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PORT AND COASTAL STATES

ERIK J MOLENAAR

1 Introduction

The concepts 'port State' and 'coastal State' relate to different capacities in which a State can act to further or safeguard its own interests, or to comply with international obligations or commitments. Although the port State concept is more recent than the concepts of coastal and flag States,[1] the exercise of port State jurisdiction as such is likely to predate the exercise of coastal State jurisdiction. This nevertheless depends on the definitions for the concepts 'port State' and 'coastal State' that are employed. Neither term is defined in the 1982 United Nations Convention on the Law of the Sea (LOSC) or other global instrument with near-universal participation.[2]

Coastal States are universally understood to be States with a sea-coastline. Fresh-water lakes (eg the North American Great Lakes and Lake Victoria) and fully enclosed salt-water lakes or seas not connected to another sea or ocean (eg the Aral

[1] See chapter 1 in this volume. For an early discussion of port State jurisdiction, see British Branch Committee on the Law of the Sea, 'The Concept of Port State Jurisdiction' in International Law Association, *Report of the Fifth-Sixth Conference—New Delhi 1974* (International Law Association London 1976) 400.

[2] The 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter PSM Agreement) contains a definition of 'port' (in Art 1(g)) but not of 'port State'.

and Dead Seas) are generally accepted not to be subject to the international law of the sea.[3] The prevailing view is that the same applies to the Caspian Sea.[4]

Entitlement to coastal State maritime zones is generally accepted to be based solely on sovereignty over land territory with a sea-coastline.[5] A coastal State's jurisdiction is commonly regarded to relate to its own maritime zones, and encompasses the resources and activities therein as well as external impacts on them. In view of the agreement to disagree on the question of sovereignty over land territory in Antarctica (south of 60°S) enshrined in the 1959 Antarctic Treaty, States claiming title to such land territory are not generally recognized as coastal States[6] and thereby also not recognized to be entitled to exercise coastal State jurisdiction over maritime zones adjacent to land territory in Antarctica. A collective exercise of jurisdiction by the Antarctic Treaty Consultative Parties (ATCPs) could be an alternative to coastal State jurisdiction, but the ATCPs have so far not pursued this.[7] Outside of the Antarctic context, disputes relating to title to land territory concern competing claims by two or more States. While these competing claims may have implications for the exercise of coastal State jurisdiction (eg in terms of effectiveness), the ability to exercise such jurisdiction as well as the existence of a coastal State vis-à-vis the disputed territory is not questioned as such.

The spatial scope of a (sea)port includes the outermost permanent harbour works—but not offshore installations and artificial islands—as well as roadsteads that extend beyond the outer limit of the territorial sea, provided they are normally used for the loading, unloading, and anchoring of ships.[8] Port State jurisdiction can be defined to relate to activities and standards occurring within, or applicable to:

(a) the port;

(b) the maritime zones of other coastal States;

(c) areas beyond national jurisdiction (ie the high seas and the 'Area'[9]); and

(d) the maritime zones of the coastal State in which the port is located. This component can also be defined as coastal State jurisdiction.[10]

[3] See also 1982 United Nations Convention on the Law of the Sea, Art 122 (hereinafter LOSC).

[4] The 'Table recapitulating the status of the Convention and of the related Agreements, as at 10 January 2014', available at <www.un.org/Depts/los>, lists Azerbaijan, Kazakhstan, and Turkmenistan as landlocked States despite the fact that they only border on the Caspian Sea. See also n 65.

[5] See eg *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Judgment) [1993] ICJ Rep 38, [80].

[6] Apart from the mutual recognition that may exist between claimant States.

[7] See R Lefeber, 'Marine Scientific Research in the Antarctic Treaty System' in EJ Molenaar, AG Oude Elferink, and DR Rothwell (eds), *The Law of the Sea and the Polar Regions: Interactions between Global and Regional Regimes* (Martinus Nijhoff Publishers Leiden/Boston 2013) 323, 329–31.

[8] LOSC, n 3, Arts 11–12. See also, PSM Agreement, n 2, Art 1(g).

[9] See LOSC, n 3, Art 1(1).

[10] See EJ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International The Hague/Boston/London 1998) 91–5.

The term 'port State jurisdiction' is broader than the term 'port State control'. The latter term is best understood in light of the rationale of the 1982 Paris Memorandum of Understanding (MOU)[11] and other regional merchant shipping port State control (PSC) arrangements modelled thereon. These regional PSC arrangements responded to inadequate performance by flag States as well as port States (ie 'flags of convenience' and 'ports of convenience') by, *inter alia*, harmonizing and coordinating PSC procedures and commitments to carry out inspections and taking predominantly corrective enforcement action (eg detention for the purpose of rectification). Even though regional PSC arrangements are non-legally binding, they nevertheless contain saving-clauses to ensure that nothing in them affects a port State's so-called 'residual' jurisdiction.[12] Such residual jurisdiction allows a port State to prescribe more stringent standards and take more onerous enforcement measures than those internationally agreed.

Within the sphere of international fisheries law, the term 'port State control' is often used together with the term 'port State measures'. The latter's consistent use in the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSM Agreement)[13] indicates that port State measures can relate to prescription as well as to enforcement, and that it is therefore more akin to port State jurisdiction than PSC.

The remainder of this chapter consists of three sections. The Sections 2 and 3 are devoted to 'Port States' and 'Coastal States' respectively, and Section 4 to 'Future Developments'.

2 Port States

2.1 Overview

Like land borders, seaports give access to the landmass of a State for persons and goods, and are therefore logical points of control for, *inter alia*, customs, immigration, sanitation, and national security purposes. Ports also offer an obvious opportunity for verifying whether visiting foreign ships comply with certain types of national or international standards and if they have engaged in certain illegal activities in the maritime zones of the coastal State in which the port is located, or beyond. The costs and difficulties of at-sea enforcement also mean that, despite its

[11] 1982 Paris Memorandum of Understanding on Port State Control (hereinafter Paris MOU). This chapter uses the version that includes the 36th amendment and came into effect on 20 August 2013.

[12] See eg ibid, §§ 1.7 and 9.1. [13] See n 2.

shortcomings, in-port enforcement is often preferable or, in fact, the only enforcement option.

Port State jurisdiction may not just serve more immediate national interests but can also further the interests of the international community, for instance, in relation to maritime safety and security, marine environmental protection, sustainable use and conservation of marine living resources, and food security. The more immediate national interests and the interests of the international community can coincide as well. Illegal, unreported, and unregulated (IUU) fishing and illegal vessel-source pollution on the high seas, for example, can have transboundary effects on species or the broader marine environment in the maritime zones of the coastal State within which the port is located.

By complementing the flag State's responsibility over its ships, port States can make an important contribution to ensuring compliance with national and international regulatory efforts. Flag States, beneficial owners, and operators who benefit as flags of convenience or 'free riders' from the primacy of flag State jurisdiction on the high seas as well as the consensual nature of international law, can—through port State jurisdiction—be deprived of competitive advantages, for example, lower operating costs and avoidance of catch restrictions. The level playing field for maritime activities thereby promoted is an essential component of—or even a prerequisite for—safeguarding many of the aforementioned interests of the international community.

