoriality, which acts in favour of territoriality within some states.

4.3.1. The ‘*domaine réservé*’ as an exception to the principle of territoriality

§ 312. Before entering a discussion on what the principle of territoriality consists of and how it entitles states to act over ships contacting their ports, it is important to clarify whether states can claim that the exercise of their port state powers is nothing but a matter of domestic jurisdiction (i.e. part of the *domaine réservé* of the state).¹⁰³⁴ For if this is the case, the discussion on the principle of territoriality would arguably become unnecessary, or at least of secondary importance.

§ 313. The *domaine réservé* doctrine posits that there are certain state actions that are free from international regulation. It builds upon the fundamental right of states to prevent foreign

¹⁰³³ (Ryngaert, 2015, p. 51)

¹⁰³⁴ (Gavouneli, 2007, p. 11)

interference in their internal affairs and can be considered as an attribute of state sovereignty under international law.¹⁰³⁵ The PCIJ explained, in 1923, that this doctrine contemplates “certain matters which, though they may very closely concern the interest of more than one State, are not, in principle, regulated by international law”.¹⁰³⁶ This principle appears in the Covenant of the League of Nations¹⁰³⁷ as well as in the Charter of the United Nations.¹⁰³⁸ Despite its relevance as a cornerstone, the scope of this principle has been shrinking progressively in the twentieth century.¹⁰³⁹ This reduction has been attributed to three factors: (1) factual interdependence (i.e. globalization); (2) development of international law (both by extension and proliferation of international norms and by intensification of enforcement mechanisms); and (3) international integration.¹⁰⁴⁰

§ 314. This study submits that the shrinking of the scope of the *domaine réservé* has affected the scope of the jurisdiction of the port state, making it erroneous to claim that unilateral port state jurisdiction over ship-source pollution is a matter of domestic jurisdiction. The position defended here stems from two main arguments, a general one and a specific one, both arguments inspired by the exercise of the powers of the port state over the harm caused by ship-source pollution to both the environment in the territory, and also, more broadly, as a global concern that all states ought, as cosmopolitan actors, to strive to prevent.¹⁰⁴¹

§ 315. The first argument, i.e. the general argument, is that, despite not being the object of general treaty norms such as flag state jurisdiction (e.g. in the UNCLOS), port state jurisdiction in general is, in its many iterations, becoming increasingly a matter regulated by international law, namely in treaty instruments. It is not an exaggeration to say today that it has a capacity of its own, under which states may act unilaterally or multilaterally. Nevertheless, jurisdiction

¹⁰³⁵ (Ziegler, 2013, p. 31)

¹⁰³⁶ PCIJ, Nationality Decrees Issued in Tunis and Morocco (French Zone), page 23-24.

¹⁰³⁷ Covenant of the League of Nations: Article 15.

¹⁰³⁸ UN Charter, Article 2(7).

¹⁰³⁹ (de Visser, 1957, p. 231)

¹⁰⁴⁰ (Ziegler, 2013, pp. 9-26)

¹⁰⁴¹ Section 1.5, The port state as a cosmopolitan actor.

is never an abstract exercise. Although the port powers remain an essential attribute of state sovereignty, just like the regulation of the entry of individual persons into a territory, the occasions and substance of the requirements imposed on foreign vessels touch an international legal nerve that the entry of persons does not. This is because states have, for centuries, developed international norms on the access to port, negotiating that right and creating expectations and, arguably, rights, for other states. One only must consider the 1923 treaty,¹⁰⁴² or the 1974 draft proposed by the USSR,¹⁰⁴³ to understand how port powers are today the object of international law. This conflict between a self-perceived sovereign attribute and an international norm to which the port state itself has consented, activates the relevance of the law of jurisdiction. The powers of the port state may hence be exercised until the moment they affect other sovereign states, either directly, as in the jurisdiction of flag states over foreign vessels, or indirectly, as in the regulation of issues which are the object of international regulation. This means that, in practical terms, the *domaine réservé* powers of the port state are very narrow, for port states have been setting international procedural conditions for their use that make the law of jurisdiction relevant (such as UNCLOS Art. 218).

§ 316. The second argument, i.e. the specific argument, refers solely to the subject matter over which port states use their capacity powers. In this case, this argument is relevant to ship-source pollution; yet it could possibly apply to other cases as well such as Illegal, unreported, and unregulated (IUU) fishing. This argument relies on two distinct types of evidence. First, one must consider the participation of port states in the drafting of international legal instruments that provide port states with jurisdiction over ship-source pollution. Second, one must consider general international treaties and diplomatic documents by which the port state has been involved in the regulation of marine environmental protection, even if only as a matter of principle and with legal regulatory detail.¹⁰⁴⁴ The will of the port state to participate in the making of international instruments on the matter is evidence that the prerogative to use port powers to regulate pollution is no longer exclusive.¹⁰⁴⁵ These two pieces of evidence illustrate

¹⁰⁴² Convention and Statute on the International Regime of Maritime Ports

¹⁰⁴³ IMCO, LEG XXVI/2

¹⁰⁴⁴ (de Visscher, 1957, p. 230)

¹⁰⁴⁵ (de Visscher, 1957, p. 460)

how a port state is estopped from claiming *domaine reserve* for that matter is now the object of international law and no state may set itself in contradiction to its own previous conduct (*venire contra factum proprium non valet* principle).¹⁰⁴⁶ It is hard to consider any port state being excluded from general international legal commitments on ship-source pollution.

§ 317. A more complex discussion emerges when the port state claims that conduct which is not the object of a treaty, or where the state goes beyond a standard set multilaterally, is part of its *domaine réservé*. The legality of this action could not be simply a matter of verifying the existence of a territorial link, because the port state would here be claiming that this issue is excluded from the scope of international law and thus not a matter of stronger connection but of exclusive connection. This perspective, however, ignores the substance of the jurisdiction, the matter which is being regulated by the port state. The *domaine réservé* is, however, a “two-edged sword” for the port state. One needs to consider for a moment the perspective of the flag state of a ship entering the port. A flag state could indeed argue that an assertion of port state jurisdiction constitutes an interference with its own *domaine réservé*, namely that non-regulation is an option of the flag state and that the unilateral port state action is infringing on the flag state’s right – its domestic jurisdiction prerogative – not to impose certain rules or standards on its ships. Although this is an argument worth considering in theory, in practice this position is very fragile. A flag state relies on customary international law, as well as treaties, to justify its jurisdiction, and not on this doctrine of *domaine réservé* and flag states also participate in the drafting of instruments that create entitlements of port state jurisdiction. The applicability of this doctrine could merely relate to the right of the flag state not to have its internal mechanism of nationality attribution to ships (registration) contested as not being “genuine”.¹⁰⁴⁷ Still, this argument too has been considered to be flawed.¹⁰⁴⁸ The limitations of arguing *domaine réservé* need to be considered. Arguing for it in a case where there is concurrent jurisdiction between the port state and the flag state seems equivalent to arguing, *a contrario*, the internal economy doctrine, which has been introduced in Chapter 1.¹⁰⁴⁹

¹⁰⁴⁶ (de Visscher, 1957, p. 230)

¹⁰⁴⁷ Lauritzen v Larsen, at 584

¹⁰⁴⁸ (Gautier, 2006, p. 726)

¹⁰⁴⁹ (Lauterpacht, 1962, pp. 18-22)

§ 318. Another position that has been defended is that the doctrine of *domaine réservé* may work “as a bar to asserting extraterritorial jurisdiction of national laws and standards more generally, i.e. beyond the implementation of international norms and values”.¹⁰⁵⁰ Under this view, a state would be barred from regulating conduct taking place outside its territory if that conduct is part of a state’s reserved domain of regulation. One may thus think about whether the port state may interfere with a foreign ship, namely in the face of the internal economy doctrine which may be seen, as discussed in Chapter 1, as a practical embodiment of the *domaine réservé*. This interpretation, which this study does not embrace, would mean that the port state was prevented, under international law, from acting unilaterally. It may therefore be concluded that, even though there is a well-accepted principle of domestic jurisdiction in international law, that principle fails to provide an accurate legal ground for a port state’s jurisdiction regarding conduct of ships at sea. At most, this principle may be used as a justification for the setting of entry conditions with respect to parochial concerns, but then again that would not be an exercise of port state jurisdiction as defined in international law. It would be disconnected from the capacity to act towards the flag state and would hence be nothing more than an action undertaken outside the scope of this study. Now that a conclusion has been reached on the inapplicability of the *domaine réservé*, the principle of territoriality may be introduced and its relationship with port states established.

4.3.2. *The principle of territoriality as applicable at port*

§ 319. The link between the state and the territory may be used as a legal basis for the exercise of jurisdiction over ships. This legal basis is constructed under the “principle of territoriality”. The exercise of jurisdiction under that principle has been defined as “the competence of the state towards people living in its territory, things to be found therein and facts occurring therein”.¹⁰⁵¹ Indeed, the principle of territoriality entitles a state to exercise its powers over everything and everyone found on its territory, including ships.¹⁰⁵² There are exceptions to this

¹⁰⁵⁰ (Ziegler, 2013, p. 31)

¹⁰⁵¹ (Rousseau, 1974, p. 8) Tome III

¹⁰⁵² The *Schooner Exchange v. McFaddon* “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute”,.

principle of jurisdiction, which can be set by treaty or customary practice: for example, diplomatic embassies or high commissions of foreign states are immune from this prerogative.¹⁰⁵³ In respect to ships in the territorial sea, another exception is the right of innocent passage.¹⁰⁵⁴ Notwithstanding the exceptions that may exist, in general the territoriality of a state's laws is a principle that has been reconfirmed throughout the twentieth century as an exclusive and absolute attribute of the sovereignty of the nation.

§ 320. The principle of territoriality is also one of the oldest legal bases for states to claim criminal jurisdiction under international law, although the primacy which the principle of territoriality receives today has not been always so in the past.¹⁰⁵⁵ In the twentieth century, some would go as far as regarding it “as the most fundamental of all principles governing jurisdiction”.¹⁰⁵⁶ When referring to this principle's “dynamism and adaptability”, the literature noted that “the newer problems arising from activities considered to be generally injurious to the community of States have been handled very largely by reference to the territorial principle”.¹⁰⁵⁷ This is why the territoriality principle has been expanding its scope of application in previous centuries and also why it is used to tackle environmental harm caused to or on the high seas by ships.¹⁰⁵⁸

§ 321. The principle of territoriality consists of a test that has two dimensions. One of the dimensions, the ‘subjective’ dimension, focuses on the place where the subject which caused the wrong was located. The other dimension, the ‘objective’ dimension, the place where the wrong has occurred. Apart from these two dimensions, which are widely recognized, there is a legal doctrine which stems from the objective dimension and which focuses on the effects caused by extraterritorial conduct which are felt in the territory.

¹⁰⁵³ Vienna Convention on Diplomatic Relations, Article 22.

¹⁰⁵⁴ (Aquilina, 2014, p. 38)

¹⁰⁵⁵ (Ryngaert, 2015, p. 49)

¹⁰⁵⁶ (Bowett, 1983, p. 4)

¹⁰⁵⁷ (Bowett, 1983, p. 4)

¹⁰⁵⁸ *Infra* 4.5, The limitations of the principle of territoriality for port states.

§ 322. The subjective territoriality test requires verifying that an act has commenced within the territory of the state, even if it has been completed or consummated abroad. It is also possible that, despite the existence of a transboundary element, “an offence will, under the forum state’s laws, have been completed entirely within that state, without the need to take into account the further factor involving action abroad”.¹⁰⁵⁹ Some acts are often referred to illustrate this test: possession of explosives for use abroad, blackmail of a person abroad, conspiracy to endanger life abroad or conspiracy to defraud persons abroad. The classic example of cross-border shooting could be adapted to the context which this study looks at. A port state could claim, based on this principle, that its laws apply to a ship which will cause pollution after leaving the territory of the state. This test is thus particularly useful in cases of pollution prevention, where no actual harm has been caused but where the consequence is foreseeable following checks carried out at port.

§ 323. The objective territoriality test has been applied in the *S.S. Lotus* case, where the ship was then considered to be an extension of the state’s territory.¹⁰⁶⁰ It requires verifying that an act has been completed within the territory of the state, even if it has been commenced abroad.¹⁰⁶¹ In other words, this means that “jurisdiction is founded when any essential constituent element of a crime is consummated on state territory”.¹⁰⁶² A transliteration of this customary test is reflected, for example, in the French code of criminal procedure.¹⁰⁶³ The application of this test in maritime matters was illustrated some years ago by Canada in a case of coastal state unilateral jurisdiction.¹⁰⁶⁴ It can also be used as a ground for unilateral port state jurisdiction.¹⁰⁶⁵ The presence of the ship in internal waters would be a sufficient example of the territorial link with the state; even if the relevant conduct took place outside the port, the subsequent short presence of the ship at port is often brought into play in a way that

¹⁰⁵⁹ (Jennings & Watts, 1996, p. 460)

¹⁰⁶⁰ (Greenwald, 1979)

¹⁰⁶¹ PCIJ, *SS Lotus*, p. 19-23

¹⁰⁶² (Brownlie, 2003, p. 299); (Crawford, 2012, p. 458)

¹⁰⁶³ France, Code de procédure pénale, Article 693. “Est réputée commise sur le territoire de la République toute infraction dont un acte caractérisant un de ses éléments constitutifs a été accompli en France.”

¹⁰⁶⁴ (M’Gonigle, 1976, p. 191)

¹⁰⁶⁵ (Jennings, 1957, p. 159)

encompasses prior conduct. Port states may indeed use legal drafting techniques to partly territorialize (i.e. establish a territorial link) an otherwise exclusively extraterritorial act to be able to pass this jurisdictional test and ensure compatibility with customary international law.

§ 324. This test does not lead to the assumption that jurisdiction exists when there are legal consequences of the action – and not part of the action itself as it would be in the case of the objective dimension – occurring in the territory. That is more properly defined by a subcategory of the territoriality principle: the ‘effects doctrine’.

4.3.3. *The ‘effects’ doctrine as applicable to environmental matters*

§ 325. There is no consensus among scholars on whether the ‘effects test’, also called “long-arm jurisdiction”,¹⁰⁶⁶ constitutes an autonomous jurisdictional principle.¹⁰⁶⁷ The same level of doubt about its nature is expressed by state authorities.¹⁰⁶⁸ Some authors would argue that this is nothing but an application of the objective territoriality principle.¹⁰⁶⁹ Yet, the effects test, or doctrine, is a frequent presence in any document which attempts to systematize the international law of jurisdiction.¹⁰⁷⁰ This study submits that it should not be autonomous from the principle of territoriality as it is a doctrinal construct based on the link existing between the state and a territory.¹⁰⁷¹ This is so because an ‘effect’ must be felt within the territory with which the state has a link, and this requires a jurisdictional test which requires a connection with, or at least a consideration of, that territory.¹⁰⁷² Yet, despite its potential for opening up

¹⁰⁶⁶ (Lowenfeld, 1994, p. 30)

¹⁰⁶⁷ (Krisch, 2014, pp. 12-13)

¹⁰⁶⁸ USA, Brief Of The European Commission On Behalf Of The European Union As Amicus Curiae In Support Of Neither Party [Kiobel case] “Although the territorial principle has been extended by some forums to include extraterritorial activity ‘having or intended to have substantial effect within the state’s territory,’ id. at § 402 cmt. d, the validity of this so-called effects doctrine as a matter of international law is subject to substantial controversy.”

¹⁰⁶⁹ (Jennings & Watts, 1996, p. 475)

¹⁰⁷⁰ UN, A/61/10, p. 522.

¹⁰⁷¹ (Scott, 2014, p. 92)

¹⁰⁷² USA, *US v Aluminum co of America* “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends”

the applicability of the principle of territoriality to many cases which would not fulfil the subjective and objective dimensions of the test, it is exercised by states very conservatively.¹⁰⁷³

§ 326. The ‘effects’ doctrine goes beyond the test of objective territoriality in the sense that, when relying on it, the state is looking at “conduct outside its territory that has or is intended to have substantial effect within its territory”.¹⁰⁷⁴ The most complex operation to be made in this regard is to work out precisely what ‘effect within a territory’ might encompass. Some have suggested restricting the right to argue this doctrine to states which feel the ‘primary effect’ of a conduct.¹⁰⁷⁵ However, nothing appears to prevent a broader interpretation if an effect in the territory can be proved. There is also a need to consider the question of the intent, which has progressively been omitted as a requirement.¹⁰⁷⁶ What is more, this doctrine has mostly been used in competition law cases,¹⁰⁷⁷ which, since they focus on economic ‘effects’,¹⁰⁷⁸ have little bearing on environmental issues.¹⁰⁷⁹ Nevertheless, the rare environmental issues raised do provide some evidence as to how the port state can claim its applicability.¹⁰⁸⁰ The literature has also already explained that Article 218 of UNCLOS does not correspond to a case of the “effects” doctrine, making this doctrine relevant from a unilateral jurisdiction standpoint.¹⁰⁸¹

§ 327. The interpretation given by the WTO AB in the context of the permissibility of trade restrictions is a useful example for port states to consider in connection with the application of

¹⁰⁷³ (McDorman, 1997, p. 321)

¹⁰⁷⁴ (American Law Institute, 1987) Section 402.

¹⁰⁷⁵ (Akehurst, 1972, p. 154).

¹⁰⁷⁶ (Parrish, 2008, p. 1475)

¹⁰⁷⁷ (Dabbah, 2010, p. 426)

¹⁰⁷⁸ (Dabbah, 2010, p. 423)

¹⁰⁷⁹ (Ringbom, 2008, p. 365)

¹⁰⁸⁰ (Nash, 2010, p. 1013)

¹⁰⁸¹ (Molenaar, 2007, p. 237)

this principle from an international law perspective.¹⁰⁸² Although this does not have a direct impact on the usage of port state powers per se, it may provide theoretical backing for port states which claim to have jurisdiction over ship-source pollution that occurred partially beyond their territorial boundary.¹⁰⁸³ The WTO AB stated, in its 1998 dispute settlement procedure concerning a US measure which banned imports of shrimps and shrimp products harvested by vessels of foreign nations (where the exporting country had not been certified by US authorities as using methods not leading to the incidental killing of sea turtles above certain levels), that legislation that would violate Article III (National Treatment on Internal Taxation and Regulation) may survive under Article XX (General Exceptions), but only when there is ‘a nexus’ between the jurisdiction of the country whose legislation is at issue and the environmental resources sought to be protected.¹⁰⁸⁴ In that case the nexus between the US and “migratory and endangered marine populations involved” was established by the AB as being sufficient.¹⁰⁸⁵ The AB explicitly decided “to pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g)”, limiting this finding to the case.¹⁰⁸⁶ Be that as it may, this nexus requirement appears to follow the same sort of jurisdictional reasoning which has allowed for the development of an “effects doctrine” in some national legal orders.¹⁰⁸⁷ The AB looked at the environmental harm’s consequences, as felt by the claiming state, to justify the application of a nation’s environmental laws over conduct occurring beyond that nation’s territory, excluding it from being considered an exercise of extraterritorial jurisdiction, or an abuse of the principle of territoriality. The award demonstrated not only how

¹⁰⁸² (Nash, 2010, p. 1013)

¹⁰⁸³ (Okidi, 1978, p. 143)

¹⁰⁸⁴ (Nash, 2010, p. 1013)

¹⁰⁸⁵ WTO Appellate Body Repertory of Reports and Awards 1995-2010 at 406: “We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, *there is a sufficient nexus between the migratory and endangered marine populations involved and the United States* for purposes of Article XX(g)” (emphasis added).

¹⁰⁸⁶ United States - Import Prohibition of Certain Shrimp and Shrimp Products - AB-1998-4 - Report of the Appellate Body para. 133

¹⁰⁸⁷ (Sands & Peel, 2012, p. 195)

the effects doctrine permeates international law, but also how the rationale behind the development of the effects doctrine can be adapted to environmental law issues. Nonetheless, it is worth highlighting that international law more generally does not offer any guidance as to how to identify the requirements necessary for establishing a link between an act and a state and so prove the existence of an effect.¹⁰⁸⁸

§ 328. Within the EC/EU, in 1976 there was a case of environmental harm caused to a river which had consequences in the territory of a state downstream: this was considered by the ECJ to constitute “effects jurisdiction”.¹⁰⁸⁹ There have been other instances where the effects jurisdiction doctrine might have been used in the EC. In the *Dyestuffs* case (1972) and in the *Wood Pulp* case (1988) the same reasoning was followed, but, in the second case, the court rejected it itself.¹⁰⁹⁰ However, the EU has so far never used this doctrine as a sole argument for justifying its jurisdiction.¹⁰⁹¹

§ 329. In the instance of ship-source pollution, the harm resulting from ship-source pollution can be felt within a territory despite the conduct which caused that pollution not having occurred there. This has provided a reason for claiming coastal state jurisdiction over conduct in maritime zones (high seas) adjacent to its own, namely because of the impact on residents.¹⁰⁹² Harm felt ‘within’ the territory would encompass not only effects felt within the landmass of the state in question, but also to effects felt in the internal waters or territorial sea of that state, which result from extraterritorial conduct. It is also arguable that effects felt within the continental shelf might fall within this principle, although imagining a practical example of this is less easy.

§ 330. The application of this doctrine has already received some criticism. It has been said that it fails to prevent conflict of laws.¹⁰⁹³ It has also been said that “the test is difficult to apply

¹⁰⁸⁸ (Dabbah, 2010, p. 426)

¹⁰⁸⁹ ECJ, C-21/76

¹⁰⁹⁰ (Breitbart, 1989, p. 168) (Breitbart, 1989, p. 164)

¹⁰⁹¹ (Scott, 2014, p. 95)

¹⁰⁹² (McDougal & Burke, 1962, p. 849)”

¹⁰⁹³ (Parrish, 2008, p. 1479)

and lacks doctrinal clarity”.¹⁰⁹⁴ It is seen as not protecting the interests of individuals (although it is not explained why the doctrine should reflect that concern).¹⁰⁹⁵ It has been submitted that it destroys territorial restraints to the application of national law.¹⁰⁹⁶ The effects test has also been described as “the linchpin to understanding the geographic reach of domestic laws”.¹⁰⁹⁷ The major issue regarding pollution is that it is extremely difficult, if not impossible, to determine with precision the link between the action and the consequence. Nevertheless, this has not discouraged states, in particular the US, from building on this doctrine to justify unilateral port state jurisdiction.¹⁰⁹⁸

§ 331. Overall, the effects test is today a doctrinal construction for territorial jurisdiction with contested recognition. It has solid foundations in the practice of the US and, to a lesser degree, with practices within the EC and EU. The AB has absorbed the reasoning into its decisions and has provided states with the possibility of claiming that it has international backing. This means that port states could, in theory, construct their jurisdiction based on this broader interpretation of the principle of territoriality when acting unilaterally.

4.3.4. *The ‘extraterritorial effects’ of port state territoriality-based jurisdiction*

§ 332. Assertions of jurisdiction based on the principle of territoriality may sometimes generate what has already been termed ‘extraterritorial effects’.¹⁰⁹⁹ This phrase has now often been used with reference not only to environmental regulations but also rather more generally.¹¹⁰⁰ Sometimes, it is generally referring to “extraterritoriality”.¹¹⁰¹ In its strictest sense,

¹⁰⁹⁴ (Parrish, 2008, p. 1480)

¹⁰⁹⁵ (Parrish, 2008, p. 1482)

¹⁰⁹⁶ (Parrish, 2008, p. 1482)

¹⁰⁹⁷ (Parrish, 2008, p. 1458)

¹⁰⁹⁸ *Infra* 4.4.2.1, The approach of the US to the principle of territoriality.

¹⁰⁹⁹ (Dover & Frosini, 2012)

¹¹⁰⁰ (Scott, 2014, p. 1356)

¹¹⁰¹ (Kopela, 2016, p. 106)

extraterritorial effects are those effects that assertions of jurisdiction based on the principle of territoriality (either by prescription, enforcement or adjudication) generate on people and their property outside the territory of the regulating state. The setting of CDEM standards to be controlled at port could not be an exercise of extra-territorial jurisdiction despite the existence of such effects.¹¹⁰² This extraterritorial effect is purportedly not the objective of a regulation or, at the very least, not the main objective. Rather, it is indirect, in the sense of a non-legal dissuasion or an influence associated with the object of the regulation. The identification of extraterritorial effects ends up being a matter of the sensitivity of the sovereign state which is affected by them, at least for such effects to become legally relevant. It would be naïve to consider that legislators do not envisage generating certain extraterritorial effects when enacting laws.¹¹⁰³

§ 333. This study proposes that ‘extraterritorial effects’ should not always be considered mere by-products of the principle of territoriality, but rather as actual regulatory impacts that require proper legal grounds. This is especially so when the legislator has the intention of making such effects or has at least acknowledged such effects during the law-making procedure. Nonetheless, the lack of any such intention should not mean that the port state does not have to establish that legal basis when defending its prescription, should a conflict of laws case arise.

§ 334. When port states exercise prescriptive jurisdiction, the normative impact of such prescription over foreign ships (and arguably over the actors involved in its navigation, from the flag state administration to the shipbuilder and the crew members) before they enter the port state’s territory are extraterritorial effects. Because the right to use such powers aimed at regulating extraterritorial conduct cannot be based solely on the principle of territoriality, states often frame, through legislative techniques, the usage of these powers by focusing on components of conduct which occur within the territory.¹¹⁰⁴ The extraterritorial effect of a prescription consist, in this circumstance, on the norms that ship owners and ship operators may feel compelled to comply with even before calling to a port; although the exercise of the port power will often be based on the principle of territoriality due to the enforcement

¹¹⁰² (Churchill, 2016, pp. 454-455)

¹¹⁰³ (Ringbom, 2008, p. 340)

¹¹⁰⁴ *Infra*, 4.4, The principle of territoriality in the practice of port states.

circumstance, that would not cover the prescription of norms with regard to conduct prior to the establishment of that territorial connection.¹¹⁰⁵

§ 335. These effects are fundamentally different from prescriptions of extraterritorial jurisdiction, i.e. jurisdiction which is exercised based on the principles of extraterritoriality. This is due to two main reasons: 1) extraterritorial effects result from jurisdiction exercised under the principle of territoriality; and 2) whilst exercises of extraterritorial jurisdiction aim at regulating extraterritorial conduct, extraterritorial effects are not the explicit aim of the exercise of jurisdiction under the principle of territoriality but, rather, predictable or unpredictable consequences of the regulation. These two points are important to an understanding of why this study proposes that such effects may not fit the principle of territoriality and, in some cases, require a legal basis of their own.

§ 336. The first point is that the main difference between extraterritorial effects and extraterritorial jurisdiction is that whilst the latter regulates conduct beyond the territory of the state, the former is a mere by-product of the regulation of territorial conduct. The principle of territoriality could not provide a basis for extraterritorial jurisdiction, i.e. for the regulation of conduct outside the territory. Hence, the extraterritorial effects resulting from its enactment are non-jurisdictional (in the sense that they do not generate jurisdictional overlap) consequences of the application of the territoriality principle. In the case of port state jurisdiction, the exercise of port powers always generates some sort of extraterritorial effect because foreign ships must consider the enforcement and prescriptions applicable before entering that territory, adapting conduct and compliance with CDEM if necessary. It is a matter of circumstance whether those extraterritorial effects are still an acceptable part of the action undertaken under the principle of territoriality or whether they extrapolate the scope of application of that principle.

§ 337. The second reason why extraterritorial effects differ from extraterritorial jurisdiction is the stated intent of the state at the moment of prescription. The object and purpose of the territoriality-based assertion must not be to regulate what occurs outside a territory. The extraterritorial effects are just those unforeseen or incidental consequences that are not the object of the regulation. The question that follows is whether these effects are an intrinsic part of the regulation, as they are often unavoidable. Regarding access to the territory – and more

¹¹⁰⁵ *Supra*, 4.2.2, The link between the ship and the territory of the port state.

particularly to the market – these effects are often a means of deploying power beyond the border. This causes some contention, for example when considering CDEM standards (which are ‘static’) that are controlled at port.¹¹⁰⁶ When the intent is not to regulate the condition of the ship when it is beyond the territory, but rather the territorial consequences of a ship calling to a port in a substandard condition, this can hardly be considered an extraterritorial assertion of jurisdiction, at least under the principles which permit extraterritoriality under international law.¹¹⁰⁷ One question that remains unanswered is what the legislator should do, if anything, to mitigate these effects. Yet it may also be the case that the port state does wish to ensure higher standards of seaworthiness, knowing that those standards will have a global impact. That global impact is not only an extraterritorial effect of the exercise of port powers but also, to a certain extent, an exercise of prescriptive extraterritorial jurisdiction. And when this is the case, the principle of territoriality provides answers only to the limit of the effects that may be felt within the territory from the noncompliance with that standard.

§ 338. The international legal consequences of extraterritorial effects in the strictest sense – i.e. that are unintended/unforeseeable consequences of the exercise of port powers – are less than clear. One state may claim that port state extraterritoriality is tampering with its rights and demand to know the legal basis for that interference. From this perspective, extraterritoriality will consist of one of two situations: 1) an illegitimate use (or abuse) of the principle of territoriality; or 2) an exercise of extraterritorial jurisdiction which competes with, for example, the jurisdiction of the flag state over its ships at sea. This would be tantamount to turning those effects into (part of) a jurisdictional act when they are not always so.

§ 339. It might be a promising idea to require the legislator to consider all such legislative effects, for they could impair the freedom of another legislator. However, if such effects are not considered an exercise of extraterritorial jurisdiction, it is difficult to imagine whether there is a breach of a due regard obligation. Unless it can be demonstrated that the extraterritorial effect is the object and purpose of a territoriality-based exercise of jurisdiction, or that such effects result in restricting a right of the other state (the flag state, for example), then extraterritorial effects have no legal bearing in international law and are just a product of meta-

¹¹⁰⁶ *Supra*, 2.3.2.3, The exceptional regime for ‘CDEM’ standards.

¹¹⁰⁷ *Infra*, 5, The extraterritoriality of unilateral port state jurisdiction.

legal analysis (e.g. financial costs of retrofitting ships with SCR or implications for global trade).¹¹⁰⁸ In the same way that the port state should be able to prove a legal basis for such effects if confronted by a flag state, the flag state should be able to point to the regulatory impact being exercised by the port state which affects its rights as a flag state. That legal bearing will only occur if foreign protest emerges which, in the cases that will be discussed, has been if not actually non-existent, at least very discreet.

§ 340. Overall, this subsection has shown how unilateral actions taken under the principle of territoriality may have extraterritorial effects, i.e. display some extraterritoriality. The existence of rules to prevent extraterritoriality beyond the principles of extraterritorial jurisdiction is, however, a matter of domestic jurisdiction and not a matter of international law. One of such rules is the ‘presumption against extraterritoriality’ which may be looked at from the perspective of the port state.

4.4. The principle of territoriality in the practice of port states

§ 341. Port states have resorted to the principle of territoriality as a legal basis to justify their unilateral jurisdiction. They have relied on this principle at two distinct moments in time. One moment is when that principle gives a ground for the enforcement of international standards over foreign ships whose flag state has not signed the instrument being applied, and for taking recourse to powers not attributed by the applicable instruments.¹¹⁰⁹ The other moment is when the principle serves to justify the prescription of national standards, as well as the subsequent enforcement of such prescriptions.¹¹¹⁰ Some have said that the principle of nationality, which grants states the capacity to act as a flag state, must yield when ships have entered foreign waters and, by analogy, a port.¹¹¹¹ More recently, the sufficiency of the principle of territoriality to justify jurisdiction at port was said to be presumed.¹¹¹² This sufficiency of the principle of

¹¹⁰⁸ (Scott Brown & Savage, 1996, p. 168)

¹¹⁰⁹ *Infra* 4.4.1, The principle of territoriality as a basis for port state enforcement.

¹¹¹⁰ *Infra* 4.4.2, The principle of territoriality as a basis for port state prescription.

¹¹¹¹ (Greenwald, 1979, p. 752)

¹¹¹² (Ecorys Nederland BV / NILOS, 2009, p. 15)

territoriality does exist unless states provide otherwise.¹¹¹³ The primacy of the principle of territoriality at port has long existed under the so-called ‘peace of the port doctrine’. However, this doctrine did not make it into the UNCLOS and it is arguable whether, in light of current international law developments, it is by now a dead letter. At the very least, one may say that this doctrine only applies when states have expressly agreed to limit their port state jurisdiction towards one another.¹¹¹⁴ In light of this, the following subsections explain how the principle of territoriality has been relied upon in cases where port states tackle ship-source pollution, and how this illustrates both a distinct understanding of the relation between sovereignty and territory and of the scope of application of this particular principle.

4.4.1. *The principle of territoriality as a basis for port state enforcement*

§ 342. This section starts by looking at the MoU on port state control and the related state practice, searching for signs of the presence of the principle of territoriality. The argument is that territoriality is present but does not fully explain the rights exercised under these administrative agreements. The discussion will then move to the practice of the USCG port state control programme, which does not belong to any of these MoU. The example of the ROC port state control system will be mentioned but not considered in any depth. The argument defended here is that recourse to the principle of territoriality for enforcement under port state control programmes may be the result of a collective strategy which is still unilateral in relation to the global standard, or individual unilateral action.

4.4.1.1. *The principle of territoriality in the MoU on port state control*

§ 343. It has already been submitted that unilateral enforcement jurisdiction is more than mere implementation through powers provided under a multilateral framework, and it occurs when a port state is applying norms of those treaties on ships whose flag states have not signed (or ratified) them.¹¹¹⁵ The powers, or rather the way they are used (such as targeted inspections, which rely, inter alia, on lists of records of compliance by flag states rather than on the usual

¹¹¹³ (Molenaar, 2007, p. 228)

¹¹¹⁴ (Sohn, et al., 2010, p. 192)

¹¹¹⁵ *Supra* 3.2, The unilateral approach to international law.

“clear grounds”), have been shown as having no ground in the existing multilateral framework. This begs the question of whether consent was given to such exercise of jurisdiction by the flag state or whether its source lies somewhere else.

§ 344. The enforcement powers of the port state are partly territorial in nature. They are linked to the presence (past, present, or future) of the ship in the port, and the connection established with the state’s territory by the presence in that port. However, in those MoU the principle of jurisdiction that could justify the control activity is not referred to explicitly. The MoU on PSC do not use the term ‘territory’, nor do they articulate any dimension of the principle of territoriality, to justify the ground upon which their participant states can exercise those control powers. The sole explicit reference to “territory” exists in some MoU to clarify the scope of application of the memorandum itself.¹¹¹⁶ It is hence necessary to analyse each enforcement power used to verify whether and how territoriality plays a role.

§ 345. The targeting of inspections at port under MoU relies on information concerning the compliance rate per flag state, as produced by the secretariat of the specific Memorandum, with the cooperation of maritime authorities. The port state does not rely here on a subjective analysis of “clear grounds” – as it could, outside this collective framework – but rather on the likelihood of a ship not following international standards (regardless of consent of the flag state to them). A territorial link is thus established based on the voluntary entrance of the ship into the port. One relevant factor for this link is the fact that the ship has been previously inspected (and so in this way present in the port of another state of that Memorandum), arguably establishing with that other state a territorial connection basis for that inspection. It is submitted that the presence at port is not sufficient to explain the discrimination between ships at the moment of inspection. This is more of an issue at the prescriptive level.¹¹¹⁷ Also, it is not clear whether the territoriality link of one port state may be used as a basis for the enforcement by another state: this transaction of rights would be tantamount to vicarious jurisdiction and it is not likely that port states are actively acting based on that reasoning.

§ 346. In the case of detention, port states use this enforcement power as a reaction to deficiencies encountered during inspections and to prevent a ship from leaving the port until they have been remedied. This consists of an exit condition, based on the presence of the ship

¹¹¹⁶ Abuja Memorandum of Understanding (1.8); Tokyo Memorandum of Understanding (1.2); Caribbean Memorandum of Understanding (Footnote 1:); Viña del Mar Memorandum of Understanding (1.5.).

¹¹¹⁷ *Infra*, 4.4.2, The principle of territoriality as a basis for port state prescription.

in the territory and its compliance with international standards that the port state has adopted into its national laws. Again, the principle of territoriality applies, as the ground for the application of the law is the presence of the ship in port and that the non-compliance has occurred (or been acknowledged, at least) within the territory of the state.

§ 347. In the case of bans, the relevance of the principle of territoriality is twofold. First, there is the decision of the ban, which enforces a certain standard within the territory, i.e., while the ship is within the territory. Second, the ban decision is enforced through denials of entry. Here the territorial link is more diffuse. The port state is preventing access to its territory to a ship that is outside its territory. The ship cannot be prevented from entering the port except as the result of a coastal enforcement and so the principle of territoriality reveals itself as less relevant here. It is even less relevant when the denial of entry is the result of a decision taken by another port state, as the territoriality of the prescription that justifies such enforcement cannot even be disputed. The difference here is that at least one memorandum of understanding provides for banning because of non-compliance with a multilateral standard, regardless of the nationality of the ship and that consequently the banned ship will be refused access to any port in the region of the memorandum for a minimum period. The refusal of access will become applicable as soon as the ship leaves the port or anchorage. Other examples can be helpful to picture the existence of those enforcement powers in national law. These cases have been selected from within the EU and the Paris Memorandum of Understanding, which have themselves dealt with oil spills. The French “Transport Code” applies to ships calling at a French port.¹¹¹⁸ It provides that these ships may be subject to port state control.¹¹¹⁹ As a possible consequence of this control, foreign ships can be subject to denial of entry.¹¹²⁰ In certain cases, French law determines expulsion.¹¹²¹ When the ship represents a risk for “the marine environment and its connected interests”, its departure can be forbidden or adjourned.¹¹²² In Spain, the law provides

¹¹¹⁸ France, Code des Transports, Article L5241-1.

¹¹¹⁹ France, Code des Transports, Article L5241-4-3

¹¹²⁰ France, Code des Transports, Article L5241-4-5

¹¹²¹ France, Code des Transports, Article L5241-4-6

¹¹²² France, Code des Transports, Article L5241-5

for detention of foreign ships.¹¹²³ It also extends its competence over foreign ships.¹¹²⁴ A right to inspect is explicitly given by the legislator to the maritime administration.¹¹²⁵ The same occurs with detention.¹¹²⁶ These two cases show that the MoU are a pool of pre-existing powers aimed at attaining shared objectives. The territorial presence of the ship is a given and appears to be a sufficient basis.

§ 348. Outside the scope of the Paris Memorandum of Understanding, one can, for example, consider the laws of Mexico, which is a part of the Acuerdo Viña del Mar. Foreign ships fall under the jurisdiction of those laws when they “execute any activity in the national territory”.¹¹²⁷ This formula illustrates the link that justifies the jurisdiction. The territorial connection triggers the ability of the port state to exercise control powers to ensure compliance with international instruments to which Mexico is party (it should be noted that there is no reference to the consent of the flag state being subject to the rules and standards therein).

§ 349. The MoU seem therefore to rely on a trigger that all constituent port states individually recognize as sufficient to trump the powers of the flag state. However, it is also possible to find state practice outside the realm of the MoU on port state control. The US provides an example of that unilateral enforcement, as does Pakistan which is not party to the Indian Ocean Memorandum of Understanding;¹¹²⁸ the ROC which is not party to the Tokyo Memorandum of Understanding;¹¹²⁹ and Nicaragua which is not party to the Acuerdo Viña del Mar.¹¹³⁰

4.4.1.2. *The principle of territoriality in the USCG port state control programme*

¹¹²³ Spain, Ley 14/2014.

¹¹²⁴ Spain, Ley 14/2014, Artículo 12. Jurisdicción sobre buques extranjeros.

¹¹²⁵ Spain, Ley 14/2014, Artículo 104.

¹¹²⁶ Spain, Ley 14/2014, Artículo 105.

¹¹²⁷ Mexico, Reglamento de Inspección de Seguridad Marítima, Artículo 5.

¹¹²⁸ Pakistan Maritime Security Agency Act, 1994.

¹¹²⁹ *Supra*, 3.3.4, The Taiwanese port state control system.

¹¹³⁰ Nicaragua, Lei General Puertos Nicaragua.

§ 350. The USCG PSC programme is unique in the sense that the US is a state which is not party to the UNCLOS but that still enforces rules and standards of international conventions on ship-source pollution without the backing of a memorandum of understanding on port state control.¹¹³¹ The principle of territoriality has been the object of contention in particular USCG actions and this study focuses on one in particular: the implementation of MARPOL Annex I requirements on the oil record book (ORB).¹¹³² What follows is an account of the jurisprudence which ensued from port state control enforcement actions by the USCG.

§ 351. An instance where the principle of territoriality played an important role in this unilateral enforcement was the Royal Caribbean Cruises cases.¹¹³³ One key finding of those cases is that the protection of the flag state ceases to exist when an act of pollution occurs within the territory of the state.¹¹³⁴ Another conclusion is that extraterritorial acts can produce an effect within the territory, and that this justifies the enforcement jurisdiction by the port state.¹¹³⁵ The court at times clearly separated the moment in time when the ORB was presented at port from the moment when it was filled in, or should have been filled in, i.e. at sea. This is the reason why the court concluded that Article 228(1) of UNCLOS was inapplicable to this situation.¹¹³⁶

§ 352. One interesting aspect of this jurisprudence is that the courts deliberately considered Article 218 of UNCLOS to check whether there was any interference with the jurisdiction of the flag state (in this case Liberia) or with the jurisdiction of the affected coastal state. By considering this to be a “domestic port violation”, it appears that the court had in mind the

¹¹³¹ (United States Coast Guard, 2018)

¹¹³² (Roach & Smith, 2012, p. 629)

¹¹³³ (Goldberg, 2000, pp. 72-73)

¹¹³⁴ Royal Caribbean Cruises 1997: UNITED STATES of America, Plaintiff, v. ROYAL CARIBBEAN CRUISES, LTD., Henry Ericksen and Svenn Rikard Roeymo, Defendants. (F. Supp. 2d 155 (D.P.R. 1997)):

¹¹³⁵ U.S. v. ROYAL CARIBBEAN CRUISES, LTD., (S.D.Fla. 1998)

¹¹³⁶ U.S. v. ROYAL CARIBBEAN CRUISES, LTD., (S.D.Fla. 1998)

territoriality of the enforcement to exclude the application of Article 218 to the case and hence not engage with the imprecision of its phrase “in respect of any discharge”.¹¹³⁷

§ 353. The same logic also emerged in other cases. In the appeal in the *Ionia Management* case (2009),¹¹³⁸ the defendant argued that the court had erred in considering extraterritorial information.¹¹³⁹ The decision of the court illustrated how the port state can use the principle of territoriality to trump the rule of the flag state, even regarding conduct that occurred prior to the entry into the territory. It was shown that the port state has the right to verify compliance of the ORB. The US courts assumed that, because of the connection between the ship and the territory, namely the port, the USCG had jurisdiction over what constituted an extraterritorial incident of ship-source pollution. It is possible to say that by enforcing this MARPOL discharge standard, the USCG used the negative effects that a false declaration causes to the maritime authority (a crime in itself) to unilaterally use the right provided under UNCLOS Article 218, to which it is not bound by treaty, but which may be representative of a customary law.

§ 354. These cases show how enforcement jurisdiction to implement international treaties at ports of the US is construed upon the presence of the vessel at port and assumes the territoriality link as sufficient, even if indirectly linked to the moment when the breach occurred and so could eventually be termed extraterritorial.¹¹⁴⁰ Some literature has considered that this enforcement does not violate international law because the treaty itself addresses non-domestic conduct.¹¹⁴¹ What the US practice shows is how thin the line is between the justifying principle for unilateral enforcement of international rules and standards and the actual content of those rules and standards. The principle of territoriality at the enforcement level allows the state to have access to the ship at port, but it is not able to grant any international legal ground for the port state to consider any element of the ship’s conduct beyond the confines of the territory. However, the control officer enforcing at port will consider extra-territorial conduct for enacting the enforcement measures, be they fines, detention or ban. For that matter, the

¹¹³⁷ U.S. v. ROYAL CARIBBEAN CRUISES, LTD., (S.D.Fla. 1998)

¹¹³⁸ US v. *Ionia Management SA*, 555 F. 3d 303 - Court of Appeals, 2nd Circuit 2009

¹¹³⁹ In this Appeal, the defendant argued, inter alia, “that the District Court erred in sentencing by not properly grouping the crimes, relying on disputed facts, and considering extraterritorial information”.

¹¹⁴⁰ *Royal Caribbean*, 11 F. Supp. 2d at 1364.

¹¹⁴¹ (Statman, 2013, pp. 277-278)

enforcement is assumed under the territorial applicability of the treaty, and the unilateral nature of the power used is a matter of discretion. Nonetheless, this effort to ensure compliance through more stringent enforcement already reveals a somewhat cosmopolitan attitude towards international law. If this cosmopolitanism already exists as an element of the justification provided by the state, then the territorial application of treaty law does not fully explain the disparity in enforcement strategies.

§ 355. The next subsection looks at those cases where this principle was used to go beyond mere enforcement aimed at implementation of treaty rules and standards. Rather, the principle of territoriality may serve to justify the enforcement and the prescription of novel rules and standards devised by the port state itself. This is fundamentally challenging as although the enforcement will always rely on a tenuous territorial connection, part of the effect of the prescription is totally disconnected from it. Therefore, although port state powers are used, the enforcement method will not be sufficient to justify the jurisdiction over the conduct of the ship when it takes place.

4.4.2. The principle of territoriality as a basis for port state prescription

§ 356. One main submission of this study is that port state jurisdiction comprises more than the set of port powers resorted to for enforcing international standards. It is undeniable that the inherent territoriality of port state executive action is often put forward as a sufficient argument to justify the recourse to port state powers to enforce applicable international rules and standards, and which consist already of cases of unilateral port state jurisdiction because they apply to ships despite the lack of consent of the flag state. This subsection discusses the cases of unilateral jurisdiction where the principle of territoriality was argued to justify port state prescriptions. Closer attention will again be given to the US and to the EU, but other practices have been identified which may illustrate alternative views on territory and territoriality. The practice referred in the following subsections has already been introduced in Chapter 3, and this discussion will focus not on the history and the interaction with the applicable multilateral framework but rather on how particular norms on port state powers relate to the principle of territoriality.

4.4.2.1. The approach of the US to the principle of territoriality

§ 357. The main argument put forward here is that the US is more inclined to use the effects doctrine than its transatlantic neighbours (or at least the EU). This reveals a higher level of

respect for the notion of territory under the object theory discussed *supra*.¹¹⁴² Although the discussion will focus on cases related to ship-source pollution, one may consider the validity of the conclusions for an overall understanding of the approach to jurisdiction of the US.

§ 358. Before extraterritorial pollution was an issue of national concern, and hence a matter of control at port, the US was already relying on the idea of primacy of the territoriality principle to justify its jurisdiction over ships in port.¹¹⁴³ Twelve years after the *Schooner Exchange v. McFaddon* (1812) award, another decision, the *Appollon* (1824), made it clear that consideration of extraterritorial conduct was only allowed under the principle of nationality.¹¹⁴⁴ More explicit reference to the legal nature of the jurisdiction exercised at port emerged in *Wildenhus* (1876), combined with the understanding that “when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding”.¹¹⁴⁵ The idea that the port is territory subject to jurisdiction was proposed in *Cunard v Mellon* (1923).¹¹⁴⁶ What has changed since then, and in particular since the emergence of environmental concerns related to shipping, is that the prescription of rules and standards does not merely relate to the conduct of the ship at port but also to extraterritorial conduct, namely pollution incidents.

§ 359. Instances which deal with ship-source pollution bring developments which are relevant to understanding the role which the principle of territoriality plays in the definition of the scope of application of US environmental laws and regulations. There are three instances of unilateral port state jurisdiction that can be analysed in that regard, as introduced in Chapter 3: the first on construction standards to prevent oil spills within the OPA90; the second on ballast water management systems which remain an aspect of US marine protection policy; and the third on sulphur emissions from ships enacted in the state of California.

¹¹⁴² *Supra* 4.2.1, The link between the port state and its national territory.

¹¹⁴³ USA, *Exchange v McFaddon*

¹¹⁴⁴ USA, *The Appollon*

¹¹⁴⁵ USA, *Wildenhus*. USA, *Diekelman*.

¹¹⁴⁶ USA, *Cunard SS Co v. Mellon*.

§ 360. The first instance of unilateral prescriptive jurisdiction is the accelerated timetable for the phasing in of double-hulled ships, which was part of OPA 90.¹¹⁴⁷ The control at port was here focused on a static requirement and not on conduct that could occur exclusively beyond the territory. As this is a CDEM standard, there is a limited extraterritorial effect.¹¹⁴⁸ Despite, as argued, extraterritorial effects not being a matter of jurisdictional discussion, it is worth considering whether there is here an exercise of extraterritorial jurisdiction hidden behind the territorial application of this CDEM standard. By discouraging single hull ships from embarking on a journey towards US ports because of their construction, the port state affects the management of a shipping company's fleet or a construction yard's plans and revenues. Yet, because the law is not banning those ships from navigating outside waters under US jurisdiction, it would be hard to say that there is more than a legislative externality here. What is more, if one focuses on the environmental concern of preventing oil spills, it should be noticed that OPA 90's double hull rule may well have pushed substandard ships to other areas of the world, putting them at higher risk, because ships would not be scrapped just because they cannot be used in one region. The requirement for ships to be fitted with a double hull prior to the entry into the port can be argued under some dimensions of the principle of territoriality. Either it is a matter of objective territoriality, as the conduct was initiated prior to the entry of the ship into the port but concluded therein, or it is a matter of application of the 'effects' doctrine, whereby the focus of the legislator is on the risk which the ship poses to the territory while still being outside the port. Indeed, the Act states that this requirement "will provide as substantial protection to the environment" as is economically feasible.¹¹⁴⁹ However, it does not state whether there is a limit to the environment to be protected, i.e., whether this refers to protection of the world's environment in general or to the protection of the environment within the territory of the US. The focus may be put either on the wrong being committed before entering the port, at the moment of the call but not at the construction stage (for the Act does not seem to aim at banning the construction of single hull ships abroad), or on the wrong being committed in the port, by establishing a territorial connection with the

¹¹⁴⁷ *Supra* 3.4.1.1, The USA's approach: standard creation.

¹¹⁴⁸ USA, *US v. Locke* (2000).

¹¹⁴⁹ USA, OPA 90, p. 267

authority of the state, even if the ship continues to be single-hulled after departing the port. Nevertheless, it is submitted that the justifications may overlap and correspond, partly, to both a parochial interest and a cosmopolitan one. Arguing territoriality would thus be possible, but it would fail to cover the regulatory impact of the measure beyond its territorial confines. Some have tried to interpret this right in the light of UNCLOS, searching for room within the residual jurisdiction opportunities under the treaty for such a CDEM standard.¹¹⁵⁰ Nevertheless, this assertion is described as “extraterritorial” when in fact it is partially territorial (due to the territorial link established by the presence in the port) and partially extraterritorial (as part of the conduct occurred on the high seas, prior to any territorial link being established with the port state).

§ 361. Another instance concerns whether the principle of territoriality provides a legal ground for exercising port state jurisdiction over a ship’s ballast water management systems. The US requires the ballast water treatment system to be type-approved by the USCG, a rule which is controlled at port and which is never equivalent to those rules set by the IMO. The USCG regulations require the same discharge standards as the IMO regulations, but they also contain some additional requirements regarding a ship’s operational procedures that are unilateral.¹¹⁵¹ Furthermore, the State of California is developing its own standards, which are even stricter than those of the USCG.¹¹⁵² The US is the only country which requires type-approved systems that satisfy a standard other than that of the IMO. This possibility has already motivated some jurisprudence. In 2005 Michigan amended its Natural Resources and Environmental Protection Act, to require all vessels “engaging in port operations in” Michigan to obtain a permit from the state.¹¹⁵³ In 2008 the court found that Michigan’s special requirements, applicable to ships

¹¹⁵⁰ (Molenaar, 2007, p. 233)

¹¹⁵¹ These are 1) Clean ballast tanks regularly to remove sediments, 2) Rinse anchors and chains when the anchor is retrieved, 3) Remove fouling from the hull, piping and tanks on a regular basis, 4) Maintain a BWM Plan that includes the above in addition to BWM (there is no requirement that the BWM Plan must be approved), 5) Maintain records of ballast and fouling management, 6) Submit a report form 24 hours before calling at a US port. Apart from these, the EPA and VGP (Vessel General Permit) has additional requirements for periodical sampling as specified: 1) Calibration of sensors, 2) Sampling of biological indicators and 3) Sampling of residual biocides. The records of the periodical sampling must be retained on board for 3 years.

¹¹⁵² USA, State of California, Assembly Bill No. 1312.

¹¹⁵³ USA, State of Michigan, Permit Application for Port Operations and Ballast Water Discharge.

declaring that they had no ballast on board, are not a violation of federal law.¹¹⁵⁴ The USCG reiterated its position that special standards within the US are not a violation of national laws.¹¹⁵⁵ Despite their relevance when foreign-flagged ships are involved, the international legal principles of jurisdiction were never argued in these cases. The US legislation points out that the reporting requirements exist for each vessel “bound for ports or places of the United States regardless of whether a vessel operated outside of the Exclusive Economic Zone”.¹¹⁵⁶ This illustrates how the US legislature considers conduct occurring outside its territory by reference to the destination (and hence a future territorial connection). The fact, for example, that it requires a ballast water report “at least 24 hours” in advance of the entry into port illustrates how the conduct of a vessel prior to entering the territory is affected by the Act. Also, the rule that requires storage of records of the vessel’s ballasting practices on board for a period of three years affects the conduct of the ship’s crew regarding that information. The port state is using the territorial link established at the call moment, where information must be provided, to exercise its jurisdiction over extraterritorial conduct. However, the focus always appears to be on the protection of “its waters” rather than on a general environmental protection (as is the case in the European Union).¹¹⁵⁷ What is more complex than the consideration of high seas conduct through the request of information is that, at times, the conduct required occurs in another state’s territory. Regarding ballasting reporting requirements, for example, there is a rule stating that “[i]f a vessel’s voyage is less than 24 hours, then the report shall be submitted upon departure from the last port of call prior to arrival”.¹¹⁵⁸ This means that the port state is exercising jurisdiction over an area where another state has territorial jurisdiction, requiring the ship to comply with this requirement therein. Yet, that extraterritorial conduct is only targeted where it threatens the waters of the US, again in an exercise of the principle of territoriality as interpreted under the ‘effects’ doctrine. Another possible interpretation is to consider this as a

¹¹⁵⁴ USA, *Fednav, Ltd. v. Chester*, 547 F.3d 607 (6th Cir. 2008)

¹¹⁵⁵ USA, Federal Register. Ballast Water Management for Vessels Entering the Great Lakes That Declare No Ballast Onboard.

¹¹⁵⁶ USA, 33 CFR §151.2060 (a)

¹¹⁵⁷ *Infra*, 4.4.2.2, The approach of the EU to the principle of territoriality.

¹¹⁵⁸ USA, California State Lands Commission, Marine Invasive Species Program Annual Vessel Reporting Form.

case of objective territoriality: the ship's illicit extraterritorial conduct is concluded territorially as it is its presence in port which brings that requirement into play. One could not find extraterritorial effects here apart from the need to install specific ballast water management systems, adequate for US ports, something which also affects US ships.

§ 362. The third instance concerns atmospheric pollution, more precisely the vessel fuel rules (VFR) adopted by the California Air Resources Board (CARB).¹¹⁵⁹ This initiative is not the first attempt by California to control what was described in 1979 as “extraterritorial polluters at sea”.¹¹⁶⁰ Back then, the justification was the effects upon the territory or, as they were called, “the domestic effects”.¹¹⁶¹ In the most recent cases, the ‘effects’ doctrine has, to some extent, also been resorted to again.¹¹⁶² The new rules mandate that vessel operators “use cleaner marine fuels in diesel and diesel-electric engines, main propulsion engines, and auxiliary boilers on vessels operating within twenty-four nautical miles off the California coastline”.¹¹⁶³ This would apply to ocean-going vessels that call on California ports. Once again, this CARB regulation was brought to the attention of the judiciary, first the California Eastern District Court and then the 9th Circuit Court of Appeals. This time, however, the courts upheld the CARB regulation by confirming the district court’s decision.¹¹⁶⁴ At the trial court level, the US District Court (E.D. California) argued that “[u]nder the so-called ‘effects test’, California may enact *reasonable regulations* to monitor and control conduct that substantially *affects its territory*” (emphasis added).¹¹⁶⁵ When addressing “whether that police power, in the form of environmental regulation, can also extend seaward between three and twenty-four nautical miles” under such a test, the court noted that under United States law, “when state regulations

¹¹⁵⁹ *Supra*, 3.4.2.2, The California Ocean-Going Vessel Fuel Regulation.

¹¹⁶⁰ (Greenwald, 1979, p. 747)

¹¹⁶¹ (Greenwald, 1979, p. 749)

¹¹⁶² *Supra* 4.3.3, The ‘effects’ doctrine as applicable to environmental matters.

¹¹⁶³ USA, California Code of Regulations, Title 13 § 2299.2(a). USA California Code of Regulations, Title 17, § 93118.2(a).

¹¹⁶⁴ USA, *Pacific Merchant Shipping Ass'n v. Goldstene*, 639 F.3d 1154 (9th Cir. 2011).

¹¹⁶⁵ USA, *Pacific Merchant Shipping Association v. Goldstene* (2009), 639 F.3d 1154 (9th Cir. 2011). at 17

have extraterritorial effects, the propriety of such regulations are judged against the effects test”, adding that such a test is indeed “designed to ensure that regulations with applicability beyond the geographic confines of a particular state are reasonable and directed at conduct that has a substantial effect in the state”.¹¹⁶⁶ Pacific Merchant Shipping Association (PMSA) was then asked to demonstrate that the measures adopted by the CARB did not address the environmental problem at stake when the court said that the PMSA “has also failed to adequately rebut California’s argument (...) that the Vessel Fuel Rules target pollution substantially affecting the State and are reasonable in light of the demonstrable effects linked to that pollution” and that it “has therefore not shown that the Vessel Fuel Rules, even to the extent they apply on an extraterritorial basis, are unlawful”.¹¹⁶⁷ This led the court to reach the conclusion that “[b]ecause the effects on California of ocean-going vessel pollution are equally plain, Plaintiff cannot establish any illegality on the basis of the effects test, and the Rules withstand summary judgment on that basis”.¹¹⁶⁸ Some careful attention should be given to a footnote in this judgment, which highlights the relevance of international law. The District Court stated that: “Although Plaintiff argues that state jurisdiction over activities affecting California could extend on an *ad infinitum* basis if, for example, a determination was made that polluting practices in Shanghai Harbor were found to affect California, the pervasive effect here, as well as the dramatic benefits to be gained from mandating ocean-going fuel requirements for vessels entering California ports, make resort to such an attenuated analogy misguided”.¹¹⁶⁹ This had actually been the object of concern at the law-making level, illustrating how the concern for emissions would hardly fit a territorial approach to jurisdiction.¹¹⁷⁰ In other words, the court here accepted the reasonability of an effects test-based measure because of its geographical scope of application. In this case the effects are not so much the refitting of engines (although in some cases that may be necessary) but preparing the

¹¹⁶⁶ USA, *Pacific Merchant Shipping Association v. Goldstene* (2009), 639 F.3d 1154 (9th Cir. 2011). at 18

¹¹⁶⁷ USA, *Pacific Merchant Shipping Association v. Goldstene* (2009), 639 F.3d 1154 (9th Cir. 2011). at 17

¹¹⁶⁸ USA, *Pacific Merchant Shipping Association v. Goldstene* (2009), 639 F.3d 1154 (9th Cir. 2011). at 19

¹¹⁶⁹ USA, *Pacific Merchant Shipping Association v. Goldstene* (2009), 639 F.3d 1154 (9th Cir. 2011). at 20 footnote 8

¹¹⁷⁰ USA, Senate hearing, “Examine Port Pollution And The Need For Additional Controls On Large Ships”.

ship with special fuel for that part of the journey, a requirement which the flag state is not bound to under the MARPOL.

§ 363. A comparison can already be made between the three instances. Because ships must be fitted to use different types of fuels, to be equipped with a type-approved ballast water treatment system or to have a double hull, there is a static requirement at stake here.¹¹⁷¹ This means that, for example in the case of the CARB VFR, the measure has some effects beyond those twenty-four nautical miles, even though it merely aims at controlling pollution in that delimited area.¹¹⁷² The ship calling to Californian ports must consider not only the fuel it may use in that zone, prior to the entry into the port, but also it must be fitted for and equipped with the fuel prior to the entry into that zone.¹¹⁷³ The control of the port authority will focus on a conduct which requires some degree of preparation which is not universal, as the IMO has not sanctioned such restriction, but which is national. In 2011, the American judiciary again discussed the principle of territoriality applicable to this matter and confirmed the approach based on the application of an effects test.¹¹⁷⁴ The court concurred with the idea that “[t]he express purpose of the regulations (...) is to reduce air pollutants affecting the State of California by requiring ocean-going vessels to use cleaner marine fuels”.¹¹⁷⁵ The principle was argued to have been fulfilled precisely because of this connection between the regulations and the effects of the fuel in the territory of California, in particular on its population’s health.¹¹⁷⁶ The court acknowledged that “emissions are likely to be blown on-shore from beyond the geographical area actually covered by the Vessel Fuel Rules”.¹¹⁷⁷ When applying the effects test to the VFR, the Appeals Court concluded that “there are genuine issues of material fact with respect to both the effects of the fuel use governed by California’s regulations on *the health*

¹¹⁷¹ *Supra*, 2.3.2.3, The exceptional regime for ‘CDEM’ standards.

¹¹⁷² (Easterbrooks, 2011, p. 687)

¹¹⁷³ (Murray, 2014, p. 32)

¹¹⁷⁴ USA, *Pacific Merchant Shipping Association v Goldstene* (2011) 639 F3d 1154 at 4097-4098

¹¹⁷⁵ USA, *Pacific Merchant Shipping v Goldstene* 2009 at 3.

¹¹⁷⁶ USA, *Pacific Merchant Shipping v Goldstene* 2009 at 5

¹¹⁷⁷ USA, *Pacific Merchant Shipping Association v Goldstene* (2011) 639 F3d 1154 at 4071

and well-being of the state's residents as well as the actual impact of these regulations on maritime and foreign commerce” (emphasis added).¹¹⁷⁸ Yet, this was not the only link between the Californian ports and the ships outside the territory of the United States: “[e]specially in light of the sheer amount and importance of the shipping that goes through California (particularly Southern California), the regulated conduct here clearly has a close connection with the state, even apart from the environmental impact of this conduct”.¹¹⁷⁹ The court appears to have focused on two dimensions of the same principle: the territorial effects of the pollution and the close connection of the ship’s conduct to the territory as the pollution is felt by coastal residents. Indeed, the court appears to assume that the port state has the right to regulate shipping beyond the impact of this conduct. This may be referring to a territorial link, namely the connection established by ships to the port (and hence a full-fledged attribution of regulatory rights even beyond the territory because of this link) or maybe another link, not based on the principle of territoriality but on trade interests and on economic security.¹¹⁸⁰ It has been pointed out that “Goldstene is now law”.¹¹⁸¹ This ‘law’ is relying on the principle of territoriality as a legal ground to justify the right to regulate extraterritorial conduct, by focusing on the effects caused in the territory of a conduct which does not take place in the territory. The dimension explored results in an extension of the spatial scope of the application of criminal law. This approach by the US courts did not go uncriticised. It was pointed out that the effects test in this case “did more than legitimize a basis for legislative action; it undermined the presumption of territoriality”, in particular because “courts have employed the effects test to apply federal laws extraterritorially, despite the lack of evidence that Congress intended this reach”.¹¹⁸² All this illustrates how this approach to territoriality is not universally accepted in the literature or within the US despite the absence of protests by flag states. What is also not universally accepted is whether there is an extraterritorial effect from a lawful interpretation of the principle of territoriality or whether there is indeed an exercise of extraterritorial jurisdiction, something which would require a different right to exercise jurisdiction.

¹¹⁷⁸ USA, *Pacific Merchant Shipping Association v Goldstene* (2011) 639 F3d 1154 at 4085

¹¹⁷⁹ USA, *Pacific Merchant Shipping Association v Goldstene* (2011) 639 F3d 1154 at 4098-99

¹¹⁸⁰ *Infra* 5.4.2, The principle of security in cases of ship-source pollution.

¹¹⁸¹ (Murray, 2014, p. 1)

¹¹⁸² (Parrish, 2008, p. 1474)

Considering all this, what this study submits is that although the principle of territoriality helps the port state to construct a legal basis, in this case by considering effects in the territory, it fails to cover the regulatory effect of the norm outside the territory. As ships must comply with a certain rule throughout the journey to access the port without any impediment, the law of the US in fact applies on the high seas. The final presence of the ship at port is hence not sufficient to explain the prescriptive rights of the port state, which are not provided by MARPOL.

§ 364. Overall, the practice shows that the US approach to the principle of territoriality in its exercises of port state jurisdiction over extraterritorial ship-source pollution often relies on the ‘effects’ doctrine. Yet, it also builds on the objective dimension of this principle to somehow territorialize an offence, making it a territorial act. This reveals a peculiar understanding of the link between the port state and its territory. Accordingly, the US interprets the scope of its jurisdiction in a way that does not rely on considering extraterritorial conduct itself, but rather brings the territorial consequences of extraterritorial conduct to the forefront of its legislative and judicial techniques. There does not seem to be an explicit intent to regulate the extraterritorial conduct but merely to regulate whatever has a territorial link to the territory. This point is reinforced by the existing presumption against extraterritoriality, which has been argued in case law generally to point to the legislation’s internal illegality.¹¹⁸³ The ‘effects’ doctrine also serves to enlarge the spatial scope of territoriality, but only to a point where there is still the possibility to verify whether the link between the conduct prior to the call to the port and the territory exists. From an international law perspective, this approach raises the point of whether all states consider the effect caused in the territory as sufficiently relevant to justify actions which have some degree of extraterritoriality. Through these strategies, the US is not only broadening the scope of the principle but also providing to some international treaties the implementation strategies they would require for their objectives to be attained. In that sense, it is possible to say that the US is making a functionally oriented use of the principle of territoriality without referring to the object and purpose of the treaties being implemented, but with the support that a hegemonic principle of territoriality deserves today.

4.4.2.2. *The approach of the EU to the principle of territoriality*

¹¹⁸³ *Supra* 4.3.4, The ‘extraterritorial effects’ of port state territoriality.

§ 365. Despite encompassing very diverse legal traditions, the EU has been developing its own approach to the application of the principle of territoriality, with the European Commission playing the role of a regulator with autonomy from its member states. The EU's approach regarding ship-source pollution is relatively more recent than the US approach, but it is increasingly frequent and more diversified.

§ 366. When regulating unilaterally on ship hull construction requirements, the EU has relied on the principle of territoriality, namely the presence of a single hull ship within the port of call. The EC imposed a denial of entry into port that accelerated the IMO timetable, at least for ships aiming to establish a connection with the territory of EU member states.¹¹⁸⁴ This measure was taken in order to “enhance safety and prevent pollution in maritime transport”.¹¹⁸⁵ The concern was that shipping accidents would result in “pollution of its coast-lines and harm to its fauna and flora”.¹¹⁸⁶ This coastline includes parts of the state's territory and hence the pollution would exist not only where the incident had occurred but also in parts of the territory affected by it. It was then made explicit that the decision to impose an additional entry condition not set by the IMO was a measure “in the Community's interest”.¹¹⁸⁷ When it was decided to further accelerate the IMO's timetable, one reason was that “the rapidly increasing volume of oil transported through the Baltic Sea poses a threat to the marine environment, especially during the winter season”.¹¹⁸⁸ This was framed not as a measure to regulate the usage of double hulls at sea but rather to forbid the entrance of single-hulled vessels into the port. Despite falling under the category of CDEM, the fact is that this measure was drafted not as a condition of navigation in the territorial sea but rather as a condition of access to the port.¹¹⁸⁹ Hence it would not violate Article 21(2), because it is a “particular requirement” which the port state can

¹¹⁸⁴ EU, Regulation 417/2002

¹¹⁸⁵ EU, Regulation 417/2002, Preamble, (1).

¹¹⁸⁶ EU, Regulation 417/2002, Preamble, (2).

¹¹⁸⁷ EU, Regulation 417/2002, Preamble, (10).

¹¹⁸⁸ EU, Regulation 1726/2003, Preamble, (11).

¹¹⁸⁹ UNCLOS, Article 11.

impose under UNCLOS Article 211(3).¹¹⁹⁰ Yet considering that there were already generally accepted rules and standards on this matter, an exercise of unilateral jurisdiction on that same matter alters the rules applicable extraterritorially. This is especially unavoidable in the case of CDEM, as was the case of this entry condition.¹¹⁹¹ So the EU may have relied on the principle of territoriality here because that principle provided sufficient argument for claiming the unavoidability of regulating extraterritorial conduct as well. Some commentators have inclusively considered the EU's action with respect to double hulls as based on the effects doctrine, although it is arguable that this reasoning would only make sense in the case of an accident due to non-compliance.¹¹⁹²

§ 367. Another example concerns the control of discharges occurring outside the Exclusive Economic Zone (EEZ).¹¹⁹³ It has been argued that the EU has unilaterally extended the scope of powers of the port state by considering conduct occurring on the high seas as relevant, regardless of the consent of the flag state to the relevant MARPOL annexes.¹¹⁹⁴ As seen *supra*, the UNCLOS provides a right for port states to enforce international rules and standards on discharges occurring beyond the EEZ.¹¹⁹⁵ Also, MARPOL has discharge standards which focus on deliberate discharges of polluting substances into the sea.¹¹⁹⁶ Nonetheless, the EU confirmed that it was extending the scope of its powers by referring to conduct on the high seas, or whenever it “has caused or is likely to cause pollution in its territory”.¹¹⁹⁷ That approach was opposed in the *Intertanko* case, which raised questions with a bearing on international law.¹¹⁹⁸

¹¹⁹⁰ UNCLOS, Article 211(3).

¹¹⁹¹ (Ringbom, 2008, p. 340)

¹¹⁹² (Rehbinder, 2012, p. 135)

¹¹⁹³ EU, Directive 2005/35/EC, Article 3(2)

¹¹⁹⁴ (Ringbom, 2008, p. 337)

¹¹⁹⁵ *Supra* 2.3.2.4, Port state enforcement in the UNCLOS.

¹¹⁹⁶ MARPOL, Article 2(3)(a).

¹¹⁹⁷ EU, Council Framework Decision 2005/667/JHA, Article 7

¹¹⁹⁸ ECJ, Case C-308/06.

The opinion of the Advocate-General discussed the legality of imposing more stringent standards on high seas navigation.¹¹⁹⁹ The questions on the legal basis under international law focused exclusively on the compliance with the UNCLOS and not on the territoriality of the application of the European Directive. However, the consideration of the territory of member states, namely the impact caused by such discharges, is a component of this assertion. The reference, in the Directive on ship-source pollution to “has caused or is likely to cause pollution in its territory” deserves some attention. First, this is clearly not just an extraterritorial effect of the prescription. The EU authorities consider that conduct as the reason why states have jurisdiction to give extraterritorial application to this standard when the ship is present at port. So, even though the enforcement will be linked with the presence of the ship in the territory, the prescription is based on the impacts of the pollution. Second, this extraterritorial conduct must produce effects within the territory. This may be a case of application of the ‘effects’ doctrine. In the case of the ‘effects’ caused by the pollution, there is not only consideration of actual harm but also of risk. This raises some questions about whether the principle is accurately interpreted, as the legislator is here claiming the right to assess the ship’s conduct not based on actual harm but based on other indicators which have not necessarily been provided by the flag state. Whilst the actual extraterritorial harm occurs partially within the territory, and hence provides a link between the ship and the territory of the port state, the existence of a risk of such harm provides a rather more tenuous territorial link, for risks themselves produce no consequence within the territory. It could be argued that port state authorities may be acting preventively to control ships, but the scope of the principle of territoriality would not cover this. It could be argued, like it has been with respect to the double hulls, that this is motivated by the effects doctrine. This would allow a preventive approach to a consequence that affects the territory of the state.

§ 368. In the case of the sulphur content of marine fuels of ships visiting EU ports, the relevance of territoriality in this matter has two dimensions.¹²⁰⁰ One of the dimensions, the usage of heavy fuels at berth, is less relevant to this study as it does not focus on what the ship does prior to the entry into the port, except as a matter of effect as it requires the ship to be prepared to

¹¹⁹⁹ ECJ, Case C-308/06, Opinion Of Advocate General Kokott, par 68-70.

¹²⁰⁰ *Supra*, 3.4.2.1, The EU Sulphur Content of Marine Fuels Directive.

comply by having certain fuels and engines.¹²⁰¹ The other dimension concerns the usage of such fuels prior to the entry into port, namely by considering consumption rates at sea. When regulating this issue, the EU refers to “Member States’ territory, territorial seas and exclusive economic zones or pollution control zones” instead of just to territory.¹²⁰² This enlarges the spatial scope of the application of EU law to areas where functional jurisdiction is exercised by these states when acting under their capacity as coastal states. What is more, it started to explicitly target “all vessels of all flags, including vessels whose journey began outside the Community”.¹²⁰³ Interestingly, this Article referred to pollution control zones “falling within SOx Emission Control Areas” whilst other Articles exclude this reference, leaving perhaps a broader scope of action for member states. What is also relevant for understanding territoriality in the EU practice is that the member states have, under this Directive, to “take all necessary measures” to ensure that marine fuels are not used in “their territorial seas, exclusive economic zones and pollution control zones” by passenger ships operating on regular services “to or from any Community port” (arguably including restrictions to access to port).¹²⁰⁴ This confirms the idea that the journey of the ship is considered even when part of it occurred outside that area and that port states will resort to this principle individually, extending the scope of the EU’s regulation through the extension of their own right to argue for that principle. Another dimension relates to the information given to port authorities by ships regarding their fuel consumption. The EU member states may require the correct completion of ships’ logbooks, including fuel-changeover operations, “as a condition of ships’ entry into Community ports”.¹²⁰⁵ Here the wrongful act is arguably not the conduct at sea but the inaccurate report of that activity once the ship is within the territory. However, this report relates to conduct prior to the entry into the territory, at a moment where the link with the port state had yet to be established. The territorial link established at port serves to regulate the ship’s conduct, in this case through an entry condition. Because the impact of the extraterritorial emissions – i.e. the environmental impact on the high seas – is not argued, nor demonstrated, the principle of

¹²⁰¹ EU, Directive 1999/32/EC, Article 1(2) “use within the territory of the Member States”.

¹²⁰² EU, Directive 2005/33/EC Article 1(2).

¹²⁰³ EU, Directive 2005/33/EC, Article 4.

¹²⁰⁴ EU, Directive 2005/33/EC, Article 4a, 4.

¹²⁰⁵ EU, Directive 2005/33/EC, Article 4a, 5.

territoriality is relied upon merely to justify the existence of a link between the ship and the port at the moment of the entry (i.e., after the call), and not between the ship and the port prior to the entry, due to the emissions themselves. As there already exists a multilateral standard for SOx emissions, this unilateral prescription of the EU cannot escape being considered as extraterritorial. It is not by mere accident that the emissions at sea are regulated, as that is the aim of the multilaterally set standard which the EU wishes to see upgraded. What is different is that here there is a need for the regulator to justify the link to the territory of such emissions, namely to justify trumping a flag state's prescriptive rights. Here the call to the port appears as enough of a territorial connection, but, again, because there is a standard on this issue, it is unconvincing to argue merely the existence of extraterritorial effects. Indeed, the unilateral jurisdiction (to the part of the emissions which occurs prior to the port state having any multilateral entitlement to regulate extraterritorial conduct) remains unjustified. Also, it would be difficult for the port state to argue that there is a link between the conduct of emitting SOx on the high seas, sometimes in other latitudes of the globe, and an environmental consequence of that event taking place within the territory.

§ 369. The relevance of territoriality in EU unilateralism was more obvious when addressing biofouling. In the regulation on biocidal products which applied briefly to ships, the principle of territoriality may also have played some role in the unintended ban introduced by the first version of the regulation on biocidal products.¹²⁰⁶ Recourse to the principle of territoriality is shown by the phrase “use within the territory of a Member State or part of it” of biocidal products.¹²⁰⁷ This illustrates how the port state would, in practice, be imposing a standard on the usage of antifouling systems on ships entering its territory (hence the reference to “part of it”), which would in turn have an impact on conduct beyond that territory, as it is a static requirement. This happens because an antifouling system can only be controlled in the port. However, that component of the ship's hull affects the environment throughout the journey of the ship; it may liberate particles in any maritime zone including on the high seas. Yet when restricting the entry of the ship, considering the ship to be a ‘product’, the EU created an entry condition based on the impact which that product has on the market. The link created by the presence of the ship in the port could justify the right to exercise control at port, preventing the

¹²⁰⁶ EU, Regulation 528/2012

¹²⁰⁷ EU, Regulation 528/2012, Preamble (28)

entry of that ship, simply by considering it to be a product which illegally enters the territory of the member state. However, this principle fails to justify the normative effect that the regulation causes beyond the territory where the ship is not only a market product but also an object of flag state jurisdiction. The port state would have had to argue that a ship with that biocidal product in place, when navigating outside its territory, created an environmental harm in the territory of the port state. In the event, this was not needed as the Regulation was soon updated so as to exclude ships.¹²⁰⁸

§ 370. The case of the EU's financial instrument on ship-recycling is another situation where the link to the territory was argued as a basis for unilateral jurisdiction.¹²⁰⁹ The literature has already highlighted the exaggerated interpretation of this principle here, as it causes regulatory effects not only extraterritorial in the sense of beyond the territory but actually within the recycling state's territory, thereby exporting environmental requirements to third states.¹²¹⁰ However, this is quite controversial, as it relies on an extensive interpretation of its member states' powers.¹²¹¹ This is not the case where EU-flagged ships are involved, but rather when other ships are the object of this Regulation. This has indeed been perceived as giving preferential treatment to some flag states, namely those which would abide by the EU standards.¹²¹² The question that matters here is whether the port state has jurisdiction under the principle of territoriality to impose such conditions, especially if a restrictive interpretation is given to Article 15 of the Hong Kong Convention.¹²¹³ This case is markedly different from all of the previous ones as it relates to conduct of the ship after its presence in port, sometimes years after that. Another question relates to the creation of a levy. The existence of a territorial link between the ship which is the object of the exercise of jurisdiction and the state is less than evident. Indeed, it appears that the European legislators have considered future consequences

¹²⁰⁸ *Supra*, 3.4.5, The usage of biocidal products and anti-fouling paints.

¹²⁰⁹ *Supra* 3.4.8, The recycling of ships.

¹²¹⁰ (Tsimplis, 2014, p. 433)

¹²¹¹ (Tsimplis, 2014, p. 436)

¹²¹² (Tsimplis, 2014, p. 436)

¹²¹³ HKC, Article 15.

of the port-ship link rather than immediate ones. Considering that the environmental (and social) harm caused by substandard recycling practices is immediately felt in one territory, other than that of the port state, it remains hard to justify this unilateral jurisdiction with that principle.

§ 371. The case of the MRV relies on an even more diffuse interpretation of the principle of territoriality.¹²¹⁴ The conduct of the ship which is being considered by the EU legislator is wider than the conduct occurring in the territory. This is so because the whole journey to the EU port is taken into consideration by the legislator, which requests information on extraterritorial conduct, namely the CO₂ emissions. This initiative includes some degree of port state extraterritoriality, which reveals itself in the request of information concerning the voyage.¹²¹⁵ The fact that this information is requested when a territorial link is established (i.e. when a call to the port is realized) illustrates how the principle of territoriality does not provide the necessary legal entitlement. Furthermore, the fact that shipping impacting on the “global climate” is stated ‘up front’ in the text of the Regulation, illustrates how this assertion of jurisdiction can hardly be justified by a principle which has been developed as a limit to the exercise of jurisdiction outside the confines of the territorial boundaries.¹²¹⁶

§ 372. One final example is ongoing at the time of writing.¹²¹⁷ The EU is currently discussing a ban on the “use of heavy fuel oil (HFO) and carriage as ship fuel” in the Arctic. This ban would rely on port state control of ships which navigate the marginal seas of the Arctic Ocean and which call at EU member states’ ports.¹²¹⁸ This measure could not be the result of coastal state regulations, as provided by the jurisdiction granted under UNCLOS Article 234, because no part of the territory of EU member states provides for such jurisdiction (except Greenland, which is exempted from the EU in this regard). It is unilateral, because no coastal state has

¹²¹⁴ EU, Regulation 2015/757.

¹²¹⁵ EU, Regulation 2015/757, at (14). “[a]ll intra-Union voyages, all incoming voyages from the last non-Union port to the first Union port of call and all outgoing voyages from a Union port to the next non-Union port of call, including ballast voyages, should be considered relevant for the purposes of monitoring”

¹²¹⁶ EU, Regulation 2015/757, Preamble

¹²¹⁷ *Supra*, 3.4.7, The carriage and use of heavy fuel oils in the polar regions.

¹²¹⁸ EU, 2016/2228(INI).

used the multilateral entitlement to develop such a ban (which then would be a case of delegated jurisdiction, expressed or tacit). The relationship established with the port is again the sole territorial link with the conduct which might occur in the Arctic.

§ 373. Overall, these examples show how the EU provides for a unique understanding of the legal nature of territory, as expansive as that of the US but with a markedly different interpretation of the principle of territoriality and of territory itself. As a “post-territorial” international actor,¹²¹⁹ the EU does not appear to have the same restraint as the US towards the spatial scope of its acts, and this influences the way in which its member states are then required, by treaty, to give application to EU law.¹²²⁰ Some have said that this is a better way of dealing with transnational issues.¹²²¹ This appears to reveal an embodiment of the ‘space theory’, whereby the territory of the state exists where the law applies; another possible interpretation is to consider that the EU, when prescribing as a port state, relies on the ‘competence theory’, which provides a clearer picture of how the state may relate to areas such as the high seas.¹²²² This is in line with an interpretation which considers that the Westphalian model is here in a second phase of its evolution, best understood by de-territorialisation.¹²²³ This is because the territorial link appears as a trigger to allow the port state to give extraterritorial application to unilateral environmental standards.¹²²⁴ Without looking at cases of ship-source pollution, some have described the broader picture of the EU’s interpretation of the territoriality principle as “territorial extension”, highlighting that the EU only rarely engages with extraterritorial jurisdiction.¹²²⁵ This territorial extension can be used with a view to enforcing international standards before their entry into force, “when the international standards are in a form that is not binding, and where they have been ratified by only a small

¹²¹⁹ (Walters, 2004, p. 676)

¹²²⁰ (van Staden & Vollard, 2002, p. 165) (van Staden & Vollard, 2002, p. 180)

¹²²¹ (Ireland-Piper, 2012, p. 124)

¹²²² *Supra* 4.2.1, The link between the port state and its national territory.

¹²²³ (Teschke, 2006, p. 38)

¹²²⁴ (Scott, 2014, p. 90)

¹²²⁵ (Scott, 2014, p. 90)

number of states”.¹²²⁶ These are still instances of unilateral jurisdiction, for there is no multilateral right for the port state to apply such rules and standards upon flag states until there is a binding instrument. However, principles of jurisdiction have developed to consider conduct occurring beyond the territorial boundaries and hence give legal ground for states to claim any regulatory power over conduct which lacks a substantive territorial connection. By relying on the connection between the ship and the port, and the powers thereby attributed to the port state, the EU is building an artificial link to that part of the conduct which occurred outside the territory and which bears an immediate territorial connection to its member state’s territory. Consequently, this extension of territoriality is rather more disputable under international law than the US approach, at least from the perspective of states which may consider the normative meaning of territory less flexibly. In this way, the principle of territoriality presents some limitations for port states which wish to regulate extraterritorial conduct. The limitations of this principle for that purpose are discussed *infra*,¹²²⁷ but before moving on to those limitations, this study now looks at experiences of other port states with port state jurisdiction.

4.4.2.3. *Other port states’ experiences with the principle of territoriality*

§ 374. Despite the priority given to the distinction between the approaches of the EU and of the US in this study, some isolated cases of unilateral port state jurisdiction from other states have occurred and deserve mention and commentary. The purpose of the next paragraphs is not so much to revisit the cases of unilateral port state jurisdiction introduced in Chapter 3, but rather to point to certain specificities of the grounds used to justify them, namely the relationship established between the sovereign state and the territory as a means to argue for the existence of a right to act. However, because there are fewer unilateral prescriptions from each of these states, this study does not consider these descriptions of the experience of the principle of territoriality as representative of an ‘approach’.

¹²²⁶ (Scott, 2014, p. 112)

¹²²⁷ *Infra* 4.5, The limitations of the principle of territoriality for port states .

§ 375. The practice of Australia regarding the Great Barrier Reef provides an example of how Australia used the principle of territoriality.¹²²⁸ Australia's position in this regard is similar to that of the EU, as it uses the territorial link (call to port) to exercise prescriptive powers over conduct which itself is not linked to the territory. The fact that this norm applies even when the entry into port is not immediately after the voyage without a pilot shows how diffuse the link is. Ignoring the vexed question of the passage in straits regime, the point here is that Australia sought to use a port power to regulate conduct which is not territorial.¹²²⁹ This illustrates how a state may wish to use the conditionality of access to port as a trigger to change a multilaterally regulated issue, relying on the territorial connection which a ship necessarily establishes throughout its journey. The UNCLOS sets strict rules on the opportunities for unilateral jurisdiction for states bordering straits, as freedom of navigation is a highly regarded common concern. Article 42 limits these opportunities to four different purposes. As far as Article 42, purpose (b), is concerned, the norm clarifies that national laws and regulations in respect of the prevention, reduction and control of pollution must be "giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait".¹²³⁰ This limitation to unilateral jurisdiction is further confirmed by Article 43 of the treaty, which states that there should be cooperation by agreement in this matter.¹²³¹ Rules on pilotage have been considered to fall outside the scope of Article 42.¹²³² Yet on this issue, it has been argued that port state enforcement jurisdiction is not able to cure the lack of a prescriptive right under UNCLOS.¹²³³ Beckman considers this initiative to be illegal when taking into consideration what UNCLOS provides in terms of enforcement at port.¹²³⁴ He adds that "The most a port state could do would be to deny entry to its ports to ships that have failed

¹²²⁸ Australia, Great Barrier Reef Marine Park Act 1975, Section 59C-D.

¹²²⁹ (Marten, 2015, p. 134)

¹²³⁰ UNCLOS, Article 42(1)(b).

¹²³¹ UNCLOS, Article 43.

¹²³² (Koh, 2012, p. 26)

¹²³³ (Koh, 2012, p. 26)

¹²³⁴ (Beckman, 2007, p. 345)

to comply with an IMO system of compulsory pilotage” in accordance with Article 211(3).¹²³⁵ Tanaka has also weighed in on this case, having written that “Australia’s experience seems to suggest that unilateral action to implement compulsory pilotage could not win support from user States” and that “Article 43 of the LOSC merits particular attention with a view to reconciling such contrasting interests through international cooperation”.¹²³⁶ Others have also affirmed that, in this case, “Australia turned the compulsory pilotage requirement into a condition for port entry”.¹²³⁷ This debate shifted the focus away from territoriality but it still should be noted how the setting of entry requirements relates to territoriality. Australia is here using that port power as a means of dissuading conduct in an area which is subject to a specific multilateral regime and hence the principle of territoriality is used as a means of competing with that regime.

§ 376. China. The case of the Chinese unilateral SECA has also highlighted the relevance of the principle of territoriality to establishing measures countering shipping emissions. China established a SECA in parts of its territorial seas, whose emissions requirements were to be enforced at its ports.¹²³⁸ The maritime authority issued a marine notice imposing penalties, such as retention of the ship and fines.¹²³⁹ Despite the existence of a procedure under MARPOL Annex VI for the setting of such areas and special requirements, this measure was not notified to the IMO. One of the reasons why Chinese authorities decided not to subject their domestic ECA to the MARPOL procedure may be because none of the areas concerned is beyond twelve nautical miles, hence referring only to conduct within the territorial sea. This is a case of unilateral jurisdiction because it was done despite the existence of an applicable multilateral

¹²³⁵ (Beckman, 2007, p. 348)

¹²³⁶ (Tanaka, 2015, p. 109)

¹²³⁷ (Allen, 2012)

¹²³⁸ *Supra* 3.4.2.3, The PRC ECA low sulphur content fuel requirement.