Where port State jurisdiction remains entirely optional, it inevitably leads to ports of convenience where less stringent levels and efforts of prescription and enforcement exist. Incentives for operating ports of convenience include port fees, use of port services (such as landing, transhipping, processing, refuelling, and resupplying), linkages with transport on land and associated socio-economic interests. These incentives may lead to situations where international standards, for instance those adopted within the International Maritime Organization (IMO), the International Labour Organization (ILO), or regional fisheries management organizations (RFMOs),[14] are poorly enforced or not at all.

2.2 Access to port

As ports lie wholly within a State's territory[15] and fall on that account under its territorial sovereignty, customary international law acknowledges that a port State has wide discretion in exercising jurisdiction over its ports. This was explicitly stated by the International Court of Justice (ICJ) in the *Nicaragua v USA* case, where it observed that it is 'by virtue of its sovereignty, that the coastal State may regulate

[14] For the purpose of this chapter, 'arrangements' are covered by this acronym.

[15] Apart from the exception provided in LOSC, n 3, Art 12. See n 8 and accompanying text.

access to its ports'.[16] While there may often be a presumption that access to port will be granted, customary international law gives foreign vessels no general right of access to ports.[17]

Articles 25(2), 38(2), 211(3), and 255 of the LOSC and Articles 4(1)(b) and 7–9 of the PSM Agreement as well as the many bilateral port access agreements in existence today, confirm the absence of a right of access for foreign vessels to ports under customary international law as well as a port State's wide discretion in exercising jurisdiction under customary international law. Article 2 of the Statute to the 1923 Convention on the International Regime of Maritime Ports (Maritime Ports Convention)—which provides for access to ports based on national treatment and reciprocity—does not affect this conclusion owing to the current limited participation in the Convention and the fact that the conditional right which it establishes is further qualified, for instance, in relation to fishing vessels and warships.[18]

These conclusions on the extensive nature of port State jurisdiction and the absence of a general right of access to ports under general international law are, *mutatis mutandis*, also applicable to airports and 'airport States' within the domain of international air law.[19]

A widely acknowledged exception to the above-mentioned discretion is a ship in distress or in a *force majeure* situation. Even in these cases, however, the specific circumstances may be such that the interests of the port or coastal State override those of the ship. This understanding is reflected in the neutral wording of Article 10 of the PSM Agreement. The 2003 IMO Guidelines on Places of Refuge for Ships in Need of Assistance[20]—adopted in the aftermath of the disaster with the *Prestige* in 2002—confirm the need to balance the various interests attached to the ship and its crew with those of the port and/or coastal State.[21] In January 2009, a majority within the IMO's Legal Committee did not see the need for a convention on places of refuge when discussing a draft instrument developed by the Comité Maritime International.[22]

[16] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14, [213].

[17] AV Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 *San Diego Law Review* 597, 622.

[18] 1923 Statute on the International Regime of Maritime Ports, Arts 13 and 14. Cf LA De La Fayette, 'Access to Ports in International Law' (1996) 11 *International Journal of Marine and Coastal Law* 1, 4, and 17. At the time of writing, there are around 40 contracting parties, see <www.untreaty.un.org>.

[19] See eg *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* (C-366/10) [2011] ECR I-13755, [128].

[20] Assembly Resolution A.949(23), *Guidelines on Places of Refuge for Ships in Need of Assistance* (5 December 2003).

[21] Ibid, [3.12]–[3.14]. See also AE Chircop and O Lindén (eds), *Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom* (Nijhoff Leiden 2006).

[22] See 'Report of the Legal Committee on the Work of its Ninety-Fifth Session', IMO Doc LEG 95/10 (22 April 2009) 24–5.

Even though a right of access to ports does not exist in customary international law, it may be provided by an applicable treaty such as the Maritime Ports Convention or a bilateral port access agreement. Whether a right of access to ports could be covered by the freedom of transit laid down in Article XI of the 1994 General Agreement on Tariffs and Trade (GATT 1994) is discussed in the next subsection.

2.3 Conditions for entry into port

A port State's jurisdiction to prescribe conditions for entry into port is subject to a number of restrictions. These include the limitations arising from diplomatic immunities and sovereign immunities for foreign warships and other government ships operated for non-commercial purposes.[23] Moreover, port States commonly do not exercise jurisdiction with respect to affairs regarded to be internal to the ship and that do not affect the interests of the port State.

Other restrictions ensue from adherence to specific treaties. The principle of non-discrimination, for instance, is widely recognized in the international law of the sea[24] and in international trade law.[25] A State's adherence to IMO instruments such as MARPOL 73/78 may also affect its residual jurisdiction as a port State owing to specific provisions included in them.[26] At the same time, however, there are also provisions in IMO instruments that explicitly confirm a port State's residual jurisdiction.[27] The view that adherence to IMO instruments does not constrain a port State's residual jurisdiction per se, is supported by limited but significant State practice, including by the United States and the European Union (EU).[28]

A question that has so far not been resolved is whether or not the freedom of transit and the prohibition of quantitative restrictions laid down in Articles V(3) and XI of the GATT 1994 constrain a port State's residual jurisdiction. In 2000, these two provisions were invoked by the (then) European Community (EC) when it instituted a World Trade Organization (WTO) dispute settlement procedure against Chile for prohibiting Spanish fishing vessels to land swordfish in Chilean

[23] As, *inter alia*, confirmed in *ARA Libertad (Argentina v Ghana)* (Provisional Measures) [2012] ITLOS Rep 21, [95].

[24] See LOSC, n 3, Arts 24(1)(b), 25(3), 119(3), and 227.

[25] 1994 General Agreement on Tariffs and Trade, Art XX (GATT).

[26] See eg 1973 International Convention for the Prevention of Pollution, as modified by the Protocol of 1978, Annex VI, § 15(1) (hereinafter MARPOL).

[27] See eg 2001 International Convention on the Control of Harmful Anti-fouling Systems on Ships, Art 1(3). For other examples, see EJ Molenaar, 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage' (2007) 38 *Ocean Development & International Law* 225, 231.

[28] B Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer Cham 2013), in particular chs 4–6; H Ringbom, *The EU Maritime Safety Policy and International Law* (Nijhoff Leiden 2008), in particular ch 5; and Molenaar, n 27, 231.

ports, even if just for the purpose of transhipment.[29] The large number of States that reserved their third-party rights in this procedure underlined the significance of the issues and the interests involved: Australia, Canada, Ecuador, Iceland, India, Norway, and the United States. Shortly thereafter, Chile instituted a dispute settlement procedure against the EC under the LOSC.[30] However, neither of these two swordfish cases culminated in a ruling as both procedures were suspended in 2001 and discontinued in 2009–2010.

Another opportunity for an international ruling on these issues could have arisen in the WTO dispute settlement procedure instituted in November 2013 by Denmark (in respect of the Faroe Islands) against the EU in relation to Atlanto-Scandian herring.[31] According to the Faroe Islands, certain coercive economic measures taken by the EU—including the closure of EU ports to Faroese vessels[32]—are inconsistent with Articles I(1), V(2), and XI of GATT 1994. An even larger number of States reserved their third-party rights than with regard to the WTO dispute settlement procedure on swordfish.[33] Interestingly, several months earlier—in August 2013—Denmark (in respect of the Faroe Islands) also instituted proceedings against the EU in relation to Atlanto-Scandian herring pursuant to the LOSC. In its Statement of Claim, the Faroe Islands holds that the (threats of) above-mentioned measures amount to a breach of the EU's obligation to cooperate in relation to shared fish stocks laid down in Article 63(1) of the LOSC.[34] By mid-2014, however, the Faroe Islands and the EU came to an agreement on the allocation of Atlanto-Scandian herring and both procedures were subsequently terminated.