¹²³⁹ Notice of the Maritime Safety Administration of the People’s Republic of China on Strengthening the Supervision and Administration on Emission Control Areas for Vessels, HCJ [2016] No.48. See also Law of the People’s Republic of China on the Prevention and Control of Atmospheric Pollution; “ a) Warning education; b) Rectify the violation; c) Retain the vessel; d) Impose punishment in accordance with Art.106 of the Law of the People’s Republic of China on the Prevention and Control of Atmospheric Pollution”

procedure for the creation of a new SECA.¹²⁴⁰ The legality of this unilateral assertion can be assessed in light of the principle of territoriality. First, the Chinese law refers to a “Domestic” ECA. This is particularly relevant considering that the purpose of this ECA is “to improve the air quality of coastal areas and regions along the rivers, and in particular, of port cities in China”, i.e. in Chinese territory.¹²⁴¹ Secondly, the law only applies to ships that navigate, anchor, or operate in this area. The relevant ports may impose, “where appropriate”, higher standards upon vessels which have not complied with such standards.¹²⁴² Yet, as said before in connection with the US CARB VFR,¹²⁴³ as well as the EU’s MRV and SOx legislation,¹²⁴⁴ there may be extraterritorial effects associated with the Chinese measure, i.e., implications for ships prior to the establishment of a territorial link with the port state, as it requires ships to be equipped with appropriate engines and fuel ahead of the journey, or to bunker at sea before entering those areas. Yet, despite these considerations, China considers that this fits with the application of the principle of territoriality, as the port state activity will only look at conduct occurring within the territorial sea (the usage of the fuel) and the conclusion of that conduct arguably having an impact in the territory (port cities of China). The port state powers are exercised to prevent consequences from occurring in the territory even though, arguably, the emission of sulphur also affects the air quality over maritime zones outside Chinese territorial jurisdiction, as well as foreign territories. The harm caused to the port state is then not the emissions themselves, but the lack or falsification of the relevant record document. There has already been some information about the enforcement of this measure which highlights the combination of enforcement plus monetary penalties, but as far as it is known, no further measures (such as detention, ban, denial of entry) have been taken.¹²⁴⁵

¹²⁴⁰ MARPOL VI, Regulation 14(3)

¹²⁴¹ PRC, Implementation Plan on Domestic Emission Control Areas in Waters of the Pearl River Delta, the Yangtze River Delta and Bohai Rim (Beijing, Tianjin, Hebei), I. Objectives.

¹²⁴² PRC, Implementation Plan on Domestic Emission Control Areas in Waters of the Pearl River Delta, the Yangtze River Delta and Bohai Rim (Beijing, Tianjin, Hebei), V. Implementation Arrangements.

¹²⁴³ *Supra* 3.4.2.2, The California Ocean-Going Vessel Fuel Regulation.

¹²⁴⁴ *Supra* 3.4.4, The control of CO₂ emissions from shipping: the EU MRV Regulation.

¹²⁴⁵ (CNSS, 2017) (World Maritime News, 2017)

§ 377. New Zealand has also resorted to the principle of territoriality as a ground for unilateral port state jurisdiction. The standard issued under section 24G of the Biosecurity Act 1993 shows the relevance of that principle when constructing the legal basis for states.¹²⁴⁶ It requires that ships “must arrive in New Zealand with a ‘clean hull’”.¹²⁴⁷ One of the so-called “acceptable measures” relies on extraterritorial conduct, as the cleaning of the hulls must take place prior to the entry into the territory.¹²⁴⁸ Despite relying materially on multilaterally developed standards, those standards are merely voluntary guidelines with no legal force over flag states which do not impose them on their ships. The Craft Risk Management Standard applies starting 2018, giving force to these standards. It refers to the territorial link, providing evidence for the reliance on the principle of territoriality.¹²⁴⁹ There have already been instances of ships ordered to leave port because of this standard.¹²⁵⁰

§ 378. Canada has used unilateral jurisdiction to regulate the ballast water management practices of ships, especially with a view to protecting local environments against invasive species. Through the power of preventing a ship from leaving the port prior to having cleaned its hulls, the port state can control whether the ship acted in a particular way outside the territory of the state, even outside maritime zones under its jurisdiction. The territory is relevant not only because of the link established by the ship at the moment of call and entry, but also because

¹²⁴⁶ Heading inserted on 18 September 2012, by section 20 of the Biosecurity Law Reform Act 2012 (2012 No 73).

¹²⁴⁷ Appendix B: Craft Risk Management Standard (CRMS) for Bio-fouling on Vessels arriving to New Zealand: “This standard applies to any vessel, which arrives into New Zealand territory, meaning a vessel that will anchor, berth or be brought ashore after a voyage originating outside New Zealand’s Territorial Sea.”. Appendix B: Craft Risk Management Standard (CRMS) for Bio-fouling on Vessels arriving to New Zealand: “‘Clean hull’ means that no biofouling of live organisms is present other than within the thresholds below”. Ministry for Primary Industries, 29 March 2017, [Banned vessel allowed to return after cleaning](#).

¹²⁴⁸ Appendix B: Craft Risk Management Standard (CRMS) for Bio-fouling on Vessels arriving to New Zealand: “Cleaning before visit to New Zealand (or immediately on arrival in a facility approved by MPI within 24 hours of arrival) – All biofouling must be removed from all parts of the hull and this must be carried out less than 30 days before arrival to New Zealand.”

¹²⁴⁹ New Zealand, Guidance Document for the Craft Risk Management Standard - Biofouling on Vessels Arriving to New Zealand “(...) must have regard to the following matters in relation to craft of the class or description proposed for coverage by the standard: (i) the likelihood that the craft will import organisms into New Zealand territory: (ii) the nature of the organisms that the craft may import into New Zealand territory: (iii) the possible effect on human health, the New Zealand environment, and the New Zealand economy of the organisms that the craft may import into New Zealand territory”.

¹²⁵⁰ (New Zealand, 2017)

of the consequences that can be felt by an act of pollution within the territory of the state (namely in internal waters).

§ 379. This practice shows how the principle of territoriality is present outside the regimes of both the US and the EU when asserting prescriptive port state jurisdiction.

4.5. The limitations of the principle of territoriality for port states

§ 380. The idea that territory is not an end in itself but rather a purpose is not a revolutionary contribution of this study, nor is it something new.¹²⁵¹ Despite being resorted to in the practice dissected above, the principle of territoriality does not provide a sufficient legal basis for unilateral jurisdiction that, more than influencing conduct through so-called ‘extraterritorial effects’,¹²⁵² is in fact regulating extraterritorial ship-source pollution, i.e. asserting extraterritorial jurisdiction. This is due to three arguments that are discussed in this section: 1) a lawful reliance on the principle of territoriality resides foremost in the legal link between the state and its national territory;¹²⁵³ 2) the environmental harm caused by ships outside the territory may not be felt, exclusively or at all, in the territory of the port state; 3) the unilateral jurisdiction asserted by the port state over ship-source pollution occurring on the high seas, even when establishing some kind of territorial link, is also regulating a common concern of humankind and could hence not be fully justified by the existence of such a link.

§ 381. Regardless of how the relationship between the state, as a sovereign entity, and a territory, as a space, is interpreted and theorized, it is difficult to argue against the fact that today a geographical space is an essential element of a state under contemporary international law.¹²⁵⁴ The jurisdiction of the port state is partly based on this feature, which provides a physical element of statehood with which factual events connect; that is the case of pollution, which may objectively affect the environment within that well-defined area. Another

¹²⁵¹ (Brownlie, 2003, p. 113)

¹²⁵² *Supra* 4.3.4, The ‘extraterritorial effects’ of port state territoriality.

¹²⁵³ PCIJ, S.S. Lotus, Dissenting Opinion by M. Loder: “(...) the right of jurisdiction over its own territory is an attribute of its sovereignty.”

¹²⁵⁴ *Supra* 4.2.1, The link between the port state and its national territory.

connecting element is the link established between that territory and the ship.¹²⁵⁵ In other words, the limits of the normative concept of ‘territory’ also define the limits of the legal principle of jurisdiction conceived around it, i.e., the principle of ‘territoriality’. This does not mean that the principle of territoriality does not have its own life, separate from the concept of territory. In a sense, territoriality brims over into the concept of territory.¹²⁵⁶

§ 382. Environmental harm is widely scattered and rarely limited to one territory, i.e., it is rarely the object of one single territorial link. In the case of ship-source pollution, the state can both 1) find a territorial connection because the polluting ship is present at or has called to the port after the event in question; and 2) argue that there is a territorial link that grants jurisdiction because there is harm, which is not always the environmental harm but that can also be merely a false declaration to authorities occurring within its territory, for example; this in turn can refer to harm which has been caused by conduct on the high seas or within another state’s territory. The principle of territoriality is thus not a sufficient jurisdictional ground because the harm is not exclusive to that territory, i.e., it affects other states’ territories as well as areas which are not in the territory of any state, such as the high seas or the international airspace. This in turn signifies that the jurisdictional connection established at port is not exclusive, for other states apart from the flag state were concerned by that action at the moment it occurred; thus, there are other states involved in an incident (even if they do not regulate that part of the conduct unilaterally). The sole presence of the ship in port does not preclude the rights of third states to argue for the territoriality principle, namely claiming the transboundary effects of the pollution – a very unlikely academic hypothesis – or simply the fact that the ship started that polluting conduct (e.g. a violation of a CDEM) within its own territory if it departed from its ports. These situations would result in a conflict of territorial links if, in practice, there were to be much interest in enforcement.

§ 383. The third argument is less about positive law and more about international/global justice. It relates to the concern that gives rise to the unilateral regulation, and whether its inherent commonality has a normative value which makes it a *non-territorial* issue. Ship-source pollution, whether it is marine or atmospheric, and regardless of where it occurs, affects

¹²⁵⁵ *Supra* 4.2.2, The link between the ship and the territory of the port state.

¹²⁵⁶ (Sassen, 2013, p. 23)

the environment of the planet. It is undeniable that some territories may suffer more direct impacts. It is true that the coast of Galicia was more severely affected than that of the Bahamas, which retained flag state jurisdiction, when the single-hulled MV *Prestige* sank, spilling 50,000 tonnes of oil.¹²⁵⁷ However, it is also true that the coast of the Bahamas was more threatened by the oil discharge not reported by the MS *Nordic Empress* than the coast of Florida where port state jurisdiction over that incident was exercised, and even more so than the coast of Liberia, the flag state at the time.¹²⁵⁸ It is also undeniable that assertions of unilateral port state jurisdiction, which focuses on high seas atmospheric pollution from CO₂, NO_x or SO_x, benefit all territories. Arguing for the principle of territoriality in these cases is inadequate because the pollution results in an environmental concern which is common to all states, i.e. it affects all national territories. More, this concern is common to all of humankind, for even if states were not in existence, it would still be a precondition (and maybe arguable also a right) for humanity, for present and future generations, to live in a territory with a healthy environment.¹²⁵⁹ This means that one state which asserts jurisdiction at its ports over ship-source pollution, looking at either territorial or extraterritorial pollution, is in fact acting for the benefit of the community of states and, to some extent, of all humans. The territorial element in unilateral jurisdiction over common environmental concerns is therefore argued to be merely incidental and does not provide an adequate justification for the more complex relationship between the state and the conduct.

§ 384. When third states do not object to broad interpretations of the principle of territoriality by port states, and accept triggered territoriality, extraterritorial effects spilling over onto their flag state jurisdiction or their territorial concerns, or even the effects doctrine, for example, they are – willingly or not – participating in a development of the principles of jurisdiction. This may signify that they agree that territoriality is an adequate basis for unilateral port state jurisdiction. It may also signify that it is that extended territoriality that is not questioned and, at the same time, that there is another principle being recognized as a legal ground for the extraterritoriality resulting from the application of the principle of territoriality. In that case,

¹²⁵⁷ *Supra* 3.4.1.2.2, Spain's Real Decreto-Ley 9/2002 and EC Regulation 1726/2003.

¹²⁵⁸ *Supra* 3.4.1.1, The USA's approach: standard creation.

¹²⁵⁹ France, Charte de l'environnement. Bolivia, Constitución Política del Estado, Article 33. Fiji, Constitution of the Republic of Fiji, Article 40(1).

third states would be accepting that the principle of territoriality is rather flexible but still not adequate to fully account for the actions of the port state.

§ 385. Territoriality not only *is* inadequate, for the three reasons already mentioned in this section, but also territoriality *should not* be used to unilaterally extend the power of the port state beyond what occurs, totally or partially, within the confines of its territory. The reason for this normative submission is that the broad interpretation of the principle of territoriality erodes the normative meaning of territory, bringing more and unnecessary confusion to the interpretation of jurisdictional principles in general.¹²⁶⁰ This normative statement is based on three other propositions: 1) the existence of a normative concept of territory works today as a pillar of the principle of sovereign equality, upon which the entire edifice of international law rests; 2) the notion of territory ensures that the state which is claiming the applicability of the principle of territoriality has a link which is objectively verifiable and formally agreed to by all states; and 3) as a consequence of the erosion of the normative meaning of territory and territoriality, the distinction between the two roles of the state, as a national actor and as an international actor, may become less clear.

§ 386. Firstly, the currently dominant paradigm of international law relies on sovereign states being equal in the eyes of the law and in their contractual (treaty) relations. It is true that sovereign equality does not mean factual equality: some states are larger, some are wealthier, some are landlocked, and some are archipelagic. However, all states are constituted of an asset which is a share of the global condominium: namely, a space where the power of the sovereign applies, and which sets a spatial limit for the exercise of power by all other states. The legal notion of territory is the keystone of this paradigm. Once territory is removed, the arch collapses, possibly resulting in a shift in paradigms. Now this does not mean that territory *should* remain that keystone; what it does mean is that losing the semantic connection between what territory is and what it can encompass, will have a broader impact in the relations between states. This will especially be the case between states which do not share the same understanding of territoriality, separating it from the concept of territory.¹²⁶¹

§ 387. Secondly, a more diffuse understanding of territory may be tantamount to turning the agora of international law into a Tower of Babel, where nations do not understand each other

¹²⁶⁰ (Ryngaert, 2015, p. 435)

¹²⁶¹ (Ruggie, 1993, p. 165) (Ruggie, 1993, p. 171)

anymore. Testing for a territorial connection is for many states an obvious solution: it is about verifying that conduct started in, or was concluded in, the territory of the state. Accepting the legality of the effects doctrine, for example, is already a controversial step beyond this. In the same vein, “territorial extensions”, or other legislative manoeuvres to recast the regulatory focus onto the territorial part of the conduct, may represent a threat to the shared understanding of what territory means for international lawyers and, more importantly, for state authorities. Even though the existence of a common set of fundamental definitions should not be a dogma, where evolution can never occur, it is submitted that such evolution should still consider the legal meaning and relevance of territory.

§ 388. The third proposition is a logical consequence of the previous two. The state plays a role in the domestic legal order, but the state also plays a role at the international level. Whilst that first role is limited by the constitution, the second role is limited, or enhanced, by international law. The existence of a claim of jurisdiction based on the principle of territoriality ends up curtailing the regulatory ambitions of a state to a certain space, despite its constitution. So, if: 1) the meaning of territory is diluted beyond reason, becoming an obscure norm; and 2) the principle of territoriality is, as a consequence, unworkable as a jurisdictional test; then the distinction between the basis for acting in each of those roles will become less evident, for one state may claim to be acting unilaterally on behalf of the international community just to extend the scope of its laws beyond what other states have consented to multilaterally. This in turn may lead to a peak in disputes between sovereign states, which is something the principles of jurisdiction are meant to avoid. The proposed alternative to be discussed in Chapter 6 – that a functionality-based approach is preferable when dealing with common concerns – shifts the focus from location to value, balancing joint global commitments undertaken by states rather than parochial prerogatives of sovereignty such as the territory. The port state can enact laws that fulfil its role as a member of the community in developing international law, but when the port state relies on the principle of territoriality to regulate extraterritorial ship-source pollution, it is not evident if the state is acting to regulate the consequences of pollution over its territory or to regulate, on behalf of the international community, common concerns. In the latter case, territoriality is a false pretence, and port state actions would be prone to being challenged on the ground of fragile territorial connections. It is true that territoriality would still play a role, strengthening a claim of jurisdiction, yet the point here is that it would not be sufficient, nor would it be correct to use that principle as a means to regulate extraterritoriality.

§ 389. To sum up, this section argues that the interpretation of the normative scope of the territoriality principle is not, and should not be, infinitely flexible. This signifies that the right

to exercise jurisdiction based on the principle of territoriality can be abused by port states. Such infringement would happen when, on the basis of this principle, the port state unilaterally prescribes a more stringent standard which considers, for regulatory purposes, extraterritorial ship-source pollution.¹²⁶² For when port states argue for the existence of a territorial link to exercise unilateral jurisdiction under the principle of territoriality, but with an aim of regulating extraterritorial conduct and not the part of the conduct which creates that territorial link, namely if they regulate, totally or partially, common concerns unilaterally by referring merely to that territorial link, then they are in fact abusing the scope of the principle of territoriality, i.e., the principle itself. Then, if the territoriality principle is not adequate and should not be used and/or interpreted as providing a ground for a state to regulate extraterritorial harm, the state must look at other principles of jurisdiction to provide a more accurate justification for its jurisdiction. These other principles would provide different arguments as to how port states could claim extraterritorial jurisdiction and hence justify their legal assertions. However, like the territoriality principle, they also have their own inherent limitations.

4.6. Interim conclusion (IV)

§ 390. The capacity to act as a port state reveals the port state's territorial existence, in the sense that the state has a legal link to a space, and this link has international normative meaning. Laws are created and enforced in the port and rely often on a territorial link. This link is territorial in the sense that it relies on the existence of a territory, which has legal significance under international law. Yet there are many ways of constructing this link and of projecting jurisdictional power outside the territory. One way is through extraterritorial effects, which do not create a jurisdictional relationship and are hence irrelevant to an argument on conflict of laws. The other is extraterritorial jurisdiction, which ought to be based on principles that sustain those claims. The principle of territoriality hardly sustains an exercise of jurisdiction which is not constructed upon a territorial link and hence it would be a mistake to consider lawful an exercise of extraterritorial jurisdiction based on this principle alone. Yet many states have been developing approaches which rely on this principle and that aim at regulating ship-source pollution. This chapter has demonstrated how the US and the EU are going in the same direction of unilaterally strengthening the level of environmental protection at sea, but how

¹²⁶² ICJ, Corfu Channel Case (merits), Individual Opinion by Judge Alvarez, p 47-48.

they are doing so following fundamentally different routes. Whilst the US focuses on harm caused to its territory, constructing its jurisdictional rights on the effects caused by the pollution within its territory, the EU has a broader scope of action and aims to regulate extraterritorial conduct through effects, when exercising extraterritorial jurisdiction under the guise of the territoriality of the enforcement stage of its unilateral prescriptions. In other words, whilst the EU is using this feature to act as a catalyst for international norms, ensuring their compliance, the US is more preoccupied with the consequences of non-compliance on its territory. The former approach raises questions of legality, despite not having been challenged so far. Unilateral port state jurisdiction can partly be justified by the existence of a territorial link, but only up to the point where that ground justifies the regulation. Yet, the territory of the state and the territoriality of its laws are open and evolving normative concepts. This means that any account of the scope of the principle of territoriality must bear in mind the normative meaning of the concept of territory and how it serves as a limit to jurisdiction. Because these accounts are often influenced by diverging perspectives on the link between the state and its national territory, this chapter has proposed a more conservative interpretation of this principle, i.e., measuring the scope of application of that principle by reference to the location of the conduct in relation to defined and recognized international boundaries. Any exceptions to this should either result from the consent of states as expressed in treaties such as the UNCLOS or from principles of extraterritorial jurisdiction.

5. THE EXTRATERRITORIALITY OF UNILATERAL PORT STATE JURISDICTION

‘Extra territorium ius dicenti impune non paretur.’¹²⁶³

5.1. Introduction to Chapter 5

§ 391. Roman law had a maxim stating that extraterritorial jurisdiction could be disobeyed with impunity. This old dictum invokes the persistent relevance of territory in defining the spatial scope of a state’s authority and hints that extraterritoriality has always been an ambition of sovereigns. The twentieth century has shown that in practice, despite the extraterritoriality of many state actions, much respect is still attached to the principle of territoriality,¹²⁶⁴ to the point of it being acceptable to say that territoriality deserves a certain degree of primacy. Some have gone even further to say that territory is actually an obsession of states.¹²⁶⁵ Notwithstanding the obsession of states with their territory, the principle of territoriality is just one of various legal bases that may cumulatively serve for states to claim jurisdiction under international law.¹²⁶⁶ Despite the undeclared degree of deference that that principle receives in the practice of some states,¹²⁶⁷ customary international law does not give that principle of jurisdiction any preponderance in relation to other principles of jurisdiction.¹²⁶⁸ Nevertheless, states may eventually establish a priority of one jurisdictional principle over others, thereby providing some ranking between the available principles.¹²⁶⁹ For port states as well, territoriality is not the only legal ground upon which unilateral jurisdiction over foreign ships’ conduct may be based; in fact, when the aim is to tackle extraterritorial pollution with more stringent

¹²⁶³ Digesta, 2.1.20, Paulus libro primo ad edictum: *Extra territorium ius dicenti impune non paretur. Idem est, et si supra iurisdictionem suam velit ius dicere* – The one executing justice beyond their territory can be disobeyed without punishment. The same occurs when someone wants to apply the law beyond their jurisdiction.

¹²⁶⁴ (Wolftrum, 2016, p. 366)

¹²⁶⁵ (Scelle, 1958, p. 361)

¹²⁶⁶ Council of Europe, Recommendation No. R (97)11/E, p. 60.

¹²⁶⁷ (Mills, 2014, p. 198)

¹²⁶⁸ (Cameron, 1994, pp. 19-20)

¹²⁶⁹ (Klip, 2012, p. 409)

prescriptions, that link may be the weakest of all. That is why an account of extraterritorial jurisdiction is necessary.

5.2. Extraterritorial jurisdiction in international law

§ 392. From a treaty law perspective, the unilateral enforcement of a multilateral standard is lawful when done at port because the applicable treaty is, in principle, applicable territorially.¹²⁷⁰ The eventual extraterritorial effect of a treaty is then simply a question of the interpretation of the treaty itself and of the will of states.¹²⁷¹ Some treaties are indeed designed to cover non-territorial matters and in those cases the extraterritoriality has been explicitly agreed to.¹²⁷² It is also important to remember that port state enforcement is a territorial event, for the moment of application of the general and abstract rule of law to the relevant fact occurs at port, i.e., in the territory of the state.¹²⁷³ When a state claims to have unilateral prescriptive jurisdiction under its capacity to act as a port state (i.e. not treaty-based port state jurisdiction), it may argue the principle of territoriality solely or combined with any of the “recognized bases for extraterritorial jurisdiction”.¹²⁷⁴ The need for such a combination of rights when exercising jurisdiction exists, as it has been proposed in this study, because the object and purpose of the rule or standard to be applied by taking recourse to port state powers does matter.

§ 393. Port states acting unilaterally over non-territorial conduct may encounter some difficulties in finding consensus on how to justify their claims. There is no binding treaty on extraterritorial jurisdiction; there are merely principles which have developed through state practice since the dawn of international law. It is true that, despite the lack of a binding

¹²⁷⁰ VCLT, Article 29.

¹²⁷¹ (Milanovic, 2014, p. 191)

¹²⁷² UN, A/CN.4/190, p 213. “Certain types of treaty, by reason of their subject matter, are hardly susceptible of territorial application in the ordinary sense. Most treaties, however, have application to territory and a question may arise as to what is their precise scope territorially.”

¹²⁷³ *Supra* 4.2.2, The link between the ship and the territory of the port state.

¹²⁷⁴ USA, Brief Of The European Commission On Behalf Of The European Union As Amicus Curiae In Support Of Neither Party: “Three recognized bases for extraterritorial jurisdiction may be implicated by an action brought under the ATS: nationality, the protective principle, and universal jurisdiction. If any of these circumstances is present, the assertion of extraterritorial jurisdiction will comply with international law.”

instrument governing extraterritoriality, there have been, in the last two centuries, some efforts to shed light on the customary law which applies to it. In 1883 the *Institut de Droit International* (Munich Session) approved a set of articles with rules related to conflicts of criminal laws on the jurisdiction of the state.¹²⁷⁵ In 1931 the same *Institut de Droit International* (Cambridge Session) reviewed its previous drafting.¹²⁷⁶ In between, in 1927, the Permanent Court of Justice delivered an Award on the *S.S. Lotus* case which clarified the law of jurisdiction, in particular in the maritime domain.¹²⁷⁷ In 1935, the *Research in International Law* group at Harvard Law School, prompted by a mandate from the League of Nations' Assembly,¹²⁷⁸ published a 'Draft Convention on Jurisdiction with Respect to Crime with Comment'.¹²⁷⁹ From a US perspective, the American Law Institute has published its Restatements on the "Foreign Relations Law of the United States", which compile rules on jurisdiction as provided by the practice of states. This has occurred twice to date: 1987, the Third Restatement, and 1965, the Second Restatement. A new Restatement is currently being drafted.¹²⁸⁰ Another effort was undertaken by the United Nations' International Law Commission in 2006 in the Report for its fifty-eighth session.¹²⁸¹ More recently, in 2009, the International Bar Association also delivered a report on this matter.¹²⁸² All these sources provide guidance on how states – sometimes specifying situations where they act in their capacity as port states – may give extraterritorial application to their laws. However, they provide scant support to the extraterritoriality of environmental regulations.¹²⁸³

¹²⁷⁵ (Institut de Droit International, 1883)

¹²⁷⁶ (Institut de Droit International, 1931)

¹²⁷⁷ PCIJ, The *S.S. Lotus* Case, p. 4.

¹²⁷⁸ (Bialostozky, 2014, p. 31)

¹²⁷⁹ (Harvard Law School, 1935)

¹²⁸⁰ (American Law Institute, 2018)

¹²⁸¹ UN, A/61/10, Annex E,

¹²⁸² (International Bar Association, 2008)

¹²⁸³ (Francioni, 1996, p. 122)

§ 394. The exercise of jurisdiction beyond the territorial boundaries of the state is often shortened by terms such as ‘extraterritoriality’ or ‘extraterritorial jurisdiction’, and this has already been mentioned when discussing the ‘extraterritorial effects’ of the principle of territoriality.¹²⁸⁴ These phrases carry a controversial meaning in the recent history of international relations, which must not be ignored. Recourse to international law as a tool of political domination in colonial times left the term ‘extraterritorial’ tainted with negative connotations.¹²⁸⁵ Those terms are still often associated with the “unequal treaties” of the late nineteenth century,¹²⁸⁶ and some would today consider extraterritoriality as posing “a greater threat to democratic sovereignty than traditional sources of international law”.¹²⁸⁷ In this chapter, the terms are used without such historical connotations, and are taken simply as descriptive terms that depict deployments of state power at sea. Extraterritorial jurisdiction consists, in this context, of the application of national laws to conduct occurring outside the territory of the state and ‘extraterritoriality’ is used as a broader term to encompass their legally relevant consequences (which are different from their non-regulatory “effects”).¹²⁸⁸ Arguably, extraterritoriality may also follow from the assertion of jurisdiction based on the principle of territoriality, for example through a claim based on objective territoriality.¹²⁸⁹

§ 395. One concept that may be more neutral than extraterritoriality is that of ‘non-territoriality’. Non-territorial jurisdiction is not a term created by this study, but it is employed more rarely than the term extraterritorial jurisdiction.¹²⁹⁰ This term would refer to areas of the globe which are not part of a territory of any state; in that sense they are absolutely ‘extraterritorial’. These areas may be considered either common (*res communes omnium*) or of

¹²⁸⁴ *Supra* 4.3.4, The ‘extraterritorial effects’ of port state territoriality.

¹²⁸⁵ (Kayaoglu, 2010, p. 1)

¹²⁸⁶ (Cassel, 2011, p. 6)

¹²⁸⁷ (Parrish, 2009, p. 820) (Parrish, 2009, p. 874)

¹²⁸⁸ *Supra* 4.3.4, The ‘extraterritorial effects’ of port state territoriality.

¹²⁸⁹ (Jennings, 1957, p. 152)

¹²⁹⁰ (Inazumi, 2005, p. 198)

no appropriation (*res nullius*).¹²⁹¹ In the former case, there is often a sense of cosmopolitanism involved in the respective jurisdictional framework (e.g. the deep seabed resources regime, where states cooperate and the benefit of the exploration is shared amongst all states); in the latter, parochialism seems to dominate (e.g. the high seas fisheries regime, where states still compete, often allowing unsustainable practices for access to fish stocks).

§ 396. However, as seen previously, it is not only states which may act as extraterritorial or non-territorial regulators.¹²⁹² It is possible that other institutions with the power to set rules face the same sorts of issues when dealing with extraterritoriality. Very much like a state, the EU is bound by international legal norms, including those on jurisdiction. Its institutions may act as environmental regulators, pushing the constituting member states to give extraterritorial application to EU environmental law. On one occasion, the ECJ had to clarify that a particular Regulation did not require member states “to extend their jurisdiction beyond the limits laid down by the generally accepted principles governing the distribution of criminal jurisdiction between States”.¹²⁹³ In the *Poulsen* case, the ECJ stated that the EC must respect international law and that the scope of its jurisdiction is limited by rules of the international law of the sea.¹²⁹⁴ According to the opinion of one ECJ advocate general, “international law would prohibit the extraterritorial application of domestic law where it might give rise to conflicting obligations, or provoke conflicts of jurisdiction”.¹²⁹⁵ In a sense, these cases highlight the fact that the EU is limited by the jurisdiction of its member states. Evidence of a more recent interpretation of extraterritoriality by the EU can also be found in the ATAA case, where the EU sought to regulate extraterritorial emissions from aeroplanes.¹²⁹⁶ Therefore, when referring to EU (or EC)

¹²⁹¹ Justinian, Institutes: “1. Thus, the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations. 2. On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein. 3. The sea-shore extends to the limit of the highest tide in time of storm or winter.”

¹²⁹² *Supra* 4.4.2.2, The approach of the EU to the principle of territoriality.

¹²⁹³ ECJ, C-9/89, par.27

¹²⁹⁴ ECJ, C-286/90.

¹²⁹⁵ ECJ, C-9, 104, 114, 116, 117 and 125 to 129/85, Opinion of Advocate General Darmon, para. 49.

¹²⁹⁶ ECJ, C-366/10.

practice, one must consider that it still relies on the same rules that its constituents may claim under international law.

§ 397. Another point to consider is the existence of constitutional limits to extraterritorial jurisdiction. The US, for example, has its own constitutional limits to the exercise of extraterritorial jurisdiction. It has already been explained in Chapter 4 that there exists a constitutional practice, in force in some states such as the US or Canada, to establish a presumption against the extraterritorial application of its statutes.¹²⁹⁷ Both these states have case law that provides for exceptions to that presumption so as to apply environmental statutes to transboundary polluters.¹²⁹⁸ This presumption acts as a means to interpret national law, circumscribing the applicability of municipal legislation.¹²⁹⁹ In these states, clear evidence for the intent to exercise extraterritorial jurisdiction must be shown, for otherwise legislatures are presumed not to exercise this power. Another distinct but equally relevant legal doctrine is the “consistent interpretation doctrine” or ‘The Charming Betsey doctrine’ developed in the US.¹³⁰⁰ This doctrine does have some bearing on port state jurisdiction.¹³⁰¹ For example, a court has applied this doctrine when considering that the application of US labour law to a foreign ship would exceed the limits set by international law and potentially conflict with the law of the flag state.¹³⁰² On another occasion, courts were faced with a discussion as to whether the American Disabilities Act applied to foreign cruise ships in American waters.¹³⁰³ This case constituted an example of another approach to extraterritoriality: the clear statement rule.¹³⁰⁴ Also of interest on this point on constitutional limits to extraterritorial jurisdiction, is a case where the discussion concerned whether the Federal Tort Claims Act could apply in

¹²⁹⁷ *Supra* Fout! Verwijzingsbron niet gevonden., Fout! Verwijzingsbron niet gevonden..

¹²⁹⁸ (Medeiros, 2007, p. 549)

¹²⁹⁹ (Milanovic, 2014, p. 190)

¹³⁰⁰ USA, Murray v. The Charming Betsey.

¹³⁰¹ (Knox, 2010, p. 351)

¹³⁰² USA, McCulloch v. Sociedad Nacional.

¹³⁰³ USA, Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005)

¹³⁰⁴ (Ryngaert, 2005, p. 347)

Antarctica.¹³⁰⁵ These cases will not receive much attention here as this chapter focuses on the legal bases and their own intrinsic limitations.

§ 398. The International Law Commission had excluded the possibility of cosmopolitan jurisdiction when it defined extraterritorial jurisdiction as “an attempt to regulate by means of national legislation, adjudication or enforcement the conduct of persons, property or acts beyond its borders *which affect the interests of the State* in the absence of such regulation under international law” (emphasis added).¹³⁰⁶ Although this statement originates from a highly respectable source, the thesis proposed in this study submits that extraterritoriality does not only exist “[w]hen one state regulates for its own benefit, and to the detriment of others in the world”.¹³⁰⁷ Rather, it is proposed that the port state, when exercising extraterritorial jurisdiction, does not regulate only for its own benefit but also in the interest of all (i.e. of states and, in a broader sense, of humankind) which share a concern for environmental protection. This is a similar approach to that taken by some literature focusing on trusteeship, yet without ever referring to the particular case of ship-source pollution.¹³⁰⁸ It is true that the dominant interpretation of extraterritorial jurisdiction says that the principles of jurisdiction are applicable when only two conditions are verified: 1) when states do not have a multilateral entitlement, hence needing an international legal entitlement to exercise unilateral jurisdiction; 2) when states claim to regulate extraterritorial conduct, i.e. what occurs beyond their territory and which establishes a connection to the territory, for otherwise the principle of territoriality would be applicable. However, a third condition is not precluded, and states can indeed use these principles to achieve a cosmopolitan goal that reflects the basic values which law is supposed to serve and embody.¹³⁰⁹

¹³⁰⁵ USA, *Smith v. United States*, 507 US 197 - Supreme Court 1993.

¹³⁰⁶ UN, A/61/10, p. 516.

¹³⁰⁷ (Parrish, 2008, p. 1504)

¹³⁰⁸ (Benvenisti, 2013, p. 12)

¹³⁰⁹ (Orakhelashvili, 2008, p. 71)

§ 399. All in all, the evidence seems to indicate that states wish to preserve the freedom to act unilaterally and thus they have not codified the rules of extraterritorial criminal jurisdiction.¹³¹⁰ The general discretion allowed to states in *S.S. Lotus* has somehow survived the criticism and allows states to move beyond the limits imposed by the principle of territoriality, finding ground in a more “suitable” principle that is not precluded under international law.¹³¹¹ As three ICJ judges have noted already, there may well be a movement by some states towards other bases of jurisdiction than subjective territoriality, either by expanding the scope of this principle or by relying on other principles.¹³¹² Although port states have shown in their practice a preference for reinterpreting territoriality in order to expand its reach, instead of relying on other principles of jurisdiction, it is both important and necessary to consider all the existing routes as well as their inherent normative limitations. The caveat when considering such routes is that a capacity to act is a bundle of rights and port state jurisdiction is composed of more than treaty law-based and territoriality principle-based actions. It may encompass other principles, even if only tangentially. A piece of legislation may not necessarily argue all of the legal basis upon which its legality is to be assessed, but that would not mean that such basis is not at play in the background. It is therefore a necessary academic exercise, aside from proposing solutions, to reconstruct the practice as it is, providing meaning to what is left unsaid by the legislator. That starts with the focus on the human element involved in ship-source pollution and how port powers may be directed at who is on the ship or who takes part in its operations.

5.3. The principle of nationality as a basis of port state jurisdiction

§ 400. This section takes issue with the premise that “jurisdiction based upon nationality will only apply to vessels operating under that state’s own flag”, for flag state jurisdiction does not exhaust all the possibilities which the principle of nationality offers to a state.¹³¹³ The aim of this section is to understand what possibilities the link between the port state and its

¹³¹⁰ (Pozdnakova, 2012, p. 79)

¹³¹¹ PCIJ, *SS. Lotus*, par. 46.

¹³¹² ICJ, *Arrest Warrant*, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal at par. 47.

¹³¹³ (Marten, 2014, p. 13)

nationals/persons offers to unilaterally regulate ship-source pollution which has taken place at sea.

5.3.1. *The link between the port state and its nationals and other persons*

§ 401. National affinity matters, for individuals, as a way of self-representation in a world of diversity. For the sovereign state, the nationality link matters to distinguish the citizenry from foreign dwellers, individually or collectively considered (i.e. natural and legal persons) both within the territory and abroad. In early modern international law doctrine, reference was made to the duty of the state to protect its nationals from any offence.¹³¹⁴ According to the classic doctrine of sovereignty, a ‘permanent population’ represents a requirement for the recognition of statehood.¹³¹⁵ This doctrine has been confirmed by the ICJ.¹³¹⁶ The permanence requirement is intrinsically linked to a territory, which raises the possibility that, at least in its origin, the jurisdiction of the state over nationals relates to its own pre-existence as a territorial institution: the prominence of the principle of territoriality replaced the previous predominance of the principle of nationality.¹³¹⁷ Evidence for the legal category of ‘nationals’ features multilateral legal instruments, such as the widely ratified UN Charter,¹³¹⁸ and it has even been the sole object of at least one regional treaty, the European Convention on Nationality.¹³¹⁹ Yet there is little evidence of the relevance of the link between the person and the state beyond the discussion on multiple nationality.¹³²⁰ It is also important to note that there are no customary

¹³¹⁴ (de Vattel, 1758, pp. 309-310)

¹³¹⁵ Montevideo Convention on Rights and Duties of States (inter-American), Article 1: “The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”

¹³¹⁶ ICJ, The Nottebohm case, *Liechtenstein v. Guatemala*, p. 23

¹³¹⁷ (van Panhuys, 1959, p. 126)

¹³¹⁸ Charter of the United Nations, Article 76(d).

¹³¹⁹ European Convention on Nationality, Article 2.

¹³²⁰ (Sironi, 2013, p. 54)

rules on the attribution of nationality.¹³²¹ The setting of criteria on attribution of nationality is one of those issues that falls under a state's domestic jurisdiction.¹³²²

§ 402. By attributing nationality to individuals, or allowing registration of legal persons or vehicles, the state establishes a link with them. This link persists whether these persons are within the territory or abroad. This includes jurisdiction over seafarers in foreign-flagged ships, wherever that foreign ship may be, and over national companies which may have ownership of foreign ships. This link may be useful when prescribing norms of conduct to be enforced with recourse to port powers, for they can target the conduct of national persons prior to the entry into the territory. The nationality of the members of the crew or of the owner of the ship is most of the time irrelevant for port states; it does not signify that there is a right to prescribe. It rather means that there is a degree of comity towards the jurisdiction of the flag state. In this sense, the jurisdiction over sailors under the principle of nationality is concurrent with the jurisdiction of the flag state over the ship under the ship-as-a-unit doctrine. The port state may claim to have the right to enforce at port a prescription on the conduct of its sailors on board foreign-flagged ships. Indeed, sailors do not become nationals of the ship's flag when at sea, they are merely under its exclusive enforcement jurisdiction until they reach the port of their home state.

§ 403. It is true that UNCLOS Article 94(2)(b) does not distinguish between nationals and non-nationals.¹³²³ However, the leniency of certain flag states when overseeing whether their ships comply with the applicable standards, has led to a quest for rescaling the jurisdictional balance of that treaty through subsequent practice in areas such as labour and security.¹³²⁴ This study argues that the same logic applies – or could apply if states so wished – to environmental issues. Natural persons and legal persons are affected by what sailors do, and by what ships do. Also, the port state may wish to ensure that no environmental harm is caused by its nationals abroad, namely as a way of ensuring that all of its citizens are law-abiding regardless of where they are. The existence of liabilities as the result of navigational incidents already shows the

¹³²¹ (Sironi, 2013, p. 55)

¹³²² *Supra* 4.3.1, The 'domaine réservé' as an exception to the principle of territoriality.

¹³²³ (Papanicolopolu, 2015, p. 307)

¹³²⁴ (Papanicolopolu, 2015, p. 310) Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), Article 2(d)(ii).

existence of jurisdiction over the conduct of individuals and the opportunities for unilateral action.¹³²⁵

§ 404. It is also necessary to consider the link between the port state and features of nature which are considered to be equivalent to legal persons. This arises from very recent developments aiming to enhance the legal protection afforded to a particular feature of nature within a territory.¹³²⁶ However, some cases on this topic can be found in the past, notably in the *Sierra Club* case where it was said that “[t]he river as plaintiff speaks for the ecological unit of life that is part of it”.¹³²⁷ Such a threshold has also made its way into the constitutional law of at least one state.¹³²⁸ The link between the state and its own environment, when established in this way, leads to understanding the damage to the environment as an attack on a person of that state and not on its territory, arguably giving grounds for extraterritorial jurisdiction if the threat of harm comes from outside the territory. Although it is difficult in practice to distinguish this link from the territoriality link established when the environmental harm is produced in the territory, especially because of the developments in the objective dimension of the principle of territoriality and the effects doctrine, there is no rule of customary international law to prevent such ‘environmental persons’ from being established with respect to what lies beyond the confines of the state’s territory, namely at sea, for example a reef, or even a fish species. As the attribution of nationality is a construction of domestic law, and considering the legal fictions created to attribute companies and ships with something akin to a nationality, it would seem that international law could not prevent a state from considering a well-defined natural feature as the subject of rights under national law. For the port state that natural feature would be akin to a legal person – a nationally registered legal person – and

¹³²⁵ International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969). (M’Gonigle & Zacher, 1979, pp. 322-323) (M’Gonigle & Zacher, 1979, p. 152)

¹³²⁶ New Zealand, Te Urewera Act 2014, Subpart 3—Legal identity of Te Urewera and vesting of Te Urewera land. India, Lalit Miglani vs State Of Uttarakhand And Others, “We, by invoking our *parens patriae* jurisdiction, declare the Glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, legal entity/ legal person/juristic person/judicial person/moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them. They are also accorded the rights akin to fundamental rights/ legal rights.”

¹³²⁷ USA, *Sierra Club v. Morton* (405 U.S. 727 (1972))

¹³²⁸ Ecuador, Constitución de la República del Ecuador, Articles 71-74.

hence capable of legal protection based on that link.¹³²⁹ What is more, this natural feature would become akin to a legal person since the formula set by the ICJ in *Nottebohm*, namely that nationality is “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”, would arguably not apply, leaving a broader margin for the state to determine the existence of such personality link.¹³³⁰ Should a ship visit a port after having caused harm to these natural features which despite existing at sea are given a quasi-personal status by the port state, port powers could be utilised as a means to provide them such natural features with legal protection. It should be noted however that this interpretation is purely academic and that it is less than plausible, in the current state of affairs, that any port state would engage with such a position with respect to natural features outside its territory.

§ 405. The way in which this link provides a basis for jurisdiction in cases of ship-source pollution is the principle of nationality. This principle may eventually be used to construct the capacity to act as a port state in broader terms than the ones generally accepted by scholars.

5.3.2. The principle of nationality in cases of ship-source pollution

§ 406. The principle of nationality permits a state to exercise jurisdiction over any of its nationals accused of, or victims of, criminal offences abroad.¹³³¹ This principle is at the root of the capacity to exercise jurisdiction over ships registered in the territory: that is the law of the flag, which provides that the sovereign whose flag the ship flies may exercise authority wherever that ship may be.¹³³² This authority may be exercised through enforcement actions in exclusivity on the high seas, and, elsewhere, it competes with the authority of the coastal state or of the port state. There is a connection with the territory as well, for the registration of the ship takes place there.¹³³³ That connection, however, is not the focus of this study. Port state

¹³²⁹ (Shelton, 2015, p. 49)

¹³³⁰ ICJ, *Nottebohm* at p. 23

¹³³¹ UN, A/61/10, at p. 522.

¹³³² Convention of the High Seas, Article 6. UNCLOS, Article 91.

¹³³³ ITLOS, *The M/V “Saiga” (No. 2) Case (Saint Vincent and The Grenadines v. Guinea)* “Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag”

jurisdiction may rely on the connection which the port state establishes with conduct perpetrated by its nationals abroad – and this excludes ships, covered by the capacity to act under the jurisdiction of the flag state. This connection is established not only with natural persons but also legal persons. Much like the principle of territoriality, the principle of nationality has two dimensions: the active dimension and the passive dimension. It would be possible to overlook the relevance of the active dimension of this principle for the port state if one was to focus only on the basis for the enforcement. Yet one could also consider a more expansive interpretation of what the capacity of acting as a port state might mean from a prescriptive point of view. In that case, the active dimension has some potential for extraterritorial jurisdiction to be exercised with recourse to port powers. For that reason, a few words must be dedicated to the active dimension before focusing on a more convincing hypothesis, namely the passive dimension.

5.3.2.1. *The active dimension of port state jurisdiction based on nationality*

§ 407. This active dimension, or test, of the principle gives a state jurisdiction over its nationals, wherever they may be.¹³³⁴ This is still a possibility even if the person ceased to be a national after the event or when the person had only become a national after the conduct took place.¹³³⁵ The active dimension of the principle of nationality allows any state, even a landlocked state, to claim jurisdiction over its nationals and legal persons. This is potentially applicable to discharge incidents perpetrated by individuals or can serve to target the captain of the ship who has responsibilities towards any event occurring on board, or even the ship-owner. Of course, this would depend on the available evidence.¹³³⁶ The UNCLOS does not elaborate on the people involved in maritime transport activities, leaving this void to be filled by states.¹³³⁷ As

¹³³⁴ (Institut de Droit International, 1883) “Article 7. Chaque Etat conserve le droit d’étendre sa loi pénale nationale à des faits commis par ses nationaux à l’étranger.”

¹³³⁵ (Ryngaert, 2015, p. 104)

¹³³⁶ (Pozdnakova, 2012, p. 75)

¹³³⁷ (Pozdnakova, 2012, p. 76)

any state has an interest in the proper behaviour of its nationals, even abroad, this encompasses compliance with environmental norms.¹³³⁸

§ 408. The same general principle still applies at sea despite the existence of a custom, embedded in the multilateral framework, which provides primacy to flag states.¹³³⁹ This is so because the registration link established between the flag state and the ship does not override the nationality link established between the port state and its natural or legal persons. The capacity to act as a port state would here mean that certain powers could be used at port by specifically targeting the individuals committing the action and not the ship itself, thus avoiding competing with the claim of the flag state.

§ 409. Legal persons such as companies also fall under the principle of nationality.¹³⁴⁰ This means that maritime transport companies can fall under the jurisdiction of states other than that of the flag state.¹³⁴¹ Nonetheless, despite this possibility, this does not mean that the ship is ascribed to the nationality of the port state invoking the jurisdiction.¹³⁴²

§ 410. Another hypothesis which may have to do with this principle considers “the corporate operation behind a foreign vessel”.¹³⁴³ The port state would not only be targeting a corporate practice but would eventually be tackling extraterritorial environmental misconduct by ships of such a company. The reason for the port state to rely on the active dimension of this principle in these cases is that it allows the port state to prevent other states from deciding on criminal sanctions over its nationals.¹³⁴⁴ This would, however, mean having to pierce the ship-as-a-unit veil, which would pose some limitations on the actual exercise of jurisdiction.

¹³³⁸ (van Panhuys, 1959, p. 128)

¹³³⁹ (Beale, 1923, p. 253)

¹³⁴⁰ (Pozdnakova, 2012, pp. 76-77)

¹³⁴¹ (Pozdnakova, 2012, p. 77)

¹³⁴² (Molenaar, 1998, p. 83)

¹³⁴³ (Marten, 2015, p. 137)

¹³⁴⁴ (Pozdnakova, 2012, p. 75)

§ 411. The EU has allegedly made use of this principle for the protection of the environment.¹³⁴⁵ Port states would here have a basis of jurisdiction that goes beyond the strict territoriality of the offence and encompasses the nationality of the offender.¹³⁴⁶ It is an exception that confirms the rule that port states do not commonly use the active nationality principle, except to strengthen their case under other existing principles.¹³⁴⁷

§ 412. This avenue enriches the possibilities for states to exercise extraterritorial jurisdiction, but the principle is more flexible than that, allowing states to establish a link with those who feel the consequences of such acts. Apart from the possibilities offered to port states by the active dimension, it is also necessary to consider the passive dimension of nationality.

5.3.2.2. *The passive dimension of port state jurisdiction based on nationality*

§ 413. The second dimension of the principle of nationality focuses on the passive part of the legal relationship. For some, this is a contested justification for extraterritorial jurisdiction.¹³⁴⁸ Nonetheless, some judges at the ICJ have considered it to be less than controversial.¹³⁴⁹ This dimension is sometimes represented as a separate basis of jurisdiction,¹³⁵⁰ and has also been presented as an application of the principle of security, which will be discussed in Section 5.4.¹³⁵¹ However, as this study associates each basis of jurisdiction with elements of state sovereignty, there are few reasons to give it such a dogmatic autonomy. Indeed, the trigger for its applicability relates to nationality – as a formal act of registration – linking the victims to the registering state that must protect them.¹³⁵² It is therefore more accurate to consider it as

¹³⁴⁵ (Klip, 2012, p. 194) EU, European Commission MEMO/07/50

¹³⁴⁶ (Ringbom, 2008, p. 322)

¹³⁴⁷ (Pozdnakova, 2012, p. 77)

¹³⁴⁸ (Ryngaert, 2015, p. 110)

¹³⁴⁹ ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, par. 47.

¹³⁵⁰ (Watson, 1993, p. 31)

¹³⁵¹ (van Panhuys, 1959, p. 130)

¹³⁵² (Gavouneli, 2007, p. 29)

part of a broader principle of nationality rather than as a strand of the principle of security.¹³⁵³ This dimension of the principle is also distinct from the scope of application of the effects doctrine. Indeed, it is important to emphasise that the passive personality test considers harm caused to nationals, including the conduct properly described as extraterritorial,¹³⁵⁴ whereas the effects doctrine does not consider conduct without a territorial component, excluding effects caused to nationals abroad. One piece of evidence for the existence of this principle is, for example, the norms of jurisdiction on crimes committed on board aircraft, namely the exception to the case when “the offence has been committed by *or against a national or permanent resident*” (emphasis added) of the contracting state which is not the state of registration.¹³⁵⁵ The US considers both natural and legal persons, but regarding the passive dimension it solely considers natural persons as victims.¹³⁵⁶

§ 414. Some scholars say that this dimension is unlikely to be used despite the existence of a legitimate interest for the state.¹³⁵⁷ Some dismiss the likelihood of this principle being applied with regard to discharges on the high seas, without referring to the specific case of emissions.¹³⁵⁸ Considering the harm that may result from pollution to citizens’ health, and the general obligation to both protect the environment and citizens’ lives, it seems that port states willing to prevent or punish ship-source pollution which harms nationals abroad, at sea or living in coastal areas of third states, may find here legal grounds for claiming jurisdiction.

§ 415. Nationals on board the ship may be affected, namely their right to ‘live’ in a sound environment or simply not being willing to be involved in an act of environmental depredation. This is particularly the case of exposure of passengers of cruise ships to high levels of emissions and the harm caused to their respiratory systems, which recent research has shown to exist.¹³⁵⁹

¹³⁵³ (Higgins, 1994, p. 68)

¹³⁵⁴ (Higgins, 1994, p. 65)

¹³⁵⁵ Convention on offences and certain other acts committed on board aircraft, Article 4(b).

¹³⁵⁶ (American Law Institute, 2018, p. 5)

¹³⁵⁷ (Pozdnakova, 2012, p. 77)

¹³⁵⁸ (Molenaar, 1998, p. 84)

¹³⁵⁹ (Channel 4, 2017)

Another possibility is to consider the damage to the health of passengers, not only on board the ship itself but also on ships nearby, caused by toxic fumes emitted by the ship, as well as on coastal populations. Finally, the protection of nationals abroad may cause the port state to intervene simply as a means to uphold the right of its citizens not to be exposed to substances which are proven to be a detriment to their health and to the environment. This is also the case if we consider that the state of nationality of a perpetrator may be affected because of its general obligation under the UNCLOS to protect the environment.¹³⁶⁰ Nonetheless, these three cases are very hard to prove, as the link between conduct (e.g. usage of certain fuels) and harm (health problem) is not immediate and often only reveals itself in the longer term. However, they illustrate that port states may have an interest in regulating extraterritorial conduct, not only that which happens on the high seas but also that which happens in other states' maritime zones and even within their own territories.

5.3.3. *The limitations of the principle of nationality for port states*

§ 416. Although for some the principle of nationality provides a weak basis for jurisdiction over extraterritorial ship-source pollution cases,¹³⁶¹ it may provide a ground for states willing to act unilaterally in their capacity as port states to regulate extraterritorial ship-source pollution. However, this principle finds an obstacle in the rights of the flag state. What is more, its material scope has some limitations regarding the protection of common concerns.

§ 417. One limitation to the application of this principle is the so-called 'ship-as-a-unit' doctrine, which has developed in the law of the sea regime.¹³⁶² This doctrine proposes that everything on a vessel is considered "holistically".¹³⁶³ This doctrine has been upheld by the ITLOS in the *M/V "Saiga" (No. 2)* case.¹³⁶⁴ The doctrine has more recently been confirmed at

¹³⁶⁰ (Pozdnakova, 2012, pp. 74-75)

¹³⁶¹ (Pozdnakova, 2012, pp. 74-75)

¹³⁶² (Yang, 2006, p. 15)

¹³⁶³ (Drenan, 2014, p. 113) (Drenan, 2014, p. 166)

¹³⁶⁴ ITLOS, *M/V "Saiga" (No. 2)* case, par.106.

the PCA in the *Arctic Sunrise* case.¹³⁶⁵ It posits that, for matters of jurisdiction, the legal moment of ‘registration’ provides jurisdictional supremacy. In other words, the ship is considered ‘as a whole’, and the eventual alternative links of jurisdiction existing on board, such as the nationality of the crew, are hidden. However, there is a precedent that opens up the possibility of a different interpretation: the *I’m Alone Case* arbitration.¹³⁶⁶ In this case, the arbitrators pierced the ship registration veil and found that the state of nationality of the sailors had a link with the case based on the principle of nationality.¹³⁶⁷ The idea that the protection offered by the flag state is a complement to the concept of diplomatic protection and as such does not preclude the rights of the state of nationality of the crew has been recently defended in a separate opinion at the ITLOS.¹³⁶⁸ This evidences that the ship-as-a-unit doctrine only refers to the obligations of the flag state with respect to the ship and does not preclude the port state from, for example, exercising jurisdiction over nationals who are a part of the crew of the ship.¹³⁶⁹ On this note, it has been said that the principle of passive nationality causes much legal insecurity for the members of the crew.¹³⁷⁰

§ 418. The principle of nationality is also ill-equipped to provide jurisdictional rights to act on behalf of, or in the interests of, humankind, as well as to explain the existing attempts to do so. Similar to the principle of territoriality,¹³⁷¹ this principle of jurisdiction has developed throughout history to allow the sovereign to protect its own interests when a conflict of interests occurs.¹³⁷² When a port state claims the principle of nationality as a basis for tackling an incident of ship-source pollution, it is nonetheless still focused on its own sovereignty. It may well be partly realizing the common interest since, as a result of the prescription, there is another deterrent to acts of pollution; but the claim to have jurisdiction which has that

¹³⁶⁵ PCA, *Arctic Sunrise Case*: par. 172.

¹³⁶⁶ Arbitration, S. S. “I’m Alone” (Canada, United States) at p. 1617.

¹³⁶⁷ (Kasoulides, 1989, p. 550)

¹³⁶⁸ ITLOS, *The Arctic Sunrise Case*, Separate opinion of Judge Jesus, p. 19.

¹³⁶⁹ (Crawford, 2012, p. 702)

¹³⁷⁰ (Meyers, 1967, p. 47)

¹³⁷¹ *Supra* 4.3, The principle of territoriality as a basis for port state jurisdiction.

¹³⁷² (Buxbaum, 2009, pp. 659-660)

consequence is made in terms that do not correspond to a cosmopolitan approach to the regulation of such concerns. Instead, the port state manifests an interest in protecting its nationals or in ensuring that they abide by the laws of the state. In other words, the port state may have such cosmopolitan motivations, but the principle used to justify its jurisdiction is not an adequate legal ground for regulating common concerns per se.

§ 419. A final note on how this principle may develop in the future relates to the fact that legal persons may today include not only companies but also features of nature. This new development is relevant when considering that environmental harm then becomes an issue of passive personality as well. Although the current practice only affords protection of natural features within the territory of the state, it could be considered that not only does passive personality apply to extraterritorial conduct which causes an impact to that ‘person’ (which would complement the argument based on territoriality), but also that such ‘persons’ may be constructed outside the territorial boundaries of the state.

5.4. The principle of security as a basis of port state jurisdiction

§ 420. For centuries, states have given extraterritorial application to their laws for matters of political offence.¹³⁷³ This led to the slow development of an autonomous principle of jurisdiction not based on a link between the state and a feature of geography (territory) or on its natural and legal population, including registered vehicles such as ships (nationality), but rather on the survival of the *polis*, i.e., on the *security* of the political substratum which is part of the state. This has occurred in the US¹³⁷⁴ as well as in Europe.¹³⁷⁵ The concern of the state here is the protection of its institutional stability, its territorial integrity and political independence. The right to act unilaterally in pursuance of such goals is simply based on the fact that one state cannot rely on another to protect its vital interests as necessary or

¹³⁷³ (Ryngaert, 2015, p. 114)

¹³⁷⁴ (Harvard Law School, 1935) “Article 7”

¹³⁷⁵ (Institut de Droit International, 1883) “Article 8: Tout Etat a le droit de punir les faits commis même hors de son territoire et par des étrangers en violation de ses lois pénales, alors que ces faits constituent une atteinte à l'existence sociale de l'Etat en cause et compromettent sa sécurité, et qu'ils ne sont point prévus par la loi pénale du pays sur le territoire duquel ils ont eu lieu.”

desirable.¹³⁷⁶ This principle's applicability in the maritime domain is not new: one example of the right to exercise jurisdiction over ships on the basis of this principle was the seizure by Portugal of a US vessel off the coast of Brazil in 1804.¹³⁷⁷ The question now is whether acts of pollution that occur at sea beyond the Exclusive Economic Zone of the state may fall under the scope of this principle.

§ 421. This section will first look at the connecting factors existing between the sovereign state acting in its capacity of port state and the threats posed to its security by ships, essential to justify the right to act under this principle. Then, focus is given to the application of this reasoning to conduct which is harmful to the environment, especially to practices that reveal ship-source pollution to be a concern to state security. Finally, this section discusses what the limitations are for port states when approaching unilateral jurisdiction over ship-source pollution from this standpoint. Because the familiar term 'protective' has been used to refer to passive personality, it is prone to raising confusion about what basis of jurisdiction it refers to,¹³⁷⁸ thus the choice of using the word 'security' has been made.¹³⁷⁹

5.4.1. *The link between the port state and national security*

§ 422. The existence of a link between the state and events related to the principle of territoriality and the principle of nationality is relatively easy to identify, especially after the development of cartography and civil registration. But the link between a state and "acts perpetrated abroad which jeopardize its sovereignty or its right to political independence"¹³⁸⁰ is rather more complex, for it depends either on agreements over specific issues (either the explicit, multilateral way or the implicit, customary way) or on a convincing legal argument based on what is essentially a subjective assessment. The existence of this argument inaugurates a new trend in state practice and is therefore unilateral in terms of its content, based

¹³⁷⁶ (Cameron, 1994, p. 31)

¹³⁷⁷ Church v. Hubbart,

¹³⁷⁸ (Mercier, 1883, p. 443)

¹³⁷⁹ PCIJ, S.S. Lotus, Dissenting Opinion by M. Moore, par. 92.

¹³⁸⁰ (Ryngaert, 2015, p. 114)

on a principle of jurisdiction.¹³⁸¹ Consideration of previous and generalized state practice is therefore essential when discussing the legality of the usage of such a principle.¹³⁸² However, the legality is not only related to the practices that pre-exist but to the underlying values that they aim to protect.¹³⁸³ The protective principle may still be an infringement on the liberty of the individual under another jurisdiction, interfering with a deliberate right not to regulate a conduct, something which flag states often use.¹³⁸⁴

§ 423. The connection established between a ship and the port also bears some significance from a security perspective. Suffice it to refer to maritime terrorism which has led some commentators to look at port state control mechanisms.¹³⁸⁵ The usage of port state powers may be interpreted from the perspective of national security as they provide the port state with valuable information for preventing conduct which would be harmful. In the same way that the principle of nationality may provide the port state with a right to apply its laws over nationals on board foreign ships, so the port state may also incorporate, as a legal basis for its extraterritoriality when using port powers, elements of security. Port state jurisdiction may encompass this dimension as well, and so far as prescription is concerned, one may argue that security is often self-sufficient.

§ 424. The link between the state and security issues became an issue at the time of the rise of the national state, in the nineteenth century.¹³⁸⁶ Some have traced its history further back, whilst simultaneously questioning its applicability today.¹³⁸⁷ This principle of jurisdiction is today widely accepted, but the practical situations in which it provides a basis for extraterritorial prescriptions are uncertain. It applies over situations that may, or definitely will, impact on

¹³⁸¹ (Cameron, 1994, p. 333)

¹³⁸² (Cameron, 1994, p. 330)

¹³⁸³ (Cameron, 1994, p. 333)

¹³⁸⁴ (Cameron, 1994, p. 34)

¹³⁸⁵ (Mellor, 2002, p. 390)

¹³⁸⁶ (Cameron, 1994, pp. 35-36)

¹³⁸⁷ (Sarkar, 1962, p. 463)

national security.¹³⁸⁸ These situations refer to acts that affect “the basic attributes of a state as an independent member of the international community”.¹³⁸⁹ The phrase “political crimes” might be of use here, although it provides little clarity on what might be involved.¹³⁹⁰ The cases upon which the phrase rests are quite diverse: espionage, terrorism, counterfeiting of foreign currency, or even “making false statements to consular officials abroad in order to obtain a visa”.¹³⁹¹ This broadly accepted listing has not prevented states from trying to expand the scope of this principle, for example to justify jurisdiction over drug trafficking cases.¹³⁹² Arguably this principle could extend to any threat to critical resources or infrastructure of the economy, but overall each state has its own understanding of what its security entails.¹³⁹³

§ 425. This principle is distinct from the most expansive interpretations of the territoriality principle.¹³⁹⁴ Indeed, whilst for the effects doctrine damage to/in the territory must exist or be imminent, the protective principle does not require that.¹³⁹⁵ The territory of the state is absent from this equation, for what matters here is the existence of the state as a political actor in the international community. However, is this principle relevant for port states which wish to give their laws extraterritorial application?¹³⁹⁶

§ 426. Assertions of jurisdiction regarding purely administrative issues could hardly be framed as matters portraying a threat to security, as determined by the government. However, not every issue of port state jurisdiction is of an administrative nature or framed as such. Regarding incidents of pollution, states are not reluctant to consider framing certain conduct as a matter

¹³⁸⁸ (Ringbom, 2008, p. 363)

¹³⁸⁹ (Hakapää, 1981, p. 153)

¹³⁹⁰ (Staal, 1961, pp. 429-430)

¹³⁹¹ USA, *United States v Rodriguez*.

¹³⁹² USA, *United States v Vilches-Navarrete*.

¹³⁹³ (Cameron, 1994, pp. 36-37)

¹³⁹⁴ *Supra* 4.3.3, The ‘effects’ doctrine as applicable to environmental matters.

¹³⁹⁵ (Ryngaert, 2015, p. 114)

¹³⁹⁶ (Marten, 2016, p. 483)

of criminal law (e.g. false declarations have been dealt with under accounts of conspiracy).¹³⁹⁷ It is undeniable that not every crime poses a threat to security. Nonetheless, this principle is open to a broad range of uses by governments, and the environmental consequences of ship-source pollution, as perceived in this century, are rapidly pushing for a development of the potential offered by this principle.¹³⁹⁸ As it is not likely that a multilateral instrument will exist to determine which crimes fall under this principle, the principle results from what trends the practice creates. Precedents accumulate and move towards becoming custom and customary practices lay down new meanings as to what security may entail.

§ 427. The US perspective with regard to this principle evolved throughout the twentieth century. A relatively recent case considered that the US Congress can punish drug smuggling committed on the high seas under the protective principle.¹³⁹⁹ The reference to general recognition seems to make this principle framed somewhat similarly to the principle of universality. This logic is similar to the *Ford vs United States* (1926) case, where British nationals hovering on the high seas outside US waters were convicted of a conspiracy to defeat the Prohibition and Tariff Laws.¹⁴⁰⁰ The Harvard Draft added some crimes to the list such as “falsification or counterfeiting of seals, currency, instruments of credit, stamps, passports or public documents”.¹⁴⁰¹ In the Restatements too there has been an evolution. Whilst in the Second the phrasing was “crimes threatening state security or the operation of government functions”¹⁴⁰², in the Third it was “certain conduct ... against the security of the state or a limited class of other state interests”.¹⁴⁰³ The Fourth, goes further and provides a non-exhaustive catalogue of wrongful conducts deemed to justify the extraterritorial reach of a

¹³⁹⁷ (Gehan, 2001, p. 181)

¹³⁹⁸ (Buzan & Waeber, 2009, p. 271)

¹³⁹⁹ USA, *United States v. Vilches-Navarrete*, Justice Lynch, concurring in judgment.

¹⁴⁰⁰ USA, *Ford v. United States*, (1926) 273 U.S. 593, unanimous opinion, written by Chief Justice Taft.

¹⁴⁰¹ (Harvard Law School, 1935) Articles 7 and 8 mentioning crimes “against the security, territorial integrity or political independence of a state” as well as crimes of “falsification or counterfeiting of seals, currency, instruments of credit, stamps, passports or public documents”.

¹⁴⁰² (American Law Institute, 1965) Article 33

¹⁴⁰³ (American Law Institute, 1987) Article 402(3).

state's laws based on the principle of security.¹⁴⁰⁴ Of relevance to the use of port powers is the 2003 Proliferation Security Initiative, which is spreading worldwide after the US took the initiative.¹⁴⁰⁵ Specifically, the statement of interdiction instructed states to apply entry conditions as well as inspecting ships at port, thus explicitly relying on port state jurisdiction.¹⁴⁰⁶ This highlights the role of the capacity to act as a port state in strengthening the level of national security, and it also reveals that port states consider extraterritorial conduct when evaluating the risk posed by certain ships. It is possible to imagine that port states might deny access as a health precaution.¹⁴⁰⁷

§ 428. The link between the state and its security is reliant on port powers as visiting ships pose a threat to the security of the port. However, what is proposed in this study is that one possible justification for the use of specific powers is the ship's conduct or CDEM standard applied at sea. In that sense, the incidental presence of the ship at port is simply an enforcement strategy which relies on a prescription that must be valid under this principle. To assess that validity, one must consider the applied rule or standard, in this case ship-source pollution. It is likely that environmental concerns will become part of the list of conducts that justify the reliance on the principle of security once the survival of populations (e.g. because of droughts or floods) and the integrity of the territory (e.g. because of rising sea levels and melting glaciers) become a frequent reality.

5.4.2. *The principle of security in cases of ship-source pollution*

§ 429. In International Relations, "environmental security" has been gaining some ground as a scholarly concept with relevance to marine pollution.¹⁴⁰⁸ The idea started to emerge in the early 1970s especially with regard to insufficient resources and the consequences that that produces in the economy. Environmental matters are today part of a state's fundamental security

¹⁴⁰⁴ (American Law Institute, 2018) par. 412.

¹⁴⁰⁵ UN Security Council, Res. 1874 (2009), para 11 and para 13.

¹⁴⁰⁶ (U.S. Department of State, 2003)

¹⁴⁰⁷ (Liu, 2009, p. 144)

¹⁴⁰⁸ (Hulme, 2009, p. 21)

concerns.¹⁴⁰⁹ The consequence of pollution to the global climate has even been the object of discussion at the UNSC.¹⁴¹⁰ Indeed, as citizens grow more aware of environmental threats and their respective governments are held accountable for maintaining a certain level of sustainable livelihood, national legislation around the world has come to reflect increasingly higher levels of environmental protection. However, as not every issue of environmental law is considered so serious as to pass the administrative threshold and become a matter of criminal law, i.e. reflective of a community value that ought to be protected by public powers, it is still a challenge to distinguish what can pose a threat to environmental security from what is merely a standard of environmental public order (e.g. urban planning).

§ 430. To some extent, the jurisdiction of the coastal state over its EEZ serves to protect its territory from environmental harm, although this does not fit well with the way the concept of security is used. The idea of enlarging the scope of the security principle to encompass high seas pollution is not new.¹⁴¹¹ The argument of ‘self-protection’ appears to be sufficiently flexible to cover this sort of conduct.¹⁴¹² This principle has been used in the environmental context by Canada acting as a coastal state willing to protect its Arctic coastline from ship-source pollution.¹⁴¹³ The application of this principle in that case was actually praised as a means to push for further regulation.¹⁴¹⁴ A port state may elaborate on this to prevent the consequences, for example, of discharges of materials not considered under international standards or of emissions above the level set multilaterally .

§ 431. The interpretation of environmental concerns as security concerns is more recent. In 1980, the ILC included “the preservation of the environment of [a state’s] territory or a part thereof” as constituting one of the essential interests of the state.¹⁴¹⁵ In a 1997 judgment, the

¹⁴⁰⁹ (Graeger, 1996, p. 114)

¹⁴¹⁰ UNSC, S/PV.5663.

¹⁴¹¹ (Pharand, 1972, p. 257).

¹⁴¹² (Pharand, 1972, p. 261)

¹⁴¹³ (Carnahan, 1971, p. 632) (Gavouneli, 2007, p. 31)

¹⁴¹⁴ (Beesley, 1973, p. 232) (Beesley, 1973, p. 228)

¹⁴¹⁵ UN, A/CN.4/SER.A/1980/Add.1 (Part 1), p. 14.

ICJ considered that the “concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an ‘essential interest’ of that State”.¹⁴¹⁶ This study regards the phrase “essential interest” from a security perspective, such that the state could claim to have a well-justified claim to extraterritorial jurisdiction in cases of extremely serious acts of pollution.

§ 432. Although the threshold for arguing the security principle is today quite high, the threats posed by environmental harm, such as climate change or loss of biodiversity, could soon become an issue that falls under the scope of this principle. One only has to consider the rising sea level and the fact that it may lead to the disappearance of territories of states, or the loss of resources in coastal areas resulting from contamination through ballast water, to understand that pollution may well fall under this principle.

§ 433. Despite its ‘unproblematic’ acceptance, this principle is not an empty shell which states can fill with whatever measures they so choose.¹⁴¹⁷ This is so especially in the case of maritime affairs which are regulated in the UNCLOS or elsewhere.¹⁴¹⁸ The idea of considering this principle has already been mentioned with regard to the abandonment of fishing nets at sea, considered as debris.¹⁴¹⁹ What is proposed here in this study is that the practice analysed contains certain elements which relate to the link between the state and national security, but that these links remain undeclared. State practice already provides some examples.¹⁴²⁰ An important caveat to understanding the interpretation given to state practice by this study is to consider that arguments having to do with ‘safety’, e.g. of navigation, often fall under the scope of the principle of security.

§ 434. The denial of entry to the *Prestige* into the ports of Galicia was based on issues of security/safety of the port, as was the unilateral prescription to phase out single-hulled ships from port at an accelerated pace following the spill.¹⁴²¹ In this case the port state denied entry

¹⁴¹⁶ ICJ, Gabčíkovo-Nagymaros Project.

¹⁴¹⁷ (Higgins, 1994, p. 74)

¹⁴¹⁸ (McDougal & Burke, 1962, p. 566)

¹⁴¹⁹ (Paul, 1990, p. 1046)

¹⁴²⁰ (Molenaar, 1998, p. 84)

¹⁴²¹ Spain, Real Decreto-Ley 9/2002.

to ships based on extraterritorial conduct (for the ship would never be ‘built’ once it has entered the territory) that threatened security, namely the fact that single-hulled ships are more fragile and can have disastrous accidents with environmental consequences. The measure taken on the grounds of safety must be justified under some principle. Although it links to the consequences felt at the port – and so is arguably partly territorial – the claim to prescribe a rule which has the consequence of determining the way a ship must be constructed prior to arriving at port cannot fully be justified in that way. The concern of the port state is not only the conduct at port – i.e. the arrival with a single hull – but also the threat caused to the environment of the port state, regardless of that territorial component.

§ 435. Counts of conspiracy have been used unilaterally by the US to give extraterritorial application to ship-source pollution regulations.¹⁴²² This follows from the understanding that there is jurisdiction to prescribe based on extraterritorial conduct ‘directed against’ the security of the nation.¹⁴²³ More recent cases have confirmed this is an approach to deal with extraterritorial discharges. Even though the principle was not explicitly argued for, the count of ‘conspiracy’ features in the list of actions over which a state may consensually claim to have jurisdiction based on security concerns. This approach allows the state to claim jurisdiction over a “limited class” of interests and to use them for example to target environmentally harmful conduct.¹⁴²⁴

§ 436. For some authors, the threat of pollution to the territory or to the exclusive economic zone has given the EU grounds to act as a port state unilaterally under this principle.¹⁴²⁵ Recourse to the principle of security in EU law occurred in a judgment of 1997 which related to entry conditions.¹⁴²⁶ The court stated that “attempted entries” of ships into internal waters but which are in international waters fall under the scope of the applicable law.¹⁴²⁷ This would

¹⁴²² USA, *M/V Ocean Hope*.(Lexology, 2017) (Lexology, 2017) *M/T Cielo di Milano*

¹⁴²³ (American Law Institute, 2018, p. 5)

¹⁴²⁴ USA, DOJ, March 30, 2017. USA, DOJ, September 2, 2016.

¹⁴²⁵ (Klip, 2012, p. 197)

¹⁴²⁶ ECJ, C-177/95.

¹⁴²⁷ ECJ, C-177/95. (§25)

also apply to any activity aimed at supporting that attempt.¹⁴²⁸ Hence, being in course towards the internal waters may already be a matter of security concern for the state.¹⁴²⁹ Also of relevance, the recently approved resolution of the European Parliament on an HFO Ban in the Arctic also stresses security issues, namely from an energy perspective.¹⁴³⁰ In this case, the jurisdiction of the EU over the fuels carried by ships in the Arctic also does not fit the principle of territoriality.¹⁴³¹

5.4.3. *The limitations of the principle of security for port states*

§ 437. The principle of security is not totally ill-suited for pollution cases. The fact that it is not regularly mentioned as a legal basis does not mean that states do not consider it relevant; it merely illustrates that, so far, the state does not consider its security to be threatened by environmental harm. In the future, it is possible that a state will prescribe the use of port powers to regulate some type of polluting activity due to the threat to security that the regulated conduct might produce. At the very least, the principle of security seems to be suited to providing the port state with an additional set of legal arguments for claiming jurisdiction over ships. However, much like the principle of territoriality and the principle of nationality, it has its own limitations.

§ 438. One limitation is the lack of objective criteria for assessing a threat to national security. Each state has full discretion to determine what criteria are relevant. The broad spectrum of application of this principle allows states to argue that virtually any conduct has a link with their security, self-judging the essentiality of the interests allegedly threatened. In practice however, protective measures are taken by states when a danger is “clear and localized”, as one international lawyer and academic put it.¹⁴³² Another limitation is that an event or a threat of ship-source pollution is hardly conceivable as being sufficiently severe to pose a threat to the

¹⁴²⁸ ECJ, C-177/95. (§26)

¹⁴²⁹ ECJ, C-177/95. (§27)

¹⁴³⁰ EU, 2016/2228(INI), 27.

¹⁴³¹ *Supra* 3.4.9, The ban on oil tankers into port.

¹⁴³² (Schram, 1970, p. 60)

political integrity of the port state. This is especially the case when that pollution is operational and already the object of multilateral consensus on the threshold of severity for the port state to use its powers. Furthermore, it is often only because of accumulated effects that some types of pollution become an environmental concern. As the argument of security ties up with the specific interests of the coastal/port state, this principle is by no means the result of shared concerns but rather of national interests.¹⁴³³ As such, it is of little support to instances where jurisdiction is being exercised despite the lack of such threat to national security. Extensions of jurisdiction under a broad interpretation of ‘self-protection’ have already been addressed by the ITLOS, although it was at the time referring to EEZ enforcement with respect to bunkering.¹⁴³⁴ Recourse to the principle of ‘public interest’ was raised there without any cosmopolitan ambition, arguably defeating the functional jurisdiction of the coastal state in the EEZ.¹⁴³⁵

§ 439. Notwithstanding those limitations, it is noticeable that security is used broadly by states to justify the use of state powers which apply to extraterritorial conduct. In the 2017 Qatar diplomatic crisis, several states (namely the United Arab Emirates, Bahrain and Saudi Arabia) decided to deny access to port to ships coming from or going to Qatar, regardless of their flag, due to the threat that journey might pose to ‘national security’.¹⁴³⁶ The extraterritoriality exists in the sense that the determination of the relevant conduct is decided by considering acts which take place prior to the entry into the port, in this case a visit to a specific set of ports. This has been framed as a very broad rule and it was based on a very vague threat, but despite political protests, no claim has been made about the illegality of the measure. Such a case illustrates how this principle may be subject to extensive interpretation which may be an abuse of that jurisdictional right.

§ 440. To argue that jurisdiction to protect the environment can be based on security may therefore work to protect the common concern, but only indirectly. That principle is prone to generate conflicts of laws due to fundamental disagreement as to what that principle allows the port state to do with respect to extraterritorial conduct of ships. Unilateralism based on security

¹⁴³³ (Cameron, 1994, p. 35)

¹⁴³⁴ ITLOS, *M/V Saiga* Case 2, par 128-131.

¹⁴³⁵ (Goodman, 2017, pp. 22-23)

¹⁴³⁶ E.g., UAE, Port of Fujairah Notice to Mariners No. 224.

does not bring any substantial development in the structure of jurisdiction and fails to bring to the forefront of the discussion the commonality of concerns generated by ship-source pollution. It strengthens the fragmentary nature of environmental governance by allowing a port state to use its enforcement powers to claim a link to a situation and equating that link with any other link which that state may claim.

5.5. The principle of universality as a basis for port state jurisdiction

§ 441. Aside from jurisdiction over nationals abroad and over acts that pose a security threat to the state, there exists a third principle that port states may argue as a legal basis for their extraterritorial prescriptions: universality. The principle of universality has developed in international law as a jurisdictional ground that entitles states to regulate extraterritorial acts committed by non-nationals against non-nationals and which pose no immediate threat to national security.¹⁴³⁷ However, it could be aimed instead at certain conduct that is of concern to all states.¹⁴³⁸ This is the case, for example, with piracy on the high seas, which has been codified in the UNCLOS but which consists in the custom of considering pirates as *hostis humani generis*;¹⁴³⁹ and with the transport of slaves, which has also been codified in that treaty.¹⁴⁴⁰ The crimes typified in the ICC Statute can also be considered in this context: namely the crime of genocide; crimes against humanity; war crimes; and the crime of aggression.¹⁴⁴¹ In addition, torture has received similar treatment in some jurisprudence¹⁴⁴² and in treaty law;¹⁴⁴³ and the same occurs with regard to apartheid.¹⁴⁴⁴ Some would add terrorism to the list,

¹⁴³⁷ (Mercier, 1883, p. 443)

¹⁴³⁸ (Randall, 1988, p. 788)

¹⁴³⁹ UNCLOS, Article 100.

¹⁴⁴⁰ UNCLOS, Article 99.

¹⁴⁴¹ Rome Statute of the International Criminal Court, Article 5.

¹⁴⁴² USA, *Filártiga v. Peña-Irala*, “Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”

¹⁴⁴³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁴⁴⁴ International Convention on the Suppression and Punishment of the Crime of Apartheid.

considering terrorists akin to pirates.¹⁴⁴⁵ Because this principle of jurisdiction is, like all others, not completely codified but rather developed from the practice of states, its precise material scope is today a constant matter of discussion; this also illustrates the lack of consensus surrounding even its very existence.¹⁴⁴⁶ It is often submitted that the *opinio juris* on the universality of such matters of concern to all states pre-existed the instruments that formalize them (e.g. the Nuremberg Trials). Little has been written about capacities upon which states may unilaterally find grounds for universal jurisdiction, such as that of acting as a port state. This section aims to provide an account of that possibility.

5.5.1. *The link between the port state and the international community*

§ 442. The “capacity for a state to enter into relations with other states” is often referred to as an identifying mark of a sovereign state.¹⁴⁴⁷ This mark is closely linked to the production of legal effects from the recognition – or non-recognition – of states, which may be a unilateral act or included in a treaty.¹⁴⁴⁸ Indeed, no sovereign state exists in complete isolation, even if it is in a state of economic autarchy; this is especially evident in an age of accelerated integration and shared global values. This ethical element has practical implications. For example, in 1962 the Supreme Court of Israel argued that it was entitled to jurisdiction not only because of the nature of the crimes giving rise to universal jurisdiction, but also because Israel was acting “in the capacity of a guardian of international law and an agent for its enforcement”.¹⁴⁴⁹ If the state is an ethically oriented creature, then the jurisdiction it exercises with respect to extraterritorial conduct thus has a legal basis for fulfilling that dimension.¹⁴⁵⁰

§ 443. This rather more cooperative nature of sovereignty reveals itself in the exercises of jurisdiction under the capacity to act as a port state. The port state is providing an infrastructure and a service, both of which are essential to navigation, trade, and communication and,

¹⁴⁴⁵ (Greene, 2008, p. 699)

¹⁴⁴⁶ UN, A/69/174. No reference is made to environmental crimes.

¹⁴⁴⁷ Montevideo Convention on Rights and Duties of States, Article 1.

¹⁴⁴⁸ (Frowein, 2010)

¹⁴⁴⁹ Israel, Attorney General of the Government of Israel v. Adolf Eichmann.

¹⁴⁵⁰ (Higgins, 1994, p. 77)

ultimately, they provide a service to the world economy, ensuring the uninterrupted flow of people and goods. Providing these services establish a relationship with the flag states, ship-owners, maritime transport companies, crews, passengers and ultimately with humankind which benefits from this development. Also, by supporting the flag state in the fulfilment of its obligations, the port state is not only maintaining good diplomatic relations with that single state but, from a substantive point of view, it is also ensuring that all ships entering its ports are more compliant with the internationally applicable rules and standards, and this has a positive impact on navigation by discouraging substandard shipping.

5.5.2. *The principle of universality in cases of ship-source pollution*

§ 444. The international community has arguably not yet determined any act of pollution as providing for universal jurisdiction. However, evidence of the universal criminalization of pollution exists. An earlier draft of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) contained an Article which provided for “international crimes”.¹⁴⁵¹ In that draft, one of the crimes was environmental in nature, and referred to obligations “such as those prohibiting massive pollution of the atmosphere or of the seas”. In the commentary, the ILC built on the risk to the environment resulting from human activity.¹⁴⁵² Notwithstanding its presence throughout the negotiations, this Article was not included in the final draft of 2001. And what is more, the adjective “massive” would presumably not give states the possibility to enforce standards of the kind discussed in this study. Nonetheless, it would provide a line of reasoning for a port state willing to argue for the applicability of this principle.

§ 445. Universality could be applicable when pollution is deliberate and constitutes an act of terrorism, even if it does not affect the government. However, the phrase of a 1972 UN Resolution on terrorism that includes reference to “pollution, fouling, or poisoning of drinking water or food” appears to be drafted in a way that excludes intentional ship-source pollution.¹⁴⁵³

¹⁴⁵¹ UN, A/CN.4/SER.A/1976/Add.1 (Part 2), p. 75, Article 19(d)

¹⁴⁵² UN, A/31/10, p. 109.

¹⁴⁵³ UN, Doc A/C/6/418.

What is more, instances of deliberate pollution of this kind are the exception and not the rule, and they are also more likely to occur close to the coastal areas and not in areas outside the state's maritime zones.

§ 446. Because UNCLOS Article 218 allows port states to enforce discharge standards regardless of the location of the incident, some have considered that right as a manifestation of the principle of universality.¹⁴⁵⁴ This is because the port state would hardly have any connection with incidents of pollution other than the mere presence of the ship in port.¹⁴⁵⁵ Some see the violations of discharge standards as being tantamount to violations *erga omnes* and hence committed against the world community.¹⁴⁵⁶ The question arises as to whether this principle may be resorted to by non-parties to the UNCLOS. This would be evidence of the customary nature of that jurisdiction and, more convincingly, of the applicability of the principle of universality as the legal ground for that right to enforce. More relevant to understanding the unilateral application of this principle is state practice from states which are not parties to the UNCLOS. In the US, courts rely on UNCLOS Article 218 as customary international law.¹⁴⁵⁷ This may illustrate how at least port state enforcement of international discharge standards may be interpreted as being based on a principle of universality.

§ 447. Some literature suggests that there is a similarity between pollution on the high seas and piracy.¹⁴⁵⁸ There are even comparisons of cases where the UNCLOS recognizes customary jurisdiction under the principle of universality, such as piracy and radio broadcasting, with the “concern to the world community” caused by high seas pollution.¹⁴⁵⁹ Yet again, this would depend on the sort of pollution. However, the example of UNCLOS Article 218 is a fragile example: the limits set by the treaty on the prescription of rules and standards regarding other issues seem to indicate that, although the concern exists, the multilateral approach is the

¹⁴⁵⁴ (McDorman, 1997, p. 318) (Keselj, 1999, p. 136) (Oxman, 2007, p. 43)

¹⁴⁵⁵ (Bodansky, 1991, p. 740)

¹⁴⁵⁶ (Ringbom, 2008, p. 216)

¹⁴⁵⁷ USA, *US v. Jho*.

¹⁴⁵⁸ (Pharand, 1972, p. 257)

¹⁴⁵⁹ (Bodansky, 1991, p. 719)

privileged means of justifying jurisdiction and unilateralism should not, according to this view, result from arguments linked to the universality of the concern but rather to specific circumstances which may grant extended powers of jurisdiction.¹⁴⁶⁰ In other words, the treaty seems to reveal the existence of a right under that principle but, by creating well-defined terms under which jurisdiction may be exercised, seems to preclude further action.

§ 448. There is a great lack of prescriptions which indicate recourse to this ground in environmentally related matters. In the US, the phrase “such as”, present in the definition of the Restatement, does allow for pollution to be considered, but no actual examples could be found.¹⁴⁶¹ The EU has also left a window open for the application of this principle. When adopting Directive 2005/35/EC on ship-source pollution, the EU also adopted a Decision intended to supplement and ensure the effectiveness of that Directive. The instrument had a specific Article on jurisdiction which provided that each member state would “take measures necessary to establish its jurisdiction, so far as permitted by international law”.¹⁴⁶² That jurisdiction, under the Directive, has the effect of criminalizing illicit discharges, as per MARPOL. Paragraph (g) of that Article refers specifically to offences committed on the high seas and to the exercise of port powers. Whilst paragraph (f) still refers to effects in the territory by the pollution caused by the visiting ship, paragraph (g) makes no such reference. This means that the EU requires each member state to establish jurisdiction over any ship which has, outside that state’s territory, committed a crime of discharge, irrespective of the applicability of the MARPOL standards to the flag state. The presence of the ship in the port is an argument in favour of those who see this as a limited application of the principle of universality.¹⁴⁶³ The Decision was eventually annulled by the ECJ on grounds of incompetence according to EC treaty law.¹⁴⁶⁴ Nonetheless, it is an important example of how port states have regulatory ambitions over the high seas and how they acknowledge that international law provides for the

¹⁴⁶⁰ (Tams, 2011, p. 398)

¹⁴⁶¹ (American Law Institute, 2018, p. 5)

¹⁴⁶² EU, Framework Decision 2005/667, Art. 7(1).

¹⁴⁶³ (Klip, 2012, p. 198)

¹⁴⁶⁴ ECJ, C -440/05.

scope of their jurisdiction. It remains, however, a matter of dispute as to whether the decision enshrined the principle of universality. Paragraph 5 of Article 7 referred to “connecting factors” that “shall be taken into account” when establishing that jurisdiction, which referred to all the other grounds of jurisdiction.¹⁴⁶⁵ Nevertheless, it appears that these factors, when not verified, would not preclude the port state from exercising jurisdiction on the basis of the universality of MARPOL’s discharge standards and their generally accepted nature. That would essentially have the same consequences as UNCLOS Article 218.

§ 449. Overall, evidence for the principle of universality in cases of ship-source pollution outside the scope of treaties is lacking, although there exists some *opinio juris* as to the universality of the concern around discharges at sea that may point to the application of the universality principle. Arguably, every exercise of port state jurisdiction with an aim of preventing, reducing, and controlling ship-source pollution represents a prescription which is universally beneficial.¹⁴⁶⁶ Discharge is generally accepted as wrong but there is disagreement as to the specific standards. This may be explained by the inherent limitations of this principle for states which, acting in their capacity as port states, aim at regulating extraterritorial conduct of ships which is deemed as polluting the oceans or the atmosphere. Those limitations need to be addressed separately

5.5.3. *The limitations of the principle of universality for port states*

§ 450. Universal jurisdiction is unilateral when any state may act, regardless of existing links.¹⁴⁶⁷ More precisely than that, however, it means that *every* state has links to that conduct.¹⁴⁶⁸ Because of this high threshold, the application of this principle by port states is quite limited. Some limitations justify why port states do not rely on this principle to support their assertions of port state jurisdiction even when they relate to other states’ interests.¹⁴⁶⁹

¹⁴⁶⁵ (Pozdnakova, 2012, p. 244)

¹⁴⁶⁶ (Okidi, 1976, p. 215)

¹⁴⁶⁷ (Reydams, 2003, p. 38)

¹⁴⁶⁸ (Randall, 1988, p. 788)

¹⁴⁶⁹ (Byers, 1999, p. 64)

§ 451. Firstly, this principle applies to ‘serious crimes’, namely acts defined as international crimes. Most ship-source pollution is regulated through administrative laws, whose infraction does not necessarily constitute a crime but rather a contravention, a delict. If only the port state criminalizes the conducts, or if such conduct is deemed a crime in a rare number of jurisdictions, the argument of universality is not sustainable. The principle of universality does not allow jurisdiction based on the universality of the concern itself but rather on the universality of the criminalization.