2.4 Leaving port

As a corollary of the absence of a general right of access to ports under general international law and the port State's broad discretion in stipulating conditions for entry into port, there is in principle no objection to prescribe conditions for departure as conditions for entry. This so-called 'departure State jurisdiction' can,

[29] *Chile—Measures Affecting the Transit and Importation of Swordfish*, EC Request for consultations, WT/DS193 (19 April 2000).

[30] *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)* (Order) [2000] ITLOS Rep 148.

[31] *European Union—Measures on Atlanto-Scandian Herring*, Denmark Request for consultations, WT/DS469 (4 November 2013).

[32] Commission Regulation (EU) No 793/2013 (20 August 2013), Art 5(2).

[33] Australia, China, Guatemala, Honduras, Iceland, India, Japan, New Zealand, Panama, Russian Federation, Chinese Taipei, Turkey, United States, Argentina, Brazil, Mexico, Norway, Peru, and Thailand.

[34] *Kingdom of Denmark in respect of the Faroe Islands v European Union* (Coercive Economic Measures in respect of the Shared Stock of Atlanto-Scandian Herring). Statement of Claim, 16 August 2013 (on file with author).

for example, be used to require mandatory disposal of all types of waste in port to ensure that these will not be illegally discharged after departure.[35] The exercise of departure State jurisdiction may sometimes even be mandatory, for instance, in cases where 'applicable international rules and standards relating to seaworthiness of vessels' are violated and this 'threatens damage to the marine environment'.[36] As confirmed by the International Tribunal for the Law of the Sea (ITLOS) in its Judgment in the *M/V 'Louisa'* case, the freedom of navigation on the high seas laid down in Article 87 of the LOSC does not give a vessel 'a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it'.[37]

2.5 Legal bases for port State jurisdiction

2.5.1 *Territorial jurisdiction*

A general limitation on jurisdiction imposed by customary international law is the need for a sufficiently close or substantial connection with the person, fact, or event and the State exercising jurisdiction.[38] This aims at creating order by minimizing overlaps in jurisdiction. However, unless and until States are bound to more specific limitations on jurisdiction, for instance through their adherence to treaties containing such specifications, it will be up to an international court or tribunal to rule on the sufficiency of a jurisdictional link in a particular case.

Port State jurisdiction can either be territorial, quasi-territorial, or extraterritorial. The sufficiency of the territorial principle as a basis for jurisdiction can be presumed unless international law stipulates otherwise. Non-compliance with static standards or illegal behaviour occurring in port can be addressed through territorial jurisdiction. As regards behaviour prior to entry, port or coastal States can still rely on territorial jurisdiction in cases where the behaviour took place within maritime zones that are part of their territory, namely their internal waters, archipelagic waters, or territorial sea.[39]

Jurisdiction based on the territorial principle can sometimes still be used even though extraterritorial jurisdiction is not possible, for instance, with regard to unregulated high seas fishing. The focus of enforcement should then be not on illegal behaviour beyond the port but on illegal behaviour within the port. Obstruction

[35] See eg Directive 2000/59/EC *On port reception facilities for ship-generated waste and cargo residues* (consolidated version) (27 November 2000), Art 7.

[36] LOSC, n 3, Art 219.

[37] *M/V 'Louisa' (Saint Vincent and the Grenadines v Spain)*, Judgment of the International Tribunal for the Law of the Sea (28 May 2013), [109].

[38] A Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours de l'Académie de Droit International* 9, 83.

[39] See also the discussion below on areas in which the regime of transit passage applies.

of in-port inspection and investigation, or providing false or incomplete information to the inspection authorities (eg oil record books or declarations of not having engaged in, or supported, IUU fishing or fishing activities), could be options in that regard. The United States makes extensive use of this approach.[40]

Port State jurisdiction with regard to construction, design, equipment, and manning (CDEM) standards warrants separate discussion. Owing to their static nature, the level of non-compliance with CDEM standards is commonly uniform throughout a vessel's voyage. This is quite different from discharge standards and many types of fisheries conservation and management measures, where a vessel's non-compliance generally occurs only during part of the vessel's voyage. Unlike CDEM standards, these standards and measures essentially seek to regulate 'behaviour'. Irrespective of the question as to whether or not CDEM standards seek to regulate behaviour, however, it is conclusive for the jurisdictional basis that non-compliance continues to occur in port. Jurisdiction can therefore be safely based on the territorial principle.[41]

The use of port State jurisdiction in the context of the regime of transit passage in straits used for international navigation[42] led to heated debate following the 2003 joint Australia–Papua New Guinea proposals within the IMO to designate the Torres Strait as an extension of the Great Barrier Reef particularly sensitive sea area (PSSA), complemented with compulsory pilotage as an associated protective measure (APM). A 2005 IMO Marine Environment Protection Committee (MEPC) Resolution approved the PSSA extension but merely recommended that governments 'inform ships flying their flag that they should act in accordance with Australia's system of pilotage'.[43] Despite this non-mandatory wording, however, Australia issued Marine Notice 8/2006 (no longer current), which stipulated that non-compliance with its compulsory pilotage system by foreign vessels would lead to the imposition of non-custodial penalties in port or, for ships in transit, at the next port of call in Australia.[44] Australia thereby intended to circumvent the need for IMO approval by exercising port State jurisdiction. Mainly between 2006 and 2008, several States—including the United States and Singapore—repeatedly took the view within the IMO and the United Nations General Assembly (UNGA) that such sanctions would be inconsistent with the 2005 MEPC Resolution and the LOSC. Subsequently, Australia issued Marine Notice 07/2009, which stipulates that non-compliance triggers a 'risk' of prosecution. Classified United States embassy cables disclosed by WikiLeaks in 2011 suggest that these changes were the result of

[40] Cf Molenaar, n 27, 242–3.

[41] See also *Air Transport Association of America* (C-366/10), n 19, [125].

[42] Laid down in LOSC, n 3, Part III, Section 2.

[43] Resolution MEPC.133(53), *Designation of the Torres Strait as an extension of the Great Barrier Reef Particularly Sensitive Sea Area* (22 July 2005).

[44] Pursuant to §§ 186G–186L of its Navigation Act 1912 (Cth), since replaced by §§ 162–173 of the Navigation Act 2012 (Cth). This was softened somewhat by Marine Notice 16/2006 (no longer current), which notes that non-compliance 'may result' in prosecution.

diplomatic consultations between Australia and the United States.[45] In September 2013, Australian authorities advised that no instances of non-compliance had occurred since issuing Marine Notice 8/2006.[46] As Australia has therefore never actually denied access to port—either immediately or at a next call—or imposed non-custodial penalties for non-compliance with the pilotage requirements, its practice on port State enforcement jurisdiction is in line with State practice examined below in the scenario of unregulated fishing on the high seas.