§ 452. Secondly, if state practice shows that the conduct is a serious offence in ‘most’ legal systems, being punishable therein by severe sentences, this does not automatically mean that the port state may consider such extraterritorial conduct.¹⁴⁷⁰ There must be evidence of a collective effort of the international community in tackling that conduct with a certain sense of cooperation. It is possible to consider certain types of pollution as reaching this threshold, especially those linked to climate change.¹⁴⁷¹

§ 453. Thirdly, the capacity to act as a port state emerged as a substitute for flag state jurisdiction and to some extent is still limited by it, at least at the procedural level. In arguing that the extraterritorial prescription performed under the capacity to act as a port state is justified by reasons of universality, the port state may have to consider that the respective flag state is unwilling or unable to prosecute criminals under its domestic law. When the flag state has regulations in place which conform at least to existing international standards, then it becomes even less likely that this principle will apply.

§ 454. Finally, a crime of universal jurisdiction would hardly be framed as falling under the jurisdiction of a state only when acting under one specific capacity. Port states may construct the basis for acting under this principle in general terms, using the presence of the ship in port as a mere incident of the crime and looking at environmental laws being applied not necessarily in connection with the ship’s conduct but rather in other contexts.

5.6. Interim conclusion (V)

§ 455. This chapter sought to reinterpret the unilateral practice of port states by taking into consideration the jurisdiction effectively exercised without reference to the principle of

¹⁴⁷⁰ (Reydams, 2003, p. 28)

¹⁴⁷¹ *Infra* 6.2.3.2.3, The function of climate change mitigation.

territoriality. By looking into the law and the policy arguments of port states, it becomes evident that port state jurisdiction is not equivalent to territorial jurisdiction. Rather, port state jurisdiction is a bundle of rights, where part of the equation requires looking at other types of links that are at stake when a ship pollutes the sea. This chapter arrived at the conclusion that cosmopolitan action is hardly justifiable by recourse to the principles of nationality and security. The principle of universality is the sole ground for states to pursue cosmopolitan goals, but practice has shown that states find this principle difficult to argue *per se*, especially because it relies on consent on very specific criminal conduct. It is not an exaggeration to say that port states do seek to achieve the universal application of their unilateral standards, as that would level the playing field worldwide. Yet it is necessary to consider that it is not universality *per se* that justifies unilateral port state jurisdiction geared towards providing legal protection to global commons. Rather, it is a different principle which therefore deserves a separate chapter.

6. THE FUNCTIONALITY OF UNILATERAL PORT STATE JURISDICTION

“ (...) dans l’ordre interétatique (...) les agents et gouvernants étatiques (...) sont investis d’un double rôle. (...) C’est ce que nous appellerons la loi fondamentale du dédoublement fonctionnel.”¹⁴⁷²

6.1. Introduction to Chapter 6

§ 456. The quest for the universal recognition of a certain legal standard of cosmopolitanism requires giving due normative relevance to the link between the state and a subject matter (*materiae*). Instead of assessing the traditional parochial links of jurisdiction, one is instead challenged to verify whether “the requirements of justice”, as they were termed in the *SS Lotus* case, are present when states are acting unilaterally.¹⁴⁷³ Some would simply argue that unilateral assertions of port state jurisdiction which are not grounded in any of the principles discussed so far are simply unlawful.¹⁴⁷⁴ That is a view which this study does not share. The dominant “territoriality/extraterritoriality divide” paradigm does not work in addressing the environmental consequences of shipping, and it also fails in dealing with other issues such as jurisdiction in cyberspace.¹⁴⁷⁵ Faced with the limitations of that dichotomy this section suggests turning to an alternative approach to better understand the missing piece of a port state’s jurisdiction. This approach relies on both a distinct interpretation of “territory” – already explained in Chapter 4 – and on a principle which is not extraterritorial jurisdiction but rather a *tertium genus* with the potential of justifying action within the territory itself.

6.2. Functional jurisdiction in international law

§ 457. The applicability of ‘functionality’ to understand the role of states, often referred to as ‘functional jurisdiction’, is not a novel contribution of this study.¹⁴⁷⁶ It has been already noted

¹⁴⁷² (Scelle, *Regles Generales du Droit de la Paix*, 1933, p. 358)

¹⁴⁷³ PCIJ, *SS Lotus*, pp. 30-31.

¹⁴⁷⁴ (Bauerle, 2012, pp. 117-118)

¹⁴⁷⁵ (Svantesson, 2015)

¹⁴⁷⁶ (Riphagen, 1975, p. 122)

that cosmopolitanism itself “provides a basis for conceptualizing the functional role of states in terms of law”.¹⁴⁷⁷ This principle stems from an interpretation of sovereignty which is no longer authoritarian but participative, i.e., determined by the fulfilment of a role amongst equals.¹⁴⁷⁸ The principle has most recently been mentioned by the Inter-American Court of Human Rights to explain the sort of purpose-based jurisdiction established over areas at sea.¹⁴⁷⁹ What is novel in this study is that this principle has never been used to explain the legal ground for unilateral prescriptions by port states either purposefully or incidentally as cosmopolitan. That is what this section aims to do.

§ 458. First it is necessary to recapitulate some points from Chapter 4. It was concluded that the dominant approach to port state jurisdiction falls into a ‘territorial trap’, which is the assumption that the territory of the state provides it with its sovereign authority.¹⁴⁸⁰ In fact that assumption is merely the result of an historical circumstance of the exercise of state sovereignty.¹⁴⁸¹ To better understand possible developments in the law of jurisdiction, one must understand first that states are not bound to consider their jurisdiction from a strictly territorial/extraterritorial standpoint but may also do so from the perspective of purpose.

§ 459. From the perspective of functionality, purpose matters. The sovereign state is here not an ‘owner’ of the territory, but a mere ‘user’, managing it with a predetermined purpose.¹⁴⁸² This perspective arguably does not undermine rights over natural resources, for the state would be a privileged user which can always prevent access.¹⁴⁸³ Furthermore, the principle of functionality only applies with respect to areas beyond the territory.

§ 460. The notion of ‘territorial exclusivity’ would, under a functional perspective, serve rather as a limit to state jurisdiction in the accomplishment of international law. It would be

¹⁴⁷⁷ (Hey, 2010, p. 58)

¹⁴⁷⁸ IACHR, Opinion Consultiva 2018, Judge Alvarez individual opinion, par. 43

¹⁴⁷⁹ IACHR, Opinion Consultiva 2018, Judge Alvarez individual opinion, par. 87, fn.

¹⁴⁸⁰ (Agnew, 1994, p. 77)

¹⁴⁸¹ (Elden, 2013, p. 237)

¹⁴⁸² (Scelle, 1958, p. 352)

¹⁴⁸³ (Barnes, 2009, p. 231)

illustrating that what occurs within the territory is not necessarily under a state's sovereignty.¹⁴⁸⁴ Indeed, the principle of territoriality has been said to be a mere "rule of convenience in the sphere of the law of evidence", or a consideration which "is not a requirement of justice or even a necessary postulate of the sovereignty".¹⁴⁸⁵

§ 461. Notwithstanding the value of a functional approach to jurisdiction in the study of the law of the sea regime, the understanding of the literature on what is encompassed by the functionality of a state's jurisdiction is still not wholly adequate. The early interpretations of functionality did not take any account of the cooperation between states towards the achievement of shared goals. This cooperation enables new functions for sovereignty that serve more than preserving the healthy coexistence between states.

§ 462. Functional jurisdiction is also broader than a treaty-based right. Although certain limits to unilateral action may exist as a result of an ongoing negotiation of a treaty, none exists as the result of a general duty to cooperate with other states to achieve a certain objective.¹⁴⁸⁶ Depending on the outcome of a negotiation, states may also act unilaterally whilst still being part of a cooperative effort to strengthen a regulatory framework, such as being party to an international organization or a treaty. Indeed, states often find that an effective way to justify their unilateral actions is by making an appeal to shared interests, strengthening the idea that cooperation is a source of, or at least a political inspiration for unilateralism.¹⁴⁸⁷

§ 463. One of the main reasons behind the proposal made in this study that port state unilateral claims are based on functionality is that this principle has always been a legal basis for jurisdiction at sea, even before the sea could be appropriated as part of the territory to form the territorial sea. Sovereign states still agree that the oceans remain a global common, continuing the tradition of the Roman law that they are part of what was then called *communis omnium naturali jure*.¹⁴⁸⁸ However, for some time now sovereign states have also accepted that they

¹⁴⁸⁴ (Scelle, 1958, p. 353)

¹⁴⁸⁵ (Lauterpacht, 1977, p. 241)

¹⁴⁸⁶ (Dupuy, 2000, p. 23)

¹⁴⁸⁷ (Dupuy, 2000, p. 20)

¹⁴⁸⁸ D. 1.8.2 pr.-1 Aelius Marcianus libro tertio institutionum. Quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis acquiruntur. Et quidem

may fulfil parochial objectives at sea as well, such as ensuring their own “safety and welfare” in an ill-defined area surrounding their coasts.¹⁴⁸⁹ Functionality has also been shown to allow the coexistence of both parochial and cosmopolitan functions: consider, for example, the way in which sovereign rights over living and non-living resources in an EEZ, a self-interest of the coastal state, articulate with that state’s jurisdiction to protect and preserve the marine environment, which brings benefit to all other states.¹⁴⁹⁰ What is more, this principle allows multiple functions to be fulfilled in the same space by different sovereign states.¹⁴⁹¹ This is a problematic outcome of this approach especially because there is neither coincidence nor hierarchy between all the functions attributed to states under international law.¹⁴⁹²

§ 464. There are many examples of jurisdiction grounded in functionality. The most relevant are posited on international legal instruments, such as the UNCLOS.¹⁴⁹³ This study submits that some functions pre-exist functional jurisdiction, i.e., they are not necessarily a legal construction issuing from a multilateral agreement. Functions are purposes, goals, objectives, for the fulfilment of which sovereign actions are required. The right to act to fulfil those functions is based on a link between the state and the goal/value itself. The state organs/branches (legislative/executive/judiciary) become then a means to achieve the internationally authorised function, a process termed ‘functional splitting’.¹⁴⁹⁴ In that sense, some unilateral actions are not the result of a discretionary power of the state but rather the end result of a legally relevant ‘call for action’ from either the scientific community or the community of states, even if in a non-binding way (e.g. General Assembly of the UN, Resolutions of the IMO Assembly, Sustainable Development Goals etc.). Considering that

naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris. (Schachte Jr, 1990, p. 144)

¹⁴⁸⁹ (Dodson, 1853, p. 210)

¹⁴⁹⁰ UNCLOS, Article 56.

¹⁴⁹¹ (Riphagen, 1975, pp. 148-149) (Riphagen, 1975, p. 164)

¹⁴⁹² (Cassese, 1990, p. 215)

¹⁴⁹³ (Gavouneli, 2007, pp. 10-11)

¹⁴⁹⁴ (Tanaka, 2011, pp. 352-353)

functionality has also been approached as a “limitation of state jurisdiction”, one could argue that these calls to action, or the global commons themselves, provide a legal limit to the exercise of jurisdiction.¹⁴⁹⁵ This limit would restrict the port powers to what is strictly required to obtain that result.¹⁴⁹⁶

§ 465. Resorting to the principle of functionality allows the port state to go beyond the insufficiencies of the sectoral approach (jurisdiction by reference to the maritime zone) by which human activities at sea are currently governed.¹⁴⁹⁷ This approach has not been exclusively restricted to the understanding of the law of the sea regime; it has also been proposed in the realm of space law, which shares similar legal challenges due to its ‘extra-terrestrial’ context.¹⁴⁹⁸ There has been official reference to this approach in this field as early as 1959, at the inception of the Committee on the Peaceful Uses of Outer Space.¹⁴⁹⁹ Some literature has also used this approach in specific cases within the international law of occupation.¹⁵⁰⁰ The same approach has been used to explain extraterritoriality in international human rights law.¹⁵⁰¹ One judge at the ECHR has even made a case for a “functional jurisdiction test” to assess whether a state is effectively exercising jurisdiction.¹⁵⁰² The applicability of functional jurisdiction has also been explored in the literature with respect to the control of borders at sea.¹⁵⁰³ In these three cases, jurisdiction is not justified by having recourse to the principles of territoriality, nationality, security or universality but rather by

¹⁴⁹⁵ (Conforti, 1993, p. 140)

¹⁴⁹⁶ (Conforti, 1993, p. 140)

¹⁴⁹⁷ (Tuerk, 2012, p. 185)

¹⁴⁹⁸ (Csabafi, 1971, p. 131)

¹⁴⁹⁹ UNGA, A/AC.98/2, p. 8.

¹⁵⁰⁰ (Otto, 2012, pp. 505-506) (Shehadeh, 1997, p. 22)

¹⁵⁰¹ (Shany, 2013, p. 71)

¹⁵⁰² ECHR, *Al-Skeini and Others v. The United Kingdom*, par 11.

¹⁵⁰³ (Trevisanut, 2014, p. 662)

reference to realization of a certain mission which, once fulfilled, arguably leads to the expiration of the right to exercise power.¹⁵⁰⁴

§ 466. Historically, the recourse to functional ‘sovereignty’ over parts of the high seas has been a way to circumvent the rule of non-appropriation.¹⁵⁰⁵ Under an exercise of functional jurisdiction, no title may be acquired following the exercise of legal control, which is temporary.¹⁵⁰⁶ Through functional jurisdiction, coastal states purport to extend their territorial dominion without extending their territory. The enforcement of coastal laws at sea has been limited by a criterion of adjacency, which led to the definition of maritime zones where all states would respect the exercise of such functions.¹⁵⁰⁷ There are two separate elements here: one is the definition of the maritime zone, where geography matters, and the other is the function itself, which is to be fulfilled in that area.¹⁵⁰⁸

§ 467. Proposing a non-zonal port state functional jurisdiction goes against the principle that “the land dominates the sea”; the practice analysed in this study, however, seems to support the notion that the principle of domination is losing the significance it once held.¹⁵⁰⁹ It remains relevant to determine maritime zones, but it fails to account for port states’ consideration not determined by location. This view challenges the approach taken by the PCIJ in the *SS Lotus* case whereby a state may exercise jurisdiction, on any matter, even if there is no specific rule of international law permitting it to do so, the judgment adding that states have a wide measure of discretion, which is only limited by the prohibitive rules of international law.¹⁵¹⁰ In practice, this means that when prescribing norms of conduct under a capacity to act as a port state, the dichotomy territorial-extraterritorial is not present. Rather, the state is entitled to consider conduct anywhere if that conduct is relevant to its function as a sovereign state. The

¹⁵⁰⁴ (Csabafi, 1971, p. 131)

¹⁵⁰⁵ (Riphagen, 1975, p. 123)

¹⁵⁰⁶ (Csabafi, 1971, p. 131)

¹⁵⁰⁷ (Riphagen, 1975, p. 137)

¹⁵⁰⁸ (Juda, 1999, p. 107)

¹⁵⁰⁹ (Jia, 2014, p. 4)

¹⁵¹⁰ PCIJ, *SS Lotus*, paras 46 and 47.

territoriality of the enforcement is hence accessory in determining the scope of the jurisdiction of the port state.

§ 468. As port states give extraterritorial effect to environmental action through port powers, their measure of discretion is thus limited by the function being fulfilled. The *SS Lotus* judgment indeed held that states can act “with a view to the achievement of common aims”.¹⁵¹¹ If international law recognizes the existence of such common aims, then states ought to be able to provide common aims with legal protection so that inaction by states does not turn those states into participant accomplices to acts which compromise such aims. In the face of the lack of a prohibitive rule on the use of port state powers, the legal basis and limits must necessarily be linked to the function of achieving such common aims.

§ 469. The argument put forward in this section is that there is a legally relevant connection between sovereignty and the environment, as an object of common legal protection. This presupposes a reading of the state practice in search of evidence for the applicability of the principle of functionality as a legal basis for unilateral port state jurisdiction. This may consider practices both at the enforcement level and the prescriptive level. The idea is to demonstrate that port states exercise functional jurisdiction even when acting under treaty rights, but that functionality is here not based on the global commons itself but rather on the fulfilment of international legal order. This limit vanishes when looking at unilateral actions of port states. Unilateral enforcement of international rules and standards reveals the use of port state powers in an autonomous fashion, as part of a strategy to ensure that such rules and standards have an impact on the regulatory framework offered by international law to global commons. Unilateral prescription takes it one step further by revealing how port states are *de facto* legislators for common concerns. Yet, because cosmopolitan unilateralism may be abused, namely in the pursuance of parochial gains, certain limits must exist. It will be submitted later in this chapter that scientific evidence works as a yardstick by which to assess abuses of claims based on functionality. That issue constitutes the final contribution of this study, which aims at distinguishing, from the state practice available, circumstances which raise doubts with regards to inappropriate recourse to functional rights to protect the environment through port state jurisdiction.

¹⁵¹¹ PCIJ, *SS Lotus*, page 18:

§ 470. The promise of functional jurisdiction is universality without multilateralism. Through functional jurisdiction, port states have been unilaterally furthering the protection of the global commons, namely the world environment in its many related iterations: marine environment, biological diversity, climate change, world heritage. This approach has prevented conflicts of jurisdiction at port, as it allows for competing justifications to coexist in different ports.¹⁵¹² Functional unilateralism has thus proved to be a means to achieve a diffused environmental governance mechanism based on the capacity to go further to protect the global commons.¹⁵¹³ Interpreting unilateral port state jurisdiction as being based on functionality offers a blueprint for the interpretation of future developments of environmental rules and standards applicable to the maritime transport sector. In this sector, many jurisdictions overlap, each enhancing concerns of a local polity, putting the national interest ahead of common interests. To face this complexity, international lawyers must today engage with these laws from a policy perspective and acknowledge the present instrumental role of states, not as competing sovereigns but as cooperating agents endowed with jurisdiction on behalf of humankind. Nevertheless, it must be acknowledged that this proposal still faces the challenge of reading new forms through the lens of the old ones, even despite the sweeping development of cosmopolitan formulae in past decades.¹⁵¹⁴ Indeed, functional jurisdiction, even as depicted in this study, still relies on sovereign powers and a state's own interpretation of what the world environment encompasses that is worthy of legal protection.

6.2.1. *The link between the port state and ship-source pollution*

§ 471. So far, each principle of jurisdiction has been established on a link between the state and an element of statehood. The principle of territoriality was said to be based on a link between the state and a share of land space understood in many ways to be a 'territory'. The principle of nationality was shown to be based on a link between the state and the nation, i.e., a community of people bound by a shared belief that the state represents their uniqueness amongst other human communities. The principle of security was described as resulting from the link between the state and the survival of its polity, as defined by a government regardless

¹⁵¹² (Riphagen, 1975, pp. 148-149)

¹⁵¹³ (Gritsenko, 2017, p. 131)

¹⁵¹⁴ (Csabafi, 1971, p. 128)

of regime and political system. Finally, the principle of universality was found to be established on the ability of the state to enter into relationships with other states, sharing goals with respect to countering certain conduct that harms all nations, such as piracy or genocide. As this proved to be insufficient to fully grasp the exercise of jurisdiction of port states with respect to ship-source pollution, this study now attempts to explain that the state is also able to establish a link with certain conduct regardless of a shared agreement on its wrongfulness but rather based on the commonality of the concern that may be raised by it. In the case in hand, we could say that the port state establishes a link with ship-source pollution as a general matter of concern.

§ 472. The recognition of the environment as an object of common legal protection has been in the background of this study since the beginning.¹⁵¹⁵ However, when the limitations for the environment of that common legal protection were being presented, much emphasis was put on the multilateral approach to its realization. This led to exploring actions undertaken unilaterally by port states which also contribute to strengthening that common legal protection. No link that has been explored so far, however, could provide a sufficient connection to the regulatory effect of the norm over an extraterritorial action committed by or against non-nationals and which does not either cross the threshold of a national security threat or present a crime of universal jurisdiction. This study now submits that as those are parochial links, they fail to adequately provide for a connection with the underlying values which motivate cosmopolitan port actions. The link exists then with the value itself, i.e., the value is tied to the principle of state sovereignty which is being augmented with non-cosmopolitan functions.

§ 473. States have demonstrated in their practice that they have concerns about the consequences of pollution. Every state may claim a link to pollution because the consequences of polluting actions are commonly shared by humankind.¹⁵¹⁶ This is already something different from saying that the state is concerned with the consequences of pollution in its territory, for that would simply be an iteration of the effects doctrine, and not cosmopolitan. The intrinsic commonality of the pollution concern is the reason why all states can prescribe norms on the basis of that link: all states exist as in the world environment and affect it to a great extent than, for example, when exercising their right to use the high seas for

¹⁵¹⁵ *Supra* Fout! Verwijzingsbron niet gevonden., Fout! Verwijzingsbron niet gevonden..

¹⁵¹⁶ (Tuerk, 2012, p. 185)

navigation.¹⁵¹⁷ However, this study submits that such common concerns do have a role to play in defining a legal basis for jurisdiction. It would be fair to say that these common concerns go beyond the territoriality/extraterritoriality divide in the sense that they could eventually operate with respect to a state's jurisdiction within other states' territories. Indeed, consequences of ship-source pollution do not respect boundaries and actions taken to regulate such pollution often consider its worldwide impact.¹⁵¹⁸ These considerations encompass consequences to the high seas and they also apply to another state's territory, although enforcement there is quite limited and hence prescriptions are not so abundant. By claiming to have jurisdiction over a ship's conduct prior to the entry into the port, even if only by setting entry conditions that may just lead the ship to choosing another port, the port state is establishing a link that goes well beyond its territory and beyond its maritime zones of functional jurisdiction.

§ 474. The port state establishes varying levels of effective control over the ship throughout its journey, up to the moment where the ship is in the port and the port state exercises full control over it and even beyond that, when the ship leaves the port after complying with certain conditions aimed at ensuring its seaworthiness. With this power comes responsibility, in particular that of preventing the 'activities' of the ship (*scilicet* navigation) causing damage to the environment of other states.¹⁵¹⁹ This confirms the existence of a link between the port state and the environment in other states' maritime zones and territories, in the sense that the port state will have to have knowledge about the impact a certain conduct, or compliance with a CDEM standard, may bear, even if it is just a risk assessment. This argument, however, implicitly excludes pollution caused while the ship is on the high seas. It also considers only a threshold of environmental harm which is that used to determine responsibility for transboundary harm and hence does not encompass the harm to common concerns. Finally, the argument also requires considering whether the phrase "incidents or activities under their jurisdiction or control" (UNCLOS, Art. 194(2)) includes call and/or presence of the ship in the port, and hence grants the state a right to act. More specifically, the question is whether a ship that is, for example, carrying certain toxic materials in the port that are then dumped "beyond the areas where they [states] exercise sovereign rights" (UNCLOS 194(2)), is a scenario that

¹⁵¹⁷ (Bothe, 2011, p. 553)

¹⁵¹⁸ (Bothe, 2011, p. 542)

¹⁵¹⁹ UNCLOS Article 194(2).

does or does not fit the letter of the law. The port state would be required to prevent pollution from ‘spreading’, for a ship can sometimes be the source of the pollution but it is not the pollution itself. Accordingly, its journey could not be considered as pollution ‘spreading’ away from the port. If one understands that the state has a legally relevant jurisdictional link towards ship-source pollution, then the word ‘jurisdiction’ in that sense is enlarged to encompass such an extensive interpretation of the UNCLOS and jurisdiction would not be totally unilateral.

§ 475. A final remark concerning this link regards constitutional law. The port state may be using its powers to regulate ship-source pollution for constitutional reasons. Constitutions throughout the world provide evidence of the existence of values which are endogenous to the national community. Most states in the world recognize in their constitutions, or in the constitutional texts of their component federal states, a right to a healthy environment.¹⁵²⁰ The EU treaties have similar kinds of commitments, namely through Article 191 of the TFEU, which sets the objectives for EU environmental policy.¹⁵²¹ One possible way of assessing the state’s link to the environment, as established to justify assertions of jurisdiction with regard to ship-source pollution outside its maritime zones, may thus well be the self-proclaimed mission of protecting the environment. The state, as a sovereign entity, would hence have a link to the environment not out of international law, but out of constitutional law. Here recourse to port state powers would be in fulfilment of a domestic policy that happens to reflect the common concern of humankind.

§ 476. All in all, it is now safe to affirm that one of the functions of the port state in international law is to provide legal protection to the world environment. This function is realized in two points in time: first, when states enforce existing standards unilaterally, for example when they are not applicable or have yet to enter into force; and secondly, when states formulate new standards, with no multilateral backing. Before discussing the unilateral state practice, however, it is important to understand that functional port state jurisdiction may be set multilaterally. This will illustrate how the treaty-based jurisdiction of the port state is nothing but a manifestation of the principle of functionality.

6.2.2. *Multilaterally set functional port state jurisdiction*

¹⁵²⁰ (Boyd, 2011, p. 59)

¹⁵²¹ TFEU, Art. 191(1).

§ 477. Before moving on to explain how the principle of functionality operates when port states act unilaterally, it is relevant to explain how it already operates within the multilateral framework. Functional jurisdiction is often the object of multilateral agreement, resulting in treaty law such as the UNCLOS. It is a principle of functionality, embedded in that treaty, which allows coastal states to give extraterritorial application to their laws, up to the limits of maritime zones defined by that treaty. Coastal state jurisdiction over the body of water beyond the territorial sea is functional in the sense that its permissibility is based on the lawfulness of a particular purpose, and not on occupation or any territorial proclamation.¹⁵²² Accordingly, a (coastal) state's jurisdiction extends beyond the territory over which it exercises sovereignty to a contiguous zone in relation to customs, fiscal, sanitary and immigration matters,¹⁵²³ and to "protect objects of an archaeological and historical nature found at sea".¹⁵²⁴ A coastal state's jurisdiction also extends over an exclusive economic zone (EEZ). It does so in relation to the establishment and use of artificial islands and structures,¹⁵²⁵ including exclusive and full civil and criminal jurisdiction over them irrespective of whether they are situated in the EEZ or the continental shelf;¹⁵²⁶ in relation to marine scientific research,¹⁵²⁷ and in relation to the protection and preservation of the marine environment.¹⁵²⁸ In relation to the exploration for and exploitation of the living and non-living resources therein, including energy sources, states have sovereign rights;¹⁵²⁹ these rights are different from jurisdictional rights in terms of scope, yet they are also functionally limited.¹⁵³⁰ The same occurs with jurisdiction exercised over the

¹⁵²² (Csabafi, 1971, p. 131)

¹⁵²³ UNCLOS, Article 33.

¹⁵²⁴ UNCLOS, Article 303.

¹⁵²⁵ UNCLOS, Article 56(1)(b)(i).

¹⁵²⁶ UNCLOS, Article 60 and Article 80, respectively.

¹⁵²⁷ UNCLOS, Article 56(1)(b)(ii).

¹⁵²⁸ UNCLOS, Article 56(1)(b)(iii).

¹⁵²⁹ UNCLOS, Article 56(1)(a).

¹⁵³⁰ (Proelss, 2012, p. 101)

continental shelf, where the coastal state is said to exercise “sovereign rights for the purpose of exploring and exploiting its natural resources”.¹⁵³¹ This means that in this zone the coastal state has functionally limited sovereign rights, which provide exclusive jurisdiction to the coastal state.

§ 478. Functional jurisdiction at sea therefore simply translates as the right of a state, in international law, to regulate rights of persons, to affect property, things, events and occurrences in designated zones at sea. This principle is, however, not a creation of the UNCLOS. Some unilateral endeavours before its signature had already made use of its main tenets; for example, Canada's 1975 Arctic Act;¹⁵³² Canada's intention in 1976 to create a 200-mile fishing zone,¹⁵³³ or the Icelandic Regulations of 1972, which were aimed at extending Iceland's zone of exclusive fisheries jurisdiction to 50 miles and which led to international litigation. State practice prior to the UNCLOS illustrates how the right to exercise jurisdiction based on a functional entitlement, which received a place in the UNCLOS, pre-existed treaty law and could by no means be exhausted by its norms.

§ 479. At the present time, one can argue that two examples of multilaterally set functional port state jurisdiction already exist: the enforcement of generally accepted international rules and standards (GAIRAS) on pollution, as expressed for example in UNCLOS Article 218 on discharge; and the UNCLOS-based right to prescribe “particular requirements” for entry into the port (Article 211(3)). The following subsections attempt a reinterpretation of what is commonly viewed as treaty-based jurisdiction but which, since it arguably does not require the treaty to be operated, is actually a case of functional jurisdiction.

6.2.2.1. *The functionality of ship-source pollution GAIRAS enforcement*

§ 480. The enforcement of international rules and standards by port states can be analysed from a functional perspective. That right to enforce appears, in the UNCLOS, on at least three occasions: regarding discharge (Article 218), dumping (Article 216) and pollution-causing instances of seaworthiness (Article 219). The theory of functional splitting posits that states, when giving application to international law through municipal laws, are fulfilling a dual role:

¹⁵³¹ UNCLOS, Art 77(1).

¹⁵³² (M'Gonigle, 1976, p. 192) (Johnson & Middlemiss, 1977, p. 85)

¹⁵³³ (Johnson & Middlemiss, 1977, p. 72)

one as sovereign states, and the other as a long arm of the international community. In those three articles, the UNCLOS relies on this split personality of the state to ensure that applicable rules and standards are implemented. Despite being generally agreed upon at the multilateral level, international rules and standards on ship-source pollution must be incorporated in municipal law prior to their application. In that sense, the state legislature is legislating on behalf of the international community, ensuring that such standards are implemented.

§ 481. UNCLOS Article 218, despite giving the state legal grounds for taking into consideration the occurrence of discharges “outside the internal waters, territorial sea or exclusive economic zone of that State”, also limits the scope of the possible norms to be taken to those which correspond to “applicable international rules and standards established through the competent international organization of general diplomatic conference”.¹⁵³⁴ Furthermore, the UNCLOS restricts this possibility, when occurring in the internal waters, territorial sea or EEZ of another state, to prior consent, occurring in the form of a “request” by that state, or to an immediate connection with the state instituting the proceedings (i.e. “unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of that State”).¹⁵³⁵ The relevance of this consent is reinforced when the treaty expressly provides that port states can, at the request of any state potentially or effectively damaged by that pollution, vicariously undertake investigations; this possibility does not only apply to requests of coastal states but also of flag states, irrespective of where the violation occurred.¹⁵³⁶

§ 482. Some consider UNCLOS Article 218 to be a case where the principle of universality already manifests itself.¹⁵³⁷ However, this study submits that this Article is rather a case of functional jurisdiction. First, because concerns about unilateral exercises of authority were already part of the discussions that led to the drafting of UNCLOS Article 218.¹⁵³⁸ In a sense,

¹⁵³⁴ UNCLOS, Article 218(1).

¹⁵³⁵ UNCLOS, Article 218(1).

¹⁵³⁶ UNCLOS, Article 218(3).

¹⁵³⁷ *Supra* 5.5.2, The principle of universality in cases of ship-source pollution.

¹⁵³⁸ (Keselj, 1999, p. 130)

this Article was supposed to act as a deterrent to unilateral jurisdiction, framing port state action as part of a treaty mandate to ensure compliance with GAIRAS. Second, the Article was an innovation because, under customary international law, port states did not yet have, at the time, jurisdiction over a foreign vessel's discharges on the high seas.¹⁵³⁹ It is important to note, in this regard, that reference to damage to the coastline was part of the original proposal at UNCLOS III and was not included into the final treaty.¹⁵⁴⁰ This historical evidence highlights the non-territoriality of the concern addressed.¹⁵⁴¹ The literature has criticized that original proposal which relied on territoriality, saying that this approach to jurisdiction would be tantamount to justifying all extraterritoriality.¹⁵⁴²

§ 483. Enforcement with respect to pollution by dumping is also subject to a functionality analysis. Port states (as in “any state”, to quote from UNCLOS) play a role in preventing negative environmental consequences of acts involving the loading of waste. With respect to the loading of waste at port, UNCLOS Article 216(1)(c) provides for the enforcement of applicable international rules and standards as well as to “laws and regulations adopted in accordance with this Convention”, i.e. prescribed unilaterally, aside from those which may be the result of GAIRAS implementation.¹⁵⁴³ Regarding the enforcement of GAIRAS, the port state is not only fulfilling its environmental responsibility but, in reality, preventing dumping according to certain standards which would otherwise not be enforced. It is acting in fulfilment of the interests of the international community to see those GAIRAS applied, having an impact in areas beyond its coastal influence.¹⁵⁴⁴ Furthermore, the treaty also acts as a framework for further normative development, hence establishing a functional right for states to apply their port powers.

¹⁵³⁹ (Tanaka, 2011, p. 351)

¹⁵⁴⁰ UN, A/CONF.62/C.3/L.24, Article 3(11).

¹⁵⁴¹ (British Branch Committee on the Law of the Sea, 1974, pp. 407-408)

¹⁵⁴² (Riphagen, 1975, p. 149)

¹⁵⁴³ UNCLOS Article 216(1)(c)

¹⁵⁴⁴ USA, US v. Jho.

§ 484. Assessing the seaworthiness of ships has, apart from safety considerations, important environmental consequences. The UNCLOS allows port states to take measures in this regard. Article 219 provides a basis for port states to enforce all “measures relating to seaworthiness of vessels to avoid pollution”.¹⁵⁴⁵ It expressly enables a state to “take administrative measures to prevent the vessel from sailing”, i.e. providing for the use of denial of exit powers. Enforcement regarding the violation of applicable rules and standards and the recourse to the port state power of ‘denial of exit’ has, apart from territorial considerations already discussed in Chapter 4, consequences for the world environment, protecting it from a risk it would otherwise face, and from the harm that an accident would cause. This Article does not provide for the right to set “particular requirements” and is hence merely relying on the port to enforce the GAIAS.

§ 485. These three examples all provide the port state with extraterritorial prescriptive jurisdiction. Nonetheless, it is not enough simply to say “treaty-based” to explain the legal basis of prescriptions imposed on non-parties to such treaties or to the UNCLOS. One submission is that, although there are multilaterally set standards to be enforced and a multilaterally set rule to enforce them, the legal basis may still be, at least at its origin, a principle of functionality. In other words, multilateralism has adopted an approach to port state jurisdiction which is based on a principle of jurisdiction that is neither territoriality nor any of the previously explored principles of extraterritorial jurisdiction.

6.2.2.2. *The functionality of UNCLOS-based “particular requirements”*

§ 486. The UNCLOS allows port states to enact “particular requirements” as entry conditions to prevent pollution.¹⁵⁴⁶ This does not only stem from Article 211(3), which states it explicitly, but also from enforcement rights with respect to pollution by dumping.¹⁵⁴⁷ It is possible to read these norms from a functional perspective, thus understanding the true legal nature of these jurisdictional rights enshrined in the UNCLOS.

§ 487. Contrary to Article 211(1), which requires the coastal state to follow a multilateral procedure, and to Article 211(2), which requires the flag state to have as a minimum reference

¹⁵⁴⁵ UNCLOS, Article 219.

¹⁵⁴⁶ UNCLOS, Article 211(3).

¹⁵⁴⁷ *Supra* 2.3.2.4, Port state enforcement in the UNCLOS.

the international rules and standards, Article 211(3) has no such condition attached. Despite not using the term “port state”, this Article indirectly refers to a right of port states to unilaterally regulate the environmental impact of ships visiting their ports. It is not the treaty that provides the right, for that would follow the usual formula “states shall adopt”, but it merely recognizes a pre-existing right and imposes certain limits which are more procedural than substantive, such as publicity and communication with an international organization.¹⁵⁴⁸

§ 488. Whilst the enforcement of GAIRAS represented a functional splitting whereby port states had to merely legislate and to ensure compliance by enforcement, here there is an opening for legislation whose legal basis is the function which that legislation fulfils and not the other treaties. Under this approach, the rules jurisdiction in the UNCLOS in this regard, much like that of regional treaties, is not substantive but procedural, framing a right based on a function of the port state under international law (providing legal protection to the world environment) and ensuring the compatibility of such measures with the treaty itself.¹⁵⁴⁹ The material compliance of these requirements with international law is therefore assessed not only with reference to the UNCLOS but with regard to other treaties and in rules and standards that have developed in the practice among states.

§ 489. The other example, Article 216, confirms this idea when it allows for “laws and regulations” which are “adopted in accordance” with the UNCLOS to be enforced by the state. Arguably, so does UNCLOS Article 220(1) too, at least partially, allowing a state, when a vessel is voluntarily within its port, to institute proceedings in respect of any violation of its laws and regulations “adopted in accordance” with the UNCLOS.¹⁵⁵⁰ However, in this last example, the port state would be limited to regulating violations occurring within the maritime zones of the coastal state, something which can be read as fulfilling the concerns with the world environment as well.

§ 490. Multilaterally set functional jurisdiction has the limitation of ensuring that states do not challenge the universality of environmental GAIRAS even when some margin for legislative innovation is granted in the treaty. At this stage, the link between the port state and the world environment is totally defined by the instrument upon which the port state relies. That is not

¹⁵⁴⁸ (Yu, et al., 2018, p. 87)

¹⁵⁴⁹ (Dzidzornu, 2002, p. 268)

¹⁵⁵⁰ UNCLOS, Article 220(1).

the case when port states set their functional jurisdiction unilaterally, where the appeal to the link with the world environment is based on the commonality of that concern rather than on the positive law which enshrines it. It is this state practice which has been pushing for the development of the principle of functional jurisdiction regarding new types of ship-source pollution.

§ 491. One example is the EU double hull Regulation.¹⁵⁵¹ The Regulation explains the applicable timetable set by MARPOL's Regulations on the phasing out of single hull oil tankers, highlighting that, under the original timetable, the deadline could only be reached in 2026. The EU Regulation also referred to the amendment adopted in 2001 which accelerated that timetable, namely the division of the oil tankers into three distinct categories according to their tonnage, construction and age.¹⁵⁵² Under this amendment, the final date by which a single hull oil tanker is to be phased out became the anniversary of the date of delivery of the ship, according to a schedule starting in 2003 until 2007 for Category (1) oil tankers, and until 2015 for Category (2) and (3) oil tankers. Paragraph 5 of the same MARPOL Regulation allows for an exception for Category (2) and (3) oil tankers to operate, under certain circumstances, beyond the time limit of their phasing-out. According to the EU perspective, Paragraph 8b of that same MARPOL Regulation gives the right for Parties to the MARPOL 73/78 Convention to deny entry into the ports or offshore terminals under their jurisdiction to oil tankers allowed to operate under this exception. It is precisely because EU member states have declared their intention to use that right that this Regulation was adopted.¹⁵⁵³ The preamble of the Regulation also explains that the intention of this initiative is to "reduce the risk of accidental oil pollution in European waters"; this reference emphasizes the relevance of environmental concerns in the strategy of the EU member states and can be seen as evidencing that this Regulation is not aimed at creating a technological discrimination.¹⁵⁵⁴

¹⁵⁵¹ *Supra* 3.4.1.2, The European approach: accelerated implementation.

¹⁵⁵² MARPOL, Regulation 13G of Annex I. IMO, Resolution MEPC 95(46).

¹⁵⁵³ EU, Regulation 417/2002, Article 1

¹⁵⁵⁴ EU, Regulation 417/2002, (10).

6.2.3. *Unilaterally set functional port state jurisdiction*

§ 492. Resorting to unilateral jurisdiction to achieve common goals at sea might seem at first somewhat a contradiction in terms. Some would say that this ambition is simply an imposition by strong regulators, tantamount to legal colonialism, by which one community claims to be the best interpreter of the common interest.¹⁵⁵⁵ The proposed cosmopolitan interpretation of this reality is in itself not new. One can, for example, think of pre-modern (pre-Westphalian) international law where one may find references to the “glory of God”;¹⁵⁵⁶ nations ought to act in accordance with that benchmark and not exclusively in their own selfish interest, an idea that led to justifying imperial claims and colonial regimes, a criticism to which modern iterations of the same idea may also be subject. This is especially true today as there already are international institutions legally mandated to develop global standards, composed of almost all states in the world. It is indeed undeniable that the IMO has developed a comprehensive international legal regime on shipping-related concerns, but it is doubtful whether the IMO’s achievements reflect the apogee of consensus rather than the highest possible benchmark which international law could offer to protect the world environment from the negative side-effects of shipping. From what has been analysed in the course of this study, it can be shown that an institutionalist approach to international law can actually enhance, rather than avoid, so-called ‘collective actions problems’.¹⁵⁵⁷ This might happen, for example, by delaying the application of municipal standards which integrate the ‘best available scientific evidence’, to use an UNCLOS term.¹⁵⁵⁸ Institutions such as the IMO can, in fact, act as a deterrent to unilateral state practice which could be more effective, from a scientific perspective, in protecting the environment than any compromise achieved collectively. For some states, that deterrent is in line with the idea that the IMO sets the maximum jurisdiction allowed.¹⁵⁵⁹ That is what

¹⁵⁵⁵ (Sands, 2000, p. 293)

¹⁵⁵⁶ The Treaty of Peace between France and Prussia, concluded at Utrecht the 11th of April 1713. “Who after imploring the Divine Assistance, and communicating respectively and exchanging their full Powers, have agreed, to the Glory of God, and for the Good of Christendom, on the Conditions of Peace and Friendship following.”

¹⁵⁵⁷ (Ostrom, 2010, pp. 155-156)

¹⁵⁵⁸ UNCLOS, Art. 234.

¹⁵⁵⁹ *Supra* 1.4.1, The port and the powers of the port state.

occurred in the *Sellers* case, where a court referred to certain functions of the port state as limiting the scope of unilateral actions which would have other purposes.¹⁵⁶⁰ For some other states, that deterrent effect has proved to be requiring only a more flexible approach to the exercise of jurisdiction. It is submitted that the way in which that is achieved is by combining the default territoriality link to functionality of a non-multilateral nature. This subsection analyses actions by those other states that do not see the IMO as the definitive benchmark for jurisdiction, first by looking at port state powers unilaterally resorted to for enforcing international treaties in MoU on port state control and secondly by looking at prescriptions of novel rules and standards geared towards functions of the state which are cosmopolitan.

6.2.3.1. *The functionality of MoU-based unilateral port state enforcement*

§ 493. In Chapter 3, this study explained how port states would collectively agree on using their port state powers for ensuring compliance with certain multilateral instruments.¹⁵⁶¹ An example of the application of those powers is the creation of lists of ships that will be subject to ‘concentrated inspection campaigns’ (CIC) in ports of states whose maritime authorities have signed up to a Memorandum of Understanding on port state control. Even though the international instruments being applied do not foresee the creation of a particular distinction between ships or, for example, the possibility of temporarily banning ships from the port, some port states have sought to explore these possibilities unilaterally.

§ 494. Some literature suggests that this unilateral enforcement under MoU on port state control is an application of the ‘functional splitting’ theory.¹⁵⁶² This enforcement would be an application of that theory under the assumption that the port is acting on behalf of the international community and not really *motu proprio*.¹⁵⁶³ The functionality of port state enforcement may in that case be analysed from two separate perspectives.

§ 495. On the one hand, for ships whose flag states have ratified the treaties to be implemented under that Memorandum of Understanding, the enforcement by the port state is merely the ‘reinforcement’ of the international rule of law (as applicable between the parties), for no

¹⁵⁶⁰ New Zealand, *William Rodman Sellers v Maritime Safety Inspector*. (Devine, 2000, pp. 218-219)

¹⁵⁶¹ *Supra* 3.3.1, Enforcement under the MoU on port state control.

¹⁵⁶² (Tanaka, 2011, p. 357)

¹⁵⁶³ (Tanaka, 2011, p. 362)

innovative appeal is made to environmental concerns apart from those existing in the treaty. In this case, the port state is merely entitled to use its powers to ensure that international laws are applied. One could still argue that the environment is being ‘unilaterally’ regulated because although the standard itself is the same, the levels of compliance with that standard may increase as a result of the deterrence caused by foreseeable inspections; the environment becomes *ipso facto* more protected than by using the regular enforcement methods but this is not unilateral jurisdiction as defined in this study.¹⁵⁶⁴ Apart from this consideration, the unilateral application of port state powers does not serve the function of protecting the environment beyond what has been set in each of the treaties. Port state jurisdiction is here posited on the function of ensuring compliance with the international rule of law as applicable between the parties.

§ 496. On the other hand, those instruments may be enforced upon ships whose flag states did not sign or ratify them. In those cases, it can be argued that the port state is in fact not applying treaty law but rather its own municipal law, which happens to be composed of treaty norms that it has ratified but that could not be enforced upon that ship for lack of consent of the flag state. In that case, the functionality of port state jurisdiction gives way to the recourse to state powers outside the framework of that treaty and arguably outside the jurisdictional framework established by the UNCLOS, for the rule of reference is not applicable either.¹⁵⁶⁵ In that sense, it is a unilateral enforcement of a non-applicable multilaterally-set standard. Practice shows that port states do verify compliance with international treaties on ship-source pollution regardless of whether or not the flag state is a party to those treaties. Participation in the UNCLOS also seems irrelevant: Peru and Venezuela, which are not parties to the UNCLOS, are parties to the Vina del Mar agreement; Turkey, also not party to the UNCLOS, is party to the Mediterranean Memorandum of Understanding and the Black Sea Memorandum of Understanding; Israel is party to the Mediterranean Memorandum of Understanding, and Eritrea is party to the Indian Ocean Memorandum of Understanding although neither Israel nor Eritrea are parties to the UNCLOS and thus are not bound by the UNCLOS rules of reference. The case of the *Zinnet Cavusoglu*, flagged in Turkey, detained in an Israel port following an

¹⁵⁶⁴ *Supra* 3.2, The unilateral approach to international law.

¹⁵⁶⁵ *Supra* 2.3.2.2, The rule of reference in the UNCLOS.

analysis of, *inter alia*, its “oil filtering equipment” provides a very interesting example of port state practice.¹⁵⁶⁶

§ 497. This unilateral MoU-based enforcement is hence perhaps partly based on territoriality, for the ship is present in the territory, but it is also partly based on functionality, as it applies to all ships without the applicability of the principle of universality. Nevertheless, unlike the case of prescriptive unilateralism, MoU functionality cannot find legal ground in the objective and purpose of the treaties themselves, for those treaty norms are only applicable to all parties to the treaty and not to third states. This illustrates how the function of the port state is not only the realization of the rule of law, ensuring that the ships are law-abiding at all levels, but sometimes the realization of common goals which exist outside treaty law. The jurisdiction to accomplish that mission through unilateral port state control is hence customary for the port state; this is further confirmed when port states prescribe new rules of conduct.

6.2.3.2. *The functionality of unilateral port state prescription*

§ 498. The state practice presented in Chapter 3 has been described as being undertaken in a port state capacity and as being unilateral in the sense that it goes beyond a multilateral standard or that it establishes a new one. The legal basis for a state to use port powers unilaterally to regulate ship-source pollution has been presented in Chapter 4 as partly based on a principle of territoriality, in the sense that there is a connection between the ship and the port. As this principle does not cover the regulation of extraterritorial conduct, some attempts have been made in Chapter 5 to show how other principles may provide for the missing piece in the argument of the port state that such unilateral action is lawful. Yet as the three principles of extraterritorial jurisdiction are either inapplicable or also insufficient, it is suggested that the port state may be exercising functional jurisdiction in the same way that it does when acting under a multilateral legal framework. It is submitted that the function here is linked to a non-national normative order, one that has been established over time to provide national legal protection for what are already objects of common legal protection.¹⁵⁶⁷

¹⁵⁶⁶ Mediterranean Memorandum of Understanding, (report 20.11.2012).

¹⁵⁶⁷ *Supra* Fout! Verwijzingsbron niet gevonden., Fout! Verwijzingsbron niet gevonden..

§ 499. Under the functionalist theory, the jurisdiction being exercised must be connected to the normative order which is being maintained.¹⁵⁶⁸ In *Eichmann*, the case used to exemplify the principle of universality, the Israeli courts were enforcing international law not only because of the state's normative order, but also because of the universality of the concern it represented.¹⁵⁶⁹ It may well be that the issue there was an international crime over which the principle of universality would undoubtedly apply, but it is possible to argue that the logic which leads to universality starts with functionality. Fast forward a couple of decades and one may find a very similar logic being applied by port states with the earlier MoU. Whilst the environment has been provided legal protection on several occasions through cosmopolitan formulae, more specific subcategories have, in past decades, gained autonomy in their importance. The international community has considered biodiversity and the climate, to name two examples, as common concerns.¹⁵⁷⁰

§ 500. A note on the enforcement of unilateral port state prescriptions is necessary as a caveat to the upcoming argument. The functionality of the enforcement of national law is distinct from the functionality leading to enforcement under MoU over state-parties. In the former case, port states are enforcing norms whilst having little regard to the realization of the international rule of law. Instead, this enforcement is best understood as a realization of 'environmental justice', which, in international law, is still kept at the abstract level but which states have been giving substantial content to through unilateral actions.¹⁵⁷¹ As the prescription is justified by a principle of functionality developed by states which provide legal protection to the environment, the enforcement of such prescriptions is consequently presumptively valid.¹⁵⁷²

§ 501. The following five subsections describe the functions that the port state fulfils when exercising jurisdiction in some of the cases analysed in this study. It is submitted that the link between the port state and the event of pollution will grant jurisdiction to the port state in so far as the application of port powers effectively realizes one of these functions. These functions correspond to the development of cosmopolitan formulae aimed at providing a common legal

¹⁵⁶⁸ (Scelle, 1956, p. 332)

¹⁵⁶⁹ Israel, *The State of Israel vs. Adolf Eichmann*.

¹⁵⁷⁰ CBD, a. Preamble. UNFCCC, a. Preamble. UNFCCC Paris Agreement, Introductory text.

¹⁵⁷¹ (Nollkaemper, 2009, p. 264)

¹⁵⁷² (Francioni, 1996, p. 122)

protection to the environment; but whilst in Part I that correspondence was analysed from the perspective of commitments undertaken at the multilateral level, the study now argues that unilateral state practice follows the same values, realizing them and providing them with new substance. That substance – the rules and standards adopted – could not become customary per se, but it is the jurisdiction based on these functions which is already a right based on the practice of port states. This development is similar to how coastal states developed, with their practices, a function to prescribe and enforce environmental norms with respect to an area which would later become the EEZ under the UNCLOS. In this other context of port state jurisdiction, five functions will be discussed: 1) marine environment protection; 2) biological diversity preservation; 3) climate change mitigation; 4) natural heritage conservation; and 5) human health safeguarding.

6.2.3.2.1. The function of marine environment protection

§ 502. One of the functions of the state in international law is to protect and preserve the marine environment, regardless of maritime zones.¹⁵⁷³ This function stems from obligations that have been assumed in the past when acting as a coastal state and as a flag state. The scope of these functions has been well described under the UNCLOS, but it goes beyond the UNCLOS limits as state practice has developed over time. It is important to note that the function relates not to the consequence itself, but rather to the introduction of pollutants into the oceans per se.¹⁵⁷⁴ In other words, the state has the right – as well as a duty – to protect by prevention.

§ 503. The proposal put forward here is that the unilateral jurisdiction presented in this study is partly justified by the function of the state of protecting and preserving the marine environment from ship-source pollution. The practice shows that port states have that objective and that its realization goes beyond the standards put forward by treaty law. In the earlier period of this trend, the unilateral port state jurisdiction aimed at protecting the marine environment had focused mostly on preventing oil spills from tankers by accelerating the introduction of double hulls in those ships. Both the US, in OPA 90, and later, inspired by that measure, the

¹⁵⁷³ Arbitration, Philippines/China Award (Merits), par. 940

¹⁵⁷⁴ (Lyons & Cheong, 2017, p. 62)

EU, have implemented accelerated double hull phasing-in timetables.¹⁵⁷⁵ The prescription affects a construction standard (CDEM), but by framing that standard as a port entry condition, both measures have been interpreted as a mere application of the principle of territoriality which only occurs when non-compliance with such standards has been detected in port.¹⁵⁷⁶ Understanding that part of these two measures also represents an application of a principle of functionality, requires looking at the broader impact of the measure to the environment. First, because the extraterritoriality of the measures is not only a matter of environmental security, since the positive externality of discouraging single-hulled ships benefits all states worldwide which see their coasts protected from ships prone to causing oil spills. Second, because this measure was not taken by many states and only became universal following the IMO's timetable which changed because of those unilateral actions. Third, because the development of novel construction standards in naval architecture may often require regulatory actions to enable such standards to enter the market, as ships have a long life-cycle, which means that riskier ships are still in use many years after the development of safer ships. Considering these three factors, the unilateral recourse to port state powers by the US and by EU member states has fulfilled a governance role in the sense that they pushed forward the introduction of a standard to protect the environment from a risk which, when it materializes, has long-lasting consequences not only for the coastal environments affected but to the marine environment as a whole (namely due to the accumulation of persistent toxic substances).¹⁵⁷⁷ The fact that this effect may have been unintended does not preclude arriving at the conclusion that, by doing so, the port state exercised jurisdiction over such ships prior to their decision to come to port and protected the marine environment from that risk. The intention of the legislator is hence irrelevant when considering that there is this regulatory effect beyond the port: indeed, for the flag state, the conflict of laws occurs as soon as its ships are facing a restriction in navigation to a port, and that occurs prior to coming under the territorial jurisdiction of the port state.

§ 504. One criticism that has been made of this unilateral action is that the fulfilment of the function was actually compromised by the nature of such measures. Indeed, the risk is not

¹⁵⁷⁵ *Supra* 3.4.1, The phasing-in of double hull tankers.

¹⁵⁷⁶ *Supra* 4.4.2, The principle of territoriality as a basis for port state prescription.

¹⁵⁷⁷ (Rogowska & Namieśnik, 2010, pp. 104-105)

eliminated immediately after the ship is refused entry, nor is it evident that ship-owners will accelerate the scrapping of their ships to introduce new ones, nor will they retrofit a newer technology (which is impossible in the case of ship hulls, unlike, for example, installing ballast water treatment systems). Instead, substandard ships with single hulls may end up being confined to one region of the world, augmenting the risk of an oil spill in that region and hence not reducing the overall risk to which the marine environment as a whole is exposed.¹⁵⁷⁸ It would be thus be subject to debate whether those unilateral measures are, from a functionality perspective, lawful, as they might serve merely to protect coastal interests but disguise themselves as measures aimed at fulfilling the functions of a cosmopolitan port state. Unfortunately, there is no litmus test for this. The unwelcome side effects of a functionally-based assertion of jurisdiction may also be legally relevant. However, as long as those unilateral measures have that cosmopolitan component, their intrinsic validity remains intact, for there is always a limit to what port states may do. In other words, it is not because substandard ships are not banned from the oceans that recourse to banning powers by the port state does not fulfil the function of protecting the marine environment.

§ 505. The implementation campaign document of China's Hainan port measures showed some interesting motivations that are reflective of how this function may materialize in domestic laws.¹⁵⁷⁹ Although it is not clear what "ecological civilization" may signify in international legal terms, it appears clear that there is a purpose to be attained which goes beyond the parochial interests of the state. However, these measures were not communicated to the IMO and appear to be an exercise of jurisdiction based on a domestic approach to port state jurisdiction. Nonetheless, their international relevance does require a principle of jurisdiction to exist, and that "ecological civilization" could be read as having a normative meaning in that sense.

6.2.3.2.2. The function of biological diversity preservation

¹⁵⁷⁸ (Tan, 2005, pp. 149-150)

¹⁵⁷⁹ (Hainan MSA, 2017)

§ 506. A distinct function, also present in the UNCLOS, relates to the preservation of biological diversity.¹⁵⁸⁰ Biological diversity is stricter than “environment” as it concerns “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part”.¹⁵⁸¹ This function is fulfilled when regulating the introduction of invasive aquatic species, for example. An invasive species “is capable or potentially capable of causing unwanted harm to any natural and physical resources or human health”.¹⁵⁸² The introduction of invasive seaweed has allegedly been the result of untreated ballast water contamination.¹⁵⁸³ This concern was one of the issues argued by New Zealand to ratify the Ballast Water Management Convention (BWM Convention), illustrating how the unilateral approach to international law complements the multilateral approach in fulfilling the function of the state.¹⁵⁸⁴ The proper legal justification for unilateral prescription of ballast water standards was the function to protect this “concern of humankind”.¹⁵⁸⁵ In another case on ballast water management, Canada explicitly said that even if it acceded to MARPOL and to the International Convention on the Control of Harmful Anti-fouling Systems in Ships (AFS Convention), “stricter discharge provisions apply in internal and inland waters” for “Canada is committed to protecting *its* marine wildlife and ocean environment and will not tolerate the illegal discharge of oil, oily substances or other toxic substances *in Canadian waters*” (emphasis added).¹⁵⁸⁶ The reason for specific regional requirements is the fact that “ecosystems are different within Canada”.¹⁵⁸⁷ Even though the

¹⁵⁸⁰ Arbitration, Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), para 538

¹⁵⁸¹ Convention on Biological Diversity, Article 2.

¹⁵⁸² New Zealand, Biosecurity Act 1993

¹⁵⁸³ (Gordon, et al., 2010, p. 12)

¹⁵⁸⁴ New Zealand, Report of the NZ House of Representatives: *International Convention for the Control and Management of Ships’ Ballast Water and Sediments 2004 National Interest Analysis*:

¹⁵⁸⁵ Convention on Biological Diversity, preamble. “Affirming that the conservation of biological diversity is a common concern of humankind”

¹⁵⁸⁶ Canada, Notices to Mariners 1 to 46, “32 Pollution – Compliance with Canadian Regulations”

¹⁵⁸⁷ Canada, Guidelines For The Control Of Ballast Water Discharge From Ships In Waters Under Canadian Jurisdiction

objective is more closely linked to the environmental security of the state, namely by focusing on the local environment, an argument could be made that those measures also benefit the marine environment as a whole. Ballast water regulations fit the more specific function of protecting biological diversity which has developed because of both the Convention on Biological Diversity (CBD) and related state practices.

§ 507. Protection from ship-source pollution which threatens biological diversity is achieved through ballast water treatment systems and sound antifouling systems, both of which prevent invasive species and contamination from the toxicity of normal shipping operations entering the oceans. The state has hence developed a function of biological diversity preservation. This function relates to the actions undertaken with an aim of ensuring that activities performed under the control and jurisdiction of the state do not cause an impact on the variety of natural life on the planet. Ships are prone to be a threat to this variety especially due to the transfer of aquatic invasive species transported in ballast.¹⁵⁸⁸ To fulfil its function, the port state would have to justify the requirements imposed on ships prior to their entry into port, namely that they dispose of their ballast water at sea. From a functionality perspective, the right to regulate such conduct is based on the right to regulate the local biodiversity which is also a part of the world environment – one may see it through a parochial lens, as an interest of the state, but one may also see that the state is performing a cosmopolitan action because all humans benefit from the protection offered to biological diversity.

6.2.3.2.3. The function of climate change mitigation

§ 508. The climate is another component of the environment affected by shipping which port states aim to regulate.¹⁵⁸⁹ Some examples of state practice show how port states may be relying on functionality to do so. One example is the EU which has sought to address the concern about climate change in two different issues. This concern has been expressed in Regulation 2015/757, which aims to create a mechanism to monitor CO₂ emissions. Explicit reference to the “global climate” was a part of the reason to act by EU members.¹⁵⁹⁰ Unilateralism fulfilled, at least for some months – i.e. up to the moment of approval of an IMO mechanism – a function

¹⁵⁸⁸ *Supra* 3.4.3, The transfer of invasive aquatic species .

¹⁵⁸⁹ UN, A/RES/43/53

¹⁵⁹⁰ EU, Regulation 2015/757, Article 21(5)

of regulating maritime transport emissions in the absence of international agreement. As states have agreed to consider climate change to be a common concern and because maritime transport emissions are considered as a cause of climate change, one may find the regulation of emissions at sea to be justifiable under that commonly held purpose. Evidence of that comes, for example, from the SDG Goal 13, whereby states have committed to “integrate climate change measures into national policies”.¹⁵⁹¹ The question remains as to whether the EU may still claim to be exercising functional jurisdiction after an IMO mechanism was approved and put into place.

§ 509. Another distinct situation, where emissions are not immediately accounted for, is the carriage and use of heavy fuel oils (HFO) in the Arctic.¹⁵⁹² The EP resolution on HFO illustrates the enduring relevance of customary principles of state jurisdiction in international law in helping to cover the jurisdictional gaps in the text of treaties such as MARPOL and the UNCLOS. It also illustrates the inadequacy of these principles in conferring jurisdiction geared towards what is perceived by a regulator, be it the EU or a state, as a ‘common concern’. Indeed, in the parliamentary debate where the report which contained the proposal for this resolution was discussed, EU Commissioner Julian King acknowledged that “[t]he challenges that our oceans face today do not recognise national boundaries”, whilst MEP Sirpa Pietikäinen, the rapporteur, noted that “the Arctic (...) is a common heritage”.¹⁵⁹³ It is true that the other rapporteur, MEP Urmas Paet, argued that “it should be very clear that the EU has to stick very strongly to international law whatever the developments in the Arctic area”, but this does not mean ignoring that state practice plays a role in developing customary norms. Although this is still only a proposal, the fact that these arguments are used reveals their relevance for jurisdiction law.

¹⁵⁹¹ Sustainable Development Goals, adopted at the United Nations General Assembly

¹⁵⁹² *Supra* 3.4.7, The carriage and use of heavy fuel oils in the polar regions.

¹⁵⁹³ EU, Debates Wednesday, 15 March 2017 – Strasbourg . 17. An integrated EU policy for the Arctic (debate). REPORT on an integrated European Union policy for the Arctic (2016/2228(INI)) Committee on Foreign Affairs Committee on the Environment, Public Health and Food Safety Rapporteurs: Urmas Paet, Sirpa Pietikäinen

§ 510. Apart from CO₂, the SO_x content of marine fuels also contributes to climate change, constituting another environmental impact of shipping.¹⁵⁹⁴ In a 2012 EU directive on SO_x emissions, reference is already made to “the Union’s climate change objectives” as a reason to limit modal shift from sea transport to land-based transport.¹⁵⁹⁵

6.2.3.2.4. The function of natural heritage conservation

§ 511. Parts of the world are commonly considered to be a natural heritage of humankind, and hence deserve special legal protection. As such, they are no longer only a mere parochial concern of the state based on the territorial nature of their location, but rather a cosmopolitan concern. The territoriality of this natural heritage becomes in this way a secondary link when establishing jurisdictional rights over conduct that threatens such areas.

§ 512. When Australia decided to unilaterally install a compulsory pilotage scheme for navigation in the Great Barrier Reef, to be enforced following port entry, reference was made to “environmental protection”, in addition to safety, as being the effect of the carriage of an Australian pilot.¹⁵⁹⁶ The protection of the Great Barrier Reef from accidents that could result in pollution is, of course, a coastal concern. However, that reef is also the largest structure of living organisms on earth and it has been declared a UNESCO World Heritage Site under the World Heritage Convention.¹⁵⁹⁷ It is true that the Great Barrier Reef World Heritage Area does not include the reefs found in the Torres Strait, but any incident taking place in the strait would be likely, as it already has, to pose a serious threat to the reef.¹⁵⁹⁸ From this standpoint, the measure aimed to protect something of “outstanding universal value” and thus could not easily be read along strict parochial lines.¹⁵⁹⁹ The universality of the concern that motivates recourse to port state powers, even if it has only been challenged on the grounds of restriction on

¹⁵⁹⁴ (Messner, et al., 2013, p. 14)

¹⁵⁹⁵ Directive 2012/33, Preamble (21)

¹⁵⁹⁶ Australia, Marine Notice 16/2006.

¹⁵⁹⁷ UNESCO, Decision: CONF 003 VIII.15.

¹⁵⁹⁸ (Bateman, 2010, p. 7)

¹⁵⁹⁹ World Heritage Convention, Article 2.

innocent passage, is evidence that this unilateral action is best assessed on the basis of functionality.¹⁶⁰⁰

§ 513. A similar approach can be found in Canada’s parliamentary discussions with a view to a moratorium on oil tankers.¹⁶⁰¹ Debate on this Bill is still ongoing, but it has already included references to the environment being made as a purpose for its enactment.¹⁶⁰² The environment was previously mentioned in the debate of a similar Canadian Bill that did not become law, where the focus of the legislators’ attention was not only the interest of “Canadians” in their coastal environment, but also the fact that “the coastal and inland areas adjacent to the Pacific North Coast of Canada constitute the Great Bear Rainforest, the largest intact, coastal temperate rainforest left in the world”, and that “the ocean environments within Canada’s exclusive economic zone are a world treasure, home to some of the most abundant and diverse webs of marine life on earth”.¹⁶⁰³ However, it should be noted that, although the nearby island of Sgang Gwaay (Anthony Island) has been declared by UNESCO to have “outstanding universal value”, that declaration did not feature the environment but rather the cultural heritage of the island’s people.¹⁶⁰⁴ In that Bill, transport of oil was to be banned from a certain area in the Great Bear Sea, and there was no reliance on port state powers. In the ongoing Bill, however, tankers would be banned from port, as well as ships carrying their content into the port. The jurisdiction exercised – i.e. the jurisdiction aside from the territorial link established with the call to port – could well be based on the principle of functionality, more specifically on the function of the prescription of the port state over ship-source pollution threatening natural heritage.

6.2.3.2.5. The function of human health safeguarding

§ 514. States have also developed with their practice a function of safeguarding human health from the effects of ship-source pollution, as a human right “to a standard of living adequate for

¹⁶⁰⁰ *Supra* 3.4.6, The protection of Particularly Sensitive Sea Areas: Australia’s compulsory pilotage rule.

¹⁶⁰¹ *Supra* 3.4.9, The ban on oil tankers into port.

¹⁶⁰² Canada, Joyce Murray Vancouver Quadra, BC, 4 October 2017, 5:05pm:

¹⁶⁰³ Canada, Bill C-606, preamble.

¹⁶⁰⁴ UNESCO, CC-81/CONF/003/6, Decision: CONF 003 VIII.15.

[the] health and well-being”.¹⁶⁰⁵ This function is entrenched in broader obligations of realizing human rights of which the right to living in a sound environment is a dimension. Ports, as points of entry into a territory, are specified by the WHO as a place where certain precautions should be taken to prevent the spread of contagious diseases – arguably an issue of concern for humankind and not exclusively the populations immediately affected.¹⁶⁰⁶ Port states have also expressed concern regarding the effects of ship-source pollution on the health of coastal populations and the passengers and crews of visiting ships. That was the case, for example, in Australia, which set specific requirements for ships at berth following “concerns raised by residents”.¹⁶⁰⁷ Why are these measures a cosmopolitan effort requiring functional jurisdiction? Under the principle of territoriality, the impact on the health of national and foreign residents could be justified. From the perspective of the principle of nationality, the port state could also establish a link with its citizens abroad, but that would be insufficient to explain the regulatory impact of that exercise of jurisdiction over non-national coastal populations and over non-nationals abroad who are protected by the action taken. A measure undertaken in the US by the state of California may be explained by this principle. The objective of this measure is deliberately to tackle health concerns of Californians;¹⁶⁰⁸ there is, however, some evidence that this measure ties in with broader climate change regulations which may help to explain a part of the legal basis for this unilateral action.¹⁶⁰⁹ The same could be said about the EU sulphur directive.¹⁶¹⁰ There, explicit reference is made to the consequence of SO_x emissions on “human health”; the mention of coastal areas, despite being referred to in the Directive as being “particularly affected”, does not seem to exclude the consideration of environmental and

¹⁶⁰⁵ United Nations Universal Declaration of Human Rights, Article 25(1).

¹⁶⁰⁶ WHO (2014) Handbook for inspection of ships and issuance of ship sanitation certificates. P. 119:

¹⁶⁰⁷ (NSW EPA, 2017)

¹⁶⁰⁸ California, California Environmental Protection Agency, Air Resources Board, Public Hearing To Consider Adopting Regulations On Fuel Sulfur And Other Operational Requirements For Ocean-Going Vessels Within California Waters And 24 Nautical Miles Of The California Baseline.

¹⁶⁰⁹ Canada, Assembly Bill no 32, Chapter 488.

¹⁶¹⁰ *Supra* 3.4.2.1, The EU Sulphur Content of Marine Fuels Directive, on page 205.

human consequences beyond those areas.¹⁶¹¹ The reference to “human beings” instead of “residents” or “nationals” can be read as a rather more cosmopolitan approach by the port state to the regulation of the sulphur content of fuels. In Sweden, the effect of NOx emissions on health was also argued when justifying the regulation of equipment on board a foreign (Danish) ship.¹⁶¹² It is true that it was, at its heart, an issue of territoriality, for the ships’ journey being considered by the legislator occurred in territorial waters, or at least the regulation was limited to that geographical scope. Yet apart from verifying whether UNCLOS criteria (non-discrimination and due publicity) were fulfilled, the court engaged in discussing the purpose of such regulation. It noted that the right to impose special requirements “should not be abused” and that it “must be rationally justified”.¹⁶¹³ The “strong link” between the ships’ emissions and the Helsingborg harbour area meant that it was not discriminatory to impose stricter requirements on those ships, focusing on the types of activities rather than the nationality of the ship.¹⁶¹⁴ The Appeal Court found that health considerations would justify unilateral jurisdiction in this matter.¹⁶¹⁵ More importantly for the argument defended in this subsection, the “need to protect public health” was a term used by the court.¹⁶¹⁶ This term had already been used in the Ordinance itself, i.e. at the prescriptive level.¹⁶¹⁷ The court stopped short of discussing two points of relevance to a jurisdictional analysis. The first point of discussion relates to whether this could consist of an argument on passive personality. Arguably, part of the Swedish population is affected by conduct which threatens their right to health and which ought to be protected by the public institutions.¹⁶¹⁸ However, this is not the case. First, people affected are within the territory (so there is no need to give extraterritorial application to

¹⁶¹¹ EU, Directive 2005/33 (4) and (5)

¹⁶¹² *Supra* 3.4.2.5, Sweden’s order of the Environmental Board of Helsingborg Municipality.

¹⁶¹³ Environmental Board of the Municipality of Helsingborg v HH Ferries AB and Sundbusserne A/S, par 14.

¹⁶¹⁴ Environmental Board of the Municipality of Helsingborg v HH Ferries AB and Sundbusserne A/S, par. 18.

¹⁶¹⁵ Environmental Board of the Municipality of Helsingborg v HH Ferries AB and Sundbusserne A/S, par. 109.

¹⁶¹⁶ Environmental Board of the Municipality of Helsingborg v HH Ferries AB and Sundbusserne A/S, par. 106.

¹⁶¹⁷ Environmental Board of the Municipality of Helsingborg v HH Ferries AB and Sundbusserne A/S, par. 103.

¹⁶¹⁸ Sweden, Sveriges grundlagar, Article 2

Swedish laws), and therefore this case does not relate to one particular individual or group of individuals but to the population in general. Secondly, one may ask whether to apply the effects doctrine. It is true that there is an effect of ship-source emissions on the territory's ecosystems.¹⁶¹⁹ This is nonetheless much harder to prove. In its award, the court took recourse to tables to illustrate how the companies involved were contributing to the city's emissions, which exceeded norms on oxide concentrations.¹⁶²⁰ As the port state claims to have the right to regulate foreign ships' CDEM standards due to the impact on the 'public' – i.e. not just nationals but more broadly considering inhabitants with a human right to living in a decent environment – it may be submitted that a functional jurisdiction can be argued as part of the claim to prescriptive jurisdiction.

6.2.4. *The legal limit of functional port state jurisdiction*

§ 515. The proposal that unilateral port state jurisdiction is partly grounded in a principle of functionality has the practical consequence of imposing certain legal limits on cosmopolitan unilateralism. These limits make it clear that at no time is the action of a state unfettered, even when geared towards regulating a common concern. Whilst functional coastal state jurisdiction is zonal, i.e., spatially limited by a defined maritime zone, functional port state jurisdiction appears to know no such limits (except for the obvious limitation regarding enforcement). As geography provides little support in this matter, how are such limits to be identified? This section proposes a method. This method is not a mechanism of managing competing claims but rather a limit to the scope of the principle itself. This section will hence not discuss other international law limits to jurisdiction which might always apply, and which have been mentioned previously.¹⁶²¹ Instead, as has been the case throughout Part II, the limits of the principles themselves are the centre of the legal analysis on jurisdiction. Overlooking what territory means has already allowed the principle of territoriality to expand drastically; it is therefore necessary to ensure that states' jurisdictional functions are not interpreted too extensively, as has often been attempted by coastal states.

¹⁶¹⁹ Environmental Board of the Municipality of Helsingborg v HH Ferries AB and Sundbusserne A/S, par. 57.

¹⁶²⁰ Environmental Board of the Municipality of Helsingborg v HH Ferries AB and Sundbusserne A/S, par. 29-34.

¹⁶²¹ *Supra* 1.4.3, The limits to port state jurisdiction.

§ 516. If one accepts, faced with the evidence presented in Part I, that a custom to protect certain global commons by recourse to port state powers has emerged, then substantive limits to the state's assertion are unlikely to be found in multilateral instruments. Rather, such limits are to be found in the actual purpose providing the need for the assertion of functional jurisdiction. In practice, this is very difficult to assess. The assessment requires a constant reinterpretation of the mandate to act, looking at new evidence available from state practice and also from multilateral developments including non-binding norms, as well as from, as this study submits, looking at new evidence available from scientific research. In that sense, the custom of protecting common concerns through port powers by relying on functions which are achieved through that protection is as open to legal interpretation as the concepts of territory, nation or security.

§ 517. Furthermore, there is no clear-cut line separating the unilateral regulation of global commons, which fulfils a common interest, and the realization of self-interest, especially when there is no opposition between them. Consider, for example, if 'disappearing states', such as Tuvalu or Kiribati, concerned with rising sea levels caused indirectly by climate change, decide to enact very strict regulations with regard to shipping emissions when acting as port states.¹⁶²² Would the associated extraterritoriality be strictly functional? It is hard to say. In those cases, the common concern matches the state interest in regulating greenhouse gas emissions at sea, and hence the principle of functionality may be relied upon as well as the other principles which focus on the state's interest in the matter. Aside from cases where regulating global commons is in the national interest, there is the risk that functional jurisdiction provides a means of ascertaining the national interest under the false banner of the commonality of the concern. A practical application of this question might help to situate the debate in concrete terms. For example, did the EU violate the limit to its functional jurisdiction to mitigate climate change at port in Regulation 2015/757?¹⁶²³ A flag state acknowledging the functional jurisdiction of the port state over ship-source pollution could still claim that port states have no right to unilaterally prescribe a norm that requires ships to provide information about their emissions because providing that information is of no immediate benefit to the environment, which is the legal basis for that unilateral extraterritoriality. The flag state could claim that this is a disguised

¹⁶²² (Rayfuse, 2011, p. 281)

¹⁶²³ *Supra* 3.4.4, The control of CO2 emissions from shipping: the EU MRV Regulation.

way of getting access to private information about the corporate structure of the vessel's ownership, or information about the efficiency of engines whilst on the high seas, which is not a common concern but rather a parochial interest of the state for economic gain. One argument in favour of the flag state's position is the fact that, following pressure caused by this Regulation, the IMO created an instrument that addresses such concerns without requiring transfer of information. Unilateralism having served its norm-steering purpose, that prescription would no longer be necessary. It would then be up to the EU member states to argue, and provide evidence to sustain that argument, that requesting this information, because it is part of a mechanism which will, in the future, serve to limit CO₂ emissions, already has the impact of deterrence, making ships act more sustainably than they otherwise would.¹⁶²⁴ In a case where this did not convince the flag state, an international dispute would ensue. The chosen court or arbitrators would then have to verify whether the EU member states should have inserted an actual consequence for emissions above a certain level, namely to justify the collection of that information as part of its functional jurisdiction to mitigate climate change.

§ 518. In one case where the extraterritoriality of EU law was the object of contention, the court focused on the territoriality/extraterritoriality dichotomy, stopping short of discussing the limits on the EU in the unilateral regulation of aircraft pollution.¹⁶²⁵ Hence, one is still left to wonder how the functional jurisdiction of port states may be abused in practice. One possible benchmark could be the scientific evidence used in support of the prescription.

§ 519. The role of science in assessing a state's rights in international law is not a novel idea.¹⁶²⁶ The role of scientific evidence in the decision of international courts has been growing in importance in recent years: for example in the case concerning the river works in the Gabčíkovo-Nagymaros project (*Hungary v. Slovakia*);¹⁶²⁷ or in the case concerning pulp mills on the River Uruguay (*Argentina v. Uruguay*);¹⁶²⁸ or, more recently, in the case concerning

¹⁶²⁴ EU, COM(2013) 479 final.

¹⁶²⁵ ECJ, Case C-366/10, Air Transport Association of America

¹⁶²⁶ (Foster, 2011, p. xiv)

¹⁶²⁷ ICJ, *Hungary v. Slovakia* Par 40

¹⁶²⁸ ICJ, *Argentina v. Uruguay* Par 213.

whaling in the Antarctic (*Australia v. Japan: New Zealand intervening*)¹⁶²⁹ among other examples.¹⁶³⁰ In these three cases, states have partly relied on scientific evidence to substantiate their claims in matters pertaining to environmental law. This illustrates how states attach value to arguments based on scientific authority in their international practice and how other states acknowledge that method and engage with it, never refuting the normative value of science but rather finding scientific arguments that refute the propositions put forward by the other party. Arguments based on scientific authority eventually permeate the discussions on the limits to a state's jurisdiction. More specifically, a state may claim to have jurisdiction because its regulations provide a more rigorous protection to the environment according to scientific evidence. These cases illustrate how states use scientific authority to justify their actions, opening a way for port states that need to justify their jurisdictional claims to fulfil a certain function.

§ 520. Recourse to science as a determinant of a state's jurisdiction has also made its way into environmentally related cases within states. In the *Urgenda* case (Netherlands), a court in The Hague considered an EU assessment on scientific evidence with respect to climate change.¹⁶³¹ It concluded, on the basis of that evidence, that the state “does not meet the standard which according to the latest scientific knowledge and in the international climate policy is required for Annex I countries to meet the 2°C target”.¹⁶³² In *Thomson v The Minister for Climate Change Issues* (New Zealand) a court in Wellington was required to deal with a similar issue, looking at New Zealand's jurisdiction with respect to climate change on the basis of scientific evidence. The *Urgenda* case was mentioned as a precedent in front of that court, illustrating

¹⁶²⁹ ICJ, *Australia v. Japan: New Zealand intervening* Par. 134

¹⁶³⁰ Case concerning Land Reclamation (Malaysia v. Singapore); Southern Bluefin Tuna case (Australia and New Zealand v. Japan); The MOX Plant cases (Ireland v. United Kingdom); Nuclear Tests cases (Australia v. France)(New Zealand v. France); European Communities – Measures Affecting Asbestos and Asbestos-Containing Products; European Communities – Measures Concerning Meat and Meat Products (Hormones); European Communities – Approval and Marketing of Biotech Products.

¹⁶³¹ Netherlands, *Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 2.60.

¹⁶³² Netherlands, *Urgenda Foundation (on behalf of 886 individuals) v The State of the Netherlands (Ministry of Infrastructure and the Environment)*, 4.48.

the global impact of court decisions on common concerns.¹⁶³³ In *Client Earth v Secretary of State for the Environment, Food and Rural Affairs* (UK), a case on air pollution, the court said that measures taken by the state “must be scientifically feasible, but effective”.¹⁶³⁴ In the *Milieudefensie* case (Netherlands), the court looked at the WHO standards and decided that the state was under a legal obligation to do more despite the existence of guidelines.¹⁶³⁵ The *Lluyia v. RWE* case (Germany), where a Peruvian farmer is suing a German company on the grounds of climate change impacts, may soon provide more evidence of that sort of litigation material, showing the relevance of extraterritorial consequences.¹⁶³⁶

§ 521. Another element that may use scientific evidence as a way of determining the limits of functional port state jurisdiction is the assessment undertaken in a state prior to the law being adopted. Although originally the result of treaty obligations, lawmakers in certain states (e.g. OECD member states such as, for example, the Netherlands, Switzerland, Australia) now regularly integrate in their law-making procedures a regulatory impact analysis/assessment.¹⁶³⁷ This assessment includes, among other matters, the environmental impact of a state’s policies, ensuring that its objectives are achieved. Conducting a regulatory impact assessment has the advantage of taking into account the environmental consequences of a policy *ex ante*.¹⁶³⁸ This practice offers a way of assessing the compliance of a certain unilateral action with the functions of jurisdiction, because it encompasses an analysis of the law, having as a reference certain objectives to be achieved.

§ 522. The ‘functional compatibility test’ proposed here may have implications in the interpretation of the compatibility of unilateral port state practice with existing treaty law. For example, the UNCLOS provides that states taking environmental measures cannot unjustifiably interfere with ‘activities’ carried out by other states, namely when they are in

¹⁶³³ New Zealand, *Thomson v Minister for Climate Change Issues*, at 127.

¹⁶³⁴ UK, *Client Earth (No 2) vs SSEFRA*.

¹⁶³⁵ Netherlands, *Milieudefensie and Stichting Adem Rotterdam v The State of the Netherlands*, 4.75-4.77.

¹⁶³⁶ Germany, *Lluyia v RWE (Challe, 2017)*

¹⁶³⁷ (Jacob, Weiland, Ferretti, Wascher, & Chodorowska, 2011, p. 8)

¹⁶³⁸ (Jacob, Weiland, Ferretti, Wascher, & Chodorowska, 2011, p. 49)

pursuance of their duties.¹⁶³⁹ This poses a legal limit to port states, which must justify any such interference. If a flag state regulates an issue ‘in pursuance of’ its duty to protect the environment (either unilaterally or as a simple transposition of multilaterally set rules and standards) and the port state claims to have jurisdiction to regulate that same issue, considering conduct outside the port state’s maritime zones when doing so, then there is a conflict of regulatory power over the same global commons. Even if one is to accept the primacy of flag state jurisdiction and the vicarious nature of port state jurisdiction, that interference will be ‘justifiable’ only if the port state provides a justification which puts forward its right to prescribe rules of conduct because of the commonality of the concern being regulated – its unilaterally set functional port state jurisdiction – and also that the flag state’s prescription does not exist or is not sufficient to do so. On this latter point, the state would have to indicate according to which scientific yardstick the flag state’s right is not sufficient to fulfil that objective. One of the yardsticks by which to measure could be the ‘best practicable means at their disposal’ combined with ‘capabilities’, something that could eventually serve as a limit to the enforcement but not the prescription. Another possibility, suited for prescriptive jurisdiction, is the ‘best available scientific evidence’ threshold, which in treaty law is only relevant for ice-covered areas.¹⁶⁴⁰

§ 523. In practice, the legislature which prescribes pollution rules and standards on foreign ships visiting its ports should be able to provide evidence as to whether its prescription does fulfil one of the port state’s functions. Whilst the enforcer must be able to show how a certain power does result in higher levels of compliance, the legislating port state must, for example, explain how its particular standard is better suited than the one of the flag state to achieve this or that function. Does compulsory pilotage prevent ships from having accidents? Does a recycling fee prevent ships from being scrapped in substandard yards? Does a ban on carriage and use of HFO in some areas provide those areas with better legal protection than the one from which they already benefit? In other words, the state arguing functional jurisdiction to fulfil certain cosmopolitan functions must explain, either when it prescribes or later if challenged, the purpose of its unilateral initiative so as to demonstrate that it is not abusing its right to act under the principle of functionality.

¹⁶³⁹ UNCLOS Article 194(4).

¹⁶⁴⁰ UNCLOS, Article 234.

§ 524. And what about the role of the IMO? The organization remains responsible today for most of the rules applied worldwide on the matter of ship-source pollution. Under the interpretation of the legal limits to unilateral port state jurisdiction put forward in this thesis, the IMO will not lose its significance with the development of unilateral functionalism, but it will have to overhaul its mission which, to some extent, it is already starting to do. This organization develops studies and scientific enquiries, providing flag states with all the necessary information on shipping efficiency and environmental compatibility. It would be up to each individual state to race for the top instead of using subsidiary standards such as international treaties as a bottom line for its legislative efforts. This organization would then be the privileged entity to assist states in preventing and resolving jurisdictional disputes and it would be able to develop its instruments based on the highest standards applicable, making unilateral jurisdiction less necessary.¹⁶⁴¹ This assistance would be based on a balancing of interests – both cosmopolitan and parochial – following criteria that its member states would have to agree on in abstract. Nevertheless, as the interest of the organization is to ensure that its own rules and standards remain the sole rules and standards applicable at sea, an existential identity crisis ought to be averted simply by acknowledging that a level playing field is not only negotiated within its confines.

§ 525. Scientific evidence provides a benchmark to verify compatibility with the function which states fulfil as trustees of the world environment on behalf of humankind.¹⁶⁴² Recourse to port powers is limited not only by general international law considerations but also by limits attached to these specific functions which the port state aims to fulfil unilaterally. Even though practice proves that states are openly engaging with such functions, as well as with scientific evidence, there is no case where port states have actually been challenged on the grounds of abusing their functional jurisdiction.

6.3. Interim conclusion (VI)

§ 526. In this chapter it has been proposed that port state jurisdiction over common concerns is best explained by the principle of functionality. The case was made that port states have certain functions and that those functions are the normative ground that allows the exercise of

¹⁶⁴¹ (Lister, et al., 2015, p. 193)

¹⁶⁴² (Benvenisti, 2013, p. 300)

regulatory functions over ship-source pollution. It was also submitted that, in the case of these functions, the best way to evaluate the limitations of that principle in justifying a port state's right over such conduct is the effective achievement of the function. This would be done by relying on scientific evidence and also possibly on a state's environmental impact assessments. Only then would it be possible to understand whether that exercise of extraterritorial prescriptive jurisdiction is not outside the bounds of international law. This submission does not preclude the applicability of other principles of jurisdiction in the formulation of the international legal basis for unilateral port state jurisdiction but it complements the complex argumentative bundle upon which a state acts.

FINAL CONCLUSION

Unilateralism is a means and not an end. As this study has showed, the final goal of states acting unilaterally is often universality, i.e. the creation of a new, widely accepted level playing field –unanimously followed if possible – where other actors compete under the same rules. Despite the mandate of certain international organizations such as the IMO, the power to create such a level playing field under international law is not centralized, and hence the “rules to create the rules” evolve as the result of the permanent power struggle between states. This struggle is best illustrated through the practice of states which may lead to the development of an international custom or to the emergence of certain legal principles. That is what has guided this study on unilateral port state jurisdiction, which was an inquiry about the legal basis for state action. Throughout this dissertation, six fundamental ideas about the port states’ quest for universality in the regulation of ship-source pollution were presented. They constitute the stepping stones that led to the conclusion that states have a right to exercise certain cosmopolitan functions by taking recourse to their port powers.

The first idea is that states act in the international sphere not only as parochial entities, protecting their national interests from competing national interests, but also as entities endowed with cosmopolitan functions. This cosmopolitan nature of contemporary statehood manifests itself in the struggle to achieve commitments that set a tangible legal threshold for what is perceived to be a common interest to all states and what is, ultimately, beneficial to all humankind. That is the case, at least, of the many concerns raised by the environmental harm that certain human actions cause. In order to face these types of common concerns, states must act under a certain ‘capacity’. It has been submitted that the capacity to act as a port state is, at least partly, suited to respond to such cosmopolitan aims. This capacity allows a port state to use certain port powers, such as inspection or expulsion, to regulate the conduct of ships which affects not only the port state’s parochial concerns, such as its territory or its nationals, but also the concerns of others, which may include foreign territories or nationals, or simply areas of the planet which are not part of any territory, such as the high seas or the atmosphere. The question raised by this first idea was whether such cosmopolitan aims entitle states to exercise jurisdiction or whether such aims remain intangible goals for which port states may elaborate their own laws. In considering this question, Chapter 1 hinted that there were two ways in which port states could achieve those cosmopolitan aims: the multilateral way, based on the consent of other states, or the unilateral way, based on uncodified principles of jurisdiction.

The second idea that is proposed in this study is that there is today a well-developed multilateral framework for port states to assert jurisdiction over ship-source pollution. This framework goes well beyond UNCLOS Article 218(1), which, despite its centrality, is not the only or the last word with respect to either port state enforcement or port state prescription. Chapter 2 has shown that the central role of the UNCLOS has not prevented the development of other international legal instruments which deal with the role of these states with respect to this particular subject-matter. These instruments, most of them developed under the aegis of the IMO, all share the ambition of universality (be it global or regional). They aim to create a legal framework for maritime transport which defines the terms and conditions through which state parties may develop more stringent environmental standards. This framework is not only composed of binding instruments but also of non-binding guidelines, the contents of which are often used as a test-bed for the development of new treaties, should some states decide to experiment with more stringent measures. In all of these instruments, the role of port states is confirmed and/or developed as a reliable alternative for the inadequacies of both coastal state and flag state enforcement. With rare exceptions, states do not commit to use this multilateral framework as the maximum possible benchmark to establish their jurisdiction. Therefore, the capacity to act as a port state was shown not to have reached its ultimate limit in the existing multilateral framework which, although it provided opportunities for so-called 'residual jurisdiction', did not preclude more detached exercises of unilateral jurisdiction.

The third idea is that, despite the existence of a multilateral framework, there are many instances where states have used their port powers in a way that falls outside its scope, even considering the possibilities offered by clauses of residual jurisdiction. In this study, those actions have been called 'unilateral port state jurisdiction', by reference to the fact that this jurisdiction is based not on a right explicitly consented to by other states in that framework but rather by the actions undertaken without such legal basis. This has occurred with respect to all types of ship-source pollution: for example, ballast water discharges; the sulphur content of marine fuels; carbon dioxide emissions; the sound recycling of ships; CDEM rules and standards, etc. For methodological reasons, this study has not looked at other circumstances where port powers are also used, such as with respect to illegal, unreported and unregulated (IUU) fishing or labour standards, but it is argued that unilateral jurisdiction can also take place in those circumstances. Through regional MoU, to name the most well-known example, port states have agreed to collectively enforce various international rules and standards that would otherwise often not be applicable to certain ships, namely of non-parties. It has been argued

that using port powers unilaterally to tackle ship-source pollution is already fulfilling a cosmopolitan function, as the state is enforcing international law without a treaty right to do so but still for the benefit of all. This third idea also means that the port state may legislate unilaterally. By creating novel rules of conduct, some port states have exercised prescriptive unilateral jurisdiction, effectively shaping the development of international treaties and creating new environmental standards for maritime transport. This sort of unilateralism provides evidence not only of the fact that jurisdiction has not reached its ultimate limit in the multilateral framework, as suggested previously, but also of the fact that port states find opportunities to exercise their port powers in a way that impacts on other states' rights.