2.5.2 *Quasi-territorial and extraterritorial jurisdiction*

Jurisdiction over behaviour that occurs beyond the port State's territory can either be quasi-territorial or extraterritorial. The former relates to jurisdiction over the port State's own exclusive economic zone (EEZ), another 200-nautical mile (nm) maritime zone 'derived from' the EEZ (such as a fishing zone), or continental shelf. Proceeding from this understanding of quasi-territorial jurisdiction, truly extraterritorial jurisdiction exercised by a port State relates to behaviour that occurs beyond its own maritime zones: on the high seas, in the Area, or in the maritime zones of other States.

The legality of extraterritorial port State jurisdiction under international law depends on two aspects, namely a sufficient jurisdictional basis and the type of enforcement measure taken.[47] A sufficient jurisdictional basis could, for instance, be provided by a treaty—whatever its underlying rationale—or by justifiable reliance on a jurisdictional principle, such as the universality principle or the security principle.

The relevance of the type of enforcement measures opted for is directly related to the absence of a general right of access to ports under general international law. Examples of port State enforcement measures include:

(a) denial of landing, transhipment, or processing of cargo;

(b) denial of use of other port services, such as refuelling, other forms of re-supplying (eg water, food, equipment, bait, and changing crew) and maintenance and drydocking;

(c) denial of access to ports (ad hoc or a priori);

[45] P Dorling, 'Reef Safeguard Sacrificed Secretly for US, Singapore' *Sydney Morning Herald* (12 September 2011). See also DK Anton, 'Does Australia Make or Break the International Law of Transit Passage? Meeting Environmental and Safety Challenges in the Torres Strait with Compulsory Pilotage' in DD Caron and N Oral (eds), *Navigating Straits: Challenges to International Law* (Brill Nijhoff 2014) 49; and RC Beckman, 'PSSAs and Transit Passage—Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS' (2007) 38 *Ocean Development and International Law* 325.

[46] Information provided by an Australian government official to the author by email on 13 September 2013.

[47] Marten, n 28, 108–11 and 234 takes the view that the type of enforcement measures is not relevant, even though this does not (yet) seem to be supported by State practice.

(d) boarding and inspection;

(e) detention until standards are complied with, (eg repairs to meet technical standards); and

(f) monetary or other penalties, including confiscation of ship or cargo, for violations of national legislation.

A distinction can be made between measures (a)–(c), on the one hand, and measures (e)–(f), on the other hand. The principal aim of the former three is to withhold benefits to which foreign vessels are not entitled under general international law. The latter two however, are punitive or at least have a punitive element. While the punitive character of detention for the purpose of making repairs appears at first sight less onerous than that of a monetary penalty, owners or operators of large merchant vessels may often prefer the latter. For such ships an extra day or even a couple of extra hours of idleness in port can be very costly.

There are two general rules on the relationship between prescriptive and enforcement jurisdiction. First, enforcement is only lawful if based on legislation that has been enacted in accordance with international law and which is applicable to the specific circumstances of the event calling for enforcement. Second, national legislation enacted in accordance with international law does not necessarily bring unlimited enforcement powers.[48]

The argument that the legality of extraterritorial port State jurisdiction depends above all on the two aspects mentioned above can be illustrated by comparing the scenario of illegal discharges on the high seas with so-called 'unregulated' fishing on the high seas. Unregulated high seas fishing essentially means fishing by flag States that are non-members of the relevant RFMO and fail to comply with the obligation to cooperate with respect to the fish stocks managed by that RFMO.[49]

In the former scenario, Article 218 of the LOSC grants port States the right to institute proceedings and impose monetary penalties for illegal discharges that have occurred beyond its own maritime zones. Conversely, no global treaty provides a similar right in relation to unregulated fishing on the high seas. Such a right is for instance not explicitly incorporated in Article 23(1) of the 1995 Fish Stocks Agreement (FSA), which merely stipulates that a port State 'has the right and the duty' to take certain measures in its ports. There also seem to be no States that either take the view that such a right is covered by the saving-clause in Article 23(4)—which reads: '[n]othing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law'—or that

[48] See eg LOSC, n 3, Art 220(5) and (6).

[49] This obligation is based on ibid, Arts 63(2), 64–67, and 116–119 and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Art 8(3) (hereinafter FSA).

have actually imposed such more onerous enforcement measures.[50] A few RFMOs nevertheless authorize or even require their members to confiscate catch of foreign vessels in their ports in certain very specific scenarios.[51] Article 4(1)(b) of the PSM Agreement acknowledges this practice and the right of port States to impose more onerous enforcement measures 'pursuant to a decision of' an RFMO.[52]

2.6 Port State cooperation through global and regional instruments and bodies

In 1991, the adoption of IMO Assembly Resolution A.682(17), entitled 'Regional co-operation in the Control of Ships and Discharges',[53] reflected broad recognition that—in most circumstances[54]—port State jurisdiction can only effectively address inadequate flag State performance if exercised collectively, thereby also addressing the problem of ports of convenience. The resolution implicitly acknowledged the added value of the 1982 Paris MOU and led to efforts to create a global network of regional merchant shipping PSC arrangements. The expansion in participation in the Paris MOU and the creation and expansion of eight new arrangements since then (ie Asia and the Pacific (Tokyo MOU); Latin America (Acuerdo de Viña del Mar); Caribbean (Caribbean MOU); West and Central Africa (Abuja MOU); the Black Sea region (Black Sea MOU); the Mediterranean (Mediterranean MOU); the Indian Ocean (Indian Ocean MOU); and the Arab States of the Gulf (Riyadh MOU)), means that almost complete global coverage has now been achieved.[55] While the Arctic Ocean/region and the Southern Ocean/Antarctic region constitute

[50] See EJ Molenaar, 'Non-Participation in the Fish Stocks Agreement. Status and Reasons' (2011) 26 *International Journal of Marine and Coastal Law* 195, 207–8.

[51] See eg Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), Conservation Measure 10-07 (2009), *Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures*, [22(iv)(b)(i)]; North-East Atlantic Fisheries Commission (NEAFC), *Scheme of Control and Enforcement 2014* (version in effect from 5 March 2014), Art 23(3); and Northwest Atlantic Fisheries Organization (NAFO) *Conservation and Enforcement Measures*, NAFO/FC Doc 14/1, Art 43(7).

[52] Note that South East Atlantic Fisheries Organization (SEAFO), *System of Observation, Inspection, Compliance and Enforcement* (version in effect from 15 February 2014), Art 22(5) implements PSM Agreement, n 2, Art 9(5), without specifying a specific scenario (such as done by CCAMLR, NAFO, and NEAFC; see n 51).

[53] IMO Assembly Res A.682(17), *Regional co-operation in the Control of Ships and Discharges* (6 November 1991).

[54] Exceptions are States like the United States, which have relatively few ships that merely transit its maritime zones without calling at one of its ports. Also, many owners and operators of ships prefer to have the ability for their ships to call at United States ports.