These three ideas have been the pillars of Part I of this study. They have led to an inquiry on the jurisdictional grounds that international law provides for states to use their port powers unilaterally and how those grounds may be interpreted to open up opportunities for port states to regulate ship-source pollution regardless of flag state consent. This inquiry led to three more chapters: the fourth discussing the territoriality of port state jurisdiction; the fifth, pointing to the extraterritoriality involved in acting under this capacity; and the sixth, looking at the functionality of unilateral port state jurisdiction. Each one brought its own separate input, resulting in three additional core ideas.

The fourth idea is that port states still conceive their unilateral port state jurisdiction from the standpoint of territorial sovereignty. Indeed, the right to pursue cosmopolitan functions, as identified in the unilateral actions directed towards countering ship-source pollution at sea, often relies exclusively on a very parochial legal ground: the right of the port state to regulate conduct linked to its territory. This takes place either by considering the port as the place where a certain conduct should not begin (subjective territoriality) or end (objective territoriality), or by considering the environmental consequences from that conduct that may take place as the result of non-territorial conduct (effects doctrine). In theory, the port state does have jurisdiction over any matter occurring at port under a principle of territoriality. This is rather uncontroversial today and hence little attention was given to actions which only take place within the port, such as emissions at berth or discharges in internal waters. However, territory is a notion that requires reassessment in view of the fact that the principle of territoriality has been the object of very broad interpretations, encompassing actions of ships prior to or after their entry into the port. The practice shows that in some cases a mere territorial trigger suffices for conduct which is not occurring in the territory but at sea, to be absorbed by that principle.

This seemingly neutral interpretation is offered by port states, and taken on by many scholars, as a self-sufficient justification for certain rights which the port state claims to have over the ship, or its crew, or its management structure, once it has entered voluntarily into the port. The fourth idea submitted in this study illustrated how, in view of the diverging views existing on what territory means for sovereign states, the principle of territoriality provides a very illusive legal justification for unilateral port state jurisdiction. The principle offers a very poor explanation not only of the rights of the port state over the extraterritorial conduct itself but also of the cosmopolitan functions that are at the root of the regulatory endeavour. This led the study to shift towards other legal bases that specifically account for a state's extraterritoriality.

The fifth idea has been the result of that shift of attention from the territoriality argued by port states as sufficient in view of the circumstances of the ship when powers are enforced, to the actual extraterritorial impact of its norms. Despite the many exercises of prescriptive jurisdiction over conduct taking place outside the territory of the port state, the principles of extraterritorial jurisdiction are very rarely relied upon. They are also very inadequate for justifying what states do when disregarding collective action problems which require very technical regulation. However, they offer additional support for port states which may wish to appeal to parochial links involved in incidents of ship-source pollution, enlarging the scope of potential action of those states. In light of the inadequacy of the principles of nationality, security and universality to fully explain certain aspects of the unilateral practice of port states with respect to ship-source pollution, it was submitted that cosmopolitan unilateralism is not fully justified by those principles even though they may assist in assessing the international legality of unilateral port state jurisdiction over ship-source pollution.

The sixth idea presented in this study was that functionality covers the inadequacies of the other three principles of extraterritorial jurisdiction, in that it does not require any link to the sovereign state nor the shared acceptance of a specific conduct as a crime; it also helps in the understanding of the legal basis that such actions require. In the same way that coastal states use functionality to justify their jurisdiction at sea, by reference to a maritime zone, so port states rely on a similar reasoning to regulate shipping conduct regardless of where it occurs. This is valid as long as it is geared towards a specific purpose, namely a broadly accepted cosmopolitan function of sovereignty. This illustrates how, contrary to what is often assumed, functional jurisdiction is not treaty-based but customary, and that it is not to be confused with the zonal approach to maritime jurisdiction. It also illustrates how cosmopolitan unilateral

action may find legal ground not in a specific right to act but rather in shared values and interests previously agreed upon in other fora.

These ideas lead to the fundamental conclusion of this study: that today the institution of proceedings to investigate, detain or ban ships and eventually prosecute cases of extraterritorial ship-source pollution is not the monopoly of the flag state but increasingly the role of the port state as well. The port state has been increasingly complementing the role of the flag state as the primary body responsible for setting the rules and standards applicable on the high seas. It does so by setting territorial bounds to which ships consent due to the economic advantage of visiting a region's ports. Yet without necessarily affirming it or acknowledging it, the port state has found a permissive international legal ground for its port state powers with respect to non-territorial conduct, to the extent that its actions vindicate cosmopolitan functions. These functions are not only found in multilateral instruments but also in state practice worldwide, allowing the potential regulatory reach of states to grow as they acknowledge certain issues to be a shared global concern. Through this cosmopolitan unilateralism, states aim to achieve universality, i.e., the consensual recognition under customary law – and eventually in treaty law by future amendments to existing treaties or by a new treaty – that a certain conduct is wrongful, and that the standard used as a threshold to determine that wrongfulness may be developed unilaterally according to the scientific evidence at the time. This right has the advantage of eliminating the time-consuming international negotiations at the IMO without forcing flag states to change their laws, as the entry into the port always remains voluntary and the applicability of such unilateral standards subject to a procedural rule of publicity. The criticism of this view is often linked to private interests, such as the requirement of having to have a ship equipped to meet the highest standard required for a journey. Yet it is precisely that policy effect which often motivates states to act unilaterally and to explore all legal avenues such as functionality.

It is thus less than accurate to claim that only non-legal aspects, such as the commercial competitiveness of ports, will limit the recourse of states to unilateral jurisdiction. This study proposes that the principles that provide a legal basis for unilateral jurisdiction carry in their own 'DNA' certain limits. In the case of unilateral jurisdiction over ship-source pollution, it is submitted that port states aiming to unilaterally regulate ship-source pollution are limited to fulfilling certain cosmopolitan functions: marine environment protection; biological diversity preservation; climate change mitigation; natural heritage conservation; and the safeguarding of

human health. The fulfilment of these cosmopolitan functions imposes limits on unilateralism aimed at furthering parochial interests, for it requires the regulator to provide evidence of whether the unilateral rule or standard prescribed and enforced at port has the virtue of serving such functions.

The impact of unilateral jurisdiction in multilateral institutions and procedures – which are often wrongly considered as the sole legal authorities entitled to set the benchmarks for cosmopolitan action – offers a different perspective on the role which states play outside the negotiating room to further specific agendas. It was not an aim of this study to systematically establish a causality link between this or that unilateral action and this or that international regulatory development. However, the coincidence in time between the application by the great economic powers of more stringent environmental standards at port and the subsequent adaptation of the multilateral framework to make those standards widely applicable to all is evident. Suffice it to mention the agenda of the IMO regarding the reduction of greenhouse gas emissions from ships following the adoption by the EU of a monitoring mechanism, to show how international organizations, and more specifically their state parties, are keen on maintaining a degree of uniformity in the legal framework of maritime transport. It is this wish for uniformity that port states aim to explore when prescribing more stringent rules and standards, for they themselves also want universal acceptance of their standards, without which the prescription could backfire and make the state or the region less competitive from an international trade standpoint.

The creation of an international legal regime for ships in foreign ports has been the object of a treaty, the Convention and Statute on The International Regime of Maritime Ports, which is almost a century old but which few states have so far ratified. The idea of reinvigorating this issue has also been taken off the agenda of the IMO on one occasion. It is up to state practice, and emerging customs, to determine the scope of port state jurisdiction in international law, and treaties setting rules and standards for ship-source pollution are likely to remain consistent in directing that the overall rights to jurisdiction of a state are not altered by treaty. For this reason, the study ends with some policy advice to port states wishing to unilaterally regulate ship-source pollution without violating international law.

1. Regulators should consider the asymmetry of enforcement capabilities within their own jurisdiction, for the lack of enforcement may be evidence of a lack of real concern apart from

at the prescriptive moment (especially if that results from an obligation of the state under international treaties); this advice is especially valid when considering entities such as the EU.

2. Unilateral jurisdiction should continue to be transparent, as the international principle of publicity which applies to port state enforcement within the UNCLOS ought to apply to all cases where port powers are used; and similarly, the communication to the IMO of novel measures which relate to a function of the state requires an administration ready to engage with queries as to the substance of the rule or standard put into place, namely its scientific basis.

3. Despite the legality of well-grounded unilateral port state jurisdiction, this option still requires a massive effort in terms of enforcement capabilities which may not be at the disposal of the port state; thus it would be preferable to establish incentive schemes based on compliance records and providing financial advantages to instances of best practice, letting private actors steer a course towards the protection of the public good; this offers a more flexible solution for the complexity of regulating a global industry subject to different regulators.

4. The enforcement of unilateral port state prescriptions dealing with high seas conduct should focus on the exact conduct committed by the ship rather than on the territorial trigger, for that trigger is more easily avoided if known in advance; in this case, arguing the function being fulfilled allows a dialogue with states that share an interest in that enforcement as well.

5. Port states should put the cosmopolitan element of their regulation – even if that only occurs as an externality – in the centre of their argument, explaining that their jurisdiction is based on the commonality being preserved and bringing about the commitments undertaken by the involved actors to counter the respective concern.

6. Procedures of cooperation with the flag state should not be abandoned despite their applicability being based only on a treaty so far as regards discharges, for they enhance the communitarian aspect of the function being pursued, revealing not a conflict between capacities but rather a complementarity of roles, which is the original purpose of port state jurisdiction that many states still consider to be the sole purpose of this capacity.

Should this policy advice be followed by all port states, unilateral jurisdiction would certainly be normalized and become a more accepted part of the legal landscape of an international law that needs to respond more rapidly to the threat of ship-source pollution without compromising the pre-existing rights of all states involved. Regardless of what is the appropriate legal basis and regardless of the disputes about the benefits and perils of the actions that have been undertaken, one point seems certain: ports have become fault lines between two models of governance, both aimed at universality. The reinterpretation of state practice based on a

principle of functionality proposed in this study attempted to provide the reader with a compromise perspective that allows more legal flexibility than strict institutionalism but at the same time rejects views of unilateralism being unbridled and prone to abuses of power. Only by respecting this balance will cosmopolitan unilateralism provide an opportunity for port states to develop international law.

BIBLIOGRAPHY

- Abi-Saab, G. (1998). Whither the international community? *European Journal of International Law*, 9(2), 248-265.
- Agnew, J. (1994). The Territorial Trap: the Geographical Assumptions of International Relations Theory. *Review of International Political Economy*, 1(1), 53-80.
- Akehurst, M. (1972). Jurisdiction in International Law. *British Yearbook of International Law*, 46, 145-258.
- Allen, C. H. (2012, May 30). Do State Governments have the Power to Regulate Oceangoing Vessels Outside their Waters by Treating the Regulations as a “Condition for Entry” into their Ports? *The Maritime Executive*. Retrieved from <https://www.maritime-executive.com/article/do-state-governments-have-the-power-to-regulate-oceangoing-vessels-outside-their-waters-by-treating-the-regulations-as-a-condition-for-entry-into-thei>
- Allen, C. H. (2012). U.S. Supreme Court Rejects PMSA's Challenge to California's Vessel Fuel Rule. *Pacific Maritime Magazine*, 26.
- American Law Institute. (1965). *Restatement of The Law Second, The Foreign Relations Law of the United States*.
- American Law Institute. (1987). *Restatement of The Law Third, The Foreign Relations Law of the United States*.
- American Law Institute. (2018). *Restatement of The Law Fourth, The Foreign Relations Law of the United States*. Retrieved June 16, 2018, from <https://www.ali.org/projects/show/foreign-relations-law-united-states/>
- Anderson, B. (2006). *Imagined Communities* (1st ed.). London: Verso.
- Anderson, D. (2008). *Modern Law of the Sea: Selected Essays*. Martinus Nijhoff Publishers.

- Aquilina, K. (2014). Territorial Sea and the Contiguous Zone. In D. Attard, M. Fitzmaurice, & N. A. Martinez Gutierrez (Eds.), *The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea* (Vol. I, pp. 26-70). Oxford University Press.
- Aust, A. (1986). The theory and practice of informal international instruments. *International and Comparative Law Quarterly*, 35, 787.
- Ayorinde, A. A. (1994). Inconsistencies Between OPA '90 and MARPOL 73/78: What is the Effect on Legal Rights and Obligations of the United States and Other Parties to MARPOL 73/78? *Journal of Maritime Law and Commerce*, 25(1), 55-94.
- Babalola, Y. (2017, August 22). *Climate Change: NIMASA To Bar Carbon Emitting Ships From Nigerian Ports*. Retrieved May 3, 2018, from <http://leadership.ng/2017/08/22/climate-change-nimasa-bar-carbon-emitting-ships-nigerian-ports/>
- Baltic and International Maritime Conference. (1981). Charterparty Laytime Definitions.
- Bang, H.-S. (2009). Port State Jurisdiction and Article 218 of the UN Convention on the Law of the Sea. *Journal of Maritime Law & Commerce*, 40(2), 291-313.
- Bang, H.-S., & Jang, D.-J. (2012). Recent Developments in Regional Memorandums of Understanding on Port State Control. *Ocean Development & International Law*, 43(2), 170-187.
- Barnes, R. (2009). *Property Rights and Natural Resources*. Oxford: Hart Publishing.
- Bassin, M. (1987). Imperialism and the nation state in Friedrich Ratzel's political geography. *Progress in human geography*, 11(4), 473-495.
- Bassiouni, M. C. (1989). A functional approach to general principles of international law. *Michigan Journal of International Law*, 11, 768-.
- Bastmeijer, K. (2003). *The Antarctic Environmental Protocol and Its Domestic Implementation*. Kluwer Law International.

Bibliography

- Bateman, S. (2010). *Coastal State Regulation of Navigation in Adjacent Waters - the Example of the Torres Strait and Great Barrier Reef*. Monaco: ABLOS.
- Bäuerle, T. (2012). Integrating Shipping into the EU Emissions Trading Scheme? In H.-J. Koch, D. König, J. Sanden, & R. Verheyen (Eds.), *Climate Change and Environmental Hazards Related to Shipping: An International Legal Framework* (pp. 109-120). Martinus Nijhoff Publishers.
- BBC. (1967, March 18). *Supertanker Torrey Canyon hits rocks*. Retrieved May 3, 2018, from http://news.bbc.co.uk/onthisday/hi/dates/stories/march/18/newsid_4242000/4242709.stm
- BBC. (1978, March 24). *Tanker Amoco Cadiz splits in two*. Retrieved May 3, 2018, from http://news.bbc.co.uk/onthisday/hi/dates/stories/march/24/newsid_2531000/2531211.stm
- BBC. (1989, March 24). *Exxon Valdez creates oil slick disaster*. Retrieved May 3, 2018, from http://news.bbc.co.uk/onthisday/hi/dates/stories/march/24/newsid_4231000/4231971.stm
- BBC. (1999, December 13). *French struggle to contain oil spill*. Retrieved May 3, 2018, from <http://news.bbc.co.uk/2/hi/europe/561754.stm>
- BBC. (2002, November 19). *Stricken oil tanker sinks*. Retrieved May 3, 2018, from <http://news.bbc.co.uk/2/hi/europe/2492755.stm>
- Beale, J. H. (1923). The Jurisdiction of a Sovereign State. *Harvard Law Review*, 36(3), 241-262.
- Beckman, R. C. (2007). PSSAs and transit passage - Australia's pilotage system in the Torres Strait challenges the IMO and UNCLOS. *Ocean Development & International Law*, 38(4), 325-357.
- Bederman, D. J. (2012). The Sea. In B. Fassbender, & A. Peters (Eds.), *The Oxford Handbook of the History of International Law* (pp. 359-379). Oxford University Press.

- Beesley, J. A. (1973). The Arctic pollution prevention act: Canada's perspective. *International Law Journal of Syracuse, 1*, 226-235.
- Benner, C. J. (2006). State Clean Air Regulation Takes a Long Sea Voyage. *Natural Resources & Environment, 21*, 27-31.
- Benvenisti, E. (2013). Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare? *GlobalTrust Working Paper Series 02*. Retrieved from <http://globaltrust.tau.ac.il/publications>
- Benvenisti, E. (2013). Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders. *The American Journal of International Law, 107*(2), 295-333.
- Bernhardt, J. P. (1980). A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference. *Virginia Journal of International Law, 20*(2), 265-311.
- Bialostozky, N. (2014). Extraterritoriality and National Security: Protective Jurisdiction as a Circumstance Precluding Wrongfulness. *Columbia Journal of Transnational Law, 52*, 617-686.
- Bijnkershoek, C. v., & Frank, T. (1964). *Quaestionum juris publici: liber duo*. Ocean Publications.
- Birnie, P., Boyle, A., & Redgwell, C. (2009). *International Law and the Environment* (3rd ed.). Oxford University Press.
- Blanco-Bazán, A. (2004). IMO - Historical highlights in the life of a UN Agency. *Journal of the History of International Law, 6*(2), 259-283.
- Blum, G. (2008). Bilateralism, Multilateralism and the Architecture of International Law. *Harvard International Law Journal, 49*(2), 323-379.
- Bodansky, D. (2000). What's So Bad about Unilateral Action to Protect the Environment? *European Journal of International Law, 11*(2), 339-347.

Bibliography

- Bodansky, D. M. (1991). Protecting the Marine Environment from Vessel Source Pollution: UNCLOS III and Beyond. *Ecology Law Quarterly*, 18, 720-777.
- Bodin, J. (1993). *Les six livres de la République*. Paris: Librairie générale française.
- Boone, L. (2013). International Regulation of Polar Shipping. In E. J. Molenaar, & A. G. Oude Elferink (Eds.), *The Law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes* (pp. 193-216). Martinus Nijhoff Publishers.
- Bothe, M. (2011). Whose environment? Concepts of commonality in international environmental law. In G. Winter (Ed.), *Multilevel Governance of Global Environmental Change* (pp. 539-558). Cambridge University Press.
- Bowett, D. W. (1983). Jurisdiction: changing patterns of authority over activities and resources. *British Yearbook of International Law*, 53(1), 1-26.
- Boyd, D. R. (2011). *The environmental rights revolution: a global study of constitutions, human rights and the environment*. UBC Press.
- Boyle, A. (2006). EU Unilateralism and the Law of the Sea. *The International Journal of Marine and Coastal Law*, 21(1), 15-31.
- Boyle, A. E. (1985). Marine Pollution under the Law of the Sea Convention. *The American Journal of International Law*, 79(2), 347-.
- Breibart, E. (1989). The Wood Pulp Case: The application of European economic community competition law to foreign based undertakings. *Georgia Journal of International and Comparative Law*, 19, 149-173.
- British Branch Committee on the Law of the Sea. (1974). *The Concept of Port State Jurisdiction*. New Delhi: International Law Association.
- British Prize Court Decisions. (1915). The M \ddot{o} w \ddot{e} . *American Journal of International Law*, 9(2), 547-.
- Brownlie, I. (2003). *Principles of Public International Law* (6th ed.). Oxford University Press.

- Brugmann, G. F. (2003). *Access to Maritime Ports*. Books on Demand.
- Brunée, J. (2008). Common Areas, Common Heritage, and Common Concern. In *The Oxford Handbook of International Environmental Law* (pp. 550-573). Oxford University Press.
- BSU, B. f. (2014). *Fire and explosion on board the MSC FLAMINIA on 14 July 2012 in the Atlantic and the ensuing events*. Investigation Report 255/12.
- Bull, H. (2012). *The Anarchical Society: A Study of Order in World Politics* (4th ed.). London: Palgrave Macmillan.
- Buxbaum, H. L. (2009). Territory, Territoriality, and the Resolution of Jurisdictional Conflict. *American Journal of Comparative Law*, 57, 631-676.
- Buzan, B., & Waever, O. (2009). Macrosecuritization and security constellations: reconsidering scale in securitization theory. *Review of International Studies*, 35(2), 253-276.
- Byers, M. (1999). *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge University Press.
- California Environmental Protection Agency. (2005, December 8). *Air Resources Board Adopts Measures to Reduce Emissions from Goods Movement Activities*. Retrieved from News Release: <https://www.arb.ca.gov/newsrel/nr120805.htm>
- Cameron, I. (1994). *The protective principle of international criminal jurisdiction*. Dartmouth Publishing Co.
- Cançado Trindade, A. A. (2010). *International Law for Humankind: Towards a New Jus Gentium*. Martinus Nijhoff Publishers.
- Carnahan, B. K. (1971). The Canadian Arctic Waters Pollution Prevention Act: An Analysis. *Louisiana Law Review*, 31(4), 632-649.
- Carpenter, A. (2016). Introduction. In A. Carpenter (Ed.), *Oil Pollution in the North Sea* (pp. 1-12). Springer.

Bibliography

- Carrillo Salcedo, J. A. (1997). Reflections on the Existence of a Hierarchy of Norms in International Law. *European Journal of International Law*, 8, 583-.
- Cassel, P. K. (2011). *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. Oxford University Press.
- Cassese, A. (1990). Remarks on Scelle's Theory of Role Splitting (dédoulement fonctionnel) in International Law. *European Journal of International Law*, 1, 210-231.
- Cavalcante Oliveira, U. (2008). *The Role of Brazilian Ports in the Improvement of the National Ballast Water Management Program According the Provisions of the International Ballast Water Convention*. New York: Division for Ocean Affairs and the Law of the Sea.
- CE Delft. (2009, December). *Environmental Ship Index (ESI) An Instrument to Measure A Ship's Air Emission Performance*. Retrieved May 4, 2018, from https://www.ce.nl/assets/upload/file/Publicaties/7848_brochure.pdf
- CE Delft; Germanischer Lloyd; MARINTEK; Det Norske Veritas. (2006). *Greenhouse Gas Emissions for Shipping and Implementation of the Marine Sulphur Directive, Delft, CE, October 2006, p. 71*. Delft: CE Delft.
- Challe, T. (2017, December 7). *The Huaraz Case (Lluyia V. Rwe) – German Court Opens Recourse To Climate Law Suit Against Big Co2-Emitter*. Retrieved May 3, 2018, from <http://blogs.law.columbia.edu/climatechange/2017/12/07/the-huaraz-case-lluyia-v-rwe-german-court-opens-recourse-to-climate-law-suit-against-big-co2-emitter/>
- Channel 4. (2017, July 3). *Secrets of your Cruise: Channel 4 Dispatches*. Retrieved May 4, 2018, from <http://www.channel4.com/info/press/news/secrets-of-your-cruise-channel-4-dispatches-2>
- Charteris, A. H. (1920). The Legal Position of Merchantment in Foreign Ports and National Waters. *British Yearbook of International Law*, 1, 45.

- Chircop, A. (2006). The Customary Law of Refuge for Ships in Distress. In A. Chircop, & O. Linden (Eds.), *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom* (pp. 163-230). Martinus Nijhoff Publishers.
- Chiu, R. H., Yuan, C. C., & Chen, K. K. (2008). The implementation of port state control in Taiwan. *Journal of Marine Science and Technology*, 16(3), 207-213.
- Chomsky, N. (2002, September). *The Crimes of 'Intcom'*. Retrieved May 3, 2018, from <http://www.chomsky.info/articles/200209--.htm>
- Christodoulou-Varotsi, I. (2008). *Maritime Safety Law and Policies of the European Union and the United States of America: Antagonism or Synergy?* Springer.
- Churchill, R. (2016). Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships - What Degree of Extra-territoriality? *The International Journal of Marine and Coastal Law*, 31(3), 442-469.
- Churchill, R. R., & Lowe, V. A. (1999). *The Law of the Sea* (3rd ed.). Manchester: Juris Publishing.
- Clean Shipping Index. (2017). *About*. Retrieved May 3, 2018, from <http://cleanshippingindex.com/#page-about-jumbotron>
- CNSS. (2017, April 21). *China is cracking down on air pollution from shipping*. Retrieved May 4, 2018, from http://www.cnss.com.cn/html/2017/updates_0421/268578.html
- Coast Guard News. (2010, May 27). *Coast Guard restricts Norwegian-flagged Wilmina from U.S. ports for three years*. Retrieved May 2, 2018, from <http://coastguardnews.com/coast-guard-restricts-norwegian-flagged-wilmina-from-u-s-ports-for-three-years/2010/05/27/>
- Conforti, B. (1993). *International Law and the Role of Domestic Legal Systems*. Dordrecht: Martinus Nijhoff Publishers.
- Conforti, B. (1994). The Theory of Competence in Verdross. *European Journal of International Law*, 5, 70-77.

Bibliography

- Crawford, J. (2002). *The International Law Commission's Articles on State Responsibility*. Cambridge University Press.
- Crawford, J. (2008). *Brownlie's Principles of Public International Law* (7th ed.). Oxford: Oxford University Press.
- Crawford, J. (2012). *Brownlie's Principles of Public International Law* (8th ed.). Oxford University Press.
- Csabafi, I. A. (1971). *The Concept of State Jurisdiction in International Space Law*. Springer.
- Dabbah, M. M. (2010). *International and Comparative Competition Law*. Cambridge University Press.
- Daillier, P., Forteau, M., & Pellet, A. (2009). *Droit International Public* (8th ed.). Paris: L.G.D.J.
- de La Fayette, L. (1996). Access to ports in international law. *The International Journal of Marine and Coastal Law*, 11(1), 1-22.
- de Vattel, E. (1758). *Le Droit Des Gens ou Principes de La Loi Naturelle*.
- de Visscher, C. (1957). *Theory and Reality in Public International Law*. Princeton University Press.
- Degan, V. D. (1986). Internal Waters. *Netherlands Yearbook of International Law*, 17, 3-44.
- Devine, D. (2000). Port state jurisdiction: a judicial contribution from New Zealand. *Marine Policy*, 24, 215-219.
- DOALOS. (1996). *Law of the Sea Bulletin No. 31*. New York: United Nations.
- DOALOS. (2002). *Enforcement by Port States: Legislative History of Article 218 of the United Nations Convention on the Law of the Sea*. New York: Division for Ocean Affairs and Law of the Sea.
- Dodson, J. (1853). *Reports of Cases Argued and Determined in the High Court of Admiralty* (Vols. II (1815-1822)). Boston: Little, Brown and Company.

- Dover, R., & Frosini, J. (2012). *The Extraterritorial Effects of Legislation and Policies in the EU and US*. Brussels: European Union. Retrieved October 6, 2018, from [http://www.europarl.europa.eu/RegData/etudes/STUD/2012/433701/EXPO-AFET_ET\(2012\)433701_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2012/433701/EXPO-AFET_ET(2012)433701_EN.pdf)
- Drenan, M. T. (2014). Gone Overboard: Why the Arctic Sunrise Case Signals an Over-Expansion of the Ship-As-A-Unit Concept in the Diplomatic Protection Context. *California Western International Law Journal*, 45(1), 111-167.
- Dupuy, P.-M. (1991). Soft law and the international law of the environment. *Michigan Journal of International Law*, 12, 420-435.
- Dupuy, P.-M. (2000). Place and Role of Unilateralism. *European Journal of International Law*, 11(1), 19-29.
- Dzidzornu, D. M. (2002). Marine environment protection under regional conventions: limits to the contribution of procedural norms. *Ocean Development & International Law*, 33(3-4), 263-316.
- Dzidzornu, D. M., & Tsamenyi, B. M. (1990). Enhancing International Control of Vessel-Source Oil Pollution Under the Law of the Sea Convention, 1982: A Reassessment. *University of Tasmania Law Review*, 10, 269-291.
- Easterbrooks, B. D. (2011). Overreach on the High Seas: Whether Federal Maritime Law Preempts California's Vessel Fuel Rules. *Pepperdine Law Review*, 39(3), 645-699.
- Ecorys Nederland BV / NILOS. (2009). *Study on the Labour Market and Employment Conditions in Intra-Community Regular Maritime Transport Services Carried out by Ships under Member States' or Third Countries' Flag: Aspects of International Law*.
- Elden, S. (2013). *The Birth of Territory*. University of Chicago Press.
- European Bank for Reconstruction and Development. (2013, September). *Ballast Water Management Infrastructure Investment Guidance*. Retrieved June 22, 2018, from http://www.imo.org/en/OurWork/Environment/MajorProjects/Documents/EBRD%20BWM_Infrastructure_Investment_Guidance.pdf

Bibliography

- European Commission. (2010). *Legal and socio-economic studies in the field of the Integrated Maritime Policy for the European Union*. Luxembourg: Publications Office of the European Union.
- European Maritime Safety Agency. (2018). *FAQs on the ban list and on the banning procedures*. Retrieved May 2, 2018, from <http://www.emsa.europa.eu/about/financial-regulations/184-port-state-control/505-how-is-the-mss-rota-organised51.html>
- Eyffinger, A. (2012). Diplomacy. In B. Fassbender, & A. Peters, *The Oxford Handbook of the History of International Law* (pp. 813-839). Oxford: Oxford University Press.
- Fellmeth, A. X., & Horowitz, M. (2009). *Guide to Latin in International Law*. Oxford University Press.
- Finamore, B. (2015, December 8). *China Acts to Control Shipping Air Pollution and Greenhouse Gas Emissions*. Retrieved May 3, 2018, from <https://www.nrdc.org/experts/barbara-finamore/china-acts-control-shipping-air-pollution-and-greenhouse-gas-emissions>
- Financial Times. (2015, September 10). *Nigeria lifts oil tanker ban*. Retrieved May 4, 2018, from <https://www.ft.com/content/3f72b136-57be-11e5-a28b-50226830d644>
- Firestone, J., & Corbett, J. J. (2005). Coastal and port environments: international legal and policy responses to reduce ballast water introductions of potentially invasive species. *Ocean Development & International Law*, 36(3), 291-316.
- Firestone, J., & Jarvis, C. (2007). Response and Responsibility: Regulating Noise Pollution in the Marine Environment. *Journal of International Wildlife Law and Policy*, 10, 109-152.
- Fitzmaurice, M. (2002). Third Parties and the Law of Treaties. *Max Planck Yearbook of United Nations Law*, 6(1), 37-127.
- Fonseca de Souza Rolim, M. H. (2008). *The International Law on Ballast Water*. Leiden: Martinus Nijhoff Publishers.

- Foster, C. E. (2011). *Science and the Precautionary Principle in International Courts and Tribunals*. Cambridge University Press.
- Fowler, M. R., & Bunck, J. M. (2010). *Law, power, and the sovereign state: the evolution and application of the concept of sovereignty*. Penn State Press.
- Francioni, F. (1996). Extraterritorial Application of Environmental Law. In K. M. Meessen (Ed.), *Extraterritorial Jurisdiction in Theory and Practice*. The Hague: Kluwer Law International.
- Franck, T. M. (2008). On proportionality of countermeasures in international law. *American Journal of International Law*, 102(4), 715-767.
- Franckx, E. (2001). Vessel-source Pollution and Coastal State Jurisdiction: The Work of the ILC Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000). Kluwer Law International.
- Frank, V. (2005). Consequences of the Prestige Sinking for European and International Law. *International Journal of Marine and Coastal Law*, 20(1), 1-64.
- Frank, V. (2007). *The European Community and Marine Environmental Protection in the International Law of the Sea*. Martinus Nijhoff Publishers.
- Frommer, A. M. (1981). The British Hovering Acts: A Contribution to the Study of the Contiguous Zone. *Revue Belge de Droit International*, 16, 434-.
- Frowein, J. A. (2010, December). Recognition. *Max Planck Encyclopaedia of Public International Law [MPEPIL]*.
- Galdorisi, G. V., & Vienna, K. R. (1997). *Beyond the Law of the Sea: new directions for U.S. Oceans Policy*. Praeger.
- Galtung, J. (1969). Violence, peace, and peace research. *Journal of peace research*, 6(3), 167-197.
- Gard. (1999, August 1). *The powers of a Port State Control Officer and the legal impact of a detention order*. Retrieved May 2, 2018, from

Bibliography

- <http://www.gard.no/web/updates/content/52182/the-powers-of-a-port-state-control-officer-and-the-legal-impact-of-a-detention-order>
- Gard. (2016, January 29). *New Zealand - management of biofouling risk*. Retrieved May 4, 2018, from <http://www.gard.no/web/updates/content/20923502/new-zealand-management-of-biofouling-risk>
- Gard. (2017, September 21). *China changes its ECA timeline*. Retrieved May 3, 2018, from <http://www.gard.no/web/updates/content/24046962/china-changes-its-eca-timeline>
- Gard. (2018, April 19). *Get ready for New Zealand's new biofouling requirements*. Retrieved May 4, 2018, from <http://www.gard.no/web/updates/content/25358042/get-ready-for-new-zealands-new-biofouling-requirements>
- Gautier, P. (2006). L'etat du Pavillon et la Protection Des Intérêts Liés au Navire. In M. Kohen (Ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law / La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international* (pp. 717-746). Brill.
- Gavouneli, M. (2007). *Functional Jurisdiction in the Law of the Sea*. Leiden: Martinus Nijhoff Publishers.
- Gehan, S. (2001). United States v. Royal Caribbean Cruises, LTD.: Use Of Federal "False Statements Act" To Extend Jurisdiction Over Polluting Incidents Into Territorial Seas of Foreign States . *Ocean and Coastal Law Journal*, 7(1), 167-183.
- Geiss, R., & Tams, C. (2015). Non-Flag States as Guardians of the Maritime Order: Creeping Jurisdiction of a Different Kind? In H. Ringbom (Ed.), *Jurisdiction over Ships* (pp. 17-49). Brill.
- Gipperth, L. (2009). The legal design of the international and European Union ban on tributyltin antifouling paint: direct and indirect effects. *Journal of environmental management*, 90(s1), S86-S95.
- Glenn, H. P. (2013). *The Cosmopolitan State* (1st ed.). Oxford: Oxford University Press.

- Goldberg, W. A. (2000). Cruise Ships, Pollution, and International Law: The United States Takes on Royal Caribbean Cruise Lines. *Wisconsin International Law Journal*, 19(1), 71-93.
- Goodman, C. (2017). Rights, Obligations, Prohibitions: A Practical Guide to Understand Judicial Decisions on Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone. *The International Journal of Marine and Coastal Law*, 32, 1-27.
- Gordon, D. P., Beaumont, J. M., Robertson, D. A., & Ahyong, S. T. (2010). Marine biodiversity of Aotearoa New Zealand. *PLoS ONE*, 5(8), 1-17.
- Gottmann, J. (1973). *The significance of territory*. University Press of Virginia.
- Graeger, N. (1996). Environmental security? *Journal of Peace Research*, 33(1), 109-116.
- Greene, J. (2008). Hostis Humani Generis. *Critical Inquiry*, 34(4), 683-705.
- Greenwald, P. (1979). Pollution Control at the Maritime Frontier: The Limits of State Extraterritorial Power. *State Clara Law Review*, 19, 747-775.
- Greig, D. (2002). International Community, Interdependence and All That... Rhetorical Correctness? In G. Kreijen (Ed.), *State, Sovereignty and International Governance: in Honour of Judge Pieter Kooijmans of the International Court of Justice* (pp. 521-603). Oxford: Oxford University Press.
- Gritsenko, D. (2017). Regulating GHG Emissions from shipping: Local, global, or polycentric approach? *Marine Policy*(84), 130-133.
- Grotius, H. (1925). *De Jure Belli Ac Pacis Libri Tres*. Oxford: Clarendon Press.
- Guzman, A. (2011). The Consent Problem in International Law. *Virginia Journal of International Law*, 52, 747.
- Hainan MSA. (2017, November 3). *Notice of Hainan MSA on Circulating the Ship Pollution Control*. Retrieved June 2018, 30, from http://www.american-club.com/files/files/MA_112917_PRC_Hainan_Notice_Ship_Pollution_Control_Plan_p2.pdf

Bibliography

- Hakapää, K. (1981). *Marine Pollution in International Law: Material Obligations and Jurisdiction*. Helsinki: Helsinki Suomalainen Tiedeakatemia.
- Hakapää, K. (2005). Foreign ships in vulnerable waters: coastal jurisdiction over vessel-source pollution with special reference to the Baltic Sea. *International Journal of Legal Information*, 33(2), 256--266.
- Hare, J. (1997). Port State Control: strong medicine to cure a sick industry. *Georgia Journal of International and Comparative Law*, 26, 571-594.
- Harnik, P. G., Lotze, H. K., Anderson, S. C., Finkel, Z. V., Finnegan, S., Lindberg, D. R., . . . Tittensor, D. P. (2012). Extinctions in ancient and modern seas. *Trends in Ecological & Evolution*, 27(11), 608-617.
- Harvard Law School. (1935). Draft Convention on Jurisdiction with Respect to Crime. *The American Journal of International Law, Supplement: Research in International Law*, 29, 439-442.
- Henry, C. E. (1985). The carriage of dangerous goods by sea: the role of the International Maritime Organization in international legislation. Pinter.
- Hernandez, G., McGuinn, J., & Zamparutti, T. (2013). *Financing the environmentally sound recycling and treatment of ships*. Brussels: IMPA.
- Hertogen, A. (2015). Letting Lotus bloom. *European Journal of International Law*, 26(4), 901-
- Hey, E. (2010). Global Environmental Law and Global Institutions: a system lacking 'good process'. In R. Pierik, & W. Werner (Eds.), *Cosmopolitanism in context: perspectives from international law and political theory* (pp. 45-73). Cambridge University Press.
- Higgins, R. (1994). *Problems and process: international law and how we use it*. Clarendon Press.
- Hobbes, T. (1965). *Leviathan*. Oxford: Clarendon Press.

- Honniball, A. N. (2016). The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States? *The International Journal of Marine and Coastal Law*, 31(3), 499-530.
- Huatai. (2016, August 23). *Circular Ref No.:PNI1607*. Retrieved May 3, 2018, from <http://www.nepia.com/media/467973/Huatai-Circular-PNI1607.pdf>
- Huatai. (2017, September 1). *Circular Ref No.: PNI1710*. Retrieved May 4, 2018, from <http://www.nepia.com/media/793721/Huatai-circular-PNI1710.pdf>
- Hulme, K. (2009). Environmental security: Implications for international law. *Yearbook of international environmental law*, 19(1), 3-26.
- IMO. (2002). *Anti-fouling systems*. Retrieved May 3, 2018, from <http://www.imo.org/en/OurWork/Environment/Anti-foulingSystems/Documents/FOULING2003.pdf>
- Inazumi, M. (2005). *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*. Intersentia.
- INERIS. (2005, May 10). *Données technico-économiques sur les substances chimiques en France: TRIBUTYLETAIN*. Retrieved June 30, 2018, from www.ineris.fr/substances/fr/substance/getDocument/2616
- Institut de Droit International. (1883). Règles relatives aux conflits des lois pénales en matière de compétence . *Session de Munich*.
- Institut de Droit International. (1898). Session de la Haye. *Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers*.
- Institut de Droit International. (1910). *Annuaire de l'Institut de Droit International*. Paris: A. Pedone.
- Institut de Droit International. (1910). Rapport sur l'hospitalité neutre dans la guerre maritime. *Annuaire de l'Institut*.
- Institut de Droit International. (1928). Stockholm Resolution. Stockholm.

Bibliography

- Institut de Droit International. (1931). *Le conflit des lois pénales en matière de compétence*. Cambridge.
- Institut de Droit International. (1957). La distinction entre le régime de la mer territorial et celui des eaux intérieures. Amsterdam.
- Insurance Technology Industry News. (2011, August 10). *Ships older than 25 years to be denied entry into Gujarat ports*. Retrieved June 22, 2018, from <http://insurance-technology.tmcnet.com/news/2011/08/10/5697674.htm>
- International Bar Association. (2008). *Report of the Task Force on Extraterritorial Jurisdiction*. International Bar Association, Legal Practice Division.
- International Maritime Organisation. (2018). *International Convention for the Prevention of Pollution from Ships (MARPOL)*. Retrieved May 5, 2018, from [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx)
- International Maritime Organization. (2016, April 7). IMO News: Issue 1. *The Magazine of the International Maritime Organization*. London: IMO.
- Ireland-Piper, D. (2012). Extraterritorial criminal jurisdiction: Does the long arm of the law undermine the rule of law? *Melbourne Journal of International Law*, 13(1), 122-157.
- Jacob, K., Weiland, S., Ferretti, J., Wascher, D., & Chodorowska, D. (2011). *Integrating the environment in regulatory impact assessments*. OECD. Retrieved October 6, 2018, from <https://www.oecd.org/gov/regulatory-policy/Integrating%20RIA%20in%20Decision%20Making.pdf>
- Jenks, C. W. (1958). *The common law of mankind*. Praeger.
- Jennings, R. Y. (1957). Extraterritorial Jurisdiction and the United States Antitrust Laws. *British Yearbook of International Law*, 33, 146-175.
- Jennings, R. Y. (1963). *The acquisition of territory in international law*. Manchester University Press.

- Jennings, R. Y., & Watts, A. (1996). *Oppenheim's International Law* (9th ed., Vol. I). Longman.
- Jensen, Ø. (2007). *The IMO Guidelines for Ships Operating in Arctic Ice-Covered Waters: From Voluntary to Mandatory Tool for Navigation Safety and Environmental Protection?* Retrieved June 22, 2018, from <https://www.fni.no/publications/the-imo-guidelines-for-ships-operating-in-arctic-ice-covered-waters-from-voluntary-to-mandatory-tool-for-navigation-safety-and-environmental-protection-article775-290.html>
- Jessen, H. (2016). Commentary on Regulation EU/2015/757 on Carbon Dioxide Emissions. In H. Jessen, & M. J. Werner (Eds.), *EU Maritime Transport Law*. Hart Publishing.
- Jia, B. B. (2014). The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges. *German Yearbook of International Law*, 57, 1-32.
- Johnson, B., & Middlemiss, D. (1977). Canada's 200-Mile Fishing Zone: The Problem of Compliance. *Ocean Development & International Law*, 4(1), 67-110.
- Juda, L. (1999). Considerations in Developing a Functional Approach to the Governance of Large Marine Ecosystems. *Ocean Development & International Law*, 30(2), 89-125.
- Kachel, M. J. (2008). *Particularly Sensitive Sea Areas: The IMO's Role in Protecting Vulnerable Marine Areas*. Berlin / Heidelberg: Springer-Verlag.
- Kant, I. (1917). *Perpetual Peace: A Philosophical Essay*. London: George Allen & Unwin Ltd.
- Karim, M. S. (2015). *Prevention of Pollution of the Marine Environment from Vessels*. Springer International Publishing Switzerland.
- Kasoulides, G. C. (1989). The 1986 United Nations Convention on the Conditions for Registration of Vessels and the Question of Open Registry. *Ocean Development & International Law*, 20(6), 543-576.
- Kasoulides, G. C. (1993). *Port state control and jurisdiction: evolution of the port state regime*. Dordrecht: Martinus Nijhoff.

Bibliography

- Kayaoglu, T. (2010). *Legal Imperialism*. Cambridge University Press.
- Kaye, S. B. (1997). *The Torres Strait*. Martinus Nijhoff Publishers.
- Kelsen, H. (1932). Théorie Générale Du Droit International Public: Problèmes Choisis. In A. d.-H. Law (Ed.), *Recueil des Cours / Collected Courses*, (pp. 121-). Martinus Nijhoff Publishers.
- Kelsen, H. (1942). *Law and Peace in International Relations*. Harvard University Press.
- Kelsen, H. (1945). *General Theory of Law and State*. Cambridge: Harvard University Press.
- Kent, H. S. (1954). The historical origins of the three-mile limit. *American Journal of International Law*, 48(4), 537-553.
- Keselj, T. (1999). Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding. *Ocean Development & International Law*, 30(2), 127-160.
- Klip, A. (2012). *European Criminal Law*. Cambridge: Intersentia.
- Knox, J. H. (2010). A Presumption Against Extrajurisdictionality. *American Journal of International Law*, 104(3), 351-396.
- Koh, H. (2012). Straits Used for International Navigation: Some Recent Developments. In A. Chircop, N. Letalik, & T. L. McDorman (Eds.), *The Regulation of International Shipping: International and Comparative Perspectives* (pp. 15-27). Brill.
- Kopela, S. (2016). Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons. *Ocean Development & International Law*, 47(2), 89-130.
- Krisch, N. (2014). The Decay of Consent: International Law in an Age of Global Public Goods. *The American Journal of International Law*, 108(1), 1-40.
- Kwiatowska, B. (1991). Creeping jurisdiction beyond 200 miles in the light of the 1982 law of the sea convention and state practice. *Ocean Development & International Law*, 22(2), 153-187.

- Lagoni, R. (1996). The prompt release of vessels and crews before the International Tribunal for the Law of the Sea. *The International Journal of Marine and Coastal Law*, 11(2), 147-164.
- Lane, F. C. (1964). Tonnages, medieval and modern. *The Economic History Review*, 17(2), 213-233.
- Lauterpacht, H. (1962). *The contemporary practice of the United Kingdom in the field of international* (Vol. I). London: Stevens & Sons Limited.
- Lauterpacht, H. (1970). *Private law sources and analogies of international law (with special reference to international arbitration)*. Archon Books.
- Lauterpacht, H. (1977). *International Law - 3. The Law of Peace* (Vol. III). (E. Lauterpacht, Ed.) Cambridge University Press.
- Lepard, B. D. (2010). *Customary international law: a new theory with practical applications*. Cambridge University Press.
- Lesaffer, R. (2009). *European legal history: a cultural and political perspective*. Cambridge University Press.
- Lexology. (2011, September 28). *Current trends in MARPOL enforcement—higher fines, more jail time, the banning of ships, and whistleblowers galore*. Retrieved May 2, 2018, from <https://www.lexology.com/library/detail.aspx?g=9079650d-5c56-4643-b585-d3f8558822a0>
- Lexology. (2017, January 3). *Maritime Environmental Law Update (January 2017 Edition)*. Retrieved May 4, 2018, from <https://www.lexology.com/library/detail.aspx?g=2f9ff80b-33b1-4e97-948b-75ee03fe49ba>
- Librando, G. (2014). The International Maritime Organization and the Law of the Sea. In D. Attard (Ed.), *The IMLI Manual on International Maritime Law: The Law of the sea* (pp. 577-605). Oxford University Press.

Bibliography

- Lin, B., & Lin, C.-Y. (2006). Compliance with international emission regulations: Reducing the air pollution from merchant vessels. *Marine Policy*, 30(3), 220-225.
- Lindin, G. F., & Warde, C. T. (2008, July 3). *United States: U.S. Court Strikes Down MARPOL And UNCLOS Defenses In OSG Prosecution*. Retrieved May 3, 2018, from <http://www.mondaq.com/unitedstates/x/62880/cycling+rail+road/US+Court+Strikes+Down+MARPOL+And+UNCLOS+Defenses+In+OSG+Prosecution>
- Lindpere, H. (2005). Prompt Release of Detained Foreign Vessels and Crews in Matters of Marine Environment Protection. *International Journal of Legal Information*, 33(2), 240-255.
- Linné, P. A. (2017). Regulating Vessel-Source Standard-Setting in the Regulation of SOx Emissions. University of Gothenburg, Sweden.
- Liou, S.-t., Liu, C.-P., Chang, C.-C., & Yen, D. C. (2011). Restructuring Taiwan's port state control inspection authority. *Government Information Quarterly*, 28(1), 36-46.
- Lister, J., Taudal, P. R., & Ponte, S. (2015). Orchestrating transnational environmental governance in maritime shipping. *Global Environmental Change*, 34, 185-195.
- Liu, C. (2009). *Maritime Transport Services in the Law of the Sea and the World Trade Organization*. Bern: Peter Lang.
- Lloyd's List. (2017, October 27). *Is the EU Ship Recycling Regulation a lame duck?* Retrieved June 22, 2018, from <https://lloydslist.maritimeintelligence.informa.com/LL111985/Is-the-EU-Ship-Recycling-Regulation-a-lame-duck>
- López Martín, A. G. (2010). *International Straits*. Springer.
- Lowe, A. V. (1976). The right of entry into maritime ports in international law. *San Diego Law Review*, 14, 597.
- Lowenfeld, A. F. (1994). *International litigation and the quest for reasonableness: general course on private international law*. Martinus Nijhoff.

- Lyons, Y., & Cheong, D. (2017). The international legal framework for the protection and sustainable use of marine biological diversity. In C. R. McManis, & B. Ong (Eds.), *Routledge Handbook of Biodiversity and the Law* (pp. 60-82). Routledge.
- Mann, F. A. (1964). The doctrine of jurisdiction in international law. In T. H. Law (Ed.), *Collected Courses of the Hague Academy of International Law* (pp. 1-162). Brill.
- Manners, I. (2006). Normative power Europe reconsidered: beyond the crossroads. *Journal of European public policy*, 13(2), 182-199.
- Marten, B. (2013). Port state jurisdiction in New Zealand: the problem with Sellers. *Victoria University of Wellington Law Review*, 44, 559-.
- Marten, B. (2014). *Port State Jurisdiction and the Regulation of International Merchant Shipping* (1st ed.). Heidelberg: Springer International Publishing.
- Marten, B. (2015). Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation. In H. Ringbom (Ed.), *Jurisdiction over Ships* (pp. 103-139). Brill.
- Marten, B. (2016). Port State Jurisdiction over Vessel Information: Territoriality, Extraterritoriality and the Future of Shipping Regulation. *Journal of Marine and Coastal Law*, 31(3), 470-498.
- McConnell, M. (2002). *GloBallast Legislative Review, Final Report. GloBallast Monograph Series No. 1*. London: International Maritime Organization.
- McDorman, T. L. (1997). Port State enforcement: a comment on article 218 of the 1982 law of the sea convention. *Journal of Maritime Law and Commerce*, 28(2), 305-322.
- McDorman, T. L. (2000). Regional Port State Control Agreements: Some Issues of International Law. *Ocean and Coastal Law Journal*, 5(2), 207-226.
- McDougal, M. S., & Burke, W. T. (1962). *The Public Order of the Oceans: A Contemporary International Law of the Sea*. Martinus Nijhoff Publishers.

Bibliography

- McMillan, S. (1987). *Neither confirm nor deny: The nuclear ships dispute between New Zealand and the United States*. Praeger Publishers.
- Medeiros, J. C. (2007). How the Presumption Against Extraterritoriality Has Created a Gap in Environmental Protection at the 49th Parallel. *Minnesota Law Review*, 92, 529-572.
- Meese, S. A. (1982). When Jurisdictional Interests Collide: International, Domestic, and State Efforts to Prevent Vessel Source Oil Pollution. *Ocean Development & International Law*, 12(1/2), 71-139.
- Mellor, J. S. (2002). Missing the Boat: The Legal and Practical Problems of the Prevention Maritime Terrorism. *American University International Law Review*, 18, 341-397.
- Mercier, A. (1883). Le Conflit Des Lois Pénales en Matière de Competence. *Revue de Droit International et de Legislation Comparée*, 12, 439-490.
- Messner, D., Schellnhuber, J., Ramstorf, S., & Klingefeld, D. (2013). The Budget Approach - A Framework for a Global Transformation towards a Low Carbon Economy. In H.-J. Koch, D. König, J. Sanden, & R. Verheyen (Eds.), *Climate Change and Environmental Hazards Related to Shipping* (pp. 13-34). Martinus Nijhoff Publishers.
- Meyers, H. (1967). *The Nationality of Ships*. The Hague: Martinus Nijhoff.
- M'Gonigle, R. M. (1976). Unilateralism and international law: the Arctic waters pollution prevention act. *University of Toronto Faculty of Law Review*, 34, 180-198.
- M'Gonigle, R. M., & Zacher, M. W. (1979). *Pollution, Politics, and International Law: Tankers at Sea*. Berkeley: University of California Press.
- Milano, E. (2006). *Unlawful Territorial Situations in International Law*. Martinus Nijhoff Publishers.
- Milanovic, M. (2014). The spatial dimension: Treaties and territory. In C. J. Tams, & A. Tzanakopoulos (Eds.), *Research Handbook on the Law of Treaties* (pp. 186-221). Elgar.

- Mills, A. (2014). Rethinking Jurisdiction in International Law. *British Yearbook of International Law*, 84(1), 187-239.
- Molenaar, E. J. (1996). The EC Directive on Port State Control in Context. *The International Journal of Marine and Coastal Law*, 11, 241-288.
- Molenaar, E. J. (1998). *Coastal state jurisdiction over vessel-source pollution*. Den Haag: Kluwer Law International.
- Molenaar, E. J. (2000). Navigational Rights and Freedoms in a European Regional Context. In D. R. Rothwell, & S. Bateman (Eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (pp. 22-46). Martinus Nijhoff Publishers.
- Molenaar, E. J. (2007). Port state jurisdiction: toward comprehensive, mandatory and global coverage. *Ocean Development & International Law*, 38(1-2), 225-257.
- Molenaar, E. J. (2014). Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region. *Ocean Development & International Law*, 45, 272-298.
- Molenaar, E. J. (2015). Shipping - Vessel-source pollution. In R. Warner, & S. Kaye (Eds.), *Routledge Handbook of Maritime Regulation and Enforcement* (pp. 176-192). Taylor and Francis Inc.
- Molenaar, E. J., & Dotinga, H. M. (2001). The Netherlands. In E. Franckx (Ed.), *Vessel-Source Pollution and Coastal State Jurisdiction: The Work of the Ila Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000)* (pp. 303-322). Martinus Nijhoff Publishers.
- Morrison, A. P. (2012). *Places of refuge for ships in distress: problems and methods of resolution*. Martinus Nijhoff Publishers.
- Mukherjee, P. K. (2001). *Maritime Legislation*. WMU.
- Murray, A. P. (2014). California Falls into the Sea: Pacific Merchant Shipping Assoc. v. Goldstone & State Authority to Regulate beyond the Territorial Sea. *University of San Francisco Maritime Law Journal*, 27(1).

Bibliography

- Nagarsheth, P. S. (2001). Can the shipbreakers in India make the change towards ship recyclers? Mare Forum 2nd Global Ship Recycling Summit, 25 June 2001.
- Nash, J. R. (2010). The Curious Legal Landscape of the Extraterritoriality of U.S. Environmental Laws. *Virginia Journal of International Law*, 50, 997-1020.
- National Research Counsel. (1998). *Double-Hull Tanker Legislation*. 1998: National Academies Press.
- New Zealand. (2017, March 7). *Dirty vessel ordered to leave New Zealand*. Retrieved May 4, 2018, from <http://mpi.govt.nz/news-and-resources/media-releases/dirty-vessel-ordered-to-leave-new-zealand/>
- New Zealand House of Representatives. (2008, September 3). *International treaty examination of the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004*. Retrieved June 22, 2018, from http://www.parliament.nz/resource/en-nz/48DBSCH_SCR4187_1/6ec406ddb90553ffdc5a858fff5ebeeac88742b
- Nollkaemper, A. (2009). Sovereignty and Environmental Justice in International Law. In J. Ebbesson, & P. Okowa (Eds.), *Environmental Law and justice in context* (pp. 253-269). Cambridge University Press.
- Nordquist, M. H. (Ed.). (1991). *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol. IV). Brill Academic Publishers.
- NSW EPA. (2017, September 28). *Cruise ship fuel compliance in Sydney Harbour*. Retrieved May 3, 2018, from <http://www.epa.nsw.gov.au/your-environment/air/non-road-diesel-marine-emissions/reducing-diesel-emissions-shipping/cruise-ship-fuel-compliance-sydney-harbour>
- Nuyts, A. (2007, July 6). *Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations*. Retrieved from European Commission: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf

- Odendahl, K. (2012). Article 29. Territorial scope of treaties. In O. Dörr, & K. Schmalenbach (Eds.), *Vienna Convention on the Law of Treaties: A Commentary* (pp. 489-504). Springer.
- Okidi, C. O. (1976). Review of Recent Developments Regarding the Rule of Extra-Territorial Jurisdiction with Focus on the Control of Marine Pollution. *East African Law Journal*, *XIII*(2), 189-216.
- Okidi, C. O. (1978). *Regional Control of Ocean Pollution: Legal and Institutional Problems and Prospects*. Sijthoff & Noordhoff International Publishers B.V.
- Orakhelashvili, A. (2008). Natural Law and Customary Law. *Heidelberg Journal of International Law*, *68*, 69-110.
- Orrego Vicuña, F. (2000). Port State Jurisdiction in Antarctica: A New Approach to Inspection, Control and Enforcement. In D. Vidas (Ed.), *Implementing the Environmental Protection Regime for the Antarctic* (pp. 45-70). Springer.
- Ostrom, E. (2010). Analyzing collective action. *Agriculture Economics*, *41*(s1), 155-166.
- Ottesen, P., Sparkes, S., & Trinder, C. (1994). Shipping Threats and Protection of the Great Barrier Reef Park - The Role of the Particularly Sensitive Sea Area Concept. *The International Journal of Marine and Coastal Law*, *9*(4), 507-522.
- Otto, R. (2012). *Targeted Killings and International Law*. Springer.
- Oxman, B. H. (1991). The Duty to Respect Generally Accepted International Standards. *New York University Journal of International Law and Politics*, *24*, 109-159.
- Oxman, B. H. (1994). The 1994 Agreement and the Convention. *American Journal of International Law*, *88*(4), 687-696.
- Oxman, B. H. (2007, November). Jurisdiction of States. *Max Planck Encyclopaedia of Public International Law [MPEPIL]*.
- Özcayir, Z. O. (2009). The use of port state control in maritime industry and application of the Paris MoU. *Ocean and Coastal Law Journal*, *14*(2), 201-240.

Bibliography

- Paasivirta, E. (2017). Four Contributions of the European Union to the Law of the Sea. In J. Czuczai, & F. Naert (Eds.), *The EU as a Global Actor - Bridging Legal Theory and Practice* (pp. 241-265). Brill.
- Papanicolopolu, I. (2015). Seafarers as an Agent of Change of the Jurisdictional Balance. In *Jurisdiction over Ships: post-UNCLOS Developments in the Law of the Sea* (pp. 301-323). Brill.
- Parrish, A. (2008). The Effects Test: Extraterritoriality's Fifth Business. *Vanderbilt Law Review*, 61(5), 1455-1506.
- Parrish, A. L. (2009). Reclaiming International Law From Extraterritoriality. *Minnesota Law Review*, 93, 815-874.
- Paul, L. M. (1990). Using the protective principle to unilaterally enforce transnational marine pollution standards. In R. S. Shomura, & M. L. Godfrey (Eds.), *Proceedings of the Second International Conference on Marine Debris, 2-7 April 1989* (pp. 1045-1074). Honolulu, Hawaii: U.S. Department of Commerce.
- Pharand, D. (1972). Contiguous Zones of Pollution Prevention. *Syracuse Journal of International Law & Commerce*, 1, 257.
- Pierik, R., & Werner, W. (2010). Cosmopolitanism in Context: an introduction. In R. Pierik, & W. Werner (Eds.), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (pp. 1-18). Cambridge: Cambridge University Press.
- Plutarch, & Perrin, B. (1917). *Plutarch's Vitae Parallelae: Pompeius* (Vol. V). Cambridge: Harvard University Press.
- Port of Helsinki. (2017, December 4). *The Port of Helsinki offers a price incentive to reduce vessel emissions and noise*. Retrieved May 4, 2018, from <http://www.portofhelsinki.fi/en/port-helsinki/whats-new/news/port-helsinki-offers-price-incentive-reduce-vessel-emissions-and-noise>
- Pozdnakova, A. (2012). *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation* (1st ed.). Leiden: Brill.

- Proelss, A. (2012). The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited. *Ocean Yearbook Online*, 26(1), 87-112.
- Puthucherril, T. G. (2010). *From Shipbreaking to Sustainable Ship Recycling*. Martinus Nijhoff Publishers.
- Randall, K. C. (1988). Universal Jurisdiction Under International Law. *Texas Law Review*, 66, 785-841.
- Rayfuse, R. (2011). International Law and Disappearing States - Maritime Zones and the Criteria for Statehood. *Environmental Policy and Law*, 41(6), 281-287.
- Rayfuse, R. G. (2009). W(h)ither Tuvalu? International Law and Disappearing States. *UNSW Law Research Paper*(9), 1-13. Retrieved from <https://ssrn.com/abstract=1412028>
- Redgwell, C. (2006). From permission to prohibition: the 1982 Convention on the Law of the Sea and protection of the marine environment. In D. Freestone, R. Barnes, & D. M. Ong (Eds.), *The Law of the Sea - Progress and Prospects* (pp. 180-191). Oxford University Press.
- Redgwell, C. (2006). The 1982 LOSC and Protection of the Marine Environment. In D. Freestone, R. Barnes, & D. Ong (Eds.), *The Law of the Sea* (pp. 180-191). Oxford University Press.
- Redgwell, C. (2014). Mind the Gap in the gairs: The Role of Other Instruments in losc Regime Implementation in the Offshore Energy Sector. *The International Journal of Marine and Coastal Law*, 29(4), 600-621.
- Rehbinder, E. (2012). Extra-territoriality of pollution control laws from a European perspective. In H. G. Zekoll, & P. Zumbansen (Eds.), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (pp. 127-162). Brill.
- Reydams, L. (2003). *Universal Jurisdiction*. Oxford University Press.
- Ringbom, H. (2008). *The EU Maritime Safety Policy and International Law*. Leiden: Martinus Nijhoff Publishers.

Bibliography

- Ringbom, H. (2011). Regulatory Layers in Shipping. In D. Vidas, & P. J. Schei (Eds.), *The World Ocean in Globalisation* (pp. 345--370). Brill.
- Ringbom, H. (2016). Enforcement of the sulphur in fuel requirements: the same, only different. *Scandinavian Institute of Maritime Law Yearbook*(482), 45-110.
- Ringbom, H. (2017). Ship-Source Marine Pollution. In A. Nollkaemper, & I. Plakokefalos (Eds.), *The Practice of Shared Responsibility in International Law* (pp. 265-293). Cambridge University Press.
- Ringbom, H. (2017). The European Union and Arctic Shipping. In N. Liu, E. A. Kirk, & T. Henriksen (Eds.), *The European Union and the Arctic* (pp. 239-273). Brill.
- Ringbom, H. (2017). *The International Legal Framework for Monitoring and Enforcing Compliance with the Sulphur in Fuel Requirements of MARPOL Annex VI*. Åbo Akademi University Co-financed by the Finnish Ministry of Transport and Communications and the European Union's Connecting Europe Facility (2014-EU-TM-0546-S). Retrieved from https://www.trafi.fi/filebank/a/1493101850/9fc383e6244dfc9fa5a5ce14387c38ee/25024-1_The_International_Legal_Framework_for_Monitoring_and_Enforcing_Compliance_with_the_Sulphur_in_Fuel_Requirements_of_Marpol_Annex_VI.pdf
- Riphagen, W. (1975). Some Reflections on "Functional Sovereignty". *Netherlands Yearbook of International Law*, 6, 121-165.
- Roach, J. A., & Smith, R. W. (2012). *Excessive Maritime Claims* (3rd ed.). Martinus Nijhoff Publishers.
- Roberts, J. (2005). Protecting sensitive marine environments: The role and application of ship's routing measures. *International Journal of Marine and Coastal Law*, 20(1), 135-159.
- ROC Ministry of Transportation and Communications. (2008, July 7). *Taiwan's Development of Port State Control*. Retrieved May 3, 2018, from http://eng.mtnet.gov.tw/psc_eng/index.html

- ROC Ministry of Transportation and Communications. (2011). *Port State Control System*. Retrieved June 22, 2018, from http://eng.mtnet.gov.tw/psc_eng/04-01.html
- Rogers, A. D., & Laffoley, D. (2013). Introduction to the special issue: The global state of the ocean, interactions between stresses, impacts and some potential solutions. Synthesis papers from the International Programme on the State of the Ocean 2011 and 2012 workshops. *Marine Pollution Bulletin*, 74(2), 491–494.
- Rogoff, M. A. (1994). The Obligation to Negotiate in International Law: Rules and Realities. *Michigan Journal of International Law*, 16(1), 141-185.
- Rogowska, J., & Namieśnik, J. (2010). Environmental implications of oil spills from shipping accidents. *Reviews of Environmental Contamination and Toxicology*, 206, 95-114.
- Rolim, M. H. (2008). *The International Law on Ballast Water*. Brill.
- Rosenau, J. N. (2006). *The Study of World Politics: Volume 2: Globalization and Governance*. London: Routledge.
- Rousseau, C. (1974). *Droit International Public* (Vol. II). Paris: Sirey.
- Ruggie, J. G. (1993). Territoriality and Beyond: Problematizing Modernity in International Relations. *International Organization*, 47(1), 139-174.
- Ryngaert, C. (2005). The application of U.S. law to foreign-flag vessels: the clear statement rule after *Spector v Norwegian Cruise Line* (U.S. Supreme Court, 2005). *Journal of International Maritime Law*, 11(5), 331-.
- Ryngaert, C. (2014). Subsidiarity and the law of jurisdiction. SSRN. Retrieved from <https://ssrn.com/abstract=2523327> or <http://dx.doi.org/10.2139/ssrn.2523327>
- Ryngaert, C. (2015). *Jurisdiction in International Law* (2nd ed.). Oxford University Press.
- Ryngaert, C. (2015). *Jurisdiction in International Law* (2nd ed.). Oxford University Press.

Bibliography

- Ryngaert, C. (2015). The Concept of Jurisdiction in International Law. In A. Orakhelashvili (Ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (pp. 50-75). Elgar.
- Ryngaert, C. (2015). Whither Territoriality? The European Union's Use of Territoriality to Set Norms with Universal Effects. In C. Ryngaert, E. J. Molenaar, & S. Nouwen (Eds.), *What's Wrong with International Law?* (pp. 434-448). Brill.
- Ryngaert, C., & Ringbom, H. (2016). Introduction: Port State Jurisdiction: Challenges and Potential. *The International Journal of Marine and Coastal Law*, 31(3), 379-394.
- Sage-Fuller, B. (2013). *The Precautionary Principle in Marine Environmental Law*. Routledge.
- Salvarani, R. (1996). The EC Directive on Port State Control: A Policy Statement. *The International Journal of Marine and Coastal Law*, 11(2), 225-231.
- Sands, P. (2000). 'Unilateralism', values and international law. *European Journal of International Law*, 11(2), 291-302.
- Sands, P., & Peel, J. (2012). *Principles of International Environmental Law* (3rd ed.). Cambridge: Cambridge University Press.
- Sarkar, L. (1962). The Proper Law of Crime in International Law. *The International and Comparative Law Quarterly*, 11(2), 446-470.
- Sassen, S. (2013). When Territory Deborders Territoriality. *Territory, Politics, Governance*, 1(1), 21-45.
- Scelle, G. (1933). Regles Generales du Droit de la Paix. In A. d. Haye, *Recueil des Cours* (Vol. 46).
- Scelle, G. (1956). Le phénomène juridique du dédoublement fonctionnel. In W. Schätzel, & H.-J. Schlochauer (Eds.), *Rechtsfragen der internationalen Organisation: Feestschrift für Hans Wehberg zu seinem 70 Geburtstag* (p. 324). Frankfurt: M Klostermann.

- Scelle, G. (1958). Obsession du territoire. In J. H. Verzijl (Ed.), *Symbolae Verzijl : présentées au professeur J.H.W. Verzijl à l'occasion de son LXX-ième anniversaire*. Martinus Nijhoff.
- Schachte Jr, W. L. (1990). The History of the Territorial Sea From a National Security Perspective. *Territorial Sea Journal*, 1, 143.
- Schinas, O. (2016). Analysis of the Regulation (EC) No 782/2003 on the prohibition of organotin compounds on ships. In M. J. Werner, & H. Jessen (Eds.), *Brussels Commentary on EU Shipping Law* (pp. 649-666). Hart Publishing.
- Schine, C., Nattley, W., & Gundling, L. (2000). *A Guide to Designing Legal and Institutional Frameworks on Alien Invasive Species*. IUCN. Cambridge and Bonn: IUCN. Retrieved from <https://portals.iucn.org/library/sites/library/files/documents/EPLP-040-En.pdf>
- Schram, G. G. (1970). Address by Oscar Schachter: The role of the United Nations in curbing ocean pollution. *International and interstate regulation of water pollution* (pp. 84-90). New York: Columbia University School of Law.
- Scott Brown, R., & Savage, I. (1996). The economics of double hulled tankers. *Maritime Policy and Management*, 23(2), 167-175.
- Scott, J. (2014). Extraterritoriality and Territorial Extension in EU Law. *American Journal of Comparative Law*, 62(1), 87-.
- Scott, J. (2014). The New EU Extraterritoriality. *Common Market Law Review*, 51(5), 1343-1380.
- Sellers, M. (2012). Parochialism, Cosmopolitanism, and the Foundations of International Law. In M. N. Sellers (Ed.). New York: Cambridge University Press.
- Shany, Y. (2013). Taking Universality Seriously: A Functionality Approach to Extraterritoriality in International Human Rights Law. *The Law & Ethics of Human Rights*, 7(1), 47-71.
- Shaw, M. N. (2017). *International Law* (8th ed.). Cambridge: Cambridge University Press.

Bibliography

- Shehadeh, R. (1997). *From Occupation to Interim Accords: Israel and the Palestinian Territories*. Brill.
- Shelton, D. (2009). Common Concern of Humanity. *Iustum Aequum Salutare*, *V*(1), 33–40.
- Shelton, D. (2015, September 10). *Nature as a legal person*. Retrieved from Vertigo - La revue électronique des sciences de l'environnement: <http://journals.openedition.org/vertigo/16188>
- Shi, L. (1999). Successful use of the tacit acceptance procedure to effectuate progress in international maritime law. *University of San Francisco Maritime Law Journal*, *11*(2), 299-332.
- Shipbreaking Platform. (2016, October). *Make the polluter pay! Why we need the EU Ship Recycling License*. Retrieved June 22, 2018, from http://www.shipbreakingplatform.org/shipbrea_wp2011/wp-content/uploads/2016/10/Position-Paper-FINANCIAL-INCENTIVE.pdf
- Simma, B., & Paulus, A. L. (1998). The 'International Community': Facing the challenge of globalization. *European Journal of International Law*, *9*(2), 266-277.
- Sironi, A. (2013). Nationality of individuals in public international law: a functional approach. In S. Forlati, & A. Annoni (Eds.), *The changing role of nationality in international law* (pp. 54-75). Routledge.
- Smith, W. D. (1980). Friedrich Ratzel and the Origins of Lebensraum. *German Studies Review*, *3*(1), 51-68.
- Sohn, L. B. (1986). "Generally Accepted" International Rules. *Washington Law Review*, *61*, 1073-1080.
- Sohn, L. B., Noyes, J. E., Franckx, E., & Juras, K. G. (2014). *Cases and Materials on the Law of the Sea* (2nd ed.). Leiden: Brill.
- Sohn, L. B., Noyes, J. E., Juras, J. G., & Franckx, E. (2010). *Law of the Sea in a nutshell* (2nd ed.). West Publishing Co.

- Sousa Santos, B. (2006). Globalizations. *Theory, Culture & Society*, 23((2-3)), 393-399.
- Staal, R. (1961). International Conflict of Laws - The Protective Principle in Extraterritorial Criminal Jurisdiction. *University of Miami Law Review*, XV, 428-433.
- Staker, C. (2014). Jurisdiction. In M. D. Evans (Ed.), *International Law* (pp. 309-335). Oxford: Oxford University Press.
- State of California. (2017, August 15). *Re: Biofouling Management Regulations to Minimize the Transport of Nonindigenous Species from Vessels Arriving at California Ports, Effective October 1, 2017*. Retrieved June 22, 2018, from http://www.slc.ca.gov/Programs/MISP/4-8_FinalLetter_15Aug2017.pdf
- Statman, K. (2013). "To Comply or Not to Comply?" An Argument in Favor of Increasing Investigation and Enforcement of MARPOL Annex I Violations. *Washington and Lee Journal of Energy, Climate, and the Environment*, 5(1), 251-292.
- Strauss, M. J. (2015). *Territorial Leasing in Diplomacy and International Law*. Brill.
- Stuyt, A. M. (2013). *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction*. Springer.
- Suter, K. (2003). *Global order and global disorder: globalization and the nation-state*. London: Praeger.
- Svantesson, D. (2015, November 17). *The concept of 'extraterritoriality': widely used, but misguided and useless*. Retrieved from <https://blog.oup.com/2015/11/extraterritoriality-law/>
- Svantesson, D. J. (2016). Enforcing Privacy Across Different Jurisdictions. In D. Wright, & P. d. Hert (Eds.), *Enforcing Privacy: Regulatory, Legal and Technological Approaches* (pp. 195-222). Springer.
- Swan, J. (2006). Port State Measures to Combat IUU Fishing: international and regional developments. *Sustainable Development Law & Policy*, 7(1), 38-43.

Bibliography

- Swanson, J. R., Liggett, D., & Roldan, G. (2015). Conceptualizing and enhancing the argument for port state control in the Antarctic gateway states. *The Polar Journal*, 5(2), 361-385.
- Swartztrauber, S. A. (1972). *Three Mile Limit of Territorial Seas*. Annapolis: Naval Institute Press.
- Tams, C. J. (2011). Individual States as Guardians of Community Interests. In U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, & C. Vedder (Eds.), *From Bilateralism to Community Interest* (pp. 379-405). Oxford University Press.
- Tan, A. K.-J. (2005). *Vessel-Source Marine Pollution: The Law and Politics of International Regulation*. Cambridge: Cambridge University Press.
- Tanaka, Y. (2004). Prompt release in the United Nations convention on the law of the sea: some reflections on the ITLOS Jurisprudence. *Netherlands International Law Review*, 51(2), 237-271.
- Tanaka, Y. (2011). Protection of community interests in international law: the case of the law of the sea. *Max Planck Yearbook of United Nations Law*, 15, 329-.
- Tanaka, Y. (2015). *The International Law of the Sea* (2nd ed.). Cambridge University Press.
- Teschke, B. (2006). The metamorphoses of European territoriality. In M. Burgess, & H. Vollaard (Eds.), *State Territoriality and European Integration* (pp. 37-68). Routledge.
- Timagenis, G. (1977). *Marine Pollution and the Third UN Conference on the Law of the Sea: Emerging Régime of Marine Pollution*. London: Lloyd's of London Press.
- Timagenis, G. J. (1980). *International Control of Marine Pollution*. Oceana.
- Tradewinds. (2011, August 10). *Mundra bans oldies*. Retrieved 06 15, 2018, from http://www.tradewindsnews.com/port/587019/mundra-bans-oldies?__hstc=150786729.d50a3c91e72c280a7921bf0d7ab734f9.1496534400072.1496534400073.1496534400074.1?utm_medium=email&utm_source=free_article_access&utm_content=180484628

- Transport Canada. (2017, May 3). *Speaking Notes for the Honourable Marc Garneau, Minister of Transport to the Third Joint Ministerial Conference of the Paris and Tokyo Memoranda of Understanding on Port State Control at a luncheon session on Vessel Noise Vancouver, British Columbia*. Retrieved May 4, 2018, from https://www.canada.ca/en/transport-canada/news/2017/05/speaking_notes_forthehonourablemarcgarneaministeroftransporttot.html
- Treves, T. (2004). Flags of Convenience before the Law of the Sea Tribunal. *San Diego International Law Journal*, 6, 179.
- Trevisanut, S. (2009). La Convention des Nations Unies sur le Droit de la Mer et le Droit de l'Environnement: Développement Intrasystématique et Renvoi Intersystématique. In H. Ruiz Fabri, & L. Gradoni (Eds.), *La circulation des concepts juridiques: le droit interntaional de l'environnement entre mondialisation et fragmentation* (pp. 397-). Paris: Société de Législation Comparée.
- Trevisanut, S. (2014). The principle of non-refoulement and the de-territorialisation of border control at sea. *Leiden Journal of International Law*, 27(3), 661-675.
- Trevisanut, S. (2017). Twenty Years of Prompy Release of Vessels: Admissibility, Jurisdiction, and Recent Trends. *Ocean Development & International Law*, 48(3-4), 300-312.
- Tsagourias, N. (2004). The Will of the International Community as a Normative Source of International Law. In I. F. Dekker, & W. G. Werner (Eds.), *Governance and International Legal Theory* (pp. 99-124). Springer.
- Tsimplis, M. (2014). Recycling of EU ships: from prohibition to regulation. *Lloyd's Maritime & Commercial Law Quarterly*, 415-440.
- Tuerk, H. (2012). *Reflections on the Contemporary Law of the Sea*. Martinus Nijhoff Publishers.
- U.S. Attorney's Office. (2016, April 5). *Korean Company Fined \$750,000 And To Make \$200,000 Community Service Payment For Illegal Discharge Of Waste Water*.

Bibliography

- Retrieved May 3, 2018, from <https://www.justice.gov/usao-hi/pr/korean-company-fined-750000-and-make-200000-community-service-payment-illegal-discharge>
- U.S. Attorney's Office. (2016, May 11). *German Shipping Company Charged with Covering Up Illegal Dumping of Oily Waste Water Into Great Lakes*. Retrieved May 3, 2018, from <https://www.justice.gov/usao-mn/pr/german-shipping-company-charged-covering-illegal-dumping-oily-waste-water-great-lakes>
- U.S. Attorney's Office. (2016, August 16). *Korean Company Fined \$275,000 For Second Violation Of The Act To Prevent Pollution From Ships*. Retrieved May 3, 2018, from <https://www.justice.gov/usao-hi/pr/korean-company-fined-275000-second-violation-act-prevent-pollution-ships>
- U.S. Department of State. (2003, September 4). *Statement of Interdiction Principles*. Retrieved May 7, 2018, from <https://www.state.gov/t/isn/c27726.htm>
- UK Parliament. (2012). *Eleventh Report of Session 2012-13 - European Scrutiny Committee*. Retrieved June 22, 2018, from <https://publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/86xi/86xi03.htm>
- UK Royal Commission on Environmental Pollution. (1981). *Eighth Report Oil Pollution of the Sea*. Retrieved June 22, 2018, from <http://webarchive.nationalarchives.gov.uk/20060716005107/http://www.rcep.org.uk/>
- UNCTAD. (2017). *Review of Maritime Transport 2017*. Retrieved June 22, 2018, from http://unctad.org/en/PublicationsLibrary/rmt2017_en.pdf
- Union of Greek Shipowners. (2016, March 11). *EU Biocidal Products Regulation – Application on Ships*. Retrieved from Memo 381/2016: http://www.pepen.gr/pagesgr/eee/eee_MEMO_381_2016.pdf
- United States Coast Guard. (2018). *Foreign & Offshore Compliance Division (CG-CVC-2)*. Retrieved May 2, 2018, from <https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/Commercial-Vessel-Compliance/Foreign-Offshore-Compliance-Division/PSC/>

- United States Senate. (2007, August 9). *Examine Port Pollution and the Need for Additional Controls on Large Ships*. Retrieved June 22, 2018, from <https://www.gpo.gov/fdsys/pkg/CHRG-110shrg61981/html/CHRG-110shrg61981.htm>
- Valenzuela, M. (1984). IMO: Public International Law and Regulation. In D. M. Johnston, & N. G. Letalik (Eds.), *The Law of the Sea and Ocean Industry: New Opportunities and Restraints* (pp. 141-151). Honolulu.
- van Kleffens, E. N. (1954). Sovereignty in International Law. *Recueil des Cours de l'Académie de Droit International de la Haye*, 82.
- van Panhuys, H. F. (1959). *The Rôle of Nationality in International Law*. A W Sijthoff.
- van Reenen, W. (1981). Rules of Reference in the New Convention on the Law of the Sea, in particular in connection with the pollution of the sea by oil from tankers. *Netherlands Yearbook of International Law*, XII.
- van Staden, A., & Volland, H. (2002). The Erosion of State Sovereignty: towards a post territorial world? In G. Kreijen (Ed.), *State, Sovereignty and International Governance*. Oxford University Press.
- Vijayan, S. (2014). *Indian law on control of vessel sourced pollution in maritime ports*. Cochin University of Science and Technology. Retrieved from <http://hdl.handle.net/10603/25497>
- Villalpando, S. (2010). The legal dimension of the international community: how community interests are protected in international law. *European Journal of International Law*, 21(2), 387-419.
- Vukas, B. (2004). *The Law of the Sea*. Martinus Nijhoff Publishers.
- Walker, G. K. (2011). *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention*. Martinus Nijhoff Publishers.
- Walters, W. (2004). The Frontiers of the European Union: A Geostrategic Perspectiv. *Geopolitics*, 9(3), 647-698.

Bibliography

- Warner, R. (2009). *Protecting the Oceans Beyond National Jurisdiction*. Brill.
- Watson, G. R. (1993). The Passive Personality Principle. *Texas International Law Journal*, 28, 1--46.
- Wehberg, H. (1959). Pacta Sunt Servanda. *The American Journal of International Law*, 53(4), 775-786.
- Weinstein, E. B. (1994). The Impact of Regulation of Transport of Hazardous Waste on Freedom of Navigation. *The International Journal of Marine and Coastal Law*, 9(2), 135-172.
- Weis, J. S. (2015). *Marine pollution: what everyone needs to know*. New York: Oxford University Press.
- West of England. (2015, March 26). *Hong Kong - Air Pollution Control (Ocean Going Vessels) (Fuel at Berth) Regulations*. Retrieved May 4, 2018, from <https://www.westpandi.com/Publications/News/Archive/hong-kong---air-pollution-control-ocean-going-vessels-fuel-at-berth-regulations/>
- Wolfers, A. (1962). *Discord and Collaboration*. Johns Hopkins Press.
- Wolfrum, R. (2016). Military Vessel Protection Detachments under National and International Law. In R. Wolfrum, M. Seršić, & T. Šošić (Eds.), *Contemporary Developments in International Law* (pp. 360-368). Brill.
- World Bank. (2000, January 21). *Comprehensive Development Review*. Retrieved June 22, 2018, from <http://siteresources.worldbank.org/INTYEMEN/Overview/20150250/YE-Environment.pdf>
- World Maritime News. (2017, March 23). *American Club: China Fines Foreign Flagged Ship for Violating Sulfur Cap Regulation*. Retrieved May 4, 2018, from <https://worldmaritimeneews.com/archives/215875/american-club-china-fines-foreign-flagged-ship-for-violating-sulfur-cap-regulation/>
- World Ports Sustainability Program. (2017). *Environmental Ship Index (ESI)*. Retrieved June 22, 2018, from <http://esi.wpci.nl/Public/Home/AboutESI>

- WWF. (2018). *Marine problems: Shipping*. Retrieved 01 15, 2018, from http://wwf.panda.org/about_our_earth/blue_planet/problems/shipping/
- Yang, H. (2006). *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea*. Springer.
- Yu, Y., Zhao, Y., & Chang, Y.-C. (2018). Challenges to the primary jurisdiction of flag states over ships. *Ocean Development and International Law*, 49(1), 85-102.
- Ziegler, K. S. (2013, April). Domaine Réservé. *Max Planck Encyclopeia of Public International Law [MPEPIL]*. Retrieved 2018, from <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1398?prd=EPIL>
- Zoller, E. (1984). *Peacetime Unilateral Remedies*. New York: Transnational Publishers.

SUMMARY

The capacity to act as a port state in international law is best described by the specific powers exercised over foreign ships, namely inspection, detention, expulsion or request of any type of information prior to the entry into the port. Many of these powers are explicitly attributed to the state in multilateral instruments, whereby the flag state consents to having its ships subject to the jurisdiction of the port state. Notwithstanding the consensus around the complementary nature of port state jurisdiction with respect to certain obligations of the flag state, the port state is not limited to fulfil a secondary role. This is especially visible in the prevention, reduction and control of ship-source pollution, where some port states have not hesitated in acting regardless of an expressed consent by the flag state to the rule or standard being applied with the support of port powers. Not only do port states use more stringent enforcement powers to ensure that international treaties are effective, but they also prescribe novel rules and standards upon any foreign ship that approaches the port, often as a means of breaking an international negotiation deadlock. This study discusses the international legal basis for such unilateral jurisdiction by analysing the principles of state jurisdiction under the dichotomy parochial/cosmopolitan. By interpreting the stated and implicit purposes of port state actions under that dichotomy, this study proposes that states are finding a legal ground to act based on certain legal functions they fulfil in the international legal order. This argument puts into perspective the assumed self-sufficiency of territoriality and shows how unilateralism may also serve to seek to set universally applicable norms.

SAMMENVATTING

Het vermogen om op te treden als een havenstaat in het internationale recht kan het beste worden beschreven door de specifieke bevoegdheden die worden uitgeoefend op buitenlandse schepen, namelijk inspectie, detentie, uitzetting of het opvragen van enige vorm van informatie voorafgaand aan de binnenkomst in de haven. Veel van deze bevoegdheden worden expliciet aan de staat toegekend in multilaterale instrumenten, waarbij de vlaggenstaat ermee instemt dat zijn schepen onder de jurisdictie van de havenstaat vallen. Niettegenstaande de consensus over de complementaire aard van de jurisdictie van de havenstaat met betrekking tot bepaalde verplichtingen van de vlaggenstaat, is de havenstaat niet beperkt om een ondergeschikte rol te vervullen. Dit is vooral zichtbaar in de preventie, vermindering en beheersing van verontreiniging vanaf schepen, waarbij sommige havenstaten niet hebben geaarzeld om te handelen, ongeacht een uitdrukkelijke toestemming van de vlaggenstaat om de regel of norm toe te passen die wordt toegepast met de steun van havenbevoegdheden. Niet alleen gebruiken havenstaten strengere handhavingsbevoegdheden om ervoor te zorgen dat internationale verdragen effectief zijn, maar ze schrijven ook nieuwe regels en normen voor aan elk buitenlands schip dat de haven nadert, vaak als een middel om een internationale onderhandelingstaak te doorbreken. Deze studie bespreekt de internationale rechtsgrondslag voor een dergelijke unilaterale jurisdictie door de beginselen van de rechtsmacht van de staat te analyseren onder de dichotomie parochiaal/kosmopolitisch. Door de genoemde en impliciete doeleinden van havenstaatacties in het kader van die dichotomie te interpreteren, stelt deze studie voor dat staten een rechtsgrond vinden om op te treden op basis van bepaalde juridische functies die zij vervullen in de internationale rechtsorde. Dit argument relateert de veronderstelde zelfvoorzienendheid van territorialiteit en laat zien hoe unilateralisme ook kan dienen om universeel toepasbare normen vast te stellen.

CURRICULUM VITAE

Nelson F. Coelho (1987) has initiated his academic career at the Universidade de Coimbra, in Portugal, where he obtained a Bachelor of Laws, a Bachelor of Arts in International Relations, a Master of Laws and a Postgraduate Certificate in International Politics and Conflict Resolution. In 2014 he roamed to Utrecht to become part of a project on unilateral jurisdiction in international law (UNIJURIS), specialising in the environmental laws and regulations applicable at port. For four years he was a doctoral research fellow at the Netherlands Institute for the Law of the Sea, during which he visited the International Maritime Organisation and the World Maritime University. Throughout his doctoral research and thereafter, he has been co-editor of *De Maribus*, a news blog on the law of the sea.

PUBLICATIONS

- NF Coelho (2014) A Autoridade da Humanidade-uma análise à proteção institucional do reduto geográfico do património comum da humanidade no contexto jurídico-político do fenómeno de alargamento das plataformas continentais além das 200 milhas marítimas (The Authority of Mankind-An Analysis to the Institutional Protection of the Geographical Stronghold of the Common Heritage of Mankind in the Legal-Political Context of the Phenomenon of the Continental Shelf Enlargement Beyond 200 Nautical Miles) Estudos de Doutoramento & Mestrado Volume 1 Issue Série M Pages 1-55, Instituto Jurídico da FDUC (Coimbra)
- NF Coelho (2014) A proteção do meio marinho - prolegómenos jusinternacionalistas a uma resposta europeia (The Protection of the Marine Environment - An International Law Preamble to a European Response), *Debater a Europa* 10 (Desafios europeus no âmbito das Águas e dos Mares), 23-47'
- NF Coelho (2015) Extraterritoriality from the Port: EU's approach to jurisdiction over ship-source pollution, *Spanish Yearbook of International Law* 19, 269-284
- NF Coelho (2015) Environmental and Energy Law, edited by Karen E. Makuch and Ricardo Pereira, published by WileyBlackwell, 2012, 676pp., £80.95, hardback, *European Energy and Environmental Law Review* 24 (5), 130-132 (book review)
- NF Coelho (2015) Governing Europe's Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?, edited by Michael Gilek and Kristine Kern, published by Ashgate, 2015, 290 pp., £ 65.00, hardback, *Review of European, Comparative & International Environmental Law* 24 (3), 373-374 (book review)
- NF Coelho (2016) *Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Judgment, Reference for a preliminary ruling, C-347/10, *Oxford Reports on International Law [ORIL]* Report number ILEC 079 (CJEU 2012) (OUP reference) (case note)
- NF Coelho (2016) Práticas da contratação petrolífera internacional (International Oil Contracting Practices), *Honoris - Revista da Faculdade de Ciências Jurídicas e Políticas* 1 (1), Universidade Gregório Semedo, Angola

NF Coelho (2017) Remarks on the European Parliament's proposal to ban Heavy Fuel Oils in the Arctic, (April 28, 2017), on-line: <http://site.uit.no/jclos/files/2017/04/Remarks-on-the-European-Parliament's-proposal-to-ban-Heavy-Fuel-Oils-in-the-Arctic.pdf>

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