[55] See the information at <http://www.imo.org/OurWork/Safety/Implementation/Pages/PortStateControl. aspx>.

gaps in global coverage, this does not necessarily mean that these gaps require the establishment of new PSC Arrangements.[56]

However, mere geographical coverage does not necessarily mean that the performance of the Paris and Tokyo MOUs is also achieved by the other regional PSC arrangements. Differences in performance are, among other things, caused by overdue updates of constitutive instruments owing to developments at the IMO and ILO, and by lack of adherence by the participating authorities with the underlying regulatory conventions. Efforts to address these and other challenges have been undertaken by the IMO—often together with ILO and the United Nations Food and Agriculture Organization (FAO)—including the establishment of international harmonized minimum standards[57] and the convening of (bi-annual) workshops for regional PSC arrangements Secretaries and Database Managers, which facilitate information exchange, harmonization, and policy recommendations.[58] Other forms of cooperation between regional PSC arrangements include joint inspection efforts and granting mutual observer status.[59]

In the sphere of marine capture fisheries, the entry into force of the 1995 FSA in 2001 meant that parties were required to exercise port State jurisdiction pursuant to its Article 23. In the same year, FAO Members committed to exercising port State jurisdiction through the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU);[60] both individually and collectively.[61] The inclusion of detailed provisions on port States in the IPOA-IUU was inspired by the practice of several RFMOs at the time, and constituted a first step in creating global minimum standards, even though those standards were not legally binding. This approach is essentially the same as that pursued in the IMO since 1991. The adoption within the FAO of the Model Scheme on PSM[62] in 2004 aimed to contribute to the creation of a global network of regional port State jurisdiction in the sphere of the regulation of marine capture fisheries, and offers guidance and opportunities for harmonization in this respect. The FAO's decision

[56] As regards the Arctic region, see EJ Molenaar, 'Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region' (2014) 45 *Ocean Development & International Law* 272, 284.

[57] See eg IMO Assembly Res A.1052(27), *Procedures for Port State Control* (30 November 2011).

[58] See eg IMO Doc PSCWS 6/11, *Record of Recommendations* (9 July 2013).

[59] See Paris MOU, *Annual Report* (2012) 11 and 16, available at <https://www.parismou.org/sites/default/files/Annual%20Report%202012%20%28final%29.pdf>.

[60] FAO, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO Rome 2001), adopted by consensus by FAO's Committee on Fisheries on 2 March 2001 and endorsed by the FAO Council on 23 June 2001, available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>.

[61] Ibid, [52]–[64].

[62] FAO, *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*, implicitly endorsed by FAO's Committee on Fisheries in March 2005; FAO Fisheries Report No 759, *Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing* (2004), Annex E.

in 2007 to commence negotiations on the PSM Agreement nevertheless underscored that the Model Scheme on PSM was not regarded as an adequate solution for the aims it pursued.

The PSM Agreement lays down global minimum standards and thereby fosters a level playing field among regions. Articles 6 and 9(4)—in conjunction with Article 4(2)–(3)—of the PSM Agreement also link future parties, to some extent, to the conservation and management measures of RFMOs to which they would not otherwise be legally bound. These linkages could be regarded as a step towards the development of a duty under general international law for port States to cooperate with a relevant RFMO; quite similar to the flag and coastal States' obligation to do so under Article 8(3) of the 1995 FSA. Crucial for this development however, is the entry into force of the PSM Agreement. As of August 2014, only nine States and the EU had ratified, accepted, approved, or acceded to the Agreement—well short of the 25 required for entry into force.[63]

At the regional level, most RFMOs that deal with straddling, highly migratory, and discrete high seas fish stocks have developed port State practices. Some regions and some RFMOs have not, however, and some existing port State regimes lack transparency, are optional, insufficiently implemented, or apply exclusively to vessels flying the flag of non-members of the RFMO.[64]

3 Coastal States

3.1 Overview

At the time of writing, there are 152 coastal States and 43 landlocked States.[65] These numbers can change owing to processes such as secession, accession, and

[63] Information obtained from FAO, 'Treaties under Article XIV of the FAO Constitution', available at <www.fao.org/legal/treaties/treaties-under-article-xiv/en/>.

[64] See K von Kistowski et al, *Port State Performance: Putting Illegal, Unreported and Unregulated Fishing on the Radar* (PEW Environment Group Online 2010) available at <www.portstateperformance.org>.

[65] Based on United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS), *Table of Claims to Maritime Jurisdiction* (as at 15 July 2011), and DOALOS, *Table Recapitulating the Status of the Convention and of the related Agreements* (as at 10 January 2014), both available at <www.un.org/Depts/los>; and the information on UN Membership at <www.un.org/en/members/index.shtml>. The Cook Islands and Niue are not UN Members at the time of writing. The following are landlocked States at the time of writing: Afghanistan, Andorra, Armenia, Austria, Azerbaijan, Belarus, Bhutan, Bolivia, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Czech Republic, Ethiopia, Hungary, Kazakhstan, Kyrgyzstan, Lao People's Democratic Republic, Lesotho, Liechtenstein, Luxembourg, Malawi, Mali, Moldova, Mongolia, Nepal, Niger, Paraguay, Rwanda, San Marino, Serbia, Slovakia,

dissolution. The implications of climate change induced sea-level rise on statehood are currently under examination.[66]

Post World War II, coastal States became more prominent in the law of the sea. This process—often called 'creeping coastal State jurisdiction'—involved a seaward expansion of coastal State maritime zones as well as an expansion of their substantive rights and jurisdiction within these zones. While coastal States initially focused on maximizing authority within a relatively narrow zone along their coasts, they subsequently claimed specific, exclusive resource-related rights in much larger adjacent areas. Some coastal States also advocated for jurisdiction to protect and preserve the marine environment within these areas. The LOSC eventually granted these, even though prescriptive jurisdiction over foreign vessels remains largely confined to applying international rules and standards.

In view of the considerable number of coastal State maritime zones as well as the significant differences between the rights and jurisdiction of coastal States and rights and freedoms of flag States in each zone, it is not possible to provide more than an overview here.[67]

3.2 Coastal State maritime zones

3.2.1 *Maritime zones under coastal State sovereignty*

The LOSC stipulates that a coastal State's sovereignty extends beyond its land territory to three maritime zones: internal waters, archipelagic waters (where applicable), and a territorial sea.[68]

The marine waters landward of the baseline (for measuring the breadth of the territorial sea) are part of the internal waters of a coastal State.[69] The normal baseline is the low-water line along the coast, but a coastal State can use straight baselines in certain scenarios, provided specific conditions are met.[70] These conditions are not applicable to 'historic bays' or 'historic waters', which are internal waters on account of longstanding effective administration and control by the coastal State and sufficient recognition or acquiescence by the international community.[71] So-called 'closing lines' are often used to delimit these bays and waters from the territorial sea.

As internal waters are part of the coastal State's territory and therefore subject to its sovereignty, it can be assumed that the coastal State has:

South Sudan, Swaziland, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkmenistan, Uganda, Uzbekistan, Zambia, and Zimbabwe. See also n 4 and accompanying text.

[66] See eg the International Law Association (ILA) Committee on International Law and Sea Level Rise, information available at <www.ila-hq.org>.

[67] See in particular chapters 5 and 24 in this volume.

[68] LOSC, n 3, Arts 2(1) and 49 (1).

[69] Ibid, Art 8(1).

[70] Ibid, Arts 5, 7, and 9–10. See chapter 4 in this volume.

[71] See eg LOSC, n 3, Arts 10(6), 15, and 298(1)(a)(i).

(a) exclusive access to, and unlimited jurisdiction over, all living and non-living resources therein; and

(b) unlimited jurisdiction over all domestic and foreign persons, vessels and activities taking place therein.

These assumptions are rebuttable by restrictions imposed by international law, which in this case largely mirror those that apply to a port State in terms of its ability to deny access to internal waters and to prescribe conditions for entry or departure.[72] In addition, Article 8(2) of the LOSC stipulates that a right of innocent passage continues to exist in internal waters generated by a new use of straight baselines.

Only coastal States that also qualify as archipelagic States can have archipelagic waters. Article 46(a) of the LOSC defines an 'archipelagic State' as 'a State constituted wholly by one or more archipelagos and may include other islands'.[73] This definition is meant to confine archipelagic States to so-called 'mid-ocean archipelagic States' and thereby excludes coastal States whose land territory is in part continental (eg the Netherlands with regard to its islands in the Caribbean). Not all coastal States that qualify as archipelagic States also claim that status, and not all States claiming archipelagic status have chosen to designate archipelagic waters.[74]

As regards the regime of archipelagic waters, the rebuttable assumptions for internal waters identified above apply as well. The LOSC contains two relevant restrictions:

(a) the right of innocent passage in archipelagic waters *outside* routes normally used for international navigation or—if designated—archipelagic sea lanes; and

(b) the right of archipelagic sea lanes passage *within* routes normally used for international navigation or—if designated—archipelagic sea lanes.

The procedure for designating archipelagic sea lanes must be initiated by the archipelagic State and involves a need for approval by the IMO and the International Civil Aviation Organization (ICAO).[75] Only Indonesia has initiated this process so far, and this has led to a partial designation.[76] Controversial issues for the regime of innocent passage are whether or not coastal States have the right to request prior

[72] See Sections 2.2–2.4 above.

[73] The term 'archipelago' is defined in LOSC, n 3, Art 46(b).

[74] See chapter 7 in this volume.

[75] The procedure is laid down in LOSC, n 3, Art 53 of but has been operationalized in Annex 2 to the 'General Provisions on Ships' Routeing': IMO Resolution A.572(14) (20 November 1985), as amended; Annex 2 was added by means of IMO Resolution MSC.71(69), Adoption of Amendments to the General Provisions on Ships' Routeing (Resolution A.572(14) As Amended) (19 May 1998).

[76] IMO Resolution MSC.72(69), Adoption, Designation and Substitution of Archipelagic Sea Lanes (19 May 1998). The substantive scope of the rights and obligations of flag States and the jurisdiction of coastal States in waters where the regimes of innocent passage and archipelagic sea lanes passage apply are discussed in chapters 5 and 24 in this volume.

notification or authorization for warships, nuclear-powered vessels, and vessels carrying hazardous cargoes.

Article 3 of the LOSC stipulates that the territorial sea of a coastal State cannot be wider than 12 nm measured from the baselines. This resolved a long-lasting disagreement and uncertainty on the width of the territorial sea, which the first and second United Nations Conferences on the Law of the Sea were unable to resolve. Agreement on Article 3 was, *inter alia*, facilitated by agreement on a more liberal navigation regime—from a flag State perspective—in straits used for international navigation. While a large majority of coastal States have opted for the maximum width, some—including parties to the LOSC—have established outer limits (far) beyond this maximum, and a few have chosen widths less than 12 nm.[77] As regards the regime of the territorial sea, the rebuttable assumptions for internal waters identified above apply as well. The LOSC contains four relevant restrictions:[78]

(a) the (suspendable) right of innocent passage in 'normal' situations;

(b) the non-suspendable right of innocent passage for a special type of straits used for international navigation, namely those that connect the high seas or EEZ and the territorial sea of another State (eg the Strait of Tiran);[79]

(c) the right of transit passage in straits used for international navigation;[80] and

(d) navigational rights and freedoms laid down in long-standing conventions relating to straits (eg the 1936 Montreux Convention[81] regarding the straits of the Dardanelles, the Sea of Marmara, and the Bosphorus).[82]

3.2.2 *Maritime zones where coastal States have sovereign rights and/or jurisdiction*

In addition to maritime zones under coastal State sovereignty, the LOSC recognizes that coastal States can have three other maritime zones: a contiguous zone, an EEZ, and a continental shelf. This subsection provides an overview of the key aspects of these zones, including the main rights and obligations of coastal and flag States therein.[83]

As a coastal State's entitlement to a continental shelf is inherent (*ipso facto* and *ab initio*), it does not need to be proclaimed.[84] Conversely, contiguous zones and EEZs need to be proclaimed. The outer limits of the three zones are different but

[77] See chapter 5 in this volume.

[78] The substantive scope of the rights and obligations of flag States and the jurisdiction of coastal States in waters where these rights apply are discussed in chapters 5, 6, and 24 in this volume.

[79] LOSC, n 3, Art 45(1)(b). [80] Ibid, Arts 37, 35(c), 36, and 45 contain exceptions.

[81] 1936 Convention Regarding the Regime of the Straits. [82] LOSC, n 3, Art 35(c).

[83] Chapters 5, 8, and 9 in this volume, offer a more in-depth analysis of these three maritime zones.

[84] LOSC, n 3, Art 77(3).

their inner limits are all constituted by the outer limit of the territorial sea. All three zones have a *sui generis* character and serve specific purposes or functions; thus giving rise to functional jurisdiction. Within them, coastal States cannot assume to have (exclusive) access and (unlimited) jurisdiction over resources and domestic and foreign persons, vessels, and activities taking place therein, but only those (sovereign) rights and jurisdiction explicitly accorded by international law. This line of reasoning was, for instance, pursued by the ITLOS in the merits phase of the *M/V 'Saiga'* case, where it ruled that a coastal State does not have jurisdiction to regulate bunkering for the purpose of customs within its EEZ.[85]

The contiguous zone cannot extend further than 24 nm from the baselines.[86] Article 33(1) of the LOSC grants a coastal State enforcement jurisdiction for the purpose of preventing or punishing violations of its customs, fiscal, immigration, or sanitary laws and regulations within its territory (including internal waters and archipelagic waters) or territorial sea. Article 303(2) of the LOSC grants a coastal State both prescriptive and enforcement jurisdiction in the contiguous zone relating to the removal of archaeological and historical objects. While the LOSC does not give other States any rights or freedoms that apply specifically to the contiguous zone, as the contiguous zone overlaps with either the EEZ (if proclaimed) or the continental shelf/high seas, other States can exercise the rights and freedoms accorded within these maritime zones also in the contiguous zone.

The EEZ cannot extend further than 200 nm from the baselines.[87] Pursuant to Article 56 of the LOSC, a coastal State has in its EEZ sovereign rights and jurisdiction relating to the water column as well as the seabed and subsoil. The sovereign rights and jurisdiction with respect to the seabed and subsoil must be exercised in accordance with the LOSC's Part VI on the continental shelf (discussed below). The coastal State's sovereign rights—and associated jurisdiction—in its EEZ relate to all living and non-living natural resources as well as other activities for economic exploitation and exploration. As regards commercially exploitable species, Articles 61–67 constrain the coastal State's sovereign rights in various ways (eg to avoid over-exploitation, to strive for optimum utilization and to cooperate in relation to transboundary stocks). In addition to the specified sovereign rights and associated jurisdiction, the coastal State has jurisdiction relating to:

(a) artificial islands, installations and structures (see in particular Article 60);

(b) marine scientific research (see in particular Article 246); and

[85] *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* [1999] ITLOS Rep 10, [127] and [136]. See also LOSC, n 3, Art 59.

[86] LOSC, n 3, Art 33(2). [87] Ibid, Art 57.

(c) the protection and preservation of the marine environment (see in particular Part XII).

Within EEZs, other States have the freedoms of navigation, overflight, the laying of submarine cables and pipelines—subject to Article 79—and other internationally lawful uses of the sea related to these freedoms.[88]

Article 76 of the LOSC recognizes that in certain circumstances the juridical continental shelf extends beyond 200 nm from the baselines. This is the so-called 'outer continental shelf'. Coastal States with an outer continental shelf must submit information on its outer limits on the basis of the criteria in Article 76 to the Commission on the Limits of the Continental Shelf (CLCS). The limits of the outer continental shelf established by the coastal State 'on the basis of' the recommendations of the CLCS 'shall be final and binding'.[89] The sovereign rights—and associated jurisdiction—of a coastal State over its continental shelf relate to its natural resources, which include non-living resources and 'living organisms belonging to sedentary species'.[90] Other States have largely the same freedoms as in EEZs.[91]

A number of coastal States have not established EEZs so far. The majority have nevertheless proclaimed other types of 200 nm maritime zones, even though these are not explicitly recognized by the LOSC. The most common of these are Exclusive Fishery Zones (EFZs),[92] which were accepted to be part of customary international law before the EEZ reached that status. Some coastal States first established an EFZ and later also established an EEZ for the same waters, without revoking the EFZ (eg the Netherlands). While this approach can be preferred for domestic legislative reasons, from the perspective of international law, such a coastal State should be categorized as having established an EEZ as this is the more comprehensive zone. Coastal States may also decide to establish an EEZ adjacent to part of their territory and an EFZ to another part. Norway for instance, has established an economic zone off its mainland, a fishery zone off Jan Mayen, a fisheries protection zone (FPZ) off Svalbard, but no 200 nm maritime zones at all off its (claimed) territories in the Southern Ocean.[93] While Norway claims the right to establish an EEZ off Svalbard, it has established an FPZ as a consequence of the disagreement between Norway and other States parties to the 1920 Spitsbergen Treaty[94] as to whether or not the Treaty also applies seaward of the territorial sea.[95] Quite a few States have established EFZs or other types of

[88] Ibid, Art 58(1). [89] Ibid, Art 76(8). [90] Ibid, Art 77(4).

[91] Ibid, Art 78. But see eg ibid, Art 68.

[92] Or Exclusive Fisheries/Fishing Zone, Fishing/Fisheries Zone.

[93] These are Bouvet Island (north of 60°S), Peter I Island and Queen Maud Land (both south of 60°S).

[94] 1920 Treaty Concerning the Archipelago of Spitsbergen.

[95] For a discussion, see EJ Molenaar, 'Fisheries Regulation in the Maritime Zones of Svalbard' (2012) 27 *International Journal of Marine and Coastal Law* 3.

200 nm maritime zones off (part of) their coasts in the Mediterranean Sea, for instance an FPZ (Spain and Libya), an ecological protection zone (EPZ; Italy and Slovenia) or an ecological and fisheries protection zone (EFPZ; Croatia). In recent years, however, some of these maritime zones have been replaced by EEZs.[96]

These 200 nm maritime zones are in principle not inconsistent with the LOSC. As establishing an EEZ is a right and not an obligation, a coastal State can also choose to claim only some of the sovereign rights or jurisdiction to which it is entitled under general international law. Inconsistency with the LOSC could nevertheless occur if a coastal State only claims the rights but does not accept or comply with the associated obligations, including the duty to respect the freedoms of other States. Analysis of State practice may also highlight that a coastal State is in fact claiming more (sovereign) rights and jurisdiction than the LOSC allows.

Finally, there do not appear to be coastal States that have established or claimed maritime zones beyond 200 nm in clear non-conformity with general international law. Reference can be made here to the limited practice of coastal States that cede to other coastal States by means of a treaty their EEZ-derived sovereign rights and jurisdiction relating to a specific area within 200 nm of their baselines, even though the specific area is beyond 200 nm of the other coastal States.[97] It is also submitted that Chile's claim to a *mar presencial*, first included in its legislation in 1991,[98] is not necessarily inconsistent with international law as such. The *mar presencial* is defined as the area of high seas in a huge quadrangle between Chile's coast, Easter Island, and Antarctica.[99] Even though the concept has been included in Chilean legislation at several other instances since then, lastly in 2006,[100] no general clarification as to which rights or jurisdiction Chile claims in the *mar presencial* has yet been included in Chilean legislation.[101] Specific enactments nevertheless include a requirement for all vessels carrying nuclear substances or radioactive materials to obtain authorization prior to transit through the *mar presencial*.[102] Current international law offers no basis

[96] See chapter 8, subsection 2.3, in this volume.

[97] See eg 2010 Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, Art 3.

[98] The concept of *mar presencial* was included in the *Ley Nº 18.892 General de Pesca y Acuicultura* 1989 [General Law No 18.892 on Fisheries and Aquaculture] (Chile), by means of amendments included in Law No 19.080 (6 September 1991) (see Arts 2, 43, and 172). Both enactments are available at <www.leychile.cl>.

[99] General Law No 18.892 (Chile), n 98, Art 2. [100] Ibid, Art 124(2).

[101] The description in the Chilean Ministry of Defense, *El Libro de la Defensa Nacional de Chile* (2010), Part 1 'El Estado De Chile', 39–40, merely emphasizes Chile's special interests and responsibilities in the *mar presencial*, rather than claiming rights or jurisdiction, available at <www.defensa.cl/libro-de-la-defensa-nacional-de-chile/libro-de-la-defensa-2010>.

[102] *Ley Nº 18.302 de Seguridad Nuclear* [Law No 18.302 on Nuclear Security] of 16 April 1984 (Chile), Art 4(1), included by means of Law No 19.825, of 1 October 2002. See <www.leychile.cl>.

for such a right. It is nevertheless unclear if Chile has enforced non-compliance with the requirement by means of at-sea enforcement, port State jurisdiction or otherwise. Other Chilean enactments exert influence on fishing in the *mar presencial* by foreign vessels—in particular those targeting swordfish and jack mackerel—by exercising port State jurisdiction.[103] Chile does not seem to have imposed port State enforcement measures that are more onerous than denial of entry or use, however, and it was already concluded earlier that the consistency of such jurisdiction with in particular international trade law remains an unresolved question.

3.3 Regional coastal State cooperation

Regional cooperation is widespread, both in general and relating to the marine domain. Cooperation among regional States can be desirable for many reasons, for instance to enhance (bargaining) power in terms of international trade, collective defence, or common interests or values vis-à-vis extra-regional (groupings of) States, but also to address free riders or create harmonized regulation and thereby a level playing field among the regional States. As regards the law of the sea, regional cooperation may, for instance, be warranted owing to the spatial distribution of particular species or habitats, or the spatial reach of land-based and/or marine pollution. Enclosed or semi-enclosed seas, like the Black and Mediterranean Seas, are obvious candidates for regional cooperation, as is reflected in Article 123 of the LOSC.

The LOSC encourages or imposes (qualified) obligations to cooperate at the regional level.[104] A similar approach is pursued by various global organizations and their instruments that are part of the global framework of the law of the sea. As a consequence, regional cooperation exists, *inter alia*, in the following fields:[105]

(a) *Merchant shipping*. Regional cooperation occurs predominantly by States in their capacities as port States—mostly through regional PSC arrangements—and to a lesser extent as flag States, but only rarely as coastal States. This is due to the LOSC's objective of globally uniform minimum regulation, which is pursued by linking prescriptive jurisdiction by flag and coastal States through 'rules of

[103] See eg General Law No 18.892, n 98, Art 165 as implemented in part by Decree No 123, *Aprueba Política de uso de Puertos Nacionales por Naves Pesqueras de Bandera Extranjera que Pescan en Alta Mar Adyacente* (3 May 2004), as amended, and Chile's declaration of 28 August 2012 upon ratification of the PSM Agreement.

[104] Eg in LOSC, n 3, Part V (Arts 63–67) and Part XII (Arts 198–200).

[105] For a more comprehensive overview, see EJ Molenaar, 'Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea' (2012) 27 *International Journal of Marine and Coastal Law* 553, 558–65.

reference' to the generally accepted international rules and standards adopted by competent international organizations like the IMO and ILO;[106]

(b) *Marine environmental protection*, in particular through Regional Seas programmes—the majority of which are supported or coordinated by the United Nations Environment Programme (UNEP)[107]—and large marine ecosystem (LME) mechanisms, many of which are supported by the Global Environment Facility (GEF);[108]

(c) *Conservation and management of marine living resources*, including through RFMOs, other types of regional fisheries bodies (RFBs; including those (also) dealing with marine mammals)[109] as well as regional bodies exclusively aimed at the conservation of species;

(d) *Marine scientific research*, for example the International Council for the Exploration of the Sea (ICES);

(e) *Search and rescue*, for instance the Arctic SAR Agreement[110] and its Meetings of the Parties; and

(f) *Pollution incidents*, whether by means of monitoring and surveillance, or contingency planning, preparedness and response (eg the 2013 Arctic MOPPR Agreement[111] and its Meetings of the Parties).

Owing to the considerable diversity and large number of these regional bodies and their instruments, it is not possible to provide even a concise overview of their key features and differences. One aspect is nevertheless worth singling out: as a general rule, the States participating as full members in these regional regimes do so in their capacity as coastal States. There are two exceptions to this general rule: the instruments of the Antarctic Treaty System and RFMOs whose regulatory areas consist partially or entirely of high seas. The former exception is a result of the agreement to disagree on the question of sovereignty over land territory in Antarctica (south of 60°S) and the latter a result of the freedom of high seas fishing.

[106] Eg LOSC, n 3, Art 211(1).

[107] See United Nations Environmental Programme (UNEP), Regional Seas Programme, available at<www.unep.org/regionalseas>.

[108] See eg Large Marine Ecosystems of the World, <www.lme.noaa.gov> and International Waters Learning Exchange & Resource Network, <www.iwlearn.net>.

[109] See the list of RFBs at FAO Fisheries and Aquaculture Department, Regional Fishery Bodies (RFB), available at <www.fao.org/fishery/rfb/en>; and chapter 20 in this Volume.

[110] 2011 Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic.

[111] 2013 Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic.

4 Future Developments

Port State jurisdiction is gradually moving from optional use in limited regulatory spheres towards comprehensive and mandatory use through regional and global instruments and bodies. Awareness that the interests of the international community are not only undermined by free riders in their capacity as flag States but also in their capacity as port States, is expected to spread due to current and future concerns on issues such as maritime safety and security, the marine environment, sustainable fisheries, and marine biodiversity.

It is submitted that the following four aspects of port State jurisdiction warrant special attention in the near future. First, will the residual prescriptive jurisdiction of port States be invoked more or less, and how will this affect the authority and effectiveness of competent international organizations like the IMO and ILO? Second, how does State practice develop with regard to treaty-based rights to exercise extraterritorial port State jurisdiction (eg Article 218 of the LOSC and Article 4(1)(b) of the PSM Agreement)? Third, will port States impose more onerous enforcement measures (eg monetary penalties or confiscation of catch or equipment) for extraterritorial behaviour without a treaty-based right to do so, for instance, by claiming that a foreign vessel's voluntary entry into port is sufficient?[112] Fourth, how will global and regional efforts to ensure that port States comply with their obligations—and thereby address ports of convenience—evolve? The answers to these questions will shed light on the popularity of (unilateral) port State jurisdiction, confidence in multilateral regulation and advances in flag and port State performance and the evolution of the notion of port State responsibility.[113]

As noted in Section 3.1 above, owing to the considerable number of coastal State maritime zones as well as the significant differences between the rights and jurisdiction of coastal States and the rights and freedoms of flag States in each zone, this chapter cannot provide more than an overview. Likewise, well-founded conclusions on current overall practice by coastal States in light of their rights and obligations under the international law of the sea—let alone future trends—are perhaps only feasible in the last chapter of this volume.

Having said this, it nevertheless seems safe to conclude that there is no evidence that creeping coastal State jurisdiction continued significantly after the adoption of the LOSC in 1982. While a considerable amount of State practice (eg on straight baselines, the width of territorial seas, rocks claimed as islands, requesting prior authorization for the passage of certain types of ships and cargoes, and regulating

[112] Marten, n 28, 234 takes the view that such practice is likely to emerge.

[113] See in this regard BH Oxman, 'The Territorial Temptation: A Siren Song at Sea' (2006) 100 *American Journal of International Law* 830, 851.

marine scientific research in the EEZ[114]) is inconsistent with the LOSC, such State practice has not become significantly more widespread since 1982. Fears for further creeping coastal State jurisdiction were above all prompted by Chilean and Canadian practice in the early 1990s. At the time of writing, however, Chile's *mar presencial* is not inconsistent with international law as such—even though the above-mentioned prior notification of transit requirement *is*—and Canada's claims to high seas enforcement jurisdiction over foreign vessels targeting straddling fish stocks—culminating in the arrest of the Spanish-flagged *Estai* in 1995—have largely—but not entirely[115]—been addressed by the inclusion of non-flag State enforcement powers in Articles 21 and 22 of the UN Fish Stocks Agreement. Finally, coastal States have so far acted in accordance with the rules and procedure for the establishment of the outer limits of the continental shelf. All this means that the balance laid down in the LOSC between the rights and interests of flag and coastal States—both geographically and substantively—remains essentially unchanged today.

[114] See eg JA Roach and RW Smith, *United States Responses to Excessive Maritime Claims* (2nd edn Martinus Nijhoff Publishers The Hague/Boston/London 1996) and the series *Limits in the Seas* issued by the United States Department of State, Office of Oceans and Polar Affairs, available at <http://www.state.gov/e/oes/ocns/opa/c16065.htm>.

[115] See Canada's Coastal Fisheries Protection Act, RSC 1985, c C-33, § 5.2, in conjunction with § 21(2)(b)(ii) and Table III of its Coastal Fisheries Regulations, CRC, c 413). Also, Canada has not withdrawn a relevant reservation to its acceptance of the compulsory jurisdiction of the ICJ so far, see Declaration of 10 May 1994, [(2)(d)]; available at <www.icj-cij.org>.